

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th STREET, SUITE 443
DENVER, CO 80202-2536
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

August 10, 2015

U.S. SILICA COMPANY,
Contestant,

v.

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION, (MSHA),
Respondent,

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION, (MSHA),
Petitioner,

v.

U.S. SILICA COMPANY,
Respondent.

CONTEST PROCEEDINGS

Docket No. WEVA 2014-802-RM
Citation No. 8715732; 04/08/2014

Docket No. WEVA 2014-803-RM
Citation No. 8416877; 04/02/2014

Mine: Berkeley Plant
Mine ID: 46-02805

CIVIL PENALTY PROCEEDINGS

Docket No. WEVA 2014-970-M
A.C. No. 46-02805-351338

Docket No. WEVA 2014-1120-M
A.C. No. 46-02805-354304

Mine: Berkeley Plant

DECISION

Appearances: Daniel McIntyre, United States Department of Labor, Office of the Solicitor, Denver, Colorado for Petitioner;

Justin Winter, Law Office of Adele Abrams, P.C., Beltsville, Maryland for Respondent.

Before: Judge Miller

These cases are before me on notices of contest filed by U.S. Silica Company and petitions 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). These dockets involve one 104(d)(1) citation and twelve 104(a) citations with a total proposed penalty of \$26,814.00. Prior to the hearing, the parties reached a settlement of eleven of the 104(a) citations. On June 10, 2015 the court issued an order approving partial settlement addressing those eleven 104(a) citations. The two remaining citations, one a 104(d)(1) and the other a 104(a), remained for hearing. The parties presented testimony and evidence regarding the two remaining citations at a hearing held on June 24, 2015 in Washington, D.C. The parties have stipulated to the jurisdiction of MSHA and the Commission and have entered into other stipulations regarding the penalty criteria that are discussed below.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

U.S. Silica Company's Berkeley Plant is a surface silica mine in Morgan County, West Virginia. The mine produces ground silica using open-pit mining methods. The mine typically blasts an area, then loads the material onto haul trucks and transports it to a stockpile area. The material is then crushed and processed on-site. The pit uses a loader and two to three haul trucks during mining activity. The mining activity has left a limestone highwall, the upper portion of which is covered by soil and vegetation.

Both of the citations at issue in this proceeding involve the maintenance and stability of a highwall and, more specifically, the soil and slope of the highwall. The stability of a highwall depends on a number of variables, including its height, geology, and the angle of the wall. The stability of soil also depends on the angle, soil composition, slope, and the raveling and erosion of material. In addition to blasting, mines normally use benching and scaling to control highwalls. Generally, benches are placed above the working area to "catch" and help control rock and material that rolls or falls from the highwall. Scaling is used to remove loose or hanging rock and material before it falls. All mines, no matter which method or methods are used to control the highwall, must be vigilant in watching the movement and the changes of the highwall.

On Sunday, March 16, 2014 a slope failure occurred on the western wall in the northern pit of the Berkeley Plant. The western wall is separated into an upper and lower section by an old haul road which, in this instance, acted as a catch bench. The upper section of the limestone highwall was approximately 200 feet high and sloped at a 45 degree angle. In most places the limestone was not visible and was covered by soil and vegetation, some of which had been in place for many years. The highwall failure resulted in soil and other material near the top of the wall falling down into the pit.

The old haul road, which was acting as a bench, was no longer in use as a road and had been bermed on both ends to prevent access. The mine did not consider the road a catch bench, nor did it maintain it as a catch bench. The bench varied from 25 to 50 feet wide, and the soil and material that slid down from above on March 16th covered a good portion of the length of the bench up to ten feet deep. In addition, soil and material that were not caught by the bench traveled all the way to the bottom of the pit and covered the access road below, which was the only means of entry into the bottom of the pit. The north portion of the mine was not in operation at the time of the failure on Sunday, March 16th. Following the failure, the mine, over the course of roughly four days, cleaned up the material that covered the access road to the bottom of the pit. The mine did not clean the bench or remove any material from the highwall.

On April 2, 2014 MSHA Inspector James Slick traveled to the mine to conduct a regular inspection. Slick, who has 11 years' experience as a mine inspector and 32 years' experience as a miner, was not aware of the slide and was not told of the slide by any management person. Rather, one of the miners mentioned the slide to him after he arrived at the mine. Slick traveled to the pit area and, upon seeing the area of the slide, said that the "hair stood up [on] the back of [his] neck." (Tr. 60). He observed the stain on the highwall from the slide, and could see its path over the old haul road that was acting as a bench and across the access road leading to the

pit. Miners were working in the pit below the slide area at the time, and the bench above had not been cleared, nor had any steps been taken to maintain the highwall in a condition that would prevent further sliding. Slick immediately told the miners who were working in the pit to move out and barricade the area. Based on his observation, he issued a 104(d)(1) citation for failing to maintain the highwall.

Sec'y Ex. 4 p. 2 is a photograph of the access road into the pit, and shows the area where miners were working when Slick arrived. Sec'y Ex. 4 p. 3 shows the active area of mining, including loose rock on the left portion of the picture. The brown material on the right hand side of the road in the photograph is the area of the fall. The old haul road that acted as a catch bench can be seen on the right hand side of the picture and was covered nearly in its entirety by the slide debris.

Slick explained that the active access road into the pit is directly below the highwall and is used by both pickups and haul trucks, as well as other mobile equipment, to enter and exit the pit. Slick questioned the mine about the cleanup of the fallen material that covered this active road. He was told that it took four days for the mine to clean up the material at the bottom of the pit so that it could re-enter the pit to work. In Slick's view, if the failure had happened at a time when a miner was traveling the pit haul road, the slide would have engulfed them and there would have been no chance of getting out alive. Slick testified that a haul truck driver, a front end loader operator, or any other miner in the area, "wouldn't stand a chance."

At hearing, the mine explained that its cleanup efforts were undertaken in order to resume operations, but there was no credible testimony regarding the mine's plans for preventing further slides during the time between when the slide occurred and when Slick issued the citation. In addition, the mine presented no evidence or efforts it had made to maintain the highwall prior to the slide described by Slick. Slick questioned the mine about the old haul road that acted as a catch bench and learned that the mine did not designate the road as a catch bench and therefore did not see the need to maintain it, before or after the slide. Instead, the road had been closed off because it was no longer useful. Although the mine cleaned the active access road into the pit after the slide so that work could resume, it did not clean off the bench above, or take any other measures to scale down the loose debris that was seen on the highwall. Slick explained that the old haul road, operating as a bench, was not maintained, nor was it adequate prior to the slide of material. According to Slick, there was a definite potential for another slide and the old haul road was less likely to be able to function as a catch bench since it was full of material.

Slick explained that he cited the mine under 30 C.F.R. § 56.3130 because the standard addresses mining methods and safety benches. Here, the bench was not maintained prior to or after the slide, nor did the mine employ any methods to ascertain that the highwall was safe. As a result, Slick opined that a serious hazard was present both prior to and after the slide. According to Slick, the highwall had the same potential to slide on April 2nd as it did on March 16th, but on April 2nd the bench was mostly full and would not have been able to catch a large portion of any sliding material. The miners were working in a pit where they could not evaluate the highwall, could not scale, and could not control any slide of loose material.

The mine explained that it used spotters to watch the highwall during the removal of the slide material from the access road. However, because spotters were not necessary after the access road was reopened, none were in place when Slick arrived. Slick addressed the mine's use of spotters and indicated that, while spotters may have some use in watching the highwall, they are not a substitute for maintaining the highwall in a safe condition. Rather, spotters are simply in place to warn miners working in the pit in the event they see rock or other material begin to slide. In Slick's opinion, any warning would be too late and would do little to protect the miners.

Slick explained that highwalls change minute by minute and operators are expected to be constantly aware of the conditions. Slick observed material on the catch bench that had accumulated prior to the March slide but had not been removed. After seeing the aftermath of this slide, Slick inspected the entire highwall and observed one other area that he considered a hazard. That area, however, had been barricaded with cones. Slick observed loose trees, stones and dirt along the highwall and understood that the mine had taken no purposeful steps in the weeks following the slide to improve the highwall or to mitigate against a future slide. Given the lack of any meaningful steps to mitigate against a failure both before and after the March 16th slide, he assessed the negligence as high.

A team from the MSHA Technical Support Division investigated the highwall failure on April 8, 2014. The MSHA team observed areas that indicated previous movement and instability of the soil and observed raveling of material just south of the slide area when conducting the investigation. The team determined that, at the time of the slope failure, the falling material mounded along the upper section of the highwall, covered the bench below, and then slid into the active pit area. The team observed that overburden material, soil and vegetation were present above the pit and had not been cleared away or benched back from the edge of the highwall.

According to the team's report, the lower section of the pit was being actively mined for sandstone along the eastern side, resulting in a 150 foot highwall sloped at 45 degrees. Some of the fallen material from the upper section of the highwall was visible on this lower section. The failure area was estimated to be 150 feet wide, narrowing to 50 feet at the lower section of the pit. According to the MSHA investigation team, it took four days to clear the fallen material from the pit. Moreover, material had not been cleared from the bench at the time of the inspection, nor had any other action been taken to scale or maintain the highwall.

Jarrold Durig, a MSHA mining engineer and supervisor who regularly assesses highwalls and slope stability, was one of two engineers from MSHA's Technical Support Division to visit the slide area at the Berkeley pit. Based on his observations, he and another MSHA engineer generated a report and assisted the mine in finding ways to bring the highwall into compliance. Durig opined that the mine used no method whatsoever to control the highwall. He noted that the only bench in place was inadvertently created by the mine when it abandoned its old haul road.

Durig's review found that the Berkeley pit contains a sandstone layer and a lighter colored strata of limestone, as shown in the photographs, Sec'y Ex. 4. The darker material seen in the photographs is the soil, which is prominent in the area. The sandstone is on top of

limestone and, as the sandstone was mined down over time, loose material slid and got hung up on the highwall or on the irregularities in the limestone strata. Loose soil was present on April 8th when Durig visited the mine and he observed a new slide near the barricade of the pit. In addition, Durig observed water and active raveling both of which are signs of slope instability. He also observed that the upper portion of the wall, not a part of the current slide, held a large accumulation of soil. Further, there were other locations on the highwall that had dormant vegetation and large accumulations of soil, including trees near the top of the wall that had fallen over or were leaning. I find Durig to be a knowledgeable, experienced witness. His analysis of the highwall, its condition, and the necessary steps to bring the highwall into compliance are well thought out and based upon, not only the evidence but his first hand observations.

Durig explained that there were two aspects to this highwall, the hard rock area and the soil area also referred to as the slope. Here, the hazard was not necessarily the rock formation, but was more the loose soil slope on the highwall. Soil or slope is weaker than highwall, and a 45 degree incline is the upper boundary of an acceptable slope. Because soil is not nearly as stable as rock, it must be addressed and brought down to maintain the integrity of the highwall in general. Most mines create benches to control soil and falling material, but, here, the old haul road had not been maintained and only accidentally acted as a bench to control a portion of the slide. Durig saw nothing that indicated the mine had made any effort to deal with the soil, the slope, or the bench, nor had it taken steps to mitigate the hazard created by the loose material on the wall both before and after the slide in March.

Although no slide occurred while Durig was at the mine, the raveling and the state of the soils and vegetation indicated impending failure. On cross examination, Durig again explained that there is no way to predict an imminent ground failure, but the geometry of the slope, the loose material, the dead vegetation and trees, and erosion all demonstrated that the stability of the slope he observed was marginal at best. Durig saw no indication that any mitigation was done prior to the slide or in the period of time after the slide but prior to the issuance of the citation. He agreed with Slick that spotters are not a substitute or control of a highwall.

Following the issuance of the citation, MSHA, the mine, and contractors hired by the mine, engaged in discussions regarding a plan to bring the highwall into compliance. The contractors started work in October and finished around November 21st. One contractor came in to scale the highwall, remove loose rock, and take down the loose soil. Another contractor addressed the top of the highwall by removing material in order to give the top a better slope, and creating berms and a new road at the top. The same contractor cleaned the old haul road, established it as a catch bench, and put berms on it to increase its storage capacity. Durig opined that the mine could have done this work over time and well before the slide.

The mine operator called John Head, a mining engineer, as an expert. Head has been involved in a variety of activities in the mining industry. He has a mining engineering degree and a master's degree in management. Head became involved in this matter on April 10, 2014, just over one week after Slick issued the 104(d)(1) citation, when he was contacted by someone from the office of the attorney representing the mine in this proceeding. Head, like Durig, prepared an expert report and testified at hearing.

Head reviewed the citation and visited the mine on April 14th. He observed the slide area, with no slide material left in pit, and could see the slide had filled the old haul road. It was his opinion that there was no large scale instability at the time. He noted that, with the highwall at an angle of 45 degrees, raveling could result in loose material rolling down. He observed some small areas where there was raveling but, generally, the highwall was stable. According to Head, his duty was to address both the stability and the safety of the highwall, and those two things are not always comparable. There was no evidence of instability in his view, but there were issues involving safety that needed to be addressed. Specifically, he expressed concern regarding areas of the brow, areas where trees had leaned over indicating that material had moved, and isolated areas with loose rocks that needed to be addressed because the catch bench was full. While he believed that a bench was desirable, he did not think it was absolutely necessary. He did not see conditions that would cause a failure in the next few days, or serious conditions like water or a bulge at the toe, but he did see conditions that needed to be addressed in the long term.

Head's report included a list of steps the mine took after the slide, and he discussed those steps during his testimony. Head explained that, among other things, the mine took steps to remind miners about being diligent and staying away from highwall, conducted examinations of the highwall to look for signs of additional movement, decided to cease work in the pit if rainfall made the soil unstable, and used spotters to inspect the highwall during cleanup. Head agreed that the use of spotters is not the answer to instability and, instead, in his view, only adds a measure of safety by possibly providing an early warning of a slide or fall. He noted that spotters were not used after the cleanup because the mine did not observe any movement of the soil or highwall and thought the spotters were no longer necessary. Head offered little testimony regarding the conditions prior to the slide, or during the time after the cleanup of the access road but prior to the inspection by MSHA. Instead Head's testimony focused on the means used by the mine to mitigate against the potential for an accident during the week the mine was cleaning up the fallen material. Head stated that the actions of the mine reasonably provided for mitigation, but they did not eliminate the hazard. The hazard was removed when the mine brought in a contractor to take back the brow and rake across the highwall to take down loose material. After the highwall was addressed, some accumulation of material remained. The contractor also cleaned off the catch bench so it was available for use, adding to the safety of the area. He agreed that the mine could have taken steps and remedied the unsafe condition of the area prior to the fall in March.

The two experts in this case offered substantially similar testimony. However, I give greater weight to the testimony of Durig who has more experience specifically with highwalls and the geology of highwalls. Further, Durig's education is more directly related to the issue at hand and he addressed the condition of the highwall and the length of time that the highwall was left to deteriorate without any work being done by the mine. Head, on the other hand, discussed what was done to clean up the fall in the one area, and what was done to abate the violation. He did little to shed light on the violation itself and the conditions that existed at the mine before the slide.

Citation No. 8716877

The Violation

On April 2, 2014 MSHA Inspector James Slick observed the bench and the slide area of the Berkeley Plant as described above. He observed that the large ground failure caused material and debris to fill the bench from end to end and to cover the haul road into the pit below. Because Slick believed that the condition of the wall and the bench continued to pose a hazard, the equipment was removed from the pit and the area was barricaded and posted immediately. During the course of the inspection, Slick learned about the highwall failure on March 16, 2014, approximately two weeks prior to his arrival and given his observations issued Citation No. 8716877 on April 2, 2014 pursuant to section 104(d)(1) of the Act for an alleged violation of 30 C.F.R. § 56.3130. The standard requires mines to use methods that will maintain the wall, bank and slope stability in places where persons work or travel, and, when benching is necessary, to maintain the benches. The requirements that the quarry wall be sloped back, as found in 30 C.F.R. § 56.3131, and that hazardous ground conditions be corrected, as found in 30 C.F.R. § 56.3200, are also applicable in this circumstance. The citation alleges that the mine failed to maintain a safety bench on a highwall. Slick determined that the condition was reasonably likely to result in a fatal injury, was S&S, affected one person, and was a result of the operator's high negligence and unwarrantable failure to comply with the mandatory standard. The Secretary has proposed a civil penalty in the amount of \$5,503.00 for this alleged violation.

The Secretary argues that the mine failed to maintain the highwall and that the only catch bench was in place by accident. Specifically, the Secretary argues that the mine did not use any method to maintain the wall, bank or slope above the area where persons were working, nor did it maintain the bench.

U.S. Silica argues that, because it did not incorporate benching into its mining method in the area, it was not required to maintain the old haul road as a bench. Moreover, because there was no evidence of large scale instability on the wall, the mine complied with the standard. The mine presented no evidence of the condition of the highwall prior to the failure, or any actions taken to maintain the highwall prior to or after the slide and therefore I agree that the violation occurred as cited.

The Commission has explained that section 56.3130 is a "clear," *Connolly-Pacific Co.*, 36 FMSHRC 1549, 1553 (June 2014), "performance-oriented" standard intended to require mining methods that maintain ground stability. *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 374 (Mar. 1993). The standard requires that benches, when used as a method of control, must function as catch benches and must be maintained in order to prevent falls of ground to the area below. The plain language of the standard, when read in conjunction with sections 56.3131 and 56.3200, requires operators to "maintain highwall stability and correct hazardous conditions before work or travel takes place." *Connolly-Pacific Co.*, 36 FMSHRC 1549, 1553 (June 2014). The evaluation of whether a violation occurred is measured against the standard of whether reasonably prudent person familiar with the factual circumstances would recognize that a hazard, as contemplated by the standard, existed. *Id.* (citing *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982)). In this case, the mine failed to maintain the highwall at all, offering no

information about the stability of the wall or the slope, or about steps that had been taken to bring down loose material or to provide or maintain an adequate bench to catch any sliding material.

MSHA's Program Policy Manual provides additional guidance regarding the standard and requires that "a bench located immediately above the area where miners work or travel be maintained in a condition adequate to retain material that may slide, ravel, or slough onto the bench from the wall, bank, or slope." IV MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 56, at 10 (2010) ("PPM"). The MSHA guideline also indicates that if it is too hazardous to maintain a bench, other measures, including ceasing mining in the area or placing a berm at the base of the wall which prevents material from entering areas where miners work or travel, may be utilized. *Id.* at 10-11.

In *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 374 (Mar. 1993), the Commission upheld a judge's finding that a violation of section 56.3130 existed where material had accumulated on catch benches such that the benches could no longer catch material and protect persons working below. There, the Commission stated that "evidence regarding the state of the benches . . . and [the mine's] failure to clean them is probative of the stability of the walls, banks, and slopes[.]" *Id.* The Commission, in affirming the judge's decision, confirmed that the judge properly found that a reasonably prudent person would have recognized that the standard was violated. *Id.* at 375. Like in *Cyprus*, U.S. Silica allowed the bench to accumulate material to such a degree that it was rendered ineffective.

In *Connolly-Pacific Co.*, 36 FMSHRC 1549 (June 2014), the Commission upheld this court's finding that a violation of section 56.3130 existed where the mine failed to maintain the stability of a highwall. There, the court relied upon photographs and expert testimony to find that the mining method employed by the mine, which did not involve the use of scaling or benching a 300 foot highwall, and instead involved allowing rock to slide down the highwall before being removed by a loader operator at the base, did not maintain the highwall in conformity with the standard.

Here, I find that the mine offered no explanation about the general condition of the highwall prior to the failure, or how they considered and controlled the highwall and slope. Instead the mine essentially agreed that, while the old haul road may have acted as a bench in this instance and caught some material, it was purely by accident and the mine had no intent of making it a catch bench. As a result, the mine did not maintain it as a bench. Given that the mine did not scale the highwall, have any record of the wall's movement or stability, use any means to clean up the loose material at the top, or maintain a bench, it violated the standard in every respect. While benching may not be a requirement under the standard, the mine failed to employ *any* mining method to maintain ground stability and prevent the type of failure which had already occurred. I reject the mine's argument that it complied with the standard because there was no evidence of large scale instability at the time the citation was issued or when its expert viewed the area. There is no dispute that the mine had just experienced a large ground failure. The mine had failed to detect or control that failure, took no subsequent steps to prevent a similar failure in the future, and the witnesses for the Secretary offered credible testimony that the conditions were right for another failure.

While the mine, in its brief, argues in passing that it employed berms at the base of the highwall along the road and in the pit as an alternative means of control, the evidence is not persuasive. No one from the mine testified to the existence of these berms prior to the ground failure, or in the time between when the failure occurred and when the citation was issued. Moreover, even if the court were to accept the mine's argument that a berm was in place, it clearly would not have controlled the March 16th ground failure, which resulted in material 12 feet deep covering the entire width of the access road, or any subsequent similar failure.

I find that a reasonably prudent person, familiar with the mining industry, would know that this highwall presented a clear hazard, that it should have been scaled or otherwise cleaned up, and that benches above the working area, or some alternative method of control, were necessary to control falls and protect the miners below. Accordingly, I find that a violation of the cited standard occurred as alleged.

S&S and Gravity

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained its interpretation of the term "significant and substantial" to be:

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.

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula, in which the Secretary must establish that there is a reasonable likelihood that the hazard will result in an injury. The Commission has explained that the third element of the 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." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984). The Commission discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257 (Oct. 2010) (affirming an S&S violation for using an inaccurate mine map). The Commission clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury" but that the

hazard created would cause an injury. *Id.* at 1280-81. The Commission reaffirmed its position in *Cumberland River Coal*, 33 FMSHRC 2357, 2365 (Oct. 2011).

In *Connolly-Pacific Co.*, 33 FMSHRC 2270 (Sept. 2011) (ALJ), this court affirmed a S&S designation of a violation of section 56.3130 where loose and cracked rocks were observed on a near vertical highwall above miners working on foot and in equipment on the pit floor. The court found that, because it was impossible to predict when material would fall, it was “at least reasonably likely” that, assuming continued mining operations, material would fall and strike a miner or equipment operator, and that even small pieces of rock could be dangerous if they fell from great height.

In this case the Secretary has demonstrated that the violation was S&S. First, there was a failure of the wall that resulted in a mass of material sliding off the wall, covering the bench and then covering the haul road below. Slick and Durig agreed that the conditions were right for another failure of the wall. In addition, Inspector Slick explained that, had any miner been in the area when the fall occurred, he would have been buried by debris or had no way out of the pit. The mine does not dispute Slick’s description of the fall and the hazard it created. The mine was fortunate that no one was driving a truck or loader on the pit road on the day of the slide. Slick and Durig agreed that the slide was large enough to engulf equipment or push it up against the opposite wall. In addition, there was enough material to completely block the only way out of the pit and it took the mine four days to clean up just that area of the pit in order to reestablish the road and any route into the pit area. Durig testified that the photographs, Sec’y Ex. 4 pp. 4 and 5, clearly show how large the slide was and that the bench was full of material. Looking at the current active road into the pit and the scope of the slide into that area, Durig expected that a front end loader, a haul truck, or other piece of equipment, would have been engulfed or pushed against the opposite wall by the slide. The slide would have trapped others, as there was no other way out of the pit.

I have found that there is a violation of the mandatory standard, and that the violation of not maintaining the highwall did, and would in the future, result in a fall or slide of material. The fall or slide of material is a serious hazard which will lead to the covering up of equipment and the miners operating the equipment, or, in the very least, push the heavy equipment with the operator into the opposite side of the pit wall. When the drivers of the equipment are covered up or engulfed by soil, trees and other sliding material, it will result in a serious injury or death. Hence, I find the violation to be S&S.

Unwarrantable Failure and Negligence

Inspector Slick testified that he believed the violation to be the result of high negligence and an unwarrantable failure for a number of reasons, including the fact that the mine was aware of the condition of the highwall, both before and, more importantly, after the slide, yet failed to take any remedial measures. The mine had done nothing to prevent this slide or any subsequent slide even though the condition of the highwall was obvious. The mine took no steps after the slide to clear the catch bench or scale the loose material. All management members were aware of the slide but, instead of focusing on preventing another similar slide, they cleared the pit road and continued working under a bench that was now filled with debris. I find that the violation

was a result of the mine's high negligence and the unwarrantable failure to comply with the mandatory standard.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by conduct described as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2002-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) (“R&P”); *see also Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (approving Commission’s unwarrantable failure test). The Commission has explained that whether a citation is an “unwarrantable failure” is a question that should be evaluated based on the facts and circumstances in each case, and in light of each of the following factors: 1) the length of time that the violation has existed; 2) the extent of the violative condition; 3) whether the operator has been placed on notice that greater efforts were necessary for compliance; 4) the operator’s efforts in abating the violative condition; 5) whether the violation was obvious; 6) whether the condition posed a high degree of danger; and 7) the operator’s knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340 (Mar. 2000); *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009). All of the relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353

Length of time that the violation has existed. In *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009) the Commission emphasized that the duration of time that the violative condition exists is a “necessary element” of the unwarrantable failure analysis. The Commission, in remanding the case, instructed the judge to address the duration of the violative roof condition, which was found to have existed for multiple shifts and days, and determine if that duration qualified as an aggravating factor. In *Coal River Mining, LLC*, 32 FMSHRC 82 (Feb. 2010), the Commission explained that, even where the record of a case does not allow a judge to make a determinative finding with regard to how long a violative condition existed, the judge must analyze the element and “[e]ven imperfect evidence of duration in the record should be taken into account[.]” While the Commission has found that a duration of a “matter of seconds” may weigh against an unwarrantable failure finding, it has also held that a duration of a few minutes may support an unwarrantable failure finding. *Midwest Material Co.*, 19 FMSHRC 30 (Jan. 1997) (Finding that a judge erred in relying upon the brief duration of the violation when vacating the unwarrantable failure designation. Noting that the only reason the duration of the violation ended was because a crane boom crushed and killed a miner who should not have been working under the boom).

Durig testified that he viewed aerial and satellite images of the mine dating back to approximately 2000 and, in those images, he saw vegetation and soil deposits similar to what could still be seen in other areas of the mine that had not yet failed, and what would have been seen in the area of the slide prior to the failure. The dangerous condition of the highwall at the time of the failure certainly didn’t develop instantaneously. Rather, the condition developed over an extended period of time, during which the mine took no steps to maintain the stability of the highwall or slope. I find that this factor weighs heavily in favor of an unwarrantable failure finding.

Extent of the violative condition. In *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009), the Commission explained that the “extent of the violative condition is an important element in the unwarrantable failure analysis.” The Commission has explained that the purpose of this element is to “account for the magnitude or scope of the violation[,]” and the judge may analyze it by looking at, among other things, the “extent of the affected area as it existed at the time the citation was issued[,]” the number of persons affected, and the time and resources required to correct the condition. *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075 (Dec. 10, 2014) (citing *E. Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010) and *Watkins Eng’rs & Constructors*, 24 FMSHRC 669, 681 (July 2002)); *Consolidation Coal Co.*, 35 FMSHRC 2326, 2331 (Aug. 2013). In *Dawes* the Commission found that, because only one miner endangered himself by walking under the suspended boom, the violation was not extensive. *Id.*

The top of the wall in this pit was over 300 feet high, with approximately 200 feet above the old haul road, which was functioning as a bench, and approximately 150 feet below the old haul road down to the access road. Further, the wall was between 1600 to 1800 feet wide. The entire wall was left unmaintained. The Secretary’s witnesses and the mine’s expert witness testified that there were areas at the brow that needed to be addressed, as well as loose material all over the highwall. While it may have only taken the mine a few days to clear the material from the access road following the failure, it took months to formulate a plan to terminate the citation, and required approximately a month for contractors to complete their work to bring the mine into compliance before the citation was terminated. I find that the violative condition was very extensive.

Whether the operator has been placed on notice that greater efforts were necessary for compliance. The Commission has explained that repeated, similar violations, and past discussions with MSHA about a problem at the mine may serve to put an operator on notice that increased efforts to comply are necessary. *IO Coal Co.*, 31 FMSHRC 1346, 1353-1354 (Dec. 2009). The prior violations relied upon to establish notice need not have been a result of an unwarrantable failure, nor do those violations need to have involved precisely the same activity, cited standard, or area of the mine. *Id.*; *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 561 (D.C. Cir. 2012); *Consolidation Coal Co.*, 35 FMSHRC 2326, 2344 (Aug. 2013).

The testimony elicited at hearing did not address whether MSHA had ever placed this operator on notice that greater compliance efforts were necessary. It is not clear whether other inspectors had viewed the highwall, or even mentioned it, prior to the Slick’s inspection on April 2, 2014. As a result, this factor was not relied upon in reaching my unwarrantable failure finding.

Operator’s efforts in abating the violative condition. In evaluating the operator’s efforts in abating the violative condition the judge should examine those abatement efforts made prior to the issuance of the citation or order. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2342 (Aug. 2013) (citing *IO Coal Co.*, 31 FMSHRC 1346, 1356 (Dec. 2009) and *Warwick Mining Co.* 18 FMSHRC 1568, 1574 (Sept. 1996)). In *Consolidation* the Commission, in affirming the unwarrantable failure designation, noted the judge’s finding that management did not take steps

to remedy the type of condition cited despite being aware of a similar condition having been previously brought to their attention through the issuance of a citation.

I find that the mine made no efforts to abate the violative condition prior to the issuance of the citation. There is no evidence that the mine took steps to abate the violative condition prior to or after the slide. Even after the slide when it was clear that the bench was full in areas, the mine took no steps to clean it, nor did it attempt to scale the highwall or even consult with someone who could provide advice on how to remove the hazards. The only action taken by the mine in response to the failure was to clear the access road to the pit, and provide spotters, neither of which abated the violative condition. I find that this factor weighs heavily in favor of a finding that the violation was result of the mine's unwarrantable failure to comply with the mandatory standard.

Whether the violation posed a high degree of danger. The Commission has found the high degree of danger posed by a violation to be an aggravating factor in support of an unwarrantable failure finding. *IO Coal Co.*, 31 FMSHRC 1346, 1355-1356 (Dec. 2009). The Commission has acknowledged that, conceivably, the degree of danger could be "so severe that, by itself, it warrants a finding of unwarrantable failure." *Manalapan Mining Co.*, 35 FMSHRC 289, 294 (Feb. 2013). Moreover, it has noted that a violation may be aggravated and unwarrantable where the hazardous nature of a violative condition is common knowledge. *IO Coal Co.*, 31 FMSHRC 1346, 1355-1356 (Dec. 2009) (citing *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding a violation to be an unwarrantable failure based on "common knowledge" that power lines are hazardous and precautions must be taken around them)). Further, when a mine operator ignores a chronic problem, the degree of danger and likelihood of something going wrong increases. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2343 (Aug. 2013). Furthermore, a high degree of danger may be evidenced where a fatal accident occurred as a result of the cited condition or practice. *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997).

The violation posed a high degree of danger. Loose material was observed in multiple places on the highwall and the brow, or slope, of the wall, which consisted of soil and vegetation, had not been addressed by the mining methods of this operator. Just as the Commission in *Cyprus Tonopah* found that a mine's failure to maintain benches was probative of the stability of the walls, banks, and slopes, here, the mine's failure to employ *any* mining method to address the hazardous conditions on this highwall and slope is probative of the stability. 15 FMSHRC at 374. Further, the undisputed fact that a major failure of the wall occurred, combined with the obvious conclusion that the failure, or any similar failure, would almost certainly kill anyone in the path of the slide, makes it clear that the violation posed a very high degree of danger.

Whether the violation was obvious. The obviousness of the violative condition is an important factor in the unwarrantable failure analysis. *IO Coal Co.*, 31 FMSHRC 1346, 1356 (Dec. 2009). Moreover, where an operator's conduct causes a violative condition to not be obvious, the operator cannot assert that the lack of obviousness is a mitigating factor in the unwarrantable failure analysis. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2343 (Aug. 2013) (citing *Eastern Assoc. Coal Corp.*, 32 FMSHRC 1189, 1200-01 (Oct. 2010)) (upholding judge's

unwarrantable failure finding where the operator deliberately ignored air velocity requirements in the mine's ventilation plan).

Both Durig and Slick testified that the violation was obvious and I agree. The pictures entered into evidence show loose soil and other material, including rocks and dead vegetation, spread across the highwall. Sec'y Ex. 4 pp. 1, 2, 4, 5, 6. The mine had taken no steps to maintain the wall and slope by removing or protecting against the loose material. The bench, which the mine admittedly was not maintaining, was clearly full in areas and could not protect against the future fall of material in those areas.

Operator's knowledge of the existence of the violation. In *IO Coal* the Commission reiterated the well settled law that, in addition to actual knowledge, an operator's knowledge of the existence of a violation may be established where the operator "reasonably should have known of the violative condition." 31 FMSHRC 1346, 1356-1357 (Dec. 2009). The Secretary may establish that an operator "reasonably should have known of the violative condition" by showing that the "operator's knowledge of the specifics of its operations should have led it to conclude that violation charged would eventually occur[.]" *Eastern Assoc. Coal Corp.*, 32 FMSHRC 1189, 1199-1200 (Oct. 2010) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2002-04 (Dec. 1987) and *Coal River Mining, LLC*, 32 FMSHRC 82, 92 (Feb. 2010)).

I find that, even if the operator did not have actual knowledge of the existence of this violation, it certainly should have known of the violative condition. In spite of the fact that the mine was not cited for the highwall conditions prior to the slide, the condition was extremely obvious and, as discussed above, a reasonably prudent person should have known that the highwall needed constant attention in order for the mine to maintain it in a safe condition. Even if the failing condition of the highwall was not obvious before the March 16th failure, it certainly was so after the failure. Nevertheless, the mine allowed the condition to persist until the inspector issued the citation. The mine's witnesses testified that, following the failure, the managers met to discuss how to deal with the situation. The managers knowingly chose to take no steps to abate the obvious, hazardous condition. I find that they were on notice of the existence of the condition and the potential for a similar future failure given that they took no steps to prevent one from occurring.

The mine argues that the steps it took after the March 16th failure to insure that the highwall was stable were taken in a reasonable good faith belief as to what was required to achieve compliance. However, the mine did not employ any mining method to maintain the stability of the wall and slope prior to or after the failure, I find that this argument is without merit. The steps taken by the mine between the times when the fall occurred and when the citation was issued did not address the stability of the wall. Rather, they addressed the need to resume operations and, at the very most, an attempt to avoid, not address, the hazard.

While the operator argues that the presence of spotters mitigates against the high negligence and unwarrantable failure findings, I disagree. In *Connolly-Pacific Co.*, 33 FMSHRC 2270 (Sept. 2011) (ALJ), this court affirmed the Secretary's designation of moderate negligence where the mine had established protective berms in at least some portions of a quarry, had conducted routine inspections of the highwall, and had employed spotters when material was

removed from the base of the wall. Here, I find that the mine did far less. The mine did not offer credible evidence of someone being aware of the changing conditions of the wall or monitoring its movements. Further, there were no examinations or remediation even after the serious fall of ground. In *Connolly-Pacific Co.*, 36 FMSHRC 1549, 1553 (June 2014), the Commission found that the use of spotters did nothing to maintain a highwall's stability, nor did it constitute a correction of fall-of-materials hazards. Moreover, in finding that substantial evidence supported the judge's finding that an inspector did not abuse his discretion when issuing a 107(a) imminent danger order, the Commission cited the inspector's testimony that the use of spotters "does not stop or mitigate the likelihood of material coming off the wall. It just lets the guy watch it happen." *Id.* at 1555. In other words, spotters are just witnesses to falls of material, and the use of them should not be considered a mitigating factor. Here, it is undisputed that spotters were only used during the cleanup of the access road, and were not present prior to the failure, or after the cleanup was complete. Accordingly, I find that the violation was a result of the mine's high negligence and unwarrantable failure to comply with the mandatory standard.

Citation No. 8715732

On April 8, 2014 Inspector Michael Smith traveled to U.S. Silica's Berkeley Plant to conduct an inspection. Smith observed fresh tire tracks at the toe of a 175 foot perimeter highwall in the southwest corner of the Berkeley mine. He explained that no safety bench was present in the area and loose material extended all the way to the brow of the wall. In addition, he observed two foot diameter rocks approximately 75 feet above the work area. The brow of the highwall had not been stripped back and it appeared that trees were at the edge. Further, he observed loose material at the toe, which appeared to have been moved by a front end loader. Smith opined that a fall of material would cause crushing injuries to a miner working below. Based on his observations, Smith issued Citation No. 8715732 for a violation of section 56.3131 of the Secretary's regulations. Smith determined that the condition was highly likely to result in a fatal injury, was S&S, affected one person, and was a result of the operator's high negligence. The Secretary has proposed a civil penalty in the amount of \$12,248.00 for this alleged violation.

The Violation

Inspector Smith, has been with MSHA since 2008 and received the regular MSHA training as well as accident investigation training. He has an extensive background in highwalls dating back to 1972 when he started operating heavy equipment in pits similar to the one here. and he is aware of the importance of maintaining highwalls in safe condition.

Inspector Smith traveled to the Berkeley pit on April 8, 2015, about a week after Slick issued the citation associated with the fall of ground. Smith reviewed the mine file and met the engineers from MSHA's Technical Support Division at the mine to review the highwall and the fall area. While walking to the area of the slide, Smith observed a separate area, shown in two photographs, Sec'y Ex. 4 pp. 8, 9, where tire tracks were under a 175 foot highwall. As a result he issued a citation because the area where persons worked or traveled had loose unconsolidated material created a fall of material hazard.

Smith explained that Sec'y Ex. 4 p. 9 is a photograph of the area he cited and shows the material at the bottom of the wall that had fallen from above to the pit below. The photo shows material higher up the wall that appears ready to fall into the pit area. Smith testified that the rock and material he observed would roll or fall from the wall and hit a haul truck, loader or other equipment, as well as any miner on foot. It has been his experience that, when heavy equipment is being operated under and around highwalls, drivers frequently step out of the equipment and are on foot in the areas. It appeared that the mine had been removing rock at the bottom of the wall, causing the area above to shift or move. Smith said that the operator of a front end loader would only have been able to see directly in front of, and a little bit above, the equipment, and would not be able to see rock or material falling from higher up. Smith observed fresh tracks up to the area where material was being removed at the base of the highwall but he did not want to travel any closer to view the tracks as he believed the area was dangerous. He is positive that, given the conditions he observed, the rocks would come down from the highwall and hit those working below.

Smith noted that there is no way to predict exactly when a fall of rock or material will happen, but, generally, it happens fast and occurs before anyone below the wall can see it and get out of the way. It is his belief that the mine had been digging in the area, loading material and hauling it away. According to Smith, the weight of a 2 foot diameter rock coming off the highwall during this process, would hit the glass in the front of the cab and go through the windshield injuring the driver. Smith envisioned rocks falling or rolling onto the loaded bucket of the loader, traveling down the boom and into the cab, injuring, if not killing the driver. There were no safety benches in place, or any other measures to control the highwall.

While the mine asserts that Slick had observed this area six days earlier without an issue, Smith explained that highwall conditions change on a daily basis and he saw it as a clear danger on the day he was at the mine. This portion of the highwall was not affected by the barricade put in place after Slick's citation, and mining was ongoing at the quarry. Miners were traveling in the area and, while Smith did not see the loader when he passed by, he did see raveling of rock and the fresh tire tracks near the fallen rock, which indicated that work had recently been done under the highwall. Further, he observed a truck a couple hundred feet up the haul road, but when he attempted to question the driver, the driver refusal to answer. According to Smith, he could tell the work in the area was new from the conditions he observed.

Doug Andrews, an hourly employee at the Berkley pit, testified on behalf of the mine operator. According to Andrews, he was aware of the slide of material in March. Andrews testified that, at the time of Slick's inspection on April 2nd, he was spotting for the area identified in Smith's citation and shown in Sec'y Ex. 4 p. 9. There were two trucks and a loader operating in the area, and Andrews' believes that, Slick observed them working in the area, and saw no problem with the highwall. According to Andrews, they continued to mine in the area the remainder of the day and the following day. Then, as they always do when leaving an area, they bermed it off, and it remained bermed off until Smith arrived a few days later and cited the mine for working under the highwall.

The Secretary argues that this is an area where persons work and travel and that there was a fall of material hazard, thereby demonstrating a violation.

U.S. Silica argues that the Secretary cannot meet his burden of showing that there was a fall of material hazard when miners were working in the area, and that the area in question was not being mined or traveled and had been bermed to prevent unauthorized travel in the area. The operator further argues that Inspector Slick had observed mining in the area just a few days prior to this citation and did not see a hazard.

Section 56.3131 requires that “[i]n places where persons work or travel in performing their assigned tasks, loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard to persons shall be corrected.” 30 C.F.R. § 56.3131.

The Commission has explained that the language of section 56.3131 is “clear.” *Connolly-Pacific Co.*, 36 FMSHRC 1549, 1553 (June 2014). The plain language of the standard, when read in conjunction with sections 56.3130 and 56.3200, requires operators to “maintain highwall stability and correct hazardous conditions before work or travel takes place.” *Connolly-Pacific Co.*, 36 FMSHRC 1549, 1553 (June 2014). The evaluation of whether a violation occurred is measured against the standard of whether a reasonably prudent person familiar with the factual circumstances would recognize that a hazard, as contemplated by the standard, existed. *Id.* (citing *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982)).

In *Connolly-Pacific Co.*, 33 FMSHRC 2270 (Sept. 2011) (ALJ), this court affirmed a violation of section 56.3131 where large overhanging rock formations, and loose cracked material, were present on the perimeter of a quarry wall. There, the material had not been sloped or stripped back to the angle of repose. The court cited the Secretary’s evidence that a loader operator had worked and traveled under the highwall. Moreover, tire tracks at the base of the highwall, as well as the lack of protective catch benches, warning signs, or berms in the area, evidenced that this was an active area of the quarry.

In *Duke’s Sand & Gravel*, 37 FMSHRC 63 (Jan. 2015) (ALJ), Judge Moran upheld a violation of section 56.3131 where loader tracks and bucket dig marks could be seen beneath a protruding overhang in a pit. Similarly in *Allied Stone, LLC*, 35 FMSHRC 31 (Jan. 2013) (ALJ), Judge Zielinski upheld a violation of section 56.3131 where loose, unconsolidated material on a 30 foot highwall, as well as an overhanging rock protrusion, were observed above an area where miners worked. There, the court, in finding a violation, cited evidence that tire tracks could be seen within two feet of the base of the highwall, the lack of an angle of repose, and no barrier to keep miners away from the base of the wall.

I find that the Secretary has shown a violation and, in doing so, I credit Inspector Smith’s testimony. While Smith did not see a truck or loader actively engaged in work under the highwall as he passed by on April 8th, it was clear to him that work had recently been done in the area. He observed loose material both on the highwall, and on the ground. Tire tracks could be seen close to the highwall, which indicated to him that the mine had very recently loaded material in the area. The loader operator and truck driver would not speak with the inspector, but Andrews indicated that they were working in the area just days before the citation was issued.

There was nothing to indicate that the mine would not return to remove material from this part of the pit, and it was accessible to miners working. While it is not entirely clear whether a berm existed at the time of the Smith's inspection, Andrew's testimony that the mine routinely bermed work areas at the end of each day lends itself to a finding that the mine would, and in this case did, continue to mine the area below the loose material in the time leading up to Smith's issuance of the citation. Accordingly, I find that the Secretary has established a violation.

S&S and Gravity

Inspector Smith indicated that, given the condition he observed, the material on the wall would have fallen, or rolled and, when it did, it would hit the loader, go through the windshield and seriously injure the driver. Therefore, he designated the violation as S&S.

In *Connolly-Pacific Co.*, 33 FMSHRC 2270 (Sept. 2011) (ALJ), this court affirmed an S&S designation of a violation of section 56.3131 where loose, overhanging material was observed on a highwall above where miners worked. The court found that the mine's failure to strip back, slope, or perform controlled blasting to remove the loose material significantly increased the likelihood of rock falling and injuring a miner. In *Three Way Portable Crushing, Inc.*, 32 FMSHRC 1486 (Oct. 2010) (ALJ) Judge Barbour upheld the S&S designation of a violation of section 56.3131 where he found that material falling from a highwall could hit bench-like protrusions and get projected away from the wall at speeds which could cause a fatality. The presence of an inadequate berm at the base of the highwall contributed to the hazard.

I have found a violation of the mandatory standard and that the violation created a hazard in the form of a fall of material from either directly above a loader or truck, or from far above near the brow. Sec'y Ex 4 p. 9 shows loose material in the area that would have been immediately above equipment working in the area. Additional loose material can be seen higher up on the wall. In both areas material was poised to either fall or roll down into the bottom of the pit were miners had very recently been working and, given my above findings, would continue to work. As Smith explained, even a 2 foot rock rolling off the wall would go right through the windshield of the loader and lead to a serious injury or a fatality. I find the violation to be S&S.

Negligence

Smith determined that the violation was a result of high negligence given that, just a few days prior, Slick had issued the citation discussed above, which also involved a failure to maintain the highwall in the pit. In *Martin Marietta Aggregates*, 26 FMSHRC 847 (Nov. 2004), Judge Melick upheld the high negligence designation for a violation of section 56.3131 where a pit foreman was aware of fissures and cracks in a highwall prior to a wall failure, but did not take steps to protect miners working in the area below the highwall.

I find that the mine exhibited high negligence. The mine was clearly aware of issues with the stability of highwall and the presence of loose material above where miners were working. Nevertheless, the mine continued to work beneath those conditions. While the mine argues that

mitigating circumstances exist because Slick did not find a hazard in the area during his earlier inspection and the mine had not worked in the area for several days, I credit Inspector Smith's testimony and find that a hazard did exist when he observed the area on April 8th and that miners had very recently been in the area.¹ Moreover, even if minimal mitigating circumstances did exist, the court is not bound by the Secretary's regulatory definition of high negligence, *Hidden Splendor Resources*, 36 FMSHRC 3099 (Dec. 2014), and the evidence in this case clearly demonstrates that the mine was highly negligent in allowing its miners to work beneath a highwall which not only had loose material all over it, but had very recently experienced a substantial failure and the mine had taken no steps to prevent a reoccurrence.

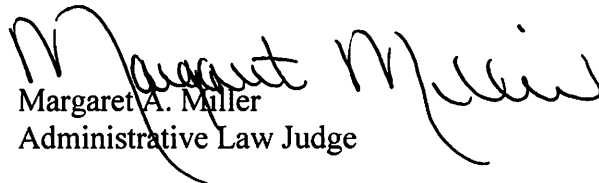
II. PENALTY

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 "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 the penalty. 29 C.F.R. § 2700.28. The Act requires, that "in assessing civil monetary penalties, the Commission [ALJ] shall consider "six statutory penalty criteria which include the history of violations, the size of the operator, the negligence, gravity, the ability to continue in business and good faith abatement. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 114 7 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is "bounded by proper consideration of the statutory criteria and the deterrent purpose[s] . . . [of] the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence and shows a reasonable history for this mine. The mine is a medium-sized operator. The parties have stipulated that the penalties as proposed will not affect its ability to continue in business, and that Respondent demonstrated good faith in abating the citation. The gravity and negligence are discussed above. Given the total lack of any mining method employed by this operator to maintain the highwall both before and after the March 16th wall failure at this facility, I find that an increased penalty of \$10,000.00 is appropriate for Citation No. 8716877. I assess the originally proposed penalty of \$12,248.00 for Citation No. 8715732.

¹ U.S. Silica, by way of an attachment to its brief, attempted to introduce Inspector Slick's field notes into the record. The field notes were referenced at hearing, but were never formally introduced into evidence. The record was closed at the end of the hearing. As a result, the court has not considered the field notes in reaching its conclusions in this matter and strikes them from the record.

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a total penalty of \$10,000.00 for Citation No. 8716877 and a penalty of \$12,248.00 for Citation No. 8715732. Accordingly, U.S. Silica Company is **ORDERED** to pay the Secretary of Labor a total penalty of \$22,248.00 within 30 days of the date of this decision.


Margaret A. Miller
Administrative Law Judge

Distribution (via Certified mail):

Daniel McIntyre, U.S. Department of Labor, Office of the Solicitor, 1244 Speer Blvd., Suite 216,
Denver, CO 80204

Justin Winter, Law Office of Adele Abrams, P.C., 4740 Corridor Place, Suite D, Beltsville, MD
20705