FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
721 19th Street, Suite 443
Denver, CO 80202-2536
303-844-3577 FAX 303-844-5268

May 23, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2016-270-M A.C. No. 26-01597-401772 1ZZ
v.	Docket No. WEST 2016-445-M A.C. No. 26-01597-406304 1ZZ
MAGORIAN MINE SERVICES, Respondent	Pinson Mine

DECISION

Appearances: Rose Darling, Esq. and Mark A. Pilotin, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for the Secretary; Robert D. Peterson, Esq., Robert D. Peterson Law Corporation, Rocklin, California, for Magorian Mine Services.

Before: Judge Manning

These cases are before me upon two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Magorian Mine Services ("MMS") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The parties presented testimony and documentary evidence at a hearing held in Sacramento, California, and filed post-hearing briefs. One section 104(d)(1) citation, one section 104(d)(1) order, and two section 104(d)(2) orders were adjudicated at the hearing. MMS was an independent contractor performing development work at the Pinson Mine, an underground gold mine in Humboldt County, Nevada. At all pertinent times, the mine's operator was Atna Resources, Inc. For reasons set forth below, I **AFFIRM** Citation No. 8876362 and Order No. 8876391, **VACATE** Order No. 8876363, and **MODIFY** Order No. 8876392.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Citation No. 8876362, WEST 2016-270-M; and Order No. 8876363, WEST 2016-445-M.

Citation No. 8876362, issued under section 104(d)(1) of the Mine Act on November 2, 2015, alleges a violation of section 57.3360 of the Secretary's safety standards and asserts that there was insufficient ground support in the 4644 intersection. GX-1. In relevant part, the safety standard provides that ground support "shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary." 30 C.F.R. § 57.3360. The standard further provides that "[w]hen ground support is necessary, the support system, shall be designed, installed, and maintained to control the ground in places where

persons work or travel in performing their assigned tasks." *Id.* The citation alleges that ground support had not been installed and "the drift was accessed constantly by foot and open cab equipment."

Order No. 8876363, issued under section 104(d)(1) of the Mine Act on November 2, 2015, alleges a violation of section 57.3200 of the Secretary's safety standards and asserts that loose ground was found in the 4644 intersection. GX-4. The citation states that loose ground was "located in the back and was scaled down and measured 2 feet by 2 feet by 2 inches . . . and fell directly into the travelway[.][1]" The "condition was a direct result of not installing ground support." In relevant part, the safety standard provides that "[g]round conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area." 30 C.F.R. § 57.3200.

Inspector Patrick L. Barney[2] issued the citation and order. He determined that, in both the citation and order, an injury was highly likely to be sustained and, if an injury occurred, it could reasonably be expected to be fatal. Moreover, he concluded that the conditions were significant and substantial ("S&S"), and that ten people were affected by the conditions set forth in the citation and one person was affected by the conditions set forth in the order. The inspector determined that MMS's negligence was high in both the citation and order. In the body of the citation and the order, the inspector stated that MMS's owner engaged in aggravated conduct because "he knew of the condition and allowed miners to work and travel in the area." The Secretary proposed a penalty of $6,996.00 for the violation alleged in the citation using his regular assessment formula, 30 C.F.R. § 100.3, and proposed a penalty of $9,100.00 for the violation alleged in the order under his special assessment regulation, 30 C.F.R. § 100.5.

Summary of the Evidence

Small Mine Development ("SMD") operated the Pinson Mine on behalf of Atna Resources. Tr. 25. SMD contracted with MMS to perform specified work, including the development of tunnels and drifts.

On or about October 27, 2015 Inspector Barney traveled to the mine after MSHA received a hazard complaint concerning ground conditions. Tr. 20. Subsequently, MSHA received a second complaint with additional information, which prompted Barney to revisit the mine. After meeting with officials from Atna Resources and SMD, Barney started his underground inspection. He traveled to the 4644 access and entered the subject T-shaped intersection. Tr. 26. In that area, he observed that the ground consisted of "sand, gravel, shale, [and] clay[.]" *Id.* He did not see any rock bolts or other ground support in the intersection. Barney testified that it was his understanding that MMS constructed the intersection. Tr. 27. The inspector was concerned, in part, because there had been a ground fall in mid-October about

[1] The "loose ground" at issue in these cases all relate to conditions in the roof, often referred to as the "back," of the cited intersection

[2] Inspector Barney has been an inspector with MSHA since February 2011 and inspected many underground gold mines during that time. Tr. 15. He started working as miner in 1988 and held many jobs up to and including supervisory positions in underground Nevada gold mines. Tr. 16.

100 or more feet away. Tr. 28. Moreover, "several" ground falls had occurred at the mine during the summer of 2015. Tr. 29. He considered the ground at the mine to be "very unstable." Tr. 28.

Atna Resources adopted a ground support plan in late October 2015 in response to a fall of ground. Tr. 31; GX-2 pp. 3-5. This plan included the mine's minimum standard for ground support and noted that "[p]oor ground conditions require more than the minimum" standards. GX-2 p. 3. The plan specifies that rock bolts should be on four or six foot centers depending on the circumstances. Tr. 32-33. It also contains requirements for wire mesh-type matting to "prevent small rock from falling from the back of the heading" Tr. 33-34; GX-2 pp. 4-5.

Barney issued Citation No. 8876362 because there was no ground support in the intersection. Tr. 35. He could see wire and a two-inch layer of shotcrete. Tr. 35. There were some bolts on either side of the intersection along one rib, but not on the other rib and not in the center of the intersection. Tr. 36; GX-1 p. 14. The plan discussed above required more roof support than was present and additional layers of shotcrete. GX-2 p. 5. Kent Hanson, a superintendent with SMD, was able to easily scale down pieces of rock from the back in the intersection. Tr. 38, GX-1 pp. 4-5. The inspector testified that Hanson "touched the rock [with a scaling bar] and it came down." Tr. 39. Footprints in the area indicated that people walked through the intersection. Tr. 40. SMD abated the cited condition by attaching hog wire to the back using rock bolts with bearing plates. Tr. 42; GX-1 pp. 11-12.

Barney testified that, in his opinion, attaching a coat of shotcrete along with some rebar was not adequate ground support for the cited area. Tr. 43. He previously worked at other underground gold mines within the same area in Nevada and, based on his experience, he has observed falls of ground "beyond anchorage" due to the nature of the rock. *Id.* Ground support in the area did not meet the minimum specifications of the mine's ground support plan. He estimated that at least 10 people were exposed to this hazard and that the condition "existed for 95 days, which was 190 shifts." Tr. 44.

Barney designated the violation as S&S because loose rock was easy to bar down, there was a lot of foot traffic and open cab traffic in the area, and the condition had existed for over 190 shifts. Tr. 45. The discrete hazard was an "unplanned fall of ground." Tr. 46. An injury was highly likely because the "drift had been advanced 228 feet beyond that intersection . . . and the intersection wasn't supported." Tr. 47. The loose ground that Hanson took down was two feet by two feet by two inches thick. Rock falling from that height could "easily be fatal." *Id.*

Barney determined that the violation was the result of MMS's high negligence because Don Magorian, the owner of MMS, admitted that he knew of the condition. Magorian "knew that the intersection was non-supported, that they had mined 228 feet beyond that intersection and that he never bothered to tell anybody that it was not supported." Tr. 48. The inspector stated that he recorded Magorian's statement contemporaneously in his notes. GX-1 p. 19. Barney also testified that Magorian went on to say that he did not tell Atna Resources or SMD about the condition because the shotcrete, mesh and rebar were better engineered than any bolt. Tr. 49.

Barney further determined that the violation was the result of MMS's unwarrantable failure to comply with the safety standard because management knew that the conditions violated that safety standard and people were not kept out of the intersection. Tr. 50. The inspector relied, in large part, on Magorian's statements during the telephone conference when making this determination. *Id.* The inspector testified that Magorian "knew that the intersection was not supported and allowed his miners, SMD miners and Atna Resources people to travel beyond that intersection while he mined another 228 feet beyond that intersection prior to leaving the mine site." *Id.*

Inspector Barney issued Order No. 8876363 one minute after issuing the citation discussed above and based it on the presence of loose rock that was present at the time of his inspection. He determined that the conditions he observed violated the safety standard because the loose ground created a hazard to persons. Tr. 53. Miners walked under the loose ground when they mined 228 feet beyond the intersection. *Id.*

An injury was highly likely because when the rock was scaled down by Hanson "it actually came down at first contact with the scaling bar, didn't require any prying, and there were multiple pieces of loose that fell in by that location[.]" *Id.* Getting hit by a 50 pound rock could result in a fatal injury. The inspector determined that MMS's negligence was high because of the statements made by Magorian, as discussed with respect to Citation No. 8876362 above. Tr. 54-55. The inspector also determined that the violation was the result of MMS's unwarrantable failure to comply with the safety standard because Magorian knew that the cited conditions had existed for a length of time and "he allowed and/or instructed his people to travel underneath that area and travel under those conditions." Tr. 55.

Barney admitted that Magorian ceased working in this area of the mine on October 2, 2015 and that the mine's ground support plan was not adopted until October 19. Tr. 61, 66. He also acknowledged that SMD scaled down the back once every shift. Tr. 69.

The Secretary also called James G. Vadnal as an expert witness with respect to this citation and order.[3] He testified that he is familiar with the geology of the mine even though he has never visited the mine. Tr. 76, 86. He has investigated the geology of the Leeville and Midas Mines, both of which are underground gold mines close to the Pinson Mine. Tr. 74. He also "read quite a bit" about the geology of the Pinson Mine. Tr. 76. He said that the rock at the mine is composed of gravel, shale, boulders, and sand. Tr. 79. There were faults in the general area. Tr. 79-80.

Vadnal testified that the conditions described in Citation No. 8876362 created a violation of section 57.3360. Tr. 81. At an intersection, there is a larger area of the back exposed with the result that "all intersections need some sort of permanent support." *Id.* The intersection in

[3] Mr. Vadnal has worked for the roof control division of MSHA's technical support group since January 2007. Tr. 71, GX-7. He has investigated many accidents resulting from falls of ground. He was an inspector with MSHA's metal/non-metal division starting in November 2004. Prior to working for MSHA, he worked as a mining engineer in the mining industry. He has a Bachelor of Science degree in geology and a Master of Science with an emphasis in mining. Tr. 73; GX-7. He was accepted as an expert witness at the hearing. Tr. 77.

question should have been supported by roof bolts, shotcrete and welded wire mesh. *Id.* After reviewing the photos taken by Inspector Barney, Vadnal concluded that the ground support installed by MMS was "not adequate in that large chunks of loose fell with very little effort." Tr. 81-82. The photos show that the roof was loose in several areas. Tr. 83. Although rebar had been used to attach mesh to the back, "rebar does not constitute ground control." Tr. 84. Photos introduced into evidence show that someone had scaled down back and installed roof bolts to abate the citation. Tr. 85; GX-1 pp. 11-12. Based on his knowledge of the rock structure at the Pinson Mine, Vadnal testified the back in the intersection should have been supported as soon as it was cut. Tr. 85-86. Vadnal believes that it is unlikely that the ground conditions in the intersection changed between early October 2015 and November 2, 2015. Tr. 87-88.

Don Magorian[4] testified that he is the owner of MMS. Tr. 89. MMS had an agreement with SMD "to come in and cut and support ground that had been difficult to – or had proved difficult to impossible to do with normal mining methods." Tr. 90. MMS believed that MSHA approved the use of its alternative mining method. Tr. 91. MMS was asked to drive "some tunnels around" cave-ins that had occurred in the area. Tr. 92. The idea was to use shotcrete and wire support after "cutting the ground and maintaining a nearly perfect shape so that we could keep the shotcrete in compression and provide an extremely strong liner." *Id.* He stated that concrete has "ten times the strength under compression than it does under tension." Tr. 93. Shotcrete in compression is structural and contains poly fibers. He testified that his employees are very experienced in doing this type of work and that MMS has been doing it for 18 years in other tunneling construction.

Magorian testified that MMS and SMD worked "hand-in-hand" and it was SMD's responsibility to install roof bolts where needed. Tr. 95, 97. MMS's responsibility was to "cut the tunnel, spray shotcrete and put wire in[.]" Tr. 95. MMS was unable to cut the tunnel in the intersection at issue because there was a block of solid limestone that MMS could not remove with its cutters. Tr. 94. As a result, SMD blasted the area and then MMS trimmed it to shape. Tr. 97, 109-111. Prior to MMS cutting the 4644 intersection, SMD bolted the ground up to the intersection. After trimming the intersection, MMS applied shotcrete that adhered to the ribs and back. Magorian did not observe any cracks in the shotcrete in that area. Tr. 109. Eventually MMS left the area to work in another area of the mine more suitable to its methods. Tr. 98.

MMS was told that its work at the mine was over after SMD drilled into water at the face of the tunnel at the "4644 Range Front Drive." Tr. 100. The nearby fault had not yet been reached but on or about September 28, 2015 all operations in that area were stopped. The area where SMD hit water was about 200 feet beyond the intersection. *Id.* MMS withdrew from the area on September 28 and then, on or about October 12, MMS was told to remove all of its equipment from the mine and that its services would no longer be required. Tr. 101. The area was barricaded due to hazardous conditions created by the presence of the water.

Magorian disagreed with the testimony of Vadnal that the conditions in the back would have remained the same between early October and November 2. Tr. 103. He believes that the ground was under high stress and in several areas it was "moving all over the place while we

[4] Mr. Magorian has a Bachelor of Science in mining engineering and has worked in underground mines for about 40 years. Tr. 91.

were digging it." *Id.* The tunnel liner was being pushed around in the area beyond the intersection, which Magorian called the "AP Zone."

Magorian testified that he would have no knowledge whether anyone entered the intersection after MMS left the mine in early October. Tr. 106. The last time he was personally in the intersection was on September 27 and "the crown was in very good shape." Tr. 112-13. In fact, he was told that the area was to be barricaded and only accessed by qualified people and that it would be bolted before anyone entered the area again. Tr. 106, 113-114. The mine owner wanted to see if the area stabilized over time so that it could continue mining. Tr. 107.

Magorian also testified that Inspector Barney, during a conversation, questioned the competence of MMS to be performing the tunneling work because the company builds wine cellars.[5] Tr. 108. Magorian said that MSHA inspected the work of MMS in August 2015 when it was mining through softer ground conditions. Although he was not present at the time, he understood that the MSHA inspector "liked the work we were doing" using the same techniques that were in place while working in the subject intersection. Tr. 108. Magorian said that he works hard to ensure the safety of MMS's employees and that it has not had a reportable injury in 28 years. Tr. 109.

MMS also called David W. Halverson[6] as a witness. He was the underground superintendent for Atna Resources at the Pinson Mine from February 2, 2015 until October 14, 2015, when he was laid off. Tr. 117. He advised MMS on October 2, 2015 that its services were no longer needed at the mine because there was "no place for [it] to work" once the area in which it was working became flooded with water. Tr. 118. "We had to shut everything down, and a lot of damage occurred, because of that water[.]" *Id.*

Halverson testified that two ground support plans had been submitted to MSHA. One was the standard "drill, and blast, [and] ground support plan." Tr. 121. A separate plan was submitted for MMS's work. Halverson was underground about four days a week and he observed MMS following its ground support plan; MMS was "very meticulous" in its work.

On rebuttal, Vadnal testified that shotcrete sprayed in compression can act as structural support. Tr. 123. Specifically, "[i]f the ground had some stability to it to begin with, the multiple layers of shotcrete and welded wire mesh would support the ground." *Id.* However, the two-inch layer of shotcrete sprayed at the 4644 intersection would not provide support. Vadnal characterized the shotcrete applied as a "flash coat to keep the air from affecting the rock." *Id.* He further testified that, as far as he is aware, all underground gold mines in Nevada use roof bolts to support the back.

---

[5] Magorian testified that building caves in California used for the storage of wine constitutes about 80% of MMS's business. Tr. 114. Since 2000, MMS has completed only three tunnel related projects at underground mines. *Id.*

[6] Halverson has a Bachelor of Science in geological engineering and he has worked in the mining industry since 1982. Tr. 120.

Citation No. 8876362

Fact of Violation

I find that the Secretary has proven a violation. The cited standard requires that ground support be used where ground conditions, or mining experience in similar conditions, indicate that support is necessary. Further, when support is necessary it must be designed, installed, and maintained to control the ground in places where persons work or travel. Here, I find that the conditions present in the intersection necessitated ground support and that the limited support provided by MMS did not control the ground.[7]

I credit the testimony of Barney and Vadnal that the back in this particular intersection, which consisted of sand, gravel, shale, clay and boulders, was not solid and that the ground in this area of Nevada is "notoriously unstable." Their conclusions are supported by the multiple falls of ground which had already occurred in the area, as well as Magorian's own testimony that the ground in the area was "moving all over the place while we were digging it." Tr. 103. Vadnal, who was offered and accepted as an expert, explained that, given the larger area of back exposed in intersections, all intersections in this type of ground require some sort of permanent support. He stated that permanent support should have been installed as soon as the intersection was cut. While MMS did put up a two inch coat of shotcrete and welded wire mesh held by rebar in the intersection,[8] I credit Vadnal's expert opinion that this support would not have controlled this ground and, instead, would only have kept the air from affecting the rock. Magorian's method of roof support may well work in many mine environments, but it was not sufficient in the intersection at issue. Moreover, and as explained immediately below, miners clearly traveled in the inadequately supported area. Accordingly, I find that a violation existed.[9]

While Respondent argues that the Secretary failed to present evidence of an employee actually being exposed to the condition, I disagree. MMS Br. 2. The Secretary introduced a map into evidence which depicts the layout of the area in question along with annotations that show

---

[7] The Secretary attempts to establish that MMS violated the standard because it failed to comply with the Pinson Ground Support plan, dated October 19, 2015. Sec'y Br. 6. However, and as noted by the Secretary, it is unclear if this or any other plan was in place at the time MMS was in the mine. Accordingly, I have not relied on the plan in reaching my findings.

[8] I decline to credit the testimony of Magorian that the ground was adequately supported by the two inch shotcrete coat, wire mesh and rebar in the 4644 intersection. The majority of MMS's business is derived from building caves for California wine businesses. Since 2000 MMS has only worked on three tunnel projects at an underground mine.

[9] While Magorian offered testimony that SMD was responsible for all bolting, clearly that was not the case, as evidenced by his statement that MMS did at times install bolts when needed. Tr. 105. At a minimum, MMS should have advised SMD that ground support was required in the intersection before the work proceeded further.

that MMS and SMD worked those areas.[10] GX-3B. Respondent did not dispute the annotations on the map. Barney indicated on the map where the subject intersection was located. The map clearly shows that MMS, as well as SMD, worked on areas inby the intersection and that personnel would have had to pass through that intersection in order to travel to those inby areas. Accordingly, MMS personnel were exposed.

Respondent also argues that the Secretary has the burden of proving that the violation occurred on the date noted in Section I, Block 1 of the citation form. I disagree. Section I, Block 1 indicates the date the citation was issued, not the date of the actual violation. The Commission has explained that an inspector need not actually observe a violation at the time of its occurrence in order to conclude that a violation did in fact occur. *See Emerald Mines Corp.*, 9 FMSHRC 1590 (Sept. 1987), *aff'd, Emerald Mines Co. v. FMSHRC*, 863 F.2d 51, 59 (D.C. Cir. 1988); *see also Nacco Mining Co.*, 9 FMSHRC 1541 (Sept. 1987). It is not necessary for the Secretary to prove that a violation existed on the date he issued the citation. Rather, he need only prove that a violation occurred. I find that the Secretary established that MMS violated the standard.

Gravity and S&S

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). In order to establish the S&S nature of a violation, the Secretary 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 will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An experienced MSHA inspector's opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

The Commission has explained that the focus of the *Mathies* analysis "centers on the interplay between the second and third steps." *ICG Illinois*, 38 FMSHRC 2473, 2475 (Oct. 2016) (citing *Newtown Energy Inc.*, 38 FMSHRC 2033 (Aug. 2016)). The second step requires the judge to adequately define the "particular hazard to which the violation allegedly contributes[,]" and then determine whether "there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Id.* at 2475-2476. This determination must be made "based on the particular facts surrounding the violation[.]" *Id.* The third step then requires the judge to assume the existence of a hazard and assess whether the hazard "was reasonably likely to result in serious injury." *Newtown* at 2038; *ICG Illinois* at 2476.

The "reasonably likely" provision does not require the Secretary to prove that an injury was "more probable than not." *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). In addition, the "Secretary need not prove a reasonable likelihood that the violation itself will cause

[10] Barney testified that he obtained map from the Atna personnel and asked them to outline and highlight the areas of the mine that MMS had worked in. Tr. 29.

injury" but, rather, that the hazard *contributed to* by the violation is reasonably likely to cause an injury. *Musser Engineering, Inc. and PBS Coals Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010)(emphasis added); *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011).

I find that the violation was S&S. MMS violated the standard. The hazard to which the violation allegedly contributes is a person being struck by ground that was either unsupported or inadequately supported. I find that this hazard was reasonably likely to occur given the inadequate ground support provided, the unstable ground, and the frequency with which miners passed through the area. I addressed the instability of the ground and inadequate support in my findings above. It is critical to note that persons were exposed to the condition for an extended period of time. MMS, SMD and Atna personnel continued to travel under the inadequately supported roof between the time the intersection was completed and early October, a period of several months. Given the instability of the rock in the area, I find it likely that a fall of ground would occur and that such a fall was reasonably likely to strike and injure a miner. A large rock falling and striking a miner could easily cause a fatal injury. The violation was S&S and serious.

Negligence and Unwarrantable Failure

If find that the violation was a result of Respondent's high negligence and unwarrantable failure to comply with the cited standard. 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 that standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator has met its duty of care, the Commission considers "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." *Jim Walter Res. Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014) (footnote omitted).

Respondent was highly negligent in failing to install adequate roof support. I credit Barney's testimony that Magorian knew the intersection only had a two inch flash coat of shotcrete and was not adequately supported. Tr. 48-49. Barney's testimony was based on his inspections notes that he recorded contemporaneously while speaking with Magorian. GX-1 pp. 18-19. Given the unstable ground in this area, a reasonably prudent person familiar with the mining industry would know that the intersection could not be properly supported by a two inch flash coat of shotcrete. Allowing that condition to continue to exist for an extended period of time, during which the likelihood of a hazard developing continued to increase, demonstrates high negligence.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by conduct described as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2002-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The

Commission has explained that whether a citation is an "unwarrantable failure" is a question that should be evaluated based on the facts and circumstances in each case, and in light of each of the following factors: (1) the length of time that the violation has existed; (2) the extent of the violative condition; (3) whether the operator has been placed on notice that greater efforts were necessary for compliance; (4) the operator's efforts in abating the violative condition; (5) whether the violation was obvious; (6) whether the condition posed a high degree of danger; and (7) the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340 (Mar. 2000); *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

I find that the violation was obvious, extensive, existed for an extended period of time, posed a high degree of danger, and, despite being known to MMS, no steps had been taken to abate the condition prior to the issuance of the citation. Magorian knew that the only support provided in the area was the two inch flash coat of shotcrete with welded wire mesh held by rebar. As discussed above, this did not amount to adequate support. The lack of proper permanent support was plainly obvious. Nevertheless, the condition existed for an extended period of time from roughly late July until the day the citation was issued in early November. While the condition was limited to a single intersection, it was extensive given the number of people from MMS, SMD and Atna that passed through that area and were exposed to the condition over the extended period of time. *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079-3080 (Dec. 2014) (citing *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 681 (July 2002)). For the same reasons set forth in my S&S finding, I find that the condition presented a high degree of danger. No credible evidence was introduced as to Respondent's efforts to abate the condition prior to the issuance of the citation. While the Secretary presented no evidence that Respondent was on notice that greater efforts were necessary for compliance, I find that, on balance, my findings on the other factors establish that Respondent engaged in aggravated conduct and unwarrantably failed to comply with the cited standard.

I find that a penalty of $10,000 is appropriate for this citation. I am not bound by the Secretary's proposed penalty of $6,996. I assess this $10,000 penalty because the cited condition created a severe and obvious hazard and because MMS was highly negligent.

Order No. 8876363

Fact of Violation

I find that the Secretary has failed to prove a violation. The cited standard requires that ground conditions that create a hazard to persons be taken down or supported before work or travel is permitted. Unlike the previous citation issued for failure to provide ground support when ground conditions or mining experience indicate that support is necessary, the cited standard here requires the Secretary to prove that a hazard existed. Here, I find that the Secretary failed to establish that a specific hazard existed during the time when MMS had some level of control over the area. *See Ames Construction, Inc.*, 33 FMSHRC 1607 (July 2011); *Sec'y of Labor v. National Cement Co. of Cal., Inc.*, 573 F.3d 788 (D.C. Cir. 2009).

The Secretary, in his brief, primarily argues that a hazard existed because Hanson was able to easily scale down a 50 pound piece of loose during his inspection. Inspector Barney's inspection of the cited area occurred approximately one month after MMS left the mine. The language in the order relies exclusively on the presence of specific pieces of loose rock. There is no proof that those pieces of loose rock were present when MMS was working in the mine. I cannot speculate that the ground scaled down in the inspector's presence existed at the time MMS was still working in the mine. In fact, Barney acknowledged that SMD scaled down loose "on a regular basis each and every shift[.]" Tr. 69. Assuming that to be the case, I find it unlikely that this loose, which was so easily scaled down, had existed since MMS was in the mine roughly a month prior.

We simply do not know what conditions existed when MMS left the mine. I cannot credit Vidal's testimony that ground conditions would not have changed between early October and November 2. The evidence shows that ground conditions in the area were not static but were under high stress. I find that the Secretary failed to meet his burden of proving that loose ground was present during the time period MMS was working in that area of the mine.[11] *Cf. Master Aggregates TOA Baja Corp.*, 28 FMSHRC 835, 839-840 (Sept. 2016) (ALJ) (Vacating a citation issued under section 56.3200 where the Secretary presented no probative direct evidence of hazardous conditions that existed prior to a fatal fall of ground). Order No. 8876363 is **VACATED**.

Order No. 8876391, WEST 2016-445-M; and Order No. 8876392, WEST 2016-445-M.

Order No. 8876391, issued under section 104(d)(2) of the Mine Act on December 1, 2015, alleges a violation of section 57.15005 of the Secretary's safety standards and asserts that a miner was not wearing fall protection while on top of a load of ventilation pipe that was stacked on the bed of a truck. GX-5. In relevant part, the safety standard provides that "[s]afety belts and lines shall be worn when persons work where there is a danger of falling[.]" 30 C.F.R. § 57.15005.

Order No. 8876392, issued under section 104(d)(2) of the Mine Act on December 1, 2015, alleges a violation of section 57.11001 of the Secretary's safety standards and asserts that no safe means of access was provided for a miner working on top of a load of ventilation pipe. GX-6. The order further alleges that the top of the load measured nine feet above the ground. In relevant part, the safety standard provides that a "[s]afe means of access shall be provided and maintained to all working places." 30 C.F.R. § 57.11001.

[11] It is important to distinguish this finding that the Secretary failed to establish that a hazard was present, from my S&S finding in the previous citation that there was a particular hazard to which the which the violation allegedly contributed. The S&S analysis requires that the Secretary establish only that the occurrence of a hazard was reasonably likely and that the violation contributed to that hazard. Here the standard itself requires that a hazard be present. The Secretary did not establish that the loose rock in question was present at the time MMS was working in the mine or that any loose rock was present prior to the end of September. Inspector Barney agreed that SMD regularly scaled down the back in the intersection.

Inspector Barney determined that, with respect to both orders, an injury was highly likely to be sustained and, if an injury occurred, it could reasonably be expected to be fatal. He determined that both violations were S&S, and that one person was affected by the conditions set forth in each order. The inspector determined that MMS's negligence was high in both orders. In the orders, the inspector stated that MMS's supervisor engaged in aggravated conduct because (1) he knew that there was no fall protection available and allowed the miner to stand on top of the load, and (2) he knew that there was no safe access and allowed the miner to climb over the cab of the truck. The Secretary proposed a penalty of $10,700 for each order under his special assessment regulation, 30 C.F.R. § 100.5.

Summary of the Evidence

Inspector Barney testified that as he was driving on mine property, he saw a truck loaded with ventilation pipe at the surface lay-down area. An individual, Jim Morse, was standing on top of the pipes. He pulled over to see if the individual was wearing any fall protection. Tr. 132. When Barney did not see a supervisor around, he asked Morse to safely climb down from the top of the load and issued Imminent Danger Order No. 8876390.[12] Tr. 132, 141. The distance between the top of the load to the ground was nine feet, as measured by the inspector. Tr. 133. The truck was not equipped with guard rails. It was a cold day and Inspector Barney observed a "thin skin" of ice on the pipes. There is no dispute that Morse was not wearing fall protection. Tr. 127-28; GX-9 p. 3. Inspector Barney considered Morse to be a miner because he worked at a mine. Tr. 146-47.

The inspector determined that the violation was S&S because there was a "very real possibility of a slip and fall." Tr. 133. A fall was "highly likely" because ice was present on the pipes, the miner was nine feet above the ground, and the pipes were being loaded onto the truck from behind with a forklift. *Id.* The inspector testified that a fall from that height "could easily be fatal." Tr. 134.

The inspector testified that Becker told him that he did not have any fall protection available and that he was "more worried about getting the load ready for the highway than he was about fall protection[.]" Tr. 134-35, GX-5 p. 2. As a consequence, Inspector Barney determined that MMS's negligence was high. He also designed the violation was an unwarrantable failure because Becker, who was a supervisor, admitted that he instructed the miner to go up on the load and did not tell him to use fall protection. Tr. 135). The condition was abated by getting a full body harness from Atna Resource's warehouse.

Inspector Barney issued Order No. 8876392 a few minutes after he issued the previous order. The inspector testified that when he ordered Morse to come down from the top of the load, he observed him crawling off the front of the load, down the windshield and then down the hood and across the front bumper of the truck. Tr. 137, 150. Inspector Barney determined that the violation was S&S because, taking into consideration the icy conditions, "it was highly likely that an injury would occur." *Id.* Morse could have slipped and fallen while climbing down.

[12] The imminent danger order is not before me and a search of the Commission's electronic case management system (eCMS) indicates that MMS did not contest the order.

Inspector Barney determined that MMS's negligence was high and that the violation was the result of its unwarrantable failure to comply with the safety standard because Becker told him that there was a ladder about 50 feet away from the truck that could have been used to get on and off the load on the truck. Tr. 138-39; GX-6 at 2.

Kevin Becker testified that he had just finished placing a pipe on the bed of the truck with a backhoe forklift when Inspector Barney arrived. Tr. 153. He heard the inspector order Morse down from the truck "in a safe manner." *Id.* The inspector spoke in an authoritative manner and he clearly wanted Morse to immediately get off the truck. He added the words "in a safe manner" a few seconds after he told Morse to get down. Tr. 154. Becker went to get a ladder to help Morse get down but by the time he got back, Morse was already off the truck. Tr. 155.

Jim Morse testified that he was an employee of MMS at the time the two orders were issued. Tr. 157. He recalled that Inspector Barney yelled "get off that truck" as soon as he drove up. *Id.* Morse immediately got down. He stated that he got down by stepping on the headboard and then using steel rails on the back of the headboard to step down between the cab and the headboard. Tr. 158. He said that there was "no way I'd go over the hood and the roof of my brand-new baby truck." *Id.*

Morse testified that he was employed by MMS to drive a Class 1 commercial vehicle "to the job site to remove supplies from that job site." Tr. 159. That has been his primary job while working for MMS.

Order No. 8876391

Fact of Violation

I find that the Secretary established a violation of the cited standard.[13] Section 57.15005 requires that safety belts and lines be worn when persons work where there is a danger of falling. There is no dispute that Morse[14] was not wearing fall protection. I credit Barney's testimony that there was a danger of Morse falling nine feet from his position on top of pipes in the bed of a truck with no guard rails. Because there was a danger of falling and no fall protection was being used, I find that a violation existed.

[13] Respondent, in discovery responses, conceded that it violated the cited standard. GX-9 p. 3.

[14] Despite conceding that a violation occurred, Respondent nevertheless argues that Morse was not a "miner" because he was only a truck driver. MMS Br. 7-9. In making this argument Respondent incorrectly relies on the Part 46 definitions of "miner" and "mine site" which applies only to training standards. 30 C.F.R. pt. 46. The Mine Act defines a "miner" as "any individual working in a coal or other mine." 30 U.S.C. § 802(g). Morse, an employee of MMS, was tasked with driving a truck "to the job site." In this case, the Pinson Mine lay-down area was the job site. Tr. 131. Because Morse was working at the Pinson Mine, he was a "miner" under the Act.

Gravity and S&S

I find that the Secretary established that the violation was S&S. MMS violated the standard. Here, the hazard to which the violation allegedly contributes is a miner falling from height without fall protection. Working nine feet off the ground on an uneven surface without fall protection or railings was dangerous. The presence of ice on that uneven surface exacerbated the likelihood of a fall. Given the presence of ice on the pipes and the lack of anything to protect Morse from falling from his standing position on top of the uneven surfaces of the pipes, I find that the hazard was, at the very least, reasonably likely to occur. Barney testified that a fall under those conditions could easily result in a fatality. I agree and find that a serious injury was reasonably likely to be sustained in the event of a fall from that height. Commission judges have held that serious injuries can be sustained from falls of less than nine feet. *E.g., Small Mine Development*, 33 FMSHRC 1477 (June 2011) (ALJ), *Molton Co., LP*, 31 FMSHRC 427 (Mar. 2009) (ALJ). The violation was S&S and serious..

Negligence and Unwarrantable Failure

I find that, the violation was a result of Respondent's high negligence and unwarrantable failure to comply with the standard. I credit Barney's testimony that Becker, a supervisor, instructed Morse to go up on the pipes and that he knew no fall protection was present. I further credit Barney's testimony that Becker said that he was more concerned with getting the load ready for travel than providing fall protection. I note that Respondent did not dispute Barney's testimony on these issues despite offering Becker as a witness. Given the obvious hazard presented by working at height without fall protection, and the lack of mitigating circumstances, I find that both Morse and Becker were highly negligent. Because Becker was a supervisor directing Morse's work, I find that he was an agent of MMS and that his negligence is imputable to MMS.[15]

As discussed above, the condition was obvious, presented a high degree of danger, and Becker, a supervisor, clearly had knowledge of it given that he was directing Morse's work and was aware that MMS had no fall protection equipment. Moreover, no evidence was presented that steps were being taken to abate the condition prior to the issuance of the order. In *Newtown Energy, Inc.*, the Commission stated that supervisors are "held to a higher standard of care than a rank and file miner, and as such, evidence of a supervisor's involvement in the creation of a violative condition is an aggravating factor that should be considered in conjunction with the traditional unwarrantable failure factors." 38 FMSHRC 2033, 2044 (Aug. 2016). Becker's involvement as the supervisor who directed Morse to get on top of the pipes while knowing that there was no fall protection is a substantial aggravating factor. Becker not only instructed Morse to get on top of the pipes, thereby creating the violation, he also was present the entire time since he was the individual driving the forklift that was placing the pipes in the bed of the truck.

[15] The Commission has held that "the negligence of an operator's 'agent' is imputable to the operator for penalty assessment and unwarrantable failure purposes." *Nelson Quarries, Inc.*, 31FMSHRC 318, 328 (Mar. 2009). The Mine Act defines an "agent" as "any person charged with responsibility for the operation of all or part of a coal or other mine or the supervision of miners in a coal or other mine[.]" 30 U.S.C. § 802(e).

While it is unclear how long the condition existed and no evidence was introduced to establish that MMS was on notice that it needed to do more to comply with the cited standard, I find that Becker's conduct, as a supervisor, when considered with the other aggravating factors, amounted to a serious lack of reasonable care and that he unwarrantably failed to comply with the standard. Accordingly, I affirm the unwarrantable failure designation.

Order No. 8876391 was originally issued under section 104(d)(2), with Order No. 8876363 serving as the underlying 104(d)(1) order. Because I have vacated Order No. 8876363, Order No. 8876391 is modified to a 104(d)(1) order. The Secretary proposed a civil penalty under his special assessment regulation. 30 C.F.R. § 100.5. Based on my above findings, I assess a penalty of $10,000 for this order because the hazard created by the violation was immediate and obvious and MMS was highly negligent.

Order No. 8876392

Fact of Violation

I find that the Secretary established a violation of the cited standard. The cited standard requires that safe means of access be provided and maintained to all working places. The parties offered conflicting testimony as to how Morse traveled from his position on top of the pipes to the ground. While Barney testified that he observed Morse climb off the front of the load, down the windshield, and then over the hood and across the front bumper of the truck, Morse testified that he stepped on the headboard and then used steel rails on the back of the headboard to go down between the cab and the headboard. I need not resolve this conflict. I find that, in either case, safe access was not provided or maintained. Clearly, climbing over the cab of the truck and down the windshield and hood is not safe access. A miner could easily slip or fall from those surfaces. If Morse climbed down the way he described, he did not do so in a safe manner. The abatement photo for the fall protection violation shows the area that Morse avers he used to climb down, i.e., the area between the cab and the headboard. GX-5 p. 4. This area clearly was not intended to be used as an access route and a reasonably prudent person familiar with the mining industry and the protective purpose of the standard would not expect to be in compliance by allowing a miner to climb up or down via this route.[16] *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (Nov. 1990). The record does not establish how Morse gained access to the top of the truck bed when Becker started loading the pipes. I find that the Secretary has proven that safe access was not provided or maintained.

[16] Respondent argues that the cited standard does not apply to the present situation because (1) Morse was not a miner, and (2) he was not "accessing" the area when he climbed down but, rather, was "egressing" the area. I find these arguments to be without merit. First, for the reasons set forth above in relation to the fall protection violation, I find that Morse was a "miner" under the Act. Second, whether Morse was traveling onto the bed of the truck or traveling down from on top of the load is immaterial. The area on top of the pipes was a working place and safe access, for Morse or any other person, needed to be provided and maintained.

Gravity and S&S

I find that the Secretary established that the violation was S&S. MMS violated the standard. Here, the hazard to which the violation allegedly contributes is a miner being unable to safely travel from on top of the load to ground level or vice versa. As discussed above, Morse was already standing on uneven, ice covered pipes. Neither of the respective routes described by Barney or Morse from his location on top of the load could reasonably be considered a safe option for travel. In both instances Morse would be taking a route not intended for a person to travel, which in turn would put him in a position where he was reasonably likely to fall. As with the above citation, a serious injury was reasonably likely to be sustained in the event of a fall. The violation was S&S and serious.

Negligence and Unwarrantable Failure

I find that the violation was the result of MMS's moderate negligence. Becker testified that, when the inspector ordered Morse off of the pipes, he went to go get a ladder to help Morse get down. Tr. 155. Based on that testimony it is reasonable to infer that Becker knew a ladder was needed to safely descend from the elevated working place. Morse climbed down from the truck upon the inspector's orders without waiting for Becker to get a ladder because he believed that the inspector wanted him to get down immediately. But for the inspector's command, Morse could have sat upon one of the pipes and waited for Becker to get the ladder. As stated above, there is no evidence as to how Morse got up on the bed of the truck. It is entirely possible that the truck bed was empty when he did so. Based on the above, I find that the negligence of MMS was moderate. Although Becker was in the area when the violation occurred he was taking steps to get Morse down in a safe manner by getting the ladder. The abatement photo shows a ladder tied to the truck. GX-6 at 5.

For the same reason, the Secretary did not establish that the violation was the result of aggravated conduct. Becker was taking steps to abate the hazard. Although the condition presented a high degree of danger, there is no evidence that MMS was on notice that it needed to do more to comply with the cited safety standard. Whether this was a frequent occurrence at the mine is not known. The unwarrantable failure designation is removed and this 104(d)(2) order is modified to a 104(a) citation.

I assess a penalty of $3,000 for this violation taking into consideration the six penalty criteria. I have reduced the penalty from that proposed by the Secretary because the violation was not the result of MMS's aggravated conduct and to account for the reduction in negligence.

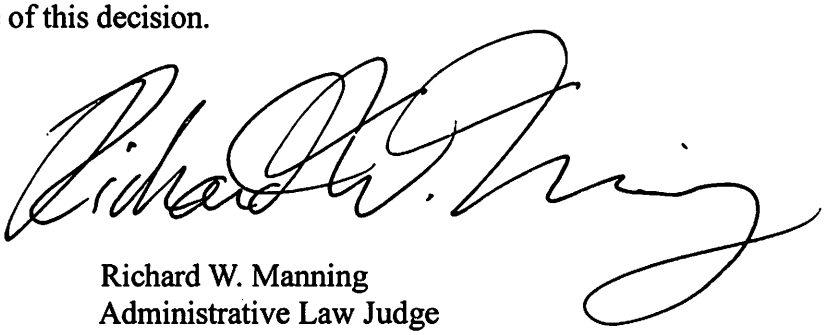
II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. 30 U.S.C. § 820(i). According to MSHA's website MMS worked fewer than 5,000 hours in 2015, which correlates with a small-sized contractor. 30 C.F.R. § 100.3 Table V. The parties have stipulated that the penalties will not affect MMS's ability to remain in business. In addition to the uncontested imminent danger order discussed above,

MMS was issued only one non-S&S citation in the 15 months preceding the issuance of these citations and orders. The gravity and negligence are discussed above. The citations were timely abated. Based on the penalty criteria I assess a total penalty of $23.000.

III. ORDER

For the reasons set forth above, Citation No. 8876362 and 8876391 are **AFFIRMED** as issued, Order No. 8876363 is **VACATED**, and Order No. and 8876392 is **MODIFIED** as set forth above. Magorian Mine Services is **ORDERED TO PAY** the Secretary of Labor the sum of $23,000.00 within 40 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

Distribution:

Rose Darling, Esq., and Mark A. Pilotin, Esq., Office of the Solicitor, U.S. Department of Labor, 90 7th Street, Suite 3-700, San Francisco, CA 94103-6704 (Certified Mail)

Robert D. Peterson, Esq., Robert D. Peterson Law Corporation, 3300 Sunset Boulevard, Suite 110, Rocklin, CA 95677 (Certified Mail)