FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 2, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. LAKE 2016-0365 A.C. No. 11-03114-412496
v.	
MORRIS SAND & GRAVEL, INC., Respondent	Mine: Morris Sand & Gravel, Inc.

DECISION AND ORDER

Appearances: Daniel Brechbuhl, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Petitioner

Daniel P. Foltyniewicz, Risk Management Network, Inc., Wheaton, Illinois for Respondent

Before: Judge McCarthy

I. STATEMENT OF THE CASE

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Docket No. LAKE 2016-0365 involves one 104(d)(1) Order charging Respondent Morris Sand and Gravel, Inc. ("Respondent") with an unwarrantable failure to comply with the Secretary of Labor's mandatory safety standard set forth in 30 C.F.R. § 56.9300(a).

A hearing was held in Chicago, Illinois on March 20, 2017. During the hearing, the parties offered testimony and documentary evidence.[1] Witnesses were sequestered. The issues presented are whether Respondent violated the cited standard, and if so, whether the significant and substantial (S&S), gravity, negligence, and unwarrantable failure designations were

[1] In this decision, "Tr. #" refers to the hearing transcript, "Jt. Ex. #" refers to joint exhibits, "P. Ex. #" refers to the Petitioner's exhibits, and "R. Ex. #" refers to the Respondent's exhibits. Jt. Ex. 1, P. Exs. 1-9, and R. Exs. 1-9 were received into evidence.

appropriate, and what civil penalties should be assessed. For the reasons discussed below, I affirm Order No. 8890960, as written, and assess a civil penalty of $2,000.

II. PRINCIPLES OF LAW

A. Gravity and Significant and Substantial (S&S)

The Mine Act describes an S&S violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). By contrast, the gravity of a violation "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). The gravity component of the penalty assessment is not synonymous with finding that a violation is S&S, but may be based on the same evidence. The gravity inquiry is concerned with the effects of a hazard, while the S&S analysis focuses on the reasonable likelihood of serious injury. *See Consolidation Coal Co.*, 18 FMSHRC at 1550 (explaining that "the focus of the [gravity inquiry] is not necessarily on the reasonable likelihood of serious injury . . . but rather on the effect of the hazard if it occurs"). Alternatively, a violation is S&S if, "based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

To establish an S&S violation, the Secretary 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. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4. (Jan. 1984).[2] The S&S determination should be made assuming "continued normal mining operations." *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). This evaluation considers 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, without any assumptions regarding abatement. *Elk*

[2] The Secretary, mine operators, and the federal appellate courts have accepted the *Mathies* test as authoritative. *See Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 160 (4th Cir. 2016) (noting federal appellate courts' uniform adoption of *Mathies* test and parties' recognition of authority of the test); *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016) (applying *Mathies* criteria); *Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria).

Run Coal Co., 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).[3]

Once the fact of the violation has been established, step two of the *Mathies* analysis focuses on "the extent to which the violation contributes to a particular hazard." The Commission has recently clarified that this step is "primarily concerned with likelihood of the occurrence of the hazard against which a mandatory safety standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016) (*citing Knox Creek Coal Corp.*, 811 F.3d at 163). Step two of the *Mathies* test involves a two-part analysis: 1) identification of the hazard created by the violation of the safety standard; and 2) "a determination of whether, based on the particular facts surrounding the violation, there exists a reasonable likelihood of occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy*, 38 FMSHRC at 2038.

The third step of the *Mathies* analysis is "primarily concerned with gravity," and whether the hazard identified in step two "would be reasonably likely to result in injury." *Id.* at 2037 (internal citations omitted). The third step's inquiry is whether the hazard, assuming it occurred, would likely result in serious injury. *Knox Creek*, 811 F.3d at 161-65. The question in applying the third step of *Mathies* "is not whether it is likely that the hazard . . . would have occurred[,]" but "whether, if the hazard occurred (regardless of likelihood), it was reasonably likely that a reasonably serious injury would result." *Peabody Midwest Mining, LLC v. Fed. Mine Safety & Health Rev. Comm'n*, 762 F.3d 611, 616 (7th Cir. 2014). The Secretary "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (*citing Musser Engineering, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). Further, "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Musser Engineering, Inc.*, 32 FMSHRC at 1281 (citing *Elk Run Coal Co.*, 27 FMSHRC at 906); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996).

The fourth *Mathies* factor requires the Secretary to show a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3. As a practical matter, the last two *Mathies* factors are often combined in a single showing. *Id.* Consistent with this approach, MSHA inspectors determine whether a violation meets the criteria

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[3] *See also Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff'd sub nom. Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989); *Knox Creek*, 811 F.3d at 165-66 (upholding Commission's rejection of "snapshot" approach to evaluating S&S for accumulations violation); *Mach Mining*, 809 F.3d at 1267-68 (discussing the operative timeframe for violations in the context of S&S analyses).

for S&S by the likelihood of injury and the expected severity of injury, which correspond to the third and fourth *Mathies* factors.[4]

B. Negligence

Negligence is not defined in the Mine Act. The Commission has found that "[e]ach mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted). In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar 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); *see also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining*, 30 FMSHRC 669, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated). In this regard, the gravamen of high negligence is "an aggravated lack of care that is more than ordinary negligence." *Brody Mining*, 37 FMSHRC 1687, 1701 (Aug. 2015) (*citing Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)). Commission judges are not required to apply the level-of-negligence definitions in Part 100 penalty regulations and *may* evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *Brody Mining*, 37 FMSHRC at 1701; *accord Mach Mining*, 809 F.3d at 1263-64. Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances, but may consider the totality of the circumstances holistically. Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Brody Mining*, 37 FMSHRC at 1701.

C. Unwarrantable Failure

The unwarrantable failure terminology is taken from Section 104(d) of the Act, 30 U.S.C. § 814(d). The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is defined by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal*, 52 F.3d at 136.

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[4] Per training, MSHA inspectors do not designate a violation as S&S unless item 10.A on the citation form is marked "reasonably likely," "highly likely," or "occurred," and item 10.B is marked "lost workdays or restricted duty," "permanently disabling," or "fatal." *See* MSHA, PROGRAM POLICY MANUAL, Vol. I, § 104 (2003).

Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if aggravating factors exist. The Commission examines seven aggravating factors, which include the duration of the violation, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance with the standard, the operator's efforts in abating the violative condition, whether the violation is obvious, whether the violation poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See, e.g.*, *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-51 (Dec. 2009); *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). The Commission and its judges must take into account all of the factors, but may determine, when exercising discretion, that some factors are not relevant, or are much more or less important than other factors under the circumstances. *IO Coal Co.*, 31 FMSHRC at 1351; *Excel Mining, LLC*, 497 F. App'x 78, 79 (D.C. Cir. 2013); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (2001).

D. Penalty Criteria

The Commission has the independent authority to assess all civil penalties. 30 U.S.C. § 820(i). In so doing, Commission Judges must consider six statutory criteria set forth in section 110(i), and the deterrent purpose of the Mine Act. The six statutory criteria are: 1) the operator's history of previous violations, 2) the appropriateness of the penalty to the size of the business, 3) the operator's negligence, 4) the operator's ability to stay in business, 5) the gravity of the violation, and 6) any good-faith compliance after notice of the violation. *See, e.g.*, *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. § 820(i). Equal weight need not be given to each criterion. *Spartan Mining*, 30 FMSHRC at 723.

Commission Judges are neither bound by the Secretary's proposed assessment nor by his Part 100 regulations governing the penalty proposal process. *American Coal Co.*, 38 FMSHRC 1987, 1993-94 (Aug. 2016) (citing *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1150-51 (7th Cir. 1984); *Mach Mining*, 809 F.3d at 1263-64 (MSHA Part 100 regulations are not in any way binding in Commission proceedings)). The Judge must provide an explanation for a substantial divergence between the Secretary's proposed penalty and the Judge's assessed penalty. *Sellersburg Stone* Co., 5 FMSHRC 287, 290-94 (Mar. 1983). The Commission reviews a Judge's civil penalty assessment under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC at 601 (citation omitted).

III. FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Stipulations of Fact and Law

The parties have stipulated to the following:

1. Morris Sand & Gravel, Inc. ("Morris") is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Mine Act").

2. The Administrative Law Judge has jurisdiction over this proceeding pursuant to §105 of the Act.

3. The citation at issue in this proceeding was properly served upon Morris as required by the Mine Act.

4. The citation at issue in this proceeding may be admitted into evidence by stipulation for the purpose of establishing its issuance.

5. Morris demonstrated good faith in abating the violation.

6. The penalty proposed by the Secretary in this case will not affect the ability of Morris to continue in business.

7. Morris was at all times relevant to this proceeding engaged in mining activities at the Morris Sand & Gravel Mine located in or near Morris, Grundy County, Illinois.

8. Morris' mining operations affect interstate commerce.

9. Morris is an "operator" as that word is defined in §3(d) of the Mine Act, 30 U.S.C. §803(d), at the Morris Sand & Gravel Mine (Federal Mine I.D. No. 11-03114) where the contested citation in this proceeding was issued.

10. On the date the citation in this docket was issued, the issuing MSHA metal/non-metal mine inspector 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.

Jt. Ex. 1.

B. General Factual Background of Order No. 8890960

Order No. 8890960 was issued on April 20, 2016 by MSHA inspector Peter Ackley, who was conducting a regular E01 inspection at Respondent's Morris Sand & Gravel mine.[5] P. Ex. 3. Respondent's sand and gravel mine contains two dredging lakes, referred to as the "north" or "blue" lake, and the "south" or "white" lake. Tr. 38-39.[6]

Prior to beginning his inspection, Ackley reviewed the mine's records and held a pre-inspection conference with Tom Van Cura, who had been working as a mechanic at Respondent's mine for about 35 years. Tr. 30-31, 36-38, 143-44; *see also* P. Ex. 7 at 16;

[5] Ackley estimated that he has inspected ten different dredging operations during his seven-and-a-half years as an MSHA inspector. Tr. 27.

[6] The two dredging lakes are divided by a public highway that runs from west to east between the lakes. Tr. 50-51.

P. Ex. 5 at 17.[7] During the pre-inspection conference and his review of mine records, Ackley learned that on May 20, 2015, Respondent had opened the south lake for dredging operations. Tr. 30-32. Although the north lake had been previously inspected by MSHA during past E01 inspections, the south lake had not. The most recent inspection prior to Ackley's inspection was conducted by MSHA inspector Don Reed on November 12, 2014, about five months prior to when Respondent opened the south lake. Tr. 29-32; P. Ex. 8 at 1. Therefore, the south lake had never been inspected by MSHA prior to Ackley's arrival at the mine site on April 21, 2016.

After the pre-inspection conference, Ackley inspected the north lake where miners were actively working. Tr. 36. Van Cura accompanied Ackley as Respondent's representative. Tr. 144-46. After inspecting the north lake, Ackley and Van Cura used a public highway to access the south lake. Tr. 39. As they approached the south lake, Ackley noted that there were no berms separating the road and the edge of the lake on the west and south sides of the lake, and only partial berms on the north side. Tr. 39; P. Ex. 5 at 1-13. Ackley also observed tire and excavator tracks on the south, west, and north sides of the lake. Some of the tire tracks were as close as two feet from the edge of the lake. Tr. 41, P. Ex 5 at 2-6 (south side), 7-12 (west side), 13 (north side). The path on the south side of the lake was used by vehicles traveling around the south lake. The path on the west side went to the stripping area, and the path on the north side was similarly used to store mobile equipment. Tr. 74-75. There was no sign of activity on the east side of the south lake, so Ackley determined that there was no need for berms there. Tr. 88.

Based on the proximity of the tire tracks to the three-to-four-foot drop-off at the edge of the lake, Ackley issued Order No. 8890960, alleging a violation of 30 C.F.R. § 56.9300(a),[8] based on the following condition:

> There were no berm [sic] or guardrail [sic] provided for the travel way around the south dredge lake. The unbermed area was on three sides of the lake. The south side drop off to the water was approximately 3 to 4 feet. Mobile equipment tracks were observed approximately 2 feet from the edge. With no berms or guardrails provided to serve as a warning, mobile equipment may travel over the edge of the roadway. Should the mobile equipment using the roadway go over the edge it would result in the operator receiving serious injuries. The supervisor has been at the south lake daily to do work place exams. The supervisor engaged in

[7] Despite working at Respondent's mine site, Van Cura is employed by Respondent's parent company, D Construction, rather than by Respondent. Ackley was not aware of this fact. Tr. 30-31, 143-44. Van Cura testified that he was instructed—presumably by Mike Lenzie, Respondent's supervisor—to accompany Ackley during his E01 inspection. Tr. 144-46; *see also* Tr. 97. In any event, I find that Van Cura acted as Respondent's walk around agent with apparent authority during Ackely's inspection.

[8] Section 56.9300(a) requires that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." 30 C.F.R. § 56.9300(a).

aggravated conduct constituting more than ordinary negligence in that he did not take any action to correct the condition. This violation is an unwarrantable failure to comply with a mandatory standard.

P. Ex. 3.

Ackley brought the alleged violation to Van Cura's attention and explained that there was a drop-off sufficient to cause a vehicle to overturn or endanger persons in equipment. Tr. 73-74. While Van Cura agreed with Ackley's assessment concerning the depth of the drop-off, Van Cura opined that he was unsure whether the grade of the drop-off would cause a vehicle to overturn. Tr. 73-74; Tr. 14, 147. After this conversation, miners put up cones around the violative condition at the south lake. Tr. 67; P. Ex. 5 at 13. Respondent installed berms around the lake and abated the violation by the time Ackely arrived the next day. Tr. 86; P. Ex. 3 at 1; P. Ex. 5 at 18-22.

C. The Violation in Order No. 8890960 was S&S.

The Secretary requests that I affirm Order No. 8890960, as written, and assess the Secretary's proposed penalty of $2,000. The Respondent argues that Order No. 8890960 should be vacated. In the alternative, Respondent challenges the fact of the violation, the S&S, high negligence, and unwarrantable failure designations, and the proposed penalty. Tr. 13-14.

In applying the Commission's *Mathies* factors, I must first determine whether the conditions cited by Ackley in Order No. 8890960 constitute a violation of section 56.9300(a). Section 56.9300(a) requires that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." 30 C.F.R. § 56.9300(a). The Commission's decision in *Lakeview Rock Products*, 33 FMSHRC 2985 (Dec. 2011), identified three relevant inquiries for alleged violations of section 56.9300(a): (1) whether there was an established roadway, (2) whether "a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment," and (3) whether any berms or guardrails exist. *See Lakeview Rock Products, Inc.*, 33 FMSHRC at 2988. I address each element in turn.

While the term "roadway" is not defined in Part 56 of the Secretary's regulations, the Commission has looked to the "common usage" and "a common-sense application of the standard to the facts" to determine whether a roadway exists. *Capitol Aggregates, Inc.*, 4 FMSHRC 846, 846-47 (May 1982) (upholding the ALJ's determination that an elevated ramp used by a front-end loader to dump petroleum coke into a loading hopper is an "elevated roadway"). The Commission has generally found roadways to exist "where a vehicle commonly travels over a surface during the normal mining routine." *Black Beauty Coal Co.*, 34 FMSHRC at 1735; *see, e.g.*, *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 36 (Jan. 1981) (finding that an elevated bench used for haulage is a roadway); *Peabody Midwest Mining, LLC*, 762 F.3d at 615 (finding that a bench regularly used by service trucks during regular mining operations constitutes a roadway).

Ackley observed what he determined to be bulldozer, excavator, and service vehicle or pick-up truck tracks around the south, west, and north edges of the lake. Tr. 41, 74-76, 117-18; P. Ex. 5 at 5-12. Ackley also observed a black truck (likely the dredge operator's vehicle) parked near the south lake, and a dozer and an excavator parked on the north side of the lake. Tr. 75, 104-105. The numerous tracks from tire-mounted and track-mounted equipment were sufficient indicia for Ackley to determine that the travel route around the lake had been used frequently and recently. Tr. 74-75; P. Ex. 5 at 5-12.[9] Although Respondent argued at hearing that the south lake accounted for only twenty percent of the mine's total production, and the travel ways were not used frequently enough to constitute a roadway within the meaning of section 56.9300(a), I do not find this argument persuasive. Tr. 156-161. Even with the reduced activity level, the dredge operator will likely be using the south lake paths as roadways with regularity. I find that vehicles commonly travel around the edges of the south lake during the normal mining routine, and those travel ways constitute roadways within the meaning of section 56.9300(a).

I turn next to the question of whether "a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." 30 C.F.R. § 56.9300(a). Ackley testified that the three-to-four-foot drop-off at the edge of the lake was sufficient to cause a vehicle to overturn. Tr. 67, 73-74. Van Cura agreed with the depth of the drop-off but opined that a vehicle would not overturn. Tr. 147. I credit Ackley's contrary determination based on his years of experience as an MSHA inspector and the fact that the drop-off was three to four feet, which could cause track-mounted equipment, in particular, and tire-mounted equipment to topple over. Ackley designated the violation as reasonably likely to result in injury or illness resulting in lost work days or restricted duty, because overtraveling the drop-off would result in, at minimum, "sprain[s], broken bone[s], [or] strain[s]." P. Ex. 3; Tr. 75. Ackley also credibly testified that mobile equipment accidents have sometimes resulted in miners being knocked unconscious, which poses a drowning risk for any vehicle that over traveled the drop-off and became submerged in the lake.[10] Tr. 76-77. I therefore find that the three-to-four-foot drop off was "of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." *See* 30 C.F.R. § 56.9300(a).

Neither party disputes that the roadways around the south, west, and north sides of the lake lacked berms or guardrails. Tr. 77-78; P. Ex. 5 at 2-12.[11] I therefore find that the lack of

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[9] There was no sign of activity on the east side of the south lake and Ackley determined that there was no need for berms on that side. Tr. 88.

[10] Van Cura testified that the lake was 25 feet deep at its deepest point, but the majority of the lake was probably between 15 and 17 feet deep. Tr. 161. He also testified that January 2016 flooding of the nearby Illinois River resulted in abnormally high water levels in the lake around the time of Ackley's inspection. Tr. 162.

[11] While there remains a factual question as to whether a berm ever existed on the north shore of the south lake, the point is inconsequential because the photographs and testimony concerning the south shore of the south lake clearly show that if there had been berms, they had deteriorated to the point where they were ineffective. Tr. 39; Tr. 60; P. Ex. 5 at 6.

berms or guardrails around the roadways surrounding the south lake constitutes a violation of section 56.9300(a).

I next identify the hazard in the first part of step two of the clarified *Mathies* test as set forth in *Newtown Energy*, 38 FMSHRC at 2038. As the Commission explained, "a clear description of the hazard at issue places the analysis of the violation's potential harm in context, by requiring a determination of the relative likelihood that the violation will have a meaningful, adverse effect on conditions miners will encounter during normal mining operations." *Id.* Under *Mathies*, the hazard contributed to by the violation is defined "in terms of the prospective danger the cited safety standard is intended to prevent," and therefore "the starting point for determining the hazard is the actual cited section [of the Code of Federal Regulations]." *Id.* The clear purpose of section 56.9330(a) is to prevent vehicles from over traveling the roadway and overturning or endangering occupants as a result of traveling too close to drop-offs.

Having determined that the lack of berms presents an over traveling and overturning hazard or an endangerment hazard to vehicle occupants near drop-offs, I now consider whether "there exists a reasonable likelihood of the occurrence of the hazard against which the [standard] is directed." *Newtown Energy*, 38 FMSHRC at 2037. In the context of Citation No. 8890960, I must determine whether the unbermed condition of the roadways around the south lake would lead to a vehicle traveling too close to the edge of the lake and overturning or endangering occupants. I note that, under Commission precedent, "[t]he question of whether a violation is S&S must be resolved on the basis of the conditions as they existed at the time of the violation and as they might have existed under continued normal mining operations." *Manalapan Mining Co.*, 18 FMSHRC 1375, 1382 (Aug. 1996) (Comm'rs Holden and Riley, plurality) (citing *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 183 (Feb. 1991); *U.S. Steel Mining Co.*, 7 FMRHC at 1130.

Workplace examination records initialed by Respondent's supervisor Mike Lenzie indicate that miners were actively preparing the south lake to begin production in the week prior to the issuance of Order No. 8890960. P. Ex. 5 at 15-17; Tr. 134-135. On April 14, 2016, miners installed a new cable on the winch for the south lake dredge. P. Ex. 5 at 15. On April 16, three miners (Kevin Mattox, the dredge operator, Mike Nelson, the excavator operator, and Van Cura) were involved in using the excavator to push the dredge from its winter storage location on the shore out into the main part of the lake. Tr. 164-166; P. Ex. 5 at 16. The three miners accessed the lake by driving trucks via the public road to the lake and then around the lake to where the dredge was parked. *Id.* Production began on the south lake on April 19, 2016. Tr. 103. On April 20, Kevin Maddox, the south dredge operator, performed maintenance on the south lake dredge prior to Ackley's arrival. Tr. 102. On April 21, Nelson used the excavator to move the dredge's anchor blocks. Tr. 140; P. Ex. 7 at 13.

Respondent argues that this elevated level of activity around the south lake was unusual, and that the activity level would be greatly decreased in the course of continued normal mining operations. Van Cura testified that the area had a limited use, accounting for only twenty percent of the mine's production, and that there had only been two days of active dredging in 2016. Tr. 159, 161. Moreover, the dredge operator would be the only person traveling around the south lake for the rest of the production season, which Respondent argues would reduce the number of

miners potentially exposed to the hazard. Tr. 152. However, given the high level of activity in the week preceding Ackley's inspection, I find that at least four miners were exposed to the hazardous condition, and at least one miner would be regularly exposed under continued normal mining operations. P. Ex. 5 at 15-16; Tr. 103, 164-166. Significantly, the vehicle tracks that Ackley observed were within two feet of the edge of the drop off, indicating that the vehicles that had recently traveled around the lake had already come in close proximity to the drop-off hazard. Tr. 41, 68, 76, 171; P. Ex. 3.

Furthermore, while there may have been fewer miners exposed to the hazardous condition under continued normal mining operations, there was no indication that the Respondent would have corrected the violation had Ackley not issued Citation No. 8890960. Immediately after issuing the citation, Ackley spoke with Lenzie, Nelson, and Mattox regarding the need to berm the south lake. They indicated to him that "they didn't notice that [berms] were missing," despite having been actively preparing the south lake dredge for production during the preceding week. Tr. 35, 121, 132. Consequently, it is likely that the unbermed condition of the south lake would have continued to exist uncorrected under continued normal mining operations. Given these facts, and considering the totality of circumstance surrounding the violation, including the nature of the vehicle tracks observed in close proximity to the three-to-four-foot drop-off, I find that the Secretary has shown that the hazard of a vehicle over traveling the drop-off and overturning or endangering occupants as it traversed the unbermed south lake roadways was reasonably likely to occur.

I now turn to the third and fourth *Mathies* steps, i.e., whether the hazard identified in step two—an overturning or an endangerment hazard to vehicle occupants traveling near a three-to-four-foot drop off of unbermed roadways—would be reasonably likely to result in an injury of a reasonably serious nature. *Newtown Energy*, 38 FMSHRC at 2038. Common sense suggests that people are likely to be injured when a vehicle overtravels a roadway and overturns into a drop-off. As noted, Ackley designated the violation as reasonably likely to result in injury or illness resulting in lost work days of restricted duty, because overtraveling the drop-off would result in, at minimum, "sprain[s], broken bone[s], [or] strain[s]." P. Ex. 3; Tr. 75. As also noted, Ackley credibly testified that mobile equipment accidents have resulted in miners being knocked unconscious, which poses a drowning risk for any vehicle that over traveled the drop-off and became submerged in the lake. Tr. 76-77. Although Respondent argues that its vehicles were equipped with seatbelts and life jackets, redundant safety measures are not to be considered in determining whether a violation is S&S. Tr. 129, 174; *Cumberland Coal Res.*, 717 F.3d 1020, 1029 (D.C. Cir. 2013); *Knox Creek Coal Corp.*, 811 F.3d at 162; *Buck Creek Coal*, 52 F.3d at 135; *Brody Mining*, 37 FMSHRC at 1691. Moreover, even seatbelts and life jackets would not prevent an unconscious miner from drowning while trapped inside the submerged vehicle. Given these facts, I determine that the injuries reasonably expected to occur from a vehicle overturning or over traveling the three-to-four-foot unbermed drop-offs are likely to be of a reasonably serious nature resulting in at least lost work days and restricted duty, if not permanently disabling or fatal injuries.

In conclusion, I find that the violation of section 56.9300(a) occurred as alleged by the Secretary, satisfying the first prong of the *Mathies* test. I have found that that the hazards created by the violation were reasonably likely to result in a reasonably serious injury. I therefore find

that the violation of section 56.9300(a) was S&S and reasonably likely to result in at least lost work days or restricted duty for one person.

D. The Violation in Order No. 8890960 was the Result of Respondent's High Negligence and Unwarrantable Failure to Comply with 30 C.F.R. § 56.9300(a).

Ackley designated the violation in Order No. 8890960 as the result of Respondent's high negligence and unwarrantable failure to comply with section 56.9300(a). The Secretary requests that I affirm the high negligence and unwarrantable failure designations, as written. Tr. 181-87. Respondent requests that I delete the unwarrantable failure designation and disputes the Secretary's high negligence designation. Tr. 191-95.

Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist. As noted, the Commission specifically considers seven aggravating factors: the duration of the violation, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance with the standard, the operator's efforts in abating the violative condition, whether the violation is obvious, whether the violation poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See, e.g.*, *Manalapan Mining Co.*, 35 FMSHRC at 293; *IO Coal Co.*, 31 FMSHRC at 1350-51; *Consolidation Coal Co.*, 22 FMSHRC at 353.

i. The Extent of the Violative Condition

Determining the extent of a violative condition requires consideration of the scope or magnitude of the violation. *See Eastern Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010), *citing Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 708 (June 1988). Extensiveness often concerns the degree of the violation and is a question of fact regarding the material increase in the degree of risk posed to miners as a result of the violation. *Eastern Associated* Coal, 32 FMSHRC at 1189. In some situations, extensiveness depends on the number of people affected by the violation. *See Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 681 (July 2002).

I find that the violation in Order No. 8890960 was extensive. The lack of berms extended to three sides of the lake, and Ackley observed vehicle tracks on all three sides. Tr. 74-75; P. Ex. 5 at 2-13.[12] While Ackley designated the violative condition as affecting only one miner, the Secretary has shown that at least four miners (Lenzie, Nelson, Van Cura, and Mattox) were involved in readying the lake for active production in the week preceding the issuance of Order No. 8890960. P. Ex. 5 at 14-17; Tr. 102-103, 134-135, 140, 164-66; P. Ex. 7 at 13. I therefore find that this factor weighs in favor of an unwarrantable failure finding.

[12] As noted above, there was no sign of activity on the east side of the south lake. Ackley concluded that berms were not necessary on that side. Tr. 88.

ii. The Duration of the Violation

The duration of the violative condition is a necessary consideration in the unwarrantable failure analysis. *See, e.g.*, *Windsor Coal Co.*, 21 FMSHRC 997, 1001-04 (Sept. 1999) (remanding for consideration of duration evidence regarding cited conditions). The duration or length of time that the violation exists is particularly critical, because the longer a violative condition or practice exists, the more likely miners will be injured. *Coal River Mining, LLC*, 32 FMSHRC 82, 92 (Feb. 2010); *see also Buck Creek Coal*, 52 F. 3d at 136 (7th Cir. 1995) (violation that lasted more than one shift was properly designated as unwarrantable failure); *Consol Coal Co.*, 23 FMSHRC 588, 594 (June 2001) (violation was unwarrantable failure where the violation existed for several shifts).

Ackley issued the citation on April 20, 2016. The testimony and workplace examinations indicate that preparation work for the 2016 dredging season began on April 14, 2016. Tr.134-35; P. Ex. 5 at 15. As previously noted, the Secretary presented extensive evidence regarding the traffic along the south lake roadways and the activity level on the south lake between April 14 and April 20, 2016. P. Ex. 5 at 14-17; Tr. 102-103, 134-135, 140, 164-66; P. Ex. 7 at 13. Furthermore, mine records indicate that the south lake was actively mined as early as May 20, 2015. Tr. 30; P. Ex. 7 at 13. Thus, the hazardous condition existed for at least a week, and possibly a year. I find that the duration of the violation weighs heavily in favor of an unwarrantable failure finding.

iii. Whether Respondent was Placed on Notice that Greater Efforts were Necessary for Compliance with 30 C.F.R. § 56.9300(a)

The Commission has stated that repeated, similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with the cited standard. *IO Coal*, 31 FMSHRC at 1353-55; *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997); *see also Consolidation Coal Co.*, 23 FMSHRC at 595. The purpose of evaluating the number of past violations is to determine the degree to which those violations have "engendered in the operator a heightened awareness of a serious . . . problem." *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007) (citing *Mid-Continent Res., Inc.*, 16 FMSHRC 1226, 1232 (June 1994)). The Commission has also recognized that "past discussions with MSHA" about a problem "serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard." *San Juan Coal*, 29 FMSHRC at 131 (citing *Consolidation Coal*, 23 FMSHRC at 595).

The Secretary failed to establish that the Respondent was placed on notice that greater efforts were necessary to comply with section 56.9300(a). Respondent has no prior violation history regarding section 56.9300(a). P. Ex. 9. Moreover, Ackley's inspection was the first inspection of the south lake since it opened for production in May 2015. P. Ex. 7 at 13; P. Ex. 8; Tr. 29-30. I therefore find that Respondent was not on notice that greater efforts were necessary for compliance with section 56.9300(a). Accordingly, this factor weighs against a finding of unwarrantable failure.

iv. Respondent Should Have Known of the Existence of the Violation

The Commission has held that knowledge is established by showing "the failure of an operator to abate a violation [that] he knew or *should have known* existed." *Emery Mining Corp.*, 9 FMSHRC at 2002-03 (emphasis added); *see also* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1602 (1975). In the absence of past violations, an operator's knowledge may be established "where an operator reasonably should have known of a violative condition." *IO Coal Company, Inc.*, 31 FMSHRC at 1356-57; *Drummond Co., Inc.*, 13 FMSHRC 1362, 1367-68 (Sept. 1991) (quoting *Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991)). The Commission has held that the extent of the involvement of supervisory personnel in a violation should be taken into account in determining whether an unwarrantable failure occurred, because supervisors are held to a higher standard of care. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001); *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998). Further, the knowledge or negligence of an agent may be imputed to the operator. *See Excel Mining, LLC*, 37 FMSHRC 459, 467-68 (Mar. 2015).

As noted above, despite being actively engaged in preparing the south lake dredge for the 2016 production season, none of the miners working in and around the south lake in the week prior to the issuance of Order No. 8890960 noticed that any berms were missing. Tr. 35, 121, 132. As a supervisor, Lenzie was responsible for conducting routine workplace examinations and for safety and training. Tr. 126; P. Ex. 4 at 1. Although Lenzie did not necessarily conduct each daily workplace examination, he signed off on each of them. Tr. 150; P. Ex. 5 at 14-17. Moreover, berms were installed on the north lake, and Ackley did not issue any citations regarding insufficient berms in that area. Tr. 36. Given the elevated activity level around the south lake just prior to the Order's issuance and the proximity of the tire tracks to the edge of the three-to-four-foot drop-off, I conclude that a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of section 56.9300(a), would have recognized the over traveling and overturning or endangerment hazards created by the lack of berms. Respondent should have known of the violation, and demonstrated indifference or a serious lack of reasonable care by allowing the violation to continue unabated for a week while significant activity took place to prepare the south lake for the 2016 season. I find that this factor strongly weighs in favor of find an unwarrantable failure.

v. Whether the Violation was Obvious

Inspector Ackley credibly testified that the hazardous conditions were obvious and could "be seen as soon as you pull into the south side." Tr. 75, 126; P. Ex. 4 at 1. The conditions existed for at least a week (if not an entire year). Tr. 30; P. Ex. 7 at 13. Ackley credibly testified that a reasonably prudent miner should have known that berms were necessary around the south lake. Tr. 127. I find that the obviousness of the violation weighs in favor of an unwarrantable failure finding.

vi. Whether the Violation Posed a High Degree of Danger

A high degree of danger posed by a violation may also support an unwarrantable failure finding. *See e.g.*, *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals*, 10 FMSHRC at 709. The degree of danger is a relevant factor, but not a threshold requirement for determining whether a violation is an unwarrantable failure. *Manalapan Mining Company, Inc.*, 35 FMSHRC at 294 (citing *Windsor Coal Co.*, 21 FMSHRC at 1001 (Commission recognizes a number of factors relevant to determining whether a violation is the result of an operator's unwarrantable failure)). The factor of dangerousness may be so severe that, by itself, it warrants a finding of unwarrantable failure, but the converse is not true, i.e., that the absence of danger precludes a finding of unwarrantable failure. *Manalapan*, 35 FMSHRC at 294. Furthermore, a violation may be aggravated and unwarrantable based on "common knowledge that certain equipment, such as power lines, are hazardous and that precautions are required." *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). For purposes of evaluating whether violative conditions pose a high degree of danger, it may be appropriate to consider the same facts already considered as part of the gravity evaluation in an S&S analysis. *See San Juan Coal*, 29 FMSHRC at 125, 132-33 (remanding for failure to apply S&S findings to danger factor in unwarrantable failure analysis).

As noted above, Ackley designated the violation as reasonably likely to result in injury or illness resulting in lost work days or restricted duty, because overtraveling the drop-off would result in, at minimum, "sprain[s], broken bone[s], [or] strain[s]." P. Ex. 3; Tr. 75. He also credibly testified that mobile equipment accidents have sometimes resulted in miners being knocked unconscious, which poses a drowning risk for any vehicle that over traveled the drop-off, overturned, and became submerged in the lake. Tr. 76-77. That result could very well be life-threatening or fatal. I therefore find that the violation underlying Order No. 8890960 posed a high degree of danger.

vii. Respondent's Efforts to Abate the Violative Condition

An operator's efforts to abate a violation are relevant to an unwarrantable failure determination. Thus, where an operator has been placed on notice of a problem, the level of priority that the operator places on abatement of the problem is relevant. *IO Coal*, 31 FMSHRC at 1356 (citing *Enlow Fork Mining*, 19 FMSHRC 5, 17 (Jan. 1997)). The focus is on abatement efforts made prior to issuance of the citation or order. *Id.* An operator's efforts to abate a violation before a citation or order issues, even during an inspection, may be a mitigating factor in an unwarrantable failure analysis. *Utah Power & Light Co.*, 11 FMSHRC 1926, 1934 (Oct. 1989).

Here, although Respondent was not placed on notice that greater efforts were necessary to comply with the cited standard, Respondent presented no evidence that it attempted to abate the obvious violation in advance of the issuance of Order No. 8890960. Respondent's supervisor and rank-and-file miners admitted that they did not even notice that the required berms were not present. Tr. 35, 121, 132. Although a reasonable, good-faith belief that a condition did not exist may excuse a lack of abatement efforts, I do not find that Respondent's failure to notice that berms were missing was based on a reasonable good-faith belief that a violative condition did

not exist. *See IO Coal*, 31 FMSHRC at 1356. In fact, the record suggests the contrary. Respondent had adequately bermed the north lake, but nevertheless neglected to berm the south lake. Tr. 36. I find that Respondent's failure to abate the violative condition prior to issuance of the citation weighs in favor of an unwarrantable failure finding.

Based on the foregoing discussion, I have found that the violative condition in Order No. 8890960 was extensive, obvious, and of sufficient duration to warrant a finding of unwarrantable failure. In addition, I have found that Respondent should have known of the violative condition, failed to abate it prior to issuance of the citation, and that a reasonable person familiar with the mining industry would have recognized that the lack of berms around the south lake posed a high degree of danger to the miners preparing the lake for the 2016 production season. I therefore find that the violation in Order No. 8890960 was the result of Respondent's high negligence and an unwarrantable failure to comply with section 56.9300(a).

E. Penalty Assessment

The Secretary proposed a penalty of $2,000 for Order No. 8890960. P. Ex. 2. Respondent's miners worked 9,021 hours in 2016. Consequently, I find that Respondent is a small-operator. *Id.*; 30 C.F.R. § 100.3, Table III. The parties have stipulated that the proposed penalty will not affect Respondent's ability to continue in business. Jt. Ex. 1. The parties have also stipulated that Respondent demonstrated good faith in abating the violation. *Id.* Respondent's Assessed Violation History report indicated that in the 15-months preceding Order No 8890960, Respondent received only three 104(a) citations, none of which alleged violations of section 56.9300(a). P. Ex. 9. I have affirmed the Secretary's gravity, high negligence, and unwarrantable failure designations. Based upon my consideration of the section 110(i) penalty criteria, and the deterrent purposes of the Act, I assess a penalty of $2,000.

IV. ORDER

For the reasons set forth above, Order No. 8890960 is **AFFIRMED**, as written. Respondent, Morris Sand & Gravel, is **ORDERED** to pay a total civil penalty of $2,000 within thirty days of the date of this Decision and Order.[13]

Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

[13]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.

Distribution:

Daniel P. Foltyniewicz, Morris Sand & Gravel, Inc., P.O. Box 5312, Wheaton, IL 60189

Daniel Brechbuhl, U.S. Department of Labor, Office of the Solicitor, Cesar E. Chavez Memorial Building, 1244 Speer Boulevard, Suite 216, Denver, CO 80204

/adh