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July 13, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. WM D. SCEPANIAK, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2015-138 A.C. No. 21-02760-364875 Mine: Plant 2

DECISION

Appearances: Emily Hays, United States Department of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

Aaron Dean, Moss & Barnett, Minneapolis, Minnesota, for Respondent.

Before: Judge Miller

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). This docket involves one 104(d)(1) citation with a total proposed penalty of $2,000.00. The parties presented testimony and evidence regarding the single citation at a hearing held in Minneapolis, Minnesota.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Wm. D Scepaniak, Inc.'s Plant 2 is a surface sand and gravel operation located in Norman County, Minnesota. The parties have stipulated to the jurisdiction of MHSA and the Commission. Sec'y Prehearing Report 2; Respondent Prehearing Report 3.

Citation No. 8847805 was issued by Inspector Wilbert Wayne Koskiniemi on August 12, 2014 pursuant to section 104(d)(1) of the Act for an alleged violation of 30 C.F.R. § 56.9301. The citation alleges that two dump trucks were backing up to the edge of an overburden dump without berms, bumper blocks or other safety devices in place to stop the trucks from going over the edge and down the twenty foot drop to the pit below. Koskiniemi determined that the condition was reasonably likely to result in a fatal injury, affected one miner, was S&S, and was the result of the operator's high negligence and unwarrantable failure to comply with the mandatory standard. The Secretary has proposed a civil penalty in the amount of $2,000.00 for the alleged violation.

For the reasons that follow, I affirm the citation, find that the violation was S&S, and find that the violation was a result of the operator's high negligence and unwarrantable failure to comply with the mandatory standard.

The Violation

On August 12, 2014 MSHA Inspector Wayne Koskiniemi was driving near Respondent's Plant 2 on his way to inspect another operation. While on the road near the plant, Koskiniemi observed two caterpillar dump trucks backing up in an area of loose, unconsolidated overburden material. The trucks were backing to the edge of an overburden dump and then dumping their loads down a twenty foot bank to the area below. There were no berms, bumpers or other safety devices in the area which would have prevented overtravel. Koskiniemi stopped his car, took a photo of one of the trucks dumping over the edge, Sec'y Ex. 6, Photo 1, and turned around to travel to Respondent's mine.

Wayne Koskiniemi has been a mine inspector for three years, and routinely inspects sixty sand and gravel operations each year. Prior to being trained as a mine inspector he worked in the mining industry and owned and operated an excavating company. He also worked as a police officer for 22 years, retired as a police chief, and spent time as a marshal.

When Koskiniemi entered the mine he observed two large haul trucks traveling from the load site in the work area to the overburden dump site, and dumping dirt and material while driving on the loose overburden material. He testified that he saw two trucks repeatedly back up to the edge of a twenty foot high bank, with no berm, bumper or other guard in place to prevent overtravel, and dump their load over the edge. Koskiniemi located a foreman, Eric Luethmers, waiting nearby in the cab of a front end loader. The inspector approached Luethmers and advised him that the trucks must stop dumping immediately and that an imminent danger order was being issued. Luethmers indicated that he had radio contact with the drivers and instructed them to stop dumping. At that point, one of the trucks pulled over to the edge and began dumping from the side of the truck. The truck, as observed by Koskiniemi, is pictured in Sec'y Ex. 6, Photo 3. In Koskiniemi's view, dumping from the side was even more dangerous than from the back since the side of the truck was raised shifting the weight in that direction, over the embankment. The dump truck was in the loose overburden material, directly next to the edge of the dumping area. Luethmers told the inspector that he was the on-site supervisor and he had instructed the drivers to dump as they were doing. Luethmers explained that the dozer, which usually moved the overburden from the dump location to the edge and over, also normally created a berm to prevent the trucks from backing too close to the edge. On the day of the inspection the dozer was down for repairs, and had been down since the previous week. Luethmers explained to the inspector that it was too difficult to move the dirt with the front end loader and, instead, he was watching the drivers and calling them by radio if he observed them drive too close to the edge or saw that they were sinking into the soft ground.

After speaking with Luethmers and one of the angry mine owners by telephone, Koskiniemi spoke to each of the dump truck drivers. Both of the drivers had less than one year mining experience, and their experience was not as truck drivers, but primarily as welders in the shop. Each driver had been task trained to drive a dump truck about one week prior to this

incident, and their experience was limited to driving on the pit floor, not dumping in overburden above a twenty foot bank. The drivers indicated to Koskiniemi that, as they backed up, they were looking into the sun and often had to put their head out the window of the cab to see. At hearing both drivers testified on behalf of the mine operator and offered a bit more, but slightly different version of facts. At hearing, each driver stated that they were instructed to back up to within 7-8 feet of the dump, and not go right up to the edge. They said they were told to drive as close to the edge as they felt comfortable and that Luethmers would call on the radio if he saw them drive too close to the edge or start to sink in the soft material. The overburden pile on which they were driving was not compacted so the trucks often got stuck in deep ruts that were one to two feet deep, causing the drivers to have to move forward in an attempt to maneuver the trucks out of the ruts in order to get closer to the edge to dump.

The drivers believed the wheels of each truck stayed eight feet from the edge, but agreed that the bed of the truck may have been closer to the edge when dumping the material. They both indicated there was a "slight" berm where they were dumping the overburden each time. However, because they were told to stay out of the ruts, they dumped at different locations along the edge with each pass. Both drivers had been working at this task from the beginning of the shift, and each had completed approximately ten dumps prior to the arrival of the inspector. Based upon his conversation with Luethmers, the inspector believed the mine had been dumping material in a similar manner on previous days, but the two drivers confirmed that this was their first day dumping overburden, and the first working day that the dozer was not on site to push the overburden. While Luethmers told the inspector that he was using the front end loader to level out the driving area and clean up the ruts, he did not suggest that he was using it to create berms or push the overburden over the edge. Rather, he told the inspector that it was difficult to push the material with the front end loader.

Koskiniemi explained that the trucks traveling near the edge as he observed, were certain to go over, slip or slide in the loose material, or overturn. In either instance, the driver would be killed. Based on his observations, Koskiniemi issued Citation No. 8847805 for a violation of section 56.9301 which requires that berms, bumper blocks, safety hooks or other impeding devices be provided at dumping locations where there is a hazard of overtravel. 30 C.F.R. § 56.9301. An imminent danger order was issued at the same time, but the operator did not contest that order.

The Secretary argues that, based upon the inspector's observations, and as demonstrated in the photographs, the violation was obvious. There is no question that berms or bumpers were not present and that a truck could easily overtravel, or even slide in the loose material as it got close to the edge. The Secretary argues that the mine was going to continue operating the trucks in this manner and that it was highly likely that a truck would overtravel or overturn while backing over the loose material to get close to the edge to dump. The operator argues that there was no violation because there was no hazard of overtravel and, therefore, there was no need for a berm or bumper block to prevent the trucks from backing over the edge as they dumped. Further, the front end loader, and not the trucks, was moving dirt to the edge and, as result, there was no possibility of overtravel. The mine also argues that the dumps made by each truck sometimes created a "berm," that the trucks were not as close to the edge as the inspector

suggested and that sinking into the loose dirt created a kind of rut, or bumper, that would protect the trucks from backing up too close to the edge.

I find that a violation of the standard occurred. While the mine argues that there were some berms present, I credit the inspector's testimony that there were no berms or spoil piles that were high enough to be considered berms. Further, there were no bumper blocks, hooks or other devices in the area to prevent overtravel. I find no argument made by the operator to be persuasive. Moreover, I find the inspector to be credible, and his photographs clearly show the dump trucks dangerously close to the edge. I find that there is a clear danger of overtravel and that berms at the correct height, or other devices to prevent overtravel, were required in this area. I find that there were no such protections in place. I do not accept the mine's argument that the trucks sinking into the soil up to a depth of two feet created a block or bumper to prevent overtravel. That argument by the mine owner is clearly contrary to the testimony of the dump truck drivers who agreed that they tried to maneuver the trucks out of the deep ruts in order to back up closer to the edge to dump. In addition, I reject the mine's argument that the photographs show that tracked equipment, not trucks, were close to the edge of the dump. The photo referred to shows only one portion of the dump area, and, even if the tracks nearest the edge were made by a tracked piece of equipment there were tire tracks immediately next to those and dangerously close to the edge of the bank. Given the photos and the inspector's observations, I find that the trucks were close to the edge, that there was a very real hazard of overtravel, and no berms, bumper blocks, safety hooks or other impeding devices were present. Therefore, I affirm the violation.

S&S and Gravity

Scepaniak argues that there is no evidence that there was a hazard of overtravel or of the truck overturning while dumping and, consequently, there is no evidence that the violation was S&S. The Secretary argues that, because the large dump trucks were traveling in unconsolidated material, and backing very close to the edge to dump their loads, without any means to prevent overtravel, they were very likely to back over the edge, and any fall off of the twenty foot high ledge in a large dump truck would have resulted in injury or death to the driver. I agree that it is likely that, if the trucks continued to operate as observed by the inspector, one would back over the edge, resulting in death or serious injury to the miner. Accordingly, I find that the violation is significant and substantial.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(l). A violation is properly designated significant and substantial "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained its interpretation of the term "significant and substantial" to be:

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

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula, in which the Secretary must establish that there is a reasonable likelihood that the hazard will result in an injury. The Commission has explained that the third element of the formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984). The Commission discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257 (Oct. 2010) (affirming an S&S violation for using an inaccurate mine map). The Commission clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury" but that the hazard created would cause an injury. *Id.* at 1280-81. The Commission reaffirmed its position in *Cumberland River Coal,* 33 FMSHRC 2357, 2365 (Oct. 2011) where it "emphasized the well-established precedent that 'the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.'" (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

The overwhelming weight of the evidence shows that an accident was highly likely to occur. Koskiniemi testified that the trucks backing up in the loose soil, to within feet of the edge, would at any time travel over the edge. There was no berm or other safety device in place to prevent overtravel, and, if a truck went over the edge, it would result in a serious accident. Koskiniemi testified that the drivers were both new to driving a large dump truck. They had been task trained to do the job on the level floor of the pit just the week prior, and this was the first instance they worked at this task of dumping atop the spoil pile. The drivers had difficulty using their mirrors, were looking out the side windows of the truck, and were looking into the sun. I find that drivers in these circumstances could easily misjudge the distance, or come close enough to be caught in the loose soil and slide or fall over the edge. As the truck dumped, the weight of the load shifted toward the edge of the pile. The two drivers were told to drive about 7-8 feet to the edge, or to a distance that was comfortable. It is clear from the photos taken by the inspector that the wheels were dangerously close to the edge and, when the bed of the truck was raised to dump, the bed was right at the edge. The inspector observed one truck dumping to the back and then another, dumping its load to the side directly at the edge. He also observed tire tracks near the edge of the dump site. There were no berms in place to keep the trucks from backing too far, or from going over the edge as they dumped their loads. The work of dumping had been going on since the start of the shift and would have continued had the inspector not observed the actions of the mine as he drove by. Under these circumstances, I find it highly likely that one of the trucks would have overtraveled the area, or would have slid with the loose material at the edge as it dumped. The hazard associated with overtravel of the large trucks is

falling over the edge, landing in some fashion at the bottom, thereby causing serious injury or death to the driver.

The Commission has recognized the serious nature of trucks backing to the edge without berms to prevent overtravel. In *Buffalo Crushed Stone, Inc.*, 16 FMSHRC 2043 (Oct. 1994), the Commission, in overturning a judge's finding that a violation was non-S&S, found that the lack of adequate berms near the edge of a stockpile, combined with the shift in weight that trucks experience as they dump their loads at the edge of a stockpile, made it reasonably likely that an injury producing event would occur. While in *Buffalo Crushed Stone* berms of inadequate height were present, here, there were no berms in place.

Koskiniemi testified that he is aware of at least two similar situations where a truck backed to the edge and went over the side, killing the driver. One incident occurred shortly after the citation was issued. In that incident, the truck driver, who had more than ten years of experience, was killed when he backed a haul truck to the edge of the overburden dump site and started to raise the truck's bed. The bank failed and the truck overturned and fell thirty feet below. Sec'y Ex. 8. A similar accident occurred several years before the citation at issue when a driver backed his truck to the edge of a stockpile to dump, went over the crest, and fell 30 feet below, killing the driver. Sec'y Ex. 10.

Respondent did not contest the imminent danger order that was issued alongside this citation. While the Commission has explained that the failure to contest an imminent danger order does not, by itself, establish the validity or S&S designation of a related citation, *see e.g., Wyoming Fuel Co.*, 16 FMSHRC 1618, 1625-26 (Aug. 1994), it has held that what constitutes an imminent danger involves an element of impending danger that does not necessarily need to exist to sustain an S&S designation for a violation, *Eastern Associated Coal Corp.*, 13 FMSHRC 178 (Feb. 1991), and that the conditions necessary to establish a S&S finding are "very distinct from, and far less dangerous than, those" which are necessary to find an imminent danger. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2340 (Aug. 2013). Accordingly, here, while the mine's acceptance of the imminent danger order does not establish the S&S nature of the citation, it does carry some weight with regard to the mine's acknowledgement regarding the seriousness of the cited condition.

I have found that a violation of a mandatory standard occurred and that the violation would result in a dump truck traveling over the edge of a twenty foot drop. The inspector explained that a large dump truck dropping to the bottom would be violent and would undoubtedly result in death to the driver. Therefore, I find that the violation was significant and substantial.

Unwarrantable Failure and Negligence

Koskiniemi observed the trucks from the road, and immediately saw that they were backing up dangerously close to the edge of the dump site. The trucks were driving on loose, unconsolidated material. He learned that the mine management, who had purportedly tasked trained the two drivers just days before, was aware of the way the dumping was progressing. The inspector spoke with the immediate supervisor, who was in a front end loader watching the

trucks dump. The supervisor told the inspector that he had instructed the trucks how and where to dump. The drivers had been instructed to back the trucks to the edge of the dump to unload and, therefore, the inspector believed this conduct to be aggravated. There were no berms, bumpers, or other measures in place to prevent the trucks from overtraveling the area and falling into the water below. Based on his observations and the information he learned from the supervisor, Koskiniemi designated the citation as high negligence and an unwarrantable failure to comply with the mandatory standard.

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 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc.*, 52 F.3d at 136 (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 or posed a high degree of danger; and 6) 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. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998) (Commissioner Marks, concurring in part and dissenting in part).

Based on the following analysis of the factors outlined by the Commission, I find the violation was a result of the mine's high negligence and unwarrantable failure to comply with the mandatory standard.

Length of time that the violation has existed. In *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009) the Commission emphasized that the duration of time that the violative condition existed is a "necessary element" of the unwarrantable failure analysis. There, the Commission noted that the presiding judge had failed to address the duration of the violative condition as a factor in his unwarrantable failure analysis. The Commission, in remanding the case, instructed the judge to address the duration of the violative roof condition, which was found to have existed for multiple shifts and days, and determine if that duration qualified as an aggravating factor. However, the Commission explained that the court, in conducting its analysis of the duration factor could be affected by the operator's reasonable "good faith" belief that the violative condition, in that case kettle bottoms, did not exist. In *Coal River Mining, LLC*, 32 FMSHRC 82 (Feb. 2010), the Commission further explained that, even where the record of a case does not allow a judge to make a determinative finding with regard to how long a violative condition existed, the judge

must analyze the element and "even imperfect evidence of duration in the record should be taken into account[.]" While the Commission has found that a duration of a "matter of seconds" may weigh against an unwarrantable failure finding, it has also held that even a duration of a few minutes may support an unwarrantable failure finding. *Compare Dawes Rigging & Crane Rental*, 36 FMSHRC ___, slip op. 5 (Dec. 10, 2014) (noting that a miner who traveled under a suspended boom was only exposed for a "matter of seconds," which in turn weighed against a finding of unwarrantable failure), *with Midwest Material Co.*, 19 FMSHRC 30 (Jan. 1997) (Finding that a judge erred in relying upon the brief duration of the violation when vacating the unwarrantable failure designation. Noting that the only reason the duration of the violation ended was because a crane boom crushed and killed a miner who should not have been working under the boom).

Here, the inspector initially believed that the violative condition, backing up the dump trucks without a berm in place, had been ongoing for several days. However, the testimony elicited at hearing demonstrated that the activity had been ongoing for only the day of the violation. The dozer, which normally moved the overburden from the dump location to the edge, and created the berms, had been down since the previous week. However, the mine was not engaged in removing overburden at this pit for several days. Therefore, the condition existed for just one day. Nonetheless, each truck driver had made at least ten hauls and dumps prior to the inspector's arrival. Given that each dump created a hazard, the length of time is significant. Additionally, the dumping procedure would have continued for the remainder of the day had the inspector not arrived. Given the circumstances here, I find that the amount of time the condition existed is significant and a relevant factor to the unwarrantable determination.

Extent of the violative condition. In *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009), the Commission explained that the "extent of the violative condition is an important element in the unwarrantable failure analysis." The Commission has explained that the purpose of this element is to "account for the magnitude or scope of the violation[,]" and the judge may analyze it by looking at, among other things, the "extent of the affected area as it existed at the time the citation was issued[,]" the number of persons affected, and the time and resources required to correct the condition. *Dawes Rigging & Crane* Rental, 36 FMSHRC ___ , slip op. 5 (Dec. 10, 2014) (citing *E. Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010) and *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 681 (July 2002)); *Consolidation Coal Co.*, 35 FMSHRC 2326, 2331 (Aug. 2013).

I find that this violation was extensive. Even though only two miners were involved, they constituted two-thirds of the workers in the area. The other worker, who was watching and directing the activity, was a supervisor. The entire overburden area, which is shown in the photographs, was involved, and the edge the drivers were exposed to was some distance in length. The drivers explained that they dumped the length of the overburden bank in an effort to avoid the ruts made by previous dumps, therefore using the entire area while engaging in the activity. The dumping was not isolated to one area but engaged the entire overburden area and the twenty foot drop below.

Whether the operator has been placed on notice that greater efforts were necessary for compliance. The Commission has explained that repeated similar violations, even if those

prior violations were not a result of an unwarrantable failure, and past discussions with MSHA about a problem at the mine may serve to put an operator on notice that increased efforts to comply are necessary. *IO Coal Co.*, 31 FMSHRC 1346, 1353-1354 (Dec. 2009). Prior violations need to have involved precisely the same activity, cited standard, or area of the mine. *Id.*; *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 561 (D.C. Cir. 2012); *Consolidation Coal Co.*, 35 FMSHRC 2326, 2344 (Aug. 2013). A court may consider an operator's argument that it had a reasonable good faith belief that the cited condition was not violative and weigh that against this this and other factors in the unwarrantable failure analysis. *IO Coal Co.*, 31 FMSHRC 1346, 1353-1354 (Dec. 2009); *Sierra Rock Products*, 37 FMSHRC ___ (Jan. 13, 2015).

The Secretary did not present any evidence as to this element, except the violation history for the past 15 months, which shows no violation of this standard. Therefore, for purposes of this unwarrantable analysis, I do not find any repeated similar violations.

Operator's efforts in abating the violative condition. In evaluating the operator's efforts in abating the violative condition the judge should examine those abatement efforts made prior to the issuance of the citation or order. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2342 (Aug. 2013) (citing *IO Coal Co.*, 31 FMSHRC 1346, 1356 (Dec. 2009) and *Warwick Mining Co.* 18 FMSHRC 1568, 1574 (Sept. 1996)). In *Consolidation* the Commission, in affirming the unwarrantable failure designation, noted the judge's finding that management did not make efforts to remedy the type of condition cited despite being aware of a similar condition having been previously brought to their attention through the issuance of a citation.

Here, there was no evidence that the mine operator made any effort to abate the violation. Instead, the mine operator encouraged and directed the violation. One of the owners of the company indicated that he had assisted in task training the drivers a few days prior to the incident, but there is nothing to indicate that he gave them adequate information about safe driving. In fact, the owner made excuses and attempted to argue that sinking into the ground, causing ruts, prevented the trucks from backing too far and, therefore, there was no violation. Of the three employees working in the overburden area on the day of the inspection, one was a supervisor who was directing the workforce and had directed the truck drivers to back up as close to the edge as they could, within 7-8 feet and then dump. No efforts were made to keep the trucks back from the edge or to provide a berm to prevent overtravel. I find that the mine made no effort to abate the condition.

Whether the violation posed a high degree of danger. The Commission has found the high degree of danger posed by a violation to be an aggravating factor in support of an unwarrantable failure finding. *IO Coal Co.*, 31 FMSHRC 1346, 1355-1356 (Dec. 2009). The Commission has acknowledged that, conceivably, the degree of danger could be "so severe that, by itself, it warrants a finding of unwarrantable failure." *Manalapan Mining Co.*, 35 FMSHRC 289, 294 (Feb. 2013). When a mine operator ignores a chronic problem, the degree of danger and likelihood of something going wrong increases. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2343 (Aug. 2013). In *IO Coal* the Commission, in remanding the case to the judge, noted that, while the judge had made findings about the dangerousness of the condition in his analysis

of whether a S&S violation existed, he failed to incorporate those findings into his unwarrantable failure analysis. 31 FMSHRC 1346, 1355-1356 (Dec. 2009).

In *Virginia Slate Co.*, 24 FMSHRC 507 (June 2002) the Commission remanded a judge's finding that a violation of section 56.9301 was not unwarrantable and instructed him to consider all of the aggravating factors, including the degree of danger posed by the violations, the operator's knowledge of the violations, and any abatement efforts. There, a mine operator was found to have violated the standard when it failed to provide berms, bumper-blocks, safety hooks, or another device for the front-end loader that loaded the hopper of the crusher. The Commission, in remanding the unwarrantable failure issue to the judge, noted that the judge needed to consider whether the violation posed a high degree of danger, especially given the court's finding that there was a danger of the load overturning due the lack of berms.

In this case, the high degree of danger is one of the most significant factors in the finding of unwarrantable failure. The mine had two drivers who normally worked in the shop and had been task trained to drive the trucks at the bottom of the pit. These two miners, one of whom had worked at the mine only a few weeks, were instructed to haul overburden and back up as close to the edge as they felt comfortable to dump the overburden near the twenty foot drop. The new miners had little to no experience, and were looking behind them into the sun. The material the miners were driving on had just been dumped and consisted of loose unconsolidated material that would allow them to sink, and could easily shift and move down the hill. There were no berms in place, and driving near the edge could have easily resulted in a slide of material, which would have caused the truck to overturn. Moreover, the risk of one, or both, of the trucks traveling over the edge was an ever-present serious danger. The violation clearly posed a high degree of danger.

Whether the violation was obvious. The obviousness of the violative condition is an important factor in the unwarrantable failure analysis. *IO Coal Co.*, 31 FMSHRC 1346, 1356 (Dec. 2009). Moreover, where an operator's conduct causes a violative condition to not be obvious, the operator cannot assert that the lack of obviousness is a mitigating factor in the unwarrantable failure analysis. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2343 (Aug. 2013) (citing *Eastern Assoc. Coal Corp.*, 32 FMSHRC 1189, 1200-01 (Oct. 2010)) (upholding judge's unwarrantable failure finding where the operator deliberately ignored air velocity requirements in the mine's ventilation plan).

Along with the extreme danger of the dumping activity, the obviousness of the violation is a major factor in the unwarrantable finding in this instance. The inspector was not on the mine property and, rather, was driving along the road just outside the mine when he saw the violation and the imminent danger it posed. The violation was obvious from the road, and should have been obvious to anyone at the mine site. When the inspector entered the mine property, he could see the further extent of the violation, the two trucks being loaded with overburden, driving in the area of unconsolidated material, with the obvious lack of berms or any other device to stop overtravel. In addition, the supervisor told the inspector that he had been watching the operation and would call the trucks on the radio if they got too close to the edge or if he thought they were sinking into the loose ground. A trained supervisor, or any person familiar with mining

activities, should immediately recognize the hazard cited by the inspector. The violation was not remote or hidden, but was obvious to any person who observed the activity, even from afar.

Operator's knowledge of the existence of the violation. In *IO Coal* the Commission reiterated the well settled law that, in addition to actual knowledge, an operator's knowledge of the existence of a violation may be established where the operator "reasonably should have known of the violative condition." *IO Coal Co.*, 31 FMSHRC 1346, 1356-1357 (Dec. 2009). The Secretary may establish that an operator "reasonably should have known of the violative condition" by showing that the "operator's knowledge of the specifics of its operations should have led it to conclude that violation charged would eventually occur[.]" *Eastern Assoc. Coal Corp.*, 32 FMSHRC 1189, 1200-01 (Oct. 2010) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2002-04 (Dec. 1987) and *Coal River Mining, LLC*, 32 FMSHRC 82, 92 (Feb. 2010).

Inspector Koskiniemi testified that when he traveled to the location where the dumping was being done, he contacted a miner sitting in a front end loader who was observing the operation. The miner, Luethmers, told the inspector that he was the supervisor of the job. Later, the owner of the mine confirmed that Luethmers was in charge of the two truck drivers who were dumping into the overburden. Given that Luethmers was a part of management, he knew that the drivers were backing up to the edge of the overburden pile, and he was the one directing them to do so, I find that management had actual knowledge of the existence of the violation. This factor weighs heavily in the determination that the violation is unwarrantable.

Based on these facts and this analysis of those facts, I find that Respondent clearly demonstrated high negligence and that the violation was a result of its unwarrantable failure to comply with the mandatory standard. I find these factors to demonstrate aggravated conduct and therefore, the penalty is adjusted below to reflect the conduct and the imminent danger the conduct created.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that "in assessing civil monetary penalties, the Commission [ALJ] shall consider "six statutory penalty criteria which include the history of violations, the size of the operator, the negligence, gravity, the ability to continue in business and good faith abatement. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 114 7 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is "bounded by proper consideration of the statutory criteria and the deterrent purpose[s] . . . [of] the Act. *Id.* at 294; Cantera *Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence and shows a reasonable history for this mine. The mine is a fairly small, seasonal operator. The parties have stipulated that the penalties as proposed will not affect the mine's ability to continue in business, and that Respondent demonstrated good faith in abating the citation. The gravity of the violation is greater than the Secretary originally assessed. The two drivers, who had spent one day being trained in a level area, were put in a position where they could easily have been killed. The operator did not dispute that their actions constituted an imminent danger. The negligence and unwarrantable failure finding are discussed above. Since the violation is very serious, a higher penalty is in order, and, considering the size of the operator, I find that a penalty of $2,500.00 is appropriate.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C.§ 820(i), I assess a penalty of $2,500.00 for Citation No. 8847805. The Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $2,500.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

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