FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

JUL 26 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. TIM M. BALL, employed by Mountain Materials, Inc., Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. VA 2014-0148-M A.C. No. 44-00165-340588 A Mine: Castlewood Plant
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. RICKY A. ROSE, employed by Mountain Materials, Inc., Respondent.	Docket No. VA 2014-0149-M A.C. No. 44-00165-340589 A Mine: Castlewood Plant

DECISION AND ORDER

Appearances: Jason S. Grover, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;

David M. Toolan, Esq., Oldcastle Law Group, Atlanta, Georgia, for Respondent.

Before: Judge L. Zane Gill

I. INTRODUCTION

These proceedings arise under section 110(c) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"), 30 U.S.C. § 820(c). Section 110(c) provides that corporate agents, officers, or directors who knowingly authorize, order, or carry out a Mine Act violation may be subject to individual civil penalties. Here, the Secretary of Labor ("the Secretary") seeks to impose individual civil penalties on Tim M. Ball and Ricky A. Rose ("Respondents") in their capacity as employees and agents of mine operator Mountain Materials, Inc. for two violations

that were issued to Mountain Materials by the Department of Labor's Mine Safety and Health Administration ("MSHA") under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1).[1]

The sole matter at issue in Docket Number VA 2014-0148-M is Citation Number 8634338, which alleges a housekeeping violation. The Secretary seeks a $1,200.00 penalty against Respondent Ball for this alleged violation. The sole matter at issue in Docket Number VA 2014-0149-M is Order Number 8634340, which alleges an examination violation. The Secretary seeks a $1,500.00 penalty against Respondent Rose for this alleged violation.

The parties presented testimony and evidence on May 27, 2015, in Big Stone Gap, Virginia. For the reasons discussed below, after considering all the evidence, I uphold the two violations as written and assess an individual penalty against each Respondent.

II. STIPULATIONS

The parties have entered into the following stipulations of fact, which were listed in the parties' Joint Prehearing Report and read into the record at hearing (Ex. S-5; Tr. 5:17–6:18)[2]:

1. Mountain Materials, Inc., was an "operator" as defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d), at the Castlewood Plant mine.

2. Castlewood Plant is a "mine" as defined in section 3(h) of the Mine Act, 30 U.S.C. § 802(h).

3. The products of the Castlewood Plant entered commerce, or the operations or products of the Castlewood Plant affected commerce, within the meaning of the Mine Act, specifically sections 3(b) and 4, 30 U.S.C. §§ 802(b), 803.

4. Operations of Mountain Materials, Inc. at the Castlewood Plant where the citation and order at issue in this docket were issued are subject to the jurisdiction of the Mine Act.

5. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges under sections 105 and 113 of the Mine Act, 30 U.S.C. §§ 815, 823.

6. Mountain Materials, Inc. is a "corporation" under the Mine Act.

---

[1] MSHA's Mine Data Retrieval website shows that Mountain Materials paid a $2,000.00 penalty for each violation without contesting either one. *See* U.S. Dep't of Labor, MSHA, Mine Data Retrieval System, http://arlweb.msha.gov/drs/drshome.htm.

[2] The Secretary's exhibits are labeled Exhibits S-1 through S-5. The Respondents did not submit any exhibits. Citations to the transcript of the hearing are abbreviated "Tr." The parties were directed to submit closing briefs within 30 days of receipt of the transcript. (Tr. 119:8-14) Because the Secretary filed his brief approximately 10 months after receipt of the transcript, I deem the brief to have been untimely filed and decline to consider it.

7. Citation 8634338 was properly served by a duly authorized representative of the Secretary of Labor.

8. Order 8634340 was properly served by a duly authorized representative of the Secretary of Labor.

III. FACTUAL BACKGROUND[3]

The citation and order at issue in this matter were written by MSHA Inspector Danny Hagy[4] on April 11, 2011, at Mountain Materials' limestone processing facility, the Castlewood Plant. (Ex. S-1; Ex. S-2) A few days earlier, Hagy had been contacted by a former MSHA colleague, Jack Burnett,[5] regarding dust conditions and buildups of material at the Castlewood Plant. (Tr. 106:14-19, 107:11–108:8) At the time, Burnett was working for Mountain Materials as a safety consultant tasked with conducting mock inspections at four of the company's operations, including the Castlewood Plant. (Tr. 66:3-12, 99:15–100:2) Burnett's comments about dust and buildups at the pelletizer plant spurred Inspector Hagy to visit the facility to make sure there were no problems. (Tr. 114:5-12)

Hagy arrived at the Castlewood Plant around 7:00 p.m. on April 11, and initiated a regular semiannual MSHA inspection. (Tr. 12:4–13:7) The mine office was closed, so he traveled directly to the pelletizer plant. (Tr. 13:5-8) The pelletizer plant is a large building where raw limestone is fed through a grinding mill, mixed with a binding agent, spun on a disc to form round pellets, and run through a dryer to create a product that is sold for use in agricultural applications. (Tr. 13:11-21, 34:14-20, 49:14-18, 52:4–53:5, 75:13-15, 80:13–83:25)

---

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

[4] Hagy has worked as a metal/nonmetal mine inspector for MSHA since October 2008. To become an inspector, he completed 6 weeks of field training and 26 weeks of classroom training at MSHA's Mine Academy. He has prior industry experience working at a limestone quarry for 22 years as a drill helper, equipment operator, and plant manager. (Tr. 9:20–11:25)

[5] Burnett died prior to the hearing. (Tr. 106:21) The Respondents object to Burnett's statements as hearsay. (Tr. 107:1-8) However, hearsay evidence is admissible under the Commission's procedural rules. *See* 29 C.F.R. § 2700.63(a). Moreover, I rely on Burnett's statements only to reveal his impressions of the plant as conveyed to Hagy, not to show whether or not there were buildups of material and dust at the plant. *See* Fed. R. Evid. 803(1) (providing that rule against hearsay does not apply to statements describing present sense impressions).

When Hagy looked through the doorway of the plant, his view was obscured by "excessive" airborne dust that prevented him from seeing beyond about fifteen feet into the building. (Tr. 13:22–14:16, 15:2-12, 18:4-11) Because his visibility was limited and he did not want to inhale the dust, he waited outside the door for about ten minutes until an employee arrived and directed him to the control room at the back of the building. (Tr. 14:1-3, 14:17–15:25) Respondent Ball,[6] the shift foreman, was in the control room operating the pelletizer plant. (Tr. 15:21-23) He was the only person in the plant at the time. (Tr. 76:11-13) Inspector Hagy asked why the dust was so thick, but as of the hearing date four years later, he could no longer recall what Ball had said to him. (Tr. 16:16-19, 32:6-10, 38:22-25) Ball immediately attempted to tamp down the dust by applying water to the material he was processing, which clogged the machinery and halted production. (Tr. 17:2-9)

Hagy walked through the plant with Ball after the dust had settled. (Tr. 17:8-19, 18:14-24) He observed "quite a bit of buildup of material throughout the plant" both in walkways and on the floor, including multiple areas where footprints were visible and one location where material was piled to a height of 63 inches. (Tr. 17:11–18:1, 19:2-15) Hagy alleges that he noticed several other obvious safety hazards, although by the hearing date he could no longer remember any of them except a large door that was hanging by a hinge which he was concerned would fall on a miner. (Ex. S-2; Tr. 29:17–30:11) When he reviewed the plant's workplace examination records, he found that no hazards had been recorded over the past two weeks except a leak in the roof. (Ex. S-2 at 5; Tr. 31:11-24)

Based on his observations, Inspector Hagy issued Citation Number 8634338, which alleges that the operator failed to keep the pelletizer plant's floor and travelways clear, and Order Number 8634340, which alleges that the operator failed to conduct an adequate workplace examination in the pelletizer plant. (Ex. S-1; Ex. S-2; Tr. 20:17–21:2, 26:9–27:18) Citation Number 8634338 was terminated eight days later, on April 19, 2011, with notation that the buildups of material in the travelways had been cleaned up. (Ex. S-1 at 3) Order Number 8634340 was terminated on April 20 with notation that shift foremen had been retrained in the proper performance of workplace exams. (Ex. S-2 at 4)

In July 2011, an MSHA investigator interviewed Ball and the plant's fine grind superintendent, Respondent Rose,[7] who had been onsite but not at the pelletizer plant the evening of the inspection. (Ex. S-3; Ex. S-4; Tr. 47:25–49:4) The Respondents told the investigator that

---

[6] Ball began working at the Castlewood Plant in 1994, serving as a general laborer and mill operator before becoming a certified foreman in 2000 or 2001. At the time of the inspection, he was the second shift foreman for the dust plant. In this capacity, he supervised five employees and was responsible for conducting pre-shift examinations, monitoring the plant for potential problems, and ensuring the safety of his men. (Tr. 72:9-20, 89:2-7; Ex. S-4 at 2)

[7] Rose is the fine grind plant superintendent at the Castlewood Plant. He began working at the mine intermittently in 1980 and became a full-time employee in 1984. Over the years, his duties have included stacking dust, driving a truck, operating a mill, operating crushers in the crushing plant, and "[doing] everything in the fine grind plant." He served as a foreman for 13 years before becoming a superintendent in 1997. As a superintendent, he directly supervises the plant foremen, including Ball, and is responsible for daily activities at the mine. (Tr. 47:3-20, 63:11-25; Ex. S-3 at 2)

the buildups had been caused by a malfunction or imbalance in the pelletizing process that occurred while running a special product. (Ex. S-3 at 4, 5; Ex. S-4 at 5) At hearing, they explained that when an imbalance causes the material to become too wet or too dry, it is diverted and dumped into a "floor bin" area[8] as reject material that is later picked up with a skidsteer and run through the system again. (Tr. 49:12–53:17, 79:4-14, 82:3–83:10, 97:11-13) They suggested this is a normal part of the pelletizing process that can rapidly generate large amounts of reject material and dust. (Tr. 49:9-11, 54:12–55:2, 59:3-18, 79:15–80:3, 84:5-20, 91:11-21, 101:5-15)

IV. LEGAL PRINCIPLES

Section 110(c) Liability

Section 110(c) of the Mine Act provides that "[w]henever a corporate operator violates a mandatory health or safety standard ... any director, officer, or agent of such corporation who knowingly authorized, ordered or carried out such violation shall be subject to the same civil penalties" as the corporate operator. 30 U.S.C. § 820(c).

Thus, as a threshold matter, section 110(c) requires a showing that the individual respondent is a director, officer, or agent of a corporate operator. Although the corporate operator – in this case, Mountain Materials – need not be a party to the proceeding, another necessary predicate for 110(c) liability is a finding that the operator violated the Mine Act. *Kenny Richardson*, 3 FMSHRC 8, 9-11 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983).

Importantly, section 110(c) also requires a showing that the individual respondent knowingly authorized, ordered, or carried out the violation. The Commission has construed "knowingly" to include both actual and constructive knowledge, explaining that 110(c) liability is triggered whenever a person "in a position to protect employee safety and health fails to act on the basis of information that gives him *knowledge or reason to know* of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 15-16 (emphasis added); *accord Sumpter v. Sec'y of Labor*, 763 F.3d 1292, 1299-1300 (11th Cir. 2014); *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). Specific intent is not required. The Secretary must prove only that the individual knowingly acted, not that the individual knowingly violated the law. *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1996 (Aug. 2014) (citing *Warren Steen Constr. Co.*, 14 FMSHRC 1125, 1131 (July 1992)). Although a showing of willfulness is not required either, "section 110(c) liability is generally predicated on aggravated conduct constituting more than ordinary negligence." *Ernest Matney*, 34 FMSHRC 777, 783 (Apr. 2012) (citing *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992)); *see also Freeman United*, 108 F.3d at 360.

Whether conduct is "aggravated" is determined by looking at all the facts and circumstances of the case to see if any aggravating or mitigating factors exist. *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec.

[8] There is no physical bin. The term "floor bin" simply refers to a section of the floor that is designated as a holding area for reject material. (Tr. 57:16-24, 90:15-17)

2009); *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Big Ridge, Inc.*, 34 FMSHRC 119, 125 (Jan. 2012) (ALJ Zielinski). These include: (1) the extent of the violative condition; (2) the length of time that the violative condition existed; (3) whether the violation posed a high degree of danger; (4) whether the violation was obvious; (5) the respondent's knowledge of the existence of the violation; (6) the respondent's prior efforts in abating the violative condition; and (7) whether the respondent had been previously placed on notice that greater efforts were necessary for compliance. *Sierra Rock Products, Inc.*, 37 FMSHRC 1, 4 (Jan. 2015); *ICG Hazard, LLC*, 36 FMSHRC 2635, 2637 (Oct. 2014); *Manalapan*, 35 FMSHRC at 293; *IO Coal*, 31 FMSHRC at 1351-57; *Consolidation Coal*, 22 FMSHRC at 353; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *see also Ernest Matney*, 34 FMSHRC at 783-87 (analyzing aggravated conduct in 110(c) case by discussing unwarrantable failure factors).

Assuming that 110(c) liability applies, the gravity of the violation and negligence must also be evaluated in accordance with the Commission's well-established legal principles, summarized below, in order to determine the appropriate penalty.

Significant and Substantial (S&S)

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

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

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

Traditionally, the third element of the *Mathies* test has presented the most difficulty when determining whether a violation is S&S. In *U.S. Steel Mining Co.*, the Commission provided additional guidance: "[T]he third element of the *Mathies* formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.'" 7 FMSHRC 1125, 1129 (Aug. 1985) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984)). The Secretary, however, "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)), *aff'd*, 717 F.3d 1020 (D.C. Cir. 2013). Further, the Commission has found that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005) and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC at 905; *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

The Fourth and Seventh Circuits have interpreted the *Mathies* test somewhat differently by placing the emphasis and the bulk of the analysis on the second element of the test. *See Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148 (4th Cir. 2016); *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014). Because the Castlewood Plant is located in the Fourth Circuit, my S&S analysis will follow the Fourth Circuit's ruling in *Knox Creek.* According to the Fourth Circuit, the second element of the *Mathies* test "primarily accounts for the Commission's concern with the *likelihood* that a given violation may cause harm" because "for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm." *Knox Creek*, 811 F.3d at 162. The Fourth Circuit also held that the occurrence of the hazard must be assumed at the third prong of the *Mathies* test, characterizing the appropriate inquiry as whether the hazard, assuming it occurred, would result in serious injury. *Id.* at 161-65.

Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984) and *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ Fauver). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an

injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130.

Negligence

"Negligence" is not defined in the Mine Act. The Commission, has, however,

> recognized that "[e]ach mandatory standard ... carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, we 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. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

Brody Mining, LLC, 37 FMSHRC 1687, 1702 (Aug. 2015); *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008). "Thus in making a negligence determination, a Judge is not limited to an evaluation of allegedly 'mitigating' circumstances. Instead, the Judge may consider the totality of the circumstances holistically." *Brody Mining, LLC*, 37 FMSHRC at 1702.

Indeed, the Part 100 regulations "apply only to the *proposal* of penalties by MSHA and the Secretary of Labor; under both Commission and court precedent, the regulations do not extend to the independent Commission, and thus the MSHA regulations are not binding in any way in Commission proceedings." *Id.* at 1701-02 (citing *Jim Walter Res., Inc.*, 36 FMSHRC at 1975 n.4, and *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties ... we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."), *aff'g* 5 FMSHRC 287 (Mar. 1983)). Although the Secretary's part 100 regulations are not binding on the Commission, the Secretary's definitions of negligence in those provisions are illustrative.

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

Penalties

The principles governing the authority of Commission administrative law judges to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing

penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). When an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess said penalty. 29 C.F.R. § 2700.28. Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52; *American Coal Co.*, 35 FMSHRC 1774, 1819 (June 2013) (ALJ Zielinski).

Section 110(i) of the Mine Act sets forth six statutory criteria for the Commission to consider when assessing civil penalties. *See* 30 U.S.C. § 820(i). These six criteria also apply, with appropriate revisions, to the assessment of penalties against individuals under section 110(c). *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1764 (Aug. 2012). Specifically, the Commission has indicated that judges should consider the following criteria when assessing a penalty against an individual: (1) the individual's history of previous violations; (2) the appropriateness of the penalty to the individual's income and net worth; (3) the effect of the penalty on the individual's ability to meet his financial obligations; (4) whether the individual was negligent; (5) the gravity of the violation; and (6) the demonstrated good faith in abatement of the violative condition. *Id.*; *Ambrosia Coal & Constr. Co.*, 19 FMSHRC 819, 823-24 (May 1997); *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 271-72 (Feb. 1997).

The Commission has repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the Section 110(i) criteria. *E.g.*, *Sellersburg Stone Co.*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 621.

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010) (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria). For example, violations involving "extreme gravity" and/or "gross negligence," or, as stated in the former section of 105(a), "an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances," may dictate higher penalty assessments. *See* 30 C.F.R. Part 100, Final Rule, 72 Fed. Reg. 13592-601, 13621.

V. FINDINGS AND DISCUSSION

A. Threshold Finding of Corporate Agency

As a preliminary matter, I find that Respondents Ball and Rose were agents of a corporate operator within the meaning of section 110(c). The parties stipulated that Mountain Materials is

a corporation. (Ex. S-5) Ball and Rose admitted that at all times relevant to these proceedings, they were employed by Mountain Materials as shift foreman and superintendent, respectively. (Answer ¶7) The Respondents also admitted they were "agents" of the company within the meaning of section 3(e) of the Mine Act, 30 U.S.C. § 802(e), which 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." (Answer ¶7; Tr. 45:22-25) Both men were charged with responsibility for the operation of the pelletizer plant and the supervision of miners working there. (Ex. S-3 at 2; Ex. S-4 at 2, 5; Tr. 63:18–64:12) Accordingly, the Respondents are subject to section 110(c) as corporate agents.

B. Citation Number 8634338 (Housekeeping Violation)

Citation Number 8634338 alleges a violation of 30 C.F.R. § 56.20003(a). The Secretary seeks an individual penalty against Respondent Ball for this violation.

1. Violation of 30 C.F.R. § 56.20003(a)

Section 56.20003(a) is a broad, general "housekeeping" standard that provides: "Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." 30 C.F.R. § 56.20003(a). Thus, the Secretary must establish two elements: (1) the cited area is a "workplace," "passageway," "storeroom," or "service room," and (2) the area is not being kept clean and orderly. The Secretary bears the burden of proving each element of the violation by a preponderance of the evidence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001). The Secretary may properly charge an operator with a violation if a reasonably prudent person familiar with the protective purposes of the cited standard and the factual circumstances surrounding the alleged violation, including any facts peculiar to the mining industry, would have recognized a hazard warranting corrective action within the purview of the applicable regulation. *LaFarge North America*, 35 FMSHRC 3497, 3500-01 (Dec. 2013); *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

In this case, Inspector Hagy alleges that § 56.20003(a) was violated when the mine operator failed to keep travelways clean and orderly in the pelletizer plant. (Tr. 20:17–21:5; Ex. S-1) Specifically, the narrative portion of the citation states that there were buildups of material "throughout the floor and the travel ways" of the plant, including one area where the material was 63 inches high and several areas where miners had been walking through the buildups. (Ex. S-1 at 1) Hagy supported these allegations by documenting and describing specific locations where he observed buildups.

Buildups in Front of the MCC

One such location was on the floor in front of the MCC (the motor control center or master control center), which houses the electrical switches that lock out the pelletizer plant. (Tr. 25:10–26:2, 76:18) Hagy observed and photographed accumulated material with footprints in it at this location. (Ex. S-1 at 6) Respondent Ball did not deny that there were buildups of material in front of the MCC. He testified that this area is adjacent to the disc that spins the material into

pellets, which emits "small particles that fly everywhere" when it malfunctions, and that the plant had malfunctioned the day of the inspection. (Tr. 76:14-77:17) Ball also conceded that he was the person who had walked through the built-up material, leaving footprints. (Tr. 19:21–20:1, 25:10-15, 88:8-14) He testified that there is a "little walkway" running through the area that is used by the plant operator. (Tr. 77:2-4)

I find that the area in front of the MCC constitutes a "passageway" under § 56.20003(a) because miners must pass through it in order to access the MCC, as evidenced by the fact that Ball referred to it as "a little walkway" and walked through it. This area was not being kept clean and orderly, in violation of § 56.20003(a).

Buildups in the Floor Bin Area

Elsewhere on the plant floor, Hagy photographed a pile of material that had accumulated to a height of 63 inches. (Ex. S-1 at 5; Tr. 19:2-7) Respondents Ball and Rose did not dispute that the 63-inch pile existed. (Tr. 53:18-24, 73:2, 88:4, 92:8-9) They also agreed that, as depicted in the photograph, there were visible footprints or a "goat path" in the pile as if someone had walked across it. (Tr. 55:18-21, 88:1-7; Ex. S-1 at 5) Ball stated that an access road had been cut through the pile on the prior shift so that miners could drive equipment through the area hauling pallets of sodium to be "poured in the bottom" or reject material to be dumped back on the belt. (Tr. 72:23–73:13, 90:22–91:10; Ex. S-4 at 4)

Respondents suggested it is acceptable for material to accumulate in this area because it is designated as a floor bin, not a walkway or workplace. (Tr. 49:9-11, 53:22–55:2, 79:15–80:3, 91:11-21, 94:9-17) According to Respondents, allowing reject material to collect here does not present a safety issue because miners should know to avoid walking through the area if material is present. (Tr. 55:9-13, 95:4–96:13) However, relying on miners' skill and attentiveness to prevent injury "ignores the inherent vagaries of human behavior." *Peabody Coal Co.*, 19 FMSHRC 1381, 1385 (Aug. 1997). Moreover, the footprints and Ball's account of an access road running through the pile show that miners were actually using this area as a passageway. In fact, Ball admitted that the area could be characterized as a travelway under the circumstances (Tr. 94:25–95:5), bringing it within the ambit of § 56.20003(a). The pile of material in this area was so large that a reasonably prudent person would have at least made an attempt to begin clearing it. I find that this area was not being kept clean and orderly, in violation of § 56.20003(a).

Buildups in Other Parts of the Plant

Other parts of the plant aside from the MCC and floor bin areas were also covered in dust, according to Inspector Hagy. (Tr. 19:8-15, 43:13-15, 108:9-21) For example, a catwalk around one of the crushers or mills was so full of rocks and dust that the material was rolling off the sides. (Tr. 19:10-13, 108:12-15, 114:20–115:2) Hagy described the accumulations as excessive. (Tr. 19:14) He did not recall seeing any parts of the plant floor that were clear. (Tr. 19:16-20, 108:22-24) There were so many places in need of cleaning that it was difficult to list them all, he testified. (Tr. 115:7-9)

The Respondents did not specifically challenge these allegations. Ball stated that if the catwalks or stairs had been "bad," he was sure he would have written them up, but he "c[ould]n't really remember." (Tr. 97:14-22) Rose opined that "on the most part, we run a pretty good – pretty clean house" (Tr. 59:22-24), but did not address Hagy's account of material blanketing the floor and spilling over the sides of the catwalk around the crusher. Ball and Rose also attempted to explain why the citation was not terminated for eight days. They testified that they had probably finished cleaning the plant relatively quickly, but had to wait several days for Inspector Hagy to return to terminate the citation. (Tr. 68:4–71:9, 78:19–79:3, 87:3-23) However, Hagy testified that although the floor probably could have been cleaned with a loader in just a few hours, "it was all the catwalks and these other areas that had to be manually shoveled and cleaned that took the amount of time that it did." (Tr. 108:18-21)

After considering all the evidence, I find Hagy's description of the conditions at the pelletizer plant to be more credible than Respondents'. I fully credit Hagy's testimony that there were extensive buildups of material throughout the travelways and floor of the plant, in violation of § 56.20003(a).

I also reject Respondents' suggestion that the buildups of material were a normal, unavoidable part of the mining process. Respondents argue that the dust and buildups developed very rapidly at the beginning of the shift when an attempt to make a particularly difficult product triggered a malfunction that required Ball, who was not the regular plant operator, to dump large amounts of reject into the floor bin to prevent it from accumulating elsewhere. (Resp. Br. 6; Tr. 57:4-6, 73:22–75:12, 77:18–78:9, 97:1-10, 101:3-15) Ball testified that his normal practice would be to clean up the material in the bin area once the plant is running smoothly again. (Tr. 97:23–98:1) The implication is that the plant would have been cleaned in due time, but the material built up too rapidly to be addressed before the inspector showed up. However, the buildups were very extensive and bore footprints in multiple places. It is improbable to believe they arose in the short period of time suggested by Respondents. Also, Ball admitted that a pile of material was already present before his shift began. (Tr. 72:16–73:10, 86:1-7) A reasonably prudent person would have recognized a hazard and initiated a cleanup. Ball chose to begin running the plant instead. This action was inconsistent with the standard of care placed on the operator under § 56.20003(a). Because the operator failed to keep passageways clean and orderly in the plant, § 56.20003(a) was violated.

2. S&S and Gravity

Inspector Hagy marked this violation as S&S and reasonably likely to result in a permanently disabling injury to one miner. (Ex. S-1) He was concerned that "[i]f normal mining practices were to continue in this condition, [with] people walking over this excessive amount of material, dust in the plant, visibility low, it's reasonably likely we could have had a serious injury" such as a broken bone caused by a miner tripping and falling over material in the floor or falling down a flight of stairs. (Tr. 21:9–23:3)

I have already found a violation of the mandatory safety standard at § 56.20003(a), satisfying the first element of the *Mathies* test for S&S.

The second *Mathies* element requires a showing that the violation contributed to a discrete safety hazard. As conceded by Respondents Ball and Rose, this violation contributed to the hazard of a miner slipping, tripping, or falling due to the built-up material. (Tr. 65:1-11, 88:19–89:21) According to the Fourth Circuit, "for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm." *Knox Creek*, 811 F.3d at 162. The buildups of material at issue in this case were located in travelways and on the floor of the active pelletizer plant in areas where miners worked and traveled, as evidenced by the footprints in many of the buildups. The buildups were so extensive that Inspector Hagy did not see any clear paths across the floor. (Tr. 19:16-20, 108:22-24) If normal mining operations had continued, it was reasonably likely that miners accessing the equipment in the pelletizer plant building would have to walk over and through the widespread accumulations, as Respondent Ball admitted doing. The accumulated material included dust, rocks, and pellets. (Tr. 53:6-13, 77:4-6, 79:19-23, 114:20-24) It would be difficult for a miner to keep his footing in these materials. Airborne dust obscured visibility in the plant (Tr. 18:4-11), increasing the chance that a miner would lose his footing and fall while trying to cross the unstable and uneven surfaces created by the buildups. Given these factors, I find that this violation was more than "at least somewhat likely to result in harm" to miners and that the safety hazard to which it contributed was discrete. Accordingly, the second *Mathies* element is satisfied.

The third and fourth *Mathies* elements inquire whether the hazard, assuming it occurred, would be reasonably likely to result in a reasonably serious injury. As noted above, the hazard presented by this violation was a slip- or trip-and-fall hazard. Extensive buildups were present both on elevated catwalks and on the floor of the pelletizer plant. If a miner were to lose his footing in the buildups and fall against a piece of machinery, down a flight of stairs, or onto the hard plant floor, especially from an elevated catwalk, he would be reasonably likely to sustain reasonably serious injuries such as broken bones, muscle sprains, or permanently disabling injuries related to contacting moving machine parts. Accordingly, the third and fourth *Mathies* elements are satisfied.

Because the evidence satisfies all four elements of the *Mathies* test, I find that this violation was S&S.

Based on my findings above, I also find that the gravity of this violation was serious because it was reasonably likely to result in a serious or permanently disabling injury to a miner.

3. Respondent Ball's Liability and Negligence

Ball can be held individually liable for a penalty under section 110(c) if he "knowingly authorized, ordered or carried out" the violation. It is not necessary to find that he intended to violate the safety standard, actually knew a standard was being violated, or displayed willfulness. *See Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997) (actual knowledge or specific intent not required); *Ernest Matney*, 34 FMSHRC 777, 783 (Apr. 2012) (willfulness not required); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992) (conscious disregard of safety standard not required). It is sufficient to find that he should have known of the violation but nonetheless authorized, ordered, or carried out the violative conduct and, in doing so, engaged in more than ordinary negligence. *See, e.g.*, *McCoy Elkhorn Coal*

Corp., 36 FMSHRC 1987, 1996-99 (Aug. 2014) (affirming 110(c) liability when foreman was aware of coal accumulations but directed production to continue before initiating cleanup).

I find that Ball knew there were buildups of material throughout the pelletizer plant on April 11, 2011, and should have known that this condition violated § 56.20003(a). As shift foreman, he was responsible for reviewing prior examination records and conducting his own examination to ensure the workplace was clear of safety hazards. (Ex. S-4 at 2, 3, 5, 7; Tr. 89:2-7, 92:24–93:6) He customarily walks through the workplace at the beginning of the shift to ensure the area is safe for his men, and he did so on April 11. (Tr. 72:16–73:21) At that time, he was aware that the plant had not been running smoothly. He observed a pile of reject material on the plant floor that was so large a road had been cut through it, and he walked through buildups of material in front of the MCC. (Tr. 73:1-13, 86:1-7, 88:11-14) He was aware that the housekeeping standard requires travelways to be kept clear and that buildups in travelways pose a slip/trip hazard. (Tr. 88:15–18) He admits it was his responsibility to clear buildups and make sure dust was controlled at the plant. (Tr. 90:1-3, 91:22–92:11; Ex. S-4 at 5) He also admits that buildups in travelways or a large pile such as the one he saw in the floor bin area create a hazard, and that he could have made a managerial decision to initiate immediate cleanup action. (Tr. 88:19–89:21, 93:7-22) Despite knowing that hazardous conditions existed and being in a position to address them, Ball failed to do so. Instead, he added to the buildups by running the plant. (Tr. 73:14–74:3, 95:18-24) I find that his actions amounted to carrying out and implicitly authorizing the violation.

Ball argues that he works with friends and family members at the mine and would never deliberately interfere with his coworkers' safety or violate a safety practice or standard. (Tr. 8:2–9:1) However, deliberate intent to commit a violation is not required. *See McCoy Elkhorn*, 36 FMSHRC at 1996. Even if Ball genuinely did not realize the buildups were extensive enough that they needed to be cleared in order to meet the standard of care prescribed in § 56.20003(a), he still can be held liable as a foreman for failing to take adequate steps to meet that standard of care. *See Sumpter v. Sec'y of Labor*, 763 F.3d 1292, 1300 (11th Cir. 2014) (rejecting good faith as a defense to 110(c) liability); *LaFarge Constr. Materials*, 20 FMSHRC 1140, 1148-49 (Oct. 1998) (noting it is incumbent on agents to recognize serious hazards and meet the standard of care proportionate to the danger); *Prabhu Deshetty*, 16 FMSHRC 1046, 1051 (May 1994) (rejecting argument that foreman did not realize accumulations were extensive enough to constitute a violation).

As discussed above, 110(c) generally requires a showing of aggravated conduct, which is analyzed with reference to factors such as the extensiveness, obviousness, dangerousness, and duration of the violation, the respondent's knowledge of the violation, his abatement efforts, and whether he was on notice that he needed to make a greater effort to comply with the Mine Act.

Notice of the need for greater compliance efforts generally takes the form of specific warnings from MSHA or a history of past similar violations. *See Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3080-81 n.5 (Dec. 2014). In this case, MSHA did not single out the Respondent to warn him that he needed to make a greater effort to comply with the housekeeping standard.

However, Ball had knowledge of the violation in that he was fully aware of the conditions at the plant and was familiar with the requirements imposed on him by § 56.20003(a) and by his role as a foreman, yet he failed to make any effort to abate the violation until Inspector Hagy arrived at the plant and asked him about the dust. (Tr. 88:15-18, 89:2-7, 90:1-3, 91:22–94:13) The violation was very obvious. The photographs taken by Inspector Hagy show that the buildups of material would have been readily discernable to anyone who walked into the pelletizer plant. (Ex. S-1 at 5-6; *see also* Tr. 24:8-9, 65:12-16) The violation was extensive both in terms of the physical extent of the buildups and the time taken to cleat them: numerous areas in the plant were affected; large amounts of material had been permitted to accumulate in some locations, such as the 63-inch pile in the floor bin and the overflowing catwalk around the crusher; and it took eight days for the citation to be terminated. The violation was dangerous in that the buildups contributed to the hazard of a miner incurring serious injury in a slip- or trip-and-fall accident. I agree with Inspector Hagy that the large amounts of material could not have accumulated in one shift, and therefore the duration of the violation was longer than a shift. (Tr. 23:8-22, 39:18-21) These are all aggravating factors.

Despite Ball's knowledge of the violation, the extensiveness and obviousness of the violative conditions, and the danger they posed, he failed to take abatement action. Ball has not shown that there were any significant mitigating factors. For these reasons, I find that he engaged in aggravated conduct constituting more than ordinary negligence in connection with this violation.[9] Because he knowingly authorized and carried out this violation and his conduct was aggravated, he is liable for a penalty under 110(c).

Based on my finding of aggravated conduct with no mitigating factors, I also find that Ball's negligence in connection with this violation was high.

4. Penalty

The Secretary requests that I assess a penalty of $1,200.00 against Ball for this violation. As discussed above, the criteria to be considered when assessing a penalty against an individual respondent include: (1) his history of previous violations; (2) the appropriateness of the penalty to his income and net worth; (3) the effect of the penalty on his ability to meet his financial obligations; (4) whether he was negligent; (5) the gravity of the violation; and (6) the demonstrated good faith in abatement of the violative condition. *Mize Granite Quarries, Inc.*, 34

[9] Consistent with this finding, it was appropriate for Inspector Hagy to mark the violation as an unwarrantable failure, which is defined as aggravated conduct constituting more than ordinary negligence. *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987). However, the unwarrantable failure allegation in the citation is directed against Mountain Materials, not Respondent Ball, as evidenced by the fact that the Secretary's proposed penalty against Ball falls below the $2,000.00 statutory minimum for unwarrantable failure violations (see 30 U.S.C. § 820(a)(3)(A)), so it is unnecessary to address the unwarrantable failure determination here. *See Kenneth D. Bowles*, 29 FMSHRC 1055 (Nov. 2007) (ALJ Barbour) (declining to address unwarrantable failure allegation in 110(c) case); *Charles Clevinger*, 26 FMSHRC 485, 499 (June 2004) (ALJ Feldman) (distinguishing between operator's aggravated conduct and individual agent's aggravated conduct).

FMSHRC 1760, 1764 (Aug. 2012); *Ambrosia Coal & Constr. Co.*, 19 FMSHRC 819, 823-24 (May 1997); *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 271-72 (Feb. 1997).

With regard to the first penalty criterion, the Secretary has not provided any information on Ball's violation history. Ball asserts that he has worked at the Castlewood Plant for more than thirty years and has never been accused of the type of aggravated conduct necessary to establish 110(c) liability. (Resp. Br. 6) I conclude that he does not have a history of 110(c) violations.

The second and third penalty criteria are intended to account for factors such as the Respondent's income and family support obligations, the appropriateness of the penalty in light of his job responsibilities, and his ability to pay. *Sunny Ridge*, 19 FMSHRC at 272. The Commission has encouraged ALJs to make specific findings as to the Respondent's net worth and income and the nature and extent of his financial obligations. *Ambrosia*, 19 FMSHRC at 824. However, in this case, the parties have presented no information that would shed any light on Ball's personal financial status aside from the fact that he is a shift foreman who has worked at a limestone processing plant for more than thirty years.

The remaining penalty criteria are negligence, gravity, and good faith abatement efforts. My findings on gravity and negligence are discussed at length above. The evidence shows that this violation was promptly abated in good faith by shutting down the plant for eight days in order to clean up the accumulations.

After considering the statutory penalty criteria, I find that $1,200.00 is an appropriate penalty to assess against foreman Ball for this serious, high-negligence violation.

C. Order Number 8634340 (Examination Violation)

Order Number 8634340 alleges a violation of 30 C.F.R. § 56.18002(a). The Secretary seeks an individual penalty against Respondent Rose for this alleged violation.

1. Violation of 30 C.F.R. § 56.18002(a)

The cited mandatory safety standard provides: "A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate action to correct such conditions." 30 C.F.R. § 56.18002(a). This standard can be satisfied by a preshift examination conducted at the beginning of the shift or by an onshift examination. (Tr. 42:9-24) The standard carries an implicit adequacy requirement. As the Commission recently explained, the examination must be adequate in the sense that it must identify the hazardous conditions that would be recognized by a reasonably prudent competent examiner. *Sunbelt Rentals, Inc.*, 38 FMSHRC _, Docket Nos. VA 2013-275 et al., slip op. at 9 (July 12, 2016).

According to the Respondents, the competent persons designated by the operator to conduct workplace examinations at the Castlewood Plant are the shift foremen. (Tr. 60:20-22, 92:24–93:6; Ex. S-3 at 5; Ex. S-4 at 5) As of the inspection date, there was no written policy in place for conducting workplace exams. (Ex. S-3 at 3, 6; Ex. S-4 at 3) The examiners were

expected to record the exam results in the mine's preshift books, which were kept in a control room until full and then stored in Rose's office. (Ex. S-3 at 3, 4; Ex. S-4 at 4; Tr. 64:4-9) Rose, who holds overall responsibility for safety at the plant, generally reviewed the exam records. (Ex. S-3 at 3, 6; Tr. 64:1-12)

Order Number 8634340 alleges that proper workplace examinations were not being conducted at the pelletizer building, sand plant, and pulverized bagging area. (Ex. S-2 at 1) Both the order and Inspector Hagy's contemporaneous Citation/Order Documentation state that Hagy issued six citations, some for violations that were of a serious nature, at these locations during the April 11, 2011 inspection. (Ex. S-2 at 1, 5) Hagy described two of these violations at hearing. The first was the built-up material throughout the pelletizer plant and the second was a heavy door that was broken and hanging by one hinge. (Tr. 29:22–30:11) Hagy believed that the operator had violated § 56.18002(a) because all the violations he cited on April 11 were obvious, but no action was being taken to correct any of them, and the only hazard reported in the preceding two weeks' worth of examination records was a leak in the roof. (Tr. 27:5-18, 29:17-21) Hagy took pictures of the examination records for the weeks of March 28 to April 2, 2011, and April 3 to April 9, 2011, which confirm that no hazards were recorded in any areas of the Castlewood Plant during that timeframe except water leaks. (Ex. S-2 at 6, 7) In fact, there is no indication that five of the seven areas listed on the examination forms were actually examined at all. *Id.* Two of the areas were marked "OK" on some days, but the boxes where examination results should be recorded for the other five areas are completely blank. *Id.*

I have already found that buildups of material were present in the pelletizer plant for more than one shift, constituting "conditions which may adversely affect safety or health" within the meaning of § 56.18002(a). I credit Inspector Hagy's undisputed allegation that he issued five other violations during the inspection. Rose testified that he and Ball probably did not notice the broken door because it stays open most of the time (Tr. 60:8-19), but the Respondents failed to explain why the obvious, extensive buildups of material were not reported and corrected through a proper workplace examination or why the exam records do not address any of the other violations referenced by Hagy. The fact that two weeks' worth of exam record forms were left blank for some areas of the plant suggests that these areas may not have been examined at all. Further, any exam that was performed at the pelletizer building on the day of the inspection was inadequate in that the examiner failed to identify and address the obvious, extensive buildups of material. Accordingly, I find that § 56.18002(a) was violated.

2. S&S and Gravity

Inspector Hagy marked this violation as S&S and reasonably likely to result in a permanently disabling injury to one miner. (Ex. S-2) He believed the violation contributed to the same hazard as Citation Number 8634338, namely, the hazard of a person tripping or slipping and falling in the buildups of material in the pelletizer plant, leading to serious injuries such as broken bones. (Tr. 27:19–29:14) He also believed the door that was hanging by a hinge presented a safety hazard because it could fall on a miner. (Tr. 29:7-10; Tr. 30:6-8)

The first element of the *Mathies* test for S&S is satisfied because a mandatory safety standard was violated. The second *Mathies* element is also satisfied because this violation

contributed to the discrete safety hazards of a miner tripping and falling in the buildups of material or the heavy door falling on a miner and injuring him. Although the violation did not itself create these hazards, the operator's failure to identify and promptly correct the hazards through a proper workplace exam contributed to the risk that the hazards would occur and cause injury. I have already found that, assuming a slip/trip-and-fall accident were to occur in the pelletizer building, it would be reasonably likely to result in serious injury. This finding satisfies the third and fourth elements of the *Mathies* test. Accordingly, this violation is S&S.

I find that the gravity of this violation is serious because it was reasonably likely to result in serious injury to a miner, as discussed above. The inspector's gravity designations are consistent with my findings and I uphold them.

3. Respondent Rose's Liability and Negligence

Superintendent Rose can be held liable for a "knowing" violation under 110(c) if the examination violation involves aggravated conduct and he knew or should have known of the violation but nonetheless authorized, ordered, or carried out the violative conduct.

I find that Rose should have known of this violation. As the fine grind superintendent at the pelletizer plant, he is responsible for dust control, daily activities, supervision of the foremen, and overall safety at the plant. (Ex. S-3 at 2, 5; Tr. 63:22-25, 64:10-12) He spends 80-90% of his workday in the plant area. (Ex. S-3 at 3) He is also the person responsible for reviewing the examination records. (Ex. S-3 at 3, 6; Tr. 64:1-3) Although he was not in the pelletizer building when Hagy inspected it, he was onsite that day and should have been aware of the buildups of material, given that they were extensive, obvious, and had been amassing long enough to create a 63-inch pile in one location, and given that he was responsible for daily activities and safety at the plant. Given his position and responsibilities, Rose had a duty to make sure that the foremen he supervised were conducting proper workplace examinations. He should have recognized their failure to correct the obvious hazardous conditions in the pelletizer plant, and he should have noticed the blank spaces in the exam records indicating that his men may not be duly conducting the required exams. Whether he turned a blind eye to the spotty exam records and the buildups in the pelletizer plant, or whether he simply failed to adequately supervise the foremen working beneath him, his actions amounted to knowing authorization of this violation.

I further find that Rose engaged in aggravated conduct constituting more than ordinary negligence in knowingly authorizing the violation. Several aggravating factors contribute to this determination. As discussed above, this violation posed a serious degree of danger to miners by virtue of its contribution to the likelihood of a slip/trip-and-fall accident or other accident stemming from the hazards that were not identified and corrected through a proper exam. The violation was also obvious. The widespread presence of built-up material in the plant and the blank spaces stretching across two weeks' worth of exam records rendered it very apparent that adequate workplace exams were not being conducted. The violation was also extensive in terms of the area affected and the hazards missed by the examiners. Failure to conduct an adequate exam affects the entire workplace, and in this case, six violations were permitted to exist because they were not addressed through a proper workplace exam. Rose should have known of this violation, yet took no abatement action, even though he could have stopped production to

address the hazards and could have instructed his foreman of the need to conduct more effective exams. Rose has not identified any significant mitigating factors. For all these reasons, I find that Rose engaged in aggravated conduct in connection with this violation,[10] and he is liable for a penalty under 110(c).

Based on my finding of aggravated conduct with no mitigating factors, I further find that Rose's negligence was high.

4. Penalty

The Secretary requests that I assess a penalty of $1,500.00 against Rose for this violation.

As was the case for Respondent Ball, the parties have not presented any evidence regarding Rose's income, net worth, or financial obligations aside from the general fact that he holds a position as fine grind superintendent at the Castlewood Plant, where he has worked for 35 years. (Resp. Br. 6) Thus, the record does not support specific findings on the appropriateness of the penalty to Rose's income and net worth or its effect on his ability to meet his financial obligations.

The Secretary also has not provided any information about Rose's violation history. Rose, like Ball, asserts he does not have a history of 110(c) violations. (Resp. Br. 6) I accept this assertion.

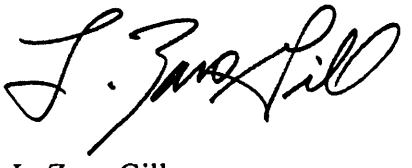
My findings on gravity and negligence are discussed in detail above. I further find that this violation was abated promptly and in good faith, in that the shift foremen at the plant were retrained on the proper performance of workplace exams within a week of the violation. (Ex. S-2 at 4) The foremen's hours were also changed so that they would have time to perform more thorough workplace examinations. (Ex. S-4 at 7) In addition, Rose indicated to the MSHA investigator that he began reviewing the exam records more frequently after receiving this violation. (Ex. S-3 at 3)

After considering the penalty criteria, I find that $1,500.00 is an appropriate penalty to assess against superintendent Rose for this serious violation involving high negligence and aggravated conduct.

[10] As discussed in footnote 9, my finding of aggravated conduct would support Inspector Hagy's designation of this violation as an unwarrantable failure, but the unwarrantable failure allegation is not relevant here.

ORDER

It is hereby **ORDERED** that Tim M. Ball pay a penalty of $1,200.00 and Ricky A. Rose pay a penalty of $1,500.00 within thirty (30) days of the date of this order.[11]



L. Zane Gill
Administrative Law Judge

Distribution:

Jason S. Grover, Esq., U.S. Department of Labor, Office of the Solicitor, 201 12th Street South, Suite 401, Arlington, VA 22202

David M. Toolan, Esq., Oldcastle Law Group, 900 Ashwood Parkway, Suite 600, Atlanta, GA 30338-4780

[11] 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.