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AUG 24 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. EUREKA STONE QUARRY, INC., Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. PENN 2015-12-M A.C. No. 36-05527-363760 Docket No. PENN 2015-176-M A.C. No. 36-05527-375186 Mine: Eureka Stone Quarry, Inc.

DECISION AND ORDER

Appearances: Matthew R. Epstein, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for Petitioner

Stephen B. Harris, Esq., Eureka Stone Quarry, Inc., Warrington, Pennsylvania, for Respondent

Before: Judge John Kent Lewis

Statement of the Case

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801, et seq., ("Mine Act"). On August 12, 2014, an MSHA inspector issued a §103(j) order, and on August 14, 2014, the inspector issued a § 104(d)(1) citation, and two § 104(d)(1) orders to the Respondent arising out of a non-fatal accident that took place at Respondent's quarry.

A hearing was held in Scranton, Pennsylvania on April 19, 2016. After careful review of the parties' post-hearing briefs and reply briefs, the Court issues the following decision.

Stipulations

At hearing, the parties stipulated to the following facts:

1. Respondent was an "operator" as defined in Section 3(d) of the Act, 30 U.S.C §802(d) at the Eureka Stone Quarry, MSHA Mine I.D. No. 36-05527 (hereinafter the "mine") at which the citation and orders in this matter were issued.

2. The operations of the Respondent at the mine are subject to the Act.

3. The above-captioned proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its assigned Administrative Law Judge, pursuant to Sections 105 and 113 of the Act.

4. The citation and orders in this matter were served by a duly authorized representative of the Secretary upon an agent of the Respondent at the date, time, and place stated therein as required by the Act.

5. True copies of the citation and orders in this matter were served on the Respondent and/or its agents as required by the Act.

6. The citation and orders contained in "Exhibit A," attached to the Secretary's Petition in the cases docketed as PENN 2015-0012 and PENN 2015-0176 are authentic copies of the subject citation and orders.

7. Robert Carr was superintendent of the mine on August 12, 2014.

8. Robert Carr was the person responsible for blasting at the mine on August 12, 2014.

9. Robert Carr was at the mine and supervising work on August 12, 2014.

10. There was a blockage in the impact crusher at the mine on August 12, 2014.

11. Robert Carr was supervising work to clear the impact crusher on August 12, 2014.

12. As part of the work to clear the impact crusher, blasting was conducted.

13. As part of the work to clear the impact crusher, Robert Carr went inside the impact crusher.

14. At approximately 3:40 p.m., on August 12, 2014, Robert Carr was injured when rocks fell from above him inside the impact crusher.

Resp't's Br., 2-3.

In addition the parties have stipulated that the proposed penalties in this matter will not affect the Respondent's ability to remain in business. Tr. 7.

LAW AND REGULATIONS

Burden of Proof and Standard of Proof

The burden of persuasion is upon the Secretary to prove the gravamen of a violation by a preponderance of the evidence. *Jim Walter Resources, Inc.*, 28 FMSHRC 983, 992 (Dec. 2006), *RAG Cumberland Resources, Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). This includes every element of the citation. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 872, 878 (Aug. 2008).

Commission precedents have held that "[t]he burden of showing something by a 'preponderance of the evidence' the most common standard in the civil law, simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.'" *RAG Cumberland Resources Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *quoting Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993).

The United States Supreme Court has held that "[b]efore any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty." *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993). The assessment of evidence is a process of weighing, rather than mere counting: "[T]here is a distinction between civil and criminal cases in respect to the degree or quantum of evidence necessary to justify the [trier of fact] in finding their verdict. In civil cases their duty is to weigh the evidence carefully, and to find for the party in whose favor it preponderates." *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 266 (1877).[1]

[1] "What is the most acceptable meaning of the phrase, proof by a preponderance, or greater weight, of the evidence? Certainly the phrase does not mean simple volume of evidence or number of witnesses. *One definition is that evidence preponderates when it is more convincing to the trier than the opposing evidence.* This is a simple commonsense explanation which will be understood by jurors and could hardly be misleading in the ordinary case." 2 McCormick On Evid. §339 (7th ed.), emphasis mine. Indeed the notion of justice being an assessment by weighing has ancient roots, extending at least as far back as the *Iliad*'s Book XXII: "Then, at last, as they were nearing the fountains for the fourth time, the father of all balanced his golden scales and placed a doom in each of them, one for Achilles and the other for Hektor." HOMER, THE ILIAD, BOOK XXII, trans. Samuel Butler, 1898.

Assessment of Credibility

As trier of fact, this Court is free to accept or reject, in whole or in part, the testimony of any witness. In resolving any conflicts in testimony, this Court has taken into consideration the demeanor of witnesses, their interests in the case's outcome, or lack thereof, consistencies or inconsistencies in each witness's testimony, and any other corroborative or conflicting evidence of record. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the Court'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).

Statutory Construction

The first inquiry in statutory construction is, "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43. *Accord Local Union No. 1261*, UMWA v. FMSHRC, 917 F.2d 42, 44 (D.C. Cir. 1990). If, however, the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "Chevron II" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. See *Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2. Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. Chevron, 467 U.S. at 843; *Joy Technologies, Inc. v. Sec'y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), cert. denied, 520 U.S. 1209 (1997).

Turning to the first inquiry, "in ascertaining the plain meaning of the statute, the court must look at the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). Traditional tools of construction, including examination of a statute's text and legislative history, may be employed to determine whether "Congress had an intention on the precise question at issue," which must be given effect. *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989) (citations omitted).

Significant and Substantial Violations

A violation is S&S if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC at 3-4 (Jan. 1984), the Commission further explained:

> 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.

Oak Grove Resources, 37 FMSHRC at 2691-92 (citing *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995)); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988) (approving *Mathies* criteria.))

The *Mathies* test has long been accepted as authoritative. *See Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 160 (4th Cir. 2016) (noting federal appellate courts' uniform adoption of *Mathies* test and parties' recognition of authority of test); *Mach Mining, LLC v. Sec'y of Labor*, 890 F.3d 1259, 1267 (D.C. Cir. 2016) (applying *Mathies* criteria); *Austin Power, Inc., v. Sec'y of Labor,* 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria).

A recent decision by my esteemed colleague Judge McCarthy summarizes recent developments in S&S case law aptly:

> The Commission has held that the S&S determination should be made assuming "continued normal mining operations." *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1990-91 (Aug. 2014) (citing *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985)). The assumption of continued normal mining operations considers "the length of time the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued," without any assumptions as to abatement. *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff'd sub nom. Peabody Midwest Mining, LLC, v. FMSHRC,* 762 F.3d 611 (7th Cir. 2014); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989); *see also Knox Creek*, 811 F.3d at 165-6 (upholding Commission's rejection of "snapshot" approach to evaluating S&S for accumulations violation); *Mach Mining*, 809 F.3d at 1267-8 (citing with approval *McCoy Elkhorn*'s discussion of operative timeframe for S&S). The Commission has repeatedly stated that the S&S determination must be based on the particular facts surrounding the violation. *See, e.g., Wolf Run Mining Co.*, 36 FMSHRC 1951, 1957-59 (Aug. 2014) (remanding S&S finding for further consideration of relevant circumstances); *Black Beauty*, 34 FMSHRC at 1740; *Peabody Coal Co.*, 17 FMSHRC 508, 511-12 (Apr. 1995); *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1998).
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> A line of cases beginning with the Seventh Circuit's decision in *Buck Creek, supra*, has established that an operator cannot rely on redundant safety measures to mitigate the likelihood of injury for S&S purposes. *See, e.g., Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015). Commission precedent indicates that the likelihood of injury is the key consideration in determining

> whether a violation is S&S. *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996) (comparing S&S inquiry, which focuses on the "reasonable likelihood of serious injury," with gravity inquiry, which focuses on "the effect of the hazard if it occurs").[2]

Mach Mining, Inc., LAKE 2014-0077, LAKE 2014-0132, 2016 WL 3226147 (May 2016) (ALJ McCarthy).

Following established precedent Commission judges have generally evaluated the reasonable likelihood of injury at the third *Mathies* prong rather than at the second *Mathies* prong. "There is no requirement of 'reasonable likelihood'" encompassed in this [second prong] element. *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1280 (Sept. 2010). The likelihood of harm should be accounted for in the third *Mathies* element which requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836.[3]

Negligence

Section 110(i) of the Mine Act authorizes the Commission to assess penalties for violations of the Act, and includes the operator's negligence as one of the criteria the Commission is required to consider in assessing a penalty. To start the process, MSHA proposes

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[2] Commission precedent has established special rules for applying the Mathies test in two situations:

> First, for violations that contribute to the hazard of an ignition, fire, or explosion, the Commission has held that the third Mathies element is satisfied only when a "confluence of factors" is present that could have triggered an ignition, fire, or explosion, under continued normal mining operations. *Zeigler Coal Co.*, 15 FMSHRC at 953; Texasgulf, 10 FMSHRC at 501; see, e.g., *Paramount Coal Co. Va., LLC*, 37 FMSHRC 981, 984 (May 2015). Second for violations of emergency safety standards, the Commission assumes the emergency when making the S&S evaluation. See, e.g., *Cumberland Coal Res.*, LP v. FMSHRC, 717 F.3d 1020, 1027-8 (D.C. Cir. 2013); *Mill Branch Coal Corp.*, 37 FMSHRC 1383, 1394 (July 2015).

Mach Mining, Inc., LAKE 2014-0077, LAKE 2014-0132, 2016 WL 3226147(May 2016) (ALJ McCarthy).

[3] See, however, the recent holding in *Knox Creek Coal Corp v. Secretary of Labor*, 811 F.3d 148 (4th Cir. 2016), in which the Fourth Circuit held that "for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm." See also the recent and perceptive decisions of my esteemed colleagues, ALJs McCarthy and Moran, discussing a possible shift of focus from the third to second element of Mathies in determining the likelihood of injury. *Northshore Mining Company*, No. LAKE 2015-0340-M, slip op at 1 (April 11, 2016) (ALJ McCarthy); *Oak Grove Resources*, LLC, SE 2009-261-R (April 2016) (ALJ Moran) at 4.

a penalty pursuant to section 105(a) of the Act, 30 U.S.C. §815(a). MSHA has published regulations explaining its role in the penalty process, including how it arrives at proposed penalty amounts. *See* 30 C.F.R. Part 100.

The Part 100 regulations address how MSHA calculates most proposed penalties in light of the statutory criteria the Commission must consider, and explains how MSHA views each of the criteria. *See* 30 C.F.R. §100.3. With regards to the negligence criteria, MSHA has adopted a formulaic approach, categorizing negligence into five different levels, from "no" negligence to "reckless disregard," based on the existence of a mitigating circumstance, or multiple such circumstances, for the violation. 30 C.F.R. §100.3 (d); *see generally Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3106 (Dec. 2014) (Comm'r Cohen, concurring.)[4]

The Commission has recently explained that judges are not required to apply the level of negligence definitions in Part 100 and may evaluate negligence from the starting point of a traditional negligence analysis[5] rather than the Part 100 definitions. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015); *accord Mach Mining, LLC v. Sec'y of Labor*, 804 F.3d 1259, 1263-4 (D.C. Cir. 2016).

Moreover, the Commission in *Brody* held that judges in making their negligence determinations were not to be limited to an evaluation of potential mitigating circumstances but should instead consider "the totality of the circumstances holistically." *Brody*, 37 FMSHRC at 1702.

In determining the existence and degree of negligence associated with an alleged violation, a Commission judge must consider the duty of care accompanying the mandatory standard at issue.

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

> "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an

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[4] *See also* §100.3, Table X- Negligence, which provides for 0 penalty points where there is "no negligence" (the operator exercised diligence and could not have known of the violative condition or practice); 10 penalty points for "low negligence" (the operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances); 20 penalty points for "moderate negligence," (the operator knew or should have known of the violative condition or practice but there are mitigating circumstances); 35 penalty points for "high negligence" (the operator knew or should have known of the violative condition or practice and there are no mitigating circumstances); 50 points for "reckless disregard" (the operator displayed conduct which exhibits the absence of the slightest degree of care).

[5] Under a traditional negligence analysis the operator is negligent if it fails to meet the requisite standard of care – a standard of care that is *high* under the Mine Act. *Brody*, at 1702.

operator met its duty of care, we consider what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

> *JWR*, 36 FMSHRC at 1975; *see, e.g., id.* at 1976-77 (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated.)

Brody, 37 FMSHRC at 1702.

Unwarrantable Failure

In *Sec'y of Labor v. Manalapan Mining Co.*, 35 FMSHRC 289 (Feb. 2013), the Commission reviewed the factors to be evaluated in determining unwarrantable failure:

> In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).
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> Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, including (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *See IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999). These seven factors need to be viewed in the context of the factual circumstances of a particular case, and some factors may be irrelevant to a particular factual scenario. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Nevertheless, all of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated, or whether mitigating circumstances exist. *Id.*; *IO Coal*, 31 FMSHRC at 1351.

Manalapan Mining Co., 35 FMSHRC at 293.

The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See BethEnergy Mines, Inc.*, 14 FMSHRC at 1243-44 (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering the area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation to be aggravated and unwarrantable based upon "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland Coals*, 10 FMSHRC at 709 (finding unwarrantable failure where roof conditions were "highly dangerous"). The Commission has specifically noted that the factor of dangerousness, by itself, may warrant a finding of unwarrantable failure, though the absence of significant danger does not necessarily preclude a finding of unwarrantable failure. *Manalapan Mining*, 35 FMSHRC at 294.

While an administrative law judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge. *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

Penalty

The Act requires that the Commission consider the following statutory criteria when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business; (3) the operator's negligence; (4) the operator's ability to stay in business; (5) the gravity of the violation; and (6) any good-faith compliance after notice of the violation. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. §820(i). The Commission is not required to give equal weight to each of the criteria, but must provide an explanation for any substantial divergence from the proposed penalty based on such criteria. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

SUMMARY OF TESTIMONY

Ralph Bennett

At hearing, MSHA Inspector Ralph Bennett testified on behalf of the Secretary.[6] Bennett had been an accident investigator for 5 to 6 years, having received formal training for such at the National Mine Academy. Tr. 19. He had worked with jaw crushers/impact crushers. His job duties included operation, maintenance, blockage, clearance, and rebuilding. Tr. 19-20. Bennett had used dynamite to clear blockages, noting that dynamiting was an accepted practice but a "last resort" to clear blockages. Tr. 20.

[6] Bennett had worked as an MSHA inspector since October 2006. He had previously worked in mining operations, both surface and underground, metal and non-metal, for 33 years. Tr. 17. His past positions included common laborer, shovel cleaning under conveyor belts and licensed blaster, blasting for nearly ten years. Tr. 18. As an MSHA Inspector Bennett had taken courses at the National Mine Academy. He had served an apprenticeship for 2 years, working with senior veteran inspectors, and had attained his MSHA inspector certification. Tr. 19.

Bennett described the operation of an impact crusher. Material is fed into the crusher from the top and "gravity fall[s] into any number of rollers."[7] Tr. 20. In the instant case, there was a pair of rollers running in opposite directions. The material would fall between the rollers, with the smaller chunks falling through the gap between the rollers. Tr. 20-1. A jam would occur in the crusher when material was too large to actually fall down and get gripped by the crusher teeth so as to be pulled into the system to be ground. The chunks that were too large would bridge above the rollers and jam the crusher. Tr. 21.

On August 12, 2014, Bennett's supervisor, Gary Merwine, had phoned Bennett, advising him that a miner was trapped at Eureka Stone and to proceed to the scene. Merwine subsequently called Bennett to notify him that the miner had been rescued and that Merwine had issued a 103(j) Order.[8] Tr. 23. Upon arriving at the mine site, Bennett changed the 103(j) Order to a 103(k) Order.[9] Tr. 23; *see also* Government Exhibit S-1.

Bennett opined that the Respondent had done a "very good job" of preserving the accident scene. Tr. 25. Bennett met with James Furey, the Respondent's Environmental Safety Director, and advised Furey of the modification of the (j) order to a (k) order. Tr. 25-6. The victim of the accident was Robert Carr, who was also the superintendent of Eureka Stone Quarry. Tr. 26.

Bennett went to the crusher accident site and had taken photographs of the scene, sending the pictures to MSHA's nearby district office. Tr. 27. Bennett ensured that the crusher had been locked out and that the integrity of the accident site had been preserved. Tr. 27. The crusher had been locked out to prevent inadvertent starting and further injury. Tr. 27-8.

Locking out the crusher only controlled the crusher's rollers. Although nothing could be started mechanically, boulders already in the hopper could still fall because of gravitational energy. Tr. 28. Boulders on the edge of the feeders could fall at any time. Tr. 29. If someone

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[7] "Gravity fall," meaning the material rolls down the crusher chute before free-falling into rollers, its descent made possible by the "natural law" of gravity.

[8] Section 103(j) provides, in pertinent part, that in the event of an accident the operator must notify the Secretary and take appropriate measures to prevent the destruction of evidence: "In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary, the Secretary or an authorized representative . . . shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activities in such mine." 30 U.S.C. §813(j).

[9] Section 103(k) provides, in pertinent part, that in the event of an accident an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the mine: "In the event of an accident . . . an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine[.]" 30 U.S.C. §813(k).

wanted to stop the material from falling, he would need to clean the feeder of excess rock and pull the stones from the edge so that material could not fall down to something below. Tr. 29.

The Respondent's crusher was located immediately at the end of the feeder with a connecting chute. Tr. 29. Anything coming off the feeder would fall down the chute and drop into the crusher. Tr. 29. It was not possible to run the crusher without operating the feeder; both were interconnected to work as one complete system. Tr. 29-30.

The photograph in Government Exhibit S-6 depicted the side entrance to the impact crusher. Tr. 30; S-6[10]. The impact crusher was totally enclosed inside the structure. Tr. 30. On the left hand side at the top of the crusher was an opening for the material to come off the feeder, slide down the chute and drop five or six feet down into the impact rolls. The side and feeder openings were the only openings into (and out of) the crusher. Tr. 30.

Government Exhibit S-7 depicted the flow chart of how material came off the feeder, slid down the chute, dropped into the crusher, and was processed between two crusher rolls, the smaller pieces dropping between the rollers, going out the discharge, and ultimately going for further processing or storage. Tr. 30-1.

The photograph in Government Exhibit S-8 depicted a photograph of the feeder hopper taken on August 13, 2014, the center of the photograph showing the discharge end of the conveyor feeder where material dropped into the chute and into the impact crusher. Tr. 31. Multiple stones could be seen at the very edge of the feeder. Tr. 31. The size of the stones observed in the feeder hopper could be estimated by comparing them to the two miners standing on the catwalk. Tr. 32. Bennett estimated the boulders' sizes to be between 2 ½ feet to 3 feet wide and 3 feet long with unknown thickness. Tr. 33. Given that limestone weighs roughly about 150 lbs. per cubic foot, the stones probably weighed more than several hundred pounds. Tr. 33.

The photograph in Government Exhibit S-9 depicted a view taken by Bennett from the walkway directly above the chute where the two miners in Government Exhibit S-8 were standing. Tr. 33. The photograph showed rocks piled, not just at the edge, but heaped up to a height of several feet above the edge. Tr. 33. Once any of these rocks fell, they would go down the sloped chute (which was 8 feet long) and drop 5 feet vertically into the impact crusher. Tr. 34.

Bennett opined that it would be "absolutely" unsafe to work inside the crusher while rocks were lodged in the hopper as depicted in the photographs. Tr. 34. Given that the stones could fall at any time, were several hundred pounds in weight, and would gain gravitational momentum coming down the chute, dropping vertically for five feet, an individual, even with a hard hat, couldn't "take a couple of hundred pounds of rock on [his] head." Tr. 34.

After various discussions between Bennett and Respondent's employees as to how to make the crusher safe for access, it was ultimately decided that an on-site excavator would be

[10] The identifying exhibits in this case will be referred to, in evidence proffered by the Secretary, as S-X, by the Respondent, R-X, and by the Court, C-X, respectively.

utilized. Tr. 36. The excavator would clean materials from the edge and place it in such a way so as to block the hopper, preventing any materials from inadvertently falling or being pushed downward. Tr. 36-7. Because the excavator could both clean the hopper out and block the chute, allowing for the safe removal of rocks and tools, the violation was terminated. Tr. 37-8.

The photograph in Government Exhibit S-10 depicted the actual throat of the impact crusher, showing the boulders that had trapped Mr. Carr still in place. Tr. 35.

The photograph in Government Exhibit S-11 depicted where Mr. Carr had been seated inside the crusher at the time of the accident. Tr. 37.

Bennett had learned from miners' testimony that blockages would occur "several times a month." Tr. 40. Depending upon where the "feed stock" came from, materials broke in different ways, sometimes not falling into the crusher rollers, but bridging instead.[11] Tr. 40. According to miners' and management statements, the instant blockage was the worst they had ever seen. Tr. 40. There was a new operator on the day of the accident who failed to recognize that a blockage was going to happen until it was too late. Tr. 40. Routinely when blockages occur – "a couple of times a month" – one or two blasts could dislodge the obstructed materials before they could build up "so full." Tr. 41.

On the date of the accident the crusher operator, after recognizing how severe the blockage had become, shut down the crusher and notified Carr of such. Carr, along with other employees of the Respondent, determined they should attempt a "mud cap": putting an explosive charge on top of the rock to try to shatter it and shake the pile loose so that material could fall down onto the rollers and be crushed. Tr. 42. Before detonating the first shot, miners unlock the crusher and start it. This activates the crusher's rollers. Tr. 43. The intention is that the initial blast will shake or break material up enough to unclog the blockage and that the crusher will clear itself. Tr. 43.

However, the initial blast did not work; material fell and the rollers "jammed tight" with rock. Tr. 43. The miners realized that they would need to blast and dig their way down to the bottom, continuing to blast and then clear. Tr. 44. Miners went into the crusher, handpicked material, and handed it out the window. Tr. 44. 16 blasts were necessary to finally get through the buildup. Tr. 44. After a blast, miners would go into the crusher and hand pick materials to hand out. Tr. 44. Because the crusher was jammed, miners had to clear their way in, all the way through the crusher, clear the crusher rolls and then start up again. Tr. 44-5.

The rocks were being handed out through the 22" by 29" side door. A miner inside the crusher would hand out the rocks to miners on the deck and pass the rocks via a human chain. Tr. 44. Bennett was unsure if miners went in every time after a blast, but several miners had related that they themselves had gone into the crusher multiple times. Tr. 44-5. One to three miners were inside the crusher at any given time. Tr. 45.

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[11] Bridging occurs when materials discharge into the crusher do not fall into the rollers, but accumulate on top of such.

The trapping and injuring of Mr. Carr had taken place at around 10:00 A.M., after the miners had been blasting and cleaning all day long. Tr. 46. Carr announced that he would perform the final clean out. Tr. 46.

Carr advised Bennett that, once inside the crusher, he could hear rocks coming but did not have time to do anything to protect himself. The rocks knocked him down. Fortunately, they did not hit his head, but trapped, and pinned his legs. Tr. 46.

Alerted by Carr's screams, miners jumped into the crusher to help him. Medical assistance was called for. Tr. 46. Pursuant to Carr's instructions, miners obtained a "porta-power," a handheld hydraulics kit, and hoist, to free his legs from the two boulders that had come down. One of the boulders weighed approximately 400 pounds and the other weighed approximately 1,000 pounds. Tr. 47.

Other than looking upward through the chute, the miners did not conduct any post-blast examination. Tr. 48. Unless a miner enters the crusher at either end, he cannot see into the hopper. Tr. 48. A miner would need to walk around on the elevated walkway and look down the throat or go to the main dump station where the excavator had been eventually placed and look over into the hopper. Tr. 49.

Bennett visited Carr at the hospital on August 14, 2014. Carr was lucid, but sedated, having sustained 19 fractures in his lower legs. Tr. 50. Carr related that the crusher had been blasted 16 times. He heard the rocks tumbling, but did not have time to react. Tr. 51.

Based upon his observations and investigation, Bennett determined there were three violations. Tr. 52.

Citation No. 8801650 was issued based upon Respondent's failure to ensure that the flow of materials had stopped at the crusher throat prior to entering the unit for cleaning. Tr. 52, *see also* Government Exhibit S-2. Before miners entered the crusher and were exposed to rock falls, they should have ensured that the boulders (depicted in Government Exhibit S-9) sitting on the edge of the feeder had not been loosened or dislodged by the blasts. Tr. 52. If the Respondent had cleaned the rock back ten feet with push rods so that any dislodged material near the edge could not have fallen down the chute, the citation would not have been issued. Tr. 53. Considering that the violation involved hundred-pound rocks falling five feet onto miners below, the violation was evaluated as reasonably likely to result in a fatal injury and graded to be Significant and Substantial (S&S) in nature. Tr. 53-4. Given that there were two other people inside the crusher in addition to Carr, the number of people affected was actually three and not one individual as initially designated. Tr. 53, *see also* Government Exhibit S-2 at Section 10 D. Because Carr, who was a member of management, performed the unsafe operation and had actual knowledge of such, the level of negligence was rated as high. Tr. 55.

The violative conduct was found to constitute an unwarrantable failure: the hazardous condition was extensive and existed on a recurring basis during the 16 blasts; a member of management, a licensed blaster, had knowledge of the unsafe operation and hazardous condition;

miners had been exposed to possible fatal injuries multiple times; rocks could have come down after any one of the 16 blasts. Tr. 56-8.

Order No. 8801651 alleged a violation of §56.16002(a)(1) based upon the Respondent's failure to ensure there was a mechanical means or device in place to protect miners below in the event that the lock was pulled out and the feeder started. Tr. 58; *see also* Government Exhibit S-3. Bennett testified that locking and tagging out the controller would have decreased the likelihood of restarting the feeder – although it would not alone have prevented additional material from falling. Tr. 58-9. The violation actually occurred in the hopper; anything that came out of the hopper must go through the crusher. Tr. 58. Respondent should have installed a gate or used a bucket to block materials from falling into the crusher so that no miner would be exposed to the hazard. Tr. 59. Even if the hopper had been cleaned back so as not to violate section 56.16002(c), there would still have been a violation of section 56.16002(a)(1). Someone could still go in and start up the crusher operator causing movement of material still present in the hopper. Tr. 60. The mechanical device would have to be placed somewhere between the material that was in the hopper and where it would discharge from the hopper so that nobody could be exposed to a falling rock hazard. Tr. 60.

The section 56.16002(a)(1) violation was assessed similar to the section 56.16002(c) violation for the same reasons described previously. Tr. 61. The same miners and management personnel were involved during the same time period, engaging in the same unsafe activities. The violations arose out of the same event.

Bennett opined that the cleaning out of crushers constituted "normal operations" within the framework of section 56.16002(a)(1). Tr. 61-2. According to Respondent's history such rock jamming conditions as occurred in the instant case had occurred "numerous times" before. Tr. 62. The fact that the Respondent may not have been cited previously would not affect Bennett's judgment: there may have been different circumstances involving past crusher jams including the number of blasts and methods of detonation. Tr. 62.

Order No. 8801652 was issued based upon the Respondent's failure to conduct "post-blasting" examinations after each of the secondary blasts inside the crusher in violation of section 56.6306(g). . Tr. 63, *see also* Government Exhibit S-4. Somebody down in the crusher could not observe what was going on in the hopper. Tr. 63. According to their own statements, the miners and victim had not gone up to the feeder to assess whether there had been any change in conditions due to the blasts. Tr. 63-4. During a post-blast examination, Respondent should have gone to the top of the crusher to ensure that material hadn't become loose and that the roof wasn't going to fall on those entering the crusher. Tr. 64. After a blast, one would not know what might have been changed, damaged, repositioned, or what may have been structurally "sacrificed." Tr. 64.

Although there is no set check list for post blast examinations, an individual who has passed the blaster's examination and who has the knowledge to assess the surroundings must go out and check the post-blast surroundings. Tr. 63-4.

This violation was also assessed as reasonably likely to be fatal in nature for the same reasons discussed previously.[12] Tr. 66. Given the high degree of care imposed upon a person directing the workforce, who was both a superintendent and licensed blaster, and the high degree of risk to miners who were repeatedly exposed to hazards during the three and one half hour blast time period, high negligence and unwarrantable failure were also found. Tr. 66-7.

On cross-examination, Bennett confirmed that when the feeder is shut off, the supply of materials to the crusher is shut off. Tr. 70. When he had arrived at the mine site, the system had been locked out. Tr. 70.

Carr had advised Bennett that his post blast examination consisted of looking up the chute – which Bennett found to be inadequate. Tr. 71.

Nobody had suggested to Carr that, of the blockages which occurred "every month or two," any had been like this instant blockage. Tr. 71. Bennett denied that Carr had stated that the crusher had filled with material blockage only three or four times in the past. Tr. 71.

The violation of 30 C.F.R. §56.16002(a)(1) had become apparent to Bennett after discussions with the District office. Tr. 73. Respondent could have violated section 56.16002(a)(1) without having violated section 56.16002(c). One citation involved material still laying on the top of the feeder at the edge where the material could free fall at any time; the other citation required that something be done to ensure that, if the feeder were cleaned half way back, somebody could not start the crusher and run material through the rear. Tr. 74-5.

Robert Carr

At the hearing Robert Carr appeared on behalf of the Respondent.[13] On the date of the accident, Carr had been called by the feeder operator and told that the crusher had been "blocked all the way up." Tr. 78. Carr characterized the blockage as not being "normal," or "routine," stating that it had happened only 3 or 4 times since he has become quarry superintendent. Tr. 78.

Carr disagreed with the inspector's assertion that blockages happened a couple of times a month. While one single rock might go across the "impellers" or get jammed inside, blockages would not fill up all the way as here. Tr. 79. When such more routine blockages occurred where a rock would bridge the impeller, Carr would customarily shut everything down, shut the impellers and feeder off, lock them out, open the crusher door, reach in, set the blast, get

[12] Bennett again erred in finding one individual affected rather than three individuals being affected.

[13] Carr had been employed by the Respondent for 31 years. Tr. 76. He started out a laborer and in 1999 became foreman of Chalfont Quarry. Tr. 76. He became a licensed blaster after taking a three day course through the Commonwealth of Pennsylvania and having passed testing. (Tr. 77.)

everybody out of the way, start everything back up and blast the rock. Tr. 79. Generally, this would clear the blockage. Tr. 79.

On the date in question, Carr went to the site and saw that stone was blocked all the way up the chute. Tr. 79. Everything was locked out.[14] The levers in the electric rooms were padlocked so that nobody could turn them on. Tr. 79-80. Both the feeder and crusher were locked out. Carr went back to the crusher and started to blast the bigger stones so miners could reach in and start a chain to empty the crusher out. Tr. 80. Prior to starting to remove rock, Carr concluded a full inspection of the area, including looking at the hopper from above. Tr. 81. During the first six to eight blasts, nobody would climb into the crusher because the stone was still flowing slowly down the chute. Tr. 81. Miners would just reach in and take all the stones out that they could handle. Tr. 81. After a blast, miners would wait "a couple of minutes" before entering the crusher to allow gas from the blast(s) to ventilate.[15] Tr. 82.

Before miners entered the crusher after a blast, someone would look up the chute to ensure it was empty: one could look through the chute to the "throat of the hopper" to see if there were any stones likely to fall into the crusher. Tr. 83. This process was repeated 16 times. Tr. 83.

After the 16th blast, the door of the crusher was opened to allow gases to escape. Carr looked inside the feeder and then looked upward through the chute. Tr. 84. Carr reported that "it seemed like nothing had moved."Tr. 84. Carr also made an inspection from above, looking through the feeder before he entered after the 16th blast.[16] Tr. 84.

Because miners had been working all day removing rocks from the crusher, Carr volunteered to go into the crusher to remove the last rock. Tr. 84. Two rocks were remaining, which Carr handed out. He then requested poles to clean out between the walls, as well as the impellers themselves, which were jammed with small material. Tr. 84.

Carr heard something in the feeder "lurch forward," and he tried to jump out of the way. Tr. 85. A rock hit the chute, coming down and catching his left leg. Tr. 85. Another rock came down and crushed his right leg. Tr. 85.

Carr instructed his miners to call 9-1-1. First responders and Mr. Furey arrived shortly thereafter. Tr. 85. After assessing the situation, Carr sent for a "porta-power" and "come-alongs" with slings. The rocks were removed and first responders transported Carr to the hospital. Tr. 86.

Carr denied that he had thought it unsafe to enter the crusher – either for himself or for other employees. Tr. 86.

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[14] The feeder could run even if the motors go off. The feeder and two impeller motors were locked out. Tr. 79.

[15] Carr later amended the waiting period to 3 to 4 minutes. Tr. 82.

[16] Carr testified that he had gone above to have a Gatorade. Tr. 84.

There was a previous blockage during which an MSHA inspector was on site and that inspector did question the safety of the procedures used to remove stone from the crusher. Tr. 85.

When Carr looked down the hopper before going into the crusher after 16th blast, the rocks did not appear to have been as close to the edge as they are depicted in Government Exhibits S-8 and S-9. Tr. 87.

Although the excavator used to block the feeder had been on site, a narrower bucket had to be brought in the next day to fit into the feeder. Tr. 87-8.

Carr had returned to his foreman position at Chalfont Quarry last fall. Tr. 88.

On cross examination, Carr testified there were blockages in the past, but only three or four that had been from the impellors to the feeder itself. Tr. 88. It was not an uncommon occurrence for rocks not to fit into the mouth of the crusher or to bridge across the impellors. Tr. 89. Since the accident, rocks had bridged across probably two or three times. Tr. 89. Miners are very routinely sent into the crusher to weld. Tr. 89. It is necessary to ensure the hopper and crusher are empty before the welding work was performed. Tr. 90.

The crusher chamber was approximately four feet across. Tr. 90.

Carr testified that he had checked the hopper from above after *each blast* because he had to go up to the trailer to secure dynamite. Tr. 93. He was, however, shown a statement from a prior deposition in which he reportedly stated that he "didn't go up every time . . . but *every other* time because we (he) had to go to the trailer to get more dynamite." Tr. 93, emphasis mine.

After the last blast, Carr did not go up for more dynamite but he went to get a Gatorade while the crusher was ventilating. Tr. 95.

James Furey

At the hearing James Furey appeared on behalf of the Respondent. Furey had been employed by Eureka Stone Quarry for 16 years and was its environmental safety director. Tr. 95-6.

On the day of the accident, Furey was called by a labor foreman who indicated that Carr had an accident in the crusher. Tr. 96. Furey – who was also a volunteer firefighter – immediately contacted MSHA and was advised that a (j) order would be issued. Tr. 97. When Furey arrived at the site, Carr was still trapped. Tr. 98. Carr's rescue instructions were in the process of being carried out. Tr. 98. Once Carr was evacuated, the site was secured pursuant to MSHA directives. Tr. 99.

Furey did not consider the site as depicted in Government Exhibit S-9 to be safe to work underneath. Tr. 101.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Citation No. 8801650

I. Contentions of the Parties

Given that miners had entered the crusher chamber before the discharge of materials from the hopper had completely ceased and given that two rocks actually fell onto Carr on August 12, 2014, the Secretary contends that this standard had been clearly violated. Sec'y's Reply Br., at 3.

Respondent, however, maintains that the feeder and crusher had been locked out and that, "although two rocks subsequently fell into the crusher . . . supply and discharge had ceased." Resp't's Br., at 9. Further, the Respondent maintains that because an MSHA inspector had observed "the very same conduct previously and did not state it was unsafe," no citations for a violation should have been issued. *Id.* Respondent finally argues that no *Chevron II* analysis is necessary, given the clear statutory language. Resp't's Br., at 9, n. 1.

II. The Secretary has carried his burden of proof by the preponderance of the evidence that the Respondent violated 30 C.F.R. §56.16002(c)

30 C.F.R. §56.16002 provides as follows:

> (c) Where persons are required to enter any facility listed in this standard for maintenance or inspection purposes, ladders, platforms, or staging shall be provided. No person shall enter the facility until *the supply and discharge of materials have ceased* and the supply and discharge equipment is locked out. Persons entering the facility shall wear a safety belt or harness equipped with a lifeline suitably fastened. A second person, similarly equipped, shall be stationed near where the lifeline is fastened and shall constantly adjust it or keep it tight as needed, with minimum slack.

30 C.F.R. §56.16002(c), emphasis added.

This Court is constrained to reject the Respondent's arguments on multiple grounds.

The plain language of the regulation provides that "no person shall enter the facility until the supply and discharge of materials have ceased." 30 C.F.R. §56.16002(c). It is undisputed that moments after Carr entered the crusher chamber, large rocks came tumbling down the hopper chute, almost killing him. Obviously, the discharge of materials into the crusher had not ceased.

In ascertaining the plain meaning of a statute, the Court must look at the particular statutory language at issue as well as the language and design of the statute as a whole.[17] *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

The Administrative Law Judge finds that the "specific clear and unambiguous language" of §56.16002(c) prohibits entry into a 'facility' (crusher chamber) until the supply and discharge of 'materials' (rock) has ceased. Although the crushing apparatus and feed conveyor had been locked and had been tagged out of service at the main control panel, there was indisputably an ongoing supply and discharge of materials in the crusher chamber as starkly evidenced by the fall of boulders into the chamber.

Neither party has cited specific Commission case precedent as to the proper interpretation of §56.16002(c). Further, as noted by the Respondent, neither party initially contended that a *Chevron II* analysis would be necessary in the case *sub judice*. Resp't's Br., at 9, n. 1.

To the extent that the regulatory language is deemed to be ambiguous, this Court finds that the Secretary's interpretation of such is reasonable and should be afforded *Auer* deference.[18] Sec'y's Reply Br., at 2.

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[17] The Commission has observed in the past that "[i]t is well established that regulations should be read as a whole, giving comprehensive, harmonious meaning to all provisions." *Morton International, Inc., Morton Salt,* 18 FMSHRC 533 at 536 (Apr. 1996). In *Morton Salt* the Commission quoted approvingly the Supreme Court's language in *Smith v. United States*, 508 U.S. 223, that "[j]ust as a single word cannot be read in isolation, nor can a single provision of a statute.'" *Morton Salt*, 18 FMSHRC 533 at 537, citing *Smith v. United States*, 508 U.S. 223, 233 (1993).

The Commission has consistently held that a mandatory safety standard should be interpreted with an eye toward the plain meaning of the standard, "unless such a meaning would lead to absurd results." *Wolf Run Mining Co.,* 32 FMSHRC 1669, at 1679 (Dec. 2010.); *see also Rock of Ages Corp.*, 20 FMSHRC 106, 122 (Feb. 1998), *aff'd*, 170 F.3d 148, 161 (2d Cir. 1999).

[18] This Court notes the Supreme Court ruling in *Christen v. Harris County*, 529 U.S. 576, 588 (2000) in which the Court refused to give deference to an agency's interpretation of an "unambiguous regulation," observing that to defer in such a case would allow the agency to "create *de facto* a new regulation." *Id.* In this case, however, it is the Respondent who is attempting to create *de facto* a new regulatory meaning for the unambiguous phrase "until . . . discharge of materials has ceased." The self-serving Humpty-Dumpty nature of such construction is apparent:

> "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master – that's all."

Lewis Carroll, Through the Looking Glass, 205 (1872).

The Administrate Law Judge also must observe that throughout its brief the Respondent appears to misapprehend the strict liability nature of the regulations.[19] When a near fatal accident as within takes place, the Mine Act imposes strict liability on mine operators regardless of whether they acted in good faith or had actual knowledge of the hazards.[20] This Court has no

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[19] *See* Respondent's argument: "It's easy for the Secretary to say after the fact that someone was injured, therefore, there must have been a violation." Resp't's Br., at 9.

[20] *See Stillwater Mining Co v. FMSHRC*, 142 F.3d 1179, 1184 (9th Cir. 1998): "Knowledge and culpability, however, are not relevant to the determination of whether there was a violation."

To illustrate this point another way, consider the case of *Musser Engineering, Inc.*, concerning the failure of the operator of the Quecreek No. 1 Mine to discover the precise layout of the nearby abandoned Harrison No. 2 Mine – a mine that the operator had no real opportunity to survey. *Musser Engineering, Inc., and PBS Coals, Inc.*, 32 FMSHRC 1257, 1259 (Oct. 2010).

The Harrison No.2 Mine closed in 1963 and flooded sometime after it was sealed, thus rendering the mine too hazardous for survey. *Id.* The Pennsylvania Department of Environmental Protection had misplaced the final mine map for Harrison No. 2, making it nigh-impossible for the operator to know with any certainty the architecture of the abandoned mine. *Id.* An exhaustive multi-year search by the operator required visits to numerous state and federal offices before an undated Department of the Interior (DOI) map was discovered in Greentree, Pennsylvania. *Id.*, at 1260. Ultimately Consol Energy, Inc., provided the current operator with an undated and uncertified map that was deemed more recent that the DOI map. *Id.*

Despite this wealth of effort, miners at the Quecreek No. 1 Mine accidentally broke into the flooded ruins of the Harrison No. 2 Mine on July 24, 2002. *Id.*, at 1258. Nine endured a harrowing escape while another nine trapped below ground wrote letters to loved ones and prepared to drown as the water rose around them. *Id,* at 1259. Eventually the nine miners trapped below were rescued and survived. *Id.*

In judging the operator's conduct in that case, the Commission reasoned:

> In any event, PBS's argument that the citation in this case required it to do the 'impossible' because the precise location of the Harrison No. 2 Mine workings was unknown ignores the precept that 'operators may be held liable for violations of mandatory safety [standards] under the Mine Act even if they did not have knowledge of facts giving rise to the violation.' S. Br. at 20, citing *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 156 (2nd Cir. 1999); *see also Stillwater Mining Co. v. FMSHRC*, 142 F.3d 1179, 1183-84 (9th Cir. 1998). As noted by the Second Circuit, this is consistent with the purpose of the Mine Act because it encourages 'greater vigilance' and avoids creating an incentive for operators 'to avoid gaining knowledge.' *Rock of Ages,* 170 F.3d at 155.

Musser Engineering, Inc., and PBS Coals, Inc., 32 FMSHRC at 1272 (Oct. 2010).

doubt that Carr had a good faith belief that the discharge of materials had ceased before he entered the crusher chamber.

However, §56.16002(c) does not provide that a miner may enter a facility if he has a good faith or reasonable belief that the supply and discharge of material has ceased or no actual or constructive knowledge of an existent hazard involving the supply and discharge of materials. It simply prohibits the entry into a facility until the supply and discharge of materials has ceased – a safety standard that Carr violated to his clear detriment.

The Administrative Law Judge is also compelled to reject another supporting argument advanced by the Respondent in its brief: "given the fact that an MSHA inspector watched the very same conduct and did not state that it was unsafe or that it was a violation of any regulation and did not issue any citations for violations of the mining regulations, a citation should not have been issued this time." Resp't's Br., at 9. This argument ignores clear Commission precedent that MSHA's lack of prior enforcement of safety standards at a mine does not demonstrate an absence of violations or hazardous conditions. *See Austin Power Co.*, 29 FMSHRC 909, 920 (Nov. 2007) (a past, inconsistent enforcement pattern by MSHA inspectors does not prevent MSHA from proceeding to apply the correct interpretation of a standard.)[21]

In assessing the Secretary's photographic evidence, Respondent argues that there may have been post-accident shifting of rocks in the crusher prior to the Secretary's photographs being taken and that therefore the Secretary's photographs "are not reliable evidence of the situation as it existed at the time of the accident." Resp't's Reply Br., at 3, *see also* Government's Exhibit S-9.

This Court disagrees.

The Secretary need only prove the existence of a fact by the preponderance of the evidence. There may have been some post-accident shifting of materials. However, this Court is persuaded that it was "more likely than not" that the accident site pre- and post-accident was essentially the same as depicted in the Secretary's photographs. In reaching this finding the Administrative Law Judge again observes that large boulders, weighing hundreds of pounds, fell upon Carr.[22] These rocks did not magically move. Either they were perilously close to the chute

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[21] When he was a young and callow attorney, the undersigned had a case which illustrates the meritlessness of the Respondent's argument as to the issue of violation. My client had been cited by a code enforcement officer for driving his overweight truck over a municipal bridge. An even larger truck had passed over the bridge just before my client's truck, but had not been cited. I passionately argued how "unfair" it was for my client to have been cited and not the previous offender. The magistrate crankily but properly pointed out: "Counsel, just what does that have to do with your case? The code enforcement officer may have been daydreaming earlier. The issue is whether or not your client's truck exceeded the weight limit."

[22] This Court heard testimony that Carr suffered 19 individual fractures in his lower legs following the accident. Tr. 50.

opening, as shown in the Secretary's photographs, or lodged inside the chute (which would contradict Carr's testimony as to what he observed looking upward from the crusher chamber).

Given the total circumstances and plain meaning of the statutory language, §56.16002(c) was clearly violated.

III. The violation of 30 C.F.R. § 56.16002(c) was reasonably likely to result in fatal injury and was significant and substantial in nature

A violation is significant and substantial (S&S) if "based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in injury or illness of a reasonably serious nature." *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). Given that Mr. Carr was nearly killed by large rocks falling downward through a chute, one need not go through an exhaustive *Mathies* analysis to determine that the instant violation was S&S in nature.

A violation is significant and substantial (S&S) if "based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in injury or illness of a reasonably serious nature." *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). Though the occurrence or non-occurrence of accidents or injuries is not dispositive of the S&S analysis, it should be noted that in this instance Carr was nearly killed by large rocks falling downward through a chute.

The first element of the Mathies test has been met, as there was a clear violation of 30 C.F.R. §56.16002(c). Second, as was persuasively argued by the Secretary, this violation contributed to a discrete safety hazard: the danger that unimpeded materials would fall from the hopper onto miners working in the crusher below. *See also* Sec'y's Br., 15-6, 20-1, as to hazards presented by the Respondent's violations of §56.16002(a)(1) and §56.16002(c).

Even if no accident had in fact taken place, the surrounding circumstances almost guaranteed that an injury would inevitably occur. One need not engage in sophisticated Pascalian risk analysis to determine such: there was a lack of a mechanical device or means to prevent the fall of materials; there was a large volume of materials, including huge rocks in the hopper; there were numerous blasts and vibrations from quarry operations and quarry traffic that could dislodge materials in the hopper and chute; there was a crusher which was designed so as to enable gravitational forces to pull materials downward from the hopper through the chute into the crusher chamber; there was a lack of speedy or safe egress for exposed miners attempting to flee materials that might fall into the enclosed crusher chamber. Arguably the grim reality of Carr's accident itself is an example of the reasonable likelihood that the hazard contributed to would result in an injury, satisfying *Mathies*' third element.

Materials, including large boulders weighing hundreds of pounds, falling in on a miner, inarguably create a reasonable likelihood of serious, if not fatal, injury. And the terrible injuries sustained by Mr. Carr, while not establishing *Mathies*' fourth element in and of themselves, support the Court's finding that there was a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Order No. 8801651

I. Contentions of the Parties

The Respondent does not dispute that there was not a mechanical device or other effective means in place on August 12, 2014. Rather, Respondent contends that at the time of the accident, the quarry was not engaged in "normal operations." Resp't's Br. at 10, Resp't's Reply Br., at 4-6. *Inter alia,* the Respondent argues that the crusher had been taken out of operation when the impeller jammed. *Id.* Because the crusher and feeder were locked out and could not be restarted, neither could be "put in normal operation." *Id.* at 10-11. The Respondent further argues that the blockage which filled up the crusher on August 12, 2014 was not routine or "normal." *Id.* at 11. Unlike blockages that could be cleared with one or two blasts without requiring miners to enter the crusher chamber to clear it before resuming operations, the blockage at issue necessitated 16 blasts, required miners to enter the crusher chamber, and was in fact the worst blockage in the quarry's history. Resp't's Br. at 11.

The Secretary contends that the miners on August 12, 2014 were in fact engaged in "normal operations" when they entered the crusher chamber to clean and clear the severe rock jam. Sec'y's Br. 14. Further, the Secretary contends that the term "normal operations" is not ambiguous. Sec'y's Reply Br., 5. The fact that the blockage was far worse than usual did not remove the acts of cleaning and clearing from the rubric of "normal operations."

II. The Secretary has carried his burden of proof by the preponderance of the evidence that the Respondent violated 30 C.F.R. §56.16002(a)(1)

§56.16002 provides, in pertinent part, the following:

> **(a)** Bins, hoppers, silos, tanks, and surge piles, where loose unconsolidated materials are stored, handled or transferred shall be—
>
> **(1)** Equipped with mechanical devices or other effective means of handling materials so that *during normal operations* persons are not required to enter or work where they are exposed to entrapment by the caving or sliding of materials;

30 C.F.R. §56.16002(a)(1).

When Carr and other miners entered the crusher chamber on August 12, 2014, they were engaged in "normal operations" of cleaning and clearing a blockage. The phrase "normal operations" does not appear to be explicitly defined in the Act or regulations. As discussed *infra*, this Court finds that the plain meaning of "normal operations" would encompass the Respondent's violative conduct. To the extent that this phrase is ambiguous, *Auer* deference should be given to the Secretary's interpretation of §56.16002(a)(1) so that the operator's

cleaning and clearing of the occasional blockages, including the instant blockage, would be considered part of "normal operations."[23]

The ALJ observes that the Respondent has muddled the within statutory interpretation controversy by conflating and confusing the essential issue of whether the *clearing of blockages* is part of "normal" operations at the quarry with the questions of whether blockages are "normal" occurrences at the quarry, and whether the instant blockage was "abnormal" in severity.

The Respondent has offered no case law that supports its contentions. The Secretary, however, has cited pertinent precedent in support of his position. Sec'y's Br., at 14. In *Secretary v. LaFarge Construction Materials*, 20 FMSHRC 1140, 1144 (1998) the Commission held that the mine operator's failure to remove loose materials before allowing a miner to enter a bin violated §56.16002(a)(1), that the violation was S&S and that the violation was the result of an unwarrantable failure. In *LaFarge*, a miner climbed inside a "surge bin" to weld a metal patch. During his repair, rocks began falling down on the miner, entrapping him in the bin. The Commission specifically rejected the operator's argument that the standard was inapplicable because the acts of patching a hole in the surge bin did not constitute "normal operations." *LaFarge*, 20 FMSHRC at 1144, *see also W.S. Frey v. Secretary* 57 F.3d 1068, 1995 WL 356494 at *3 (4th Cir. 1995) (approving the Commission's finding that clearing blockages is part of normal operations).

The Secretary argues that if the provision in question is ambiguous, he is entitled to interpretive deference under *Auer*. And the Secretary observes, "[i]t is well established that a standard must be interpreted in a manner that furthers the purposes of the standard and the underlying statute, not in a manner that thwarts those purposes. *Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 320 (D.C. Cir. 1990)." Sec'y's Reply Br., at 2, *further citations omitted.*

While there is some controversy in the record as to how often blockages occurred, it is evident that blockages did occur throughout the work year.[24] Certainly it was reasonably foreseeable that, during the course of business through the year, miners would be required to clean out blockages.

Inter alia, the Respondent argues that because the blockage in question was uncommonly severe in nature, its clearing should not have been considered "normal operations." This argument is patently specious. The statutory purpose of §56.16002(a)(1) is to protect miners in situations – whether common or not – where "unconsolidated materials" might cave in or slide

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[23] *See Auer v. Robinson*, 519 U.S. 452 (1997) wherein the Supreme Court reaffirmed that deference should be afforded to an agency's interpretation of ambiguous regulatory language pursuant to its earlier holding in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

[24] *See, e.g.*, Tr. 40, 41, 78-9, 88.

upon them.[25] Even conceding that the blockage at issue was the worst in the quarry's history, the cleaning and clearing of blockages was part of the quarry's "normal operations" during a business year. The meaning of this term is plainly unambiguous. Removing blasted rock from a crusher is within the ambit of "normal operations."

The Respondent's arguments are painfully reminiscent of the sophistic defenses raised by responsible parties at the time of the Katrina disaster.[26] Government authorities were charged with maintaining levees in New Orleans in a safe condition as part of "normal [flood control] operations." Because Katrina was one of the worst hurricanes in the City's history, authorities shamefully claimed they bore no responsibility for the levee's failures.[27]

To accept the Respondent's arguments would lead to the absurd result of allowing miners to be placed in harm's way every time there is a blockage and an operator fails to have a mechanical device or effective means to prevent entrapment. This the Undersigned will not do.

Therefore – notwithstanding the infrequent and irregular nature of blockages and the uncommon severity of the blockage in question – the Respondent plainly violated §56.16002(a)(1).

III. The violation of 30 C.F.R. §56.16002(a)(1) was significant and substantial in nature, reasonably likely to result in a fatal injury, was the result of high negligence on the part of the operator and was the result of an unwarrantable failure.

As noted in *Consolidation Coal Co.*, *supra*, the "likelihood of injury" is the key consideration in determining whether a violation is S&S. Addressing the above *Mathies* criteria *seriatim*, there was a clear violation of the mandatory safety standard. *Mathies*'s second step is also patently met: there was a discrete safety hazard contributed to by the operator's violation of §56.16002(a)(1). "Loose, unconsolidated material" could fall from the hopper onto a miner entering the crusher chamber with no mechanical device or other effective means to prevent such. The ALJ notes that the Commission has held that the Secretary "need not prove a reasonable likelihood that the violation itself will cause injury" and that "the absence of an injury producing-event when a cited practice has occurred does not preclude a determination of S&S." *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011). The fact that an accident occurred in this case does not therefore prove that an accident was made more likely. However, given the within accident, the existence of a reasonable likelihood that the hazard contributed to

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[25] Indeed, the primary purpose of the Mine Act is to protect miners from unsafe conditions and practices which – hopefully due to the enlightened passage of health and safety regulations and vigorous enforcement of such – have become an increasingly uncommon phenomenon.

[26] To further extend this analogy, hurricanes, like blockages do not have a set schedule.

[27] This Court is reminded of the old theologically bankrupt "Act of God" defenses raised by mine operators and coal company insurers any time there was a catastrophe caused by blatant safety violations.

would result in injury – *Mathies*'s third step – is supported by the actual events in this case. Two large dislodged boulders in fact *fell* upon Carr. The actual injuries sustained by Carr, including 19 fractures, may establish that the fourth step of *Mathies* is satisfied on their own, but this Court finds that an injury contemplated in this case is likely to be reasonably serious. That the injuries could have easily been fatal in nature is beyond dispute: only good fortune saved Carr from having his skull crushed in.

IV. The Respondent was highly negligent in its violation of §56.16002(a)(1).

The Respondent's conduct in this case rose to the aggravated level of high negligence when it violated §56.16002(a)(1). The operator knew or should have known that blasting rocks in the hopper/crusher might loosen dislodged materials which, if unimpeded, could slide on or cave in on miners who entered the chamber below. Only after Carr was nearly killed did the mine operator put an excavator and bucket in place to ensure that rocks dislodged by blasting would not fall down upon miners entering the crusher. §100.3(d) expressly provides that a mine operator is held to a *high standard of care*: he must be alert for conditions and practices that might affect miners' safety and must "take steps necessary" to prevent hazardous conditions.

Using the formulaic approach utilized by MSHA in assessing the degree of negligence displayed by the Respondent, the Administrative Law Judge can find no mitigating circumstance to vitiate a finding of high negligence.[28]

In also considering "the totality of the circumstances holistically" under *Brody*, this Court finds that the Respondent violated the high statutory standard of care demanded.

V. The Respondent's failure to have a mechanical device in place or other effective means of handling materials was unwarrantable in nature.

This Court also finds the Respondent's failure to have a mechanical device in place or other effective means of handling materials was unwarrantable in nature. Considering the totality of the circumstances and specifically taking into account the *Manalapan* factors cited *supra*, the Respondent's failure to comply with §56.16002(a)(1) was aggravated conduct constituting an unwarrantable failure.

A. Length of time

The violation of not having a mechanical device in place or other effective means of handling materials had existed at least throughout the four hour period during which 16 blasts were shot. Given the inherent dangers associated with blasting, including the obvious danger posed by possibly dislodged large rocks, the violation lasted for clearly an unreasonable length of time. *See also* the Secretary's arguments in Sec'y's Br., at 16-7, with which this Court concurs.

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[28] 30 C.F.R. §100.3(d), Table X, provides there is high negligence when the operator "knew or should have known of the violative condition or practice, and there are no mitigating circumstances."

B. Extent of violation

The violation extended throughout the hopper/crusher which operated as one unit. As noted by the Secretary, "the hazardous condition that resulted from the lack of a device was large, dangerous, and extensive." Sec'y's Br., at 18.

C. The violation was obvious

It is undisputed that a mechanical device or other effective means of handling materials was not in place when the boulders fell upon Carr. Without engaging in *flagellum equus mortus*, this Court finds that the obviousness of the violation was and should have been readily apparent.

D. The operator knew or should have known of the existence of the violation

Regardless of an MSHA inspector's alleged prior failure, to have cited the Respondent in a similar situation, this Court agrees with the Secretary's contentions that Respondent and its agent had notice of the hazard. Sec'y's Br., at 18. As pointed out by the Secretary, the Respondent's own safety director, Furey, who arrived on the scene after the accident, admitted that miners should not have worked in such an unsafe environment. *See also* Sec'y's Br., at 18.

One need not be an expert in Newtonian or Einsteinian gravitational physics to recognize that large objects, possibly dislodged by explosives, will, unless somehow impeded, fall downward. A reasonably prudent person familiar with the mining industry and the protective purpose of the standard would have recognized the safety hazard posed in entering a crusher chamber post-blasting with no effective means in place to prevent dislodged materials from falling onto miners below.

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

The operator eventually abated the violative condition after the accident by putting an excavator with proper sized bucket in place. However, as the Secretary properly points out, the Respondent had made no attempt to comply with the standard during the entire pre-accident time period: miners worked repeatedly underneath an unimpeded load in the hopper without any device in place to protect them from rocks caving or sliding upon them. *See also* Sec'y's Br., at 18-9.

F. Whether the operator had been placed on notice that greater effects were necessary for compliance

As discussed *infra* the fact that MSHA did not enforce this safety standard in the past does not vitiate a finding of violation. Notwithstanding such, even if technically the operator had not been placed upon notice that greater efforts were necessary, this factor, standing alone, does not lessen the aggravated nature of the Respondent's conduct under the total circumstances.

G. The violation posed a high degree of danger

As noted *supra*, the Commission has specifically held that the factor of dangerousness, by itself, may warrant a finding of unwarrantable failure. This Court can envision few situations posing a higher degree of danger to miners than the instant violation: boulders looming overhead, possibly dislodged by dynamiting, and no device or means to prevent their sudden fall onto miners below. Based upon this factor alone, this Court could be persuaded that a finding of unwarrantable failure is justified.

Citations No. 8801650 and Order No. 8801651 Are Not Duplicative

This Court essentially concurs with the arguments of the Secretary that Citation No. 8801650 and Order No. 8801651 are not duplicative. Sec'y's Br., at 22-3.

The Commission has recently reviewed the test for determining whether citations or orders are duplicative:

> The Commission has held that citations or orders are not duplicative as long as the standards allegedly violated impose separate and distinct duties. *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003, (June 1997); *see also Sumpter v. Sec'y of Labor*, 763 F.3d 1292, 1301 (11th Cir. 2014); *Spartan Mining Co.*, 30 FMSHRC 699, 716 (Aug. 2008); *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (Mar. 1993) (violations are not duplicative merely because they emanate from the same events); *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 40 (Jan. 1981) (hole in fence around electrical power transformer and leaving fence grate unlocked constituted separate offenses). In reviewing whether standards impose separate duties, the Commission does not view standards in a vacuum. Rather, because the question is whether citations are duplicative, the standards are examined as they are being applied to the operator through the citations in question. *See Western Fuels-Utah*, 19 FMSHRC at 1004 & n. 12.

Kentucky Fuel Corporation, 38 FMSHRC ____, slip op. at 3, Nos. KENT 2011-1557, KENT 2011-1558 (July 2016).

The duty imposed by §56.16002(a)(1), as cited in Order No. 8801651, is to require operators, where loose unconsolidated material is present, to have mechanical devices or other effective means of handling materials in place so that miners are not exposed to entrapment. This duty is clearly separate and distinct from the duty imposed by §56.16002(c), as referenced in Citation No. 8801650, that requires operators to disallow entry into a facility until the supply and discharge of materials have ceased.

Order No. 8801652

I. Contentions of the Parties

The Secretary contends the Respondent violated 30 C.F.R. §56.6306(g) because post-blast inspections were not conducted before work resumed in the blast area on August 12, 2014. Sec'y's Br., 23. The Secretary further contends that the violation was S&S and reasonably likely to cause a fatality to one miner and was the result of high negligence on the part of the operator. *Id.* at 24. The Secretary finally asserts this violation constituted an unwarrantable failure of a mandatory safety standard, as Carr was a blaster and member of management on scene. *Id.* at 25.

The Respondent contends that the Secretary failed to prove that Eureka Stone had violated 30 C.F.R. §56.6306(g) by allowing work to resume in a blast area before a post-blast examination addressing potential blast related hazards had been conducted. Resp't's Br., at 13. The Respondent argues also that, as Mr. Carr had no reason to believe that any materials would fall into the crusher, his actions were entirely reasonable. Resp't's Br., at 16.

II. The Secretary has carried his burden of proof by the preponderance of the evidence that the Respondent violated 30 C.F.R. §56.6306(g)

30 C.F.R. §56.6306(g) provides that:

> (g) Work shall not resume in the blast area until a post-blast examination addressing potential blast-related hazards has been conducted by a person with the ability and experience to perform the examination.

There is some controversy in the record as to whether a post-blast examination was conducted after *each* of the 16 blasts at the accident site. At hearing, Inspector Bennett testified that "by their own statements, the miners and the victim stated that they did not go up to the feeder to see what had changed, to see what else may or may not have occurred as a result of their blasting." Tr. 63. However, at hearing, Carr testified that "after each blast . . . I would go up the steps, walk by the feeder, look in, get another stick of dynamite." Tr. 62. Carr further testified that in addition to walking above the crusher and looking down in, he also looked up through the chute to the opening, the throat of the hopper and he conducted his examination thusly every time anybody went into the crusher. Tr. 83.

Carr however, was confronted at hearing with prior conflicting depositional testimony in which under oath he testified that "I didn't go up *every time* but I went up, like, every other time because *we* had to go to the trailer to get more dynamite." Tr. 92-3.

The Administrative Law Judge is uncertain as to which of Carr's hearing or depositional recollections was the more accurate. Obviously, a failure to have conducted a post-blast examination after *each* of the 16 dynamitings, would have been a *per se* violation of §56.6306. However, even accepting that there was in fact an inspection conducted after *each* blast, the Administrative Law Judge finds, as the Secretary argues, that the inspections were inadequate.

That an accident had, in fact, taken place following the 16th blast in itself raises questions as to whether the Respondent's inspection addressed all potential blast-related hazards.

There is no dispute that the integrity of the accident scene had been preserved by the Respondent prior to Inspector Bennett's arrival. Both his observations and the Secretary's photographs of the crusher convincingly establish that there was a build-up of large rocks perilously close to the edge of the hopper chute – which posed a clear and present danger to any miner entering the crusher below. Tr. 30-4, Government Exhibits S-8, S-9.

Carr's testimony that the rocks did not appear close to the edge when he looked down to the hopper before going into the crusher after the 16th blast was not convincing to this Court. *See also* Tr. 86-7.

Applying the reasonably prudent person test in light of this case's factual circumstances, this Court finds that a reasonably prudent blaster would not enter the crusher until a proper post-blast examination had been conducted. The Court finds that the Respondent violated 30 C.F.R. §56.6306(g).

III. Respondent's post-blast examinations were as a matter of fact and law demonstrably "inadequate"

In a recent decision, the Commission has essentially held that there is an implied "adequacy" requirement in safety standards involving work place examinations.

In *Sunbelt Rentals, Inc.*, falling material had knocked a miner unconscious while he was working in a preheat tower. *Sunbelt Rentals, Inc., et al.*, 38 FMSHRC ____, slip op. at 2, Nos. VA 2013-275-M, VA 2013-276-, VA 2013-291-M (July 2016). In inspecting the accident site, an MSHA inspector observed a build-up of materials which could have fallen through a six-foot long hole between the 6th and 7th levels *above* where the injured miner was working. *Id.* The inspector found that the Respondent had violated §56.18002(a) due to its failure to "adequately" inspect the area above where employees where working. [29]

The Administrative Law Judge dismissed the proceedings based, *inter alia*, upon findings that a competent and qualified person had in fact examined the work place and that there was no specific statutory language or notice that work place examinations were required to be adequate. 35 FMSHRC 3208, 3214-15 (Sept. 2013) (ALJ McCarthy).

Upon review, the Commission remanded the ALJ's decision, disagreeing that an "operator must only examine the workplace to a standard of care slightly surpassing not conducting the examination at all." *Sunbelt, slip op.*, at 7. The Commission further held that a proper construction of §56.18002 should be consistent with Commission case law construing

[29] 30 C.F.R. §56.18002(a) provides that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such actions."

regulations to further the protective policy of the Act and to avoid an absurd result. *Id.,* at 7, n. 16.

The Commission accordingly held that a proper construction of §56.18002(a) requires that a workplace examination "be adequate in the sense that it identify conditions which may adversely affect health and safety that a reasonably prudent competent examiner would recognize." *Sunbelt*, at 9.

In determining "adequacy"[30] in instances where there is a "broadly worded" standard (such as here) the Commission observed that the reasonably prudent person test is consistently applied:

> The reasonably prudent person test provides that an alleged violation is appropriately measured against whether a reasonably prudent person, familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting correction within the purview of the applicable standard. *Spartan Mining Co., Inc.,* 30 FMSHRC 699, 711 (Aug. 2008); *see also Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

Sunbelt, at 8.

The fact pattern and issues presented in *Sunbelt* are remarkably similar to the case *sub judice*. There are mandatory examinations which in fact had been performed at the mine sites by qualified personnel. There were build-ups of materials overhead that posed direct dangers to miners working below. The build-ups were either not detected or not recognized as potential hazards. The material build-ups actually led to accidents. The Respondent contested the correct statutory construction of the safety standards in question.

In reaching its within conclusion, this Court is guided by the Commission's admonitions in *Sunbelt* that mandatory safety standards should be construed in such a way as to promote miner's health and safety and avoid absurdist interpretation. Given such and considering the totality of the circumstances, this Court is constrained to find that Carr's post blast examinations were demonstrably inadequate.

In reaching this conclusion, this Court emphasizes that it found Carr to have been a competent, qualified, and experienced examiner who was indeed courageous, albeit reckless, in entering the crusher chamber. The Court further finds that, based upon his post-blast examinations, Carr had no doubt entered the crusher chamber *with a good faith belief* that there was no existent hazards overhead.

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[30] The Commission has noted that the requirement of "adequacy" is "not a novel theory of regulatory interpretation" but a consistent concept in Commission case law "repeatedly applied to broadly worded mandatory safety standards." *Sunbelt*, at 8 n. 17.

However, a good faith belief, standing alone, does not transmutate a deficient examination into an adequate one.

This Court well recognizes that there must be a mixed *subjective/objective analysis* in assessing the conduct of parties. *See Robinette v. United Coal Co.*, 3 FMSHRC 803 (Apr. 1981) (wherein the Commission held that a miner's *honest perception* of a potentially hazardous condition must be one made in *good faith and be reasonable under the circumstances*); *see also Newmont USA, Ltd.,*, 37 FMSHRC 499 (Mar. 2015) (wherein this Court's decision was remanded precisely because it had failed to determine whether, under the total circumstances, the operator's good faith belief that it was in compliance with the regulations was also *objectively reasonable*).

This Court finds that prior to the within accident there was a large buildup of materials in the hopper with large rocks bordering on the chute's edge. This Court found Bennett's testimony credible that he had observed such at the accident scene – a scene whose integrity had been preserved after the accident. The Secretary's photographic exhibit 9 corroborates Bennett's testimony on this point and in part contradicts Carr's testimony. Further, that an accident had in fact taken place confirms the existence of hazardous materials overhead which were unimpeded by any mechanical device or means.

Given such and given the clear dangers of dislodgement or sudden movement of unimpeded materials due to blasting, surrounding vibrations, and gravitational forces – this Court concludes that Carr conducted post blast examinations that were manifestly inadequate. Pursuant to the Commission's above cited holdings in *Newmont* and *Sunbelt*, Carr's good faith belief that no post blast conditions existed which could "adversely affect safety and health" was *objectively unreasonable*. Carr's post-blast examinations as a matter of fact and law failed to identify hazards that a reasonably prudent competent examiner would have recognized.

IV. The violation of 30 C.F.R. §56.6306 was significant and substantial in nature, reasonably likely to result in a fatal injury and was the result of high negligence on the part of the operator and was the result of unwarrantable failure.

Much of the above analysis regarding the gravity assessment of §§56.16002(c) and 56.16002(a)(1) is applicable to the instant violation and is hereby adopted without full recitation thereof. The failure to conduct adequate post-blast examinations created a discrete safety hazard: miners could be exposed to uncontrolled rocks which, in the instant matter, could tumble down an 8 foot chute and then fall 5 feet vertically directly upon them or as here, indirectly, after bouncing off the crusher chamber walls. Tr. 33-4.

Given the accident that occurred and the injuries sustained by Carr, the reasonable likelihood of serious and fatal injury is clearly proven.

V. The Respondent was highly negligent and its failure to comply with the standard was unwarrantable.

Given that Carr was both a licensed blaster and quarry superintendent he violated his high duty of care in conducting inadequate post blast examinations. *Brody*, at 1702.

The very high degree of danger posed by the violation of §56.6306 instantly in and of itself arguably justifies a finding of unwarrantable failure. Given *inter alia* the extent and obviousness of the violative condition discussed *supra*, the Respondent's failure to conduct adequate post-blast inspections was aggravated in the extreme. Even if the factor of dangerousness does not by itself establish unwarrantable failure, the other *Manalapan* factors in combination certainly establish such.

A. Length of time

The violation of not resuming work until a post-blast examination had been conducted existed at least for the period wherein Carr entered the crusher before conducting an adequate post-blasting examination. It is possible, however, the violation had existed for the entire four hour blasting period. As stated *supra*, given the inherent dangers associated with blasting, including the obvious danger of dislodged large rocks, the violation clearly lasted for an unreasonable length of time.

B. Extent of violation

The violation extended throughout the hopper/crusher which operated as one unit, as mentioned *supra*.

C. The violation was obvious

Given, *inter alia*, the size and volume of materials in the hopper, the danger of sudden shifting or dislodgement due to 16 blasts, the fact that an accident had in fact happened, Carr's failure to conduct an adequate post-blast examination was obvious. The testimonial and photographic evidence presented by the Secretary outweigh the Respondent's protestations to the contrary. Patently, potential post-blast hazards had not been detected by Carr so as to ensure the safety of the crusher chamber.

D. The operator knew or should have known of the existence of the violation

The victim of the accident was a certified blaster and a senior member of management. With his years of experience in the field, as well as the safety of the miners under his authority to consider, Carr knew, or should have known, that the post-blast accident site in question required more adequate examination than that which was performed.

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

The operator did not abate this violation until after the accident took place. I therefore find this factor weighs against the operator.

F. Whether the operator had been placed on notice that greater effects were necessary for compliance

In his discussion of the *Manalapan* factors supportive of a finding of unwarrantable failure, the Secretary did not present evidence that the Respondent had been cited for the same or similar violations in the past. *See also* Government Exhibit S-15. This factor however standing alone does not vitiate a finding of unwarrantable failure.

G. The violation posed a high degree of danger

The degree of danger in this case was unquestionably high. Judging from either the severe injuries actually inflicted on Carr or the potential fatal injures he could have endured, the danger here is likely death. As noted *supra*, the Commission has specifically held that the factor of dangerousness, by itself, may warrant a finding of unwarrantable failure. This was neither a trivial nor technical violation. A miner was nearly killed as a result of the failure to conduct adequate post-blast examinations. The violation posed an unwarrantably high degree of danger.

Penalty

In reference to the special and regular assessments proposed by the Secretary for each of the within violations, the Administrative Law Judge can find no reason for any substantial divergence therefrom. The Secretary correctly calculated and properly took into account the Section 110(i) criteria in assessing the proposed penalties.[31] *Inter alia*, the Respondent has stipulated that the proposed penalties would not affect its ability to remain in business. It is also worth noting the Respondent's representations that "if it is determined that the Citations were properly issued and that Eureka violated the regulations cited, Eureka does not contest the reasonableness of the proposed civil penalties assessed for Citations No. 8801650 and 8801652." Resp't's Br., at 2. Instead, the Respondent challenges the "proposed civil penalty assessed pursuant to Citation No. 8801651," contending it is "not fair and equitable and should be reduced." *Id.*

[31] The six statutory factors the Commission must take into account in assessing a penalty are (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. §820(i).

The Secretary's penalty regulations and assessment formula, though not binding, serve as useful reference points in helping this Court navigate to its own independent decision regarding proper, just, and fair penalty amounts.

In *Brody Mining, LLC*, the Commission has reiterated that:

> the Part 100 regulations apply only to the *proposal* of penalties by MSHA and the Secretary of Labor; under both Commission and court precedent, the regulations do not extend to the independent Commission, and thus the MSHA regulations are not binding in any way in Commission proceedings. *JWR Res. Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014); *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984), *aff'g* 5 FMSHRC 287 (Mar. 1983) ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties ... we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission.")

Brody, at 1701-2.

Given the totality of the circumstances, including the high degree of danger posed by the violations, the high negligence of the operator, and the operator's unwarrantable failure to observe mandatory safety standards at the quarry, the Administrative Law Judge finds that the proposed penalties of the Secretary were proper, fair, and just.

The Administrative Law Judge agrees with the Secretary's arguments that he reasonably exercised his discretion to specially assess penalties in this case because the conditions warranted such pursuant to 30 C.F.R. §100.5. *See also* Sec'y's Br., at 25-9.

The Administrative Law Judge specifically rejects the Respondent's argument that the specially assessed penalty for Order No. 8801657, alleging a violation of §56.16002(a)(1), was "neither fair nor equitable." Resp't's Br., at 17-8. Having a backhoe with its bucket in place was a simple means to prevent the caving and sliding of rocks which could entrap, injure, or kill miners. Government Exhibit S-12. The Respondent's failure to provide such was akin to playing Russian Roulette with miners' lives. That no prior accidents had occurred is not a mitigating factor but just "dumb luck" that there was no bullet in the chamber when the trigger was pulled previously.

Given, *inter alia*, essentially the same gravity and negligence assessments associated with all three violations, the Respondent also argues there was no rational basis for the Secretary to propose a civil penalty of $2,000 for two of the violations and $52,500 on the third violation. *See* Sec'y's Br., at 18. This argument is of course a double-edged sword, as it could just as easily be argued that the same $52,500 special assessment should be applied on all 3 violations. That the Secretary declined to do so is supportive of a fair and equitable penalty assessment.

ORDER

Order No. 8801651 is affirmed as issued. Citation No. 8801650 is affirmed as issued. Order No. 8801652 is affirmed as issued.

Accordingly, it is hereby **ORDERED** that the operator pay a penalty of $56,500.00 within 30 days of the issuance of this order.[32]

John Kent Lewis
Administrative Law Judge

Distribution:

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[32] 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