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AUG 21 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. NALLY & HAMILTON ENTERPRISES, INC., Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. KENT 2012-749 A.C. No. 15-19611-281692 Mine: Tinsley Branch Docket No. KENT 2012-904 A.C. No. 15-19301-284689 Docket No. KENT 2012-1085 A.C. No. 15-19301-287868 Mine: Bear Branch

AMENDED DECISION AND ORDER[1]

Appearances: Anthony M. Berry, Esq., U.S Department of Labor, Office of the Solicitor, Nashville, TN for the Secretary

Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, PLLC, Lexington, KY & Thomas Hamilton, Esq., Saltsman & Willett, PSC, Bardstown, KY for Respondent

Before: Judge Lewis

STATEMENT OF THE CASE

This proceeding is before the undersigned Administrative Law Judge on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor against Respondent, Nally & Hamilton Enterprises, Inc. ("Respondent" or "Nally & Hamilton") pursuant to Section 104(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(d).

PROCEDURAL HISTORY

On November 1, 2011, MSHA Inspector Larry Wayne Stubblefield went to Respondent's Bear Branch Mine to terminate an earlier citation unrelated to the instant proceeding. While there, he issued Citation No. 8366644 and Order No. 8366645 under Section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"). Respondent later contested these citations and they were placed in Docket No. KENT 2012-1085. On November 19, 2011, he returned to Bear Branch Mine as a result of an anonymous complaint filed under Section 103(g) of the Mine Act. While at the mine, Stubblefield issued three citations: Nos. 8366655, 8366656,

[1] The heading on page 30 of this decision was amended to reflect the cited standard of 30 CFR § 77.1001 rather than 30 CFR §75.1001. Further, the heading on page 40 of this decision was amended to reflect the violation at issue was found to be "Reasonably Likely To Result In A Fatal Injury And Was Significant And Substantial In Nature."

and 8366657, under Section 104(d)(2) of the Act. Respondent also contested these citations and they were placed in Docket No. KENT 2012-904. This docket also included Citation No. 8344920, which was issued on June 13, 2011 by MSHA Inspector Elmer Hall Jr. under Section 104(d)(1) of the Mine Act.

On May 18, 2013, these matters were set for hearing and consolidated with Docket Nos. KENT 2012-749 and KENT 2014-98. The parties agreed to settle KENT 2014-98 and a Decision and Order Approving Settlement in that matter was issued on May 4, 2015. A hearing was held in Lexington, KY on February 10, 2015 at which the parties submitted testimony and documentary evidence. The parties announced at the outset of the hearing that the two citations contained in Docket No. KENT 2012-749 had been settled[2] and that Citation No. 8344920 in KENT 2012-904 had likewise settled.[3] The hearing was held on the remaining five citations with a total assessed penalty of $136,926.00. After the hearing, each party submitted a post-hearing brief and a reply brief.

STIPULATIONS

The parties have entered into several stipulations, admitted as Parties' Joint Exhibit 1.[4] Those stipulations include the following:

1. Nally & Hamilton Enterprises, Inc. was an "operator" as defined in the Federal Mine Safety and Health Act of 1977, as amended ("the Mine Act"), 30 US.C. § 802(d), at Bear Branch (Mine Identification No. 15-19301).

2. Bear Branch (Mine Identification No. 15-19301) was a "coal or other mine" within the meaning of the Mine Act, 30 U.S.C. § 802(h).

3. At all relevant times, the products of Bear Branch (Mine Identification No. 15-19301) entered commerce, or the miner operations or products affected commerce, within the meaning of the Mine Act, 30 U.S.C. §§ 802(b) and 803.

4. Nally & Hamilton Enterprises, Inc. is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to 30 U.S.C. §§ 815 and 823.

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[2] Under the terms of the settlement, Citation No. 8369000 and Order No. 8369001 were modified to change the type of action from 104(d)(1) issuances to 104(a) citations. Further, the penalty for each was reduced from $19,300.00 to $2,500.00. Therefore, the entire settled amount was $5,000.00.

[3] Under the terms of the settlement, Citation No. 8344920 was modified from 104(d)(1) Citation marked as "Highly Likely," "Fatal," "S&S," and "High Negligence" to a 104(a) Citation marked as "Unlikely," "Permanently Disabling," "Non-S&S," and "Moderate Negligence. Further, the penalty was reduced from $52,500 to $1,000.00.

[4] Hereinafter the Joint Exhibits will be referred to as "JX" followed by the number. Similarly, the Secretary's Exhibits will be referred as "GX" and Respondent's Exhibits will be referred to as "RX."

5. 30 C.F.R. §§ 77.1001, 77.1713(a), and 77.1005(a) are each mandatory health and safety standards as the term is defined in Section 3(l) of the Mine Act.

6. Payment by Respondent of the proposed penalty of $80,700.00 in KENT 2012-1085 will not affect Respondent's ability to remain in business.

7. Payment by Respondent of the proposed penalty of $56,226.00 for the remaining violations in KENT 2012-904 will not affect Respondent's ability to remain in business.

8. The citations and/or orders contained in the Exhibits A attached to the Secretary's petitions in KENT 2012-1085 and KENT 2012-904 are authentic copies of the citations and orders at issue in this proceedings with all appropriate modifications and abatements, if any.

9. Citation No. 8366644 was properly served by a duly authorized representative of the Secretary of Labor, Mine Safety and Health Administration, upon an agent of Respondent on November 1, 2011.

10. Order No. 8366645 was properly served by a duly authorized representative of the Secretary of Labor, Mine Safety and Health Administration, upon an agent of Respondent on November 1, 2011.

11. Order No. 8366655 was properly served by a duly authorized representative of the Secretary of Labor, Mine Safety and Health Administration, upon an agent of Respondent on November 19, 2011.

12. Order No. 8366656 was properly served by a duly authorized representative of the Secretary of Labor, Mine Safety and Health Administration, upon an agent of Respondent on November 19, 2011.

13. Order No. 8366657 was properly served by a duly authorized representative of the Secretary of Labor, Mine Safety and Health Administration, upon an agent of Respondent on November 19, 2011.

14. Respondent produced 383,754 tons of coal at Bear Branch Mine in 2010.

(JX-1, Tr. 8).[5]

[5] Hereinafter the transcript will be cited as "Tr." followed by the page number.

DOCKET NO. KENT 2012-1085

I. Summary of Testimony

On November 1, 2011 Inspector Larry Wayne Stubblefield[6] went to Bear Branch Mine to review ground control revisions submitted in response to a citation (unrelated to the instant matter) issued on the safety benches.[7] (Tr. 19-20, 46-47). He was conducting an E-16 spot inspection to terminate that citation.[8] (Tr. 21). Upon arrival, he reviewed the mine file. (Tr. 21-22).

Stubblefield arrived at Bear Branch at around 1 p.m. and traveled to the Cow Head area. (Tr. 22). At around 1:30-1:40 p.m. he went to the Beatty Branch area and measured the highwall at the Leatherwood Seam 5A pit. (Tr. 22-23). He used a TruPulse 200 Laser Rangerfinder and inclinometer and determined that the area was 265 feet long and 89 feet tall. (Tr. 25, 27, 32).

Developing such a highwall involved finding a coal seam and measuring with a rock level to determine where the highwall should be established. (Tr. 103). A dozer then installed a road to the top bench (where the drilling occurs). (Tr. 103, 126). Once the location was determined the operator removed trees and brush to create a blasting pad for the drill and set up a blasting plan (or series of holes on a grid). (Tr. 48-49, 103-104, 126-127, 138, 219). The drill could not run while vegetation was in place. (Tr. 49). Removing loose material aids in keeping the holes open. (Tr. 219-220). Holes are then drilled down to the coal level. (Tr. 126). The last hole was placed two or three feet from where the highwall should be established. (Tr. 49, 138). However, blasting is not an exact science, and the distance the wall will form behind the last hole depends on the strata of rock. (Tr. 49-50, 77-78). The break can be farther back than expected. (Tr. 77-78). As a result, vegetation must be removed some distance behind where the wall is planned, though Stubblefield did not know the exact distance. (Tr. 28-29, 49-50, 138-139). A powder crew then loads and shoots. (Tr. 127). If more of the wall is blasted away than intended, excavators can be used to remove vegetation close to the edge. (Tr. 78-79).

A dozer or excavator could be used to check if material on the side of the wall was solid. (Tr. 51, 116-117). This first occurs when there is 10 feet of exposed wall then again as each 10 to 20-foot step of material is removed. (Tr. 118-119). Equipment can be used to reach up and check areas and, if the rock is loose, the equipment will take it down. (Tr. 117, 128-129). Soft slate can be smoothed down while rocks are pulled out. (Tr. 129). If a rock is stuck or does not

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[6] Larry Wayne Stubblefield was present at the hearing and testified. (Tr. 14). At the time of the hearing, Stubblefield was a surface coal mine inspector specialist. (Tr. 14). In that capacity, he inspected surface coal mines, prep plants, and facilities, investigated accidents, and reviewed plans. (Tr. 15). He had extensive experience, training, and certifications. (Tr. 15-16). He had conducted highwall examinations for 10-12 years. (Tr. 16).

[7] The highwall inspections here were unrelated to an earlier accidents or fatalities, though MSHA may have discussed those accidents in meetings. (Tr. 203-204). Stubblefield did not know if highwall violations in his district increased at this time. (Tr. 204).

[8] A spot inspection is not an inspection of the entire mine, but instead an inspection a specific area, a specific item, a complaint, or some other particular thing. (Tr. 21).

fall, it is presumably stable and the operator will not pry it loose. (Tr. 117, 129-130). Eventually the wall would be over 60 feet tall and too high to reach with equipment, but the higher materials should already be cleaned on earlier steps. (Tr. 119, 134). The highwall cleaning process was part of an explicit policy in place that was discussed with dozer operators. (Tr. 133).

At hearing, Stubblefield reviewed Respondent's ground control plan in place on the day at issue (RX-1) and the revised ground control plan that was put submitted on November 22, 2011 (RX-2). (Tr. 55-56). That earlier plan contained nothing about removing trees or root balls from the crest of the highwall. (Tr. 57). The earlier plan also did not define a "safe distance" for a buffer zone. (Tr. 57-58, 104). Respondent would just remove any material it believed could fall in and would leave anything that it believed was stable, regardless of distance. (Tr. 105). The revised plan developed by MSHA and Tracy Creech defined that distance as ten feet from the edge of the high wall.[9] (Tr. 59, 80, 104). However, no citations were issued November 1 for violation of the ground control plan; the citations were issued for violations of mandatory standards. (Tr. 57, 81). Since the revision, failure to remove material within 10 feet of the wall would be a violation of the ground control plan and the standard, but the standard predated the revision. (Tr. 81). At some point Creech likely talked to employees about the new ground control plan. (Tr. 136-137).

Stubblefield found that the instant highwall had loose tree roots, trees standing on the edge of the wall and dirt, root balls, and large rocks hanging over the crest.[10] (Tr. 22-24, 26-27, 58, 68, 88-89, 91, GX-4 p.1-6). The rocks appeared brown and consisted of shale. (Tr. 27). Stubblefield and Charles Baker could not tell the exact distance the trees were from the edge and did not go to the top of the highwall to find out.[11] (Tr. 51-52, 58, 107). Stubblefield believed they were right up to the edge. (Tr. 52, 91). Baker believed they were 15-20 feet from the edge. (Tr. 107). No trees were hanging over the crest, which would make the trees more likely to fall. (Tr. 52).

Inspector Ratliff, who had issued the previous citation, told Stubblefield he had informed Respondent's mine foreman Charles Baker that the top of highwalls needed to be cleaned. (Tr.

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[9] Tracy Creech was present at hearing and testified. (Tr. 120). At the time of the hearing he was employed as safety coordinator for all of Respondent's mines. (Tr. 120-121, 130-131). In that capacity he would travel with inspectors, check equipment, conduct training, deal with citizen complaints, and attend hearings. (Tr. 121). He had extensive experience, training, and certifications. (Tr. 121-122). He went to Bear Branch once a week, though he could not recall the last time he was there before November 1, 2011. (Tr. 131-132). Creech was not present when the citations were issued, he arrived later. (Tr. 132-133).

[10] A root ball occurs when timber is removed and the roots, medium-sized rocks and dirt, remain and hang. (Tr. 24, 53). Root balls range in size from 5 to 100 pounds. (Tr. 54, 88-89).

[11] Charles Baker was present at hearing and testified. (Tr. 98). He had worked for Respondent from 1997-2013 as a dozer operator and foreman. (Tr. 99, 238-239). In that capacity he conducted pre-shift and on-shift examinations of highwalls, berms, and dumping areas. (Tr. 101). Dangers included loose materials and hill seams. (Tr. 101). He had extensive experience, training, and certifications. (Tr. 99-100, 241). There was no special certification for highwall examiner, but regular training included instruction on highwalls. (Tr. 241-242).

19-21, 72). Stubblefield did not know if Ratliff mentioned root balls or trees. (Tr. 47, 72). Baker did not recall this meeting and did not recall being told there was a problem with vegetation on the crest or hanging over the highwall. (Tr. 106).

Stubblefield believed Respondent should have scaled back loose material during the initial development of the wall to ensure it was away from the edge. (Tr. 28, 30, 76). The buffer zone should have been 10-12 feet farther back than the anticipated wall location to ensure nothing was on the edge of the highwall. (Tr. 76-78). Based on the conditions present, this buffer zone was not created. (Tr. 78). It was possible the blast removed material farther back than Respondent anticipated. (Tr. 78, 134-135). Creech believed this is what happened. (Tr. 139-141). However, he conceded that even if this occurred, Respondent was responsible for ensuring the material was back a safe distance. (Tr. 141). He posited Respondent could have used a chainsaw to prune back material. (Tr. 142). He believed it was also possible a dozer had removed a rock from under the roots. (Tr. 140).

At hearing, Baker testified that he saw only little, fine roots and grass hanging over the edge and that they were not dangerous. (Tr. 106, 113). He also recalled that dozers and excavators were always at the wall checking for loose material, though he could not recall the last date this was done before the inspection. (Tr. 118). Creech also did not believe that anything present was dangerous; the roots were fine, barely hung off the edge, and none weighed 100 pounds. (Tr. 123-124, 130). He had never seen root balls fall from a highwall. (Tr. 124). The trees appeared stable. (Tr. 124). The presence of this material did not mean miners were not cleaning the wall. (Tr. 134). He did not know if the dozer operators had followed the cleaning policy, but they always did so when he was present. (Tr. 133). Blue marks on the brown rock showed places where the dozer blade had attempted to clean material. (Tr. 135-136). Creech saw other places that looked like material had been torn out. (Tr. 135-136). Creech believed Respondent had done a good job of removing hazardous material and that the foreman did not believe the remaining roots were a danger. (Tr. 137).

As a result of this condition, Stubblefield issued a 104(d)(1) citation, No. 8366644 (GX-1), under Section 77.1001. (Tr. 17, 22-23, 28, 58). That standard required loose, hazardous material be stripped back a safe distance from the top of the highwall. (Tr. 28). If that cannot be done, barriers must be put in place to prevent material from falling into the pit. (Tr. 28-29).

The citation was marked as permanently disabling because root balls, rocks, or trees falling 89 feet into the pit and striking a miner or the cab of a piece of equipment was highly likely to result in such an injury. (Tr. 31-32).

The citation was marked as highly likely because in Stubblefield's experience, the root balls and material were highly likely to fall under normal continued mining activities. (Tr. 33, 68-69, 93-94). Stubblefield could not say how large that material would be. (Tr. 70). But he had seen material, including root balls, fall from walls and strike equipment, and even a miner, during his career. (Tr. 33, 53-54, 64). He had seen trees fall from highwalls and root balls can fall even if the trees do not. (Tr. 33, 53). However, no material was falling and neither the trees nor the root balls appeared unstable when the citation was issued. (Tr. 54, 58, 63-64, 68). But, Stubblefield was not present in the morning and did not know what was cleaned up before he arrived and he did not ask. (Tr. 64). It had taken a week or two to develop the wall to that point. (Tr. 70, 108, 114). Stubblefield believed it was possible that nothing had fallen in that time. (Tr.

70). Baker testified that at no time since the development of the highwall had any trees or root balls fallen into the pit. (Tr. 107-108). Stubblefield did not know if Respondent had previous citations for this type of condition. (Tr. 80). Baker and Creech could not recall any citations for root ball material or fine roots hanging over the wall. (Tr. 111-112, 125). However, Creech believed more citations were issued later at other mines. (Tr. 125-126).

The miners in the area were in loaders that ranged from right under the highwall to 10-50 feet away. (Tr. 23). The loaders stayed perpendicular to the wall, so the closest the cabs could get was approximately 12-20 feet. (Tr. 60-61, 109). The loaders had rollover protection that prevented the cab from being crushed. (Tr. 61, 67-68, 109, 125). The equipment weighed more than a root ball or a tree. (Tr. 61). However, the machines also had sloped windshields that could be smashed in the event of a fall. (Tr. 66-67). The equipment did have falling object protection consisting of a thick piece of metal sticking out over the cab. (Tr. 67-68, 109, 125). This fall protection prevented material from crushing the cab or going through the windshield. (Tr. 110). The windshield was made of MSHA-approved safety glass and was not cracked or broken. (Tr. 110-111). Baker did not know what the weight limit was for the fall protection on the equipment. (Tr. 114). Creech was uncertain which equipment was in the pit. (Tr. 125).

Stubblefield believed only one person would be affected if something fell and marked the citation to reflect that belief. (Tr. 34, 76). However, there were two loaders (each with one miner) exposed while cleaning a pit under the highwall. (Tr. 23, 34, 59-60, 76).

The citation was marked as high negligence and an unwarrantable failure because it was extensive, had existed for more than one shift, and was obvious to anyone entering the area. (Tr. 34-36, 71). Baker was in the area and should have known that the area needed to be cleaned. (Tr. 35-36). It would have taken several shifts to remove the overburden over a 265-foot area. (Tr. 30). The record book also showed that the condition existed for several shifts. (Tr. 36). Stubblefield believed there were no mitigating factors. (Tr. 71). Stubblefield did not believe the fact that the ground control plan did not define "safe distance" was a mitigating factor. (Tr. 71). The unwarrantable failure designation was also supported because Ratliff had discussed the issue on October 12, 2011, with Baker, though it was mostly based on the conditions observed. (Tr. 71-74, 85-87).

Stubblefield testified that there was no safe way to correct this condition. (Tr. 61-62). Respondent could not place someone back on top of the wall to clean the material and the top of the wall was too high for equipment to reach. (Tr. 29-30, 62). Instead, Stubblefield testified that Respondent asked if they could use an excavator to scoop the coal out without exposing anyone directly underneath and Stubblefield allowed it.[12] (Tr. 29-30). Baker recalled that Stubblefield suggested using the excavator. (Tr. 112). Using an excavator gave an additional 18 feet of distance between the cab and the wall as compared to the loader. (Tr. 62-63). Stubblefield did not know if miners would be exposed in the excavator, but it was the safest way given the equipment present to allow Respondent to recover the coal and to remedy the problem. (Tr. 29-31, 37, 63). He had seen this technique used other times. (Tr. 37, 63).

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[12] An excavator is a track backhoe, a mast, and a bucket. (Tr. 37). Stubblefield believed the instant backhoe was a 335 Cat or something larger. (Tr. 37). It could have reached out 30-35 feet with the bucket and rake back with the mast. (Tr. 31, 37).

Once the coal was removed, the citation was terminated by placing a berm 30-40 feet from the wall to prevent entry and reclaiming the wall with backfill from the next pit. (Tr. 30, 41, 64-65, 111, 127-128). Baker believed the berm was 15-20 feet away. (Tr. 111). The area was bypassed to limit exposure. (Tr. 41). Backfilling and reclaiming were done with dozers and trucks and were a normal part of the mining process. (Tr. 65, 70, 92-93, 111). Dozers would push the shot and rock trucks would backfill close to the top of the wall. (Tr. 93, 111, 127-128). During that process, miners were necessarily within 12 feet of the wall. (Tr. 65, 70). It was not possible to keep miners 30 feet from the wall during reclamation. (Tr. 65, 70). However, it may have been possible to do some reclaiming without exposing miners. (Tr. 92).

Stubblefield reviewed the on-shift record book back to October 17, 2011, and found that no hazardous conditions were reported through the day at issue. (Tr. 38-39). None of the conditions would have occurred within the most recent shift. (Tr. 40). The condition would have existed whenever Respondent made the first cut. (Tr. 40). Baker conducted the examinations, but did not list hazards in the book. (Tr. 74, 108). There may have been as many as 100 inspections in the one to two week period the wall was in development. (Tr. 114). Baker testified he did not list any condition because there were no hazards. (Tr. 109, 115).

As a result of this condition, Stubblefield issued a 104(d)(1) Order, No. 8366645 under Section 77.1713(a). (GX-2, Tr. 18, 38). That standard required someone designated by the operator to conduct an examination of all the working areas at surface mines or facilities during each working shift. (Tr. 38). The goal of the standard was to ensure that working conditions were safe and all hazardous conditions were corrected, recorded, and reported. (Tr. 38, 247). The foreman should have seen the material hanging over the crest and the trees on the edge and prevented miners from working under the highwall. (Tr. 38-39).

The citation was marked as highly likely to result in a permanently disabling injury because failure to conduct an adequate exam exposed miners to hazards that were highly likely to cause injury. (Tr. 42). The history of mining has shown that inadequate exams can lead to serious injuries. (Tr. 42). Under continued normal mining conditions, the underlying citation would have caused an injury. (Tr. 42-43).

The citation was marked as affecting two people because there were two people in the area where the inadequate examination was conducted. (Tr. 43, 76).

The citation was also marked for high negligence because there was a failure to comply with a mandatory standard, and the violation was obvious, extensive, existed for a long time, and Respondent's agent was present. (Tr. 43-44). There was no record of a condition or corrective action and the foreman allowed miners to work in the area. (Tr. 44). The foreman was an agent and should have been aware that the wall was not in compliance. (Tr. 44). Further, foremen received in-depth and annual 6-hour refresher training to recognize hazards on highwalls, working areas, pits, roads, berms, weather conditions, and areas where miners work or travel. (Tr. 44-45). The condition was obvious and it would be impossible for the foreman not to see it. (Tr. 39).

This Order was terminated when the trees and root balls were reported in the record book. (Tr. 41, 74-75). Further, a berm was placed 30-40 feet from the wall and the area bypassed to prevent exposure. (Tr. 41, 74-75).

II. Contentions of the Parties Regarding Citation No. 8366644

With respect to Citation No. 8366644, the Secretary asserts that Respondent violated 30 C.F.R. §77.1001, that this violation was Highly Likely to result in Permanently Disabling injuries to one miner, that the violation was S&S, and that it resulted from High Negligence and an Unwarrantable Failure to comply. (GX-1)(*Secretary's Post-Hearing Brief* at 14-22). The Secretary believes that the proposed penalty of $35,700.00 is appropriate. (*Id.* at 23-24).

Respondent argues that there was no violation of the cited standard. (*Respondent's Post-Hearing Brief* at 9-10). Further, it argues that even if there were a violation of the cited standard, that it would not be S&S or an unwarrantable failure to comply. (*Id.* at 13-15). (*Id.* at 12-15). Finally, Respondent presumably believes that the penalty should be vacated or, in the event the citation is found valid, reduced pursuant to its proffered gravity and negligence determinations.

III. Findings of Fact and Conclusions of Law Regarding Citation No. 8366644

The findings of fact in this, and other sections, are based on the record as a whole and the Administrative Law Judge's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the ALJ has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the ALJ has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the ALJ's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel,* 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

a. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §77.1001.

On November 1, 2011, Inspector Stubblefield issued a 104(d)(1) Citation, No. 8366644, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> The Mine Operator has failed to strip loose hazardous material a safe distance from the top of the highwall in the Leatherwood Seam (5A) Pit of the Beatty Branch area of the mine, for a distance of at least Two Hundred and Sixty-Five Feet (265'), as measured with an MSHA issued TruPulse 200 Laser Rangerfinder and Inclinometer, Serial #014278. Loose material in the form of tree roots and dirt are hanging over the edge of the wall for the entire distance, and loose rocks are present in some areas, extending back through the pit from where the drill bench begins, in advance of where the mining sequence stopped. Numerous trees are also standing on or, very near the crest of the wall. This condition was discussed with the Mine Foreman during a mine visit on 10/12/11 for Investigation and Recommendation of Ground Control Plan Revision submitted by the Operator. The condition is obvious to anyone entering the pit, and should have been corrected prior to mining. This is an unwarrantable failure to comply with a mandatory standard and constitutes more than ordinary negligence on the part of Mine Management. Order #8366643, is issued today to the Mine Operator

> for failure to comply with his acknowledged Ground Control Plan in the same area. Order #8366645 is issued today for an inadequate on-shift examination of this area.

(GX-1). The document also discussed termination, stating:

> The Mine Operator is allowed to, and has used an excavator, placed adjacent the highwall, at mast length, to remove the coal from the affected area, so as to not expose any miners underneath the highwall in the affected area. The area is then barricaded/bermed off to prevent entry.

(GX-1).

The cited standard, 30 C.F.R. §77.1001 ("Stripping; loose material."), provides the following:

> Loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection.

30 C.F.R. §77.1001.

At hearing, inspector Stubblefield testified the instant highwall had loose tree roots, trees standing on the edge of the wall and dirt, root balls, and large, brown, shale rocks hanging over the crest. (Tr. 22-24, 26-27, 58, 68, 88-89, 91, GX-4 p.1-6). The presence of this material indicated that it was not stripped in accordance with the standard. The Secretary cited several cases in his brief where Commission ALJ upheld violations under the cited standard for loose rocks, dirt, trees, and roots. *Sunny Ridge Mining Co., Inc.*, 17 FMSHRC 648 (Apr. 1995)(ALJ Fauver) *aff'd in rel. part* 19 FMSHRC 254 (Feb. 1997); *Gatliff Coal Company, Inc.*, 13 FMSHRC 368, 378-379 (Mar. 1991)(ALJ Melick); and *Marty Corp.*, 7 FMSHRC 150, 150-152 (Jan. 1985)(ALJ Melick)(citation upheld for exposed roots and trees attached to loose material even though earlier attempts to remove the trees were unsuccessful). Therefore, I find Respondent violated 30 C.F.R. §77.1001 with respect to Citation No. 8366644.

In its brief, Respondent contended that this citation should be vacated and raised several arguments to support that position. However, none of those arguments were persuasive. Specifically, Respondent argued that Stubblefield had conceded at hearing that he did not see any instability in the highwall or anything that appeared ready to fall into the pit. (*Respondent's Post-Hearing Brief* at 10). Further, Stubblefield found no instability in the root balls. (*Id.*). Finally, while Stubblefield testified the trees were on the edge, he further stated that they did not appear unstable and that he could not tell how far the trees were from the edge. (*Id.*). In short, Respondent argued that the material was not loose and therefore the citation should be vacated.

Respondent correctly recounts the Inspector's testimony but draws legal conclusions unsupported by that testimony. Stubblefield testified that he did not see any material fall into the pit. (Tr. 54, 58, 63-64, 68). He likewise testified that he did not believe any of the material was ready to fall into the pit. (Tr. 54, 58, 63-64, 68). However, as noted above Stubblefield credibly

testified the cited material was loose. (Tr. 22-24, 26-27, 58, 68, 88-89, 91, GX-4 p. 16). Nothing presented at hearing undermines that testimony. A plain reading of the standard shows that the inquiry at hand is not whether the material has fallen or if a fall is imminent, but instead, whether the material is loose. 30 C.F.R. §77.1001. Respondent presented no authority for the proposition that "loose" means material has fallen or is about to fall. Material can be loose but not fall. Similarly, material can be loose and be in no danger of an imminent fall. Therefore, Respondent's argument does not undermine the finding that the cited material was loose and therefore violated 30 C.F.R. §77.1001.

b. The Violation Was Unlikely to Result in Lost Workday/Restricted Duty Injuries To One Miner And Was Not Significant And Substantial In Nature.

Inspector Stubblefield found the gravity of the cited danger in Citation No. 8366644 as being "Highly Likely" to result in a "Permanently Disabling" injuries to a miner and that the condition was S&S. (GX-1). With the exception of the number of persons affected, these determinations were not supported by a preponderance of the evidence.

Well-settled Commission precedent sets forth the standard used to determine if a violation is S&S. A violation is S&S "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). The Commission later clarified this standard, explaining:

> 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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984).

Regarding the first element of S&S - the underlying violation of a mandatory safety standard - it has already been established that Respondent violated 30 C.F.R. §77.1001.

The second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – was also met. Material hanging from the highwall was likely to fall under continued normal mining operations. (Tr. 33, 68-69, 93-94). Material falling from the highwall would contribute to the danger of a miner being struck by material. Stubblefield testified that he had seen miners struck by material falling from highwalls in the past. (Tr. 33, 53).

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – was not met. The Commission clarified the third element of the *Mathies* test in *Musser Engineering, Inc., and PBS Coal Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) ("PBS"). The Commission held that the "test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation...will cause injury." *Id.* at

1281. Importantly, it stated that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Id.* The Commission also emphasized the well-established precedent 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); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996). The likelihood of the hazard being realized must be considered assuming normal continued mining operations without abatement of the violation. *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (Jun. 1986).

Analysis under the third prong of *Mathies* hinges on whether a miner would be injured, assuming that the hazard is realized. In this instance, the hazard contributed to was the hanging material falling into the pit. However, even if material were certain to fall, an injury would not necessarily be likely. At hearing, Inspector Stubblefield was unable to say how large the material would be in the event it would fall. (Tr. 70). Stubblefield testified that the root balls, which were actually hanging over the edge of the wall, weighed between 5-100 pounds. (Tr. 54, 88-89). Baker and Creech credibly testified that the roots were "fine," weighed less than 100 pounds, and posed no danger in the event of a fall. (Tr. 106, 113, 123-124, 130). Perhaps more importantly, Stubblefield agreed with Respondent's witnesses that the cited equipment had roll protection to prevent the cabs from being crushed. (Tr. 61, 67-68, 109, 125). The equipment weighed more than a root ball or a tree. (Tr. 61). There was also falling object protection protecting the windshield. (Tr. 67-68, 109-110). Further, the windshield was made with MSHA-approved safety glass that was in good condition. (Tr. 110-111).

As discussed *intra*, I specifically find that the Secretary failed to carry his burden of proof that the trees in the cited area – which would have been the heaviest objects testified to—actually stood to near to the edge of the highwall that they would be considered part of the "loose hazardous material" that should have been stripped for a safe distance from the top of the highwall. The inspector did not go to the top of the highwall, where perhaps more accurate measurements could have been made of the actual distance(s) from the edge of the highwall to where the tree line/trees were located. Given the angle from which the photographs presented by the Secretary were taken and the contradictory assertions by the Respondent to the actual distances at issue, I was left to conjecture such.

In short, the Secretary failed to establish that if material fell from the highwall it would be anything more than small, fine pieces of root and small rocks. If this small material fell from the highwall and happened to strike one of the pieces of equipment, the safety measures built into the equipment would protect the cab and prevent injury. Therefore, I find that an injury was not reasonably likely to occur in the event of material falling from the highwall. As a result, the third prong of *Mathies* is not met.

In his brief, the Secretary correctly noted that it need not prove that material was likely to fall, but rather that a fall would be reasonably likely to result in a reasonably serious injury. (*Secretary's Post-Hearing Brief* at 17). In fact, the Secretary argued that an injury was highly likely to occur. (*Id.* at 15-16). He noted that if a tree or root ball struck the cab of a miner, the injury would be at least permanently disabling. (*Id.* at 16). The Secretary contended that Stubblefield had taken the size of the root balls and the protections afforded by the vehicle into account in making his assessment. (*Id.*). Finally, the Secretary noted that cabs do not offer

perfect protection and that even seemingly small amounts of material can be a fatal weight. (*Id.* at 17).

As noted *supra*, the Secretary failed to establish the size and weight of the objects that were near the edge of the highwall. Further, even if the material weighed 100 pounds, the Secretary failed to establish that the cab of the equipment would be damaged and miners inside would be injured in the event of a fall. Respondent presented compelling evidence regarding the safety of the equipment. (Tr. 61, 67-68, 109-111, 125). Nothing the Secretary presented, including Stubblefield's undocumented assertion that he considered those safety measures, undermines that evidence. In light of the Secretary's burden in this proceeding, these failures are fatal to its claim that the citation was S&S.

In addition, to support its argument, the Secretary pointed to two previous fatal injuries resulting from material falling from a highwall. (*Id.* at 16-17). However, those previous accidents were substantially different from the situation here. In one accident, "[T]he rock which struck the operator's cab of the highwall drill measured approximately seven and one-half feet long, seven feet wide, and four feet thick." "MSHA-Coal Mine Fatal Accident Investigation Report, Fall of Rick, October 5, 1998," http://www.msha.gov/FATALS/1998/FTL98C23.htm (last visited July 17, 2015). The Secretary provided no evidence that any of the material cited here approached the massive size of rock that fell in that incident. A piece of rock measuring 7.5' by 7' by 4' would weigh considerably more than one hundred pounds. Similarly, the second accident involved a miner being struck when outside of his equipment. MSHA – Coal Mine Fatal Accident Investigation Report: Fatality #23 – October 07, 2002 Falling, Rolling or Sliding Rock/Material – Surface – Alabama – Tuscaloosa Resources, Inc. – Carter Mine," http://www.msha.gov/FATALS/2002/FTL02c23.htm (last visited July 17, 2015). The Secretary presented no evidence to show that miners in the instant matter were on foot. Therefore, the fatal injuries described in those fatal reports provide little support for the Secretary's position.

Having determined that this situation does not meet the third prong of the *Mathies* test and is therefore not S&S, it is not necessary to consider the fourth prong. However, for the purpose of determining the gravity of this violation, it is still necessary to consider the severity of the injury that would result if a miner were affected.

In the unlikely event that a large piece of material was to fall on the cab of the equipment, a miner could suffer scrapes, bruises, and other similar injuries from being jostled. As a result, a finding of "Lost Workday/Restricted Duty" would be appropriate. Therefore, this citation was non-S&S and unlikely to occur, but if an incident did occur it would result in lost workday/restricted duty injuries.

c. Respondent's Conduct Is Best Characterized As "Low" Negligence rather than "High" Negligence and an Unwarrantable Failure.

In the citation at issue, Inspector Stubblefield found that the operator's conduct was highly negligent in character and the result of an unwarrantable failure. (GX-1).

Standard 30 C.F.R. §100.3(d) provides the following:

> (d) Negligence. 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. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.

In 30 C.F.R. §103(d), Table X, the category of high negligence is described thusly: "The operator knew or should have known of the violative condition or practice and there are no mitigating circumstances." Conversely, moderate negligence is shown when "[t]he operator knew or should have known of the violative condition or practice, but there are some mitigating circumstances." Low negligence is reserved for situations where there are "considerable" mitigating circumstances.

I find that Respondent should have known about the violation but that there were considerable mitigating factors. With respect to knowledge, well-settled Commission precedent recognizes that the negligence of an operator's agent is imputed to the operator for penalty assessments and unwarrantable failure determinations. *See Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997); *Rochester & Pittsburg Coal Co.*, 13 FMSHRC 189, 194-197 (Feb. 1991); and *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-1464 (Aug. 1982). An agent is defined as someone with responsibilities normally delegated to management personnel, with responsibilities that are crucial to the mine's operations, and exercises managerial responsibilities at the time of the negligent conduct. *Martin Marietta Aggregates*, 22 FMSHRC 633, 637-638 (May 2000). Further, "in carrying out... required examination duties for an operator, an examiner...may appropriately be viewed as being 'charged with responsibility for the operation of . . . part of a mine,' and, therefore, the examiner constitutes the operator's agent for that purpose." *Rochester and Pittsburg Coal Co.*, 13 FMSHRC at 194 *quoting* 30 U.S.C. §802(e).

In the instant matter, both Creech and Baker were members of management. (Tr. 99,120-121, 130-131, 238-239). Both had seen the material on the highwall. (Tr. 106, 113). Further, Baker conducted the pre-shift examinations of the cited area. (Tr. 74, 108). Both Baker and Creech seemed aware that there was material near the edge of the wall (though they characterized it as fine). (Tr. 106, 113, 123-124, 130). As discussed *supra*, this material was a violation of the cited standard. Therefore, Respondent knew or should have known that a violation existed and was negligent. The question that remains is the degree of that negligence.

I find that the record demonstrates there were considerable mitigating circumstances. While both Baker and Creech saw the material hanging, they both credibly testified that they had seen similar material on walls throughout their careers without incident. (Tr. 111-112, 125). Respondent's witnesses testified that they genuinely believed that the material present posed no hazard because of its small size and the other safety measures in the area. (Tr. 106, 113, 123-

124, 130). Respondent's witnesses testified that while the material was present, it did not appear to be unstable. (Tr. 124). Inspector Stubblefield largely corroborated that testimony. (Tr. 54, 58, 63-64, 68).

In addition, Baker and Creech credibly testified that Respondent took measures to ensure that material was back away from the edge of the wall after blasting. (Tr. 118, 133-137). These efforts were simply less effective than anticipated. Relatedly, the Secretary failed to establish that the material was as close to the edge as originally alleged. Baker testified that the trees were 15-20 feet back from the edge of the highwall. (Tr. 107). Stubblefield testified that he believed that the material was right near the edge. (Tr. 52, 91). However, he could not say for certain that the material was at that location. (Tr. 51-52, 58). Further, he took no action to confirm the location of the trees. The photographs were inconclusive. Therefore, I find that the Secretary failed to meet his burden with respect to the location of the trees.

The Secretary provided several arguments to support his contention that the "High" negligence designation was appropriate. However, none of those arguments were compelling.

For instance, the Secretary argued Stubblefield noted that the trees on the edge, the roots, and the other loose material were obvious to anyone entering the area. (*Secretary's Post-Hearing Brief* at 18). The Secretary stated that Baker, by his own admission, conducted over 100 examinations in the area but failed to mark the condition as a hazard, but argues that the failure to recognize a hazard does not excuse Respondent from obligation to correct the hazard. (*Id.*).

As noted *supra*, the Secretary failed to establish that the trees at issue were close to the edge of the highwall. Beyond that, Respondent does not maintain that it was unaware of the existence of the hanging roots. In fact, its witnesses testified that they saw the material at issue. Instead, the evidence suggests that Respondent was not aware that the roots constituted a hazard. The roots were small, appeared fine, and showed no obvious signs of an imminent fall. Though the roots were obvious, the hazard they posed was not. While the Secretary is correct that a hazard existed and that Respondent was not excused from its obligation to correct the hazard simply because it was not obvious, I find that a reduction in the assessed negligence is appropriate.

Further, the Secretary argued that Baker had conceded that a hypothetical stable tree three feet from the edge of the highwall should have been removed. (*Secretary's Post-Hearing Brief* at 18). The record supports this assertion: Baker did testify to that effect. (Tr. 105). However, as noted *supra*, the Secretary failed to establish that the trees were within three feet of the edge of the highwall. It was at least as likely that the trees were 15-20 feet away from the edge. (Tr. 107). Therefore, Baker's comment regarding the hypothetical tree three feet from the edge was irrelevant.

The Secretary also argued that while the condition likely existed because more material had been blasted than intended, Respondent should have then cleaned the material after the blast. (*Secretary's Post-Hearing Brief* at 18-19). In support, the Secretary notes that Creech agreed that Respondent did not do a good job of cleaning the, "little clumps of roots that Mr. Stubblefield considers dangerous." (*Id.* at 19). Baker and Creech credibly testified that Respondent made efforts to ensure the area was clean. (Tr. 118, 133-137). Creech simply

conceded that the fine roots, which Respondent failed to recognize as a hazard, were not cleaned. For the reasons stated *supra*, Respondent's failure to recognize this hazard was negligent, but somewhat reasonable because that hazard was not obvious.

While nothing excuses Respondent's failure to remove the loose, hanging material, a finding of "High" negligence would be inappropriate given the circumstances. Instead, I find Respondent's actions are better characterized as displaying "Low" negligence.

The Commission has recognized the close relationship between a finding of unwarrantable failure and a finding of high negligence. *San Juan Coal Co.*, 29 FMSHRC 125, 139 (Mar. 2007) *see also Consolidation Coal Company*, 22 FMSHRC 340, 353 (2000) (holding that if there is mitigation, an unwarrantable failure finding is inappropriate). *Emery Mining Corp.*, defines an unwarrantable failure, as "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997, 2002 (Dec. 1987). Such conduct may be characterized as reckless disregard, intentional misconduct, indifference, or serious lack of reasonable care. *Id.* at 2004; *see also Buck Creek Coal*, 52 F.3d 133, 135-136 (7th Cir. 1995). The Commission formulated a six-factor test to determine aggravating conduct. *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1350-1351 (Dec. 2009). While each factor does not need to be present in order to find unwarrantable failure, all six factors must be considered. The Administrative Law Judge will consider each of those factors in turn:

1. Extent Of The Violative Condition

Stubblefield determined that the condition was spread across the 265-foot crest of the highwall. (GX-1). There was a large amount of roots and loose material dangling over the highwall. (Tr. 22-24, 26-27, 58, 64, 88-89, 91, 106, 1112, 123-124, 130). Nothing presented by Respondent refutes this testimony. Therefore, the instant violation was extensive.

2. The Length of Time The Violation Existed

At hearing, Inspector Stubblefield credibly testified that this condition likely existed from the time the area was first developed. (Tr. 40). The loose material likely occurred when more material than intended was removed during the initial blasting of the highwall. (Tr. 78, 134-135, 139-141). Baker testified that it had taken 1-2 weeks to develop to that point. (Tr. 114). The book indicated that development started on October 17, 2011. (Tr. 38-39). Therefore, the condition had existed for several shifts.

3. Whether the violation is obvious or poses a high degree of danger

The violation at issue was not particularly obvious and did not pose a considerable danger. As discussed with respect to the negligence designation, *supra*, the roots were obvious but the hazards those roots posed were not. Further, whatever hazards the trees may have presented were not obvious because the trees were not as close to the edge as originally cited. Further, as discussed with respect to gravity, *supra*, the condition was unlikely to occur and was not S&S. The roots were small and the equipment was provided with fall protection. (Tr. 67-68, 106, 109-113, 123-125, 130). Further, the material appeared stable. (Tr. 124).

4. Whether the operator had been placed on notice that greater efforts were necessary for compliance or that this condition was an issue.

The evidence does not show any meaningful notice regarding the cited condition. Respondent had received no previous citations for material on top of the highwall. No one had told Respondent that it was on notice that additional efforts were needed. Further, Baker and Creech credibly testified that they had seen highwalls in the cited condition their entire careers without receiving any citations. (Tr. 111-112, 125).

The Secretary alleged that Respondent received notice regarding the cited condition in three ways. I will address each argument in turn. First, Respondent had previously received citations on its safety benches. (*Secretary's Post-Hearing Brief* at 19-21). Respondent argued that safety benches are part of the highwall and therefore these citations provided notice regarding other issues on the highwall. (*Secretary's Post-Hearing Brief* at 21 *citing Peabody Coal Co.*, 14 FMSHRC 1258, 1263-1264 (Aug. 1992).

The Secretary is correct that "[r]epeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard." San Juan Coal Co., 29 FMSHRC 125, 131 (2007). Further, the Commission "has rejected the argument that only past violations involving the same regulation and occurring in the same area within a continuing time frame may properly be considered when determining whether a violation is unwarrantable." *Id.*; *see also Black Beauty Coal Co. v. Federal Mine Safety and Health Review Com'n*, 703 F. 3d. 553, 561 (D.C. Cir. 2012). However, that case law is not so broad as to stand for the proposition that any violation on a highwall provides notice of any other violation on a highwall, however tenuously related. The Secretary presented little to no evidence regarding the circumstances surrounding the previous citations on a safety bench. I have no way to determine what caused the issuance of these citations and what relationship, if any, they bear to the instant matter. While it is possible that these citations provided some notice, I cannot make that determination on the bare record present here. In light of the Secretary's burden, I find he failed to establish that the previous citations provided notice regarding the instant condition.

Second, the Secretary argued that Ratliff told Stubblefield he had discussed the issue in the past with Respondent. (*Secretary's Post-Hearing Brief* at 21). The Secretary noted that past discussions with MSHA regarding violative conduct place an operator on "heightened scrutiny that it must increase its efforts to comply with the standard." (*Id.* at 14 *Consolidation Coal Co.*, 23 FMSHRC 588, 595 (Jun. 2001) and *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007)). Inspector Ratliff was not present at hearing and all evidence suggesting that he discussed the cited condition with Baker comes from Stubblefield's hearsay conversation. (Tr. 19-21, 73). Stubblefield did not know if Ratliff mentioned root balls or trees. (Tr. 47, 72). While hearsay is admissible under Commission rules, hearsay evidence is accorded only the weight warranted by the circumstance. *REB Enterprises, Inc.*, 20FMSHRC 203, 206 (1998)(the Commission held that hearsay evidence is admissible but that the judge has discretion to "determine whether it was reliable and entitled to any probative weight.")(citations omitted). Here, one party to the alleged conversation, Baker, was present at the hearing and testified. He credibly stated that he did not remember this conversation or any warning regarding the cited issue from Ratliff. (Tr. 106). In

light of the Secretary's burden, I find he failed to establish that Ratliff provided previous notice regarding the instant condition.

Finally, the Secretary argued that Stubblefield had discussed the issue with Respondent on October 12, 2011. (*Secretary's Post-Hearing Brief* at 21). The Secretary is correct that Stubblefield initially testified that MSHA had discussed this issue with Baker during an earlier inspection. (Tr. 19-21, 72). However, he later stated that he had no specific recollection of the content of that conversation and was not present for it. (Tr. 42, 72). On the other hand, Baker recalled the conversation and credibly testified that he and Stubblefield never discussed material on top of the highwall. (Tr. 106). In light of the Secretary's burden, I find he failed to establish that Stubblefield provided previous notice regarding the instant condition.

5. <u>The operator's efforts in abating the violative condition</u>

Creech and Baker credibly testified that Respondent took actions to ensure that material was not hanging over the edge of the wall. (Tr. 118, 133-137). However, it is undisputed that Respondent failed to remove the small root balls and other materials that were hanging over the edge. Therefore, Respondent took some action to abate the violative condition, but those efforts were insufficient.

6. <u>Operator's knowledge of the existence of the violation</u>

"It is well-settled that an operator's knowledge may be established, and a finding of unwarrantable failure supported, where an operator reasonably should have known of a violative condition." *IO Coal Co.*, 31 FMSHRC at 1356-1357 (*citing Emery*, 9 FMSHRC at 2002-2004). A supervisor's knowledge and involvement is an important factor in an unwarrantable failure determination. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) *citing* (*REB Enterprises, Inc.*, 20 FMSHRC 203, 224 (Mar. 1998) and *Secretary of Labor v. Roy Glenn*, 6 FMSHRC 1583, 1587 (July 1984). In fact, a supervisor's actual knowledge can be imputed to the Respondent for purposes of determining an unwarrantable failure, in addition to the penalty. *Whayne Supply Co.*, *supra*; *Rochester & Pittsburgh Coal Co.*, *supra*; and *Southern Ohio Coal Co.*, *supra*. As discussed *supra*, the preponderance of the evidence shows that Baker and Creech knew or should have known about the violative condition. However, Baker and Creech were not aware of the degree of the hazard present and that hazard was not obvious.

In light of the lack of notice, the fact that the cited condition was not highly dangerous, Respondent's efforts at abatement, the fact that the hazard was not obvious, and the fact that Respondent's actions were best characterized as "low" negligence, I find that this violation was not an unwarrantable failure on the part of the operator.

d. <u>Penalty</u>

In this matter, the Secretary proposed a penalty of $35,700.00 for Citation No. 8366644. The Commission has affirmed that ALJs are not bound the Secretary's proposals. *Sec. v. Performance Coal Co.*, (Docket No. WEVA 2008-1825 (8/2/2013) (*see also* 30 U.S.C. §820(i) and 29 C.F.R. §2700.30(b)). The Commission also held that, although there is no presumption of validity given to the Secretary's proposed assessments, substantial deviation from the Secretary's proposed assessments must be adequately explained using §110(i) criteria. (*Id.* at p.

2). (*see also Cantina Green*, 22 FMSHRC 616, 620-621 (May 2000)). I find that a deviation from the Secretary's proposed assessment is warranted herein and will evaluate the factors contained in 30 U.S.C. §820(i) to explain that deviation. Those factors are as follows:

(1) The Operator's history of previous violations – As discussed earlier, Respondent had no significant history of violating the cited standard or any substantially similar standards.

(2) The appropriateness of the penalty compared to the size of the Operator's business - The parties stipulated that at Bear Branch mine, Respondent produced 383,754 tons of coal in 2010. (JX-1). Further, Respondent produced 3,892,526 tons of coal at all of its operations. According to MSHA's penalty assessment guidelines this gives Bear Branch, 11 "mine size points" out of a possible 15 and 9 "controller size points" out of a possible 10. *See* 30 CFR §100.3(b). Thus, Respondent is an above-average sized operator with a relatively large mine.

(3) Whether the Operator was negligent – As previously shown, the operator exhibited low negligence.

(4) The effect on the Operator's ability to remain in business – The parties stipulated that the penalty would not affect Respondent's ability to remain in business. (JX-1).

(5) The gravity of the violation – As previously shown, this violation was unlikely to result in lost workday/restricted duty injuries to a miner and it was not S&S.

(6) The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – All evidence suggests that Respondent abated the condition quickly following the issuance of the violation.

In light of the decision to modify the negligence of the citation from "High" and "Unwarrantable Failure" to "Low" and to remove the Unwarrantable Failure designation and to modify the gravity from "Highly Likely" and "S&S" to "Unlikely" and "Non-S&S," a reduction in the assessed penalty is appropriate. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $4,000.00.

IV. Contentions of the Parties Regarding Order No. 8366645

With respect to Order No. 8366645, the Secretary asserts that Respondent violated 30 C.F.R. §77.1713(a), that this violation was Highly Likely to result in Permanently Disabling injuries to two miners, that the violation was S&S, and that it resulted from High Negligence and an Unwarrantable Failure to comply. (GX-2)(*Secretary's Post-Hearing Brief* at 24-28). The Secretary believes that the proposed penalty of $45,000.00 is appropriate. (*Id.* at 28-29).

Respondent argues that there was no violation of the cited standard. (*Respondent's Post-Hearing Brief* at 9-10). Further, it argues that even if there were a violation of the cited standard, that it would not be S&S. (*Id.* at 13-15). Further, it argues that its actions did not display an unwarrantable failure to comply. (*Id.* at 12-13). Finally, Respondent presumably believes that the penalty should be vacated or, in the event the order is found valid, reduced pursuant to its proffered gravity and negligence determinations.

V. Findings of Fact and Conclusions of Law Regarding Order No. 8366645

a. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §77.1713(a).

On November 1, 2011, Inspector Stubblefield issued a 104(d)(1) Order, No. 8366645, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> The Mine Foreman failed to conduct an adequate examination for hazardous conditions, in the Leatherwood Seam (5A) pit of the Beatty Branch area of the mine. Citation #8366644 is issued today for failure to strip/remove loose hazardous materials a safe distance from the top of the wall, for a distance of Two Hundred and Sixty-Five Feet (265') in this area. The On-shift Examination Record Book for this mine, indicates no hazardous conditions reported beginning on 10/17/2011 and continuing through today, 11/01/2011, for this area. The loose materials are obvious to anyone entering the pit area. This condition should have been found, recorded in the examination record, and corrected before the mining sequence was allowed to continue. Failure to conduct adequate examinations exposes miners to hazards that can reasonably be expected to result in an accident causing serious injuries to miners. This is an unwarrantable failure to comply with a mandatory standard and constitutes more than ordinary negligence on the part of mine management. Order #7366643 is issued today to the Mine Operator for failure to comply with his Acknowledged Ground Control Plan in the same area.

(GX-2).

The cited standard, 30 C.F.R. §77.1713(a) ("Daily inspection of surface coal mine; certified person; reports of inspection."), provides the following:

> At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

30 C.F.R. §77.1713(a).

This regulation is "broadly worded and requires, among other things, that a designated certified person examine working areas for hazardous conditions as often as is necessary for safety and that any conditions noted be corrected by operators." *Peabody Coal Co.*, 1 FMSHRC 1494, 1495 (Oct. 1979). Whether a certified person has conducted an adequate examination can be determined by using the "reasonably prudent miner" test. *Tuscaloosa Resources*, 36 FMSHRC 1615, 1636 (Jun. 2014)(ALJ Simonton). The Commission has summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Id.* at 1618.

In the instant matter, it is undisputed that the required examination was conducted by Baker in the Highwall area. (Tr. 74, 108). Baker was properly certified and qualified for the purposes of conducting examinations. The highwall was an active area in the mine. It is further undisputed that root balls and other loose material were placed near the edge of the highwall. (Tr. 22-24, 26-27, 58, 68, 88-89, 91, 106, 113, 123-124, 130). Finally, it is also undisputed that the loose material was not noted in the reported or corrected. (Tr. 38-39).

In light of this evidence and my previous findings, I find that a reasonably prudent person familiar with the mining industry and the protective purposes of the act would have recognized that the cited material was not permitted. As I found with respect to Citation No. 8366644, the underlying condition constituted a hazard and the existence of the roots and material was obvious, though the hazard was less so. The underlying standard specifically required loose, hazardous material to be stripped a safe distance from the top of the highwall. 30 C.F.R. §77.1001. Having seen the material, Baker should have recorded it in the examination record and taken steps to correct the condition. The failure to do so constituted a violation of §77.1713(a)

In its brief, Respondent argued that the order should be vacated because there was no loose, hazardous material on the highwall. (*Respondent's Post-Hearing Brief* at 9-10). It argued that this means the examination was adequate. (*Id.*). For the reasons discussed with respect to Citation No. 8366644 *supra*, the roots balls and other material on the highwall constituted a hazard. Therefore, Respondent's argument is not supported by the record.

b. The Violation Was Unlikely to Result in a Permanently Disabling Injury And Was Not Significant And Substantial In Nature.

Inspector Stubblefield found the gravity of the cited danger in Order No. 8366645 as being "Highly Likely" to result in a "Permanently Disabling" injuries to two miner and that the condition was S&S. (GX-2). With the exception of the number of persons affected, these determinations were not supported by a preponderance of the evidence.

Respondent's failure to conduct an adequate examination of the cited highwall exposed miners in the area to the hazards discussed in Citation No. 8366644. Furthermore, the Secretary's arguments in support of this designation were identical with respect to these citations. (*Secretary's Post-Hearing Brief* at 25-26). As a result, the reasoning provided *supra* with respect to the gravity of Citation No. 8366644 is incorporated here by reference. Therefore, I find that Order No. 8366645 was "Unlikely" to result in "Lost Workday/Restricted Duty" injuries and was not S&S because the cited conduct failed to meet the third prong of *Mathies*. A finding that two miners were affected is appropriate because at least two miners were operating equipment below the highwall. (Tr. 23, 34, 59-60, 76).

c. Respondent's Conduct Is Best Characterized As "Low" Negligence rather than "High" Negligence and an Unwarrantable Failure.

In the order at issue, Inspector Stubblefield found that the operator's conduct was highly negligent in character and the result of an unwarrantable failure. (GX-2). I find that Respondent should have known about the violation and that there were considerable mitigating factors.

With respect to knowledge, Baker was a member of management, he conducted the pre-shift examination in the area, and he was aware that there was material near the edge of the wall. (Tr. 74, 99, 106, 108, 113,123-124, 130, 238-239). As discussed *supra*, this material was a violation of the underlying standard. Therefore, Respondent knew or should have known that a violation existed and was negligent. The question that remains is the degree of that negligence.

I find that the record demonstrates there were considerable mitigating circumstances. Examiner Baker credibly testified that he had seen similar material on highwalls throughout his career without incident. (Tr. 111-112). I believe it is significant that no other conditions were found with respect to this highwall to indicate that the examination was otherwise inadequate. Clearly, Respondent should have recognized the instant hazard, but apparently the operator was doing an adequate job of preventing or correcting other hazards in the area. As with the underlying condition, Respondent's witnesses seemed to have genuinely believed the cited material presented no hazard because of its small size, stability and the other safety measures in the area. (Tr. 106, 113). Further, I again note that Respondent took measures to ensure that material was not close to the edge of the wall and that the Secretary failed to establish that trees were located near the edge of the highwall. (Tr. 118, 133-137).

The Secretary provided the same arguments in support of this examination citation as he raised with respect to the underlying citation. (*Secretary's Post-Hearing Brief* at 26). As a result, my discussion of the Secretary's argument and my finding that those arguments were not compelling with respect to Citation No. 8366644 are incorporated here by reference. A finding of "High" negligence would be inappropriate given the circumstances. Instead, I find Respondent's actions are better characterized as displaying "Low" negligence.

The Secretary also found that the cited condition constituted an unwarrantable failure to comply. I will now turn to the six *IO Coal* factors with respect to that determination:

1. Extent Of The Violative Condition

Baker testified that he may have conducted as many as 100 examinations in the area during development. (Tr. 114). He failed to record or correct the cited condition during each of those examinations. Therefore, the instant violation was extensive.

2. The Length of Time of the Violation Existed

At hearing, Inspector Stubblefield credibly testified that underlying condition likely existed from the time the area was first developed 1-2 weeks before the citation. (Tr. 40, 114). The book indicated that development started on October 17, 2011. (Tr. 38-39). Examinations were conducted during that time and the condition was not recorded or corrected. Therefore, the condition had existed for several shifts.

3. Whether the violation is obvious or poses a high degree of danger

As discussed with respect to the underlying citation, the loose material that was missed during the examination was not particularly obvious and did not pose a considerable danger. While the roots were obvious, the hazards those roots posed were not. Further, whatever hazards the trees may have presented were not obvious because the trees were not as close to the edge as

originally cited. Also, as discussed with respect to gravity, *supra*, the condition was unlikely to occur and was not S&S. The roots were small and the equipment was provided with fall protection. (Tr. 67-68, 106, 109-113, 123-135, 130). Further, the material appeared stable. (Tr. 124).

The Secretary argued that Baker was aware of the hazard but was not writing it in the book, thereby placing two miners in danger. (*Secretary's Post-Hearing Brief* at 28). I believe this overstates the situation. Baker was aware that the roots were present on the edge, but he was not aware that this condition posed a danger.

4. Whether the operator had been placed on notice that greater efforts were necessary for compliance or that this condition was an issue.

The evidence does not show any meaningful notice regarding the cited condition. Respondent had received no previous citations for failure to conduct adequate examinations of the highwall. No one had told Respondent that it was on notice that additional efforts were needed. Further, Baker and Creech credibly testified that they had seen highwalls in the cited condition their entire careers without receiving any citations. (Tr. 111-112, 125).

The Secretary alleged that Respondent received notice regarding the cited condition because it had received previous citations regarding the maintenance of highwalls and therefore was on notice that examinations were required to detect those hazards. (*Secretary's Post-Hearing Brief* at 27). Once again, the Secretary has taken the case law regarding past violations too broadly. The Secretary essentially argues that any citation issued on a highwall provides notice to find all other possible hazards on a highwall during future examinations. Because the Secretary presented no evidence to show how previous citations in the area provided notice in the instant matter, the Secretary essentially argues that any citation issued on a highwall necessarily provides notice for all hazards possible on subsequent examinations on the highwall. Apparently, this is true regardless of whether the previous citation addressed the specific issue missed during that subsequent examination. I believe this is far too tenuous to constitute notice. Without a showing that the previous citations bear some actual relationship to the instant matter, I cannot find that they provide notice.

5. The operator's efforts in abating the violative condition

Baker conducted examinations of the area and actually saw the underlying condition. (Tr. 74, 108-109, 115). He failed to recognize the condition as a hazard. There is no evidence of any abatement conducted before the order was issued because of this failure to recognize the hazard.

6. Operator's knowledge of the existence of the violation

As discussed *supra*, the preponderance of the evidence shows that Baker knew or should have known about the violative condition. However, Baker was not aware of the degree of the hazard present and that hazard was not obvious.

In light of the lack of notice, the fact that the cited condition was not highly dangerous, the fact that the hazard was not obvious, and the fact that Respondent's actions were best characterized as "low" negligence, I find that this violation was not an unwarrantable failure on the part of the operator.

d. Penalty

In this matter, the Secretary proposed a penalty of $45,000.00 for Order No. 8366645. I find that a deviation from the Secretary's proposed assessment is warranted herein and will evaluate the factors contained in 30 U.S.C. §820(i) to explain that deviation. Those factors are as follows:

(1) The Operator's history of previous violations – As discussed earlier, Respondent had no significant history of violating the cited standard or any substantially similar standards.

(2) The appropriateness of the penalty compared to the size of the Operator's business - The parties stipulated that at Bear Branch mine, Respondent produced 383,754 tons of coal in 2010. (JX-1). Further, Respondent produced 3,892,526 tons of coal at all of its operations. According to MSHA's penalty assessment guidelines this gives Bear Branch, 11 "mine size points" out of a possible 15 and 9 "controller size points" out of a possible 10. *See* 30 CFR §100.3(b). Thus, Respondent is an above-average sized operator with a relatively large mine.

(3) Whether the Operator was negligent – As previously shown, the operator exhibited low negligence.

(4) The effect on the Operator's ability to remain in business – The parties stipulated that the penalty would not affect Respondent's ability to remain in business. (JX-1).

(5) The gravity of the violation – As previously shown, this violation was unlikely to result in lost workday/restricted duty injuries to a miners and it was not S&S.

(6) The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – All evidence suggests that Respondent abated the condition quickly following the issuance of the violation.

In light of the decision to modify the negligence of the order from "High" and "Unwarrantable Failure" to "Low" and to remove the Unwarrantable failure designation and to modify the gravity from "Highly Likely" and "S&S" to "Unlikely" and "Non-S&S," a reduction in the assessed penalty is appropriate. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $4,000.00.

DOCKET NO. KENT 2012-904

I. Summary of Testimony

At 9:15 p.m. on November 18, 2011, Stubblefield received a call from Supervisor Marvin Hoskins explaining MSHA had received an anonymous verbal complaint. (Tr. 146, 204). The complaint stated Respondent was not installing safety benches and was not stripping materials a

safe distance from the top of the highwalls.[13] (Tr. 146). Hoskins assigned Stubblefield to conduct an E-16 inspection in the area. (Tr. 146-147). Upon arrival, Stubblefield reviewed the mine file. (Tr. 147).

At 9:50 a.m. on November 19, 2011, Stubblefield arrived at the mine.[14] (Tr. 146-147). Upon arrival he went to Beatty Branch and then traveled to Center Ridge. (Tr. 147). At 12:10-12:15 he arrived at the Cow Head Branch, a mountain hollow that ran into Cut Shin Creek. (Tr. 147-149). At 12:40 he arrived on the right side of the Cow Head and found Respondent was drilling for a blast. (Tr. 148-150, 160-161). Two miners, a blaster and blaster helper, were preparing shot on foot below the wall. (Tr. 148-150, 160-161). The blasters were 10-12 feet from the wall. (Tr. 161). The coal in the area was still being developed and it was probably 10-15 feet shorter than the one at Beatty Branch, 55-60 feet. (Tr. 163, 189-190). Respondent had probably already drilled and shot two or three times to develop to the highwall to that point. (Tr. 158). The blaster, Ronald Sante Smith, recalled that when Stubblefield first arrived, he was not at the wall but instead loading his truck to prepare for a shot.[15] (Tr. 220).

On the right side of the Cow Head, Stubblefield found that Respondent had failed to strip loose, hazardous material a safe distance from the top of the highwall. (Tr. 149, 222). There was loose material including roots hanging right over the edge and the crest of the wall for the entire 300-foot area. (Tr. 149-152, 160-161, GX-10, p. 1-4). There was also loose, unconsolidated rock in several areas and there were numerous trees right near the edge of the wall. (Tr. 149). There was shale located underneath all of the tree roots. (Tr. 152-152, GX-10, p. 6). There was no evidence of trees hanging over the edge or material falling at that time, though it was hard to tell what may have fallen because of the shot material. (Tr. 192, 205). Stubblefield could not tell how far from the edge the trees were located. (Tr. 192). These conditions were largely the same as previous citations. (Tr. 192-193). This condition was caused by failing to properly scale as the wall developed. (Tr. 153-154). In this situation, Respondent should have been cleaning the top from the beginning, especially in light of the earlier citations and the new ground control plan. (Tr. 157-158). However, Stubblefield later realized he had misspoken; the new ground control plan was not yet in effect. (Tr. 182).

Smith had seen the wall before Stubblefield arrived and did not see any problems in the area. (Tr. 223). Baker saw roots and vines over the edge but agreed that there was no hazard. (Tr. 235, 244, 246). There were roots and vegetation on top of the wall but they did not believe these would fall into the pit and hit anyone. (Tr. 224, 235-236, 248-249). The roots were not attached to anything. (Tr. 244-245). The trees did not look unstable. (Tr. 224).

As a result of this condition, Stubblefield issued a 104(d)(1) Order, No. 8366655 (GX-7) under Section 77.1001. (Tr. 143-145, 149, 161).

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[13] No issues were discovered with the safety benches. (Tr. 204).

[14] Stubblefield was not sure if he went to the mine between November 1 and November 19 and was not aware of any other inspectors doing so. (Tr. 211).

[15] Ronald Sante Smith was present at hearing and testified. (Tr. 216). At the hearing Smith was employed as a blaster by Virginia Drilling. (Tr. 216-217). He had worked for Respondent for four years and had extensive experience, training, and certifications. (Tr. 217-218). This training included instruction on recognizing highwall danger. (Tr. 229-230). Smith was trained as a foreman. (Tr. 230).

The citation was marked as "Fatal." (Tr. 162). Unlike the previous citation, miners were on foot with no protection, so a "Permanently Disabling" designation was not appropriate. (Tr. 162). Something small falling from the highwall and striking a miner in the head or in the back of the neck was highly like to be fatal. (Tr. 163).

The citation was marked as "Highly Likely" because it was highly likely that miners on foot underneath the highwall without protection would be struck by something falling and fatally injured. (Tr. 163-164). In Stubblefield's experience, under normal mining condition, unconsolidated material and material at the top of the highwall was going to fall. (Tr. 164). Stubblefield could not say how much the root balls weighed. (Tr. 192-193).

The citation was marked as affecting one person because if something fell from the wall, it was likely only one person would be struck. (Tr. 164).

The citation was marked as "High" negligence and an unwarrantable failure because it was more than ordinary negligence, it was a violation of a mandatory standard, it was obvious to anyone entering the area such that no one could accidentally overlook it, it had existed for more than one shift, it was extensive across the whole crest of the hill, it posed a hazard to miners, and an examination was conducted by Respondent's agent (Baker) but no hazards were recorded and no corrective action was taken. (Tr. 164-167, 177-178).

The condition had to exist at the time when the wall first began developing. (Tr. 174). Stubblefield believed the first steps in the blasting process started November 4 because that was the first day noted in the examination record. (Tr. 176, 190-191). Baker agreed with this reasoning, though he did not know the exact date development began. (Tr. 240, 244). Stubblefield did not know if vegetation was removed prior to November 1, but if it was it should have been listed in an examination record. (Tr. 191-192, 211-212). An examination record would exist even if no hazards were found. (Tr. 243). No work should be performed in an area without a pre-shift examination. (Tr. 212, 243). Baker insisted that Respondent would never work in an area that was not examined. (Tr. 243). Stubblefield did not recall seeing a record from any earlier date, though earlier dates could have been in a prior book. (Tr. 213-214).

Stubblefield believed this condition was similar to that in Citation No. 8366644 and therefore Respondent had notice with respect to the negligence and UWF designations. (Tr. 167-168). Baker did not recall receiving any earlier citations or notice from MSHA that conditions like this were a hazard. (Tr. 245). Baker did not agree with Citation No. 8366644. (Tr. 245-246). However, he conceded that the conditions were similar in the instant matter and Citation No. 8366644. (Tr. 246). He did not intend to say that he was not required to consider something a hazard when MSHA cited it in the past. (Tr. 246).

Respondent terminated the citation by barricading the area 30 feet from the wall and bypassing the area. (Tr. 161). The barricade applied only to miners on foot, not equipment. (Tr. 206). The area was later reclaimed and there was no way to do that without allowing equipment within 30 feet of the wall. (Tr. 161, 206-207). Respondent had to reclaim the wall under state law. (Tr. 207). Miners in equipment were afforded regular protection. (Tr. 206). Stubblefield did not believe this contradicted the finding of "highly likely" and "fatal" because the miners in the citation were on foot and there was no other way to reclaim the wall. (Tr. 207). It took until February 7 to terminate the condition. (Tr. 162). Stubblefield was not present for the

reclamation and did not know if anyone was placed in danger during that process. (Tr. 209-210). There was no indication Respondent was taking any steps before Stubblefield arrived. (Tr. 162).

In addition to the material on top of the wall, there were also seams or cracks in unconsolidated rock in the wall with the potential for failure. (Tr. 152-153, 168, 197, GX-10, p. 4-6). There were many different laminated layers or strata of stone in the area and these become destabilized and cracked when vibrations occur during blasting. (Tr. 154-156, GX-10, p. 4). Stubblefield was positive he saw cracks, not shadows. (Tr. 194). Baker believed that the places that Stubblefield believed were cracked were likely just hill seams.[16] (Tr. 238). Stubblefield agreed the layers were natural hill seams, but argued blasting could weaken them. (Tr. 156-157). The seams could open up and something that was originally solid could become unconsolidated. (Tr. 208). This condition was also caused by a failure to properly scale the wall. (Tr. 153, 169).

Smith did not see any loose, cracking or unconsolidated material that might cause injury to those in the area. (Tr. 224-225). He would not have worked in an area that would put his crew in danger. (Tr. 226). Baker believed this was a "good slick wall." (Tr. 236, 248). Material did not fall off the wall during development. (Tr. 248). If material was falling, it would be a sign of instability and the area would be barricaded immediately. (Tr. 248). The wall was no different than others he worked on during his career. (Tr. 249).

To correct this problem, the Respondent needed to adjust the drill bit size or pattern when encountering new strata to ensure the wall was stable. (Tr. 155). Respondent should have recognized the different laminated layers of stone and taken extra care. (Tr. 156-157). It was also important to take extra care using equipment to clean and scale the wall during development. (Tr. 155, 168-169).

The only way to determine if a rock was loose was to knock it down with an excavator. (Tr. 194, 237). If something looked unconsolidated but could not be pulled down, it was not loose. (Tr. 194, 237-238). Smith claimed that Respondent used excavators and dozers to do this cleaning all of the time in this area. (Tr. 225). According to Baker, Respondent prioritized working on the wall with the dozer or excavator after a shot so that it was safe. (Tr. 239).

Stubblefield knew the marks in the wall were cracks rather than indications of previous attempts to scale the area because he did not see any dozer blade, loader bucket, or excavator teeth imprints from those machines. (Tr. 154, 195-196). If Respondent had scaled with equipment, the highwall would have been smoother. (Tr. 169). The seams would have still been visible but unconsolidated rock would not be present. (Tr. 169). He believed the cracks in the wall indicated that the rocks were loose and unconnected (however he could not say for sure if the areas were connected). (Tr. 195, 197-198). Stubblefield saw places where rocks had popped out during blasting. (Tr. 196). Stubblefield and Smith testified it was possible for a wall to look good and scaled during development but for it to get worse after additional blasting and weather changes. (Tr. 201, 227). Stubblefield did not know if the cracks had been there the whole time. (Tr. 201). Smith believed that if there were, a dozer or excavator would again be used to scale. (Tr. 227). Stubblefield could not tell if the lines were caused by core drilling. (Tr. 196-197).

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[16] Hill seams are natural fissure joints bedding plane in the rock that over a period of time water seeps through. (Tr. 157). These seams can be full of mud unconsolidated material. (Tr. 157). Hill seams cannot be removed, but loose rock in the seams can be. (Tr. 169-170).

As a result of this condition, Stubblefield issued a 104(d)(2) Order, No. 8366656 (GX-8). (Tr. 143-145, 168).

The citation was marked as "Highly Likely" and "Fatal" because there were miners working on foot beside the wall loading holes for blasting and they were not afforded any protection. (Tr. 171). Stubblefield believed were hundreds, perhaps thousands of pounds of material that might topple over and strike someone. (Tr. 171-172). However, he conceded he could not tell the exact weight of the loose material. (Tr. 208). Under continued normal mining, and considering the nature of the condition, blasting in the area, and the weather, Stubblefield believed this material was going to fall from the seams. (Tr. 172-173, 208-209). However, he could not say when it was going to fall. (Tr. 209). If the highwall was in place for a year or two something would fall, but highwalls were no longer opened for that length of time. (Tr. 209). This condition was probably more dangerous than Citation No. 8366655 because of the amount of the material present. (Tr. 172).

Stubblefield believed that if the material fell it would strike one person. (Tr. 173).

The citation was marked as "High" negligence and an unwarrantable failure because it was a violation of mandatory standard, it was obvious to anyone entering the area such that no one could accidentally overlook it, the wall was extensive, had existed for some time, it posed a hazard to miners, an agent of the operator was present, and examination was conducted but no corrective actions were taken. (Tr. 173, 176-178). The condition had to exist for several shifts because it would take that amount of time to reach that point in the mining process. (Tr. 175). It was not possible that it arose after the most recent examination. (Tr. 175-176).

Respondent terminated this condition the same way as with Citation No. 8366655: by barricading 30 feet away, bypassing the area, and reclaiming the area. (Tr. 170-171).

Stubblefield also found that these conditions were present back to November 4, but that nothing was recorded in the record books and no corrective action was taken. (Tr. 173-174, 179, 199). Therefore, he found the examination was inadequate. (Tr. 179, 199-200). Smith was acting foreman at the time the citation was issued and he was an agent of Respondent.[17] (Tr. 185, 229). Baker arrived shortly thereafter and Stubblefield explained the situation. (Tr. 185, 188). Baker had conducted the examination that day, though Smith also looked at the wall because he was working underneath of it. (Tr. 228-229). Baker testified that if an examiner does not believe something to be a hazard, he does not write it down. (Tr. 236). Baker did not see any dangers to place in the book during his examination. (Tr. 198, 243). If he had seen a danger he would have barricaded it until it could be made safe. (Tr. 241). However, Stubblefield believed Baker should have seen and recorded these issues because the previous citations placed him on notice. (Tr. 198-199). Baker was investigated to see if he would be personally cited for these conditions. (Tr. 239). He never received heard the outcome of that investigation. (Tr. 239-240). Stubblefield was not aware of this investigation. (Tr. 200).

As a result of this condition, Stubblefield issued a 104(d)(2) Order, No. 8366657 (GX-9). (Tr. 143-145, 179).

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[17] Acting foremen, like regular foreman, needed mine foreman certification. (Tr. 185-186). The actual foreman would still need to sign the exam records. (Tr. 186).

This citation was marked as "Highly Likely" and "Fatal" because examinations were an important part of the examiner's job and here the examiner did not do an adequate exam and miners worked underneath the unsafe conditions. (Tr. 182-183).

The citation was marked as affecting one person, but it should have been marked for two because the blaster, the blaster helper, and the drill operator were all in the area. (Tr. 183-184). The drill operator was drilling underneath the wall when Stubblefield arrived. (Tr. 184).

The citation was marked for "high" negligence and an unwarrantable failure because Respondent violated a mandatory standard, it was more than ordinary negligence, it was obvious, existed for some time, exposed miners to a hazard, the mine foreman was there, and an examination was conducted but it was inadequate and no corrective action was taken. (Tr. 184, 188-189). The foreman is the one charged with making the area safe and the conditions should have been obvious. (Tr. 184).

To terminate the cited condition, Respondent developed an action plan that addressed the underlying conditions. (Tr. 179-180). Respondent conducted training on the first and second shifts regarding stripping loose materials a safe distance back from the top, removing loose materials, and conducting adequate examinations. (Tr. 180). The training also discussed the ground control plan and pre-operational examinations of equipment. (Tr. 180).

When Stubblefield was in the area, he asked Smith if the holes were loaded. (Tr. 159, 210). Stubblefield testified that Smith said that they were. (Tr. 159, 202, 210). When Stubblefield issued the order, the explosives would have to remain in the ground. (Tr. 159). Instead, Stubblefield gave Respondent permission to detonate the explosives. (Tr. 159, 161, 201-203). Stubblefield considered the fact that Respondent could not reclaim the area safely with the explosives in place. (Tr. 159). They could have "washed out" the holes with water instead, but it would have exposed miners with hoses for a longer time than detonation. (Tr. 160). It was not possible to remove the detonator, primer with ammonia nitrate, and the whole stem once loaded. (Tr. 202). He did not ask Smith to remove anything from the holes. (Tr. 210).

Smith recalled that when Stubblefield arrived, he was still loading his truck to prepare for a shot and that none of the holes had been loaded. (Tr. 220). Smith spoke with Stubblefield and sent his two helpers to prime the holes.[18] (Tr. 221). Stubblefield said to get the primers and caps out of the holes in the area and the blasters did so with their hands. (Tr. 222, 228, 240-241). No ANFO was in the hole so there was no danger in removing them. (Tr. 223). After removing the material, they put everything in boxes and headed to the magazine. (Tr. 225). Respondent then explained there was going to be a bad rain that evening and asked if they could load and shoot. (Tr. 24). Stubblefield gave them permission and they did so. (Tr. 226, 231, 240-241). Stubblefield did not order any additional precautions before setting off the shot. (Tr. 227, 241).

[18] Hole are primed by placing primers and caps together and dropping them in the holes. (Tr. 221-222). Then the bulk truck is used to load ammonia nitrate ("ANFO") into the bore holes up the level the blaster determines. (Tr. 222).

II. Contentions of the Parties Regarding Order No. 8366655

With respect to Order No. 8366655, the Secretary asserts that Respondent violated 30 C.F.R. §77.1001, that this violation was Highly Likely to result in Fatal injuries to one miner, that the violation was S&S, and that it resulted from High Negligence and an Unwarrantable Failure to comply. (GX-7)(*Secretary's Post-Hearing Brief* at 29-35). The Secretary believes that the proposed penalty of $18,742.00 is appropriate. (*Id.* at 36-37).

Respondent argues that there was no violation of the cited standard. (*Respondent's Post-Hearing Brief* at 19). Further, it argues that even if there were a violation of the cited standard, that it would not be S&S and did not display an unwarrantable failure to comply. (*Id.* at 21-23). Finally, Respondent presumably believes that the penalty should be vacated or, in the event the order is found valid, reduced pursuant to its proffered gravity and negligence determinations.

III. Findings of Fact and Conclusions of Law Regarding Order No. 8366655

a. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §77.1001.

On November 19, 2011, Inspector Stubblefield issued a 104(d)(1) Order, No. 8366655, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> The mine operator has failed to strip loose hazardous materials a safe distance from the top of the highwall in the Leatherwood Seam (5A) Pit, in the right side of the Cow Head. This area begins at the point where the active pit turns the point out of the Cow Head Hollow and extends along the contour cut to where the drill bench begins, for a distance of at least Three Hundred Feet (300') by visual observation. Loose materials in the form of trees and roots are hanging along and over the crest/edge of the wall for the entire distance, and loose, unconsolidated rock is also present at several locations along this area. Numerous trees are also standing on or, very near the crest of the highwall. This condition or practice has been cited at this mine Two (2) times previously in the last Two (2) years. This condition was discussed with the Mine Foreman on 10/12/2011, and 11/03/2011, during mine visits. The condition is obvious to anyone entering the pit. The history of the mining industry has shown that highwall failures can, and do occur, such as occurred recently on 10/28/2011 which claimed the life of Two (2) miners. This is an unwarrantable failure to comply with a mandatory standard and constitutes more than ordinary negligence on the part of Mine Management. Citation #8366656 is issued today for failure to adequately scale loose rocks and materials from the highwall in this area.

(GX-7). The document also contained a modification, stating:

> This order is modified to allow the Mine Operator to resume mining operations at this mine. He has developed an action plan to address stripping loose material a safe distance back from the top of the highwall. His plan states that loose material will be stripped a minimum of Ten Feet (10') back from the top of the wall in all locations, by use of dozers and excavators. The plan also states that the area

> affected by the Order will be barricaded a minimum distance of Thirty Feet (30') away from the wall. No miners will be allowed in this area on foot. This barricaded area will be bypassed by the mining sequence. The area will be reclaimed by using dozers and rock trucks to dump and push materials against the wall until it is reclaimed.

(GX-7). The Order was also amended to change the type of action from a 104(d)(1) Order to a 104(d)(2) Order. (GX-7). Finally, the Order was terminated with Stubblefield noting:

> The affected area has been bypassed by the mining sequence and is being reclaimed by using dozers and rock trucks to dump and push materials against the wall.

(GX-7).

Stubblefield credibly testified that Respondent had failed to strip loose, hazardous material from the edge of the instant highwall. (Tr. 149, 222). Specifically, he found loose material including roots hanging right over the edge and the crest of the wall for the entire 300-foot area. (Tr. 149-152, 160-161, GX-10, p. 1-4). These roots contained shale. (Tr. 152-153, GX-10, p. 6). He also saw loose, unconsolidated rock in several areas and there were numerous trees right near the edge of the wall. (Tr. 149). No barrier was constructed until after the violations were terminated. (Tr. 160-161). Stubblefield testified that these conditions were largely the same in Citation No. 8366644. (Tr. 192-193). Therefore, I find Respondent violated 30 C.F.R. §77.1001 with respect to Order No. 8366655.

In its brief, Respondent argued that there was no loose, hazardous material in the area on November 19, 2011, and that Stubblefield conceded that he did not see instability in the trees or root balls that would indicate any material would fall into the pit. (*Respondent's Post-Hearing Brief* at 19). As with Citation No. 8366644, the issue here is not whether material is about to fall into the pit, but instead whether that material is loose. 30 C.F.R. §77.1001. Stubblefield credibly testified that he saw loose material. (Tr. 149-152, 160-161, 222). The fact that there was no imminent danger of a fall did not change the fact that this material was loose. In Stubblefield's experience, under normal mining condition, unconsolidated material and material at the top of the highwall was going to fall. (Tr. 164). Therefore, Respondent's argument does not undermine the finding that the cited material was loose and therefore violated 30 C.F.R. §77.1001.

b. <u>The Violation Was Highly Likely to Result in a Fatal Injury And Was Significant And Substantial In Nature.</u>

Inspector Stubblefield found the gravity of the cited danger in Order No. 8366655 as being "Highly Likely" to result in a "Fatal" injury to a miner and that the condition was S&S. (GX-7). These determinations were supported by a preponderance of the evidence.

Regarding the first element of S&S - the underlying violation of a mandatory safety standard - it has already been established that Respondent violated 30 C.F.R. §77.1001.

The second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – was also met. Material hanging from the highwall was likely to fall under continued normal mining operations. (Tr. 164). Material falling from the highwall would contribute to the danger of a miner being struck by material. Stubblefield had previously testified that that he had seen miners struck by material falling from highwalls in the past. (Tr. 33, 53).

In its brief, Respondent presented several arguments to show that there was no hazard contributed to by this condition. However, those arguments are not compelling.

Specifically Respondent argued that there was no hazard contributed to because there was no instability and no one saw anything fall into the pit. (*Respondent's Post-Hearing Brief* at 22). I credit the testimony of Inspector Stubblefield that the material would eventually fall into the pit under continued normal mining operations, notwithstanding the fact that the material did not appear unstable at that time. (Tr. 164). There is no requirement under the *Mathies* formula that a danger be imminent, only that there be some danger contributed to by the violation. The material hanging from the edge of the highwall made the danger of material falling into the pit more likely. Therefore, the second prong of *Mathies* is met.

Respondent also argued that the inspector knew there was no danger to miners in the area because Stubblefield allowed the blasting crew to re-enter the area after the order was issued. (*Respondent's Post-Hearing Argument* at 23).

The exact nature of the decision to allow miners to return to the area is unclear. Inspector Stubblefield testified that he allowed miners to return to the area to detonate explosives that had already been loaded. (Tr. 159, 161, 201-203, 210). He specifically testified that he chose to allow the detonation rather than having the holes "washed out" because it limited exposure to the cited condition. (Tr. 160). Smith testified that Stubblefield allowed the miners to enter the area and remove the primers and caps with their hands. (Tr. 222, 228, 240-241). He said that after management explained that there was going to be rain, they asked if they could reload the holes and shoot. (Tr. 240). He testified that Stubblefield gave them permission and they did so and did not order any additional precautions before the shot. (Tr. 226-227, 231, 240-241).

The most likely explanation for this discrepancy in the testimony is that there was a misunderstanding. It is possible that Stubblefield did not realize that Respondent had asked to remove the primers and caps earlier or misheard when Respondent asked to re-enter the area and load the shots again. However, the issue is largely immaterial. Even if Smith's testimony is accurate, and Stubblefield allowed miners to enter the area and remove caps and primers and then return to the area to load and fire a shot, the cited condition was still hazardous. If Stubblefield knowingly allowed miners to re-enter the hazardous area then he, like Respondent, committed a grievous error. However, that action in no way minimizes that danger of material falling from the highwall. Stubblefield clearly believed there was a danger and the evidence supports this determination. As a result, Respondent's argument, even if supported by the evidence, does not change the determination with respect to the second prong of *Mathies*.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. Stubblefield testified that the cited condition was largely similar to the material found in Citation No. 8366644. In that instance, Stubblefield

testified that he saw root balls weighing 50-100 pounds in the area. (Tr. 54, 88-89). However, unlike in Citation No. 8366644, in the instant matter Stubblefield saw miners working on foot below the highwall. If 50-100 pound root balls fell into the pit, they could easily strike a miner working on foot. This would be a fall of around 55-60 feet. (Tr. 163, 189-190). Given the weight of the material and the height of a fall, it is reasonably likely that a miner being struck by a root ball would suffer an injury.

In its brief, Respondent argued that safety precautions in the equipment would keep miners in the area safe. (*Respondent' Post-Hearing Brief* at 23). This is true for the reasons discussed *supra*, with respect to Citation No. 8366644. However, unlike in the previous citation, miners here were working on foot. Safety measures contained in the equipment would not provide any protection to these miners. As a result, safe equipment would not limit the likelihood of injury here.

Under *Mathies,* the fourth and final element that the Secretary must establish is that there was a "reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC at 3-4; *U.S. Steel*, 6 FMSHRC 1573, 1574 (July 1984). A miner being struck by 50-100 pounds of material falling 55-60 feet would suffer devastating, likely fatal, injury. Clearly, fatal injuries would be reasonably serious. Therefore, the fourth prong of *Mathies* is met.

Based on the foregoing, I find that a preponderance of the evidence supports a finding that the cited condition would be "Highly Likely" to result in "Fatal" injury to one miner and further find that the S&S designation was appropriate.

c. Respondent's Conduct Is Best Characterized As "High" Negligence and an Unwarrantable Failure.

In the order at issue, Inspector Stubblefield found that the operator's conduct was highly negligent in character and the result of an unwarrantable failure. (GX-7). I find that the substantial evidence supports this determination.

In the instant matter, Baker and Smith were members of management. (Tr. 99, 230, 238-239). Both had seen the material on the highwall. (Tr. 223, 235-236, 244-249). Further, Baker conducted the pre-shift examinations of the cited area. (Tr. 228-229). Smith acted as foreman in the area when Baker was not present. (Tr. 185, 229). Baker testified that he saw roots and fines on the edge of the pit (though he testified that there was no hazard). (Tr. 235, 244, 246). Perhaps most importantly, Baker had been present when the previous citation under this standard, No. 8366644, was issued. Stubblefield testified that the instant condition was substantially similar to the condition in that earlier citation. Therefore, Baker knew, or should have known, that the roots constituted a hazard to miners along the highwall. Therefore, Respondent knew or should have known that a violation existed and was negligent. The question that remains is the degree of that negligence.

Having reviewed the evidence at length, I have determined that there were no mitigating circumstances present. As a result, I find that the "High" negligence designation is appropriate.

In its brief, Respondent argued that there were several mitigating circumstances present. However, none of these arguments are compelling. First, Respondent argued that its examiners reasonably believed that no hazard was present. (*Respondent's Post-Hearing Brief* at 21). As with Citation No. 8366644, the cited condition was obvious, and anyone entering the area would see loose roots and other material hanging from the side of the wall. Unlike Citation No. 8366644, at the time the instant order was issued, Respondent could no longer claim it was unaware of the hazard posed by that material. It is significant that Order No. 8366655 was issued by the same inspector, Stubblefield, and to the same member of management, Baker, as Citation No. 8366644. At the time of the instant order, Baker could no longer credibly claim ignorance as to the danger posed by the loose material and root balls. At hearing Baker conceded that he did not agree with Citation No. 8366644 but agreed that the instant situation was similar to that citation. (Tr. 245-246). He also tried to argue that he would not simply ignore a hazard cited by MSHA because he disagreed that it existed. However, there is really no other way to interpret the facts presented. Baker saw the cited material, he knew from the previous citation that MSHA believed it was a hazard, and he still took no action to correct the problem or even record it. Because Baker could no longer reasonably believe that the cited condition posed no hazard, it cannot constitute a mitigating circumstance.

Respondent also noted that the material appeared stable so there was no danger. (*Respondent's Post-Hearing Brief* at 21). Relatedly, it argued that Stubblefield allowed the blasting crew to return, again showing there was no danger. (*Id.*). For the reasons discussed with respect to gravity *supra*, Respondent knew or should have known that the material was a danger, even if there was no imminent risk of fall. Further, whether Stubblefield allowed miners to return to the area is irrelevant to Respondent's level of negligence. As a result, I find that the "High" negligence designation was appropriate.

The Secretary also found that the cited condition constituted an unwarrantable failure to comply. I will now turn to the six *IO Coal* factors with respect to that determination:

1. Extent Of The Violative Condition

Stubblefield credibly testified that there was loose material including roots hanging right over the edge and the crest of the wall for the entire 300-foot area. (Tr. 149-152, 160-161, GX-10, p. 1-4). Nothing presented by Respondent refutes this testimony. Therefore, the instant violation was extensive.

2. The Length of Time of the Violation Existed

The condition had to exist at the time when the wall first began developing. (Tr. 174). Stubblefield believed the first steps in the blasting process started November 4 because that was the first day noted in the examination record. (Tr. 176, 190-191). An examination record would exist even if no hazards were found. (Tr. 243). Baker agreed with this reasoning and insisted Respondent would not work before a pre-shift examination, though he did not know the exact date development began. (Tr. 240, 243-244). Therefore, it is undisputed that the condition existed for several days and many shifts.

3. Whether the violation is obvious or poses a high degree of danger

As discussed with respect to the gravity determination, this condition was highly dangerous. Miners were working on foot below the root balls and other materials. (Tr. 148-150, 160-161). It was highly likely that one of the miners would be struck by material and face a fatal injury. Further, the condition was obvious. Stubblefield testified that anyone in the area would see the hazard. (Tr. 164-167, 177-178). In fact, Respondent's pre-shift examiner, Baker, had seen the condition but had simply failed to list it as a hazardous condition. (Tr. 198, 235-236, 243-244, 246).

In its brief, Respondent argued that the condition posed no hazard. Superficially, it stated that there was no instability on the highwall and miners were allowed to reenter the area to set off a detonation. (*Respondent's Post-Hearing Brief* at 21). These arguments are rejected for the same reasons discussed with respect to gravity, *supra*.

4. Whether the operator had been placed on notice that greater efforts were necessary for compliance or that this condition was an issue.

The evidence clearly establishes that the Secretary provided direct notice to Respondent in the form of Citation No. 8366644. Both Stubblefield and Baker testified that the instant matter was very similar to that earlier citation. (Tr. 192-193, 246). It is significant that Baker specifically received this earlier notice and was the pre-shift examiner responsible for the instant cited area. Therefore, Respondent knew that MSHA considered hanging material along the edge of a highwall to be a hazardous condition. Respondent also knew that MSHA expected the management to monitor highwalls and to correct any problems that occurred with hanging material. This notice was explicit and had occurred just a few weeks earlier. Therefore, I find Respondent had notice that greater efforts were necessary for compliance.

5. The operator's efforts in abating the violative condition

Smith and Baker credibly testified that Respondent took actions to ensure that material was not hanging over the edge of the wall. However, it is undisputed that Respondent failed to remove the small root balls and other materials that were hanging over the edge. (Tr. 149-152, 160-161). Therefore, Respondent took some action to abate the violative condition, but those efforts were insufficient.

6. Operator's knowledge of the existence of the violation

As discussed *supra*, the preponderance of the evidence shows that Baker knew or should have known about the violative condition and the hazard it posed. Therefore, Respondent knew or should have known that the hanging material was unacceptable.

In light of the cited condition's large extent, lengthy time, obviousness, high degree of danger, lack of abatement, Respondent's notice, Respondent's knowledge and the fact that Respondent's actions were best characterized as "high" negligence, I find that the violation was an unwarrantable failure on the part of the operator.

d. Penalty

In this matter, the Secretary proposed a penalty of $18,742.00 for Order No. 8366655. Having affirmed the Secretary's determinations in all respects, no deviation from the proposed penalty is necessary. In fact, the proposed penalty is appropriate under the Act. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $18,742.00.

IV. Contentions of the Parties Regarding Order No. 8366656

With respect to Order No. 8366656, the Secretary asserts that Respondent violated 30 C.F.R. §77.1005(a), that this violation was Highly Likely to result in Fatal injuries to one miner, that the violation was S&S, and that it resulted from High Negligence and an Unwarrantable Failure to comply. (GX-8)(*Secretary's Post-Hearing Brief* at 37-43). The Secretary believes that the proposed penalty of $18,742.00 is appropriate. (*Id.* at 43-44).

Respondent argues that there was no violation of the cited standard. (*Respondent's Post-Hearing Brief* at 19-20). Further, it argues that even if there were a violation of the cited standard, that it would not be S&S. (*Id.* at 22-23). Further, it argues that its actions did not display an unwarrantable failure to comply. (*Id.* at 21). Finally, Respondent presumably believes that the penalty should be vacated or, in the event the order is found valid, reduced pursuant to its proffered gravity and negligence determinations.

V. Findings of Fact and Conclusions of Law Regarding Order No. 8366656

a. The Secretary Has Failed to Carry His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §77.1005(a).

On November 19, 2011, Inspector Stubblefield issued a 104(d)(1) Order, No. 8366656, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> The Mine Operator as failed to adequately scale the highwall of loose unconsolidated materials, in the form of rocks, in the Leatherwood (5A) pit, in the right side of the Cow Head area of the mine. This area begins at the point where the active pit turns the point out of the Cow Head Hollow and extends along the contour cut to where the drill bench begins, for a distance of Three Hundred Feet (300') by visual observation. There are several hill seams with cracks which separate sections of rock from the solid wall and the overall condition of the highwall is jagged. Order #8366655 is issued today for failure to adequately strip loose materials a safe distance from the top of the highwall. The history of the mining industry has shown that highwall failures can, and do occur, such as occurred recently on 10/28/2011 which claimed the lives of Two (2) miners. This is an unwarrantable failure to comply with a mandatory standard and constitutes more than ordinary negligence on the part of mine management.

(GX-8). The document also contained a modification, stating:

> This Order is modified to allow the Miner Operator to resume mining operations at this mine. He has developed an action plan to address stripping loose material a safe distance back from the top of the highwall and the scaling of loose

> materials from the highwall. His plan states that loose materials will be stripped a minimum of Ten Feet (10') back from the top of the wall in all locations, and loose materials will be scaled from the wall by use of dozers and excavators. The plan also states that the area affected by the Order will be barricaded a minimum distance of Thirty Feet (30') away from the wall. No miners will be allowed in this area on foot. This barricaded area will be bypassed by the mining sequence. The area will be reclaimed by using dozers and rock trucks to dump and push materials against the wall until it is reclaimed. Miners from both First and Second Shifts were trained in this plan today along with the Acknowledged Ground Control Plan for this mine, as well as performing adequate examinations of work areas and equipment

(GX-8). The Order was also amended to change the type of action from a 104(d)(1) Order to a 104(d)(2) Order. (GX-8). Finally, the Order was terminated with Stubblefield noting:

> The affected area has been bypassed by the mining sequence and is being reclaimed by using dozers and rock trucks to dump and push materials against the wall.

(GX-8).

The cited standard, 30 C.F.R. §77.1005(a) ("Scaling highwalls; general."), provides the following:

> Hazardous areas shall be scaled before any other work is performed in the hazardous area. When scaling of highwalls is necessary to correct conditions that are hazardous to persons in the area, a safe means shall be provided for performing such work.

30 C.F.R. §77.1005(a).

According to Judge Paez, in order to prove a violation of the cited standard, "[t]he Secretary must then show either (1) that work was performed in the hazardous area before the area was scaled, or (2) though the hazardous area was scaled, no safe means to and from the hazardous area was provided." *Humphrey's Enterprises, Inc.*, 2011 WL 7463292, *5 (Dec. 21, 2011)(ALJ Paez).

Stubblefield issued the instant order because there were seams or cracks in unconsolidated rock in the wall with the potential for failure. (Tr. 152-153, 168, 197, GX-10, p. 4-6). He believed these seams indicated that different laminated layers of stone had become destabilized during blasting. (Tr. 154-156, GX-10, p. 4). Stubblefield believed these cracks could have been caused by natural hill seams that were weakened during blasting. (Tr. 156-157, 208). Stubblefield testified that this condition was caused by a failure to properly scale the wall. (Tr. 153, 169). Stubblefield also testified that there was no indication of previous attempts to scale the area. (Tr. 154, 169, 195-198). Stubblefield and Smith agreed it was possible for a wall to look good and scaled during development but for it to get worse after additional blasting and weather changes. (Tr. 201, 227).

However, after carefully reviewing the testimony and the photographs provided by the inspector (GX-10), I find that the Secretary failed to carry the burden. Smith and Baker credibly testified that they did not see any loose, cracking, or unconsolidated material in the area. (Tr. 224-225, 236, 248). The photographs support this testimony. Baker testified that he would not have put his crew in danger. (Tr. 226). Smith testified he believed Respondent would have barricaded the material immediately if material fell during development, but it did not. (Tr. 248). The structural integrity of the wall appeared the same as any other wall Smith had ever worked on. (Tr. 249). Perhaps more importantly, both Smith and Baker testified that Respondent used excavators and dozers to scale walls regularly and that this was a priority. (Tr. 225, 239). Respondent had tried to pull loose material with equipment and found it was secure. (Tr. 225). These locations can be seen in the photographs. Further, there was no indication at hearing of any freezing or thawing cycles that may have caused material to loosen after scaling.

In short, Respondent presented credible evidence to rebut the Secretary's assertion regarding the loose nature of the rocks. Respondent's witnesses testified credibly about Respondent's efforts to scale and the integrity of the wall. The photographs, rather than supporting the Secretary's case, provided some support to Respondent's arguments. The Secretary's only legal support for its case was one *L&J Energy Company, Inc.*, 16 FMSHRC 424 (Feb. 1994)(ALJ Weisberger). In that case, loose material was validly cited on an active highwall even though Respondent had already scaled the area. *Id.* at 444. However, in contrast to the instant order, the situation in that case had freezing and thawing cycles, which loosened the rocks. *Id.* at 441. There was no evidence of freezing and thawing here. Nor was there any other reason to believe that any particular section of the wall was loose, just Stubblefield's assertion that the hill seams had come apart in a way that was not clearly visible on the photographs. Further, in *L&J Energy Company, Inc.*, the fact that rocks were loose in the area was proven when one rock actually fell. *Id.* at 444. While a rock did not need to fall here in order to prove the material was loose, I believe there needed to be some credible, supported evidence to show that a fall was possible. No such evidence exists on this record. Therefore I find the Secretary failed to show by a preponderance of the evidence that Respondent violated 30 C.F.R. §77.1005(a).

In light of the Secretary's failure to establish that Respondent violated the cited standard, it is not necessary to discuss the gravity or negligence designations. Order No. 8366656 and the related civil penalty are hereby **VACATED**.

VI. Contentions of the Parties Regarding Order No. 8366657

With respect to Order No. 8366657, the Secretary asserts that Respondent violated 30 C.F.R. §77.1713(a), that this violation was Highly Likely to result in Fatal injuries to one miner, that the violation was S&S, and that it resulted from High Negligence and an Unwarrantable Failure to comply. (GX-9)(*Secretary's Post-Hearing Brief* at 44-48). The Secretary believes that the proposed penalty of $18,742.00 is appropriate. (*Id.* at 48-49).

Respondent argues that there was no violation of the cited standard. (*Respondent's Post-Hearing Brief* at 20). Further, it argues that even if there were a violation of the cited standard, that it would not be S&S. (*Id.* at 22-23). Further, it argues that its actions did not display an unwarrantable failure to comply. (*Id.* at 21). Finally, Respondent presumably believes that the penalty should be vacated or, in the event the order is found valid, reduced pursuant to its

proffered gravity and negligence determinations.

VII. Findings of Fact and Conclusions of Law Regarding Order No. 8366657

a. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §77.1713(a).

On November 19, 2011, Inspector Stubblefield issued a 104(d)(1) Order, No. 8366657, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> The Mine Foreman has failed to conduct an adequate examination for hazardous conditions, in the right side of the Leatherwood Seam (5A) pit of the Cow Head area of this mine. Order #8366655 is issued today for failure to strip loose materials a safe distance from the top of the highwall in this area, and Order #8366656 is issued today for failure to adequately scale the highwall of loose unconsolidated materials from the highwall in this area. The On-Shift Examination Record Book for this mine indicates no hazardous conditions reported or, corrective actions taken in this area since 11/04/11, continuing through today. The conditions cited in the above orders are obvious to anyone entering the pit area. These conditions should have been found, recorded in the examination record, and corrected before the mining sequence was allowed to continue. This history of the mining industry has shown that failure to conduct adequate examinations exposes miners to hazards such as those conditions which led to the issuance of this order, that are highly likely to cause an accident which would be fatal. This mine was cited previously for this same practice on 11/01/11 (see Citation #8366645). This is an unwarrantable failure to comply with a mandatory standard and constitutes more than ordinary negligence on the part of mine management.

(GX-9). The document also contained a modification, stating:

> The Mine Operator has developed an action plan to address the conditions that initially led to the issuance of this Order. Training has been conducted today with the Mine Foreman's [sic] from both First and Second Shifts, and miners from both shifts, on the Action Plan, which covers stripping loose materials a safe distance back from the top of the highwall, and scaling the highwall to remove loose materials, and adequate examinations of those areas. The Ground Control Plan was covered, and pre-operational examination of equipment was also addressed.

(GX-9). The Order was also amended to change the type of action from a 104(d)(1) Order to a 104(d)(2) Order. (GX-9).

In the instant matter, it is undisputed that the required examination was conducted by Baker in the highwall area. (Tr. 198, 443). Smith had also acted as foreman in the area while Baker was away. (Tr. 185, 229). The highwall was an active area in the mine. It is further undisputed that root balls and other loose material were placed near the edge of the highwall.

(Tr. 149-152, 160-161). The area was developed from November 4, but it was undisputed that nothing had ever been recorded in the book. (Tr. 173-174, 179, 199).

In light of this evidence and my previous findings, I find that a reasonably prudent person familiar with the mining industry and the protective purposes of the act would have recognized that the cited material was not permitted. As I found with respect to Order No. 8366655, the underlying condition constituted a hazard and should have been obvious to Baker. The underlying standard specifically required loose, hazardous material to be stripped a safe distance from the top of the highwall. 30 C.F.R. §77.1001. With his knowledge of the previous citation, Baker should have recorded it in the examination record and taken steps to correct the condition. The failure to do so constituted a violation of §77.1713(a)

In its brief, Respondent argued that the order should be vacated because the underlying order should be vacated. (*Respondent's Post-Hearing Brief* at 20). As discussed *supra*, Order No. 8366655 was validly issued. Therefore, Respondent's argument is not supported by the record.

b. The Violation Was Reasonably Likely To Result In A Fatal Injury And Was Significant And Substantial In Nature.

Inspector Stubblefield found the gravity of the cited danger in Order No. 8366657 as being "Highly Likely" to result in a "Fatal" injury to one miner and that the condition was S&S. (GX-9). These determinations were supported by a preponderance of the evidence.

Respondent's failure to conduct an adequate examination of the cited highwall exposed miners in the area to the hazards discussed in Order No. 8366655. Furthermore, the parties' arguments in support of their positions with respect to this designation were identical to those made with respect to Order No. 8366655. *(Secretary's Post-Hearing Brief* at 44-45, *Respondent's Post-Hearing Brief* at 22-23). As a result, the reasoning provided *supra* with respect to the gravity of Order No. 8366655 is incorporated here by reference. Therefore, I find that Order No. 8366657 was "Reasonably Likely" to result in "Fatal" injuries to one miner and was S&S.

c. Respondent's Conduct Was The Result Of "High" Negligence And An Unwarrantable Failure.

In the order at issue, Inspector Stubblefield found that the operator's conduct was highly negligent in character and the result of an unwarrantable failure. (GX-7). I find that the substantial evidence supports this determination.

With respect to knowledge, Baker was a member of management, he conducted the pre-shift examination in the area, and he was aware that there was material near the edge of the wall. (Tr. 228-229). Further, Baker had specific knowledge that MSHA believed this material was a hazard and a violation of the underlying standard. However, he chose not to record or correct the cited condition. (Tr. 198, 243). Therefore, Respondent knew or should have known that a violation existed and was negligent. The question that remains is the degree of that negligence.

Having reviewed the evidence at length, I have determined that there were no mitigating circumstances present. As a result, I find that the "High" negligence designation is appropriate.

In its brief, Respondent argued that there were several mitigating circumstances present. Specifically, Respondent made the same arguments regarding the examiner's belief about the lack of a hazard, the stable nature of the material present, and the fact that the inspector allowed miners to return to the area. As such, the reasoning provided with respect to negligence in Order No. 8366655 is incorporated here and Respondent's arguments are rejected.

The Secretary also found that the cited condition constituted an unwarrantable failure to comply. I will now turn to the six *IO Coal* factors with respect to that determination:

1. Extent Of The Violative Condition

Baker testified that Respondent would not allow work to occur in the cited area unless a pre-shift examination had been conducted. (Tr. 212, 243). The area had been developed on November 4, which was several weeks before the order was issued. (Tr. 176, 190-191). As a result, many examinations would have been conducted in this area. Therefore, the instant violation was extensive.

2. The Length of Time of the Violation Existed

Stubblefield testified that this area had been developed around November 4 but at no time was the cited condition listed in the record book. (Tr. 173-174, 179, 199). This testimony was unrefuted. Therefore, the condition had existed at least for several shifts.

3. Whether the violation is obvious or poses a high degree of danger

As discussed with respect to the underlying citation, this unrecorded and uncorrected condition was highly dangerous. Miners were working on foot below the root balls and other materials. (Tr. 148-150, 160-161). It was highly likely that one of the miners would be struck by material and suffer a fatal injury. Further, the condition was obvious as anyone entering the area would see the hazard. (Tr. 164-167, 177-178, 184, 188-189). In fact, Respondent's pre-shift examiner, Baker, had seen the condition but had simply failed to list it as a hazardous condition. (Tr. 198, 235-236, 243-244, 246).

In its brief, Respondent argued that the condition posed no hazard. Superficially, it stated that there was no instability on the highwall and miners were allowed to reenter the area to set off a detonation. (*Respondent's Post-Hearing Brief* at 21). These arguments are rejected for the same reasons discussed with respect to gravity, *supra*.

4. Whether the operator had been placed on notice that greater efforts were necessary for compliance or that this condition was an issue.

As with the underlying citation, Respondent received direct, explicit notice in the form of Citation No. 8366644 that loose, hanging materials like the root balls were a hazard. Further, Respondent learned of the importance of listing the loose material in the examination record

from Order No. 8366645. Baker had been responsible for the inadequate pre-shift examination cited in Order No. 8366645 and the instant matter. He agreed with Stubblefield that the instant condition was substantially similar to the earlier citation. (Tr. 192-193, 246). As a result, Respondent knew that this examination was inadequate. Therefore, I find Respondent had notice that greater efforts were necessary for compliance.

5. The operator's efforts in abating the violative condition

Baker conducted examinations of the area and actually saw the underlying condition. (Tr. 198, 235-236, 243-244, 246). He failed to recognize the condition as a hazard. (Tr. 198, 236, 243). There is no evidence of any abatement conducted before the order was issued because of this failure to recognize the hazard.

6. Operator's knowledge of the existence of the violation

As discussed *supra*, the preponderance of the evidence shows that Baker knew or should have known about the violative condition and the hazard it posed. There was no longer any reasonable basis to believe that the cited condition should not be placed in the examination record. Therefore, Respondent knew or should have known that the hanging material was unacceptable and that the examination was inadequate.

In light of the cited condition's large extent, lengthy time, obviousness, high degree of danger, lack of abatement, Respondent's notice, Respondent's knowledge and the fact that Respondent's actions were best characterized as "high" negligence, I find that the violation was an unwarrantable failure on the part of the operator.

e. Penalty

In this matter, the Secretary proposed a penalty of $18,742.00 for Order No. 8366657. Having affirmed the Secretary's determinations in all respects, no deviation from the proposed penalty is necessary. In fact, the proposed penalty is appropriate under the Act. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $18,742.00.

ORDER

It is hereby **ORDERED** that Citation and Order Nos. 8369000, 8369001, 8344920, 8366644, 8366645, 8366655, and 8366657 are **AFFIRMED** as amended. It is hereby **ORDERED** that Order No. 8366656 be **VACATED**.

Respondent is **ORDERED** to pay civil penalties in the total amount of $51,484.00 within 30 days of the date of this decision.[19]

John Kent Lewis
Administrative Law Judge

Distribution:

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[19] 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