FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2014-0255 A.C. No. 21-00282-343682
v.	Docket No. WEST 2014-0202-RM A.C. No. 21-00282-8740887
CONVEYOR BELT SERVICES, INC., Respondent.	Mine: Minntac Mine

AMENDED DECISION AND ORDER

Appearances: Laura Ilardi Pearson, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, CO, for Petitioner;

Justin Winter, Esq., Law Office of Adele Abrams, PC, Beltsville, MD, for Respondent.

Before: Judge L. Zane Gill

This proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves one section 104(d)(1) citation, issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Conveyor Belt Services, Inc. ("CBS") at the U.S. Steel Company's Minntac Mine ("the Mine"). The parties presented testimony on December 9, 2014, in Duluth, Minnesota.

The contested issues at trial for Citation No. 8740887 ("the Citation") included whether CBS violated 30 C.F.R. § 56.11027, whether CBS had fair notice of the Secretary's interpretation of the standard, whether the violation warranted enhanced enforcement, and whether the penalty was properly assessed.

For the reasons set forth below, I find CBS violated 30 C.F.R. § 56.11027 and had fair notice that the conveyor belt bed and temporary structure were working platforms under the standard. I also find CBS's violation was properly classified substantial and significant ("S&S"), and an unwarrantable failure. Finally, I find the violation involved high negligence and was reasonably likely to result in lost workdays or restricted duty. I assess a penalty in the amount of $2,000.00.

Stipulations

The joint stipulations were read into the record at the hearing: (Tr. 92:20-94:16)

1. At all times relevant to this proceeding Conveyor Belt Service, Inc., which is known as CBS, Contractor ID# G10, was engaged in mining operations and subject to the jurisdiction of Federal Mine Safety and Health Act of 1977.

2. At the time the citation that is that the subject of this case was issued, Conveyor Belt Service was engaged in mining operations at the Minntac Mine. Mine. Mine ID# 21-00282.

3. MSHA has jurisdiction over CBS's operations at the Mine because CBS was an operator as defined in Section 3(b) of the Act, 30 U.S.C., Section 803, and the products of the Mine entered the stream of commerce or the operations or products thereof affected commerce within the meaning and scope of Section 4 of the Act. 30 U.S.C. Section 803.

4. The Administrative Law Judge has subject matter and personal jurisdiction over these proceedings pursuant to Section 105 of the Act.

5. CBS's operations affect interstate commerce.

6. On or about December 11, 2013, MSHA inspected the Mine.

7. MSHA Inspector Thaddeus Sichmeller was acting in his official capacity as an authorized representative of the Secretary when he inspected the Mine and issued the subject citation.

8. CBS abated the alleged violation in good faith.

9. The proposed penalties in this matter will not affect CBS's ability to remain in business.

10. Stipulation as to the authenticity of exhibits. The certified copy of the MSHA Assessed Violations History, Exhibit GX1, reflects the history of the Mine for the 15 months prior to the date of the Citation and may be admitted into evidence without objection by CBS.

11. The parties stipulated to the authenticity but not the truthfulness or relevance of the content of the following exhibits:
    a) Citation 8740887.
    b) Citation documentation related to 8740887.
    c) Photographs associated with citation 8740887.
    d) Citation 8664341.
    e) Complete inspection report for event number 6631817.
    f) Deposition transcript of Thaddeus Sichmeller.
    g) MSHA Program Policy Letter P12-IV-01.

Background

On December 11, 2013, MSHA Inspector Thaddeuys Sichmeller[1] ("Inspector Sichmeller") issued the Citation to CBS, alleging a violation of 30 C.F.R. § 56.11027, pursuant to § 104(d)(1) of the Mine Act. The regulation requires that "[s]caffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition." 30 C.F.R. § 56.11027. Section 56.11027 is a mandatory safety standard. The citation alleges:

> Two employees were observed conducting belt work on the 003-01 conveyor in the basement area of Step 1 and 2 Fines Crusher. The two employees were working from a makeshift work platform making a belt splice. The two employees were not protected from a fall from the work area. The top of the work area to the concrete floor below measured 51 inches on the south side and 55 inches on the north side due to the sloped concrete floor. The company has had similar violations in the past. The company has engaged in aggravated conduct by allowing the work to conduct in this area with out [sic] the proper protection of from [sic] a fall from the work platform. This violation is an unwarrantable failure to comply with a mandatory standard.

(Ex. GX 1)

U.S. Steel contracted with CBS, a company specializing in conveyor belt maintenance, to perform work at the Mine.[2] (Tr. 8:1-2; 9:2-4) On the date of the alleged violation, six CBS employees, supervised by CBS foreman Kelly Theil[3] ("Theil"), were performing conveyor belt maintenance on multiple levels of the Mine. (Tr. 67:2-10) The two employees cited[4] were replacing a fifty-four-inch wide conveyor belt in the "basement" area of the Mine.[5] (Tr. 72:22-73:4)

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[1] Inspector Sichmeller has worked for MSHA since February 24, 2003. (Tr. 13:19-20) Prior to starting at MSHA, he worked at a molybdenum mine in Idaho for about eight-and-a-half years. (Tr. 14:4-24) As a miner, Sichmeller repaired between ten and fifteen conveyor belts. (Tr. 16:4-10) As an MSHA inspector, Sichmeller is responsible for conducting sixty to eighty mine inspections a year. (Tr. 16:22-17:1) Sichmeller also acts as an MSHA accident investigator. (16:11-17)

[2] The Mine is a multi-level, surface iron-ore mine. (Tr. 22:1-6; 17:24-18:2)

[3] Theil works for CBS as a "belt technician." (Tr. 65:23-25) At the time of litigation, Theil had worked for CBS for 29 years. (Tr. 66:7-9)

[4] The employees had two and eight years of experience working on conveyor belts, respectively. (Tr. 73:7-9) The employee with two years of experience had changed about ten belts at the time the Citation was issued, while the employee with eight years of experience had changed over 100 belts. (Tr. 73:10-18)

[5] The "basement" is the second lowest level of the Minntac Mine. (Tr. 22:11-16) The lowest level of the Mine is called the "subbasement." *Id.*

To replace the conveyor belt, the employees had to splice the ends of the new belt together. (Tr. 9:25-10:15) This process involved punching holes in the ends of the belt, putting clips in the holes to attach the belt, and sealing the belt. *Id.* Because the belt was one-inch thick and very stiff, attaching the ends required flattening the belt. (Tr. 74:10-14; 75:19-25) To flatten the belt, the employees placed it on a temporary structure fashioned from a stepladder, two steel toolboxes, and a piece of plywood. (Tr. 76:10-15) This temporary structure rested on the conveyor belt bed, which measured forty-one inches from the ground. (Tr. 76:21) The temporary platform measured fifty-one inches from the ground on its south side and fifty-five inches on its north side.[6] (Tr. 23:19-23; *see also* Ex. G6)

Once the employees laid the conveyor belt ends on the temporary structure, they stood on the conveyor belt (which was placed on the conveyor belt bed) to attach the middle portion of the belt. (Tr. 10:25-11:4) When Inspector Sichmeller observed the alleged violation, one of the employees was standing on the conveyor belt and the other was kneeling on the belt. (23:4-23:10) However, Inspector Sichmeller's testimony does not make clear whether the employees were on the portion of the conveyor belt resting directly on the conveyor belt bed or the portion resting on the temporary structure. (Tr. 23:3-17; 38:7; 39:13) Both the conveyor belt bed and temporary structure lacked handrails, and the employees were not wearing fall protection. (Tr. 24:13-16) Inspector Sichmeller testified that a fall from the conveyor belt bed or temporary structure could cause sprain-strains, broken bones or, even, fatalities. (Tr. 25:4-15; 27:2-9) The employees were on the conveyor belt for an estimated forty-five minutes to an hour. (Tr. 75:24-25; 81:17-19)

Theil testified he was on an upper level of the Mine when Inspector Sichmeller saw the employees on the conveyor belt. (Tr. 78:1-6) However, Inspector Sichmeller testified that Theil was present in the "basement" area when he observed the violative condition. (Tr. 35:11-14)

About a year-and-a-half before issuing the Citation, Inspector Sichmeller issued Citation No. 86604341 ("citation 341") to CBS for a similar violation at another U.S. Steel mine. (Tr. 29:8-30:6) Citation 341 alleged that Theil, who was supervising the job, and two CBS employees, violated 30 C.F.R. § 56.15005[7] by standing on an elevated conveyor belt and cable tray without fall protection. (Tr. 30:7-12) The conveyor belt involved in citation 341 was fifty-two inches high and fifteen inches wide. (Ex. G9) The cable tray was about thirty-eight inches high. (Tr. 32:18-24) When Inspector Sichmeller issued citation 341, he spoke to Theil about fall hazards and the need for fall protection or hand railings when working on elevated surfaces. (Tr. 33:4-11)

Inspector Sichmeller classified the violation as S&S, high negligence and an unwarrantable failure, in part, because he had previously cited CBS. (Tr. 8:18-22; 61:10-13)

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[6] The height difference was due to the sloped design of the floor in the "basement" area. (Tr. 23:18-23)

[7] The standard reads: "[s]afety belts and lines shall be worn when persons work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered." 30 C.F.R. § 56.15005.

Additionally, he considered the presence of tools, mud, and water on the belt when he issued the Citation an aggravating factor. (Tr. 60:3-10)

Prior to beginning the job at Minntac Mine, Theil reviewed U.S. Steel's safety policies, which included an Occupational Health and Safety Administration ("OSHA") rule requiring fall protection at heights of six-feet or more. (Tr. 19:5-11; 20:1-6) In June, 2012, MSHA issued Program Plan Letter P12-IV-01 ("PPL") on fall protection. (Ex. R5) The PPL included OSHA's six-foot rule for inspectors to consider when issuing citations for violations of MSHA standards 56.15005 and 57.15005. (Tr. 20:7-20) Inspector Sichmeller testified that MSHA inspectors view the PPL as a "guideline." *Id.*

CBS also held a safety meeting with U.S. Steel before commencing work on the job. (Tr. 68:15-17) During this meeting, the companies discussed the safety equipment needed for every segment of the job and determined that fall protection was not required for work in the "basement" area. (Tr. 68:18-69:16; 70:22-25) However, the companies did not discuss the possibility of the employees constructing a temporary structure of the kind they ultimately made. (Tr. 85:24-86:7) Theil testified the decision to make the temporary structure was "spur-of-the moment," and that he did not witness the employees erect the structure. (Tr. 85:15-86:7) However, he testified he had seen platforms of this kind used to flatten belts in the past. (Tr. 86:8-21)

When Inspector Sichmeller issued the citation, the employees came to the ground. (Tr. 36:21-25) Subsequently, the employees used handrails, surrounding the conveyor belt, to complete the belt splice. (Tr. 81:7-11)

Brief Summary of the Parties' Arguments

Secretary of Labor

The Secretary argues the Citation was properly issued because CBS violated § 56.11027 by failing to equip a working platform with handrails. (Tr. 8:18-19) The Secretary argues the temporary structure was a working platform.[8] (Sec. Br. 12) He defines a working platform as "a place from which miners may perform work on areas they otherwise could not reach," regardless of height. (Sec. Br. 12) The Secretary contends the violation warranted enhanced enforcement because Inspector Sichmeller's testimony supported findings of S&S and an unwarrantable failure. *Id.* at 13-17. The Secretary argues the penalty was properly assessed based on CBS's high negligence and the likelihood that the injury would result in lost workdays or restricted duty. (Ex. GX 2)

Conveyor Belt Service, Inc.

CBS argues the Citation should be vacated because the Secretary failed to prove the company violated § 56.11027. (Resp. Br. 2) CBS contends the Secretary erred in interpreting the regulation to require handrails on working platforms of any height. *Id.* at. 7. Alternatively, CBS

[8] The Secretary argues the temporary structure was a working platform, but he does not contend the conveyor belt bed was also a working platform. (Sec. Br. 12) However, the conveyor belt bed is a working platform under the Secretary's definition of the term.

argues the citation should be vacated because the company did not have fair notice that the standard mandated the use of handrails on surfaces less than six feet high. *Id.* at 2. CBS also challenges the Secretary's finding that the violation warranted enhanced enforcement. *Id.* CBS argues the violation was not S&S because there were many factors that made a fall unlikely to occur. *Id.* at 13. Additionally, CBS argues the violation was not an unwarrantable failure because their actions did not meet the six requirements of an unwarrantable failure. *Id.* at 16-17. Finally, CBS argues the violation should be reclassified as low or no negligence because Theil was not aware of the violation and there were mitigating factors. *Id.* at 14-15.

Violation

Under the Mine Act, mine operators are strictly liable for violations, provided the conditions violating the regulation existed. *Asarco v. Comm'n*, 868 F.2d 1195, 1197 (10th Cir. 1989). If such conditions existed, the Secretary is not required to demonstrate that the violation creates a safety hazard. *Allied Prods, Inc. v. Comm'n*, 666 F.2d 890, 892 (5th Cir. 1982).

The Conveyor Belt was a Work Platform Under § 56.11027

CBS argues the Secretary failed to prove they violated § 56.11027 because the temporary structure was not a working platform. (Tr. 9:21-24)[9] The Secretary argues the standard mandates the use of handrails on all working platforms, which he defines as places "from which miners may perform work on areas they otherwise could not reach." (Sec. Br. 12; Tr. 52:14-17) CBS believes this interpretation is erroneous because it would lead to the absurd result of requiring handrails on all elevated surfaces, even those that are only two or three inches off the ground. (Resp. Br. 7) Additionally, CBS argues this interpretation contradicts MSHA's PPL on the minimum height at which fall protection is necessary. *Id.*

"The language of a regulation or statute is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). The Commission has found, when the language of a regulation is clear, "the ordinary meaning of words must prevail where that meaning does not thwart the purpose of the statute or lead to an absurd result." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987) (citing *In re Trans Alaska Pipeline Rate Case*, 436 U.S. 631, 643 (1978)). "In the absence of a statutory or regulatory definition of a term, or a technical usage, we look at the ordinary meaning of the terms used in the regulation." *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997). Whether a regulation is ambiguous is determined by "referring to the language itself, the specific context in which that language is used, and the broader context as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

When a mandatory standard of the Mine Act is ambiguous, "the courts and the Commission defer to the Secretary's reasonable interpretation of the regulation." *Twentymile*

[9] CBS argues the temporary structure was not a working platform but, like the Secretary, makes no mention of the conveyor belt bed. (Tr. 9:21-24) Presumably, CBS intended to argue neither surface was a working platform, since they argue fall protection was wholly unnecessary in the "basement" area. (Tr. 72:8-15)

Coal Co., 36 FMSHRC 2009, 2012 (Aug. 2014). An interpretation is reasonable if it is "logically consistent with the language of the regulation[s] and . . . serves a permissible regulatory function." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (quoting *Rollins Envtl. Serv., Inc.*, 937 F.2d 649, 652 (D.C. Cir. 1991)). Deference to an agency interpretation can be due even if the interpretation is articulated in a legal brief. *See Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156, 2166 (2012).

The term working platform is not defined in the Mine Act or any MSHA regulations. Also, there is no technical definition of the term as it relates to the facts surrounding the Citation.[10] However, MSHA regulations define a working place as "any place in or about a mine where work is being performed." 30 C.F.R. § 56.2. Merriam Webster's Online Dictionary defines platform as "a flat surface that is raised higher than the floor or ground and that people stand on when performing or speaking" or, "a usually raised structure that has a flat surface where people or machines do work." *Merriam Webster's Online Dictionary*, http://www.merriam-webster.com/dictionary (last accessed Jun. 10, 2016). Taken together, the definitions of working place and platform indicate that a working platform is a flat, elevated surface where work is performed.

This plain meaning comports with the purpose of the regulation—to "prevent a fall"—as to fall, one must generally be on a surface above ground level. *See Granite Rock Co.*, 32 FMSHRC 1792, 1794 (Nov. 2010) (ALJ Weisberger). Therefore, I find the standard unambiguous. Additionally, I find that the plain meaning of § 56.11027 does not thwart the purpose of the statute or lead to an absurd result because it protects against falls that could potentially injure miners. Judges have also interpreted working platform in a way consistent with the term's ordinary meaning. *See Voss Sand Works, Inc.*, 34 FMSHRC 906, 913 (Apr. 2012) (ALJ Miller) (holding a boat was a working platform because it was "an elevated, horizontal, flat surface"); *Lakeview Rock Products*, 19 FMSHRC 321, 359 (Feb. 1997) (ALJ Koutras) (holding that an overturned 55-gallon drum elevated 34.8 inches off the ground was a work platform). Therefore, I find the plain meaning of the regulation should govern here.

As I find the regulation unambiguous, there is no need to defer to the Secretary's interpretation of the standard.[11] I find the conveyor belt bed and the temporary structure served as working platforms because they were elevated, flat surfaces the employees stood on to perform a belt splice. Because the conveyor belt bed and temporary structure were working platforms and lacked handrails, I find CBS violated § 56.11027. Even if it were possible to claim some ambiguity remains in the regulation, I find the deference accorded to reasonable interpretations by the Secretary outweighs CBS's argument that handrails were not required on the conveyor belt bed and temporary structure.

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[10] The American Geological Institute defines a work platform as "a board or small platform placed at a suitable height in the drill tripod or derrick so that a worker standing on it can handle the drill rod stands." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 631 (2d ed. 1997) ("*DMMRT*"). However, neither drill tripods nor derricks were involved in the issuance of the Citation.

[11] At this point, I will not address the validity of the Secretary's interpretation of § 56.11027 or the exact elevation at which a working place becomes a working platform.

The Operator Had Fair Notice of § 56.11027

CBS argues it did not have notice handrails were required on a surface less than six feet above the ground. (Resp. Br. 12) This argument is based on MSHA's issuance of a PPL, which says inspectors may use the OSHA six-foot rule in interpreting 30 C.F.R. §§ 56.15005 and 57.15005. (Resp. Br. 8; *see also* Ex. 5R)

Under the due process clause, an agency may not enforce a new interpretation of a regulation without advance notice of the conduct prohibited or required by the standard. *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986). The notice requirement is generally satisfied when a party receives actual notice of MSHA's interpretation of a regulation prior to enforcement of the standard against the party. *LaFarge North America*, 35 FMSHRC 3497, 3500 (Dec. 2013). In the absence of sufficient evidence of actual notice, the Commission applies the "reasonably prudent person" test. *See id.* In *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982), the Commission articulated the reasonably prudent person test as follows: "whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation."

However, actual notice or notice via the "reasonably prudent person" test is not required when a regulation is clear, as an unambiguous standard itself provides fair notice to operators of its requirements. *See Jim Walter Resources, Inc.*, 28 FMSHRC 983, 988 n.6 (Dec. 2006) (citing *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1031 (June 1997)). Because the meaning of "working platform" under § 56.11027 is clear, I find CBS had fair notice the conveyor belt bed and temporary structure were working platforms, and, therefore, required handrails. Even if it could be argued the standard is ambiguous, I find citation 341 provided CBS with actual notice or, at a minimum, fair notice under the "reasonably prudent person" test that handrails were required on the conveyor belt.

Enhanced Enforcement

To invoke the enhanced enforcement provisions for mandatory safety standards set out in § 140(d), the Secretary must prove the violation satisfies the S&S and unwarrantable failure standards. *See Lodestar Energy, Inc.*, 25 FMSHRC 343, 345 (Jul. 2003).

Significant and Substantial

The Secretary designated the citation S&S. (Ex. G2). S&S determinations are made based on the specific facts of the case. *See Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2369 (Oct. 2011); *National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). A finding of S&S requires that the Secretary prove:

> (1) underlying violation of a mandatory safety standard; (2) a discrete safety standard—that is, a measure of danger to safety—contributed to by the violation; (3) 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.

Mathies Coal Co., 6 FMSHRC 1, 3 (Jan. 1984). The violation satisfies the first element of the test because § 56.11027 is a mandatory safety standard. (Ex. GX 2)

"The second element of *Mathies* requires the Secretary to demonstrate that the violation contributed to a safety hazard." *Oak Grove Res., LLC*, 37 FMSHRC 2687, 2696 (Dec. 2015). The Commission has said to be a "hazard," a violation must contribute to a specific danger. *See Mathies*, 6 FMSHRC at 3-4. A violation is not S&S if it is non-dangerous. *See U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984) (citing *Gypsum*, 3 FMSHRC at 827. However, even if a hazard is unlikely to occur, a violation can be deemed S&S. *See Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280 (Oct. 2010). Whether a violation is S&S is determined in the context of continued mining operations and "cannot ignore the dynamics of the mining environment or process." *U.S. Steel*, 6 FMSHRC at 1574. I find the Secretary demonstrated the violation contributed to a safety hazard, satisfying the second element of the test, because the lack of handrails contributed to the risk of falling off the conveyor belt from either side. (Tr. 20:25-21:3)

The Commission has held element three does not require the Secretary to show it is more probable than not that an injury will result from violation. *See U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1986). The hazard, rather than the specific violation, must be "reasonably likely to result in an injury" for the violation to be deemed S&S. *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611, 616 (7th Cir. 2014). An inspector's judgment is an important factor in determining whether there is "a reasonable likelihood that the hazard contributed to will result in an injury." *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (1998) (holding an inspector's belief that hanging drawrock posed a reasonable likelihood of injury to miners was persuasive). In *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995), the Seventh Circuit held no evidence beyond the testimony of an experienced mine inspector is necessary to support a finding of S&S.

Inspector Sichmeller testified an injury was reasonably likely because the employees were exposed to a fall hazard without fall protection, and there were tools and mud on the belt. (Tr. 26:12-22) Earlier that year, Inspector Sichmeller witnessed a fatal fall from a work platform of less than six feet. (Tr. 25:12-26:9) Theil testified the employees only would have been on the conveyor belt for about forty-five minutes and that CBS employees have used temporary structures to complete belt splices in the past. (Tr. 75:19-75:25) Additionally, Theil testified fall protection was not necessary because the employees were standing on a flat, wide area. (79:19-80:2) However, Inspector Sichmeller estimated the employees were on the conveyor belt for closer to an hour. (Tr. 36:2-9) Also, Theil's testimony that he has seen similar structures used in the past indicates he was aware the employees might stand on the belt because it would be difficult to reach an elevated temporary structure from the ground. Although the employees were only on the belt for forty-five minutes to an hour, and the conveyor belt was wide and flat, the tools and water on the belt made an injury reasonably likely. I credit Inspector Sichmeller's judgement that the violation was reasonably likely to result in an injury.

The remaining factor in the S&S designation, the fourth element of the *Mathies* test, is concerned with the likely gravity of an accident. To be of a "reasonably serious nature" an injury

does not need to "result in hospitalization, surgery, or a long period of recuperation." *S&S Dredging Co.*, 35 FMSHRC 1979, 1981-82 (July 2013). Injuries such as "muscle strains, sprained ligaments, and fractured bones are injuries of a reasonably serious nature," and have been deemed "reasonably serious." *Id.* Additionally, the Secretary is not required to show a similar type of injury has actually occurred. *See Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005) I find the violation meets the fourth element of the test because a fall from the conveyor belt bed or temporary structure is reasonably likely to result in sprain strains, broken bones and fatalities. (Tr. 25:10-15) As stated earlier, Inspector Sichmeller observed an injury of this kind when a miner died as a result of a fall from a similar height. (Tr. 25:12-26:9) All of these injuries are considered reasonably serious under the test. Since all the *Mathies* elements are proven, I find the violation was S&S.

Unwarrantable Failure

The Secretary argues the violation satisfies the unwarrantable failure criteria because aggravating factors were present. (Sec. Br. 17) CBS argues the facts with which the Secretary supports a finding of unwarrantable failure are not aggravating factors. (Resp. Br. 16)

An unwarrantable failure is characterized by conduct such as "reckless disregard," "intentional misconduct," indifference," or a "serious lack of reasonable care." *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (1991). The Commission has defined an unwarrantable failure as "aggravated conduct constituting more than ordinary negligence." *Emery*, 9 FMSHRC at 2001.

> Whether conduct is 'aggravated' in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as 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 are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation.

Lopke Quarries, Inc., 23 FMSHRC 705, 711 (2011). "While each factor does not need to be present in order to find unwarrantable failure, all six factors must be considered." *Alden Resources, LLC*, 37 FMSHRC 753, 767 (April 2015) (ALJ Andrews).

The Secretary argues the violation was long because any exposure to a fall hazard is "too long." (Sec. Br. 17) Although it is uncertain how long the employees were on the conveyor belt, the court must take even imperfect evidence in the record into account when evaluating whether a violation was an unwarrantable failure. *Coal River Mining, LLC*, 32 FMSHRC 82, 93 (Feb. 2010). Even if violation occurs for a relatively short period, it can be deemed of long duration for unwarrantable failure purposes if there is a high degree of danger. *See Engineering & Constructors*, 24 FMSHRC 669, 679-80 (Jul. 2002) (finding a four to five foot gap in a hand rail, 70 feet above the ground, was a violation of long duration even though it only existed for two days); *Midwest Material Company*, 19 FMSHRC 30, 34-36 (Jan. 1997) (holding a violation was an unwarrantable failure, even though it only occurred for a few minutes, because it posed a high degree of danger, involved a foreman, and may have continued, but for occurrence of accident).

Although the violation here only lasted for forty-five minutes to an hour, it posed a high degree of danger and a fall, resulting in a serious injury, was possible within the short period of time the employees were on the conveyor belt.

The Secretary also argues any exposure to a fall hazard is "too extensive." The extent of a violation "has traditionally been determined by examining the extent of the affected area as it existed at the time the citation was issued." *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079 (Dec. 2014). "In some situations . . . extensiveness depends on the number of persons affected by the violation." *Id.* at 3079-80. CBS's violation only affected a small area of one conveyor belt and two employees; therefore, I find the violation was not extensive.

The Secretary argues CBS was on notice that handrails were necessary on the conveyor belt for compliance with § 56.11027. (Sec. Br. 15-16) "The Commission has stated that repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard." *Brody Mining, LLC*, 37 FMSHRC 1687, 1698 (Aug. 2015). As discussed earlier, CBS was cited for a similar violation a year-and-a-half earlier. Although a single citation does not rise to the level of "repeated" violations, the same foreman supervised both jobs and was expressly put on notice that fall protection was necessary when performing work on elevated conveyor belts. (Tr. 31:16-25) For this reason, I find CBS was on notice that greater efforts were necessary for compliance with the standard.

The Secretary argues the violation was obvious. (Sec. Br. 17) A condition is obvious when it could be observed by a supervisor or inspector. *See E. Associated Coal Corp.*, 32 FMSHRC 1189, 1200 (Oct. 2010). The violation at issue meets this definition because Inspector Sichmeller saw the employees standing on the conveyor belt as soon as he walked into the "basement" area.

Finally, CBS claims Inspector Theil did not know the employees planned to stand on the belt to complete the splice. (Resp. Br. 14) They argue the employees' violation cannot be imputed to the company because the employees acted unilaterally in standing on the belt. *Id.* However, there is contradictory testimony regarding Theil's location when the employees were on the conveyor belt, meaning it is possible Theil witnessed the employees use the belt as a work platform. Theil testified he had seen employees use a temporary structure, like the one built by the employees, to flatten out conveyor belts in the past. (Tr. 76:2-4) This testimony, along with Theil's admission that, before receiving citation 341, CBS had done similar conveyor belt changes fifty times without fall protection, indicates Theil should have known the employees might stand on the belt to complete the splice. (Tr. 72:4-7) Therefore, I find Theil knew, or had reason to know, of the violation.

Because CBS's actions meet the majority of requirements for an unwarrantable failure, I find the violation was an unwarrantable failure. Additionally, as the violation was S&S and an unwarrantable failure, I find enhanced enforcement was warranted.

Penalty

The Secretary proposed a $2,000 penalty for CBS's violation.[12] (Ex. G2) CBS argues this penalty is too high because the violation was low or no negligence. (Resp. Br. 14-15)

The Mine Act sets forth the following criteria for the Commission to weigh in assessing civil penalties:

> (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith in abatement of the violative condition.

30 U.S.C. § 820(i). The Secretary uses the same criteria in determining proposed penalties. *See Sellersburg Stone Co.*, 736 F.2d 1147, 1151 (7th Cir, 1984). While Commission judges may weigh some of the six penalty assessment criteria more heavily than others, they must address each of the criterion in his or her decision. *See Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010); *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983).

Commission judges may set civil penalties, provided the penalty serves as an effective deterrent against future violations. *See Cantera Greene*, 22 FMSHRC 616, 620 (May 2000). Commission judges are not bound to the Secretary's proposed penalty assessments. *See Sellersburg*, 736 F.2d at 1151. However, if the Commission's assigned penalty differs substantially from the penalty proposed by the Secretary, the Commission must provide an explanation justifying the change. *Sellersburg*, 5 FMSHRC at 293. It is appropriate for a judge to raise the penalty significantly based on his or her findings of extreme gravity and unwarrantable failure. *Spartan Mining*, 2008 W.L. 4287784, at *23 (FMSHRC Aug. 28, 2008). Judges are free to give greater weight to the negligence and gravity of a violation when assessing penalties. *See Lopke*, 23 FMSHRC at 713.

Negligence

Inspector Sichmeller cited the violation as high negligence because he issued CBS and Theil a citation for a similar violation a year-and-a-half earlier. (Tr. 34:21-35:4) Inspector Sichmeller argues this prior citation indicates the operator knew of the fall protection requirement. *Id.* CBS argues the violation should be reclassified as low or no negligence because Theil did not know, or have reason to know, of the violation and there were mitigating circumstances. (Resp. Br. 15)

The Mine Act is a strict liability statute, so negligence plays no role in citation issuance. 30 U.S.C. § 814(1). Inspectors must issue citations for violations of mandatory safety standards, regardless of operator negligence. *Musser*, 32 FMSHRC at 1272. However, negligence is

[12] The proposed penalty is the minimum amount for 104(d)(1) citation, which the Commission may not lessen if the violation is deemed S&S and an unwarrantable failure. 30 U.S.C. 820(a)(3)(A); *Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3103 (Dec. 2014).

considered in assessing civil penalties. *Asarco, Inc.*, 8 FMSHRC 1632, 1636 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989). In determining negligence for penalty purposes, "the conduct of a rank-and-file miner is not imputable to the operator." *Whayne Supply*, 19 FMSHRC 447, 451 (Mar. 1997) (quoting *Fort Scott Fertilizer*, 17 FMSHRC 1112, 1116 (July 1995). However, factors used to determine negligence include the "foreseeability of the miner's conduct, the risks involved and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983).

Negligence is "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). A violation is not negligent "when the operator exercised diligence and could not have known of the violative condition or practice." *Id.* A violation is low negligence "when an operator knew or should have known of a Mine Act violation, but there are considerable mitigating circumstances." *Id.* A violation is moderately negligent when "an operator knew or should have known of a Mine Act violation, but there are mitigating circumstances." *Id.* Finally, a violation is high negligence "when an operator knew or should have known of Mine Act violation, and there are no mitigating circumstances." *Id.*

Mitigating factors are also weighed in this analysis. A mitigating factor is something an operator does affirmatively, with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions.

As discussed in terms of the unwarrantable failure analysis, CBS argues Theil did not know, or have reason to know, of the violation. I find this argument unpersuasive. CBS also argues the citation should be reclassified as low or no negligence because there were mitigating circumstances. (Resp. Br.15) Firstly, CBS argues MSHA's issuance of the PPL, which indicated inspectors may use the OSHA six-foot rule as guidance, was a mitigating factor. *Id.* However, the PPL addressed citations issued under § 56.15005, not § 56.11027. (Ex. R5-001) More importantly, the PPL "leaves room for site specific evaluation." *Boart Longyear Co.*, 35 FMSHRC 3680, 3687 (Dec. 2013) (ALJ Barbour). Inspector Sichmeller testified the PPL was a "guideline for inspectors to use," but that they were not bound to follow the OSHA six-foot rule. (Tr. 44:12-45:19) Thus, Inspector Sichmeller was not bound to the interpretation put forth by MSHA in the PPL, and it was not a mitigating factor.

Secondly, CBS argues its meeting with U.S. Steel prior to the start of the job was a mitigating factor. (Tr. 12:9-13) However, the employees deviated from the plan discussed at the meeting when they used the conveyor belt as a working platform. (Tr. 85:1-86:7) Theil testified building the temporary structure and standing on the conveyor belt was a "spur-of-the-moment decision," and that the employees had to "improvise." *Id.* There is also no proof CBS told U.S. Steel that work on the basement conveyor belt would be performed from any surface other than the floor. For these reasons, I find the meeting was not a mitigating factor. Additionally, I believe allowing employees to change work plans without supervisor approval is a dangerous business practice.

I find CBS knew, or should have known, handrails were required when the employees were on the conveyor belt bed and temporary structure. Since there were no mitigating circumstances, I find the violation was properly cited as high negligence.

Gravity

Inspector Sichmeller testified a fall from the conveyor belt could reasonably be expected to result in lost workdays or restricted duty. (Tr. 25:6-9) In assessing civil penalties, the Commission also considers the "gravity of the violation." 30 C.F.R. § 820(i). Gravity is usually viewed in terms of "the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg*, 5 FMSHRC at 294-95). Specifically, the standard refers to "the effect of the hazard if it occurs." 18 FMSHRC at 1550. The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured.

Inspector Sichmeller's gravity designation was based on his belief that a fall from 55-inches could result in a sprain-strain, broken bones, and, even, a fatality. (Tr. 25:10-15) Inspector Sichmeller found such injuries were likely to result from a fall based on his experience as an MSHA inspector and accident investigator. (Tr. 25:17-26:6) The citation alleges two people would be affected, which is reasonable given that two employees were working on the "basement" conveyor belt. (Ex. GX 2) Based on these assertions, I find an injury was reasonably likely and would have been serious, possibly resulting in lost work days or restricted duty.

Other Considerations

In addition to negligence and gravity, the Commission must consider the operator's history of previous violations, the appropriateness of the penalty to the size of the business of the operator charged, the effect on the operator's ability to continue in business, and the demonstrated good faith abatement of the violative condition when assessing penalties. 30 U.S.C. § 820(i). The parties agreed to the stipulations that the penalty will not affect CBS's ability to stay in business and that CBS abated the violation in good faith. (Tr. 93:22-35)

As discussed earlier, Inspector Sichmeller cited CBS and Theil for a violating another fall protection standard a year-and-a-half before the incident at the Minntac Mine. (Ex. G9) This shows CBS had a previous history of violations. Finally, while there is no information about CBS's size in the record, there is no evidence to support a finding that the penalty was inappropriate in proportion to the size of the business.

I find CBS was highly negligent in failing to require the use of handrails on the conveyor belt. Additionally, I find this violation was reasonably likely to result in lost work days and restricted duty. I do not believe there are any additional considerations supporting a lessened penalty. Moreover, because I find the violation was S&S and an unwarrantable failure, $2,000 is the lowest possible penalty for the citation. 30 U.S.C. 820(a)(3)(A); *Hidden Splendor Res., Inc.*, 36 FMSHRC at 3103. For the foregoing reasons, I find the penalty was properly assessed at $2,000.

WHEREFORE, it is **ORDERED** that Conveyor Belt Services, Inc. pay a penalty of **$2,000.00** within thirty (30) days of the filing of this decision.

L. Zane Gill
Administrative Law Judge

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