FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. STONE PLUS, INC., Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2013-0263-M A.C. No. 42-02587-303318 Docket No. WEST 2013-0440-M A.C. No. 42-02587-308740 Mine: Portable #1

DECISION AND ORDER

Appearances: Brian Kaufman, Esq., U.S. Dept. of Labor, Office of the Solicitor, Denver, CO, for the Petitioner;

Keen Ellsworth, Esq., Ellsworth & Associates, Ltd., Las Vegas, NV, for the Respondent.

Before: Judge L. Zane Gill

This proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994), involves one section 104(d)(1) citation and twelve 104(d)(1) orders, 30 U.S.C. § 814(d)(1), issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Stone Plus, Inc. at its Portable #1 mine. The parties presented testimony on March 4th and 5th, 2014, and June 3rd and 4th, 2014, in Salt Lake City, UT.

Stone Plus is a small, three-tiered quarry with a screening plant and crusher. The operator uses a front-end loader[1] to transport raw and finished product -- a high quality rock used primarily for landscaping. Before Stone Plus began operating in August, 2012, it had contracted with various companies to perform the same services it intended to do for itself.[2]

[1] A front-end loader is a self-propelled piece of mobile equipment. (Tr. 106:20-23)

[2] Susan Martin, a contracting company, confirmed that it removed all of its equipment from the property the first week of August, 2012. (Ex. R3; Tr. 810:2-18)

Inspectors Steven Polgar[3] and Mike Tromble[4] were on site for four days in August, 2012, to perform a hazardous condition complaint inspection[5] and a regular inspection. (Tr. 25:3 – 26:10; Tr. 34:17-25) When they arrived at the mine site there was no one on the property, and no machines were running. (Tr. 36:1-7)

Three months prior, in May, 2012, Polgar and Tromble had been at the Stone Plus site for another hazardous condition complaint inspection. (Tr. 27:9-18; Tr. 614:17 - 20) At that time, Stone Plus was operating without a mine identification number. (Tr. 615:18 – 616:11) As part of that interaction, Fred Sanchez, of MSHA's Educational Field Services division, assisted Stone Plus's owner, Neil Bradshaw,[6] to set up a Part 46 training plan. (Tr. 800:3-7; Tr. 682:1-9) During the May inspection, Tromble, Polgar, and Bradshaw discussed the screening plant, berms, guards, mobile equipment braking systems, workplace examinations, pre-shift examinations on mobile equipment, load-out areas, overtravel protection, Rules To Live By Standards, and unwarrantable failure enhanced enforcement. (Ex. S-4; Ex. S-5; Tr. 683:3 – 693:24; Tr. 800:18 – 801:1) Bradshaw was also given a checklist outlining certain MSHA requirements. (Ex. S-12C)

The August 2012 hazardous condition complaint alleged that: 1) the screening plant was missing guards; 2) there were missing berms on the ramps and pads; 3) there were no fire extinguishers at the mine; 4) the brakes on the Caterpillar 950C loader had failed; 5) there was too much dust at the mine; 6) no dust masks were provided at the mine; 7) there was no first aid kit; and, 8) safety training was inadequate. (Ex S-6; Tr. 29:8-22) Polgar found evidence to substantiate allegations 1, 2, and 4. (Tr. 30:3-17)

In summary, and for the following reasons, I conclude that:

- For Citation No. 8593603, and Order No. 8593604, Stone Plus violated Section 56.9300(a), injury was reasonably likely, the injury could reasonably be expected to be a fatality, the violation was significant and substantial, one person was affected, there was

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[3] At the time of the hearing, Polgar had about sixteen years of experience with front-end loaders, crushers, and screening plants and had been an MSHA mine inspector for approximately two years. (Tr. 17:13-16; Tr. 23:14 – 24:3) Before joining MSHA, Polgar first worked for four years at Willow Creek Sand and Gravel as a truck driver, dozer operator, skid-steel loader, general laborer, and as a crusher operator, and then performed the same tasks for Lafarge Materials for four years. (Tr. 17:23 – 9:18) He then worked for Geneva Rock Products for seven and half years. (Tr. 19:20 – 21:13)

[4] Tromble started his mining career in the early 90s. He worked as a heavy equipment mechanic and as a blasting and explosives miner. (Tr. 614:2-9) At the time of the hearing, Tromble had worked as an inspector for MSHA since June, 2008, and had been conducting hazardous accident inspections since October, 2010. (Tr. 611:8 – 612:17)

[5] A hazardous condition complaint is (in this case) a complaint from an undisclosed party alleging a hazardous condition at a mine site. *See* Program Information Bulletin No. P 10-16, September 2, 2010, *available at* http://arlweb.msha.gov/regs/complian/PIB/2010/pib10-16.asp.

[6] Neil Bradshaw is the owner and operator of Stone Plus. Most of the time, he was the only person working at the mine site. (Tr. 809:19-21)

high negligence, and an unwarrantable failure existed. I assess a penalty of $2,000.00 for each violation.

- For Order No. 8593607, Stone Plus violated Section 56.9300(b), injury was unlikely, the injury could reasonably be expected to be permanently disabling, the violation was not significant and substantial, one person was affected, there was high negligence, and an unwarrantable failure existed. I assess a penalty of $2,000.00.
- For Order No. 8593609, Stone Plus violated Section 56.9300(a), injury was reasonably likely, the injury could reasonably be expected to be permanently disabling, the violation was significant and substantial, one person was affected, there was high negligence, and an unwarrantable failure existed. I assess a penalty of $2,000.00.
- For Order No. 8593611, Stone Plus violated Section 56.9301, injury was reasonably likely, the injury could reasonably be expected to be permanently disabling injury, the violation was significant and substantial, one person was affected, there was high negligence, and an unwarrantable failure existed. I assess a penalty of $2,000.00.
- For Order No. 8593613, Stone Plus violated Section 56.14101(a)(1), injury was reasonably likely, the injury could reasonably be expected to be a fatality, the violation was significant and substantial, one person was affected, there was high negligence, and an unwarrantable failure existed. I assess a penalty of $4,000.00.
- For Order No. 8593614, Stone Plus violated Section 56.14130(i), injury was reasonably likely, the injury could reasonably be expected to be a fatality, the violation was significant and substantial, there was high negligence, one person was affected, and an unwarrantable failure existed. I assess a penalty of $2,000.00.
- For Order No. 8593617, Stone Plus violated Section 56.14100(a), injury was reasonably likely, the injury could reasonably be expected to be a fatality, the violation was significant and substantial, there was high negligence, one person was affected, and an unwarrantable failure existed. I assess a penalty of $2,000.00.
- For Order No. 8593605, Stone Plus violated Section 56.14112(b), injury was reasonably likely, the injury could reasonably be expected to be permanently disabling, the violation was significant and substantial, there was high negligence, one person was affected, and an unwarrantable failure existed. I assess a penalty of $2,000.00.
- For Order No. 8593606, Stone Plus violated Section 56.14107(a), injury was reasonably likely, the injury could reasonably be expected to be a fatality, the violation was significant and substantial, there was high negligence, one person was affected, and an unwarrantable failure existed. I assess a penalty of $2,000.00.
- For Order No. 8593608, Stone Plus violated Section 56.14107(a), injury was reasonably likely, the injury could reasonably be expected to be permanently disabling, the violation was significant and substantial, there was high negligence, one person was affected, and an unwarrantable failure existed. I assess a penalty of $2,000.00.
- For Order No. 8593610, Stone Plus violated Section 56.14107(a), injury was reasonably likely, the injury could reasonably be expected to be a fatality, the violation was significant and substantial, there was high negligence, one person was affected, and an unwarrantable failure existed. I assess a penalty of $2,000.00.
- For Order No. 8593616, Stone Plus violated Section 56.18002(a), injury was reasonably likely, the injury could reasonably be expected to be a fatality, the violation was significant and substantial, there was high negligence, one person was affected, and an unwarrantable failure existed. I assess a penalty of $2,000.00.

- Total Penalty Assessment: $28,000.00.

Preliminary Matters

Jurisdiction

The Respondent argued that MSHA lacked jurisdiction over the mine site because the mine was temporarily closed in accordance with 30 C.F.R. § 56.1000. (Resp. Br. at 2) However, as the Secretary correctly pointed out, Stone Plus failed to file a closure notice with MSHA as required by Section 56.1000. (Tr. 113:9-13; Tr. 660:14-17) Therefore, MSHA was not on notice that the mine was closed or not in operation, and thus retained jurisdiction over the mine site.

Stone Plus also argued that MSHA did not have jurisdiction over the site because it was not in production. (Resp. Br. at 2) Irrespective of this argument, the Respondent repeatedly admitted that it was setting up the screening plant and the crusher for mining, and as such, MSHA had jurisdiction over the mine.[7] (Tr. 812:13 – 813:9; Tr. 815:3; Tr. 872: 11-12; Tr. 877: 11-12; Tr. 918:4-8)

Section 4 of the Mine Act provides that "[e]ach coal or other mine [...] shall be subject to the provisions of this Act." 30 U.S.C. § 803. "Coal or other mine" is defined in Section 3(h)(1) of the Act as:

> (A) an area of land from which minerals are extracted [...] and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, *equipment, machines*, tools, or other property [...] *used in, or to be used in*, or resulting from, *the work of extracting such minerals* [...]

30 U.S.C. § 802(h)(1) (emphases added).

The statute's plain meaning gives MSHA authority over areas where mining equipment is being set up, i.e. equipment "to be used in" the work of extracting minerals, because the area is considered a mine for purposes of jurisdiction. *Id.*; *See Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1553-54 (D.C. Cir. 1984); *Royal Cement Co., Inc.*, 31 FMSHRC 1459, 1462 (Dec. 2009)(ALJ Manning); *Recon Refractory & Constr., Inc.*, 34 FMSHRC 1722, 1728 (July 2012)(ALJ Paez) ("Therefore, so long as the activities are in preparation of future mining activities, those activities fall within MSHA jurisdiction."); *Khani Co., Inc.*, 32 FMSHRC 1339, 1342 (Sept. 2010)(ALJ Moran) (MSHA had jurisdiction to inspect a closed mine because the company "was preparing to resume operations."); *The Pit*, 16 FMSHRC 2008, 2010 (Sept. 1994)(ALJ Hodgdon) (The Mine Act is "intended to protect employees from injury whether they are setting up equipment or engaged in production."); S.Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977), reprinted in U.S.Code Cong. & Ad. News 1977, 3401, 3414.

[7] In fact, as explained below, I found the plant was actually running, not just setting up.

The Respondent admitted it was setting up its mining equipment for production.[8] Therefore, I find that MSHA had jurisdiction over Stone Plus at the time the citation and orders were written.

Inability to Pay Fine

The Respondent argued that the Secretary's proposed penalties should be reduced because of Stone Plus's inability to pay. (Resp. Br. at 15)

In setting civil penalties, Commission judges are required to consider whether the fines will impede the mine's ability to continue in business. 30 U.S.C. § 820(i). Operators bear the burden of proof when arguing for penalty reductions on this basis. *Spurlock Mining Co., Inc.*, 16 FMSHRC 697, 700 (Apr. 1994); *Georges Collieries*, 24 FMSHRC 572, 575 (June 2002)(ALJ Barbour). The damage alleged by operators must be supported by specific evidence. *Broken Hill Mining*, 19 FMSHRC 673, 677 (Apr. 1997). General information, such as tax returns, may be inadequate to prove an inability to pay since these do not directly relate to the effects of proposed penalties. *See Spurlock*, 16 FMSHRC at 700.

Stone Plus's 2011 and 2012 tax returns (as well as the operator's personal tax returns for those years) were referenced in its post-hearing brief as evidence supporting its argument. However, the returns were not admitted into evidence at the hearing, and Stone Plus provided no testimony whatsoever regarding its inability to pay or what impact the fines would have on the mine's ability to continue business. Therefore, the Respondent failed to meet its burden of proving that it is unable to pay the proposed penalties.

Credibility Determination

An ALJ's credibility determination is "entitled to great deference," *Am. Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 796 F.3d 18, 31 (D.C. Cir. 2015) (citing *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1107 (D.C.Cir.1998)) and "entitled to great weight." *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). This is because the ALJ "has an opportunity to hear the testimony and view the witnesses [,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

I find that Bradshaw's testimony at the hearing was generally not credible.[9] This is based on the record as a whole, my careful observation of the witness during his testimony, and

[8] The inspectors were originally dispatched to the site to perform a hazardous condition complaint inspection, which contained eight specific complaints. (Tr. 25:3 – 26:10; Ex. S-6) As such, it can be inferred that the mine was in production long enough for a miner to complain about the hazards it cited.

his demeanor at the hearing. Additionally, there were several inconsistencies between his testimony at the hearing and his deposition, and between his testimony and the testimonies of other witnesses.

For example, Bradshaw claimed that he was just setting up the crusher and the screening plant on August 11, 2012. (Tr. 918:12-21) However, he admitted that he demonstrated the functionality of the crusher and screening plant for someone interested in buying the crusher. (Tr. 913:15 – 914:1; Tr. 918:4-8) Indeed, he admitted that he ran six to eight tons of material through the crusher for the demonstration and ran more than four bucket-loads through the screening plant.[10] (Tr. 919:2 – 920:16) It is clear that he was not just "setting up" the mine.

Additionally, at the time of the inspection, Bradshaw attempted to deceive the inspector when performing a pull-through test[11] on the front-end loader. He put his foot on the clutch, which prevented power from being transferred to the driveline and tried to create the impression that the brakes were functioning properly. (Tr. 46:21 – 47:25) Bradshaw denied this deceit by claiming he thought there were two service brakes. (Tr. 859:15-17; Tr. 861:1-3) However, anyone who has operated trucks knows the difference between the clutch, the drive pedal, and the brake pedal, especially someone like Bradshaw who has operated front-end loaders for approximately fifty years. (Tr. 48:21 – 49:3; Tr. 937:18-24)

Further, despite Bradshaw's testimony that no mining or work occurred after August 11, 2012, (Tr. 811:13-20) the front-end loader was moved from where it had been the first inspection day to a different location by the last inspection day. (Ex. S- 9G; Ex. S-14; Tr. 100:9-12; Tr. 145:3-10; Tr. 275:25 – 276:4; Tr. 297:20-25; Tr. 496:6-13; Tr. 700:19 – 701:3) Clearly, a miner was at the site after August 11, 2012, and had at least moved equipment.

Finally, during the testimony at the hearing, Bradshaw claimed that there were plywood guards covering the rollers on the screening plant on August 11, 2012, when he was using the plant, but that the guards were removed at the end of the day. (Tr. 927:25 -928:20) However, during Bradshaw's deposition, he testified that the plywood found at the site was never on the plant, was merely placed on the ground near the plant, and that he used only some of the

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

[10] It was obvious to the inspectors that production had been occurring from just looking at the mine site. (Tr. 76:25 – 77:9)

[11] A pull-through test is designed to test the service brakes of a vehicle.

plywood around the bottom of the plant to prevent rocks from going under it. (Tr. 932:19 – 933:23; Tr. 936:6-10)

Basic Legal Principles

Significant and Substantial

The citation and orders in dispute and discussed below have been designated by the Secretary as significant and substantial ("S&S"). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999). The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd* 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ Zielinski) ("The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.")

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

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

The third element of the *Mathies* test presents the most difficulty when determining whether a violation is S&S. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: [T]he third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." (citing *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984)). The Secretary, however, "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). Further, the Commission has found that "the absence of an injury-producing event when

a cited practice has occurred does not preclude a determination of S&S." *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005)); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC at 905; *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).[12]

Negligence

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

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

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

Part 100 regulations "apply only to the proposal of penalties by MSHA and the Secretary of Labor; under both Commission and court precedent, the regulations do not extend to the independent Commission, and thus the MSHA regulations are not binding in any way in Commission proceedings." *Id.* at 1701-02 (citing *Jim Walter Res. Inc.*, 36 FMSHRC at 1975 n.4; *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984), *aff'g* 5 FMSHRC 287 (Mar. 1983) ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties ... we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission.")).

Although the Secretary's part 100 regulations are not binding on the Commission, the Secretary's definitions of negligence in those provisions are illustrative. According to the

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

Secretary, negligence is "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required [...] to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* "Reckless negligence is present when "[t]he operator displayed conduct which exhibits the absence of the slightest degree of care." *Id.* High negligence is when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* Low negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* No negligence is when "[t]he operator exercised diligence and could not have known of the violative condition or practice." *Id.*

Mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions.

Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984) and *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ Fauver). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130.

Unwarrantable Failure

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an unwarrantable failure:

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester &*

> *Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); *see also Buck Creek* [*Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).

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

> (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree 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 had been placed on notice that greater efforts were necessary for compliance. *See IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999).

Manalapan Mining Co., 35 FMSHRC at 293; *ICG Hazard, LLC*, 36 FMSHRC 2635, 2637, (Oct. 2014); *Sierra Rock Products, Inc.*, 37 FMSHRC 1, 4 (Jan 2015); *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813; *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consolidated Coal*, 22 FMSHRC at 353; *IO Coal*, 31 FMSHRC at 1351; *Manalapan Mining Co.*, 35 FMSHRC at 293. "Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation." *Big Ridge, Inc.*, 34 FMSHRC at 125; *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

Penalty

The principles governing the authority of Commission administrative law judges to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess said penalty. 29 C.F.R. § 2700.28.

Under Section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness

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

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

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Engineering*, 32 FMSHRC at 1289 (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC at 725 (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC at 713 (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria). For example, violations involving "extreme gravity" and/or "gross negligence," or, as stated in the former section of 105(a), "an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances," may dictate higher penalty assessments. *See* 30 C.F.R. Part 100 Final Rule, 72 Fed. Reg. 13592-01, 13,621.

In addition, Commission ALJs are obligated to explain any substantial divergence between a penalty imposed and that proposed by the Secretary. As explained in *Sellersburg Stone Co.*, 5 FMSHRC at 293:

> When ... it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves that Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission. If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

Citation No. 8593603

Inspector Polgar issued Citation No. 8593603 to Stone Plus at its Portable #1 mine on August 14, 2012. It alleges a violation of 30 C.F.R. § 56.9300(a). The regulation states: "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." 30 C.F.R. § 56.9300(a). Section 56.9300 is a mandatory safety standard. The citation narrative alleges:

> The roadway accessing the crusher/screening plant located on the third tier/bench was not provided with berms or guardrails as required where a drop off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. The drop off from the third bench to the second bench was 7 ½ feet (measured) on average. The third bench was 65 feet (approx.) wide and 180 feet (approx.) in length. This area is used on a constant basis during operation for the purpose of feeding the screening plant. The primary equipment utilizing this area was a Cat 950 FEL (s/n 81J10961) and measured 30" from the ground to mid axle height. The crusher was not in operation the day of inspection but had been previously operating as evidenced by product stockpiles beneath the screening plant discharge conveyors. Should a miner over travel the roadway and overturn his equipment, serious if not fatal blunt force trauma injuries would be expected to occur. Mine operator Neil Bradshaw engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the volatile condition and made no attempt to correct the hazard. This violation is an unwarrantable failure to comply with a mandatory safety standard. This standard 56.9300a was cited 1 time in two years at mine 4202587 (1 to operator, 0 to contractor).

Ex. S-14

Violation

Citation No. 8593603 was issued as part of the hazardous condition complaint inspection. The citation alleges that an injury was reasonably likely, the injury could reasonably be expected to result in a fatality, the violation was significant and substantial, one person could be affected, and there was a high level of negligence. (Ex. S-14) Polgar issued the citation because there were no berms or guardrails on the third tier of the mine, which he considered a roadway. (Tr. 141:1-6; Tr. 366:8-21; Tr. 375:16-18)

The Respondent argued that it did not violate 30 C.F.R. § 56.9300(a) because the area in question was not a "roadway," there was no drop-off from the third tier, vehicles did not travel near the edge of the tier, and as such, a berm was not required. (Resp. Br. at 2–4) The Secretary argued that Stone Plus was required to have berms on the tier because the third tier was used as a

roadway, and there was a drop-off high enough to cause a vehicle to overturn. (Sec'y Br. at 26-27)

Section 56.9300(a) mandates that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." When determining whether an area is a "roadway," the Commission has looked to the nature of its use. *Capitol Aggregates, Inc.*, 4 FMSHRC 846, 846-47 (May 1982). In *Capitol Aggregates*, the Commission found that a ramp was a roadway when used by machinery to drive back and forth over it. *Id.* Additionally, the Commission has found that "an elevated area, such as a bench, is a roadway where a vehicle commonly travels its surface during the normal mining routine." *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1735 (Aug. 2012) (citations omitted); *See El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 36 (Jan. 1981); *See Peabody Midwest Mining, LLC.*, 762 F.3d 611, 615 (7th Cir. 2014).

However, "there may be a point at which a roadway is so wide that berms are unnecessary," unless the evidence shows vehicles traveled near the bench's edge. *Good Constr.*, 21 FMSHRC 201, 202 (Feb. 1999)(ALJ Manning); *Peabody Coal Co.*, 6 FMSHRC 2530, 2542 (Nov. 1984) (no vehicle was shown to operate within 60 feet of an edge); *See Arch of Wyo., LLC*, 32 FMSHRC 568, 575 (May 2010)(ALJ Manning); *Peabody Coal Co.*, 12 FMSHRC 109, 115–16 (Jan. 1990)(ALJ Lasher).

Here, the third tier was approximately 65 feet wide, 180 feet in length, and had a drop-off of 7.5 feet. (Ex. S-14A; Tr. 390:22 – 391:1; Tr. 141:23 – 142:4) Polgar determined that the 65 foot wide tier was a roadway that required a berm[13] because the area was used for travel by vehicles and equipment. (Tr. 367:2-12; Tr. 386:24 – 387:6; Tr. 391:2-7; Tr. 395:9-15; Tr. 398:11-14) I agree with this determination.

Polgar testified that the front-end loader had to travel the entire length of the tier to access the screening plant and the crusher because there was only one entrance and exit from the east side of the tier.[14] (Tr. 145:17 – 147:2) Once there, the front-end loader transported product from the crusher to the screening plant, which was located on the edge of the third tier and had a conveyor that discharged over the edge. (Tr. 144:6-14) Then, to load trucks with finished product, the front-end loader would have to travel the entire length of the bench to get down to the second tier where the stockpiles were located. (Tr. 145:17 – 146:1) The photographic evidence presented at the hearing showed front-end loader tracks on the edge of the third tier. (Ex. S-8B, 8D, 8E; Tr. 274:9-13) Polgar testified that if one of the wheels of the front-end loader were to drive off the edge of the bank, it would be enough to cause the loader to overturn (Tr. 147:7-12; Tr. 148:10-12), because the ground was unconsolidated and could give if a vehicle drove too close to the edge. (Tr. 148:5-12)

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[13] When required, berms must be maintained at mid-axle height to the largest piece of equipment, which was the front-end loader. Its mid-axle height was 30 inches. (Tr. 142:10-21)

[14] There were east and west access roads, but the screening plant on the third tier blocked access to the west road. (Tr. 146:4-10)

Bradshaw admitted that on August 11, 2012, he and his son hauled the crusher and the screening plant up the side access road from the bottom of the pit to the third tier using a Volvo tractor semi-truck. (Tr. 811:6-10; Tr. 812:13 – 813:9; Tr. 880:23 – 881:22; Tr. 882:5-11) Once on the third tier, Bradshaw drove across the tier until he found the spot where he wanted to place the crusher. He did the same with the screening plant, and maneuvered the machines into the proper locations. (Tr. 813:22-23; Tr. 883:2 – 884:5) Bradshaw also used the front-end loader to push material off the edge of the third tier and to move product into different piles on the third tier. (Tr. 893:7-15; Tr. 911:6-25)

Bradshaw claimed the tracks were made by the contractor, Susan Martin, and also argued that the tier was not meant to be a roadway. (Tr. 850:19 – 851:3) However, for purposes of determining whether an area is a roadway, it does not matter whose vehicle traveled on it, or that the area was not designed to be a roadway originally. (Tr. 777:20-23) The evidence is clear that the third tier was used as a roadway by Bradshaw, not only to transport and maneuver his equipment into place, but also during the course of normal mining operations. Additionally, the photographic evidence and testimony of Inspector Polgar confirms that the edge comprised loose, unconsolidated material. If a vehicle overtraveled the edge, it could overturn and fall 7.5 feet to the tier below. For these reasons, I conclude that Stone Plus violated Section 56.9300(a).

Negligence

Polgar designated the citation as high negligence because it was an open and obvious condition, and Tromble had informed Bradshaw of the berm/guardrail requirement three months prior, during the May inspection. (Tr. 148:13-20; Tr. 723:25 – 724:4) Bradshaw knew he needed to install berms or guardrails because he was instructed to do so.

Stone Plus argued that it was only on site for one day, did not intentionally[15] violate any rules, thought it was in compliance with the rules, and put a berm on the edge as soon as it was instructed to do so. (Resp. Br. at 1-3) However, mitigation is something an operator does affirmatively with the intent to protect miners. (Tr. 459:1-13) This includes actions taken by the operator to prevent or correct hazardous conditions. The Respondent's arguments do not constitute mitigation.

A reasonably prudent person familiar with the mining industry would have installed berms or guardrails here. Based on the above, it is clear that Stone Plus knew of the violative condition, and was highly negligent.

[15] Section 110(a) of the Mine Act, 30 U.S.C. § 820(a), imposes strict liability on operators who are found in violation of the Act. *See Ames Construction, Inc.*, 33 FMSHRC 1607, 1611 (July 2011), *aff'd*, 676 F.3d 1109 (D.C. Cir. 2012). "Imposing strict liability under the Mine Act is not optional – it is mandatory." *Wake Stone Corp.*,36 FMSHRC 825, 827 (Apr. 2014).

Gravity

Without a berm to prevent overtravel, anyone operating a vehicle or machinery on this roadway would be exposed to the hazard of rolling over the edge. (Tr. 122:20 – 123:4) Being ejected or suffering head trauma could easily cause a fatality.[16] (Tr. 147:13-20) The citation was marked as one person affected because the front-end loader only carries one person in the cab at a time. (Tr. 147:24 – 148:2) Since this mine was operated solely by Bradshaw, and possibly one other miner, the single person designation was appropriate.

Significant and Substantial[17]

The first and fourth prongs of the *Mathies* test have been met. The lack of a berm on the third tier created a discrete safety hazard that a piece of mobile equipment might overturn and cause injuries to a miner. (Tr. 147:13-20) The remaining question is whether there was a reasonable likelihood that the hazard would result in an injury.

If a vehicle wheel were to go over the edge of the tier, it could be enough to cause it to overturn, especially considering that the ground was unconsolidated and could give way if a vehicle drove too close to the edge. (Tr. 147:7-12; Tr. 148:5-12) There is a reasonable likelihood of serious injury to a miner by dropping approximately 7.5 feet in an overturned vehicle.

Further, assuming continuing normal mining operations, the frequency of travel increases the probability of an injury occurring. (Tr. 126:3-7) Bradshaw admitted that in addition to his traveling across the tier, he allowed people to come onto the mine site to borrow the front-end loader, and landscaping companies were given access to load material from stock piles. (Tr. 901:11-18; Tr. 906:14-25) This would require traveling across the tiers and into the mine pit. The Secretary has proved by a preponderance of the evidence that the S&S designation was warranted.

Unwarrantable Failure[18]

There was no evidence that a berm ever existed on the third tier. The tier was approximately 180 feet in length. (Tr. 128:12-17; Tr. 149:16-18) It was obvious that there was no berm. (Tr. 150:7-19) This violation was covered in the hazardous condition complaint of August 13, 2012. It existed at least since then. (Tr. 149:4-11) It can also be inferred that the violation existed longer because Bradshaw admitted that he did not have time to build any berms on the mine property and had been operating since at least August 11, 2012. (Tr. 131:8-14; Tr. 151:3-13) The violating condition was extensive and was present for an extended period of time. There was a high degree of danger. It was reasonably likely that if the front-end loader or other

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[16] All of the potential injuries were exacerbated by the lack of seat belt in the cab of the front-end loader, which led to the issuance of another citation. (Tr. 147:21-23; Ex. S-11)

[17] At the hearing, Polgar testified that his reasoning for the S&S designation were the same as the violation for Order No. 8593604. (Tr. 147:13 -148:12)

[18] Inspector Polgar testified that the unwarrantable failure factors he relied upon to make the determination were the same as for Order No. 8593604. (Tr. 148:25 – 149:3)

vehicle overtraveled the edge, it would overturn and possibly cause an ejection or head trauma fatality. (Tr. 150:21-25) Polgar testified that Bradshaw was aware of the requirements of the standard because he had been cited before. (Tr. 150:1-5) Additionally, at the time the citation was written, Bradshaw acknowledged knowing about the requirement that berms were required. When responding to a question why berms were not in place, he responded that he did not have time to build them. (Tr. 151:3-13) It is clear Bradshaw's failure to install berms was intentional. The record does not show that Bradshaw did anything to abate the violating condition before the citation was issued.

The Secretary proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct constituting of more than ordinary negligence. The violation constituted an unwarrantable failure to comply with the regulation.

Penalty

The Secretary assessed the penalty for this citation at $2,000.00, the minimum penalty under 30 U.S.C. § 820(a)(3)(A). Stone Plus was highly negligent and the violation was S&S. The proposed penalty will not affect the operator's ability to continue in business. Therefore, I assess a penalty of $2,000.00, as suggested by the Secretary.

Order No. 8593604

Inspector Polgar issued Order No. 8593604 to Stone Plus at its Portable #1 mine on August 14, 2012, alleging a violation of 30 C.F.R. § 56.9300(a). The regulation states that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." 30 C.F.R. § 56.9300(a). Section 56.9300 is a mandatory safety standard. The order alleges:

> The second tier/bench of the mine was not provided with berms or guardrails as required where a drop off exists of sufficient depth or grade to cause a vehicle to overturn or endanger persons in equipment. The second bench is used daily during production as a roadway by vehicles and equipment accessing the crusher/ screening plant as well as to haul away finished product. The drop off from the second bench to the bottom level was 7 ½ feet to 8 feet (measured). The second bench was 225 feet (approx) long and 100 feet (approx.) wide. Should a miner overtravel the roadway/bench and overturn his vehicle/equipment, serious if not fatal blunt force trauma injuries would be expected to occur. Mine operator Neil Bradshaw engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the violative condition and made no attempt to correct the hazard. This violation is an unwarrantable failure to comply with a mandatory standard. Standard 56.9300a was cited 2 times in two years at mine 4202587 (2 to the operator, 0 to a contractor).

Ex. S-13

Violation

Order No. 8593604 was issued as part of the hazardous condition complaint inspection. It alleges that injury was reasonably likely; the injury could reasonably be expected to be fatal; the violation was significant and substantial; one person could be affected; and, the negligence level was high. (Ex. S-13) Bradshaw admitted that the second tier did not have a berm. (Tr. 826:3-6)

As above, I must determine whether the second tier was a roadway with a significant grade to cause a vehicle to overturn or endanger persons in equipment. Polgar concluded that the entirety of tier two needed a berm because it was a roadway. (Tr. 386:24 – 387:6) As previously mentioned, once the finished product was piled onto the second tier, the loader would have to travel the length of the tier in order to load the product for sale to a customer. (Tr. 115:25 – 116:24) When the front-end loader accessed the pile, it would move the material to another pile so production could continue, or it would load a truck with the material.[19] (Tr. 117:5-10)

The edge of the drop-off consisted of loose, unconsolidated material, so the front-end loader would not have to drive completely over the edge for it to overturn. (Tr. 121:4-25) Polgar testified that it is more dangerous to drive at an angle or parallel to the edge than straight onto an embankment. *Id.* The drop-off point from the second bench to the bottom level was approximately 7.5 feet to 8 feet, which according to Polgar was enough to cause a front-end loader to overturn. (Tr. 119:22 – 120:5; Tr. 123:21 – 124:2) The second tier was 225 feet long and 100 feet wide; a blue trailer was parked in the middle of it. (Tr. 115:9-16; Tr. 122:1-9; Tr. 398:17-18; Ex. S13-E)

Bradshaw claimed that he did not use the second tier, but at the hearing he testified that he used his pickup truck to tow a blue trailer onto the second tier. (Tr. 889:19 – 890:7) After dropping off the trailer, he returned to the access road. (Tr. 890:8-11) There were also numerous tire tracks from the front-end loader and from a smaller vehicle on the second tier bench and by the pile of finished product, indicating that, contrary to Bradshaw's denial, vehicles had indeed traveled on the tier.[20] (Tr. 124:3-19; Tr. 276:19 – 277:3; Tr. 302:1-19; Ex. S-8F, 8H, 8G, 9J)

It follows that, in the case of an injury or fire near the crusher or screening plant, someone would have to drive across the third tier, down the side road, and across the second tier to reach the blue trailer where a first aid kit and fire extinguisher were kept. Despite Bradshaw's claim that he did not consider the second tier a roadway (much like the citation for the third tier above), it is clear that Bradshaw used the second tier as a roadway, not only to transport and maneuver the blue trailer into place, but also during the course of normal mining operations. (Tr. 826:8 – 827:7) The evidence photos and testimony of Inspector Polgar depict the edge as loose,

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[19] This also assumes that the truck was not oversized and did not need to use the dump site, which was also cited.

[20] Polgar could tell material had been removed from the pile because it was no longer a symmetrical cone at the top. (Tr. 124:20 – 125:5)

unconsolidated material. If a vehicle overtraveled the edge, it could easily overturn and fall approximately 7.5 feet to 8 feet to the tier below. I conclude that Stone Plus violated Section 56.9300(a).

Negligence

Polgar designated order as involving high negligence because Bradshaw knew or should have known about the violative condition, and there were no mitigating factors. (Tr. 129:9-16) He further stated that it was "inconceivable" that somebody could be on this property and not know that a 200 foot berm was missing. *Id.*

At the time Polgar wrote the order, it was his understanding that Bradshaw was on site every day during the set-up of the plant, to perform maintenance, during production, and to make sales, and should have known of the violating condition. (Tr. 134:15-18) More importantly, when discussing the issuance of the order, Bradshaw told Polgar that there were no berms on the tiers because he did not have time to build them. (Tr. 131:8-14)

It is clear that Bradshaw chose not to install berms. A reasonably prudent person familiar with the mining industry would have installed berms or taken some other compliant measure. The order was properly classified as high negligence.

Gravity

Potential injuries here involve head trauma and possible ejection from the cab of the front-end loader, if it were to overtravel and overturn. Fatalities or serious bodily injuries are reasonably likely to result. (Tr. 139:17-23) Polgar alleged the violation affected one person because a front-end loader is designed to be operated by a single person. (Tr. 127:22 – 128:11) I agree that one person would be affected.

Significant and Substantial

The first and fourth prongs of the *Mathies* test have been met. The unbermed/unguarded second tier created a discrete safety hazard that a piece of mobile equipment would overturn which could result in serious injuries. (Tr. 147:13-20) The remaining question is whether there was a reasonable likelihood that the hazard contributed to would result in an injury.

Polgar issued the citation because he felt it was an obvious violation of a mandatory health and safety standard. (Tr. 122:20 – 123:4) The lack of a berm posed a danger to anyone traveling on the tier (roadway). Miners would be exposed to the hazard of falling over the edge. (*Id.*; Tr. 126:3-7) Polgar designated the violation as reasonably likely to cause fatal injuries because the area had been used by the front-end loader and smaller vehicles. (Tr. 125:8-17)

The Secretary proved by a preponderance of the evidence that the S&S designation was warranted here.

Unwarrantable Failure

Missing berms were part of the hazardous condition complaint, and there was no evidence on site that berms had ever existed. (Tre. 128:12-17) I find that berms were missing since at least August 11, 2012. The violating condition was obvious and extensive because there was no berm anywhere on the 225-foot-long tier. (Tr. 1238-14; Tr. 133:1-8) The degree of danger was high because of the likelihood of a fatality or serious injury if a vehicle or piece of equipment were to overturn. (Tr. 133:9-17) Bradshaw was the primary loader operator and often the sole employee working at the mine. (Tr. 132:22-25) He and Polgar had discussed the berming requirement as part of the May inspection. Bradshaw told Polgar that there were no berms on the tiers because he did not have time to build them. I find that Bradshaw knew of the berming requirement and intentionally disregarded it. Bradshaw made no effort to abate the violating condition prior to the citation. (Tr. 132:18-21)

The Secretary proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct constituting more than ordinary negligence. I conclude that this was an unwarrantable failure to comply with the regulation.

Penalty

The Secretary assessed a $2,000.00 penalty for this citation, the minimum penalty amount under 30 U.S.C. § 820(a)(3)(A). Stone Plus was highly negligent, and the violation was S&S. This penalty will not affect the operator's ability to continue in business. The $2,000.00 penalty the Secretary proposed is appropriate.

Order No. 8593607

Inspector Polgar issued Order No. 8593607 to Stone Plus at its Portable #1 mine on August 14, 2012, alleging a violation of 30 C.F.R. § 56.9300(b) pursuant to Section 105(d)(1) of the Mine Act. The regulation states that "[b]erms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway." 30 C.F.R. § 56.9300(b). Section 56.9300 is a mandatory safety standard. The order alleges:

> The boulder, used in lieu of a berm on the south side of the feed ramp was not maintained in a mid-axle height position of the largest piece of equipment that travels the roadway, as required where a drop off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. The feed ramp was used by a Cat 950 FEL with a mid axle [*sic.*] height of 30" (Measured) and the boulder was 12 to 15 inches (approx) above the working level of the ramp. The ramp was 19 feet long, 11 ½ feet wide and 6 feet high (at the top, all measured). Should a vehicle overtravel the side of the ramp and overturn[,] permanently disabling blunt force trauma injuries would be expected. Mine operator Neil Bradshaw engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the standard and the violative condition and allowed it to exist

without correcting the hazard. The violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-15

Violation

Order No. 8593607 was issued as part of the hazardous condition complaint inspection. It alleges that injury was unlikely, but that if an injury did occur, there was a reasonable likelihood that any resulting injuries would be serious. (Ex. S-15) The violation was not considered significant and substantial, one person was affected, and it was given a high negligence designation. *Id.*

Bradshaw opted to use boulders to create a barrier on the crusher feed ramp instead of constructing a solid material berm or guardrail. The barrier boulders were approximately 12 to 15 inches in height. The regulation requires that a berm or barrier be at least mid-axle height of the largest vehicle using the roadway. Mid-axle height for the front-end loader was 30 inches. One of the boulders had toppled over, and the barrier was less than mid-axel height in that area. (Tr. 153:12 – 154:3; Ex. S-8M, 8N, 8O, 8P) However, even without falling over, the boulder barrier would not have been mid-axel height. (Tr. 154:11-13; Tr. 156:12-13)

Bradshaw made an attempt, albeit inadequate, to put a berm in place on the feed ramp. (Tr. 423:8-11) The feed ramp is a roadway used by equipment at this mine. I conclude that Stone Plus violated Section 56.9300(b).

Negligence

This order alleged high negligence because Bradshaw had been cited for a feeder ramp berm violation in May, 2012, at the same place. (Tr. 161:18 – 162:11; Tr. 166:13-17) Bradshaw knew of the standard. Not only had he been previously cited, he made an incomplete attempt to comply with the standard after the May violation. (Tr. 426:21 – 427:1)

Regarding mitigation, Bradshaw testified that the displaced boulder had shifted because the grizzly on the screening plant vibrated when operated, which caused the boulder to slide out of place. (Tr. 844:6-15) This does not constitute mitigation. Mitigation is something the operator does affirmatively with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. It is clear that the violating condition was the result of a deficient half-measure and was not mitigation.

A reasonably prudent person familiar with the mining industry would have installed and maintained adequate berms or barriers. The high negligence designation was warranted here because Bradshaw affirmatively created the violating condition.

Gravity

If the front-end loader came into contact with the displaced boulder, the boulder could have fallen down the ramp and not prevented the loader from overtraveling the edge. (Tr. 158:8-15) Permanently disabling injuries are foreseeable. (Tr. 160:24 – 161:13) Further, when a miner approaches the feeder with the front-end loader, the bucket is typically raised, which changes the loader's center of gravity. (Tr. 159:3-18) If a front wheel were to go off the side while the loader was in this state of disequilibrium, the loader could overturn or the bucket could slam into the feeder. In either instance it could endanger the driver. *Id.* Polgar marked this citation as unlikely because when the operator feeds material into a hopper, he almost always drives in the same tracks, and it is unlikely that he would get off course. (Tr. 160:5-13) One person, the driver of the front-end loader, would be affected. (Tr. 161:14-17)

Unwarrantable Failure

It is clear from the testimony at the hearing and the photographical evidence that the violation was obvious. (Tr. 163:13-17; Tr. 166:6-12) The length of time the violation existed is unknown. (Tr. 163:5-12) Additionally, since there were other boulders on the ramp, the violation was not extensive. This violation posed a high degree of danger of permanently disabling injury if the loader or other vehicle were to overturn. (Tr. 164:6-21) Bradshaw was on notice of this standard due to the previous citation in May. (Tr. 163:18-22) Rather than diligently try to comply with the standard and remedy the berm issue, Bradshaw attempted a quick and easy fix. His minimal effort demonstrated a lack of reasonable care. There is no other evidence that Bradshaw made any effort to effectively deal with the violating condition prior to the citation.

The Secretary proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct constituting of more than ordinary negligence. This constitutes an unwarrantable failure to comply with the standard.

Penalty

The Secretary assessed a penalty of $2,000.00, the minimum under 30 U.S.C. § 820(a)(3)(A). Stone Plus was highly negligent. The penalty will not affect the operator's ability to continue in business. Therefore, a penalty of $2,000.00 is appropriate here.

Order No. 8593609

Inspector Polgar issued Order No. 8593609 to Stone Plus at its Portable #1 mine on August 14, 2012, alleging a violation of 30 C.F.R. § 56.9300(a) pursuant to Section 105(d)(1) of the Mine Act. The regulation states that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." 30 C.F.R. § 56.9300(a). Section 56.9300 is a mandatory safety standard. The order alleges:

> The roadway accessing the upper portion of the mine, above the feed area was not provided with berms of mid axle [*sic.*] height as

required where a drop off exists of sufficient height to cause a vehicle to overturn or endanger persons in equipment. The roadway was at an approx. 15 to 20 percent grade and 25 feet (approx) wide. On the north side of the roadway was loose unconsolidated shot rock dropping into the energy trough from the previous shot below the road. Should a vehicle overtravel the edge of the roadway and overturn, permanently disabling blunt force trauma injuries would be expected to occur due to the irregular, unstable nature of the edge of the roadway. Mine operator Neil Bradshaw engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the violative condition and made no attempt to correct the hazard. This violation is an unwarrantable failure to comply with a mandatory standard. Standard 56.9300a was cited 3 times in two years at mine 420587 (3 to operator, 0 to contractor).

Ex. S-16

Violation

Order No. 8593609 was issued as part of the hazardous condition complaint inspection. The order alleges that a permanently disabling injury was reasonably likely, the violation was significant and substantial, one person was affected, and there was a high degree of negligence. (Ex. S-16) The area where this violation occurred was a roadway on a hill above the crusher and screening plant. There was no berm or guardrail in place. (Tr. 167:23-25; Tr. 168:3-9; Ex. S-8T, S-16E) Polgar determined that it was a roadway because there were vehicle tracks, it appeared to have been maintained, and it was used to access the track hoe and the crusher. (Tr. 170:6-10; Tr. 171:11-19) I agree with this assessment.

Bradshaw argued that this roadway did not need a berm because he had constructed it with a slope such that if a vehicle overtraveled the edge, it would not overturn. (Tr. 820:20 – 821:3) However, even if that were true, the material on the edge was loose, unconsolidated, and made of shot material that would not support the weight of a front-end loader. (Tr. 168:3-9; Tr. 169:17-20) As such, equipment could overturn if it went beyond the edge. (Tr. 169:21 – 170:1) I conclude that Stone Plus violated Section 56.9300(a).

Negligence

Polgar designated the order at the level of high negligence because Stone Plus was aware that berms were required, but did not build any. (Tr. 174:3-13) It is important to note that anyone entering the mine site had to use this roadway. (Tr. 176:8-16) The Respondent's negligence is further evidenced by the fact that Bradshaw attempted to slope the roadway to avoid having to build a suitable berm.

Stone Plus raised the following in mitigation: (1) It had been on site for one day and did not access the area in question; (2) There had been no prior citations; and, (3) It had acted in

good faith in complying with MSHA standards. (Resp. Br. at 8) Mitigation is something the operator does affirmatively with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. These items do not amount to mitigation. I have also considered the fact that when the road was originally constructed, it was built with a gradual slope. However, due to the loose, unconsolidated nature of the roadway material at the edges, this attempt failed its purpose and was not enough to mitigate the Respondent's high negligence.

Gravity

Polgar designated the order as reasonably likely to cause permanently disabling injuries because vehicles, including the front-end loader, accessed this roadway and were exposed to the hazard. (Tr. 171: 23 – 172:13) An injury could be permanently disabling, as opposed to resulting in a fatality, because there was not a sharp drop-off like the other elevated roadways. The possible injuries from overturning could be head injuries, back injuries, neck injuries, and injuries that result in broken bones. (Tr. 172:19-22) One person was potentially affected – the driver of the front-end loader. (Tr. 173:25 – 174:2)

Significant and Substantial

The first and fourth prongs of the *Mathies* test have been met. The unbermed upper roadway created a discrete safety hazard, i.e., an operator's ability to prevent a piece of mobile equipment from overturning was compromised, potentially resulting in injuries to the miner. (Tr. 147:13-20) The remaining question is whether there was a reasonable likelihood that the hazard contributed to would result in an injury.

Anyone traveling on the roadway would be exposed to the hazard of falling over the edge. There was a reasonable likelihood that this would cause serious injuries. There was significant front-end loader and small vehicle traffic in the area. Additionally, the grade at the edge of the roadway was approximately 15 to 20 percent – fairly steep. (Tr. 170:14 – 171:3) A vehicle with bad brakes (such as the front-end loader, as discussed below) would have difficulty stopping if it overtraveled the edge. The significant and substantial designation was warranted.

Unwarrantable Failure

It was obvious that there was no berm on the upper roadway. (Tr. 175:13-19) The violation was extensive; there was no berm anywhere in the area. (Tr. 174:22-24) It is unclear how long the violating condition existed. (Tr. 174:17-21) The degree of danger was high because of the possibility of permanently disabling injuries. (Tr. 175:20 – 176:1) Bradshaw was one of possibly two employees working at the mine at any given time. (Tr. 175:8-12) Stone Plus had been cited for a berm violation in May, and was on notice that berms were required. (Tr. 174:25 – 175:7) Bradshaw showed a serious lack of care in failing to adequately deal with the need for a berm, particularly after being put on notice by the May violation. There is no evidence indicating Bradshaw made any effort to ameliorate the violation prior to the citation.

The Secretary proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct constituting more than ordinary negligence, and that an unwarrantable failure existed.

Penalty

The Secretary assessed the penalty for this citation at $2,000.00, the minimum penalty amount under 30 U.S.C. § 820(a)(3)(A). Stone Plus was highly negligent, and the violation was S&S. The proposed penalty will not affect the operator's ability to continue in business. A penalty of $2,000.00 is appropriate.

Order No. 8593611

Inspector Polgar issued Order No. 8593611 to Stone Plus at its Portable #1 mine on August 15, 2012, alleging a violation of 30 C.F.R. § 56.9301 pursuant to Section 105(d)(1) of the Mine Act. The regulation states that "[b]erms, bumper blocks, safety hooks, or similar impeding devices shall be provided at dumping locations where there is a hazard of overtravel or overturning." 30 C.F.R. § 56.9301. Section 56.9301 is a mandatory safety standard. The order alleges:

> The elevated dump site/load out area for loading product material into trucks was not provided with berms, bumper blocks or similar impeding devices even though there was a hazard of overtravel or overturning. The dump site was 5 ½ feet high (measured) and 60 feet (apprx.) in length and was accessed on an as needed basis to load trucks with the Cat 950 FEL (s/n 81J10961). Should a person operating equipment overtravel the edge of the dump site[,] serious blunt force trauma injuries would be expected to occur. Mine operator Neil Bradshaw engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the violative condition and the requirements of the standard yet made no attempt to correct the hazardous condition. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-17

Violation

Order No. 8593611 alleges that an injury was reasonably likely, the injury could reasonably be expected to be permanently disabling, the violation was significant and substantial, one person was affected, and the violation involved a high degree of negligence. (Ex. S-17) The standard requires a berm or device to impede a vehicle from overtraveling the edge of a dump site. (Tr. 184:13-18)

The violation area was a dump site, an elevated pad from which a front-end loader dumped material into large trucks. It was located on the west access road. (Tr. 180:12 – 181:2; Ex. S-8W, 8X, 8Y) An elevated dump site is commonly used with small front-end loaders that cannot reach over larger vehicles to load materials. (Tr. 183:19-25) The dump site was sixty feet long and 5.5 feet above the road -- high enough for a loader to overturn if it overtraveled. There were no berms or barriers to prevent overtravel. (Tr. 181:12-19; Tr. 183:1-7; Tr. 184:23 -185:3)

A guardrail or barrier is required because it is common for a front-end loader to get close to the edge of the dump site while loading trucks. (Tr. 189:3-9)

Bradshaw argued that he never used the dump site and never loaded anything large enough to require use of the elevated site. (Tr. 854:16 – 855:19) However, during a previous inspection, Polgar saw the front-end loader parked on the access road to this dump site. (Tr. 181:20 – 182:2) He also testified that the dump site was very well maintained, (Tr. 191:16-23), and were it not being used, as Bradshaw claimed, it would not have been so well kept. Additionally, the dump site was not barricaded off to prevent miners from using it. (Ex. S-8W, 8X, 8Y) It is reasonable to infer from this that Bradshaw used the dump site in this condition and violated Section 56.9301.

Negligence

To Polgar, this violation involved a high degree of negligence because the condition was open and obvious, and the person who would have used this load-out area most often as the primary loader operator was Bradshaw, the owner/operator. (Tr. 187:12-20; Tr. 191:11-15) A reasonably prudent person familiar with the mining industry would have known to install berms or guardrails at this site.

Gravity

If a loader drove over the edge at this site, it could overturn. If a truck were being loaded at that moment, the loader could hit the truck, potentially causing injury to both the loader operator and the truck driver. (Tr. 186:2-18) Resulting injuries could be serious. (Tr. 186:19-22) At least one person would be affected. (Tr. 187:1-4)

Significant and Substantial

The first and fourth prongs of the *Mathies* test are satisfied. The unprotected edge of the dump site created a discrete safety hazard that a loader operator might overtravel the edge and lose control of the vehicle, causing injury to himself or others. The remaining question is whether there was a reasonable likelihood that the hazard would result in an injury.

Polgar believed this violation was significant and substantial, i.e., reasonably likely to result in permanently disabling injuries. People used the area as needed. The dump site was well-maintained despite there being no berm or guardrail to prevent overtravel. (Tr. 185:10-19) The front-end loader would have to come close to the edge while loading trucks. Tire tracks indicated that trucks had been loaded there. (Tr. 181:20 – 182:2; Tr. 183:11-15)

Typically, when a front-end loader climbs a loading ramp such as this, its bucket is full, making it top heavy and more likely to tip if it runs over the edge. (Tr. 187:21 – 188:17) The extra bucket weight also makes it more likely that the loader will tip forward into the truck it is loading. *Id.* It is reasonably likely that this could result in a serious injury. Additionally, considering the inadequate brakes and lack of a seat belt on the front-end loader (discussed below), the likelihood of serious injury is even greater. (Tr. 185:20 – 186:1)

The Secretary has proved by a preponderance of the evidence that the S&S designation was warranted.

Unwarrantable Failure

The violation was obvious and extensive. There were no berms or other barriers, and the area was well maintained. (Tr. 190:20-191:23) Additionally, the dump site had existed for approximately three months. (Tr. 189:14-21) The instability of a front-end loader climbing the loading ramp with a full bucket raised to load into a truck intensifies the risk of incident and injury. The lack of any berm or barrier further exacerbates the risk of serious injury to the loader operator and possibly the driver of the truck being loaded. (Tr. 192:5-15) This was an open and obvious condition. Bradshaw knew that there was no berm or barrier at this dump site. (Tr. 192:16-21) Polgar had also spoken to Bradshaw about the berming requirements during the May inspection. Bradshaw acted with a serious lack of reasonable care. Other than having built the roadway with a gradual slope, there is no evidence indicating that Bradshaw made any effort to ameliorate the condition prior to the citation. (Tr. 191:8-10)

The Secretary has proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct constituting more than ordinary negligence. This violation was the result of an unwarrantable failure to comply with the regulation.

Penalty

The Secretary assessed the penalty for this citation at $2,000.00, the minimum penalty amount under 30 U.S.C. § 820(a)(3)(A). Stone Plus was highly negligent, and the violation was S&S. The proposed penalty will not affect the operator's ability to continue in business. A penalty of $2,000.00 is appropriate.

Order No. 8593613

Inspector Polgar issued Order No. 8593613 to Stone Plus at its Portable #1 mine on August 16, 2012, alleging a violation of 30 C.F.R. § 56.14101(a)(1) pursuant to Section 105(d)(1) of the Mine Act. The regulation states that "[s]elf-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels." 30 C.F.R. § 56.14101(a)(1). Section 56.14101 is a mandatory safety standard. The order alleges:

> The service brakes on the CAT 950 FEL (s/n 81J1096) failed to hold the equipment with its typical load on the maximum grade it travels. Brake function was very weak and failed to hold the loader with an empty bucket. Poor grade performance combined with the lack of appropriate dump site restraints (citation # 8593611) and berms or guardrails (citation/order # 8593603, 8953604, 8593607, and 8593609), no seat belt in the loader (cit/order #8593614) and the presence of miner(s) working on foot in the crusher/screening plant area, make it reasonably likely that a fatal crushing/blunt force trauma injury would occur to the loader

operator or miner(s) on foot should the CAT 950 need to stop and be unable to. Mine operator Neil Bradshaw engaged in conduct constituting more than ordinary negligence in that he was aware of service brake defects on the loader and made no attempt to correct the hazard. This violation is an unwarrantable failure to comply with mandatory standard.

Ex. S-10

Violation

Order No. 8593613 was part of the hazardous condition complaint inspection. (Tr. 45:23 – 46:3; Tr. 76:1-7) The order alleges that a fatal injury was reasonably likely, that the violation was significant and substantial, the negligence level was high, and one person was affected. (Ex. S-10) This violation relates to one of MSHA's Rules to Live By and was designated as an unwarrantable failure. (Tr. 70:14-19; Tr. 72:20-23)

The front-end loader is a self-propelled piece of mobile equipment used to feed the screening plant, to load customers' trucks with product material, to build berms, and, during the setup of the plant, to maintain the roads, and to clean the screening deck and crusher. (Tr. 60:2-8; Tr. 62:17-23; Tr. 63:4-8) Polgar testified that while inspecting the front-end loader, he heard an air leak coming from the brake valve. (Tr. 64:2-22)

Bradshaw suggested a pull-through test[21] to test the brakes. (Tr. 46:15-16) Bradshaw operated the loader controls from inside the cab while Polgar observed from the ground. Polgar noticed that instead of pressing the brake pedal and releasing the clutch with the transmission engaged, which would cause the engine to stall if the brakes were functioning properly, Bradshaw allowed the clutch to remain engaged so that the loader did not move forward. This tactic, if not detected by the inspector, would create the impression that the brakes were holding and were in good condition. (Tr. 46:21 – 47:25; Tr. 49:4-9; Tr. 50:16-22) Polgar had Bradshaw repeat the pull-through test. The brakes failed to hold even though the loader was empty.[22] (Tr. 49:17 – 50:6; Tr. 62:9-12) Bradshaw attempted to deceive Inspector Polgar. Stone Plus violated Section. 56.14101(a)(1).

Negligence

Bradshaw had reason to know that the brakes on the front-end loader were not working correctly. He moved the loader from the feed ramp on the third tier bench, where it was on the first day of the inspection, to the lowest level of the pit near the south end stockpiles, by the last day of the inspection. (Tr. 51:9-20; Tr. 496:6-13; Tr. 700:19-23) He tried to deceive the inspector while performing the pull-through test. (Tr. 68:8 -69:6) Additionally, Polgar and

[21] A pull through test determines if the brakes are good enough to hold a vehicle when the vehicle is put in gear. (Tr. 46:6-13)

[22] The standard requires the vehicle to be fully loaded for the pull-through test to be considered valid.

Tromble spoke to Bradshaw at the previous inspection in May about mobile equipment safety. (Tr. 72:6-10) A reasonably prudent person familiar with the mining industry would have noticed and fixed the inadequate brakes. Stone Plus knew of the violating condition, and was highly negligent.

Gravity

Polgar designated this citation as potentially fatal because a miner could be struck by the front-end loader if it was unable to stop due to inadequate brakes. (Tr. 57:16 – 58:1) Further, inadequate brakes could cause the loader to drive over the edge of a roadway. It could overturn, and eject or kill the driver. (Tr. 58:2-14) The order designated one person as being affected, the driver or a pedestrian. (Tr. 54:5-22) I agree.

Significant and Substantial

The first and fourth prongs of the *Mathies* test have been met. The inadequate brakes posed a discrete safety hazard to miners because a miner could have been run over by a front-end loader that was unable to stop. The remaining question is whether there was a reasonable likelihood that the hazard contributed to would result in an injury.

The violation was reasonably likely to result in a fatal injury. (Tr. 54:23 – 55:15) The front-end loader was used at the crushing and screening plant, and for cleanup and set up purposes. *Id.* During those times, the loader driver, or anyone on the ground in its vicinity, would be exposed to possible injury due to the inadequate brakes. *Id.* Polgar testified further that if a miner had been operating the loader when he arrived on site for his inspection, he would have issued an imminent danger order. (Tr. 55:17 – 56:8) There was a reasonable likelihood that the faulty brakes would result in a serious injury.

The Secretary proved by a preponderance of the evidence that the significant and substantial designation was warranted.

Unwarrantable Failure

It is unknown how long the brakes were in the state Polgar observed, however the problem was raised as part of the hazardous condition complaint of August 11, 2012. (Tr. 70:25 – 71:3) The violation was obvious to anyone operating the loader. (Tr. 71:7-23) It was also apparent to Inspector Polgar that air was leaking from the brake valve. Anyone operating the loader would have known that the brakes were not functioning properly. (Tr. 74:1-11) The violation poses a high degree of danger because operating a font-end loader with inadequate brakes and no seat belt on unprotected elevated roadways exposes the driver and others in the vicinity to a high degree of risk of injury or death. (Tr. 74:12-25) Bradshaw knew the brakes on the front-end loader were inadequate and intentionally attempted to deceive Inspector Polgar. (Tr. 75:1-7) Despite knowing that the brakes were inadequate, Bradshaw failed to tag the loader out of service or fix the problem. (Tr. 51:21 -22:10; Tr. 65:16-22 – 67:2) Bradshaw testified that he did not intend to deceive MSHA and thought there were two service brake pedals on the loader. However, anyone with 50 years of experience operating front-end loaders, like

Bradshaw, would know that there were a clutch, a service brake, and a drive pedal and would know the difference between them. (Tr. 48:21 -49:3; Tr. 486:13-15; Tr. 859:15-17; Tr. 861:1-3; Tr. 937:18-24) Bradshaw acted with intentional misconduct. There was no effort to remedy the violation prior to the citation, but there was an effort to conceal it. (Tr. 73:18-20)

The Secretary proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct constituting of more than ordinary negligence. This violation was the result of an unwarrantable failure to comply with the regulation.

Penalty

The Secretary assessed the penalty for this citation at $3,000.00. This is $1,000 more than the minimum penalty amount under 30 U.S.C. § 820(a)(3)(A). As noted above, Stone Plus was highly negligent, and I found the violation was S&S. This penalty will not affect the operator's ability to continue in business. The Secretary increased the penalty amount due to Bradshaw's deceit and attempted concealment. The penalty is increased to $4,000.00 due to the operator's deceitful actions.

Order No. 8593614

Inspector Polgar issued Order No. 8593614 to Stone Plus at its Portable #1 mine on August 16, 2012, alleging a violation of 30 C.F.R. § 56.14130(i). The regulation states that "[s]eat belts shall be maintained in functional condition, and replaced when necessary to assure proper performance." 30 C.F.R. § 56.14130(i). Section 56.14130(i) is a mandatory safety standard. The order alleges:

> The seat belt in the CAT 950 FEL (s/n 81J10961) was not maintained in a functional condition and had not been replaced when necessary to assure proper performance. Upon inspection the seat belt was missing both halves. The mine operator stated that the loader has never had a seat belt installed in it[,] but the year of manufacture (1977 according to serial number) and the presence of a ROPS with a 29 CFR 1926.100 1972 compliance label indicate[s] that a seat belt was provided by the manufacturer. Failure to provide and maintain a functional seat belt, poor brake performance (cit/order #8593613), lack of appropriate dump site restraints (citation # 8593611) and berms or guardrails (citation/order # 8593603, 8593604, 8593607, and 8593609) combine to create a situation where fatal crushing/blunt force trauma injuries would be expected should a miner operating the loader overtravel or overturn a roadway. Mine operator Neil Bradshaw engaged in conduct constituting more than ordinary negligence in that he should have discovered the obvious lack of a seat belt and corrected the hazardous condition instead of allowing it to continue for a period of two years without addressing it. This is an unwarrantable failure to comply with a mandatory safety

standard. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-11

Violation

Order No. 8593614 alleges that injury was reasonably likely, could reasonably result in fatal injuries, was significant and substantial, the negligence level was high, and one person was affected. *Id.* The loader was originally equipped with a seat belt from the manufacturer.[23] However, Polgar found that the seat belt was missing. (Tr. 78:6-12; Tr. 91:18 – 92:5) There were two attachment studs where the seat belt should have been mounted. (Tr. 78:17 – 79:8; Tr. 80:19 – 81:8) Stone Plus violated Section 56.14130(i).

Negligence

Polgar designated the citation as high negligence because the operator had to know of the violation. Anyone driving the loader had to know the seat belt was missing. (Tr. 86:5-20) Bradshaw testified that the loader had not had a seat belt for approximately two years; it never had a seat belt. (Tr. 86:1-4; Tr. 937:25 – 938:15) A reasonably prudent person familiar with the mining industry would have noticed the missing seat belt and replaced it. I find that Stone Plus knew of the violative condition, and the high negligence rating was justified.

Gravity

A driver can be ejected from the cab and severely injured without a working seat belt. (Tr. 57:6-13; 92:12 – 93:7) The inspector designated this violation as affecting one person because there was only one seat in the loader. (Tr. 85:5-9) I agree.

Significant and Substantial

The first and fourth prongs of the *Mathies* test have been met. The missing seat belt created the discrete safety hazard that a loader driver could be subjected to ejection and/or injury by blunt force trauma. The remaining question is whether there was a reasonable likelihood that the hazard contributed to would result in an injury.

It was reasonably likely that the missing seat belt could result in an injury. If the loader overtraveled one of the elevated roadways and overturned, the occupant could be ejected from the cab. (Tr. 84:14-20) The loader had no seat belt, inadequate brakes, and there were no berms on the tiers, dump site, or roadway. This very dangerous situation could reasonably result in a fatality. (Tr. 83:21 – 84:11) The Secretary proved by a preponderance of the evidence that the significant and substantial designation was warranted here.

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[23] Equipment manufactured after 1969 was required to have a seat belt; this loader was manufactured in 1977. (Tr. 80:4-13)

Unwarrantable Failure

The violation was extensive and obvious. The seat belt wasn't just broken; it was missing. (Tr. 87:7-10; Tr. 88:9-13) According to Bradshaw, the violating condition had existed approximately two years. The front-end loader never had a seat belt. (Tr. 86:1-4; Tr. 937:25 – 938:15) There was a high degree of danger because the protection that seat belts provide against ejection from the cab and possible blunt force trauma inside the cab, in the event of an accident is lost if the vehicle has no seat belt. (Tr. 88:14 – 89:1) It is implausible that a person who has operated front-end loaders for approximately fifty years (Bradshaw) could operate this loader without knowing the seat belt is missing. I find that Bradshaw knew the seat belt was missing for approximately two years and conclude that he acted with intentional misconduct by not replacing it. Bradshaw made no effort to remedy the violating condition prior to the issuance of the citation. (Tr. 87:22-25)

The Secretary proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct constituting of more than ordinary negligence. This constitutes an unwarrantable failure.

Penalty

The Secretary assessed the penalty for this citation at $2,000.00, the minimum penalty amount under 30 U.S.C. § 820(a)(3)(A). Stone Plus was highly negligent and the violation was S&S. This penalty will not affect the operator's ability to continue in business. A penalty of $2,000.00 is appropriate.

Order No. 8593617

Inspector Polgar issued Order No. 8593617 to Stone Plus at its Portable #1 mine on August 16, 2012, alleging a violation of 30 C.F.R. § 56.14100(a) pursuant to Section 105(d)(1) of the Mine Act. The regulation states that "[s]elf-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift." 30 C.F.R. § 56.14100(a). Section 56.14100(a) is a mandatory safety standard. The order alleges:

> The mine operator failed to ensure that self propelled [*sic.*] mobile equipment was being inspected for safety defects prior to it being placed into operation. The nature of defects observed and the severity of those defects, as well as the operators own admission indicate that no safety defect exam what so ever [*sic.*] was being performed. The failure to ensure examinations are being conducted can lead to serious[,] if not fatal[,] injuries. Neil Bradshaw, mine operator, engaged in conduct constituting more than ordinary negligence in that he was aware of the requirement to conduct preoperational exams and he did not ensure they (exams) were being conducted. This is an unwarrantable failure to comply with a mandatory safety standard.

Ex. S-12

Violation

Order No. 8593617 alleged that a fatal injury was reasonably likely, the violation was significant and substantial, the negligence level was high, and one person was affected. *Id.* Polgar issued the order because the operator failed to inspect the front-end loader prior to placing it into operation. (Tr. 93:16-19; Tr. 94:1-4) The operator is also required to make a record of any defects, take the equipment out of service until defects are corrected, and correct the defects in a timely manner. (Tr. 97:21 – 98:5)

Mine operators are required to perform a pre-shift exam of mobile equipment prior to each shift. The operator must inspect all safety equipment, i.e. brakes and seat belt, to ensure everything is functional and the equipment is safe to run. (Tr. 99:10-15) Due to the obvious nature of the seat belt issue (missing) and the defective brakes, it is obvious that no preoperational exam was done. (Tr. 101:16 – 102:1) Additionally, Bradshaw admitted that no preoperational exam was done. (Tr. 94:16 – 95:1) As an example, a preoperational exam should have been done before the front-end loader was moved from the upper tier to the lower tier of the mine. (Tr. 107:2-9) Stone Plus violated Section 56.14100(a).

Negligence

It was Bradshaw's responsibility, as owner and operator of the mine and principal operator of the front-end loader, to perform preoperational exams. (Tr. 102:14-18; 107:10-20) Bradshaw knew that a preoperational exam was required. At the previous inspection in May, 2012, the inspectors and Bradshaw spoke about the preoperational exam requirement, and Bradshaw was given a safety checklist with pertinent standards that need to be followed. (Tr. 95:5-21) Bradshaw admitted in May that there no preoperational exams had been performed. It is evident that they were still not being performed when this inspection took place, months later. (Tr. 99:20-25; Tr. 101:6-11)

When Polgar asked Bradshaw to produce examination records during the August inspection, Bradshaw opened his briefcase. Polgar looked inside and saw the checklist that he had given Bradshaw in May on top of the other documents. Bradshaw was on notice and was aware of the preoperational exam requirement. (Tr. 107:25 – 108:20) Bradshaw also admitted he had no preoperational exam records. He told Inspector Polgar he knew he should be performing them. (Tr. 96:13-16; Tr. 98:7-13; S-6) Polgar assigned high negligence to this order because the owner was responsible for performing the preoperational exams, knew that they were required, yet failed to do them. (Tr. 100:18-25)

A reasonably prudent person familiar with the mining industry would have inspected the front-end loader before operating it. It is clear that Stone Plus was highly negligent in neglecting this duty to examine.

Gravity

Here, the fatality designation related to the seat belt and brake defects on the front-end loader. (Tr. 103:14-16; Tr. 106:4-9) The driver or a miner on foot in the area would be the only person affected. (Tr. 97:4-11; Tr. 98:15-20; Tr. 106:10-13)

Significant and Substantial

The first and fourth prongs of the *Mathies* test have been met. The lack of preoperational exams created the discrete safety hazard of the missing seatbelt and inadequate brakes. These defects could result in injuries to a miner. The remaining question is whether there was a reasonable likelihood that the hazard contributed to would result in an injury.

Polgar considered the violation S&S and reasonably likely to result in fatal injuries. When assessing this violation, Polgar looked at the other related violations. He testified that the purpose of the preoperational exam is to ensure that equipment is checked for defects and is safe for miners to use. (Tr. 105:15-22) Here, the operator failed to do a preoperational exam which resulted in critical safety measures being overlooked. (Tr. 104:9-20) Polgar believed that if a preoperational exam had been performed, the brake issue and the missing seat belts would have been caught immediately. (Tr. 69:16 – 70:3; Tr. 104:24 – 105:2)

Bradshaw admitted that he had operated the equipment and produced commercial product. (Tr. 96:20-21; Ex. S-6) Additionally, there was evidence that the front-end loader had been used in various locations throughout the mine. For example, there were production piles on the ground, there were loader tracks in various areas of the mine, and the loader had been moved from where it was on the first day of inspection to where it was on the last day of inspection. (Tr. 100:1-12) Most importantly, despite the inadequate brakes and missing seat belt, the loader had never been taken out of service. (Tr. 105:23-25) I agree that there was a reasonable likelihood that this was a hazard that could result in an injury. The S&S designation was warranted.

Unwarrantable Failure

The violation was obvious; it is something that should be done every shift, or every time a piece of equipment is to be placed into service. (Tr. 103:4-8) Also, the defects were extensive enough to be obvious. (Tr. 101:13-15) This violation existed since at least May, 2012. The seat belt and brake defects in the front-end loader posed a high degree of danger. (Tr. 103:9-13) It is the operator's responsibility to complete the preoperational exam. Bradshaw failed to do so and admitted that he knew he should have been performing the exams. (Tr. 103:22 – 104:5; Tr. 104:7-8) The MSHA checklist in his briefcase was further evidence that he knew of the preoperational exam requirement but ignored it. (Tr. 108:22 – 109:4) Bradshaw was on notice at least since May when he was given a copy of the MSHA checklist. (Tr. 102:2-10) I find that Bradshaw's omissions constituted intentional misconduct. Nothing was done to ameliorate the violation. (Tr. 102:11-13)

The Secretary proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct constituting more than ordinary negligence. This violation constituted an unwarrantable failure to comply with the standard.

Penalty

The Secretary assessed the penalty for this citation at $2,000.00, the minimum penalty under 30 U.S.C. § 820(a)(3)(A). As noted above, Stone Plus was highly negligent and the violation was S&S. This penalty will not affect the operator's ability to continue in business. I assess a penalty of $2,000.00, as proposed by the Secretary.

Order No. 8593605

Inspector Polgar issued Order No. 8593605 to Stone Plus at its Portable #1 mine on August 14, 2012, alleging a violation of 30 C.F.R. § 56.14112(b) pursuant to Section 105(d)(1) of the Mine Act. The regulation states that "[g]uards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard." 30 C.F.R. § 56.14112(b). Section 56.14112(b) is a mandatory safety standard. The order alleges:

> The tail pulley guard on the 26 inch wide east discharge belt of the Extec screen plant (s/n 5830) was not in place as required to prevent persons from contacting moving machine parts. The guard had been removed and was located on the ground approx. 100 feet away from the tail pulley. The smooth drum tail pulley was 48 inches AGL and adjacent to a walkway/travelway. Should a miner come into contact with a rotating tail pulley serious amputation/dismemberment injuries would be expected. Mine operator Neil Bradshaw engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the violative condition and made no attempt to correct the hazardous condition. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-18

Violation

Order No. 8593605 was issued as part of the hazardous condition complaint inspection. (Tr. 405:1-5) The order alleges that an injury was reasonably likely, could reasonably result in permanently disabling injuries, the violation was significant and substantial, the negligence level was high, and one person was affected. (Ex. S-18) Polgar testified that the standard for guarding moving machine parts requires that if the machine part is over seven feet above ground level (AGL), it is considered guarded "by location," but here, the screening plant tail pulley was only 48 inches AGL. (Tr. 196:1-8) Therefore, the tail pulley should have been guarded if the machine was in use. In this case, the tail pulley guard had been removed to a location approximately 100

feet from the screening plant, and was on a completely different tier. (Tr. 193:24 – 194:22; Tr. 195:7-12)

Bradshaw testified that he never operated the screening plant without the tail pulley guard in place, but there is credible evidence to the contrary. (Tr. 831:5-9; Tr. 834:21-23) In addition to the hazardous condition complaint claim that the screening plant had been used, Bradshaw admitted he ran the machine for a couple of hours. (Tr. 210:21-24; Tr. 410:14 – 411:3) There was also physical evidence that Polgar relied on at the time he inspected the mine to determine the machine was operated, including the fact that there were discharge piles under the belts and rocks on the frame. (Tr. 411:5-16; Tr. 727:21-25)

There is an exception to the rule: a guard can be removed during testing or for adjustments if such actions cannot be performed without removing the guard. (Tr. 210:25 – 211:8) However, the evidence here shows that the equipment was not being tested or adjusted. There were rocks located near the adjustment mechanism that would have to be removed before any adjustment was done. (Tr. 211:9 – 212:16; Tr. 295:16 – 296:9; Ex. S-9A, 9F, 18D) Additionally, as a general rule, the tail pulley guard does not need to be removed to adjust the machine. (Tr. 212:22-25) The guard was removed, and the screening plant should have been locked out, tagged out, or blocked against motion. (Tr. 609:12 – 610:7; Tr. 547:15-20) I find that Stone Plus violated Section 56.14112(b).

Negligence

Polgar rated the negligence involved in this violation as "high" because the pulley guard had been in place during the previous inspection, it had been subsequently removed, and the screening plant operated after its removal. (Tr. 204:20-25) Stone Plus was on notice of the guarding requirement because Polgar and Bradshaw discussed it at the previous inspection months before, and had even reviewed an MSHA power point presentation on the subject. (Tr. 208:3-11) Additionally, Bradshaw admitted that the tail pulley guard had been removed and excused it because it was only going to run for a couple of hours. (Tr. 352:8-13)

A reasonably prudent person familiar with the mining industry would have assured that the tail pulley on this equipment was properly guarded. It is clear that Stone Plus knew of the violative condition, failed to comply with the relevant standard, and was highly negligent.

Gravity

This type of pulley could actually pull a miner into it. (Tr. 203:25 – 204:13) The resulting injuries could be very serious. *Id.* Polgar believed that the violation affected one person because under normal operating circumstances, only one person would be near the tail pulley at any time. (Tr. 204:14-19) I agree.

Significant and Substantial

The first and fourth prongs of the *Mathies* test are satisfied. The lack of a tail pulley guard created a hazard that a miner could become entangled in the pulley assembly and suffer

serious injury. The remaining question is whether there was a reasonable likelihood that the missing guard hazard would result in an injury.

The screening plant was adjacent to a walkway, which was narrow, not compacted, and sloped, increasing the likelihood that a person could slip and fall onto the moving, unguarded tail pulley. (Tr. 196:9-14; Tr. 277:12 – 278:3; Ex. 8-I) The emergency stop button for the conveyor belt was located four or five feet from the belt. (Tr. 197:6-9) A miner could slip and fall on his way to the stop button. A conveyor belt such as this could have considerable spillage near the tail pulley, which would require shoveling. If a miner needed a hand hold to stand up while shoveling, his hand would be mere inches from the uncovered pulley at best. He could easily inadvertently put his hand on the exposed tail pulley. (Tr. 199:2-19; Tr. 201:12 – 202:6)

The Secretary has shown that there was a reasonable likelihood that the missing guard hazard would result in an injury. The S&S designation was warranted.

Unwarrantable Failure

Bradshaw admitted that the violation existed for a couple of hours -- the length of time the mine was producing. (Tr. 205:6-25) The violation was obvious. The guarding was missing, had been moved 100 feet away, and was on a different tier. (Tr. 209:6-11) The violation was extensive because there was no tail pulley on the machine and nothing had been done to minimize the danger. The missing tail pulley guard posed a high degree of danger. Entanglement accidents are well known in the industry and are unfortunately extremely grievous. (Tr. 209:21 – 210:2) Bradshaw was the owner and operator of Stone Plus, and was on site during all phases of the mining cycle. He was aware of the missing guarding, (Tr. 208:25 – 209:5) but he ran the screener nonetheless. Moreover, the inspectors had told Bradshaw about the guarding requirements the previous May. Bradshaw acted with intentional misconduct. No effort was made to minimize the violation. (Tr. 208:20-24)

The Secretary proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct constituting of more than ordinary negligence. This constitutes an unwarrantable failure.

Penalty

The Secretary assessed the penalty for this citation at $2,000.00, the minimum penalty amount under 30 U.S.C. § 820(a)(3)(A). Stone Plus was highly negligent, and the violation was significant and substantial. This penalty will not affect the operator's ability to continue in business. I assess a penalty of $2,000.00 as proposed by the Secretary.

Order No. 8593606

Inspector Polgar issued Order No. 8593606 to Stone Plus at its Portable #1 mine on August 14, 2012, alleging a violation of 30 C.F.R. § 56.14107(a) pursuant to Section 105(d)(1) of the Mine Act. The regulation states that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels,

couplings, shafts, fan blades, and similar moving parts that can cause injury." 30 C.F.R. § 56.14107(a). Section 56.14107(a) is a mandatory safety standard. The order alleges:

> The return roller on the 36 inch wide overhead belt of the Extec screening plant (s/n 5830) was not guarded as required to prevent persons from contacting moving parts. The roller was located adjacent to a travelway used to access the controls of the screening plant. The roller was 51 inches (measured) AGL, with the frame of the plant directly below the roller (approx. 30 inches distance) being used as a tool/grease gun storage area. Should a miner come into contact with a rotating return roller entanglement/suffocation injuries would be expected. Mine operator Neil Bradshaw engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the guarding standards and the violative condition yet made no attempt to correct the hazardous condition. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-19

Violation

Order No. 8593606 alleges the injury was reasonably likely, could reasonably result in fatal injuries, was significant and substantial, the negligence level was high, and one person was affected. (Ex. S-19) The standard states that moving machine parts shall be guarded. (Tr. 216:2-4) However, there was no evidence that there was a guard over the return roller at any time. (Tr. 220:7-13; Ex. S-8L, 9D, 9E, 9M) The return roller was less than seven feet off the ground and needed to be guarded. (Tr. 217:22 – 218:1)

Bradshaw told Polgar that the screening plant had been operated for only a couple of hours. However, the amount of material on the ground and in the production piles under the discharge conveyors was consistent with a longer period of operation. (Tr. 36:8-16) Polgar concluded that there had never been a guard over the return roller. (Tr. 222:3-10)

Bradshaw argued that he never operated the belt without guarding the roller, and that he used plywood as a guard, however, in light of the amount of material left around the equipment, his testimony on this point is not credible. (Tr. 835:17-25; Tr. 836:7-15) I agree with the Inspector that Stone Plus violated 56.14107(a).

Negligence

Polgar assigned high negligence to this order because it was an open and obvious condition, and he had previously discussed the guarding requirements with Bradshaw. (Tr. 221:20 – 222:20) A reasonably prudent person familiar with the mining industry would have guarded the return roller here. Stone Plus knew of the violative condition and failed to do anything to comply with the guarding regulation. This constitutes high negligence.

Gravity

Unguarded return rollers have caused fatalities before. (Tr. 220:14 - 221:2) If a loose article of clothing or a hand were to come into contact with a return roller, the rotary motion of the roller combined with the belt traveling over it could entangle a miner or his clothing. (Tr. 217:3-21) A miner's entangled clothing could cause suffocation or strangulation, or it could pull a part or all of his body into the machinery. (Tr. 217:3-21; Tr. 221:3-12) Polgar believed that one person would potentially be affected because the prospect of more than one person getting caught in the rollers is very remote. (Tr. 221:13-18)

Significant and Substantial

The first and fourth prongs of the *Mathies* test have been met. The lack of return roller guard created a discrete entanglement hazard which could result in serious injury. The remaining question is whether there was a reasonable likelihood that the hazard contributed to would result in an injury.

The unguarded return roller was located next to a travelway used to access the screening plant controls. (Tr. 218:2-5) It is also close to a tool/grease storage area. The photographic evidence shows a grease gun and a bucket of tools below the unguarded return roller. (Tr. 218:25 – 219:8; Tr. 278: 25 – 279:6; Ex. S-8C, 8K, 9D) It is feasible that a miner could reach into the danger area to get the grease gun or tools -- only 30 inches from the return roller. (Tr. 219:9-21) And, if the machine were running, his hand could get caught in the unguarded return roller.

Polgar considered this violation reasonably likely to cause a fatality and S&S. Any miner reaching for the bucket of tools or the grease gun would be exposed to the unguarded roller. (Tr. 220:18 – 221:2) There is a reasonably likelihood that this could result in a serious injury. The S&S designation was warranted.

Unwarrantable Failure

Polgar testified that the lack of guarding at the return roller was an obvious violation, particularly in light of the fact that there never had been a guard over the return roller. (Tr. 223:4-5; Tr. 220:7-13) This hazard poses a high degree of danger. An entanglement could result in serious injury or death. (Tr. 223:6-11) Bradshaw was on site daily, participating in every facet of mining operations. (Tr. 222:24 – 223:3) He knew the return roller should have been guarded since at least May, and was on site to know that there was no guarding in place. (Tr. 223:12-18) Bradshaw acted with intentional misconduct. No effort made to ameliorate the violation. (Tr. 222:21-23)

The Secretary proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct, and that its failure to provide guarding for the return roller constituted an unwarrantable failure.

Penalty

The Secretary assessed a $2,000.00 penalty for this violation, the minimum penalty allowed under 30 U.S.C. § 820(a)(3)(A). This penalty amount will not affect the operator's ability to continue in business. I concur with the Secretary and assess a penalty of $2,000.00.

Order No. 8593608

Inspector Polgar issued Order No. 8593608 to Stone Plus at its Portable #1 mine on August 14, 2012, alleging a violation of 30 C.F.R. § 56.14107(a) pursuant to Section 105(d)(1) of the Mine Act. The regulation states that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." 30 C.F.R. § 56.14107(a). Section 56.14107(a) is a mandatory safety standard. The order alleges:

> The flywheel on the idle side of the Jaw crusher was not provided with a guard as required to prevent persons from contacting moving machine parts. The flywheel was 5 foot 9 inches above a travelway and approx. 48 inches in diameter. Should a miner come into contact with a rotating machine part, such as a flywheel, permanently disabling blunt force trauma/laceration injury would be expected. Mine operator Neil Bradshaw engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the violative condition and made no attempt to correct the hazardous condition. This violation is an unwarrantable failure to comply with a mandatory standard. Standard 56.14107a was cited 1 time in two years at mine 4202587 (1 to the mine, 0 to a contractor).

Ex. S-20

Violation

Order No. 8593608 alleges that an injury was reasonably likely; it could reasonably result in permanently disabling injuries; it was significant and substantial; the negligence level was high; and, one person was potentially affected. *Id.* The flywheel[24] on the jaw crusher was unguarded and situated five feet and nine inches above the ground. (Tr. 225:11-25; Ex. S-20E, 8Q, 9O, 9P) Bradshaw admitted that there was no guard in place and explained that a permanent guard was being made. (Tr. 848:1-7)

[24] The purpose of the flywheel is to provide momentum or inertia for the jaw crusher. When the jaw crusher is in operation, the flywheel turns continuously. (Tr. 226:21-23; Tr. 232:6-9)

There were discharge material piles below the crusher, made by Bradshaw on August 11, 2012. (Tr. 433:23 -434:7; Tr. 910:16-21; Tr. 912:20-24) There is no question that the crusher had been operated with an unguarded flywheel. Thus, Stone Plus violated Section 56.14107(a).

Negligence

The violation involved high negligence because in May, Polgar and Tromble spoke with Bradshaw about the flywheel on the jaw crusher specifically. (Tr. 234:5 -235:17) At that time, they measured the distance from the ground to the flywheel and determined that it needed to be guarded. *Id.* They also advised Bradshaw that if the machine was moved, which it was, the height above ground level would have to be measured again, and the flywheel would have to be guarded if it was below the minimum height. *Id.* Polgar and Tromble both informed Bradshaw of the guarding requirement. (Tr. 236:4-8) A reasonably prudent person familiar with the mining industry would have guarded the flywheel. It is clear that Stone Plus knew of the violative condition, failed to comply with the regulation, and was therefore highly negligent.

Gravity

If a miner were to come in contact with the inside part of the flywheel, serious injuries such as amputations or blunt force trauma could occur. (Tr. 233:13-24) Lacerations were also likely if a miner even touched the outside of the moving flywheel. *Id.* Polgar believed one person would be potentially affected. (Tr. 233:25 – 234:4) I agree and find accordingly.

Significant and Substantial

The first and fourth prongs of the *Mathies* test have been satisfied. The lack of flywheel guard created a discrete safety hazard of blunt force trauma. The remaining question is whether there was a reasonable likelihood that the hazard would result in an injury.

The flywheel was located directly above a well-worn path consisting of unconsolidated and rocky material. (Tr. 229:8-17; Ex. S-8R, 8S, 9Q) If a miner were to lose his footing walking near the unguarded flywheel, and reach for something to steady himself, a serious injury could occur. *Id.* If a miner were to trip, he could also hit his head on the flywheel. *Id.*

The citation alleged that it was reasonably likely that a permanently disabling injury would occur. This S&S requirement arises from the proximity of the flywheel to the travelway, the shortest path between the jaw crusher and the loader or the screening plant. (Tr. 232:11-24) This proximity increases the likelihood that miners would walk near the unguarded flywheel.

Bradshaw testified that he did not operate the crusher without the flywheel guard, (Tr. 847:7-9), but I give this assertion no credibility. The S&S designation was warranted.

Unwarrantable Failure

Despite having the fact of the missing flywheel guard and its danger brought to his attention in May (Tr. 235:19-25; Tr. 236:1-2), Bradshaw did nothing to come into compliance.

This violation was obvious. Moreover, there was a machine component called a "shiv" on the opposite side of the crusher, which looked essentially the same as the flywheel. It was guarded. (Tr. 236:18-22) An unguarded flywheel next to a travelway poses a high degree of danger. (Tr. 236:25 - 237:1) Bradshaw was at the previous inspection, was on site operating every day the plant was open, and was well aware of the violative condition. (Tr. 236:12-17; Tr. 237:4-7) Stone Plus engaged in intentional misconduct. There was no effort made to ameliorate the violation. (Tr. 236:9-11)

The Secretary proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct which constituted an unwarrantable failure to comply with the regulation.

Penalty

The Secretary assessed the penalty for this citation at $2,000.00, the minimum penalty under 30 U.S.C. § 820(a)(3)(A). The penalty will not affect the operator's ability to continue in business. The recommended $2,000.00 penalty is affirmed.

Order No. 8593610

Inspector Polgar issued Order No. 8593610 to Stone Plus at its Portable #1 mine on August 14, 2012, alleging a violation of 30 C.F.R. § 56.14107(a) pursuant to Section 105(d)(1) of the Mine Act. The regulation states that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." 30 C.F.R. § 56.14107(a). Section 56.14107(a) is a mandatory safety standard. The order alleges:

> The return rollers (2) on the 46 inch wide Jaw discharge conveyor were not guarded as required to prevent persons from contacting moving machine parts. The bottom roller was 29 inches (measured) AGL and adjacent to a travelway used on an as needed basis. The unguarded rollers were open and obvious upon inspection. Should a miner come into contact with an unguarded, rotating roller entanglement/suffocation injuries would be expected. Mine operator Neil Bradshaw engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the standards regarding return roller guards and made no attempt to correct the violative condition. The violation is an unwarrantable failure to comply with a mandatory standard. Standard 56.14107a was cited 2 times in two years at mine 4202587 (2 to the operator, 0 to a contractor).

Ex. S-21

Violation

Order No. 8593610 was part of the hazardous condition complaint inspection. (Tr. 243:10-17) The order alleges that an injury was reasonably likely; it could reasonably be fatal; the violation was significant and substantial; the negligence level was high; and, one person was potentially affected. (Ex. S-21) This order pertains to return rollers on the crusher (the jaw), whereas the order discussed above pertains to the return rollers on the screening plant. (Tr. 239:12-17) Here, there were two unguarded rollers,[25] and the roller cited in the order was the lower of the two, at 29 inches above ground level. (Tr. 239:18-21; Ex. S-8U, 8V) Polgar and Tromble believed the machine was beyond the set-up leveling stage and had already been used in production. (Tr. 251:20-23; Tr. 252:5-7; Ex. S-8U)

Bradshaw claimed that there were plywood guards covering the rollers on August 11, 2012, when he used the equipment, which were removed at the end of the day. (Tr. 927:25 - 928:20) However, during Bradshaw's deposition, he testified that the plywood in question had never been on the machine, it was located on the ground near the machine, and he only used some of the plywood around the bottom of the machine to prevent rocks from going under it. (Tr. 932:19 – 933:23; Tr. 936:6-10) Polgar agreed that the plywood was there only to keep rocks from rolling under the conveyor. (Tr. 241:24 – 242:4) Additionally, the plywood depicted in the photo exhibit (S-8U) does not satisfy the regulation requirement because it does not prevent a person from contacting the roller. (Tr. 241:13-23) I conclude that Stone Plus violated Section 56.14107(a).

Negligence

Order No. 8593610 was assigned high negligence because it was an open and obvious condition, Polgar and Bradshaw spoke extensively about guarding in the previous inspection in May, and Bradshaw was aware of the guarding requirements. (Tr. 246:22 – 247:3) Indeed, despite discussing the guarding requirements, Polgar found no evidence that the rollers had ever been guarded. (Tr. 247 5-15) There were no guard brackets on the machinery until the order was abated. *Id.*

A reasonably prudent person familiar with the mining industry would have guarded the return rollers here. Stone Plus knew of the violative condition and failed to install appropriate guarding. This constitutes high negligence.

Gravity

Polgar testified about a likely scenario. It is reasonably likely that a miner's shovel being used to clean up the area near the unguarded return roller could get caught in the return roller. The miner could be pulled into contact with the roller, which Polgar testified, has happened before. (Tr. 245:22 – 246:3) Also, if a piece of clothing or a hand were to get caught in the

[25] Polgar testified that if there are two violations of the same standard on the same piece of equipment, MSHA doesn't issue those citations individually. (Tr. 240:5-8)

roller, it could lead to serious entanglement or suffocation injuries. (Tr. 238:14-23; Tr. 243:22 – 244: 4) It is reasonable that one person could be affected, as alleged.

Significant and Substantial

The first and fourth prongs of the *Mathies* test have been met. The missing return roller guard posed a discrete safety hazard of entanglement and resulting injuries. The remaining question is whether there was a reasonable likelihood that the hazard would result in an injury.

Crushers and screen decks spill a lot of material during operation, so a miner would frequently be in the area near the unguarded rollers to shovel the spillage. (Tr. 240:9-18) Additionally, the lower unguarded roller was about six feet from the jaw crusher controls. An operator would have to pass by the unguarded roller to get to them. (Tr. 240:23 – 241:1; Tr. 252:8-10) It is reasonably likely that a miner could come into contact with the roller while checking on the equipment, cleaning up spillage, operating the controls adjacent to the roller, or merely walking next to the equipment. (Tr. 244:9-23) Such a hazard is, in turn, reasonably likely to result in a serious injury. The S&S designation was warranted here.

Unwarrantable Failure

Polgar found no evidence that the roller had ever been guarded. To abate the order, guarding brackets had to be welded onto the machine. (Tr. 247:5-15) The equipment had not changed since May. *Id.* The condition was extensive -- there were two rollers on the same conveyor belt, and neither of them had any guarding since at least May. (Tr. 249:4-7) This was an open and obvious condition that anyone could see. (Tr. 249:19 – 250:3) The violation created a high degree of danger. Accidents involving unguarded return rollers have resulted in fatalities in the past. Here, there danger was high. There were two exposed return rollers on a single conveyor belt located next to a travelway. (Tr. 250:6-12) Like the previous unguarded roller citation, Bradshaw was on notice since the previous inspection in May. (Tr. 222:24 – 223: 18; Tr. 249:8-15) Bradshaw was regularly on site, participating in every facet of mining. He knew the rollers should have been guarded and were not. (Tr. 250:15-18) Bradshaw acted with intentional misconduct. No effort was made to ameliorate the violation. (Tr. 249:16-18)

The Secretary proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct. The unwarrantable failure designation was justified.

Penalty

The Secretary assessed the penalty for this citation at $2,000.00, the minimum penalty under 30 U.S.C. § 820(a)(3)(A). Stone Plus was highly negligent, and the violation was S&S. This penalty will not affect the operator's ability to continue in business. I assess a penalty of $2,000.00, as recommended.

Order No. 8593616

Inspector Polgar issued Order No. 8593616 to Stone Plus at its Portable #1 mine on August 16, 2012, alleging a violation of 30 C.F.R. § 56.18002(a) pursuant to Section 105(d)(1) of the Mine Act. The regulation states that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions." 30 C.F.R. § 18002(a). Section 56.18002(a) is a mandatory safety standard. The order alleges:

> The mine operator failed to ensure that a daily work place exam was being conducted to correctly identify the hazards.. [*sic.*] The number of hazards observed and the severity of those hazards, as well as the operators own admission indicate that no exam what so ever [*sic.*] was being done. The failure to ensure workplace exams are being conducted can lead to serious[,] if not fatal[,] injuries. Neil Bradshaw, mine operator, engaged in conduct constituting more than ordinary negligence in that he was aware of the requirement to conduct daily work place exams and he did not ensure the exams were being conducted. This is an unwarrantable failure to comply with a mandatory safety standard. [...]

Ex. S-22

Violation

The order alleges a reasonably likely injury; the injury could reasonably be fatal; the violation was significant and substantial; the negligence level was high; and, one person was potentially affected. *Id.* The mine operator is responsible for ensuring that an examination of each working area around the mine was completed on a daily basis. Given the number of violations identified by Polgar and Tromble during their inspection, it was obvious to Polgar that workplace examinations were not being conducted. (Tr. 260:19-24) All of the violations discussed above could have been identified in an competent workplace examination. (Tr. 261:3-10)

Significantly, Bradshaw admitted he had not conducted workplace examinations. (Tr. 261:22 – 262:5; Ex. S-6Y) This is underscored by that fact that he did not have any workplace examination records. (Tr. 263:10-14) For context, Bradshaw admitted that during a three month period, he ran the crusher five to seven days total. However, even if he was merely setting up equipment, which I determined he was not, he still had to perform a workplace exam. (Tr. 524:6-8; Tr. 873:25 – 874:3) Stone Plus violated Section 56.18002(a).

Negligence

During the May examination, Bradshaw was given an operations checklist, which apparently languished in his briefcase until Polgar's and Tromble's inspection. The requirement

to perform preoperational examinations was on the list. (Tr. 264:10 – 265:8; Ex. S-8Z) Polgar assigned this order high negligence because he felt it was the operator's responsibility to ensure that workplace examinations are being done, Bradshaw acknowledged that he should have been performing the exams, yet he admitted he had never done a single one. (Tr. 267:11-21) A reasonably prudent person familiar with the mining industry would have known to conduct a workplace examination each shift. Stone Plus knew of its obligation to perform workplace exams yet failed to do them. This constitutes high negligence.

Gravity

Polgar testified that this order's fatal designation was due in part to the other citations that were issued. He alleged that one person would be affected based on there rarely being more than one person working the equipment at the mine site. (Tr. 266:19 – 267:10)

Significant and Substantial

The first and fourth prongs of the *Mathies* test have been met. The lack of preoperational examinations created a measure of danger to safety, which arose with each failure to conduct the exams. Failure to conduct a workplace exam increases the likelihood that an injury causing event will occur. The remaining question is whether there was a reasonable likelihood that the hazard would result in an injury.

Polgar believed this violation was reasonably likely to cause fatal injuries and rated it as S&S, based on the other citations he issued. (Tr. 265:24 – 266:17) The failure to identify and correct potential hazards (such as those identified above), which could have been identified had examinations been conducted, resulted in a reasonable likelihood of serious injury. *Id.* Bradshaw was aware of the hazards daily while working at the mine site. *Id.* The S&S designation was warranted.

Unwarrantable Failure

There is a one year document retention requirement under this standard. Bradshaw had no records of any exams performed. The violation existed for an extended period of time. (Tr. 267:25 – 268:10) The failure to conduct workplace exams was extensive and obvious. The failure to maintain records for such examinations is to be expected if the examinations are simply not being done. (Tr. 268:11-18; Tr. 270:12-13) There was a high degree of danger associated with Bradshaw's failure to conduct or document workplace examinations. All of the violations discussed above would have been found if an examination had been competently and honestly done. (Tr. 270:14-22) practices cited posed a high degree of danger. During the May inspection, Bradshaw was given the checklist discussed above. He was aware of the workplace examination requirement. (Tr. 268:22 – 269:4) Bradshaw wrote on the checklist that a workplace examination was required "on the days that we work." (Tr. 270:23 – 271:5; Ex. S-8Z) Bradshaw acted with intentional misconduct. There was no effort made to ameliorate the violation. (Tr. 269:6-8)

The Secretary proved by a preponderance of the evidence that Stone Plus engaged in aggravated conduct constituting of more than ordinary negligence. This violation was the result of an unwarrantable failure to comply with the regulation.

Penalty

The Secretary assessed the minimum penalty of $2,000.00. As noted above, Stone Plus was highly negligent and the violation was S&S. This penalty will not affect the operator's ability to continue in business. I assess a penalty of $2,000.00, as recommended by the Secretary.

WHEREFORE, it is **ORDERED** that Stone Plus pay a penalty of $28,000.00 within thirty (30) days of the filing of this decision.

L. Zane Gill
Administrative Law Judge

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