FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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RBS, INC., Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	CONTEST PROCEEDINGS Docket No. WEVA 2014-0691-RM Citation No. 8718116; 02/25/2014 Docket No. WEVA 2014-0693-RM Citation No. 8718118; 02/25/2014 Docket No. WEVA 2014-0694-RM Citation No. 8718119; 02/25/2014 Mine: Greystone Quarry and Plant Mine ID: 46-00018
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. RBS, INC., Respondent	CIVIL PENALTY PROCEEDING Docket No. WEVA 2014-0817 A.C. No. 46-00018-346526 Mine: Greystone Quarry and Plant

AMENDED DECISION AND ORDER

Appearances: Daniel T. Brechbuhl, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, CO for Petitioner;

Nicholas W. Scala, Esq., Conn Maciel Carey PLLC, Washington, D.C. for Respondent.[1]

Before: Judge L. Zane Gill

[1] At the time of this hearing, Mr. Scala was employed by the Law Offices of Adele Abrams, LLC, as reflected in the transcript dated February 18, 2015.

This proceeding, under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994), involves six section 104(a) citations, 30 U.S.C. § 814(a), issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to RBS, Inc., at its Greystone Quarry and Plant. RBS was assessed a total penalty of $24,886.00 for the six violations. The Secretary and the Respondent settled one citation prior to trial: No. 8718115. The parties presented testimony regarding the remaining five citations in South Charleston, West Virginia.

Greystone Quarry is a small limestone quarry near Lewisburg, West Virginia, with a pit area and crushing and screening plants. (Tr. 193:23 – 194:24; 275:2-3) The pit contains a large natural formation of "Greenbrier Limestone," approximately 800 feet deep in some locations. (Tr. 275: 3-6) In the pit area, the operator strips a thin layer of overburden, consisting principally of mud and shale, off of the limestone and then drills and shoots the limestone with explosives leaving behind a "muck pile," also called "shot rock," on the face of the highwall where the material was found. (Tr. 275:7-11) The operator then uses a haul truck to transport the muck pile from the highwall to the crushing plant where it is crushed and classified into numerous different products. (Tr. 275:22 – 276:2)

Inspector Brett Chiccarello was on site for two days in February, 2014, to perform a regular inspection. (Tr. 10:6-8; 118:9-11) Chiccarello had been an inspector for four and a half years and had conducted roughly 250 inspections. (Tr. 27:24-28:11) However, this was his first time at this particular mine, as he was filling in for another inspector from his district field office. (Tr. 10:15 - 11:1; 118:14-16) Chiccarello did not believe that his lack of familiarity with the mine would pose any problem, since he normally inspected other limestone mines as a part of his job. (Tr. 31:4-14) He also had prior experience as a superintendent at a surface coal mine, which Chiccarello testified had similar equipment and highwalls as the Greystone Quarry. (Tr. 28:12 - 29:15; 31:14-17)

Chiccarello issued seven citations and orders during his inspection, four of which he initially designated as unwarrantable failures to correct a health or safety hazard and the result of reckless disregard. (Tr. 118:17 - 119:2) After meeting with his supervisor, Chiccarello vacated one of those four citations entirely and deleted the unwarrantable failure designations for the three remaining 104(d) orders. (Tr. 119:6-21) The level of negligence on those three citations and orders was also reduced from "reckless disregard" to "high." (Tr. 119:12-15).

In summary, and for the following reasons, I conclude that:

- For Citation No. 8718116, RBS violated Section 56.14101(a)(2), injury was unlikely, the injury could reasonably be expected to be a fatality, the violation was not significant and substantial, one person was affected, and there was low negligence. I assess a penalty of $460.00 for the violation.
- For Citation Nos. 8718118 and 8718119, the Secretary failed to prove a violation of Section 56.9314 and Section 56.320.
- For Citation No. 8718120, RBS violated Section 56.14101(a)(2), injury was unlikely, the injury could reasonably be expected to be fatal, the violation was not significant and

substantial, one person was affected, and there was low negligence. I assess a penalty of $207.00 for the violation.

- For Citation No. 8718121, RBS violated Section 56.14100(a), injury was unlikely, the injury could reasonably be expected to be fatal, the violation was not significant and substantial, one person was affected, and there was moderate negligence. I assess a penalty of $460.00 for the violation.

Stipulations

The following stipulations were submitted in a joint prehearing report:

1. RBS was at all times relevant to these proceedings engaged in mining activities at the Greystone Quarry and Plant in or near Maxwelton, West Virginia.
2. RBS's mining operations affect interstate commerce.
3. RBS 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").
4. RBS is an "operator" as that word is defined in §3(d) of the Mine Act, 30 U.S.C. §803(d), at the Greystone Quarry and Plant (Federal Mine I.D. No. 46-00018) where the contested citations in these proceedings were issued.
5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to §105 of the Act.
6. MSHA Inspector Brett Chiccarello 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 citations from docket at issue in these proceedings.
7. The citations at issue in these proceedings were properly served upon RBS as required by the Act, and were properly contested by RBS.
8. The citations at issue in these proceedings may be admitted into evidence by stipulation for the purpose of establishing their issuance. The truthfulness or relevancy of any statements asserted therein is not stipulated to by the parties.
9. RBS demonstrated good faith in abating the violations.
10. Without RBS admitting the propriety or reasonableness of the penalties proposed herein, the penalties proposed by the Secretary in this case will not affect the ability of RBS, Inc., to continue in business.

Jt. Pre-Hearing Report at 2.

Basic Legal Principles

Significant and Substantial

The citations in dispute and discussed below 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 Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), aff'd 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Resources, 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).

The third element of the *Mathies* test presents the most difficulty when determining whether a violation is S&S. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), 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." (citing *U.S. Steel Mining Co., Inc.*, 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 Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). 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., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).

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).

Jim Walter Res. Inc., 36 FMSHRC 1972, 1975 (Aug. 2014); *Brody Mining, LLC*, 37 FMSHRC 1687, 1702. (Aug. 2015); *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.

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; *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984), aff'g 5 FMSHRC 287 (Mar. 1983) ("[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.")).

Although the Secretary's part 100 regulations are not binding on the Commission, the Secretary's definitions of negligence in those provisions are illustrative. According to the Secretary, negligence is "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required [...] to take steps necessary to correct or prevent hazardous conditions or practices." Id. "Reckless negligence is present when "[t]he operator displayed conduct which exhibits the absence of the slightest degree of care." *Id.* High negligence is when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* Low negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* No negligence is when "[t]he operator exercised diligence and could not have known of the violative condition or practice." *Id.*

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.

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 (March 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.

Penalty

The principles governing the authority of Commission administrative law judges to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges 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). Thus, 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.

Under Section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith in abatement of the violative condition. 30 U.S.C § 820(i). Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 ("[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."); *See American Coal Co.*, 35 FMSHRC 1774, 1819 (July 2013)(ALJ Zielinski).

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) (citations omitted). 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 622.

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 operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Engineering*, 32 FMSHRC at 1289 (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC at 725 (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC at 713 (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. 13592-01, 13,621.

In addition, Commission ALJs are obligated to explain any substantial divergence between a penalty imposed and that proposed by the Secretary. As explained in *Sellersburg Stone Co.*, 5 FMSHRC at 293:

> When ... it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves that Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission. If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

Citation No. 8718116

Inspector Chiccarello issued Citation No. 8718116 on August 14, 2012. It alleges a violation of 30 C.F.R. § 56.14101(a)(2) pursuant to Section 104(a) of the Mine Act. The regulation states, "If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels." 30 C.F.R. § 56.14101(a)(2). Section 56.14101 is a mandatory safety standard. The citation alleges:

> The parking brake on the Chevy 2500 pickup truck . . . did not work when tested on a grade (7 degrees measured by an abney level). The parking brake did not hold while going up the grade but did hold while facing down the grade. The truck is a standard and exposes miners working in the area to [the hazard of being] struck by [the truck] that has the potential of being fatal. The truck is operated by the superintendent daily on the mine site and he was aware the parking brake did not function properly when parked on a grade facing uphill.

Ex. S-4 at 1. The citation further alleges that an injury was reasonably likely, the injury could reasonably be expected to result in a fatality, the violation was significant and substantial, one person could be affected, and there was a high level of negligence. Ex. S-4 at 1-2.

Violation

Citation No. 8718116 was issued during a "manager run" in superintendent Jim Harless's pickup truck. On a typical "manager run" a foreman or superintendent provides the inspector with a guided overview of the mine in a company vehicle at the start of the regular inspection. (Tr. 32: 5-8) Chiccarello issued the citation after asking Harless to check the parking brake in his pickup truck and subsequently discovering that the brake did not "hold" while the vehicle was facing uphill. (Tr. 33:24 – 34:4)

According to Chiccarello, upon being asked to test the brakes, Harless immediately responded that they did not work. (Tr. 32:9-11) Harless then tested the parking brake for the inspector while the vehicle was facing uphill and downhill, on a grade of seven degrees. The brake worked when the vehicle was facing downhill, but did not work in the opposite direction. (Tr. 33:24 – 34:16; Ex. S-4 at 1) Chiccarello and Harless then took the vehicle to a garage at the mine, and a mechanic promptly fixed the brake within 15 minutes. (Tr. 34:23 – 35:3; 263:1-2) After ensuring that the brake now worked both uphill and downhill, Chiccarello terminated the citation at 9:10 in the morning. (Tr. 35:4-12)

The Respondent argues that it did not violate section 56.14101(a)(2) because: (1) the "standard does not state how the parking brakes . . . should be tested" to ensure compliance; and, (2) the Secretary "did not show that the parking brake 'did not hold' when the vehicle was parked in the manner in which the vehicle is parked during actual, day-to-day operations at the mine." Resp't Br. 3, 5. According to the Respondent, its employees normally park the vehicle with its transmission in a low gear, consistent with the guidance in the vehicle owner's manual, and, as a general policy at the mine, with the vehicle facing downhill and into a berm. Resp't Br. 3, 5 (citing Tr. 197:15-22; 303:4-16). According to Harless, the brakes worked properly under these conditions. (Tr. 198:7-22)

Section 56.14101(a)(2) is silent as to the question of whether a vehicle's parking brakes must be capable of holding the equipment both uphill and downhill, and regardless of whether or not the equipment is placed in a low gear prior to testing. The standard is similarly silent as to whether the parking brakes need only hold the equipment when the vehicle is parked in a manner consistent with normal company policy. However, I find that the Secretary's construction of section 56.14101(a)(2) is more "consistent with Commission case law construing regulations to further the protective purposes of the Mine Act." *Sunbelt Rentals, Inc.*, 38 FMSHRC ___, slip op. at 7 n.16, No. VA 2013-275-M, (Jul. 12, 2016).

The standard is undoubtedly directed at the hazard of a vehicle rolling uncontrollably down a grade, which can just as easily occur with a vehicle facing uphill instead of downhill. Therefore, parking brakes must be capable of holding the vehicle in both directions. The presence of a policy encouraging miners to park the vehicle in only one direction does not alter that requirement, as there is no guarantee that this policy will be followed. (*See* Tr. 41:23 – 42:1)

Indeed, Chiccarello credibly testified that miners typically park their vehicles in the direction that they are heading. (Tr. 40:2-6). As to RBS's other parking practice, the fact that the vehicle could remain parked while the transmission was in a low gear does not mean that the defective parking brake complied with the standard's requirement of being able to hold the vehicle by itself. Chiccarello credibly testified that placing the transmission in a low gear could temporarily hold the vehicle in place while masking problems with the parking brake. (Tr. 321:12-24) Since the standard is aimed at the proper functioning of the parking brake, independent of other mechanisms that may also hold the vehicle, the parking brake must be capable of holding the vehicle whether or not it is in a low gear.

For these reasons, I find that the Secretary has established a violation of section 56.14101(a)(2).

Negligence

Chiccarello designated the citation as high negligence because, as a superintendent, Harless was considered a part of mine management, and thus Harless's acknowledgment that the brake was not working meant that management was aware of the violation. Additionally, RBS had been "cited on the exact pickup truck in a previous inspection for the same park[ing] brake." (Tr. 37:8-14) The Respondent argues that Chiccarello incorrectly recalled Harless's statements. Resp't Br. 6. Harless testified that he only told Chiccarello that the brakes were not working *after* Harless had already tested them for him during the inspection and learned of the defective condition himself. (Tr. 196:7-15) Harless claimed that he was not aware of the defective brake prior to that, because he had previously tested it under normal parking conditions at the mine, and the brake functioned properly. (Tr. 197:4-14) The Respondent also argues that the Secretary never introduced the prior alleged citation into evidence and that Chiccarello himself could not remember the precise date or substance of the previous citation. Resp't Br. 6-7 (citing Tr. 139:3-7; 140:13-21).

I find the level of negligence to be lower than alleged. I credit Harless's testimony that he was unaware of the defective parking brake before testing it for Chiccarello and that Chiccarello's belief that Harless acknowledged the defect even before testing it was mistaken. The company's normal testing procedure for the brake would not have alerted Harless to the condition. RBS, as a policy, parked its vehicles downhill into a berm because management believed that to be a much safer practice than parking the vehicle uphill and chocking it. (Tr. 197:15-22; 303:4-16) Harless also typically placed the transmission in a low gear before parking the vehicle, which would have obscured the defective parking brake. (Tr. 198:14-22) While Harless is held to a high standard of care as a superintendent at the mine, there are considerable mitigating factors to explain why he was not aware of the violation. The fact that RBS had violated the same standard with the same pickup truck before is relevant to my negligence evaluation, but the single past violation alone does not establish the "aggravated lack of care" associated with a "high negligence" finding. *Brody Mining, LLC*, 37 FMSHRC 1687, 1703 (Aug. 2015) (quoting *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

Therefore, I find that the level of negligence was "moderate" instead of "high."

Significant and Substantial and Gravity

The first prong of the *Mathies* test has been met. The defective brake also created a discrete safety hazard that the vehicle could fail to remain parked on a grade and roll dangerously toward a miner standing behind it, leading to a fatal injury. (Tr. 37:15-22) Thus, both the "fatal" and "1 person affected" designations were appropriate, and the second and fourth *Mathies* prongs have been satisfied. The remaining question is whether there was a reasonable likelihood that the hazard would result in an injury. I find that there was not.

Because the parking brake worked when the vehicle was facing downhill (and presumably on level ground as well), the brake would hold the vehicle in most circumstances, even without the additional steps that the company took to prevent an accident. The company's policy of always parking vehicles downhill into a berm, with the transmission in a low gear, further decreased the likelihood of injury, since the parking brake held the vehicle in each of those scenarios.

The Secretary argues that any parking policy at the mine was not communicated to Chiccarello and not implemented consistently during the inspection. Sec'y Br. 7. However, Chiccarello did testify that Harless told him "he parks in a berm when he stops and never parks uphill." (Tr. 132:14-22) I conclude that Harless parked in this manner because of the company's policy, which was credibly described in detail by the company's vice-president, William Snyder, at the hearing. (Tr. 302:11 – 303:16) To the extent that Harless was inconsistent in following that policy during the inspection, I conclude that he only violated that policy during the inspection in order to comply with Chiccarello's directions during the inspection. (Tr. 196:1-6)

Given these findings, the S&S designation will be deleted.

Penalty

The Secretary assessed the penalty for this citation at $7,578.00. Exhibit A of the Secretary's penalty petition credits RBS with 27,807 hours worked annually at the Greystone Quarry. Ex. S-1. Based on this information, I consider RBS to be a relatively small operator. Additionally, this was the first time that RBS was cited under this standard within the 15 months prior to the inspection, although RBS had committed 37 violations in the prior 5 inspection days. Ex. S-1. As I found above, RBS was moderately negligent. I find that the company demonstrated good faith in the abatement of the violative condition. The parties stipulated to the fact that the assessed penalty will not significantly affect RBS's ability to stay in business. Jt. Pre-Hearing Report. As to the gravity of the violation, I found the violation was not S&S, as it was unlikely that the hazard contributed to by the violation would lead to injury. However, I found that if an injury did occur, it could be reasonably expected to be fatal to one miner.

The Secretary failed to prove that the gravity of the violation or the degree of operator negligence was as high as alleged. Therefore, I assess a penalty in the amount of $460.00.

Citations Nos. 8718118 and 8718119

On February 25, 2014, Inspector Chiccarello observed what he believed to be a hazardous muckpile on a highwall in the pit area, which prompted him to issue three citations alleging violations of the Secretary's mandatory safety standards. One of the three citations (No. 8718117) was subsequently vacated for being duplicative of Citation No. 8718118. (Tr. 142:4-10)

Citation 8718118 alleges a violation of Section 56.9314, which requires that "muckpile faces shall be trimmed to prevent hazards to persons." 30 C.F.R. § 56.9314. The citation states:

> Upon an inspection of the second level mine pit it was observed that unconsolidated material had not been trimmed back and/or sloped to the ang[le] of repose on the 50 foot high muck pile. Employees working in and around this area were exposed to the possibility of injury from the fall-of-material hazard. The mine regularly operates a 9888 front-end loader in this area. The front-end loader was not working in the area at the time of the inspection. I was informed the loader was working against the pile earlier in the day and yesterday February 24th 2014. Mine management indicated they do work out of the pile and he did not consider it a hazard.

Ex. S-6 at 1. The citation further alleges that an injury was reasonably likely, the injury could reasonably be expected to result in a fatality, the violation was significant and substantial, one person could be affected, and there was a high level of negligence. Ex. S-6 at 1, 3. The citation was terminated on March 12, 2014. The termination order states:

> Upon inspection the muck pile in the 2nd level pit was knocked down and no longer has material overhanging the pile. The material is now sloped for easy access for the front end loader to dig from the pile. Mine management has brought in a Hitachi UH261 excavator and CAT OSK bull dozer to maintain the piles. This order is terminated.

Ex. S-6 at 2.

Chiccarello also issued Citation No. 8718119 for an alleged violation of Section 56.3200. The standard states:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

30 C.F.R. § 56.3200. The citation alleges:

> Upon an inspection of the of the pit's 50 foot high wall (Muck Pile), ground conditions were observed that created a hazard to mine employees. Several large boulders had not been scaled down at the southwest corner of the working face of the high wall. No warning signs or barriers were provided to prevent entry in this area, until this condition could be corrected. This hazard exposed the front end loader operator and other haulage equipment in the area to the possibility of fatal injury should the rocks fall. This area is where active mining is being conducted. I was informed work was conducted at the toe of the wall earlier in the day and yesterday February 24, 2014. Mine management was aware of the condition and did not think [it] was a hazard. He also stated they were finished in the area and were going to shoot the high wall next to it to bring down the remaining loose material that was hanging up high on the muck pile. There was no catch berm or signs to warn or prevent entry to the area.

Ex. S-8 at 1-2. The citation was terminated the same day, once a "sign and a berm were put in place to warn and prevent miners from entering the affected area." Ex. S-8 at 3. The citation further alleges that an injury was reasonably likely, the injury could reasonably be expected to result in a fatality, the violation was significant and substantial, one person could be affected, and there was a high level of negligence. Ex. S-8 at 1-2, 4.

Violation

Chiccarello issued Citation Nos. 8718118 and 8718119 after observing a muckpile consisting of several large rocks and boulders on the face of a highwall, hanging roughly 50 feet overhead. (Tr. 49:4-9) Chiccarello felt that the condition posed a hazard due to the size of the boulders and because they were not at an angle of repose. (Tr. 49:6-9; 55:12-24) He worried that miners digging at the toe of the highwall could be crushed if mining activities or thawing caused by fluctuating weather loosened the rocks. (Tr. 50:18-24) Citation No. 8718118 was issued for the failure to trim the muck pile on the highwall, while Citation No. 8718119 was issued for the failure to block off the area below and post a sign to prevent miners from entering the area, where they could be struck by falling rocks. Exs. S-6 at 1; S-8 at 1-2.

Sections 56.3200 and 56.9314 require the Secretary to first prove that the cited ground conditions and failure to trim the muckpile created a hazard to persons. I find that the Secretary failed to meet this burden for both citations. Harless credibly testified that the Respondent had previously scaled the highwall and tried to dislodge the cited rocks with an excavator in the course of its normal mining operations, but that the rocks were tied to the highwall and did not budge. (Tr. 201:19 – 202) Eventually, the rocks were blasted loose from the highwall in order to abate one of the citations. (Tr. 205:24 – 206:1) Given the difficulty in removing the muck pile, I do not find that the rocks posed a hazard of coming loose and falling on miners below. *Cf. Springfield Underground, Inc.*, 17 FMSHRC 613 (Apr. 1995) (ALJ Maurer) (finding that ground

conditions do not create a "hazard to persons" for the purpose of section 57.3200 if the allegedly hazardous "material has to be pried off the rib with thousands of pounds of material force").

It is understandable that the inspector may have believed there was a hazard from his perspective, as the boulders do appear dangerously large, unstable, and capable of falling from the highwall in the photographs he took prior to the citations' abatement. *See* Ex. S-7 at 4-5. Even Snyder, the company's vice-president, believed that the rocks posed a hazard when he viewed them from the bottom of the highwall. (Tr. 296:13-18) However, a closer vantage point and further information about the company's prior unsuccessful attempts to dislodge the rocks convinced Snyder that there was no hazard, and I agree with his later assessment. (Tr. 296:19 – 298:24)

The Secretary argues that the Respondent admitted to Chiccarello during the inspection that it did not have any way of reaching the muck pile with the equipment on site, and that there was no excavator or bulldozer on site during the inspection which could have created a path to the muckpile and trimmed it. Sec'y Br. 13. According to the Secretary's theory, these facts led to RBS failing to address the hazard, instead of any genuine belief that there was no hazard. *Id.* I find that that the inspector simply misconstrued a comment from an RBS agent in reaching this conclusion.

Harless denied ever telling Chiccarello or believing that it was unsafe to travel to the muck pile. (Tr. 210:11-15) However, Chiccarello testified that when he sought an explanation for why RBS had not trimmed the muck pile prior to the citation, he was told that the only way the company could remove the rocks was by blasting them, as the company had no other way of getting them down. (Tr. 159:1-3) It appears that the inspector interpreted this statement to mean that the company had no way of safely reaching the muckpile without further blasting, when in fact it meant that the company had no way of dislodging the rocks without blasting them. Additionally, both Harless and Mark Drennen, the mine mechanic, credibly testified that there was an excavator and bulldozer on site on the day of the inspection. (Tr. 204:9-12; 266:21 – 267:1)

To summarize, I find that RBS did have an excavator and bulldozer on site that could safely access the muckpile and that the company did attempt to trim the muckpile with the excavator prior to being cited, but that the rocks that Chiccarello identified as hazardous could not be dislodged in this manner. Instead, the company had to blast the rocks to trim the muckpile successfully. I cannot find the cited rocks to be hazardous given that they could only be pried loose with explosive material instead of an excavator.

For these reasons, I find that the Secretary has failed to establish the fact of violation for Citation Nos. 8718118 and 8718119.

Citation Nos. 8718120 and 8718121

On February 26, 2014, Chiccarello issued Citation Nos. 8718120 and 8718121 for violations of Sections 56.14101(a)(2) and 56.14100(a), pursuant to Section 104(a) of the Mine Act.

Sections 56.14101(a)(2) states, "If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels." 30 C.F.R. § 56.14101(a)(2). Citation No. 8718120 alleges:

> The Komatsu WA500, company #L-34, was put into use to load a truck while the loader operator knew the park brake did not work. He stated the park brake has not worked since 2/11/2014. The preoperational checks showed the park brake was not functional on seven different dates from 2/11/2014 through 2/19/2014. The preoperational check list was never turned into mine management.[2] This hazard exposes miners to injuries that have the potential of being fatal. The loader is used throughout the mining operation to load customer trucks.

Ex. S-10 at 1. The citation further alleges that an injury was reasonably likely, the injury could reasonably be expected to result in a fatality, the violation was significant and substantial, one person could be affected, and there was a low level of negligence. Ex. S-10 at 1.

Chiccarello also issued Citation No. 8718121 for an alleged violation of Section 56.14100(a), which states "Self-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift." 30 C.F.R. § 56.14100(a). The citation alleges:

> The pre-operational check was not conducted for the Komatsu WASOO, company #L-34, as stated by the loader operator. The last preoperational check was conducted on 2/19/2014. That preop check indicated the park brake did not work. The loader operator [k]new this and said he had to load a truck and needed a loader and used it. The loader operator knew he is required to do a preop check but neglected to do so. Miners were exposed to a higher degree of hazards and injuries due to the failure to observe, report, and correct potential defects and hazards on the equipment.

Ex. S-12 at 1. The citation further alleges that an injury was reasonably likely, the injury could reasonably be expected to result in a fatality, the violation was significant and substantial, one person could be affected, and there was a low level of negligence. Ex. S-12 at 1.

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[2] Although a loader operator had apparently conducted pre-op exams on the defective vehicle for nearly two weeks without turning in the documentation for those exams to management, none of the post-hearing briefs reference this fact or explain its relevance to the citation. Chiccarello suggested that this fact mitigates RBS's negligence because management would not have been aware of the defect if they never received the pre-op forms. (Tr. 96:12-19) However, they were aware that the equipment was tagged out for a defect, and the superintendent learned of the specific defect shortly before the company was cited. (Tr. 108:8-9; 109:5-11) The more pertinent issue is RBS's negligence in allowing the defective vehicle to be returned into service.

Violation

These citations both concern a front-end loader that was improperly put back into service by an RBS employee after being tagged out for repairs due to a defective parking brake. Citation No. 8718120 was issued for the defect itself, while Citation No. 8718121 related to the loader operator's failure to conduct a pre-operation ("pre-op") exam prior to using the loader. Exs. S-10 at 1, S-12 at 1.

The loader had been tagged out due to the defect for at least a few days – possibly up to two weeks prior to the citations – and was sitting unused at the mine during that period.[3] (Tr. 214:3-8) It was not fixed immediately upon being tagged out because it was merely a spare loader, and the mine mechanic, Mark Drennen, was attending to higher priority concerns on other equipment. (Tr. 266:1-3) However, on the day of the inspection, one of the primary loaders at the mine broke down, and a loader operator subsequently informed the mine superintendent, Jim Harless, of the need to fix the parking brake on the spare loader so that he could continue production. (Tr. 214:9-12) Harless told the operator that he would fetch the mechanic and return within about five minutes, and he explicitly instructed the operator not to move the defective loader until he returned. (Tr. 214:12-18)

Before Harless and Drennen returned, Chiccarello observed the loader operator parking the spare loader in defiance of Harless's instructions. (Tr. 87:4-8). Chiccarello questioned the employee and discovered that the parking brake did not work and that he had not conducted a pre-op check on the equipment before using it. (Tr. 87:9-13) When Chiccarello asked him why he would do this, the loader operator responded, "[T]hat's how we do it around here[;] I had to get that customer truck out of here." (Tr. 87:14-17) Chiccarello cited the company for the defective brake and a failure to conduct a pre-op exam, and the citations were abated that day once Drennen repaired the defect and the loader operator was task trained on how to fill out and turn in pre-op exam sheets. Ex. S-10 at 1; S-12 at 1.

The Respondent argues that it complied with both standards because the loader was tagged out. Since "equipment that has been 'removed from service' is not required to be defect-free" for the purposes of 56.14101(a)(2) and the pre-op exam requirements in 56.14100(a) only apply to "equipment to be used during a shift," the Respondent argues that its removal of the loader from service with no intention to use it during a shift negates the fact of the violation for both citations. Resp't Br. 12-17. I disagree. The vehicle may have been removed from service when it was tagged out, but it was very much in service for the purpose of section 56.14101(a)(2) when the inspector observed it and issued a citation. I also find that the phrase "to be used during

[3] The record is unclear about the amount of time that the defective vehicle spent tagged out of service. Harless suggested that it had been sitting out in the tag out area for a few days. (Tr. 214:4-8) Chiccarello speculated that the vehicle had been tagged out for a week or two. (Tr. 108:11-15) Chiccarello noted in passing that the fact that pre-ops were being documented regularly on that vehicle during that timeframe raised his suspicion that an operator may have been putting the defective vehicle back into service on other occasions. (Tr. 109:21 – 110:2) But, the Secretary did not develop this argument any further at hearing or in his post-hearing brief.

a shift" in section 54.14100(a) encompasses situations in which the equipment is actually used during a shift.

Since there is no dispute that the parking brake did not hold the vehicle and that the loader operator failed to conduct a pre-op inspection prior to use of the vehicle, I find a violation for both citations.

Negligence

Chiccarello designated the negligence for both citations as "low" because the mine superintendent had instructed the loader operator not to use the defective vehicle, miners were trained to perform pre-op exams and not to use defective or tagged out equipment, and mine management was not aware of the defect on the vehicle prior to the day of the inspection. (Tr. 95:4-13; 105:4-17; 177:1 – 178:12) The vehicle was parked in the designated tag-out area during that period, so mine management would have known that the vehicle was defective in some way, but they would not have expected the defective equipment to be used or to cause any problems. (Tr. 109:5-11; 117:1-6)

The Respondent argues that the level of negligence should be lowered to "none" for both citations in effect because the violations reflected the willful misconduct of a rogue employee rather than any failure to exercise diligence on the part of the company. Resp't Br. 15, 17. However, the Commission has stated that "[t]he fact that a violation was committed by a non-supervisory employee does not necessarily shield an operator from being deemed negligent." *A.H. Smith Stone, Co.* 5 FMSHRC 13, 15 (Jan. 1983). In assessing an operator's negligence in such cases, the Commission takes into account "such considerations as . . . the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue." *Id.* I find the employee's statement, "That's how we do it around here[;] I had to get that customer truck out of here," to be relevant to this analysis. (Tr. 87:15-17) Even if the employee was entirely mistaken about the mine's tendency to value production over safety, greater efforts in training and supervision were required to make that clear to him.

Additionally, there is some indication that the failure to conduct a pre-op in Citation No. 8718121 was not an isolated incident, but instead indicated larger problems with the pre-op practices at the mine. Multiple weeks' worth of pre-op documentation, including for the pre-op that originally identified the parking brake defect, was not turned in to management and was instead left inside the spare loader. (Tr. 96:13-22) MSHA requires miners to notify management when they identify a hazardous defect in a pre-op. (Tr. 178:20-23) The same breakdown in training and supervision that presumably led to those repeated failures likely contributed to the loader operator failing to conduct a pre-op before returning the vehicle into service.

I find that the "low negligence" designation was appropriate for Citation No 8718120. However, I find that the level of negligence for Citation No. 8718120 was even greater than originally designated, that is "moderate" instead of "low."

Gravity and Significant and Substantial

Chiccarello found both violations to be significant and substantial and reasonably likely to lead to a fatal injury to one miner. Ex. S-10, S-12. The defective parking brake for Citation No. 8718120 posed a discrete safety hazard of a large front-end loader striking or crushing a single miner in its path, and such injury could reasonably be expected to be fatal to one person. (Tr. 92:19 – 93:4) Citation No. 8718121 presented the additional discrete safety hazard of the loader operator failing to detect further defects on the vehicle without a pre-op inspection. (Tr. 104:19 – 105:3) Operating the vehicle with unidentified defects could likewise prove fatal to a single miner. Therefore I agree with the "fatal" and "one person affected" designations for both citations and find that three of the four *Mathies* prongs have been satisfied. The remaining question is whether there was a reasonable likelihood of injury. I find there was not.

The primary consideration for this finding is the very limited amount of time that miners were exposed to the vehicle's hazard, even assuming continued mining operation. The defective vehicle had been tagged out of service and was not used prior to the inspection in that defective state, and the mine's mechanic was already on his way to repair the vehicle when the inspector cited it. (Tr. 214:9-18; 264:21 – 265:8) I do not find that an accident or injury was reasonably likely in that small window of time between when the vehicle was put back into service and when the mechanic arrived. I find that an injury resulting from this hazard was unlikely.

The S&S designations for Citation Nos. 8718120 and 8718121 will be deleted.

Penalty

The Secretary assessed the penalties for these two citation at $1,026.00 each. I have found RBS to be a relatively small operator. Exhibit A of the Secretary's penalty petition indicates that RBS had an insignificant history of violating the cited mandatory safety standards for these two citations, but a more considerable number of violations generally in the prior seven inspection days. Ex. S-1. I found a low level of negligence for Citation No. 8718120, but a "moderate" amount of negligence for Citation No. 8718121. I find that the company demonstrated good faith in the abatement of the violative condition. The parties stipulated to the fact that the assessed penalties will not significantly affect RBS's ability to stay in business.[4] Jt. Pre-Hearing Report. As to the gravity of the violations, I found the violations were not S&S, as it was unlikely that the hazards contributed to by the violations would lead to injury. However, I found that if an injury did occur, it could be reasonably expected to be fatal to one miner.

The Secretary failed to prove that the gravity of the violations was as high as alleged. However, the level of negligence for Citation No. 8718121 was higher than alleged. Therefore, I assess a penalty in the amount of $207.00 for Citation No. 8718120 and $460.00 for Citation No. 8718121.

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[4] The parties argued extensively at hearing and in their post-hearing briefs about whether an increased penalty would affect the operator's ability to remain in business. Since I have not increased the penalties on any of the citations and the parties have already stipulated to the operator's ability to pay the assessed penalties, there is no need to resolve this dispute.

Citation No. 8718115

At the hearing, the parties agreed to settle Citation No. 8718115 for the originally assessed amount of $100.00, without any modifications. I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

ORDER

In view of the above findings, conclusions, and settlement approval, within 30 days of the date of this decision the Secretary **IS ORDERED** to:

- Modify Citation No. 8718116 to reduce the level of negligence from "high" to "moderate," to delete the "significant and substantial" designation, and to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely;"

- Vacate Citation Nos. 8718118 and 8718119;

- Modify Citation No. 8718120 to delete the "significant and substantial" designations and to reduce the likelihood of injury from "reasonably likely" to "unlikely."

- Modify Citation No. 8718121 to delete the "significant and substantial" designations, to reduce the likelihood of injury from "reasonably likely" to "unlikely," and to raise the level of negligence from "low" to "moderate."

WHEREFORE, it is **ORDERED** that RBS pay a penalty of $1,227.00 within thirty (30) days of the filing of this decision.[5]

L. Zane Gill
Administrative Law Judge

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[5] 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.