FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. KENTUCKY FUEL CORPORATION, Respondent.	CIVIL PENALTY PROCEEDING Docket No. KENT 2014-706 A.C. No. 15-18363-356746 Mine: Bevins Branch Surface Mine

DECISION AND ORDER

Appearances: C. Renita Hollins, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, TN, for the Secretary

James F. Bowman, Representative, Midway, WV, for the Respondent

Before: Judge Steele

I. Statement of the Case

This proceeding is before me upon a petition for assessment of civil penalties under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Following an inspection of Respondent's mine, an MSHA inspector issued Citation No. 8195668 for Respondent's failure to safely strip the highwall in violation of 30 C.F.R. § 77.1001. Additionally, the inspector issued Citation No. 8195670 for the Respondent's failure to follow a ground control plan for the safe control of a highwall in violation of 30 C.F.R. § 77.1000. A hearing was held in South Charleston, WV on March 14, 2016. At hearing, the Respondent contested both citations, all of the designations for the citations, and the special assessments.

This Court affirms Citation Nos. 8195668 and 8195670 in all respects, including the special assessment penalties totaling $15,400.00.

II. Procedural History

On March 17, 2014, a 104(d)(1) citation and a 104(a) citation were issued at Kentucky Fuel Corporation ("Respondent" or "Kentucky Fuel"), Bevins Branch Surface Mine. On March 14, 2016, a hearing was held in South Charleston, WV. After the hearing, the parties submitted Post Hearing Briefs, which have been fully considered.

III. Stipulations

The parties submitted stipulations in their prehearing reports. The following stipulations were submitted individually by both parties and will be treated as joint stipulations.

1. Jurisdiction exists because Kentucky Fuel is an operator of a mine as defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(D), and the products of the subject mine entered into the stream of commerce or the operations or products thereof affected commerce within the meaning and scope of section 4 of the Mine Act, 30 U.S.C. § 803.

2. The administrative law judge has authority to hear this case and issue a decision.

3. The proposed penalty will not affect Kentucky Fuel Corporation's ability to remain in business.[1]

4. A copy of Citations 8195668 and 8195670 were served on Kentucky Fuel Corporation, by a duly authorized representative of the Secretary.

5. Respondent operates Bevins Branch Surface mine, Mine Identification Number 15-18363.

6. Bevins Branch Surface Mine produced 366,025 tons of coal in 2013.

7. Respondent abated the citations involved herein in a timely manner and in good faith.

Sec'y Prehearing Rep. 1-2; Resp't Prehearing Rep. 3-4.[2]

IV. Findings of Fact and Conclusions of Law

The findings of fact are based on the record as a whole. In resolving any conflicts in the testimony, I have taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, I have also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to 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)(Administrative Law Judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

On March 17, 2014, MSHA Inspector Brian K. Robinson arrived at Bevins Branch Surface Mine and notified the supervisor and foreman that he was on the job site to perform an inspection. (Tr. 27-28). While at the mine, Inspector Robinson drove into the mid-level right side contour pit area and made visual observation of the site. (Tr. 28-29). While there, he

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[1] This stipulation was agreed to by both parties in their prehearing reports. Sec'y Prehearing Rep. 1-2; Resp't Prehearing Rep. 3-4.[1] Thus, the error in the transcript suggesting the proposed penalty might affect Kentucky Fuel's ability to remain in business will be disregarded. (*See* Tr. 5).

[2] Stipulations will hereinafter be cited to as Stip. followed by the stipulation number.

observed large boulders that were loose at the top of the highwall, in violation of § 77.1001. (Tr. 29). The wall was measured to be 70 feet at the highest point by a Trupulse Rangefinder, which Inspector Robinson calibrated and has used frequently in the past. (Tr. 45). Inspector Robinson further testified that two 993K end loaders were loading the 777 model rock trucks from underneath the highwall. (Tr. 29, 31). The end loaders had a reach of 30ft. (Tr. 66). The rock trucks transported material to a different location, where the trucks were emptied, to uncover the mined coal. (Tr. 29).

Subsequently, Inspector Robinson issued Citation No. 8195668 for a violation of § 77.1001. (Tr. 30). While conducting his inspection, Robinson spoke with a foreman, William Bevins, who indicated that he knew the inspector would not approve of the highwall condition and that he was planning to send over an excavator to fix the condition. (Tr. 38). This violation was designated as Significant and Substantial ("S&S") and reasonably likely to cause a permanently disabling injury to one miner, with high negligence.[3] (Tr. 39-41). A special assessment was also issued for this violation. (Sec'y Ex-P1).[4] This condition was terminated by the loose material being broken down with a bulldozer and an excavator. (Tr. 43).

After issuing Citation No. 8195668, Inspector Robinson continued his inspection by travelling to the lower active coal pit. (GX-P2, P3). There he saw the highwalls were shattered and cracked, exposing rocks that were not properly scaled.[5] (Tr. 93-94, 107-09). This condition was visible along the entire 300-foot length of the wall, and Inspector Robinson believed this created a risk of crushing injuries to miners. (Tr. 107-09; GX-P2, P3). Inspector Robinson testified that he observed miners on foot and miners working in end loaders directly next to the highwall. (Tr. 105-06). Inspector Robinson estimated this condition to have existed three to four days because of the extensive length of the condition across the wall. (Tr. 110-11).

Inspector Robinson also testified that he had a discussion with the only certified blaster at the mine, Josh Matheny.[6] (Tr. 90-92). During this conversation, Inspector Robinson asked Matheny if he knew that the wall was supposed to be pre-split according to the ground control plan. (Tr. 91-92; PX-6). According to Inspector Robinson, Matheny conceded that everyone knew that the wall needed to be pre-split, but that there were insufficient ammonium nitrate and fuel oil (ANFO) and gas bags for pre-splitting. (Tr. 92). Further, Inspector Robinson testified

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[3] The Secretary's Post Hearing Brief and Citation No. 8195668 do not indicate this citation has an unwarrantable failure designation. Therefore, the Inspector's reference in his testimony to this citation being assessed with an unwarrantable failure and the Respondent's Post Hearing Brief opposing an unwarrantable failure designation appear to be in error. (*See* Tr. 40).

[4] The Secretary's exhibits will hereinafter be designated as GX followed by the exhibit number, which in this case is P followed by a number.

[5] The conditions for this citation were related to Citation No. 8195669 (not at issue in this proceeding), which involved the same 300-foot highwall. (Tr. 93).

[6] Inspector Robinson first testified that the blaster he spoke with was John Matheny, but subsequently stated that the blaster's name was Josh Matheny, and Josh was used in the rest of the testimony. (Tr. 91).

that the ground control plan requires "[i]f highwalls are pre-split the slope will be greater than ninety degrees. If highwalls are not pre-split the slope will be one-hundred and ten degrees for cast blasting." (Tr. 100; GX-P6). No evidence was brought forward that cast blasting was used at the mine, and Inspector Robinson testified that "it was obvious [the highwall] was 90-plus" degrees. (Tr. 119).

As a result of this conversation with Matheny, his observations, and the ground control plan requirements, Inspector Robinson issued Citation No. 8195670 for failing to follow the ground control plan in violation of § 77.1000. (Tr. 91-92). This violation was designated Significant and Substantial ("S&S"), reasonably likely to cause a permanently disabling injury to one miner, with high negligence and an unwarrantable failure. (Tr. 106-12). This violation was also specially assessed because Inspector Robinson wanted to "get [Respondent's] attention", so that it would comply with highwall safety requirements. (Tr. 113-14).

Mark Wooten, a licensed professional engineer for Premium Coal Company, Inc, ("Premium Coal") testified about his knowledge of ground control plans.[7] (Tr. 148). He testified that he worked with Mr. Smith, who created the ground control plan at issue.[8] (Tr. 149). After reviewing the ground control plan, which has a blasting plan, Wooten testified that it wouldn't be possible to know whether to pre-split a highwall until after the production shots. (Tr. 159-60). He testified that pre-splitting was not required because on the blasting plan in the notes section it states that "[p]re-split holes are to be utilized as conditions dictate." (Tr. 158-60; GX-P6, 9). Additionally, Wooten testified that the blasting plan indicates the first step in production shot blasting was to pre-split. (Tr. 170; *See* GX-P5). Wooten testified that the blasting plan shows an example of the order in which production shots and pre-splitting may occur. (Tr. 179-181). He stated that the lines were not necessarily shot sequentially; however, the blasting plan was annotated sequentially, and "pre-split line" was labeled "1st." (Tr. 170-72; *See* GX-P6). He also testified that he was unaware if cast blasting was ever used at Bevins Branch Surface Mine as an alternative to production shot blasting. (173-74).

Wooten further testified that a jagged wall with protruding rocks does not necessarily indicate a highwall is unsafe. (Tr. 175). But Wooten did agree in his testimony that the ground control plan was developed to ensure safety while blasting. (Tr. 178).

Mark Huffman, the Director of Health Safety and Human Resources for Bluestone Industries, worked at Kentucky Fuel in March 2014, when the citations in this proceeding were issued.[9] (Tr. 181-84). He testified that pre-split shots could not be blasted after the production shots, and that cast blasting was not used at the time the citation was issued. (Tr. 198). When the citations were issued on March 17, 2014, he was not at Bevins Branch Surface Mine, and he

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[7] In January 2015, Wooten began working for Premium Coal, which was a subsidiary of the company that owns Kentucky Fuel Corporation and Bevins Branch Surface Mine. (Tr. 163).

[8] A ground control plan must be created by an operator and submitted to MSHA for acknowledgement. (Tr. 150-51).

[9] Bluestone Industries was an affiliated company of Kentucky Fuel Corporation. (Tr. 181).

did not view the highwall until one or two days later. (Tr. 212-13). At that time, he believed the wall involved in Citation No. 8195668 to be approximately 50 feet high. (Tr. 191).

V. Contentions of the Parties

The Secretary contends that Respondent violated § 77.1001 in Citation No. 8195668 and that the citation was S&S, reasonably likely to result in a permanently disabling injury to one miner, and the operator acted with high negligence. (Sec'y Br. at 2). The Respondent argues that it did not violate § 77.1001 and contests all of the Secretary's designations and the special assessment. (Resp't Br. at 5-11). Respondent argues it did not violate § 77.1001 because there was no highwall, instead only shot overburden, and there was a bench, which it argues indicates that the wall was properly stripped for safety. (Resp't Br. at 5-8). Additionally, Respondent contends that the violation was not S&S because the boulders were not likely to reach the miners working in end loaders below and cause an injury. (*Id.* at 9-10). Respondent also argues that it was not highly negligent because the foreman's comments indicating he was directing a rock truck and excavator to fix the condition was not an admittance of aggravated conduct, but rather an additional precaution. (*Id.* at 10).

Further, the Secretary contends that Respondent violated § 77.1000 in Citation No. 8195670 and that the citation was S&S, reasonably likely to result in a permanently disabling injury to one miner, with an unwarrantable failure and high negligence. (Sec'y Br. at 3). Respondent argues that it did not violate § 77.1000 and disagrees with all of the designations and the special assessment. (Resp't Br. 11-16). Respondent contends that the ground control plan was open to interpretation and there was no evidence that the wall was not pre-split. (*Id.* at 11-13). Further, Respondent argues the violation was not S&S because the wall was not unsafe even if it was jagged. (*Id.* at 14). The Respondent argues the operator was not highly negligent because the blaster that the inspector spoke to was not an agent of the operator. (*Id.* at 14-15). Also, Respondent argues the special assessment is not appropriate because it was merely issued to be punitive, which is unreasonable and speculative. (*Id.* at 16).

VI. Discussion

A. Burden of Proof and Standard of Proof

The Secretary bears the burden of proof by a preponderance of the evidence for Mine Act violations.[10] *Jim Walter Res., Inc.*, 28 FMSHRC 983, 992 (Dec. 2006); *RAG Cumberland Resources, Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). Each element of a citation must be proven by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 872, 878 (Aug. 2008).

The Commission has held that "[t]he burden of showing something by a 'preponderance of the evidence' the most common standard in the civil law, simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.'" *RAG Cumberland*

[10]Respondent incorrectly contends the Secretary's burden of proof is substantial evidence. (Resp't Br. at 8-14). The burden for violations is by a preponderance of the evidence.

Resources Corp., 22 FMSHRC 1066, 1070 (Sept. 2000), *quoting Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993).

B. Citation No. 8195668

Citation No. 8195668 was issued for an alleged violation of § 77.1001 which requires: "Loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection." 30 C.F.R. § 77.1001

During Inspector Robinson's March 17, 2014, inspection at Bevins Branch Surface Mine, he observed two 993K end loaders working beneath a highwall at the mid-level right side contour pit.[11] (Tr. 29). Inspector Robinson observed the end loaders working beneath the highwall that had loose unconsolidated material and boulders on top. (Tr. 31). He wrote a § 77.1001 citation as a result of his observations of the highwall. In section 8 of the Citation, "Condition or Practice," Robinson wrote: "Loose Hazardous Material is not being stripped for a safe distance at the active Mid-Level Right Side of Contour breakdown Pit Area Highwall... Large Boulders rest atop of this material at the Highwall."[12] (GX-P1).

Inspector Robinson testified that he observed boulders and loose material that were not stripped from the highwall. (Tr. 31). The highwall was 70 feet high, as measured by a Trupulse Rangefinder.[13] (Tr. 44-46). He also observed two end loaders working beneath this highwall.

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[11] Respondent makes the argument in its post hearing brief that this violation could not have occurred because there was no highwall. Respondent argues that the material at issue was shot overburden being removed. (Resp't Br. at 7-8). I find the distinction to be irrelevant as § 77.1001 requires loose material to be stripped for a safe distance from the top of a pit or a highwall. The material at issue appears to fall under either definition of being on top of the pit or highwall. Additionally, Inspector Robinson repeatedly testified that there was a highwall not properly stripped, and he was the only witness who was present on the day the violation. (Tr. 30-32). Inspector Robinson was the most credible witness as to the condition of the mine on the day this citation was issued. As a result, this argument that there was no violation because no highwall existed is not convincing.

[12] Respondent contends the material was kept at the angle of repose and that a bench was present, preventing a § 77.1001 hazard from existing. (Resp't Br. at 6-7). However, Inspector Robinson testified that this citation was issued because the highwall was not stripped for safety and that there were loose rocks that posed a hazard to miners below. As Inspector Robinson was the only witness present when the citation was issued, I find his testimony to be the most credible, and I find any argument concerning a bench or angle of repose by witnesses who were not present to observe the conditions that day to be unpersuasive.

[13] Huffman, the Director of Safety and Human Resources, estimated the highwall to be about 50 feet high, but as he did not view the highwall until a day or two after the citation was issued, Inspector Robinson's 70-foot finding with a Trupulse Rangefinder was more credible and

(Tr. 29). The reach of the end loaders were likely only 30 feet, even though the Respondent suggested it could ramp up 70 feet, in its questioning of Inspector Robinson. (Tr. 66). There was no other testimony or evidence to support Respondent's claim regarding the reach of the end loaders. And it was clear that the highwall could not have been safely stripped by an end loader with only a 30-foot reach. (*See* Tr. 66). Inspector Robinson found this to be dangerous because it could have resulted in loose material falling on the miners working in the end loaders below, posing a risk of a crushing injury. Thus, Inspector Robinson's observation of the unsecured boulders on top of the highwall with end loaders working below demonstrated a § 77.1001 violation.

The Respondent's witness Wooten, a licensed professional engineer, never saw the conditions and has no direct knowledge to dispute Inspector Robinson's testimony. Huffman, the Director of Health Safety and Human Resources at the time, also did not observe the conditions of the highwall on the day this citation was issued. As a result, this Court finds that the Secretary has met its burden in proving that a § 77.1001 violation occurred.

1. The Violation was Significant and Substantial and Reasonably Likely to Result in a Permanently Disabling Injury to One (1) Person.

Section 104(d)(1) of the Mine Act defines Significant and Substantial ("S&S") 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)(1). The Commission has held that a violation is S&S "if, based on the particular facts surrounding the 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). An S&S violation must be supported by the circumstances surrounding the violative condition. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

In *Mathies* the Commission set forth a four-prong test to determine a S&S violation. *National Gypsum. Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984). To prove an S&S violation, the Secretary must show: "(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." *Id.* at 3-4.

Further, an S&S determination should be analyzed in the context of "continued normal mining operations." *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1990-91 (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). When assuming continued mining operations, it must be considered without any assumption of abatement. *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff'd sub nom. Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014).

In the instant case, the first prong has been satisfied as the Secretary has proven that a § 77.1001 violation occurred due to loose and unconsolidated boulders on the highwall. (Tr. 27).

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relevant to the citation. Inspector Robinson was trained to use the Trupulse Rangefinder and he has successfully used it for measurement prior to these citations being issued. (Tr. 44-46).

Miners were also using end loaders at the bottom of the wall, which had loose boulders. These loose boulders posed a discrete safety hazard because the boulders could have fallen and caused a crushing injury, as there were no barriers to prevent the boulders from rolling off the wall. (*See* Tr. 29, 31). Therefore, the second prong has been met because the Respondent's failure to strip the highwall contributed to a discrete safety hazard of loose falling boulders.

The third prong of the test, which requires a reasonable likelihood that the hazard will result in an injury, was also satisfied. The "Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010). Instead, it is only required that the hazard would be reasonably likely to contribute to an injury. *Consolidation Coal Co.*, 6 FMSHRC 189, 193 (Feb. 1984). [14] The hazard here was the presence of loose and falling boulders from the highwall. These loose boulders could easily have fallen onto a miner and cause a serious injury to miners working below.

The injury that could have occured from a rock or other material falling from a 70-foot highwall was a crushing injury. (Tr. 40). A crushing injury could permanently disable or even potentially kill an individual. Therefore, the fourth prong has been demonstrated because it was reasonably likely that a serious crushing injury could occur from a highwall with loose material that was not barricaded. Consequently, all four prongs of the *Mathies* test have been proven by the Secretary, and the S&S designation for Citation No. 8195668 is affirmed.

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. For Citation No. 8195668, the gravity was reasonably likely to result in a permanently disabling injury to one miner. (GX-P1). The injury to one miner has been demonstrated because Inspector Robinson testified that he saw miners working in end loaders below the highwall, where rocks could have fallen on them. (Tr. 29, 31). This violation involved a highwall with loose unconsolidated material that could have fallen on a miner below. (GX-P1). The wall was approximately 70 feet high, and a large boulder falling from that height could cause a serious crushing injury that could permanently disable an individual. (Tr. 40). Thus, the gravity of reasonably likely to result in a permanently disabling injury to one person is also affirmed.

2. The Violation was the Result of High Negligence.

Negligence is not defined in the Mine Act. MSHA regulations provide that violative conduct is properly designated as "high negligence" when "the operator knew or should have known of a violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3(d), Table X. The Commission has held that Administrative Law Judges are not required to apply the Part 100 negligence definition and may instead use a traditional negligence analysis. *Brody Mining, LLC*, 37 FMSHRC 1687, 1703 (Aug. 2015); *accord Mach Mining, LLC*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016). Additionally, "Commission judges... may find 'high negligence' in spite of mitigating circumstances, or moderate negligence, without identifying mitigating circumstances." *Brody*, 37 FMSHRC at 1702-03; *Mach Mining*, 809 F.3d

[14] Recent circuit court decisions have further discussed the importance of the third prong in the S&S analysis. *See Eagle Creek Mining, LLC.*, 2016 WL 2956689 at *3-7 (May 2016)(ALJ)(discussing the traditional S&S analysis and the effect of recent Fourth and Seventh Circuit decisions).

at 1263-64. High negligence is "'...an aggravated lack of care that is more than ordinary negligence.'" *Brody*, 37 FMSHRC at 1703, *citing Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998). Accordingly "a Commission judge... may consider the totality of the circumstances holistically." *Brody*, 37 FMSHRC at 1702. An operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Id.*

The negligence for this citation was properly assessed as high. (Tr. 41; GX-P1). Section 77.1001 requires that loose and hazardous material be stripped from mine walls, sloped to the angle of repose or barricaded to protect miners from injury. Respondent did not meet this high standard of care by allowing loose unconsolidated material and boulders to remain unsecured on the highwall. (Tr. 29). This created a risk for any miner working underneath the highwall. Moreover, Inspector Robinson testified that the foreman admitted that he knew the highwall was not in good condition and that MSHA was not going to be satisfied with the safety measures implemented at the highwall. (Tr. 38). Additionally, there was no evidence of mitigating circumstances brought forth at hearing. The Respondent showed an aggravated lack of care when it knowingly allowed the condition to persist, but failed to abate it until an MSHA inspector was on site. (*See* Tr. 38). Consequently, the high negligence evaluation is affirmed.

C. Citation No. 8195670

Citation No. 8195670 was issued for a violation of § 77.1000. Under § 77.1000, it is required that "[e]ach operator shall establish and follow a ground control plan for the safe control of all highwalls, pits and spoil banks to be developed after June 30, 1971, which shall be consistent with prudent engineering design and will insure safe working conditions. The mining methods employed by the operator shall be selected to insure highwall and spoil bank stability." 30 C.F.R. § 77.1000.

This citation was issued by Inspector Robinson after he observed that a highwall in the lower active coal pit on the right contour was not pre-split as required by the Respondent's ground control plan. (GX-P3). Specifically, Inspector Robinson spoke with the certified mine blaster Matheny who said that the highwall was not pre-split because he did not have adequate materials. (Tr. 92). Neither party has disputed that the highwall was not pre-split at hearing.[15] The ground control plan on page nine shows the Blasting Plan, which lists the first blast as the pre-split line. (GX-P6). Additionally, page four of the Blasting Plan describes in the notes section that in the lower level coal seams, highwalls will be pre-split with a slope greater than 90 degrees and do not need to be pre-split for cast blasting at 110 degrees.[16] (GX-P6). According to Inspector Robinson, the highwall was greater than 90 degrees, but not 110 degrees. (Tr. 100,

[15] While Respondent briefly suggested in its post hearing brief that the highwall could have been pre-split, Respondent failed to bring forward any evidence to support a finding that the wall was indeed pre-split. (Resp't Br. at 13). Accordingly, I find this argument unpersuasive.

[16] On this same page there was a handwritten note about a fireclay highwall. (GX-P6). Both parties mention this highwall, but no evidence was brought forth as to who wrote this note or when it was written. Additionally, Respondent argues the Secretary does not prove the fireclay highwall was one of the walls involved in the violations. (Resp't Br. at 12). However, there was no consensus as to whether the highwall at issue was the fireclay highwall. As a result, the validity of this handwritten note is ultimately irrelevant.

119). Inspector Robinson, Wooten, and Huffman all testified that the mine did not use cast blasting, or they were unaware that cast blasting was used, at the time the citation was issued. (Tr. 100, 173-74, 228). Thus, no evidence was brought forward that cast blasting was used on this highwall. Therefore, Inspector Robinson concluded that the wall was required to be pre-split, and it was evident to him via visual observation that it had not been pre-split as required. (GX-P 4). The certified blaster also agreed the wall was not pre-split. (Tr. 92).

Further, neither of the Respondent's witnesses was present when this citation was issued, so they did not have direct knowledge of whether or not the highwall was pre-split. Moreover, Huffman, the Director of Health Safety and Human Resources testified that pre-split shots could not be blasted after the production shots. (Tr. 198). Thus, any argument that the pre-splitting could have been performed after the production shots does not hold weight. Since pre-splitting was required by the ground control plan, and the operator failed to pre-split the highwall at issue, the Respondent failed to follow the ground control plan in violation of § 77.1000. (*See* GX-P3).

Due to the Inspector's observations, his testimony concerning his conversation with the certified blaster Matheny, and Huffman's testimony that pre-split shots must be performed first when blasting, I find that the Secretary has met its burden of proving a violation for Citation No. 8195670.

1. The Violation was S&S and Reasonably Likely to Result in a Permanently Disabling Injury to One (1) Person.

Inspector Robinson assessed this violation as S&S. (GX-P3). Under *Mathies*, the first prong was satisfied as there was a § 77.1000 violation when the Respondent failed to follow the ground control plan requirement of pre-splitting the highwall at issue. *See* discussion *supra.*

The second prong was also satisfied as the failure to follow the ground control plan for safety contributed to a discrete safety hazard of large rocks falling onto miners. The failure to pre-split as required by the ground control plan created cracks, and holes in the wall allowing for large rocks to protrude from the highwall. (Tr. 107-09).

Beneath the highwall, Inspector Robinson observed an end loader loading coal haulage trucks and blasters on foot loading holes for blasting along the wall. (Tr. 105-06). Therefore, the third prong has been met because there was a reasonable likelihood that a rock falling from a large 300-foot long highwall onto a blaster or a machine operator would have caused a crushing injury. (Tr. 105-06). The miners below were not adequately protected from the risk of rocks falling on them. This condition was reasonably likely to cause an injury of a reasonably serious nature as boulders falling from a highwall onto an individual's head, arms, or legs could crush organs and permanently disable someone, which satisfied the fourth prong. As a result, Inspector Robinson properly found Citation No. 8195670 to be S&S.

Respondent attempts to argue, with the support of Wooten's testimony, that a jagged wall that was not pre-split may be safe. (Tr. 175; Resp't Br. at 14). However, I find this testimony to lack credibility when there was a ground control plan that requires pre-splitting for safety. (GX-P6). Moreover, it is axiomatic that a wall with protruding rocks, whether loose or not, is more likely to cause an injury than a smooth wall.

The gravity assessed here was reasonably likely to cause a permanently disabling injury to one miner. Inspector Robinson testified that a highwall must be pre-split to make a safer smoother wall for miners who work in close proximity to the wall. (Tr. 103). Pre-splitting the wall was a safety mechanism that was required by the ground control plan. (GX-P6). Respondent's witness Wooten agreed in his testimony that the ground control plan was developed to ensure safety while blasting. (Tr. 178). Inspector Robinson testified that without pre-splitting, it was more likely that large rocks from the wall could fall and hit people working below. (Tr. 107). This could crush a miner's arm or leg, which could permanently disable an individual. (Tr. 107). At any time, there could be two blasters, a spotter, and coal loaders working beneath a highwall. (Tr. 107-08). Therefore, Inspector Robinson said the risk of injury could be to one person because the rocks would likely only be able to hit one person at a time. (Tr. 108). Due to the risk of a large rocks falling from a 300-foot long wall with cracks and holes in it, which could result in serious crushing injuries to an individual, I affirm the gravity of reasonably likely to result in a permanently disabling injury to one person.

2. The Violation was the Result of High Negligence.

Inspector Robinson determined that the negligence for this citation should be evaluated as high. (Tr. 111). The Respondent's ground control plan required a highwall to have a slope of 90-plus or 110 degrees. (GX-P6). In the notes on the ground control plan, it stated that highwalls greater than 90 degrees will be pre-split and highwalls greater than 110 degrees will be cast blasted. (*Id.*). Inspector Robinson testified that the wall was 90-plus degrees, not 110, and required pre-splitting. (Tr. 110, 19).

Furthermore, Inspector Robinson had a conversation with the Respondent's certified blaster Matheny who conceded that the wall should have been pre-split and that he did not have adequate materials to properly pre-split the wall.[17] (Tr. 111). This conversation with the blaster indicates that the Respondent knew the reasonable standard of care in highwall blasting to create the safest working environment for miners. (*See id.*). Hence, the Respondent failed to exercise the requisite high standard of care required under § 77.1001. This demonstrates an aggravated lack of care by the Respondent.

Respondent made an argument that Matheny was not an agent of the operator, and therefore, his negligence cannot be attributed to the Respondent. (Resp't Br. at 14-15). Section 3(e) of the Mine Act defines an "agent" as "any person charged with responsibility for the operation of all or a part of a ... mine or the supervision of the miners in a ... mine[.]" 30 U.S.C. § 802(e). The Commission has held that "the negligence of an operator's 'agent' is imputable to the operator for penalty assessment and unwarrantable failure purposes." *Nelson Quarries Inc.*, 31 FMSHRC 318, 328 (Mar. 2009) *citing Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-97 (Feb. 1991); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982). The Commission has held that "[it] consider[s] factors such as the ability of the employee to direct the workforce, whether

[17] Respondent attempted to put a burden on the inspector to check purchase orders or the blasting log to see if proper supplies existed for pre-splitting. (Tr. 135; Resp't Br. at 15.) This Court finds this argument unpersuasive as it was not significant whether the proper materials existed for this citation. Rather it is only relevant that the material was not used in compliance with the ground control plan and the operator was aware of it.

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 Inc.*, 31 FMSHRC 318, 328 (Mar. 2009) *citing Ambrosia*, 18 FMSHRC at 1553-54, 1560-61; *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 119, 130 (Feb. 1999) (holding that leadmen who acted in a supervisory capacity and were in a position to affect safety were agents of the operator to whom employees would logically voice their complaints).

Matheny was the only person allowed to blast at the mine because he was the only certified blaster on site. (Tr. 90, 103-04). He directed the workforce in blasting, and his control over mine blasting had a direct impact on the safety at the mine. (Tr. 90-92). Therefore, he acted as an agent, and his knowledge of the condition can be imputed to Kentucky Fuel. Accordingly, Respondent's argument that the blaster's knowledge cannot be imputed on the Operator does not hold weight, and the high negligence evaluation is affirmed.

3. This Violation was the Result of an Unwarrantable Failure.

The Commission has determined that an "unwarrantable failure is aggravated conduct constituting more than ordinary negligence." *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013). An unwarrantable failure can be demonstrated by a reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (Dec. 1987).

> Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, including (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.

Manalapan Mining Co., 35 FMSHRC at 293. All of the relevant *Manalapan Mining* factors, the facts and circumstances of the case, and any mitigating circumstances must be considered by this Court. *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

i. The Extent of the Violative Condition and the Length of the Time that the Violative Condition Existed

The highwall was hazardous, and it extended 300 feet. (Tr. 108-09). Inspector Robinson testified that the absence of pre-splitting at the highwall had existed three to four days. (Tr.110-11). He made this finding based on the holes and the size of the area that had been drilled. (Tr. 110-11). Thus, the loose material along the 300-foot wall and the length of time the condition existed weigh against the Respondent.

ii. The Obviousness of the Condition and Whether the Condition Posed a High Degree of Danger

The inspector observed that there were holes drilled and that the wall was not pre-split, which demonstrate the obviousness of the condition. (Tr. 109). This posed a high degree of danger because the failure to pre-split the wall resulted in loose material, which could have created the risk of crushing injuries. (Tr. 107). There were loose rocks, holes in the wall, and cracks which could have easily created a hazard of a rock or other debris falling from a highwall onto a miner working in an end loader below. (Tr. 93-94, 107-09). Therefore, the condition was obvious, and it posed a high risk to miners working below.

iii. The Operator's Knowledge of the Condition

Inspector Robinson spoke with the certified blaster Matheny who conceded that everyone knew that pre-splitting was required. (Tr. 91-92). Additionally, the ground control plan, which the operator was required to create and submit to MSHA for acknowledgement, requires pre-splitting. (*See* Tr. 150-51). Therefore, I find that the Respondent knew or should have known that pre-splitting was not being used according to the ground control plan because the condition could have been readily observed. (*See* Tr. 109).

iv. The Operator's Efforts in Abating the Condition

Respondent did not attempt to abate the condition until after it knew the MSHA inspector was on site. (Tr. 91-92; GX-P3). There was no evidence brought forward by the Respondent demonstrating an attempt to correct condition prior to issuance of the violation.

v. The Operator's Notice that Greater Efforts were Necessary for Compliance

The certified blaster admitted that everyone knew the highwalls were meant to be pre-split. (Tr. 91-92). However, he stated he did not have the proper materials to properly blast the highwall. (*See id.*). The Operator also had the ground control plan, which provides notice of blasting requirements. (GX-P6). As a result, the Operator had notice that there should have been greater efforts to comply with the ground control plan.

Consequently, when considering all of the *Manalapan Mining* factors, the operator demonstrated the requisite aggravated conduct for an unwarrantable failure. All of the factors weigh against the Operator and demonstrate a serious lack of reasonable care to comply with the pre-splitting requirement in the ground control plan. (*See* GX-P6). Therefore, I affirm the unwarrantable failure designation for Citation No. 8195670.

VII. Special Assessments

Under 30 C.F.R. § 100.5 "(a) MSHA may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment. (b) when MSHA determines that a special assessment is appropriate, the proposed penalty will be based on the six criteria set forth in § 100.3(a). All findings shall be in narrative form." The civil penalty under § 100.3 is based on the criteria set for the in § 110(i) of the Mine Act. This section provides:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

30 U.S.C. § 802(i).

The Respondent was a large operator that produced 366,025 tons of coal in 2013 and had four § 77.1001 violations in the 18 months preceding the issuance of Citation No. 8195668. (Stip. 6). For this citation, Respondent was highly negligent as the highwall was not properly stripped, and the foreman told Inspector Robinson that he knew about the condition, but nothing was done to abate it. The parties stipulated that these penalties will not affect the Operator's ability to remain in business. (Stip. 3). This citation was hazardous because of the loose unconsolidated material on the highwalls. Therefore, this Court affirmed the designations of S&S and reasonably likely to cause a permanently disabling injury to one miner. While there was good-faith abatement in a reasonable amount of time, the remaining statutory criteria weigh heavily against the Respondent. (Stip. 7). Accordingly, the Secretary's special assessment of $6,800.00 is affirmed.

Given that the violative conduct in Citation No. 8195670 has been assessed as S&S and reasonably likely to result in a permanently disabling injury to one miner, and the high negligence and unwarrantable failure findings, and having considered all of the statutory criteria in § 110(i), this Court finds the Secretary's originally assessed penalty to be appropriate. (GX-P3). Additionally, as the same circumstances involving the mine size, ability to remain in business, gravity, and compliance apply to this order, the proposed civil penalty of $8,600.00 is affirmed.

Inspector Robinson issued these special assessments to deter the Respondent from continuing to knowingly violate highwall safety standards. The admission of knowledge by a foreman and the certified blaster of the respective violations at issue demonstrate an aggravated lack of care. This knowledge of wrongdoing, yet indifference to safety standards, poses a high risk of injury to miners, especially because the violations at issue involve extensive safety standards.

VIII. Conclusion

For the foregoing reasons Citation No. 8195668 and Citation No. 8195670 will be affirmed with all proposed designations. Consequently, it is **ORDERED** that Respondent pay

the Secretary of Labor the sum of $15,400.00 within 30 days of the date of this Decision.[18] Upon receipt of payment, this case is hereby **DISMISSED**.

William S. Steele

William S. Steele
Administrative Law Judge

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James F. Bowman, Kentucky Fuel Corporation, P.O. Box 99, Midway, WV 25878

[18] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390