FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. LINCOLN LEASING CO., INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2012-1783 A.C. No. 46-09096-298495 Mine: Pocahontas Highwall Mines

DECISION AND ORDER

Appearances: Noah AnStraus, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, for Petitioner;

Alexander Macia, Esq., Spilman Thomas & Battle, PLLC, Charleston, WV, for Respondent.

Before: Judge L. Zane Gill

This proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves one section 104(d)(1) citation and one 104(d)(1) order, 30 U.S.C. § 814(d)(1), issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Lincoln Leasing Co., Inc. ("Lincoln Leasing" or "Respondent") at the Pocahontas Highwall Mine. The parties presented testimony on May 21 and 22, 2014, in South Charleston, West Virginia.

For the foregoing reasons, I find there was a violation of 77.1605(b) for Citation No. 8142705, the citation was properly designated as significant and substantial, two persons were affected, the operator was highly negligent, and there was an unwarrantable failure. I find there was a violation of 77.410(c) for Order No. 8142706, the order was properly designated as significant and substantial, one person was affected, the operator was moderately negligent, and there was no unwarrantable failure.

Stipulations

The joint stipulations were read into the record at the hearing: (Tr.1 at 24:10 – 26:10)[1]

[1] Tr.1 refers to the transcript for the first day of the hearing and Tr.2 for the second day.

1. The Respondent is an independent contractor whose headquarters are located in Lincoln County, West Virginia. The Respondent provides trucking services for the purpose of hauling coal. At the time of the citation and order entered in this case, the Respondent was working for Pocahontas Highwall Mines located in Raleigh County, West Virginia.

2. The Respondent is subject to the Mine Act.

3. The Respondent has an effect on interstate commerce which is contained in the Mine Act.

4. The Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and stipulates that the administrative law judge has the authority to hear this case and issue a decision.

5. The citation and order identified in the Petitioner's petition as well as any modifications thereto were properly served by a dually authorized representative of the Secretary of Labor to MSHA upon an agent of the Respondent on the date and place stated therein.

6. The MSHA inspector named herein was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued the citation that is the subject of this hearing.

7. The Respondent demonstrated good faith in promptly correcting the conditions alleged.

8. The parties stipulate to the authenticity of the following exhibits that may be used in trial:
   a) Citation Number 8142705 issued on February 13, 2012
   b) The termination of Citation Number 8142705, (Citation Number 8142705-01) issued on February 16, 2012;
   c) Order Number 8142706 issued on February 13, 2012;
   d) The termination of Order Number 8142706, (Order Number 8142706-01) issued on February 16, 2012; and
   e) The inspection notes of Inspector Vincent Nicolau dated February 13, 2012, and February 16, 2012, related to Citation Number 8142705 and Order Number 8142706.

Preliminary Matter: The Secretary is Entitled to an Adverse Inference Against Respondent Based on Spoliation

At the hearing, the Secretary made a motion for an adverse inference based on Respondent's failure to produce pre-operational[2] examination records for the two weeks prior to the event in question. (Tr.2 at 215:4-7) Rather than decide the issue during the hearing, I directed the parties to address it in their post-hearing briefs. (Tr.2 at 215:13-19)

"It is well-recognized that if a party has control over a writing or other type of evidence, which is relevant to an issue, and fails to produce the evidence, an inference can be drawn that

[2] The Secretary and the Respondent use the terms preshift exam and pre-operational exam interchangeably.

the evidence would be adverse to the party." *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1359, n.11 (Dec. 2009). Indeed, "[w]hen a party intentionally destroys evidence in its control, a judge has discretion to draw an adverse inference that the evidence destroyed would have been unfavorable to the destroying party." *Dynamic Energy, Inc.*, 33 FMSHRC 1998, 2006-07 (Aug. 2001) (ALJ Paez) (citing *Kronsich v. U.S.*, 150 F.3d 112, 126 (2d Cir. 1998)). *McCormick on Evidence* provides that "[w]hen it would be natural under the circumstances for a party to ... produce documents or other objects in his or her possession as evidence and the party fails to do so, tradition has allowed the adversary to use this failure as the basis for invoking an adverse inference." 2 *McCormick on Evid.* § 264 (6th ed. 2006) at 220-21. Additionally, the Commission has held that an Administrative Law Judge must address missing preshift examination reports because the operator had them within its control and should have anticipated litigation. *See IO Coal Co., Inc.*, 31 FMSHRC at 1359, n.11.

Wylie Aaron Stowers , Vice President of Lincoln Leasing, testified that Lincoln Leasing does not have a document retention policy. (Tr.2 at 4:23 – 5:3; Tr.2 at 33:4-10; Tr.2 at 25:20-22) Stowers also testified that Lincoln Leasing did not decide to contest the citation and order until a month or more after their issuance. (Tr.2 at 35:6-19) According to Lincoln Leasing, when it came time to produce the pre-operational examination book, it could not find it. (Tr.2 at 34:3-9) Initially, it may seem that Lincoln Leasing was justified in not keeping the pre-operational reports because the Respondent did not decide to contest the citation and order immediately, thus the reports could be destroyed without concern. However, I find this argument unpersuasive.[3]

Before the citation and order were abated, Michael Smailes[4], the driver of Truck 159, testified that there were two bound 30-day pre-operational books in the truck, but after repairs were made on the truck on February 13, 2012, both books were missing, and he had to obtain a new book. (Tr.1 at 205:8-15) Additionally, although Lincoln Leasing claimed it did not have a document retention policy, and it could not produce the bound exam books, it was able to find

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

[4] At the time of the hearing, Smailes had worked for Lincoln Leasing on-and-off from 2008 to 2014 as a coal truck driver, a mechanic, and an equipment operator. (Tr.1 at 184:17-23) During his employment at the Kingston mine, he drove a truck and ran equipment, and at the Rocksprings mine he drove a truck. (Tr.1 at 185:22-24) While Smailes does not have formal mechanic training, he has been working on trucks his whole life. (Tr.1 at 187:5-9)

the reports for February 11, 12, and 13, 2012. (Ex. P-5)[5] It is troubling and highly suspect that Lincoln Leasing was able to produce reports for only three days, yet its pre-operational records were kept in a bound 30-day book. Despite this, Lincoln Leasing claims that no other reports could be found. Lincoln Leasing's document retention and production is suspiciously selective, especially since it was able to produce the pre-operational reports used to support its argument that the brakes were adjusted before the shift began. (*See* Resp. Br. at 38, 45-6)

When Lincoln Leasing destroyed or misplaced the pre-operational reports, it had control over the reports and knew it had an obligation to preserve them in anticipation of litigation. The Secretary is entitled to an adverse inference against Lincoln Leasing. However, in this instance, the adverse inference only applies to Citation No. 8142705 for inadequate brakes for the two weeks prior to the issuance of the citation and not for Order No. 8142706 for the broken back-up alarm. Smailes testified that he marked the problems with the brakes on the pre-operational record book for two weeks prior to the issuance of the citation. (Tr.1 at 193:18-21) Additionally, on the pre-operational reports produced, the brake issues were noted on all three, but an inadequate back-up alarm was not noted on any report. (Ex. P-5)

Basic Legal Principals

Significant and Substantial

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

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

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory

[5] The Secretary's exhibits are referred to as "P" and the Respondent's exhibits are referred to as "D."

> safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

The third element of the *Mathies* test presents the most difficulty when determining whether a violation is S&S. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: [T]he third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." (citing *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984)). The Secretary, however, "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). Further, the Commission has found that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005)); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC at 905; *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).

Negligence

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

The Commission has provided guidance for making the negligence determination in *A. H. Smith Stone Co.*, stating that:

> Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of

> negligence... In this type of case, we look to such considerations as 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.

5 FMSHRC 13, 15 (Jan. 1983) (citations omitted).

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

Gravity

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

Unwarrantable Failure

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

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); *see also Buck Creek* [*Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).

See Manalapan Mining Co., 35 FMSHRC 289, 293 (Feb. 2013). Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all

the facts and circumstances of each case to see if any aggravating factors exist. *Big Ridge, Inc.*, 34 FMSHRC 119, 125 (Jan. 2012) (ALJ Zielinski). These include:

> (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *See IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999).

Manalapan Mining Co., 35 FMSHRC at 293; *ICG Hazard, LLC*, 36 FMSHRC 2635, 2637, (Oct. 2014); *Sierra Rock Products, INC.*, 37 FMSHRC 1, 4 (Jan 2015); *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 at 18, *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consolidated Coal*, 22 FMSHRC at 353; *IO Coal*, 31 FMSHRC at 1351; *Manalapan Mining Co.*, 35 FMSHRC at 293. "Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation." *Big Ridge, Inc.*, 34 FMSHRC at 125; *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

Penalty

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

Under Section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith in abatement of the violative condition. 30 U.S.C § 820(i). Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties ... we find no basis upon which to conclude that

[MSHA's Part 100 penalty regulations] also govern the Commission."); *See American Coal Co.*, 35 FMSHRC 1774, 1819 (July 2013)(ALJ Zielinski).

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

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

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

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

Citation No. 8142705

On February 13, 2012, at 3:50 p.m., MSHA Inspector Vincent L. Nicolau[6] issued Citation No. 8142705 to Lincoln Leasing at the Pocahontas Highwall Mine alleging a violation of 30

[6] Nicolau began working for MSHA in May, 2007. (Tr.1 at 27:5-9) Nicolau has worked as a surface coal mine safety and health inspector and as a training instructor, and has received journeyman training, conference litigation representation training, mine elevator inspection training, fatal accident investigation training, and part 50 report and compliance training. (Tr.1 at

C.F.R. § 77.1605(b) pursuant to Section 105(d)(1) of the Mine Act. The regulation states that "[m]obile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes. " 30 C.F.R. § 77.1605(b). Section 77.1605(b) is a mandatory safety standard. The citation alleges:

> The Mack coal truck C/N: 159, S/N: 9PAE9651 operated by this contractor on this mine property is not currently equipped with adequate brakes. When a brake function test was performed, the truck readily rolled forward with little hesitation. A visual examination of the rear tandem brake components indicated severe deterioration of the driver's side rear axle brake shoe friction. This condition has been recorded and reported to the contractor supervisor for more than one shift. The pre-shift record for today indicated "[n]eed brakes on back" in the comments section. This record was signed and acknowledged by the contract supervisor who has engaged in aggravated conduct constituting more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory safety standard.

Ex. P-2.

Violation

The citation alleges that an injury was highly likely, could reasonably be expected to result in a fatality, the citation was S&S, a single person was affected, and that the negligence level was high. *Id.* Inspector Nicolau issued the citation because Lincoln Leasing violated Section 77.1605(b), "which requires vehicles to be equipped with adequate brakes." (Tr.1 at 57:11-13) He found that on Truck 159: (1) the slack adjusters were moving beyond the re-adjustment limit; (2) there was severe deterioration of the brake shoe friction; and (3) it failed the pull-through brake function test. (Tr.1 at 72:18 – 73:7)

On February 13, 2012, Nicolau was at the Pocahontas Mine conducting an EO1 inspection. (Tr.1 at 40:24 – 41:4) During his inspection, Nicolau traveled with Bruce Vance[7]

27:19-23) Additionally, he received training on surface haulage, which covered multi-axle dump trucks and articulated trucks their end loader brakes and air brakes. (Tr.1 at 35:20 –36:7) He received his AR card in June or July of 2008. (Tr.1 at 27:24 – 28:2) Before working at MSHA, Nicolau working for his father's excavation, demolition and construction business on a need bases from 1994 to 2007 where he owned, operated, and performed maintenance on several pieces of earth-moving equipment, dozers, and cranes. (Tr.1 at 30:9-17) He also attended a brake certification class where he received training in brake inspection. (Tr.1 at 28:23 – 29:24) Nicolau also has a commercial driver's license. (Tr.1 at 34:23 – 35:2)

[7] At the time of the hearing, Vance had been the maintenance superintendent at Pocahontas surface mine for five years (Tr.1 at 246:21 – 247:3) He was hired in 2007 as a mechanic and within three months he was the maintenance foreman. (Trl. at 247:7-15) All of his experience has been in surface coal mining. (Tr.1 at 248:2-7)

("Vance"), the maintenance foreman at the Pocahontas Highwall Mine. (Tr.1 at 43:22-23) At the end of the shift, Nicolau and Vance were heading back to the mine office in Vance's truck when Smailes hailed Vance on the CB radio. (Tr.1 at 44:18-22; Tr. 1 at 98:13-21; Tr.1 at 249:19 – 250:10)

Vance stopped his truck to speak to Smailes in person. Smailes informed Vance that the rear brakes on his truck, Truck 159, were in need of repair. (Tr.1 at 44:23 – 45:7; Tr.1 at 199:8-10)[8] Smailes explained that the brakes were so bad he did not want to drive downhill. (Tr.1 at 250: 15-19) Smailes also presented a page from his pre-operational examination checklist noting that the truck needed back brakes. (*Id.*; Tr.1 at 46:15-21; Tr.1 at 207:14-21; Tr.1 at 250: 15-19; Ex. P-5)[9] Vance told Smailes that he would contact Ledford Turley, Jr.[10] ("Turley") and make sure that his truck got fixed. (Tr.1 at 45:8-10)

As Vance and Nicolau began diving back to the mine office, Nicolau told Vance that he felt it was his duty to inspect all of the trucks on site, to which Vance agreed. (Tr.1 at 45:12-22) All of the trucks were waiting in line to be loaded, so Nicolau began his inspection at the beginning of the line. (Tr.1 at 45:23 – 46:9) He performed the same inspection and function tests with Truck 159 as all the others, including testing the low air alarms, lighting, and braking components. (Tr.1 at 53:18 – 54:5) He also performed a visual exam of the braking components and looked at the pre-operational checklist. *Id.*

Inspector Nicolau found two defects in Truck 159 that involved severe deterioration of the braking components. (Tr.1 at 46:24 – 47:12; Tr.1 at 50:1-6) First, Truck 159 failed the pull-through brake function test.[11] (Tr.1 at 55:7-17) Nicolau stood on the fuel tank on the driver-side to communicate with Smailes while he performed the pull-through test. The truck rolled through

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[8] Smailes did not know there was an inspector in the truck with Vance. (Tr.1 at 198:13-21; Tr.1 at 250:22 – 251:1)

[9] Smailes testified that he filled out the pre-operational forms differently than others. A checkmark indicated that the item inspected was OK; a circle meant it had been repaired, and an x-mark meant it needed to be repaired. (Tr.1 at 209:2-3) If he marked the third column, the condition needed to be fixed. (Tr.1 at 235:7-10)

[10] At the time of the hearing, Turley was working as a mechanic for Lincoln Leasing repairing coal trucks and heavy equipment. (Tr.2 at 38:16-24) He had been a mechanic since 1989. (Tr.2 at 39:3-4) Turley first began employment with Lincoln Leasing in 2001 as a mechanic and held that position until June of 2011 when he was promoted to truck boss or foreman. (Tr.2 41:21 – 42:22) At the time the citation was issued, he was the foreman for Lincoln Leasing.

[11] The brake function test is the only way the driver of the truck can test the brakes from inside the truck without having to be under the truck looking at the components. (Tr.1 at 54:14-20) The pull-through test is performed as follows: (1) the driver sets the park/emergency brake and then the truck is placed in second gear; (2) the driver lets the clutch out slowly; and (3) either the brakes are tight and hold the truck, or the truck rolls forward because the brakes are inadequate. (Tr. 1 at 54:21 – 5:6) The pull-through test checks the four rear brakes, the parking brake, and the spring brake, but it does not test the front two brakes. (Tr.1 at 166:6-9; Tr.2 at86:20 – 87:18)

the brakes without hesitation, indicating that the brakes were inadequate. (Tr.1 at 55:7-17; Tr.1 at 251:16-22) Second, when Nicolau visually[12] inspected the brakes, he found significant defects.[13] (Tr.1 at 54:6-7) The slack adjusters were out of adjustment, and there was severe deterioration of the driver's side rear brake shoe friction pad, including significant wear of the driver's side rear tandem brake lining, the drum, and the bushings which hold the S-cam. (Tr.1 at 56:16 – 57:2; Tr.1 at 67:15-23) Additionally, the push rod stroke was more than two inches, which exceeded the re-adjustment limit, also decreasing braking effectiveness. (Tr.1 at 69:12-19) The lining on the driver's side rear brake was severely deteriorated and worn down past a quarter of an inch, down to the rivets, which exceeded the out-of-service criteria. (Tr.1 at 69:22 – 70:4; Tr.1 at 71:24 – 72:3; Tr.1 at 74:6-9) A "lip"[14] had worn into the inside of the brake drum, also meeting the out-of-service criteria for the brakes. (*Id.*; 71:5-9) It was evident that the deterioration was significant enough to cause the truck to roll through the brake function test without hesitation.

For the above reasons, I find that Lincoln Leasing violated Section 77.1605(b).

Negligence

High negligence occurs when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* Nicolau assessed the violation at high negligence because the condition existed for more than one shift, its existence was acknowledged by Turley's signature on the pre-operational checklist, and the truck was placed into service despite this. (Tr.1 at 110:12-18; Tr.1 at 114:20 – 115:7; Tr.1 at 116:4-12; Ex. P-1)

Smailes presented the pages from his pre-operational examination checklist to Vance, and informed Vance that he told Turley, Vance's supervisor and Lincoln Leasing's truck foreman, about the brake problem, but nothing had been done about it. (*Id.*; Tr.1 at 44:23 – 45:7; Tr.1 at 46:15-21; Tr.1 at 207:14-21; Tr.1 at 250: 15-19; Ex. P-5) In Nicolau's opinion the deteriorated condition of the brakes existed for several shifts if not several weeks. (Tr.1 at 7: 21 – 76:4) The condition had been recorded and reported to the supervisor on at least February 11, 12, and 13, 2012. (Tr.1 at 87:23 - 88:1; Ex. P-5)

In the notes recorded in Truck 159's pre-operational examination forms, Smailes indicated on February 11, 2012, that the foot brake needed to be repaired and indicated that the "truck ... [was] not safe." On February 12, 2012, he noted that the truck "need[s] brakes on the back." On February 13, 2012, he also noted the truck "need[s] brakes on [the] back." (Tr.1 at 85:16 – 86:4; Tr.1 at 210:20 – 211:6; Ex. P-5) It is troubling that foreman Turley signed the pre-operational book on all three days, acknowledging the brake problem, but nothing was repaired.

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[12] Truck 159 did not have a dust guard covering the wheels, so both Smailes and Nicolau could actually see if the shoes were touching the drum. (Tr.1 at 228:17-23)

[13] Nicolau checked four out of the six brakes. He did not check all of them because the truck failed the pull through test and found it unnecessary. (Tr.1 at 72:4-16)

[14] A "lip" forms when brake shoe friction has eaten into the drum surface. If the friction wear is an eighth of an inch, it is considered out-of-service. (Tr.1 at 70:10 – 71:4)

(Tr.1 at 8:6-14; Tr.1 at 208:2) Smailes also raised the brake issue with Turley approximately six times over a two week period immediately prior to the issuance of the citation, to which Turley responded that the truck would be fixed, but it never was. (Tr.1 at 82:22 -83:11; Tr.1 at 192:6-9; Tr.1 at 235:21 – 236:4; Tr.1 at 201:15 – 202:9)

Despite Turley's testimony that Smailes never complained about the brakes on the truck in the period leading up to February 13, 2012, on page thirty-four of his deposition testimony, Turley admitted that Smailes told him about the brake issue prior to the citation being written. (Tr.2 at 108:9-18; Tr.2 at 109:9-11) Additionally, due to the adverse inference against Lincoln Leasing, *supra*, I infer that management knew of the brake problem for two weeks prior to the issuance of the citation and still did not remedy the problem.

Turley testified that when he was confronted by Smailes on the morning of February 13, 2012, he instructed one of his mechanics to adjust the brakes on the truck. (Tr.2 at 88:22 – 89:2; Tr.2 at 154:20- 24) After the work was complete, Turley signed the pre-operational form. (Tr.2 at 61:20 – 62:2) This testimony was confirmed by Tracy Man[15] ("Man"). (Tr. 2 at 143:9- 14) However, both Turley's and Man's testimony regarding the work performed on the brakes that morning is inconsistent with other credible evidence.[16]

Inspector Nicolau and Smailes both testified that on the day of the inspection, no work was done on Truck 159's brakes. (Tr.1 at 89:11-14; Tr.1 at 155:7-9; Tr.1 at 193:5-24; Tr.1 at 195:3-8; Tr.1 at 235:14-19) Upon visual examination of the brakes there was little or no friction material on the left rear shoe. Therefore, there was nothing for Man to adjust to make the brakes function. (Tr.1 at 89:3-10; Tr.1 at 155:10-13) Additionally, Smailes testified that he knew no mechanic had touched the truck because the slack adjuster froze while he was braking, indicating that there was no friction; thus, nothing could be adjusted on the brakes to fix the problem. (Tr.1 at 193:9-14; Tr.1 at 236:8 – 237:2) Further, Man did not sign or mark the pre-operational checklist indicating that repairs were made. (Tr.2 at 143:15-18) Therefore, I find that no work was done on Truck 159's brakes on the morning of February 13, 2012.

Even if I found Turley's and Man's testimony to be credible regarding adjusting the brakes the morning of February 13, 2012, their actions to remedy the brake problem would be arguably incorrect. (Tr.1 at 80: 13 – 82:8) Automatic slack adjusters, such as those on Truck 159, are not supposed to be manually adjusted. (*Id.*; Tr.2 at 203:7-15) Indeed, following the initial installation of automatic slack adjusters, if the automatic slack adjusters fail to automatically adjust, they are not functioning properly and must be replaced. (Tr.2 at 203:17 - 204:2) According to the Bendix automatic slack adjuster manual, manually adjusting the

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[15] At the time of the hearing Man worked as a mechanic and equipment operator at Lincoln Leasing. (Tr.2 at 130:6-11) At the time of the hearing Man had been working as a mechanic for approximately 15 years. (Tr.2 at 131:2-7) In February 2012, Man was the head mechanic with Lincoln Leasing. (Tr.2 at 132:12-14)

[16] Both Man and Turley made multiple inconsistent and factually unsupported statements that lead me to discredit their testimony, including testimony regarding when repairs were made to Truck 159, the fact that Smailes never told Turley there were bad brakes on Truck 159, and the fact that there was a dust guard on Truck 159 on February 13, 2012.

automatic slack adjusters could give a driver a false sense of security about the effectiveness of the brakes. (Tr.2 at 204:16-23)

On the day of the inspection, Nicolau met with Turley to discuss mitigating circumstances, but Turley admitted that there were none, and that he should have made sure the truck was safe. (Tr.1 at 110:19 – 111:18; Tr.1 at 156:8-12) Turley also admitted that he did not check to see if the brakes were fixed before signing the pre-shift examination form. (Tr.2 at 113:1-3)

It is clear from the record that Lincoln Leasing knew about the problem with Truck 159's brakes for weeks but did nothing to remedy the situation. I find that Lincoln Leasing was highly negligent.

Gravity

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. Nicolau indicated that the injury was highly likely and could reasonably be expected to result in a fatality. (Tr.1 at 90:3-6; Ex. P-2) Nicolau marked this citation as "one person affected" because there was a single driver in the truck. (Tr.1 at 96:3-8) However, Nicolau testified that defective brakes could also affect others in oncoming traffic. (Tr.1 at 96:11-14)

Nicolau testified that he had tested hundreds of trucks, and any time a truck rolls without hesitation during the pull-through test, there are severe brake issues. (Tr.1 at 90:8-17) Given normal mining operations, had he not intervened, the truck would still be used to haul coal and could potentially cause serious injury or death. *Id.* If an out-of-control truck were to strike another vehicle or a miner, it could cause a disabling injury or even death. (Tr.1 at 98:15-21) Additionally, a driver could lose control of his truck and drive over a drop-off. Therefore, it is highly likely that inadequate brakes could result in serious injury. I also find that two persons could be affected -- the driver and anyone else encountered in traffic.

Significant and Substantial

There was a violation of a mandatory safety standard. The faulty brakes were safety hazard and created a reasonable likelihood of serious injury. On February 13, 2012, if Smailes had needed to brake for any reason, he probably would not have been able to stop his truck.[17] (Tr.1 at 200:15-20; Tr.1 at 230:3-10) Smailes testified that driving Truck 159 was very dangerous, and the only way he would have been able to stop was to drive it into a ditch. (Tr.1 at 230:3-10; Tr.1 at 200:21-23) The mine road where trucks hauled coal was muddy and rutted and had a grade of 4% to 17%. (Tr.1 at 92:6-19) With brakes in the condition described here, it would be difficult to stop a truck with an empty weight of approximately 10 -12 tons, and more

[17] Smailes testified that he put the truck in low gear to keep it from crashing while he was hauling coal. He also testified that he used the engine jake brake, which only slows the truck down; it will not stop the truck. (Tr.1 at 199:16-20) Nicolau testified that the likelihood of injury was high under those conditions. (Tr.1 at 90:20 – 91:4)

so one weighing 40 tons when loaded, on a relatively flat surface. (Tr.1 at 92:23 – 93:4) Adding a grade to the road causes the danger to increase significantly. Furthermore, the road at this mine was made of shale, old sandstone, and dirt from the old highwall, which easily became muddy. (Tr.1 at 48:12-21) Additionally, while the mine road had two-way traffic, it was only wide enough for one truck to pass at a time on approximately 80-85% of the road. Unloaded trucks would have to wait on the side until the loaded trucks passed. (Tr.1 at 259:23 – 260:7; Tr.1 at 94:1-4) The mine road was used by everybody associated with the mine including mechanics, fuelers, greasers, highwall personnel, foremen, mine examiners, and supervisors, (Tr.1 at 96:17 – 97:1) who typically used smaller vehicles like pick-up trucks. (Tr.1 at 97:4-6)

It is imperative that all pieces of equipment, especially large coal-hauling trucks, have adequate brakes. A miner on foot or in a small vehicle could be hurt or killed. The haul truck driver might not be able to stop from falling over a drop-off. A loss of vehicle control due to inadequate brakes would likely result in a fatality. Therefore, I find that Secretary met his burden to prove a reasonable likelihood that the hazard would result in a serious injury. The citation was properly designated as S&S.

Unwarrantable Failure

The Commission has determined that an "unwarrantable failure" is aggravated conduct constituting more than ordinary negligence and is determined by looking at all the facts and circumstances of each case to see if any of the seven aggravating factors exist.

The Extent of the Violative Condition

It is clear from the record and the analysis above that the rear brakes on Truck 159 were inadequate and needed to be repaired. The slack adjusters moved beyond the re-adjustment limit, there was severe deterioration of the brake shoe friction pad, and the truck failed the pull-through test. On the February 16, 2012, Nicolau came back to the mine property to check if Lincoln Leasing abated the citation. (Tr.1 at 76:15-19) He wrote in his notes taken that day that the passenger side front tandem canister had a broken spring that was replaced, the brake drum was replaced, the back brake shoes were replaced, and all four rear slack adjusters were replaced.[18] (*Id.*; Tr.1 at 206:1-24; Tr.2 at 76:24 – 77:3; Tr.2 at 81:9-12) These parts were removed from Truck 159 at the inspection site on February 13, 2012. It is clear that the brake problem was extensive, and that a single violating condition, or any combination of violating conditions, could have made the truck's brakes inadequate and caused the truck to fail the pull through test.

[18] Turley testified that he had the mechanic change all four slack adjusters, even though he thought they were in compliance, because he wanted the truck to pass the abatement check. (Tr.2 at 113:15 – 114:9) This argument is unconvincing. Nicolau inspected the brakes on February 13, while they were on the truck, and on February 16, when they were off of the truck and concluded that they were inadequate.

The Length of Time the Violating Condition Existed

The evidence indicates that the inadequate brake condition lasted for an extended time. The condition had been recorded and reported to the truck foreman, Turley, on February 11, 12, and 13, 2012. This alone is evidence of how long the violating condition, which was acknowledged by Lincoln Leasing's foreman, existed. However, as discussed above, due to the adverse inference against Lincoln Leasing, I infer that management knew of the brake problem for two weeks prior to the issuance of the citation and still did not remedy the problem. Most importantly, it would take a long time for the brake linings to wear down to the rivets (Tr.1 at 4:6-9; Tr.1 ay 75:16-20) and to wear down beneath the v-notch line, as noted at the time the citation was written. (Tr.1 at 73:12 – 74:5)

The High Degree of Danger

An out-of-control truck could strike another vehicle or a miner, resulting in a fatality. Inadequate brakes are dangerous on a straight, paved road. However, the mine road in this instance was muddy and rutted, had a steep grade in some places, and was made up of shale, old sandstone, and dirt from the old highwall. This exacerbated the danger of the inadequate brakes on Truck 159.

Even more disturbing, Smailes testified that on February 12, 2012, the day before the citation was issued, as he was driving up the 40 bank in Truck 159 a fuse shorted out. (Tr.1 at 195:12-16; Tr.1 at 196:10 – 197:6) When Smailes tried to stop the truck, it wouldn't stop; it rolled backwards down the hill and finally stopped when it rolled into a ditch. (*Id.*; Tr.1 at 197:8-14) Smailes testified about how frightening it was having to maneuver the truck backwards and downhill when the brakes failed. (Tr.1 at 199:11-15) The Mine Act seeks to protect miners against exactly this type of danger.

The Operator's Knowledge and the Obviousness of the Violation

Management knew of the deteriorated condition of the brakes for a long time. (Tr.1 at 160:2-6) Lincoln Leasing's truck foreman signed the pre-operational examination book on February 11, 12, and 13, showing knowledge of the inadequate brakes. Smailes had informed Turley of the brake problem approximately six times over a two week period. Lincoln's foreman knew that the condition existed, he had reason to know the extent of the problem, and he let the truck operate in this condition. The condition of the brakes on Truck 159 was obvious, and Lincoln Leasing had knowledge of it.[19]

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[19] Smailes made some very disturbing statements in his testimony. On the morning of February 13, 2012, Smailes told Turley that he didn't want to drive Truck 159 because of the inadequate brakes. (Tr.1 at 197:23 – 198:2; Tr.1 at 204:20-22; Tr.1 at 231:8-13) Turley's response was that if he didn't drive Truck 159, he should go home. (*Id.*; Tr.1 at 189:13-15; Tr. 1 at 192:4) Smailes took that to mean that if he did not haul coal he would be fired. (Tr.1 at 204:23 – 205:2) At the hearing, Lincoln Leasing tried to discredit Smailes' credibility and denied this allegation, but I, along with Vance, (Tr.1 at 249:11-14), have no reason to believe that Smailes would lie about the events on and leading up to February 13, 2012.

The Operator's Efforts to Abate the Violating Condition

As previously stated, even if Turley's and Man's testimony were credible, it would have been improper to manually adjust the automatic slack adjuster. I find that Lincoln Leasing did nothing to remedy the inadequate brakes until the citation was issued.

Conclusion

The unwarrantable failure designation is justified because Lincoln Leasing engaged in aggravated and intentional misconduct: (1) there was a failure to comply with a mandatory standard; (2) the condition existed for a long time; (3) the condition was obvious; thus, (4) the operator knew or should have known that the condition existed. (Tr.1 at 168:1-12) Truck 159 needed brake work on the back axle for weeks. A supervisor acknowledged the defective brake condition. The truck failed the pull-through test. (Tr.2 at 78:8-14) I agree with Nicolau that this was aggravated conduct constituting more than ordinary negligence. This was an unwarrantable failure to comply with a mandatory safety standard. (Tr.1 at 88:2-6; Tr.1 at 111:19-22)

Penalty

The Secretary proposed a penalty of $45,708.00 for Citation No. 8142705. Lincoln Leasing operates approximately 192,500 hours at the mine, had approximately 30 past violations, two persons were affected, the citation was S&S, and the operator was found to be highly negligent. Due to the testimony at the hearing and the evidence presented about the circumstances leading up to the violation, I find that the operator is not entitled to a 10% reduction for good faith. Additionally, I find that Lincoln Leasing engaged in questionable practices regarding its document retention and production in this case. As such, I assess a penalty in the amount of $55,000.00 for Citation No. 8142705.

Order No. 8142706

At 4:00 p.m. on February 13, 2012, Inspector Nicolau issued Order No. 8142706 to Lincoln Leasing at the Pocahontas Highwall Mine alleging a violation of 30 C.F.R. § 77.410(c) pursuant to Section 105(d)(1) of the Mine Act. The regulation states that "[w]arning devices shall be maintained in functional condition." 30 C.F.R. § 77.410(c). Section 77.410(c) is a mandatory safety standard. The citation alleges:

> The automatic warning device (intended to give an audible alarm when the vehicle is placed in reverse) has not been maintained in functional condition on the Mack Coal truck C/N:159, S/N: 9PAE9651 operating on this mine property. The alarm failed to function when tested. This condition was noted and acknowledged by the contract supervisor on the pre-shift record dated 2-13-2012.

Ex. P-3.

Violation

The order alleges that an injury was reasonably likely, could reasonably be expected to result in lost workdays or restricted duty, the citation was S&S, a single person was affected, and that the negligence level was high. (*Id.*; Tr.1 at 112:14-18) The Secretary attempted to prove that the back-up alarm was not operational at the time of the pre-shift examination on February 13, 2012, and based his negligence, gravity, S&S, and unwarrantable allegations on that premise. However, the evidence does not support the conclusion that the back-up alarm was not working at the time of the pre-shift examination. It does, however, support the conclusion that the alarm was not working at the time of Nicolau's inspection. (Tr.1 at 174:8-9; Tr.1 at 202:15-23) As a result, I find that the inoperative alarm violated 30 C.F.R. § 77.410(c), but I cannot agree with the Secretary's assessment of the negligence and unwarrantable failure elements of the charge.

Negligence

High negligence is found when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3(d). Moderate negligence is present when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.*

Nicolau alleged high negligence because, according to his notes taken the day of the inspection, the pre-operational checklist indicated that the back-up alarm was not functioning, and Turley acknowledged the problem by his signature on the form. (Tr.1 at 116:16-19; Tr.1 at 118:2-7) However, the pre-operational exam exhibit admitted into evidence does not indicate that the back-up alarm was in need of repair (Ex. P-5; Tr.1 at 158:15-18), which creates a factual discrepancy. Nicolau acknowledged the discrepancy between Exhibit P-5 and what he observed and wrote about on February 13, 2012. (Tr.1 at 172:20 – 173:10) Smailes' testimony compounded the discrepancy. He testified that he reviewed the pre-operational exam book and noted that it showed that the back-up alarm was <u>not</u> working on February 13, 2012. (Tr.1 at 202:24 – 203:10) It is possible that the pre-operational exam book was tampered with, as both Nicolau and Smailes intimated, however I cannot make that finding based on this evidence. In the absence of more convincing evidence to the contrary, and based on Exhibit P-5, I find that the back-up alarm was in working condition at the time of the pre-shift examination on the morning of February 13, 2012. Thus, I am not convinced that Lincoln Leasing knew or should have known about the issue with the back-up alarm before the shift began.

However, the evidence does support an inference that the combination of muddy conditions at the mine and the location of the alarm wires affected the back-up alarm. The wires on Truck 159 were in a location where they could be easily dislodged, causing the back-up alarm to fail. (Tr.1 at 267:5-11) I infer from this that the alarm stopped working after the pre-shift but before the inspection, due to the accumulation of mud and the effects of vibration. Additionally, based on the testimony of Vance, Man, and Turley, dislodged back-up alarm wires were a common occurrence on Lincoln Leasing coal trucks at this site. Therefore, Lincoln Leasing should have known that driving Truck 159 over muddy and rutted roads could cause the back-up alarm to fail after the pre-shift examination was done. Lincoln Leasing was moderately negligent.

Gravity and Significant and Substantial

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. Nicolau testified it was reasonably likely that if a person were run over by a coal truck it would result in a fatality. (Tr.1 at 114:14-17) However, Nicolau marked the citation as lost work days or restricted duty because the miners at this site were on constant high alert that trucks were backing-up and maneuvering all the time. (Tr.1 at 114:1-6) Additionally, he marked the citation as affecting one person because he felt if there were a back-up alarm failure, the truck driver would probably hit only one person. (Tr.1 at 120:8-12) If a miner were struck by a coal truck it could result in broken bones and fractures, resulting in lost work days or restricted duty. I concur that it was reasonably likely that this violation could result in a serious injury to one miner.

Nicolau alleged that an injury was reasonably likely because the truck must back-up, maneuver around, and back up into the small highwall area (40 foot radius) where several miners were working on foot. (Tr.1 at 112:21 – 113:21; 262:7-8; 278:6-280:17)

It is important to have functional back-up alarms on every piece of mobile equipment because of the high level of miner activity near the highwall. At this mine, trucks must back up to the highwall area to get loaded, making it reasonably likely that an injury would occur. Therefore, I find that the Secretary proved by a preponderance of the evidence that an S&S designation was warranted here.

Unwarrantable Failure

Based on the evidence submitted at the hearing, and the argument presented in the Secretary's brief, I find that the Secretary failed to prove by a preponderance of the evidence that an unwarrantable failure designation is warranted here. The negligence was moderate, and the operator did not know at the beginning of the shift that the back-up alarm was not functioning. This evidence does not support a finding of recklessness or indifference that an unwarrantable failure designation is intended to protect against.

Penalty

The proposed penalty for Order No. 8142706 was $7,176.00. Lincoln Leasing operates approximately 192,500 hours at the mine, had approximately 30 past violations, one person was affected, the order was S&S, and the operator was moderately negligent. I assess a penalty of $2,161.00.

WHEREFORE, it is **ORDERED** that Lincoln Leasing pay a penalty of **$57,161.00** within thirty (30) days of the filing of this decision.

It if further **ORDERED** that Order No. 8142706 be modified from a 104(d)(1) order to a 104(a) citation.

L. Zane Gill
Administrative Law Judge

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