FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 20, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. ARNOLD STONE INC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. CENT 2016-0095-M A.C. No. 41-04473-396139 Mine: Arnold Stone Inc - Pit #2

DECISION AND ORDER

Appearances: Daniel Brechbuhl, Attorney, United States Department of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

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

Before: Judge Miller

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act"). This docket involves one citation issued on August 12, 2015, pursuant to Section 104(d)(1) of the Mine Act. The Secretary has proposed a penalty of $63,000.00. The parties presented testimony and evidence regarding the citation at a hearing held in Dallas, Texas, on June 1, 2016.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Arnold Stone Pit #2, also known as the Tolar mine, is a surface limestone mine located in Hood County, Texas. The parties have stipulated that Arnold Stone at all relevant times was engaged in mining activities and is an "operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d). Jt. Stips. ¶¶ 1, 3. The parties further stipulate that the mine is subject to the provisions of the Mine Act and the jurisdiction of the Commission. Jt. Stips. ¶¶ 2, 4. The parties agree that the violation was abated in good faith. Jt. Stips. ¶ 6.

Citation No. 8858327 was issued for a violation of 30 C.F.R. § 56.14100(b) for a non-functioning safety lock-out on a skid-steer loader. The Secretary alleges that the violation was reasonably likely to cause a permanently disabling injury, was significant and substantial, was the result of reckless disregard for the safety of miners, and was an unwarrantable failure to comply with the relevant standard. The Secretary issued a special assessment, proposing a penalty of $63,000.00. For the reasons set forth below, I find that the Secretary has proven a

violation as alleged and that the violation was significant and substantial. However, I find that the violation was the result of high negligence rather than reckless disregard and that an unwarrantable failure has not been proven.

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

MSHA's Inspection

Inspector Tommy Fitzgerald has worked for MSHA for seven years. He received the required training to become an inspector and receives periodic refresher training. He has conducted several hundred mine inspections. Prior to becoming an inspector, he worked for fifteen years in the mining industry, beginning as a haul truck driver and later working as a safety and health coordinator.

On August 12, 2015, Fitzgerald traveled to the Tolar mine to conduct an inspection. The mine, along with several other pits, is operated by Arnold Stone, Inc., which is owned by Mike Arnold. Arnold visits the Tolar site approximately twice a month. Because Arnold was not on site on August 12, Fitzgerald was accompanied during the inspection by Dennis Sorrells, the site supervisor. Sorrells told the inspector that he was a lead man and the inspector took that to mean that he was not a supervisor. However, after the testimony at hearing, it is clear that Sorrells was the supervisor at the mine site.

As part of the inspection, Fitzgerald inspected a skid-steer loader being used to move stone for chopping. He also observed a second, old skid-steer loader that had been taken apart and was inoperable. Fitzgerald observed a miner operating the working loader and stopped him to do a safety inspection. The loader was equipped with a safety lockout and safety switch. When functioning, the safety lockout would prevent the machine from operating when the seat belt was disconnected. The safety switch would allow the driver to activate the same function when the seat belt was buckled. Fitzgerald explained that the purpose of the switch and lockout is to protect the driver if he exits the machine while it is running. The configuration of the loader is such that a driver entering or exiting the machine can easily hit the controls and activate the machine if it is not locked out.

The miner operating the machine, Marcus Sanchez, informed Fitzgerald that the machine often lurched forward when it was started up, even if the lockout switch was engaged and the seat belt unbuckled. Fitzgerald observed Sanchez test the function by unbuckling his seat belt and hitting the controls. The machine took off forward until Sanchez stopped it. The machine also moved forward a couple of feet when Sanchez touched the controls while the lockout switch was on. Fitzgerald believed the machine had the potential to injure the operator when he was

entering or exiting the machine, which he would do multiple times during a typical day. If someone were standing in front of the machine when the operator exited, that person could also be run into or run over and injured. Sanchez told Fitzgerald that workers were aware of the defect and kept their distance from the machine, and that Sanchez turned off the engine when he entered and exited it. While Arnold indicated that the area of the mine was flat, Fitzgerald responded that certain areas where the machine operated were not a level grade.

Sanchez informed the inspector that there had been an intermittent problem with the switch for several years, but that the defect had become permanent in the last few months. The machine was used daily. Sorrells, the site supervisor, confirmed that the defect had existed for approximately three years. He told Fitzgerald that the defect had been reported, but that management had told the miners to continue using the machine because it was too expensive to fix. However, no MSHA inspections in the past several years had detected the defect.

Records presented by Respondent at hearing indicate that the loader in question was brought to the site from another Arnold Stone location, the Santos mine, in early 2014. Resp. Ex. E. A miner from the Santos mine testified that he had regularly inspected the loader while it was at Santos, and that it was in good condition with no defects in the lockout or switch when it was brought to the Tolar site.

Sorrells testified that the skid-steer loader was subject to a pre-operation inspection before it was used each day. Arnold confirmed that miners were trained to conduct inspections before operating equipment. Fitzgerald examined the mine's inspection records for the loader, but there were only a few available on site, and none listed a defect. The mine produced further inspection records at hearing, none of which noted a problem with the lockout.[1] Resp. Ex D. However, the records for the weeks leading up to the MSHA inspection indicate multiple other issues, including oil leaks, hydraulic leaks, and forks in need of welding, and there is no indication that any of those issues were corrected. *Id.* Sorrells blamed Sanchez for failing to perform adequate inspections on the loader and terminated him from his employment for that reason, in addition to previous reprimands.

The mine argues that the information Fitzgerald received from Sanchez and Sorrells regarding the duration of the condition was inaccurate. Both men told the inspector at the time of the inspection that the safety switch had been defective for several years and Sorrells gave the inspector a written statement to that effect. But at hearing, Sorrells testified that his statement to the inspector was in reference to the loader that had been taken out of service, which had had the same defect. Sorrells testified that he had operated and inspected the cited machine a few weeks prior to the inspection and had not noticed anything wrong, and that he did not know about the condition until the inspection. Sorrells also claims that Sanchez was not truthful about the duration of the defect because he wanted to retaliate for a recent suspension. However, Sorrells made a written statement to MSHA at the time of the inspection in which he said that he had been telling Mike Arnold about the skid-steer defect for approximately three years. Gov't Ex. 5. It is difficult to interpret this statement as referring to the out-of-service skid-steer. Additionally,

[1] Arnold believed the lockout problem would have been marked as a brake problem on the mine's checklist, since the skid-steer did not have conventional brakes. No brake problems were noted in the mine's records.

Fitzgerald testified that the miners were standing near the operating loader when they talked about the machine, so it was unlikely that they would have been talking about a different machine. Sanchez was fired shortly after the inspection and did not testify at hearing, so could not corroborate either side. Given the testimony presented and the demeanors of the witnesses, I find Inspector Fitzgerald to be credible as well as thoughtful and thorough in his investigation. Thus, I credit his testimony and find that the safety switch and lockout had been inoperable for at least a year.

Sorrells notified Arnold about the citation after the inspection. Because there was no shop on the premises at the mine, Arnold arranged for the machine to be taken to a mechanic shop for repairs. The shop found that the problem was electrical and the mechanic was unable to repair the loader at a reasonable cost. The mine was also operating with a reduced staff and had a limited need for the loader. Arnold thus took the machine out of service.

A. The Violation

Based on his observations at the mine, Fitzgerald issued Citation No. 8858327 for a non-functioning safety lockout on the skid-steer loader. The Secretary alleges a violation of 30 C.F.R. § 56.14100(b), which requires that "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." To prevail on a penalty petition, the Secretary bears the burden of proving an alleged violation by a preponderance of evidence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd* 272 F.3d 590 (D.C. Cir. 2001); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987).

To establish a violation of § 56.14100(b), the Secretary must prove that there was a defect in the equipment, that the defect affected safety, and that it was not corrected in a timely manner. *See* 30 C.F.R. § 56.14100(b). Here, the parties do not dispute that the safety lockout was not working on the skid loader. The company agrees that the skid loader had a non-functioning safety lockout switch at the time of the inspection. This condition "affected safety," in that it was capable of causing or contributing to the cause of an injury-producing incident. The purpose of the safety lockout switch is to prevent the skid loader from inadvertent motion when the machine is manually started. It also prevents movement when the seat belt is not in place. A moving, uncontrolled skid loader poses a danger to miners working or traveling near it.

The main issue regarding the violation here is whether the mine failed to correct the defect "in a timely manner." The Commission addressed the timeliness requirement of § 56.14100(b) in *Lopke Quarries, Inc.*, 23 FMSHRC 705 (July 2001), which involved a similar lockout device to the one in this case. The Commission determined that "[w]hether the operator failed to correct the defect in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of its existence." *Id.* at 715. Here, the parties presented conflicting evidence as to when the defect arose. Based on my review of the record, I find that the defect had existed at least since the time the loader was first used at the mine, approximately 18 months prior to the inspection. The mine argues that because the defective lockout was not noted on pre-shift reports, there is no reason that the operator should have known about it. However, site supervisor Sorrells testified that he frequently operated the loader. While he denies having knowledge of the defective lockout prior to the inspection, I do

not credit his statement. I thus find that the operator knew of the defective lockout for at least 18 months but failed to repair it. Accordingly, the Secretary has proven a violation of § 56.14100(b).

B. Significant and Substantial

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

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

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

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

The second element of the *Mathies* test must be evaluated with respect to specific conditions in the mine. *See, e.g., McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991-92 (Aug. 2014) (finding that an accumulations violation contributed to a combustion hazard because of the extensiveness of the accumulations of coal, their highly combustible makeup, and the amount of methane liberated by the mine). With respect to the third element, the Commission has explained that the Secretary must "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 has made clear that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury," but rather that the hazard created would cause an injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *see also Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011). Finally, the Commission has held that the S&S determination should be made assuming "continued normal mining operations." *McCoy*, 36 FMSHRC at 1990-91.

Here, the Secretary has proven a violation of § 56.14100(b), satisfying the first element. The Secretary has also demonstrated a discrete safety hazard contributed to by the violation. The safety switch is an important part of the skid loader in that it prevents the machine from inadvertent movement, particularly as the operator is trying to exit or enter the machine. The inspector explained that the machine was used to move stone, and that the operator would enter

and exit the machine frequently to perform that operation. He also believed the machine was used in close proximity to other workers and in locations that were not completely flat. The operator and those around him were in danger of being hit by the skid steer if it was moved inadvertently. While employees at the mine were aware of the broken lockout and kept their distance from the loader, it nevertheless remained a hazard. *See Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015) The second *Mathies* element is therefore satisfied. A miner traveling on foot who was hit by the skid loader would be reasonably likely to be seriously injured or killed. Thus, the Secretary has proven the third and fourth elements of the *Mathies* test. Based on the testimony of the inspector and considering the *Mathies* criteria, I find that the violation was S&S.

C. Negligence and Unwarrantable Failure

In addressing the mine's negligence, it is first necessary to determine whether Dennis Sorrells was an agent of Arnold Stone. I find that Sorrells was a manager and his negligence is therefore imputable to the operator for purposes of penalty assessment and the unwarrantable failure determination. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328 (Mar. 2009); *Whayne Supply Co.*, 19 FMSHRC 447, 450 (Mar. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991). The Mine Act defines an "agent" as "any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine." 30 U.S.C. § 802(e). In analyzing whether an employee is an agent of an operator, the Commission has considered factors including "the ability of the employee to direct the workforce, whether the employee holds himself out as a person with supervisory responsibilities and is so regarded by other miners, and whether the actions of the employee in directing the workforce have an impact on health and safety at the mine." *Nelson Quarries*, 31 FMSHRC at 328.

Here, Sorrells was the person in charge at the Tolar site. Arnold testified that Sorrells was his "eyes and ears" at Tolar when he was not at the site, which was most of the time. Sorrells had responsibility for hiring, firing, and training miners at the site, though Arnold had the final word in questionable cases. While Sorrells did not have the authority to call a mechanic to repair equipment, he addressed basic safety and maintenance issues at the mine. For more complex repairs, it was his responsibility to inform Arnold of the issue. Although Sorrells told the inspector that he did not direct work at the mine but rather was told what to do each day, he was nevertheless the person in charge at the mine.

The Secretary categorizes negligence into five categories, from "no negligence" to "reckless disregard." 30 C.F.R. § 100.3, Table X. The Commission has emphasized, however, that these regulations apply to the Secretary's proposal of penalties only, and are not binding on the Commission. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015); *see also Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984). The Commission instead directs its judges to "evaluate negligence from the starting point of a traditional negligence analysis . . . . Under such an analysis, an operator is negligent if it fails to meet the requisite standard of care—a standard of care that is high under the Mine Act." *Brody*, 37 FMSHRC at 1702. In evaluating an operator's negligence, the judge should consider "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the

regulation." *Jim Walter Res.*, 36 FMSHRC 1972, 1975 (Aug. 2014). High negligence is characterized by "an aggravated lack of care that is more than ordinary negligence." *Id.* at 1703.

Here, the inspector initially designated the citation as high negligence, but later modified the designation to reckless disregard. The Secretary also argues that the violation was the result of the operator's unwarrantable failure to comply with a mandatory standard. Based upon my review of all of the evidence, I find that the mine did not meet the required standard of care and therefore the operator's negligence should be designated as high. However, I cannot find that the violation was unwarrantable.

The unwarrantable failure terminology is taken from Section 104(d) of the Act, 30 U.S.C. § 814(d). The Commission has explained that unwarrantable failure is "aggravated conduct constituting more than ordinary negligence. [It] is characterized by conduct described as 'reckless disregard,' 'intentional misconduct,' 'indifference,' or a 'serious lack of reasonable care.'" *Consol. Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) (citations omitted) (quoting *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991)). In determining whether a violation is an unwarrantable failure, the Commission has instructed its judges to consider all of the relevant facts and circumstances in the case and determine whether there are any aggravating or mitigating factors. *Id.* Aggravating factors to be considered include

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

IO Coal Co., 31 FMSHRC 1346, 1352 (Dec. 2009); *see also Consol.*, 22 FMSHRC at 353. Based upon the following analysis of the factors enumerated by the Commission, I find that there is inadequate evidence to support a finding of unwarrantable failure in this case.

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

Here, there is some dispute as to how long the condition existed prior to the inspection. The skid loader had been at the mine for approximately 18 months, and the information gathered by the inspector indicated that the skid loader had a broken safety lockout the entire time. The inspector was also told that the lockout had been inoperable off and on for three years. The

mine, however, claims that the lockout only began malfunctioning shortly before the inspection. The site supervisor, Sorrells, testified that he had operated the machine a few weeks before the inspection and the lockout had been working. The mine also notes that the lockout had not been marked as defective in pre-shift inspection reports or cited in previous MSHA inspections. I credit the inspector's findings and agree that the lockout had been inoperable on an intermittent basis for at least the 18 months that the skid loader was at the Tolar pit.

Extent of the violative condition. The extent factor is intended to "account for the magnitude or scope of the violation" in the unwarrantable failure analysis. *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079 (Dec. 2014). Facts relevant to the extent of the condition include the size of the affected area and the number of persons affected. *Id.* at 3079-80. In *Dawes*, the Commission found that where only one miner endangered himself by walking under a suspended load, the violation was not extensive. *Id.* at 3080. Here, only one miner operated the skid loader at a time and there were only a handful of people working around the machine at any given time. Therefore the violation was not extensive.

Whether the operator has been placed on notice that greater efforts were necessary for compliance. The Commission has explained that repeated similar violations 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*, 31 FMSHRC at 1353-54. The prior violations need not have been the result of unwarrantable failure, nor must they have involved precisely the same activity, cited standard, or area of the mine. *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 561 (D.C. Cir. 2012); *Consol. Coal Co.*, 35 FMSHRC 2326, 2344 (Aug. 2013); *IO Coal*, 31 FMSHRC at 1353-54. In the instant case, previous inspectors had not cited the faulty safety switch or given the mine any other indication that it was a problem. There is no basis, therefore, to find that the mine was placed on notice that greater efforts were required.

Operator's efforts in abating the violative condition. Abatement efforts relevant to the unwarrantable failure analysis are those made prior to the issuance of the citation or order. *Consol.*, 35 FMSHRC at 2342; *IO Coal*, 31 FMSHRC at 1356. Where the operator has notice of a condition, such as through previous violations or conversations with an inspector, a failure to remedy the problem weighs in favor of an unwarrantable failure finding. *See Consol.*, 35 FMSHRC at 2343. However, an operator's reasonable, good-faith belief that the condition did not exist may excuse a lack of abatement efforts. *See IO Coal*, 31 FMSHRC at 1356.

Here, the operator did nothing to mitigate the condition of the defective lockout. However, the person with authority to fix the lockout, Mike Arnold, was not aware of the problem. The lockout was not noted on pre-operational check lists. Sorrells told the inspector he had informed Arnold about the problem, but at hearing, Arnold credibly testified that he did not know about the defect. Further, Sorrells's testimony suggests that he believed a previous supervisor at the mine had notified Arnold about the defect, so he did not need to do so. Because the person with authority to repair the defect was not aware of it, I find that the lack of abatement efforts was not a significant aggravating factor in this case.

Whether the violation posed a high degree of danger. A high degree of danger posed by a violation can be an aggravating factor that supports an unwarrantable failure finding. *IO Coal*,

31 FMSHRC at 1355-56. In some cases, the degree of danger may be "so severe that, by itself, it warrants a finding of unwarrantable failure. However, the converse of this proposition—that the absence of significant danger precludes a finding of unwarrantable failure—is not true." *Manalapan Mining Co.*, 35 FMSHRC 289, 294 (Feb. 2013). The degree of danger increases when there is a chronic problem that is ignored. *Consol.*, 35 FMSHRC at 2343. As discussed in the S&S analysis above, I find that the inoperable safety lockout was reasonably likely to result in a serious injury. The equipment operator could easily have inadvertently hit the controls in the tight space, especially when climbing out of the machine, and moved the machine without warning. The driver of the skid loader or someone on the ground nearby could have been injured. While the violation was S&S, I do not find the degree of danger to be especially high given the small number of miners working at the mine.

Whether the violation was obvious. The obviousness of the violative condition is an important factor in the unwarrantable failure analysis. *IO Coal*, 31 FMSHRC at 1356. Lack of obviousness can be a mitigating factor in the analysis, but not when actions of the operator are the reason that the condition was not obvious. *Consol.*, 35 FMSHRC at 2343 (Aug. 2013) (upholding judge's unwarrantable failure finding where the operator deliberately ignored testing requirements in the mine's ventilation plan). In this case, the violation was obvious to the miners who operated the machine. Instead of having the switch repaired, they learned to work carefully around it to avoid injury. I find that the violation was also obvious to the site supervisor, Sorrells, who regularly worked around the machine.

Operator's knowledge of the existence of the violation. In *IO Coal,* the Commission reiterated the well-settled law that an operator's knowledge of the existence of a violation may be established not only by demonstrating actual knowledge, but also by showing that the operator "reasonably should have known of the violative condition." 31 FMSHRC at 1356-57. As discussed above, Sorrells, an agent of Arnold Stone, knew that the lockout was broken. I also find that Mike Arnold should have known about the broken lockout, given that it had been broken for at least 18 months, he arranged to transport the loader to the Tolar site after another loader had a similar defect, and he visited the mine several times a month.

While aggravating factors were present in that the condition existed for 18 months, was obvious, and an agent of the operator knew about it, there are a number of factors that weigh against a finding of unwarrantable failure. The length of time that the loader remained in an unsafe condition is certainly a problem, but is addressed by the finding of high negligence. The extent of the violation was limited and it did not pose a high degree of danger. Further, the person with authority to repair the defect, Mike Arnold, was not aware of it, and had no notice that greater efforts towards compliance were necessary. Based upon my review and consideration of all of the factors, I find that the negligence of the operator was high, but I do not find the violation to be a result of an unwarrantable failure to comply.

II. PENALTY

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i)

of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). 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 judge must consider six statutory penalty criteria: the operator's history of violations, its size, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

As discussed above, I affirm the inspector's findings with regard to gravity. I find the negligence to be high rather than "reckless disregard" as it was assessed. There was limited evidence as to the size of the mine, but the operator asserts that it is a family-operated business with a number of pits located in Texas. The mine has little history of violations. Respondent indicated that it recently emerged from bankruptcy and is paying debts according to the bankruptcy plan, and that paying a penalty as high as suggested by the Secretary would therefore be a hardship for the mine. The parties stipulated that the citation was abated in good faith. After a careful review of the record and considering all of the penalty criteria, I assess a penalty of $10,000.00.

III. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $10,000.00 within 30 days of the date of this decision for the violation at issue here.

Margaret A. Miller
Administrative Law Judge

Distribution: (U.S. First Class Certified Mail)

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