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April 11, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. CENT 2016-0540 A.C. No. 41-04407-416881
v.	:	
ARNOLD STONE INC, Respondent.	:	Mine: Arnold Stone Inc

DECISION AND ORDER

Appearances: John M. Bradley, Attorney, United States Department of Labor, Office of the Solicitor, Dallas, Texas, for Petitioner;

Jules P. Slim, Attorney, Irving, Texas, for Respondent.

Before: Judge Miller

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act"). This docket involves one citation issued on April 12, 2016, pursuant to Section 104(d)(1) of the Mine Act with a proposed penalty of $21,335.00. The citation was modified to a 104(d)(1) order prior to the filing of the penalty petition. The parties presented testimony and evidence regarding the citation at a hearing held in Dallas, Texas, on February 8, 2017.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Arnold Stone mine is a surface limestone mine located in Hill County, Texas. The parties have stipulated that Arnold Stone, Inc., is an "operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d, and that the mine is subject to the provisions of the Mine Act and the jurisdiction of the Commission. Jt. Stips. ¶¶ 1-2, 5.

Order No. 8861391 was issued for a violation of 30 C.F.R. § 56.12016 for an exposed electrical component on a saw that was not locked out. The Secretary alleges that the violation was highly likely to cause a fatal injury, was significant and substantial, was the result of high negligence, and was an unwarrantable failure to comply with the relevant standard. The Secretary proposed a penalty of $21,335.00. For the reasons set forth below, I find that the Secretary has proven that a violation occurred as alleged, that the violation was significant and

substantial, was the result of high negligence, and was an unwarrantable failure to comply with the standard.

The findings of fact detailed below are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, corroboration or the lack thereof, and consistencies and inconsistencies in each witness's testimony and among the testimonies of the various witnesses. Any failure to provide detail on each witness's testimony in this decision should not be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000).

Inspector James Redwine has worked for MSHA for four years as an inspector. He has been in the mining industry for 30 years, working in safety as well as production and as a supervisor. On April 12, 2016, Redwine traveled to the Arnold Stone mine to conduct a regular inspection. He met Chris Crawford at the mine office, who identified himself as the supervisor and person in charge at the mine. The mine has several saws used to process limestone, and Redwine examined at least two of them as part of his inspection. The Eagle II saw, which is the subject of this citation, was located up a hill in a separate building from the mine office. Crawford indicated that he and some of the miners had been in that building working in the last few weeks, so Redwine included the saw in his inspection. The Eagle II saw is as big as a large room and can be moved forward and backward using a fixed control panel. The saw has a large blade that is used to cut up very large rocks into more manageable pieces so they can be moved to another saw. The controls for the saw include a 9 by 12 inch touch screen located on the operations panel. Prior to the inspection, the touch screen had been removed for repair, exposing various wires inside. The Secretary's Exhibit 1 is a photograph of the 9 by 12 inch area with electrical wiring exposed as observed by Redwine at the inspection. Redwine used a tic tracer to determine if the exposed wires were energized and found that they were. Crawford informed Redwine that the voltage of the saw was 480 volts, but the tic tracer used by Redwine does not provide a voltage reading. Redwine observed a disconnect box 20 or 30 steps from the control panel and saw that the handle was in the on position. He asked Crawford to put the handle in the off position. He then re-tested the panel with the tic tracer and determined that the wires were no longer energized. The Secretary's Exhibit 3 shows the disconnect box, as observed by Redwine, with the handle in the on position with no lock and tag or warning sign.

Crawford explained to the inspector that he had removed the touch screen control panel several weeks prior to the inspection, and that he had deenergized the control panel and put a lock on the electrical disconnect box while removing the screen. A shipping invoice from the mine indicated that the screen had been removed on March 4, 2016, over a month prior to the inspection. *See* Resp. Ex. I. However, once the control panel screen was removed, Crawford removed his lock, but left the disconnect box in the off position so that the exposed wires on the saw panel were not energized. Crawford explained that he removed his lock because he had only one and needed it for other pieces of equipment. There was no warning on the disconnect box or on the saw control panel to indicate the presence of exposed wires or ongoing work.

In addition to Crawford, the inspector spoke to other miners who worked at that location, including Tyler Colson, the assistant plant manager. Colson explained to the inspector that he and several others miners had been sent to the Eagle II saw to clean the area. It was unclear from the testimony exactly when the miners were assigned to work in the Eagle II building, but it was sometime after the touch screen had been removed, and the lock on the power switch removed. While cleaning around the saw, Colson had thrown the handle of the disconnect box into the on position because he planned to move the saw using the toggles below the exposed wires of the touch screen. He was unable to move the saw but left the power in the on position and the exposed wires energized. The Secretary's Exhibit 6 shows that the toggles were located directly below the missing touch screen. Thus Colson was directly in front of the touch screen area within a few inches of the energized wires when he tried to operate the toggles. Colson did not explain why he left the equipment energized, but clearly there was no lock on the machine and no tag to prevent him from energizing the equipment. The building was not locked and was accessible to anyone at the mine. No one was working in the saw building at the time of the inspection, but there were six miners on the property that day. Redwine testified that a person would be electrocuted and receive burns if he touched the energized wires.

The mine presented testimony from Michael Arnold, the owner of the operation. Arnold testified that he has worked in the business for 18 years. At one time the Arnold Stone mines employed nearly 100 miners, but today there are only eight employees. Crawford and Colson are no longer employed by the company. Arnold testified that in fact Colson left his job with Arnold Stone the week of April 3, 2016, prior to the inspection. Respondent's Exhibit D shows Colson's pay dates but is unclear as to when his employment ended.

Arnold was not present at the mine at the time of the inspection but testified that the building housing the saw was not being used at the time of the inspection. The company was in the process of shutting down the mine, and Arnold had the touch screen panel removed from the Eagle II saw for repair in order to prepare it for sale. Arnold asserts that he instructed an electrician to shut down the transformer to the Eagle II saw on April 5, 2016, thereby reducing the voltage on the saw from 480 to 110. The mine produced an invoice for the work but the invoice does not clearly indicate that the transformer was shut down or where the work was performed. *See* Resp. Ex. J. Arnold testified that while the saw operated on 480 volts, because the transformer was shut down on the day of inspection, it was operating on only 110 volts that day. He explained that it was his belief that Colson could not move the saw by using the toggles because only 110 volts remained. He did not discuss whether 110 volt wires would cause injury to a person who touched them. Arnold did state, however, that the wires in the box that were exposed after the screen was removed were insulated and therefore would not cause electric shock. Arnold explained that Crawford had access to more than one lock, as Arnold had purchased several locks in February after a separate MSHA inspection found issues at the mine with locking out equipment. Crawford, on the other hand, told the inspector that he purchased locks in April, shortly after the inspection for purposes of abatement.

A. The Violation.

Based on his observations at the mine, Redwine issued Citation No. 8861391 for an

exposed electrical component on equipment that was not locked out. The Secretary alleges a violation of 30 C.F.R. § 56.12016, which provides:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

The Commission has stated that "electrically powered equipment" includes any equipment whose power source is electricity. *Cleveland Cliffs Iron Co.*, 4 FMSHRC 2141, 2143 (Dec. 1981) (interpreting a former standard identical to § 56.12016). The purpose of the standard is to protect against electrocution. *Northshore Mining Co. v. Sec'y of Labor*, 709 F.3d 706, 710 (8th Cir. 2013); *Phelps Dodge Corp. v. Fed. Mine Safety & Health Review Comm'n,* 681 F.2d 1189, 1192 (9th Cir. 1982). Thus, to establish a violation of § 56.12016, the Secretary must demonstrate that a hazard of electrical shock was present. *See Northshore*, 709 F.3d at 710; *see also Ray, emp'd by Leo Journagan Constr. Co.*, 20 FMSHRC 1014, 1023-26 (Sept. 1998); *Magruder Limestone Co.*, 35 FMSHRC 1385, 1401-02 (May 2013) (ALJ).

Here, Inspector Redwine observed that the touch screen had been removed from the electrically powered saw, leaving energized wires exposed. He learned that the screen had been removed several weeks prior to the inspection and at some point during those weeks the power was restored to the saw. The supervisor at the mine, Chris Crawford, explained that he had deenergized the saw and locked it out while he removed the screen. However, he had removed his lock when he completed the work. Crawford told the inspector that he had left the power to the saw in the off position. Later, the assistant plant manager, Colson, entered the saw building with other workers to clean the saw area and turned the power to the saw back on in order to move it. The power was on and the saw energized when Redwine observed it. There were no warning notices posted at the power switch or in any other location in the area of the saw, and there was no lock or tag on the power center. Redwine believed that the exposed wires presented a risk of electric shock.

Arnold Stone argues that no violation of the standard occurred because when Redwine observed the saw, there was no "mechanical work" being done. Resp. Br. at 2. The term "mechanical work" is not defined in the regulations, but the Commission has found that the relocation and installation of light fixtures, including taking the fixtures down, handling them, and rehanging them, constitutes "mechanical work" within the meaning of this standard. *Cleveland Cliffs*, 4 FMSHRC at 2143. Consistent with the Commission language, I find that the removal and repair of the touch screen on the saw constituted mechanical work, and that work was not complete until either the screen was replaced or a suitable cover was put over the energized wires. To comply with the standard, the power switches needed to be locked out for that entire time. I am not persuaded by the company's argument that "other measures" were taken to eliminate the hazard, in that the saw building was isolated from the rest of the mine, and only Crawford and Colson had access to the saw. I credit the inspector's findings that several

employees had entered the building to clean the area, and anyone could access the saw and turn the power on.

The company also argues that the Secretary has failed to prove that the voltage present in the exposed wires exceeded the minimum amount allowed by MSHA's regulations. Resp. Br. at 3. A related standard to the one at issue provides that "The potential on bare signal wires accessible to contact by persons shall not exceed 48 volts." 30 C.F.R. § 56.12012. The company infers from this that exposed components with a voltage amount below 48 volts are permissible, and that the Secretary must therefore prove that a greater voltage was present in order to prove a violation of a standard relating to an electrical hazard. *See* Resp. Br. at 3. However, Redwine determined based on his conversations with the employees at the mine that the voltage in the wires when they were energized was at a minimum 110 volts, but 480 before the power to the saw was partially disconnected, nearly a month after the screen was removed. I credit the inspector's findings and thus find that the company's argument is not applicable.

Finally, Arnold Stone argues that a violation has not been proven because none of the exposed parts posed a risk of electric shock. Resp. Br. at 3. However, Redwine testified that the exposed wires, even those that were insulated, posed a risk of shock and electrical burns. I credit the inspector's testimony and find that the Secretary has proven a violation.

B. Significant and Substantial

A "significant and substantial" ("S&S") violation is described in Section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(l). 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).

In *Mathies Coal Co.*, the Commission established the standard for determining whether a violation is 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 second element of the *Mathies* test addresses the likelihood of the occurrence of the hazard the cited standard is designed to prevent. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2036 n.8 (Aug. 2016). The Commission has explained that "hazard" refers to the prospective

danger the cited safety standard is intended to prevent. *Id.* at 2038. In *Newtown*, for instance, for a violation of a standard requiring that equipment be locked out and tagged out while electrical work is being performed, the Commission considered the hazard of a miner working on energized equipment. *Id.* The likelihood of the hazard occurring must be evaluated with respect to "the particular facts surrounding the violation." *Id.*; *see also McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991-92 (Aug. 2014); *Mathies*, 6 FMSHRC at 4. At the third step, the judge must assess whether the hazard, if it occurred, would be reasonably likely to result in injury. *Newtown*, 38 FMSHRC at 2037. The existence of the hazard is assumed at this step. *Id.*; *Knox Creek Coal Corp. v. Sec'y of Labor,* 811 F.3d 148, 161-62 (4th Cir. 2016). As with the likelihood of occurrence of the hazard, the likelihood of injury should be evaluated with respect to specific conditions in the mine. *Newtown,* 38 FMSHRC at 2038. Finally, the Commission has held that the S&S determination should be made assuming "continued normal mining operations." *McCoy*, 36 FMSHRC at 1990-91. The Commission has recognized that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

Redwine indicated that this violation was significant and substantial because the electrical disconnect box was not locked and tagged out and the switch had been moved to the on position, thereby energizing the exposed electrical wires. The energized wires were exposed in an opening of 9 by 12 inches in an easily accessible area. When Colson attempted to move the saw, he was within inches of the exposed energized wires. In Redwine's view, it was highly likely that someone could contact those energized wires and suffer a severe burn or electrocution.

Arnold Stone argues that the violation was not S&S because no miners were present at the time of the inspection. Further, even if a miner came into contact with the exposed electrical wires that were energized, he would not be injured because the wires were insulated and contained only 110 volts.

The information Redwine received from Crawford at the inspection was that the exposed electrical wires contained 480 volts. Arnold Stone disputes the voltage amount for part of the time the wires were exposed, arguing that the exposure was only to 110 volts, and that a voltage of 110 would not cause injury to a person who came into contact with the energized wires. There is no dispute that the usual power source to the saw was 480 volts. But Arnold asserts that at some point after Crawford removed the screen, the transformer to the building was deenergized, removing the 480 volt power source and leaving only a 110 volt power source to the saw control panel. The mine supports its position with a receipt from an electrician, Exhibit J, showing only that one hour of work was performed at the mine sometime prior to April 5, 2016, and that a GFI was replaced. Arnold also suggested that when Colson tried to move the saw while cleaning the saw area, he was unable to because the voltage to the saw was only 110 volts. I do not find Exhibit J to be reliable, but even if I take Arnold at his word, the electrical work was done a month after Crawford removed the screen. It is clear that the control panel had 480 volts flowing into it after the screen was removed on March 4, 2016, for several weeks. Neither Crawford nor Colson was called to testify by Respondent, and the only witness, Arnold, was not present at the mine at the time of the inspection, so I rely on the information provided to

the inspector and find that the machine had 480 volts at the time Crawford removed the screen and at the time miners were working and cleaning up in the area.

Applying the *Mathies* criteria, the Secretary has proven a violation of § 56.12016, satisfying the first element. I find that the Secretary has also demonstrated a discrete safety hazard contributed to by the violation. The standard is designed to prevent miners from coming into contact with energized wires or otherwise being electrocuted while working on energized equipment. Here, I find that the work was ongoing. Although Crawford had removed his lock and left the area, the repair work continued while the wires remained exposed until the touch screen was replaced, and the equipment was returned to its normal operating condition. Failure to deenergize and lock out the machine exposed miners to the energized wires and components in the uncovered 9 by 12 inch area. The manual controls were located just below the touch screen area. Regarding the likelihood of injury, Redwine spoke to several miners and learned that several people had been working in the saw building while the electrical parts were not locked and tagged out. One miner had actually turned on the power, energizing the exposed wires and components. The exposed area was easily accessible to anyone working in the area. At a height of 58 inches, the miners who were assigned to clean the saw building could easily have tripped or fallen or otherwise come into contact with the wires. Redwine explained the severity of potential injury, for at least part of the time, was great because the exposed wires and components were energized by 480 volts. Touching or grabbing live wires at 480 volts would be reasonably likely to seriously injure or kill a miner.

Finally, I credit Redwine's finding that the violation was S&S. Redwine is certainly experienced and reviewed a number of fatalgrams regarding the danger of working around 480 volts and energized wires. While the mine asserts that the area around the saw was not busy, and that it was unlikely that anyone would come into contact with a bare, exposed wire, I credit the testimony of Inspector Redwine. There were people working in and around the saw while it remained unlocked and while it was energized. The miners were exposed to energized wires and components in a location that was easily accessible. Hence, I find the violation to be significant and substantial.

C. Negligence and Unwarrantable Failure

The Commission has 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, the judge must 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." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2047 (Aug. 2016); *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

The standard of care is higher for mine management. *Newtown*, 38 FMSHRC at 2047. The Mine Act places primary responsibility for maintaining safe and healthful working conditions in mines on operators, and they are thus expected to set an example for miners working under their direction. *Id.*; *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987); *see*

also 30 U.S.C. § 801(e). "Such responsibility not only affirms management's commitment to safety but also, because of the authority of the manager, discourages other personnel from exercising less than reasonable care." *Wilmot*, 9 FMSHRC at 688.

The negligence of an operator's agent is imputable to the operator for penalty assessment and unwarrantable failure purposes. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328 (Mar. 2009); *Whayne Supply Co.*, 19 FMSHRC 447, 450 (Mar. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991). The Mine Act defines an "agent" as "any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine." 30 U.S.C. § 802(e). In analyzing whether an employee is an agent of an operator, the Commission has considered factors including "the ability of the employee to direct the workforce, whether the employee holds himself out as a person with supervisory responsibilities and is so regarded by other miners, and whether the actions of the employee in directing the workforce have an impact on health and safety at the mine." *Nelson Quarries*, 31 FMSHRC at 328. In the instant case, there is no dispute that Crawford was the person in charge at the mine, and an agent of Arnold Stone.

The inspector designated the citation at issue as resulting from high negligence. The Secretary also argues that the violation was the result of the operator's unwarrantable failure to comply with a mandatory standard.

The unwarrantable failure terminology is taken from Section 104(d) of the Act, 30 U.S.C. § 814(d). The Commission has explained that unwarrantable failure is "aggravated conduct constituting more than ordinary negligence. [It] is characterized by conduct described as 'reckless disregard,' 'intentional misconduct,' 'indifference,' or a 'serious lack of reasonable care.'" *Consol. Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2007) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987)) (citations omitted). In determining whether a violation is an unwarrantable failure, the Commission has instructed its judges to consider all of the relevant facts and circumstances in the case and determine whether there are any aggravating or mitigating factors. *Id.* Aggravating factors to be considered include

> the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation.

IO Coal Co., 31 FMSHRC 1346, 1352 (Dec. 2009); *see also Consol.*, 22 FMSHRC at 353. Additionally, Section 104(d) of the Act requires that a 104(d)(1) withdrawal order like the one in this case be preceded by a separate 104(d)(1) citation within 90 days. The so-called "predicate citation" in this case is No. 8867117, which became a final order of the Commission on June 15, 2016.

In this case, Crawford, a supervisor, left electrical wires and components exposed without locking and tagging out the equipment. Colson, who was also a supervisor, later energized the

equipment and left it energized with the wires exposed for some time. The violation existed for a long period of time and nothing was done until the inspector advised the mine to deenergize and lock and tag out the equipment. Based upon the factors enumerated by the Commission, I find that the Secretary has proven an unwarrantable failure in this case.

Length of time that the violation has existed. In *IO Coal Co.*, the Commission emphasized that the duration of time that the violative condition existed is a "necessary element" of the unwarrantable failure analysis. 31 FMSHRC at 1352. However, the brief duration of a violative condition is not a mitigating factor. *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2371 (Sept. 2016). Even where the record does not permit the judge to make a conclusive finding as to the duration of the condition, "imperfect evidence of duration in the record should be taken into account." *Coal River Mining, LLC*, 32 FMSHRC 82, 93 (Feb. 2010). The condition in *IO Coal* had existed for four or five days, and the Commission remanded to the judge to consider whether such a duration was an aggravating factor. 31 FMSHRC at 1352. The Commission noted that analysis of the duration factor may be affected by the operator's good-faith, reasonable belief that the condition did not exist. *Id.* at 1352-53.

Here, Crawford removed the control screen to have it repaired near the beginning of March. Although he deenergized the equipment, he did not lock and tag it out after the screen was removed. At some point before the inspector arrived more than a month later, the saw had been energized. The equipment was not locked or tagged out for more than a month, and it was energized for a part of that time. I find that the violation existed for a long period of time and that this was an aggravating factor.

Extent of the violative condition. The extent factor is intended to "account for the magnitude or scope of the violation" in the unwarrantable failure analysis. *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079 (Dec. 2014). Facts relevant to the extent of the condition include the size of the affected area and the number of persons affected. *Id.* at 3079-80. In *Dawes*, the Commission found that where only one miner endangered himself by walking under a suspended load, the violation was not extensive. *Id.* at 3080. Here, the inspector testified that all persons working at the mine were exposed to the violation. The saw house was open and available to everyone, and the two managers, along with several other miners, were told to work in the saw house during the time the screen from the control panel was missing. I consider that the violation was somewhat extensive.

Whether the operator has been placed on notice that greater efforts were necessary for compliance. A mine operator may be put on notice that it has a recurring safety problem in need of correction where there is a history of similar violations. *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 561 (D.C. Cir. 2012); *IO Coal*, 31 FMSHRC at 1353; *Peabody Coal Co.*, 14 FMSHRC 1258, 1264 (Aug. 1992). Prior violations may be relevant even though they did not involve the same regulation or occur in the same area of the mine within a continuing time frame. *IO Coal*, 31 FMSHRC at 1354; *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007); *Peabody*, 14 FMSHRC at 1263. It is not required that the past violations were the result of unwarrantable failure. *IO Coal*, 31 FMSHRC at 1354; *Consolidation Coal Co.*, 23 FMSHRC 588, 595 (June 2001). Past discussions with MSHA can also serve to place the operator on notice that greater efforts were necessary to assure compliance with the safety standard.

Consolidation Coal Company, 35 FMSHRC 2326, 2342 (Aug. 2013) (citing cases). Evidence that a particular standard is frequently cited in the industry as a whole is not relevant to the operator's notice. *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007).

Exhibit 8 is a copy of a citation that was issued to Crawford at this mine in February, just a month before he removed the touch screen. The citation indicates that a saw had not been blocked against motion prior to work on the blades. This citation put the mine on notice that greater efforts were necessary in complying with regulations regarding equipment repairs, including the lock out and tag out requirements.

Operator's efforts in abating the violative condition. An operator's efforts in abating the violative condition are also relevant as to whether a violation is unwarrantable. *Consol.*, 35 FMSHRC at 2342; *IO Coal*, 31 FMSHRC at 1356; *San Juan,* 29 FMSHRC at 134. Abatement efforts prior to or at the time of the inspection may support a finding that the violation was not unwarrantable. *Utah Power & Light Co.*, 11 FMSHRC 1926, 1933-34 (Oct. 1989). Conversely, where the operator has notice of a condition, such as through previous violations or conversations with an inspector, a failure to remedy the problem weighs in favor of an unwarrantable failure finding. *Consol.*, 35 FMSHRC at 2343; *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). A lack of abatement efforts may be excusable if the operator had a reasonable, good faith belief that the condition did not exist. *See IO Coal*, 31 FMSHRC at 1356. Abatement efforts relevant to the unwarrantable failure analysis are those made prior to the issuance of the citation or order. *Consol.*, 35 FMSHRC at 2342; *IO Coal*, 31 FMSHRC at 1356.

Here, Arnold Stone made no effort to abate the violation prior to the inspection. While Crawford initially locked out the saw while he removed the touch screen, he then removed the lock and left the machine unlocked for several weeks. Arnold had purchased locks for the mine after a previous MSHA inspection, but the staff on site did not realize that other locks may have been available to them. Crawford, instead, left the mine to purchase another lock in order to abate the April violation.

Whether the violation posed a high degree of danger. A high degree of danger posed by a violation can be an aggravating factor that supports an unwarrantable failure finding. *IO Coal*, 31 FMSHRC at 1355-56. In some cases, the degree of danger may be "so severe that, by itself, it warrants a finding of unwarrantable failure. However, the converse of this proposition—that the absence of significant danger precludes a finding of unwarrantable failure—is not true." *Manalapan Mining Co.*, 35 FMSHRC 289, 294 (Feb. 2013). The degree of danger is greater when there is a chronic problem that is ignored. *Consol.*, 35 FMSHRC at 2343.

The condition observed by Redwine posed a high degree of danger to anyone working or passing through the area. There were six workers at the mine on the day of the inspection, and the saw building was open for anyone to enter. Some miners had been assigned to clean up the building, and while they were there, someone had energized the touch screen panel with the exposed electrical components. Redwine had equipment to demonstrate that the wires were energized, but miners in the building did not have the same equipment, and might have assumed that the power was off. Further, someone could have tripped and touched the wires by accident. A miner who touched the energized wires could be shocked or receive a severe burn.

Whether the violation was obvious. The obviousness of the violative condition is an important factor in the unwarrantable failure analysis. *IO Coal*, 31 FMSHRC at 1356. However, when a condition is non-obvious because of actions of the operator, the Commission generally does not recognize lack of obviousness as a mitigating factor. *Consol.*, 35 FMSHRC at 2343 (upholding judge's unwarrantable failure finding where the operator deliberately ignored testing requirements in the mine's ventilation plan).

Here, both Crawford, who removed his lock and left the panel without a cover, and Colson, who energized the equipment, could see the obvious exposed wires and the potential for someone to energize the wires and to come into contact with energized wires.

Operator's knowledge of the existence of the violation. In *IO Coal,* the Commission reiterated the well-settled law that an operator's knowledge of the existence of a violation may be established not only by demonstrating actual knowledge, but also by showing that the operator "reasonably should have known of the violative condition." *IO Coal Co.,* 31 FMSHRC 1346, 1356-1357 (Dec. 2009); *see also Drummond Co.*, 13 FMSHRC 1362, 1367-68 (Sept. 1991); *E. Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991); *Emery Mining Corp.*, 9 FMSHRC 1997, 2002-04 (Dec. 1987).

In this case, Crawford, a supervisor, knew of the condition because he was the person who removed the screen and left the power supply unlocked. This knowledge is imputed to the operator and shows that the condition should have been abated much sooner. *See San Juan Coal Co.*, 29 FMSHRC 125, 134 (Mar. 2007) (finding that knowledge of a condition is "critical to the evaluation of the operator's subsequent efforts, or lack thereof, in abating the violative condition").

In conclusion, I find that supervisory personnel at Arnold Stone knew of the violation at issue but failed to abate it. The violation posed a high degree of danger to numerous people at the mine, and based on the violation history at the mine, management should have been aware of the need to correct it. Based on this analysis, I find that the violation was an unwarrantable failure.

II. PENALTY

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). The Secretary calculates penalties using the penalty regulations set forth in 30 C.F.R. § 100.3 or following the guidelines for special assessments in 30 C.F.R. § 100.5. When an operator notifies the Secretary that it intends to challenge a penalty, the Secretary then petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. Commission Judges are not bound by the Secretary's penalty regulations or his special assessments. *Am. Coal Co.*, 38 FMSHRC 1987, 1990 (Aug. 2016). Rather, the Act requires that in assessing civil monetary penalties, the judge must consider six statutory penalty criteria: the

operator's history of violations, its size, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission requires that its judges explain any substantial divergence from the penalty proposed by the Secretary. *Am. Coal*, 38 FMSHRC at 1990. However, the judge's assessment must be de novo based upon her review of the record, and the Secretary's proposal should not be used as a starting point or baseline. *Id.*

The history of assessed violations has been admitted into evidence and shows 15 violations that became final orders in the 15-month period prior to Redwine's inspection. Sec'y Ex. 10. The mine also received a citation in February 2016 for a violation of a standard similar to the one at issue here, although that citation is currently under contest. The negligence and the gravity of the violation have been discussed above. Arnold Stone did not raise the issue of ability to pay prior to the hearing and therefore did not provide the Secretary with information to determine its financial situation. However, Arnold Stone argues that the financial impact of the proposed penalty is significant and supplied a financial statement illustrating their financial position. Resp. Ex. M. The company has recently emerged from bankruptcy, reduced its work force, and is in the process of closing some operations. I take from the limited evidence provided that the mine is a small operation and the proposed penalty of $21,335.00 may be difficult to pay. Therefore, I deviate slightly from the Secretary's proposed amount and assess a penalty of $18,000 for the violation.

III. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $18,000.00 within 30 days of the date of this decision for the violation at issue here.

Margaret A. Miller
Administrative Law Judge

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