FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
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Washington, D.C. 20004

July 25, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. SE 2016-56-M A.C. No. 38-00600-397382 (1BU)
v.	:	
BLANCHARD MACHINERY COMPANY, Respondent.	:	Mine: Haile Gold Mine

DECISION

Appearances: James Shaffer, Conference & Litigation Representative, U.S. Department of Labor, MSHA, Birmingham, Alabama; and Kristin R. Murphy, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia, for Petitioner;

Travis W. Vance, Esq., Fisher & Phillips, LLP, Charlotte, North Carolina, for Respondent.

Before: Judge Paez

This case is before me upon the petition for the assessment of a civil penalty filed by the Secretary of Labor ("Secretary") against Blanchard Machinery Co. ("Blanchard" or "Respondent"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "the Act"), 30 U.S.C. § 815. In dispute is a single section 104(a) citation issued to Blanchard, a contractor at the Haile Gold Mine. To prevail, the Secretary must prove any cited violation "by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

I. STATEMENT OF THE CASE

Chief Administrative Law Judge Robert J. Lesnick assigned this matter to me on December 22, 2015. Citation No. 8899032 alleges Respondent violated 30 C.F.R. § 56.14207[1]

[1] Section 56.14207 provides: "Mobile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank." 30 C.F.R. § 56.14207.

by leaving a pickup truck unattended without setting its parking brake. The Secretary proposes a penalty of $100.00. I held a hearing on June 2, 2016, in Columbia, South Carolina. The Secretary presented testimony from MSHA Inspector Harold Poe. Blanchard presented testimony from its former employee Clayton Cowart. Pursuant to the Commission's procedural rules on simplified proceedings, the parties presented closing arguments at the hearing in lieu of submitting post-hearing briefs. 29 C.F.R. § 2700.108(e). I accepted Respondent's bench brief explaining the case law cited in its closing argument.

II. ISSUES

For Citation No. 8899032, the Secretary asserts Blanchard's employee left mobile equipment unattended without setting the parking brake. The Secretary argues that the citation and proposed penalty are valid and appropriate. (Tr. 109:8–24.)[2] According to the Secretary's interpretation of section 56.14207, a miner must be "behind the wheel" or present within the vehicle to attend it. (Tr. 48:15–25, 109:17–24.) The Secretary asserts Blanchard violated section 56.14207 when its employee was not inside the vehicle and could not control it if it began to roll. (Tr. 109:8–109:24.)

Although Blanchard admits the parking brake was unset, it contends its employee did not leave the equipment "unattended" within the meaning of 30 C.F.R. § 56.14207. (Tr. 116:4–118:24.) Blanchard argues that section 56.14207 permits an operator of mobile equipment to exit if the operator remains in proximity. (Tr. 116:14–23, 118:17–24.) Blanchard cites to the definition of "attended" in 30 C.F.R. § 56.2 and avers this definition governs the usage of "unattended" in section 56.14207. (Tr. 116:14–17; Resp't Prehr'g Rep. at 2.) Based on this reading, Blanchard asserts that the citation should be vacated; alternatively, Blanchard seeks a modification of the citation to no negligence. (Tr. 122:1–15.) The gravity was not contested.

Accordingly, the issues before me are (1) whether the Secretary has proven Blanchard violated 30 C.F.R. § 56.14207; (2) whether the Secretary's negligence determination is appropriate; and (3) whether the Secretary's proposed penalty is appropriate.

For the reasons set forth below, Citation No. 8899032 is **MODIFIED** to no negligence.

III. FINDINGS OF FACT

At the hearing, the parties stipulated to the following:

1. Blanchard Machinery Company was, at all times relevant to these proceedings, engaged in mining activities at the Haile Gold Mine in or near Kershaw, South Carolina 29067;

2. Blanchard Machinery Company's mining operations affect interstate commerce;

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[2] In this decision, the hearing transcript, the Secretary's exhibits, and Respondent's exhibits are abbreviated as "Tr.," "Ex. S–#," and "Ex. R–#," respectively.

3. Blanchard Machinery Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.;

4. Blanchard Machinery Company is an "operator" as that word is defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d), at the Haile Gold Mine (Federal Mine I.D. NO. 38-00600) where the contested citation in these proceedings was issued;

5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to [s]ection 105 of the Act;

6. On or about September 16, 2015, MSHA Inspector Harold A. Poe was acting as a duly authorized representative of the United States Secretary of Labor, assigned to MSHA, and was acting in his official capacity when conducting the inspection and issuing the citation from docket SE 2016-0056 at issue in these proceedings;

7. The citation at issue in these proceedings was properly served upon Blanchard Machinery Company as required by the Act, and was properly contested by Blanchard Machinery Company;

8. The citation at issue in these proceedings may be admitted into evidence by stipulation for the purpose of establishing its issue. The truthfulness or relevancy of any statements asserted therein is not stipulated to by the parties;

9. Blanchard Machinery Company demonstrated good faith in abating the violation;

10. Without Blanchard Machinery Company admitting the propriety or reasonableness of the penalty proposed herein, the penalty proposed by the Secretary in this case will not affect the ability of Blanchard Machinery Company to continue in business.

(Tr. 9:2–6; Sec'y Prehr'g Report at 2–3.)

A. Blanchard's Operations at Haile Gold Mine

Blanchard Machinery Company, a contractor, supplies rental equipment to the Haile Gold Mine in Kershaw, South Carolina. (Tr. 13:17–25, 28:21–29:3.) Blanchard delivers equipment to the mine site for other contractors to use in moving earth to install plants for gold extraction. (Tr. 28:7–29:3.) Alongside several other contractors, Blanchard rents a portion of the Haile Gold Mine's large property, occupying a fenced area located eighty yards from the mine's gated entrance. (Tr. 27:17–24, 29:4–9, 100:7–10.) Several office trailers are situated in this area. (Tr. 62:18–23; Ex. R–2.) A flat parking area sits next to the office trailers. (Ex. R–2; Tr. 41:25–42:12, 76:15–19.) At the time of the citation's issuance, Haile Gold Mine was not yet engaged in any gold extraction activities. (Tr. 51:3–7, 76:2–8.) Rather, operations at the mine site were just beginning, whereby contractors were just starting to move earth to grade the land in preparation of building the plants for gold extraction. (Tr. 28:7–16.)

B. September 2015 Inspection

On September 15, 2015, MSHA Inspector Harold Poe came to inspect Blanchard's area at the Haile Gold Mine. (Tr. 13:17–25; Ex. S–3.) In the parking area next to Blanchard's office trailer, Poe observed Clayton Cowart, a rental representative for Blanchard, inside a parked Chevy Silverado pickup truck. (Tr. 14:21–22; Exs. R–2, S–3.) The pickup truck had an automatic transmission. (Tr. 22:22–23, 95:20–21.) Cowart had just returned from town with his lunch and parked the pickup truck against a railroad tie, perpendicular to the trailer. (Tr. 79:8–20, 43:12–18; Ex. R–2.) Cowart had been working for Blanchard for two years, but had never gone through an inspection with an MSHA inspector. (Tr. 78:21–79:3, 107:6–22.)[3] While parked and sitting in the driver's seat, Cowart got flustered and forgot to engage the parking brake when he saw MSHA's Inspector Poe in the mirror approaching his pickup truck. (Tr. 33:18–24, 107:1–22.)

Inspector Poe walked towards the pickup truck from behind at a forty-five-degree angle to the truck's cab. (Tr. 16:10–17, 32:20, 36:4–13.) Upon seeing Poe, Cowart overlooked his everyday habit of setting the parking brake before exiting the vehicle; instead, he immediately opened the door wide and hopped out to shake hands with the inspector. (Tr. 79:17–20, 80:3–21, 107:6–22.) He left his warm but uneaten lunch sitting on the seat of the truck. (Tr. 15:8–14.)

Poe was approximately twenty feet from the driver's side of the truck's cab when Cowart exited the pickup truck and approached Poe to introduce himself and shake his hand before the inspection. (Tr. 15:24–16:2, 80:16–21.) The driver's side door was open the entire time. (Tr. 16:12–17.) Upon meeting, straightaway Poe asked Cowart whether he had set the parking brake. (Tr. 16:20–23.) Cowart spun around moving back towards the cab to set the brake, but Poe insisted that Cowart wait until Poe got out his camera and took a photograph of the unset parking brake. (Tr. 16:20–25, 20:4–15, 107:6–12; Ex. S–1.)

After Inspector Poe photographed the violation, Cowart engaged the parking brake. (Tr. 83:3–6.) Poe then took a photograph of the set parking brake to note the violation's abatement. (Tr. 39:20–40:1; Ex. S–2.) From Poe noting the violation and photographing the unset parking brake to Cowart engaging the parking brake and Poe photographing the violation's abatement, the entire exchange lasted less than two minutes—and the time between photographs was perhaps a few seconds. (Tr. 45:17–46:5, 66:3–11; Exs. S–1, S–2, S–3.) Poe subsequently issued Citation No. 8899032, stating:

> The Chevy Silverado pick-up, company #8210, was left unattended with the provided park brake not set when inspected. The truck is used for transportation to and from the mine as needed as well as around the mine site and in use today. The driver may be exposed

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[3] Cowart no longer works for Blanchard. (Tr. 78:15–79:3.) After graduating in May 2013 from the University of South Carolina with a degree in political science, Cowart worked as a rental representative for Blanchard between August 2013 and November 2015. (Tr. 78:15–17, Tr. 98:25–99:23.) In late November 2015, Cowart began work as a product engineer for Contour Mining and Construction at the Haile Gold Mine. (Tr. 98:25–99:23.)

> to a struck by hazard when replacing/removing the chocks and the truck roll unsuspectedly for any reason.[4]

(Ex. S–3.) With regard to the violation's gravity, Poe determined that a single miner could be injured and that the likelihood of an injury or illness was unlikely. (*Id.*; Tr. 22:18–23:21.) In the event of an injury or illness, Inspector Poe found that the injury would reasonably be expected to result in lost workdays or restricted duty. (*Id.*) Poe later spoke to Cowart's manager. (Tr. 25:24–26:2.) Because Blanchard's management gave specific training on 30 C.F.R. § 56.14207, Poe determined that the violation was due to Blanchard's moderate negligence and noted that the violation was abated within a single minute by setting the parking brake. (Ex. S–3; Tr. 25:17–26:5.)

At the parking area, Inspector Poe did not have Cowart conduct a formal "roll test" after issuing the citation. (Tr. 24:8–19.) During a roll test, the vehicle is placed in neutral gear while the examiners observe the vehicle for any movement to determine whether the surface has an incline that would create a hazard. (*Id.*) Because the ground was level in the parking area, Poe did not believe the test was necessary.[5] (Tr. 24:15–19.) None of Blanchard's mining supervisors were present in the cited area or possessed any knowledge of the violation at the time the citation was issued. (Tr. 58:10–13.) Citation No. 8899032 was the only citation issued to Blanchard by Poe during his inspection of the Haile Gold Mine. (Tr. 13:17–14:3.) According to MSHA's mine data retrieval system, Blanchard has not been cited for any other violations at the Haile Gold Mine. (Ex. S–4.)[6]

IV. PRINCIPLES OF LAW

A. Operator Liability

Under the Mine Act, operators are strictly liable for violations of the Secretary's mandatory health and safety standards. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008) (citing *Asarco, Inc.*, 8 FMSHRC 1632, 1634–36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989)). The Mine Act's regulatory regime establishes strict operator liability for the conduct of contractors. *See Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 155 (D.C. Cir. 2006); *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1272 (Oct. 2010) ("Because the Mine Act is a strict liability statute, an operator is liable if a violation of a mandatory safety standard occurs, regardless of the level of fault.") (citations omitted). The Commission has observed that

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[4] Poe explained that he believed the likelihood of injury was unlikely but included this last sentence to describe the hazard of not setting the parking brake. (Tr. 46:8–47:25.)

[5] Although Poe did not perform a formal roll test, prior to leaving the parking area he had Cowart put the pickup truck in neutral; the truck did not appear to move. (Tr. 42:7–9, 94:6–15.) Cowart said this informal roll test was done "kind of just out of curiosity." (*Id.*)

[6] MSHA's data retrieval system catalogues citations, orders, and safeguards. It is available on MSHA's public website. Mine Safety and Health Admin., *Inspection Violations Summary: For Event Number 667183*, Mine Data Retrieval System, http://arlweb.msha.gov/drs/ASP/InspectionViolations.asp (last accessed July 5, 2016).

"operator[] fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty." *Asarco, Inc.*, 8 FMSHRC at 1636.

B. Regulatory Interpretation

Regulatory interpretation is a two-step analysis. *Walker Stone Co.*, 19 FMSHRC 48, 51 (Jan. 1997), *aff'd*, 156 F.3d 1076, 1081 (10th Cir. 1998). The first step is determining whether the regulation is clear and unambiguous. *Northshore Mining Co.v. Sec'y of Labor*, 709 F.3d 706, 709 (8th Cir. 2013). When the regulatory language is clear and unambiguous, the regulation must be applied as written. *Id.* If the regulation is ambiguous or subject to multiple meanings, the second step is to determine whether the agency's interpretation is permissible. *Plateau Mining Corp. v. FMSHRC*, 519 F.3d 1176, 1192 (10th Cir. 2008) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). The agency's interpretation is valid so long as it is reasonable. *Id.* ("An agency's interpretation of its own regulation is ordinarily controlling unless plainly erroneous or inconsistent with the regulation."); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (holding that the agency's regulation should be sustained as long it is "logically consistent with the language of the regulation and . . . serves a permissible regulatory function"). To determine whether the Secretary's interpretation is reasonable, the Commission considers the regulatory language and history. *See Twentymile Coal Co.*, 36 FMSHRC 2009, 2012–13 (Aug. 2014).

C. Operator Negligence

Commission Judges determine negligence under a traditional analysis rather than relying on the Secretary's regulations at 30 C.F.R. § 100.3(d). *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (quoting *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015)). Each mandatory regulation carries a requisite duty of care. *Id.* In the negligence determination, the Commission takes into account the relevant facts, the protective purpose of the regulation, and what actions would be taken by a reasonably prudent person familiar with the mining industry. *Id.* In evaluating these factors, the negligence determination is based on the "totality of the circumstances holistically" and may include other mitigating circumstances unique to the violation. *Id.* (quoting *Brody Mining, LLC*, 37 FMSHRC at 1703).

V. REGULATORY ANALYSIS, ADDITIONAL FINDINGS OF FACT, AND CONCLUSIONS OF LAW

A. Citation No. 8899032—Leaving Mobile Equipment Unattended

1. Interpretation of 30 C.F.R. § 56.14207

The Secretary asserts Blanchard is liable as Cowart left the pickup truck unattended with an unset parking brake when he met Inspector Poe ten to twelve feet from the pickup truck. (Tr. 109:8–24.) The Secretary argues that exiting the pickup truck's cab is sufficient to meet the definition of "unattended" under section 56.14207. (Tr. 109:12–16.) Respondent relies on the regulatory definition of "attended" provided in 30 C.F.R. § 56.2 to assert that Blanchard did not violate the standard. (Tr. 116:14–17.) Respondent reasons Cowart had no need to set the parking brake because he remained in proximity to the vehicle to prevent unauthorized entry. (*Id.*)

a. "Unattended" is Ambiguous

I must first determine whether the meaning of "unattended" in the text of section 56.14207 is unambiguous. The Commission itself has not squarely addressed the meaning of "unattended" in section 56.14207. Consequently, the starting point of interpretation is whether the plain meaning of section 56.14207's language is apparent. *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1171 (Sept. 2010). "Unattended" in plain language has two relevant alternate meanings: "[n]ot being attended to, looked after, or watched: *an unattended fire*" and "[h]aving no attendants: *unattended gasoline pumps*." *The American Heritage Dictionary of the English Language* 1871 (4th ed. 2009). In turn, "attendant" is defined broadly as "one who attends or waits on another." *Id.* at 116. The Commission has held that when the dictionary definition of a term is open to alternative interpretations, the term is ambiguous. *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1680. Section 56.14207 instructs miners to set the parking brake if the mobile equipment is left unattended, but the regulation does not speak to the precise distance a miner may move from the controls of the mobile equipment or how someone would attend or wait on the equipment. 30 C.F.R. § 56.14207. Indeed, the dictionary definitions could lead to two drastically divergent requirements: either a miner must be ever present at the equipment's controls or a miner may merely observe from a distance. I conclude that this definition does not plainly indicate the meaning of "unattended."

Respondent disputes the definition of "unattended" and argues that the section 56.2 definition of "attended"—"presence of an individual or continuous monitoring to prevent unauthorized entry or access"—should determine the meaning of "unattended." 30 C.F.R. 56.2. It is true that when a regulatory definition of a term is available, that definition should apply to other standards within the regulatory scheme. *See Wolf Run Mining, Co.*, 32 FMSHRC at 1679–1681. However, Respondent's argument fails to address two reasons why the section 56.2 definition does not apply to section 56.14207.

First, section 56.14207 predates the "attended" definition in section 56.2. 50 Fed. Reg. 4,048, 4,069 (Jan. 1985); 56 Fed. Reg. 2,070, 2,089 (Jan. 1991). MSHA drafted new definitions in 1991, including "attended" at section 56.2, to govern the regulations on "Explosives" in Subpart E. 56 Fed. Reg. at 2,089. As originally conceived, "attended" applied solely to MSHA regulations of explosive material. 56 Fed. Reg. at 2,071. Thus, the definition of "attended" in section 56.2 was not meant to apply to parking procedures for mobile equipment.

Second, the regulatory context does not support Respondent's definition. The purpose of section 56.14207 is to prevent the unintentional movement of mobile equipment. Respondent agrees that the requirement to set the parking brake is a precaution to prevent vehicles from rolling. (Tr. 121:10–20.) But the regulatory history reveals the definition of "attended" in section 56.2 is concerned with a different goal—the prevention of unauthorized entry. 30 C.F.R. § 56.2. In its original context of Subpart E, section 56.2's definition of "attended" referred to continuous monitoring to maintain the security of stored explosives which may be satisfied by "electronic or video monitoring devices." 56 Fed. Reg. at 2,071; *see* 30 C.F.R. § 56.6202(a)(7) ("[v]ehicles containing explosive material shall be [a]ttended or the cargo compartment locked"). The original context of section 56.2 emphasizes guarding access to explosives, not preventing

unintentional rolling. Because the regulatory history and context suggest otherwise, I reject Respondent's arguments applying section 56.2's definition to section 56.14207.[7]

Consequently, I determine that the meaning of "unattended" in section 56.14207 is ambiguous.

b. The Secretary's Definition is Reasonable and Entitled to Deference

Next I determine whether the Secretary's interpretation of "unattended" is reasonable. The Secretary interprets "unattended" in section 56.14207 to mean a miner is not "behind the wheel" of the vehicle or cannot control the mobile equipment. (Tr. 48:15–25.)

The Secretary's definition of "unattended" would simply require a miner to put the vehicle's gear in park and set the parking brake whenever the miner was not behind the wheel or was not within reach of the controls. The Secretary's interpretation is based on the potential rolling hazard of an unset parking brake. (Tr. 63:21–64:4.) Record evidence indicates the possibility of injury if the equipment rolled and the operator tried to jump back into the moving vehicle to control it. (Tr. 73:23–74:4.) A miner in proximity to the mobile equipment, but not in arm's reach of the controls, is not in a position to prevent the mobile equipment from rolling. Even a slow-moving vehicle may prove harmful to a miner unaware of its approach or unable to swiftly react. Moreover, section 56.14207 is among the most frequently cited standards in fatalities, which explains its inclusion in MSHA's "Rules to Live By." (Tr. 24:20–25:12.)

In contrast, Respondent attacks the Secretary's interpretation of "unattended" by arguing that the Secretary's definition is unreasonable and internally inconsistent with section 56.14207. (Tr. 116:9–118:7.) According to Respondent, a miner parking on a grade would violate section 56.14207 anytime the miner left the cab of the vehicle to chock the tires because the vehicle would be "unattended" under the Secretary's definition. (Tr. 117:15–118:7.) Rather, Respondent asks me to apply the definition of "attended" as defined in 30 C.F.R. § 56.2. (Tr. 116:12–117:7.) In Respondent's view, under the section 56.2 definition, Cowart was in proximity and thus "attended" his pickup truck; therefore, the pickup truck was not "unattended" under section 56.14207 and no violation occurred. (Tr. 119:9–120:1.)

First, Respondent conflates the regulatory definition of "attended" under section 56.2 with the Secretary's definition of "unattended" and the requirements in section 56.14207. Respondent's theory relies on the definition of "attended" which I found inapplicable to section 56.14207 because it is a different term with a different legislative history. *See* discussion *supra* V.A.1.a.

[7] In support of its argument Respondent cites to *Drilling & Blasting Systems, Inc.*, where the Commission considered section 56.7012's definition of "attended." 38 FMSHRC 190, 194–197 (Feb. 2016); (Resp't Bench Br. at 2). This case is distinguishable and inapplicable as section 56.7012 refers to safety procedures for drilling, not parking procedures for unattended mobile equipment, and discusses the term "attended," not "unattended." 30 C.F.R. § 56.7012.

Second, Respondent's logic is faulty. Section 56.14207, composed of two sentences, has two separate requirements: (1) put the equipment's gear in park position and set the parking brake whenever the equipment is left "unattended," and (2) ensure the tires are "chocked or turned into a bank" when "parked on a grade." 30 C.F.R. § 56.14207. Respondent misreads section 56.14207. The phrase "when parked on a grade" indicates that the second requirement (i.e., to ensure the tires are "chocked or turned into a bank") is conditioned on completion of the first requirement (i.e., to put the equipment's gear in park position and engage the parking brake whenever equipment is left unattended). *Id.* Respondent's example above alleges a miner would violate section 56.14207 every time the miner leaves the cab to chock the tires; but under the Secretary's definition of "unattended" in section 56.14207, compliance is achieved if the miner puts the mobile equipment's gear in park and sets the parking brake *before* exiting the vehicle to chock the tires when parked on a grade. Contrary to Respondent's arguments, the Secretary's definition is logical and workable.

Even if I were to adopt Respondent's theory that to "attend" the vehicle means being in its proximity, doing so could essentially allow a miner to complete in any order the section 56.14207 requirements of putting the gear in park position, setting the park brake, and chocking the tires if on a grade. Using Respondent's example, as long as a miner was in proximity to the mobile equipment, the miner could put the gear in park without engaging the parking brake and then exit the cab to chock the tires; while chocking the tires the miner remains in proximity to the pickup truck and may later re-enter the cab to set the parking brake. (*See* Tr. 116:9–118:7.) But Respondent's reading would potentially risk crushing a miner's hands or other injury during placement of the chocks underneath the tires even while in "proximity" to the equipment should the equipment slip out of gear if the parking brake is not set. Indeed, Respondent's interpretation could potentially lead to a less safe working environment.

Respondent's attacks on the Secretary's interpretation of "unattended" ring hollow and I reject them. I determine the Secretary's interpretation of "unattended" in section 56.14207 to be reasonable, and accordingly, I give deference to the Secretary's interpretation.

My determination is consistent with the decisions of other ALJs who have similarly deferred to such an interpretation of "unattended" under section 56.14207. *See, e.g.*, *Knife River Constr.*, 36 FMSHRC 2176, 2181 (Aug. 2014) (ALJ) (holding a miner outside of, but close to, a vehicle cannot operate the vehicle and therefore cannot attend it under the standard, as no miner was in position to immediately control the vehicle); *Southern Nevada Cement Co.*, 18 FMSHRC 1653, 1655 (Sept. 1996) (ALJ) (holding mobile equipment was "unattended" when a miner in proximity was not able to stop the vehicle)[8]; *Christman Quarry*, 18 FMSHRC 2151, 2153 (Dec.

[8] Respondent cites *Southern Nevada Cement Co.* as support for its argument. (Resp't Bench Br. at 2.) Contrary to supporting Respondent's argument, the ALJ in that case determined the mobile equipment was unattended because the miner was working underneath it, and thus held that the miner's proximity to the vehicle under the facts of that case was insufficient under section 56.14207. *Southern Nevada Cement Co.*, 18 FMSHRC at 1655. In addition, Respondent cites to *American Colloid Co.* where the ALJ applied a *de minimis* rule to determine that the measured grade was insignificant for a violation. 37 FMSHRC 2078, 2089–90 (Sept. 2015) (ALJ). The holding pertained to the second requirement of section 56.14207 (chocking tires

1996) (ALJ) (determining that exiting a bulldozer is leaving the equipment unattended inasmuch as the miner could not retain control of throttle lever or otherwise stop the equipment from the outside). Although these Commission ALJ decisions are not controlling, I find their reasoning to be instructive and persuasive regarding the meaning of "unattended" under section 56.14207.

2. Violation of 30 C.F.R. § 56.14207

Respondent does not dispute that Cowart failed to set the parking brake. (Tr. 107:2–4, 116:4–8.) Instead, Respondent disputes the distance between Cowart and the cab of the pickup truck. (Tr. 35:3–7, 119:2–7.) According to Respondent, Cowart stayed within the swing radius of the pickup truck's door and within reach of the steering wheel and parking brake. (Tr. 81:23–83:2, 118:12–13.) Respondent alleges Cowart never advanced far from the pickup truck based on his position in the inspector's photograph. (Tr. 81:13–15.) But Cowart was not standing by the door when Poe first observed the violation, and Poe estimates Cowart had been at least ten to twelve feet from the cab's side when they met. (Tr. 14:24–15:1, 39:14–19.)

I do not need to decide the precise number of feet Cowart stood from the side of the pickup truck. Cowart stated he exited the vehicle, and I find he moved to a position out of reach of the vehicle's controls whether it was ten feet from the pickup truck's side or to the position shown in the inspector's photograph. (Ex. S–1; Tr. 81:13–15.) I determine that the vehicle was unattended under section 56.14207 and that Cowart could not immediately control the vehicle or prevent it from rolling if it unexpectedly moved. Therefore, Blanchard violated section 56.14207 by Cowart failing to set the parking brake of the Chevy Silverado pickup truck.

3. Negligence

Inspector Poe assigned moderate negligence to the violation. (Ex. S–3.) Respondent contends no negligence is the appropriate determination. (Tr. 122:5–15.) While employee error or misconduct is not a defense to liability under the Mine Act, it is a factor in assessing the negligence determination. *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1115–1117 (July 1995.) Moreover, "the negligence of a rank-and-file miner is not imputable to the operator for purposes of penalty assessment or unwarrantable failure." *Martin Marietta Aggregates*, 22 FMSHRC 633, 636 (May 2000) (citing *Whayne Supply Co.*, 19 FMSHRC 447, 451, 453 (Mar. 1997); *Fort Scott Fertilizer-Cullar, Inc.*, 17 FMSHRC 1112, 1116 (July 1995.); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463–64 (Aug. 1982)). The actions of supervisors, foremen, or other managers may be imputed to the mining operator in the negligence determination. *Southern Ohio Coal Co.*, 4 FMSHRC at 1464. On the other hand, when the operator has taken care to train its employees, including supervisors and managers, and the manager acts aberrantly, negligence is not imputed to the operator. *Nacco Mining Co.*, 3 FMSHRC 848, 850 (Apr. 1981).

The Secretary provided no evidence or argument showing that Cowart, a rental representative, occupied a supervisory or managerial position. (Tr. 25:24–26:5, 26:16–17,

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when parking on a grade) and is inapplicable to the facts of this case. *Id.* If Respondent is inviting me to apply a *de minimis* standard to the first requirement of section 56.14207, I decline.

58:10–13, 98:6–99:19.) Nor did the Secretary provide evidence indicating Blanchard's management knew or should have known its employee left the pickup truck unattended without setting the parking brake. (Tr. 58:24–59:7.) Indeed, Cowart had an everyday habit of setting his parking brake. (Tr. 107:16–22.) And the record shows that Blanchard trained its employees to comply with the provisions of section 56.14207. (Tr. 58:10–13, 100:18–101:24.) Cowart freely admitted to Poe that he knew he was supposed to set the parking brake; but it slipped his mind given Poe's sudden appearance. (Tr. 58:7–8, 107:18–22.) Other than establishing the existence of the violation at the moment it occurred while the vehicle door was still open, the Secretary made no argument for why Cowart's conduct – admittedly a momentary lapse because he was flustered – should be imputed to Blanchard's management. Rather, the record shows Blanchard's management was unware of the September 15 violation as it occurred. (Tr. 58:10–59:17.) Moreover, Blanchard received no other citations during Poe's September inspection. *See* Mine Safety and Health Admin., *Inspection Violations Summary: For Event Number 667183*, Mine Data Retrieval System, http://arlweb.msha.gov/drs/ASP/InspectionViolations.asp (last accessed July 5, 2016).

Even considering Cowart's lapse, I note that he parked against a railroad tie which mitigated potential harm. (Tr. 80:6–15.) I also note conditions surrounding the violation strongly support reducing the negligence determination. First, the parking area where Inspector Poe issued the citation was flat and little danger of rolling existed. (Tr. 83:22–25, 94:6–15.) Second, the parking area did not contain any current mining activities at the time of the citation. (Tr. 76:2–8.) Although workers were moving earth prior to erecting plants at other parts of the Haile Gold Mine, no evidence in the record suggests even a remote chance of an unexpected force moving the pickup truck. (Tr. 28:7–16.) Third, the pickup truck possessed an automatic transmission that reduced the likelihood of unexpected rolling. (Tr. 22:18–23.) Moreover, Poe testified that if the pickup truck did move, it would roll very slowly. (Tr. 57:12–16.) Fourth, the duration of the violation was extremely short, possibly seconds. Finally, Cowart's eagerness to meet the MSHA inspector motivated his mistake of not setting the parking brake. (Tr. 107:1–22.) Cowart's error resides in his temporary oversight in abiding by the strict letter of the regulation when meeting a MSHA inspector for the first time rather than in his exercising poor judgment. Nothing in the record suggests Cowart habitually neglected to set his parking brake.

Given the evidence, I conclude that Blanchard did not know and had no reason to know of the momentary lapse of one of its employees. Based on the totality of the circumstances holistically given the particular facts of this case, I determine that Blanchard's conduct constituted no negligence.

B. Penalty

The Secretary has proposed a penalty of $100.00. The Commission is not bound by the Secretary's proposal and reviews penalty assessments *de novo*. *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263–1264 (D.C. Cir. 2016). Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and (6) the demonstrated good faith of the operator in

attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i). There is no requirement that these criteria receive equal weight in my assessment. *Jim Walter Resources, Inc.*, 36 FMSHRC 1972, 1979 (Aug. 2014).

Upon evaluating the criteria, I considered Blanchard's size and insignificant history of violations. (Ex. S–4.) It has already been stipulated that the citation will not affect Blanchard's capacity to continue in business. The gravity of the violation is low. I have also found Blanchard's actions to constitute no negligence. *See Asarco, Inc.*, 8 FMSHRC at 1636. Nevertheless, I note that the amount of the proposed penalty is consistent with a technical violation. The evidence of record indicates Blanchard's employee took immediate, good faith steps to abate the violation by setting the parking brake. (Tr. 20:1–3, 83:3–6.) In consideration of all the relevant facts and circumstances, I hereby assess a penalty of $75.00.

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation No. 8899032 is **MODIFIED** to no negligence and affirmed in all other respects.

WHEREFORE, it is hereby **ORDERED** that Respondent Blanchard Machinery Company pay a penalty of $75.00 within 40 days of this decision.[9]

Alan G. Paez
Administrative Law Judge

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[9] Payment should be sent to: U.S. Department of Labor, MSHA, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include docket and A.C. numbers.