

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue NW, Suite 520N
Washington, D.C. 20004

AUG 24 2016

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

v.

SAIIA CONSTRUCTION, LLC,
Respondent

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

v.

DARRELL RAGLAND, employed by
SAIIA CONSTRUCTION, LLC,
Respondent

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

v.

FREDERICK LOONEY, employed by
SAIIA CONSTRUCTION, LLC,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. SE 2011-127-M
A.C. No. 01-02985-235903 IKJ

Mine: Omya Alabama Plant

Docket No. SE 2012-206-M
A.C. No. 01-02985-276234 A

Mine: Omya Alabama Plant

Docket No. SE 2012-207-M
A.C. No. 01-02985-276235 A

Mine: Omya Alabama Plant

CORRECTED DECISION

Appearances: Jeremy K. Fisher, Esq., U.S. Dept. of Labor, Office of the Solicitor, Atlanta, Georgia, for Petitioner;

John W. Hargrove, Esq., Bradley Arant Boult Cummings, LLP, Birmingham, Alabama, for Respondent.

Before: Judge Bulluck

This Decision **CORRECTS** typographical errors in the case caption and body, and adds a footnote regarding penalty payment.

These cases are before me upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) on behalf of his Mine Safety and Health Administration (“MSHA”), against Saiia Construction, LLC (“Saiia”), Darrell Ragland, and Frederick Looney, pursuant to sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. §§ 815(d) and 820(c). The Secretary seeks a civil penalty of \$42,600.00 against Saiia for a violation of his mandatory safety standard found at 30 C.F.R. § 56.6311(b); a civil penalty of \$3,000.00 against Darrell Ragland, individually; and a civil penalty of \$3,300.00 against Frederick Looney, individually, for knowingly authorizing, ordering, or carrying out the violation.

A hearing was held in Birmingham, Alabama. The following issues are before me: (1) whether Saiia violated the standard; (2) whether the violation was significant and substantial; (3) whether the violation was an unwarrantable failure to comply with the Secretary’s mandatory safety standard; (4) whether Darrell Ragland is individually liable for the violation; (5) whether Frederick Looney is individually liable for the violation and, if so; (6) the appropriate penalty for each violation. The parties’ Post-hearing Briefs are of record.

For the reasons set forth below, I **AFFIRM** the Order, as issued, and assess penalties against Respondents Saiia, Ragland, and Looney.

I. Stipulations

The parties stipulated as follows:

1. Respondent, Saiia Construction, LLC, is engaged in a business which affects commerce.
2. Respondent, Saiia Construction, LLC, is subject to the Federal Mine Safety and Health Act of 1977, as amended.
3. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this case pursuant to section 105 of the Act of 1977.
4. MSHA Inspector Mitchell Smallwood was acting in his official capacity when he issued Respondent Order No. 6517482 on May 19, 2010.

5. True copies of the Order referenced in the previous stipulation, together with all appropriate modifications and abatements, were served on Respondent or its authorized agents, as required by the Act.
6. Copies of the subject Order and notes of alleged violation at issue in this proceeding are authentic and may be admitted into evidence for purposes of establishing their issuance, but not for the purpose of establishing the truthfulness or relevancy of any statements asserted therein.
7. The Administrative Law Judge has the authority to assess the appropriate civil penalty under section 110(i) of the Act, if she also finds that the Order at issue states a violation of the Act and the Regulations.
8. The proposed civil penalties related to the MSHA enforcement action at issue in this proceeding would not adversely affect Respondent Saiia Construction, LLC's ability to remain in business.
9. Respondents Darrell Ragland and Frederick Looney were at all relevant times agents of Saiia within the meaning of section 110(c) of the Act.

Sec'y Br. at 2; Tr. 16-18.

II. Factual Background

Omya, Incorporated, Alabama Division ("Omya"), owns the Omya Alabama Plant, a surface marble mine in Sylacauga, Alabama. At all times relevant to this case, Saiia, an independent contractor, conducted all mining operations at the Brown and Omya quarries, both located within the Plant. Another contractor, Apache Construction ("Apache"), performed and oversaw all blasting activities at the quarries. Resp't Br. at 2; Sec'y Br. at 3; Tr. 52-53, 235. The blasting operations involved separate, but interrelated, activities on the part of Saiia and Apache employees. Saiia was responsible for blocking and guarding the quarry entrances and, after blasting was completed, Apache would give the "all clear" signal. Tr. 236. The stripping crew, Saiia employees, would then haul away the blasted material. Tr. 53-55, 153. Quality overburden, usually marble, was transported to a stockpile, while other material of little value, such as dirt, mud and dolomite, was hauled to an area called "the dump." Tr. 54-55. Lead operator Darrell Ragland supervised the day-to-day activities at the Brown quarry, and superintendent Frederick Looney supervised the Omya quarry, had oversight responsibility for both quarries, and was Ragland's supervisor. Tr. 56, 233-34, 260, 262-64.

On Friday, April 9, 2010, Apache conducted a blast at the Brown quarry at 11:28 a.m.¹ Ex. P-7 at 1. According to Saiia's time sheets, the following employees, among others, were

¹ Despite some erroneous references to the Omya quarry during the course of the hearing, the events at issue in this case took place at the Brown quarry.

working at the Brown quarry that day: Looney; Ragland; excavator operator Steve Harbin; truck driver Rayford Cheatham; truck driver Ricky Cheatham; truck driver Derrick Miller; truck driver Steve Littleton; truck driver Jeromy Watkins; Michael Bradberry; Tommy Smith; Matt Honeycutt; Philip Gardner; Thomas Catchings; and Chris Vaughn. Ex. R-10; Tr. 240-41. At some point after the blast, Harbin discovered a misfire. Resp't Br. at 3, 7; Sec'y Br. at 16. While the parties agree that the blast occurred on Friday, the Secretary contends that the misfire was discovered on the same day, and Respondents argue that Harbin found it on the following Monday. Sec'y Br. at 13; Resp't Br. at 3; Ex. R-26.

On Monday, April 12, Harbin notified Omya's quarry manager, Oscar Crawley, of the misfire, although, like the date that the misfire was discovered, the time of Harbin's conversation with Crawley is unclear. Tr. 222-23. Crawley ordered Harbin to berm-off the area, and informed Apache employee Robert Barton of the misfire. Tr. 222-24; Ex. P-1 at 5, 9, 12. According to Saiia's time sheets, the following employees, among others, were working at the Brown quarry that Monday: Looney; Harbin; Bradberry; Rayford Cheatham; Ricky Cheatham; Watkins; Smith; Littleton; Miller; Honeycutt; Gardner; Vaughn; and Catchings. Ex. R-11; Tr. 240-41. Ragland had a medical appointment that day, and was listed as being on vacation. Ex. R-11; Tr. 241.

The next day, on Tuesday, April 13, Apache tied the misfire into its regularly scheduled blast between 11:45 a.m. and 12:40 p.m. Exs. P-1 at 4, 5, 9-10, R-7 at 5; Tr. 243, 265. Thereafter, Harbin discovered a second misfire from Friday's blast. Ex. P-1 at 5, 10; Tr. 78, 254-55. Barton later disposed of the misfire by tying it into a blast occurring the following week on Monday, April 19. Ex. P-1 at 5, 6. The following Saiia employees were working at the Brown quarry on that Tuesday: Looney; Ragland; Harbin; Bradberry; Littleton; Watkins; Honeycutt; Smith; Gardner; Vaughn; Catchings; and others. Ex. R-12; Tr. 240-41. According to the Daily Log for April 13, Rayford Cheatham, Ricky Cheatham, and Miller were absent that day. Ex. R-7 at 5; Tr. 244-45.

On Wednesday, April 14, Crawley held a contractors' meeting with Looney and Ragland, and Apache employees Mark Ray and blasting manager Glenn Barton, and discussed safe blasting procedures. Exs. P-1 at 12, R-29 at 3; Tr. 226, 229.

Monday, April 19, Steve Harbin terminated his employment with Saiia, and returned to Illinois to work for a former employer. Ex. P-1 at 4, 10; Tr. 79-80, 82, 84-85.

A. The Smallwood Investigation

Almost a month later, on May 11, MSHA's Birmingham field office received an anonymous hazard complaint, alleging that employees at the Omya Alabama Plant were not following safe blasting procedures. Tr. 182. MSHA Inspector Michael Smallwood conducted an on-site investigation on May 12, 13, and 18, interviewing Omya, Saiia, Apache, and contractor Dixie Drilling ("Dixie") employees. Tr. 183-84; Ex. P-1; Sec'y Br. at 3.

Smallwood first met with management-level Omya employees, supervisory-level Saiia employees, then lower-level Saiia, Apache and Dixie employees. Tr. 184-89; Ex. P-1 at 1-6. He found no physical evidence of any recent blasting violations, and several interviewees told him that they were unaware or had no direct knowledge of problems or unsafe practices at the quarry. Ex. P-1 at 3 (Daniel Massey-Dixie); P-1 at 6 (Donald Churchwell-Apache); P-1 at 8 (Thomas Catchings-Saiia); P-1 at 8 (Chris Vaughn-Saiia); P-1 at 16 (Matt Honeycutt-Saiia); P-1 at 17 (Phillip Gardner-Saiia). Ragland was the only supervisory employee who told Smallwood that he was not aware of any problems or misfires at the quarry. P-1 at 2; Tr. 188. Several others, however, including Crawley and Looney, specifically mentioned that there had been a misfire earlier in April. Tr. 184-89; Ex. P-1 at 2, 4, 5-7, 9, 13-16.

In an initial and follow-up interview on May 18, Oscar Crawley stated that, as a result of observing an unfired shot brought to his attention by Harbin on Monday, April 12, he had instructed Harbin to berm-off the area, and he reported the misfire to Apache blaster Robert Barton, who arranged to have it reshot during the blast scheduled for the following morning.² Crawley also stated that he had discussed his concerns and reviewed blasting procedures with, among others, Looney and Glenn Barton at the next regularly scheduled Wednesday contractors' meeting on April 14, and that the blasting crew was retrained on safe blasting procedures the following week. Ex. P-1 at 2, 12; Tr. 196-97.

Frederick Looney told Smallwood that, on Monday, April 12, as a result of Harbin discovering and reporting to Darrell Ragland an unfired hole from the Friday, April 9 blast, the area was barricaded and personnel were removed from the site. By his account, Apache was informed of the misfire on Monday, and the hole was reshot the next day. Looney also stated that Harbin resigned from Saiia on April 19, and took an out-of-state job. Ex. P-1 at 4; Tr. 189.

Apache employee Robert Alex Barton told Smallwood that he had conducted a clean post-blast examination on Friday, April 9, but that an unfired shot was found on Monday, April 12 that Apache tied into its blast and reshot on Tuesday, April 13. He noted that another unfired shot was discovered an hour later, and that it "was placed in the magazine and destroyed by placing [it] in a shot hole on April 19th." Ex. P-1 at 5-6. Barton also told Smallwood, during the follow-up interview on May 18, that Apache employees were retrained on all phases of blasting a week after the misfire events, with special emphasis on post-blast examinations. Ex. P-1 at 13.

Saiia employee Tommy Smith told Smallwood that he heard the excavator operator notify Ragland that he had uncovered a misfire, and that Ragland told him to "keep on loading." Ex. P-1 at 6; see Tr. 190-91.

² Apache blaster Robert Barton is also referred to in the record by his middle name, Alex. See Ex. R-3. Smallwood's interviews of May 13 and 18 are both presumed to be of Robert Barton, rather than Apache blasting manager, Richard Barton. See Ex. P-1 at 5, 13, 18-19.

Saiia employee Steve Littleton told Smallwood that on Friday or Saturday, he, himself, saw the evidence of the misfire that the excavator operator had discovered, i.e., blasting wires and ANFO. Ex. P-1 at 6. According to Littleton, he heard Harbin report the misfire to site supervisor Ragland over the CB radio, and Ragland responded that “sometimes they looked like that and to just keep on digging.” Ex. P-1 at 6-7; see Tr. 191-92. He stated that he did not believe that Ragland ever came to the site to investigate the misfire when it was reported to him, and that on Monday, Omya superintendent Oscar Crawley barricaded the area and removed all personnel from the site. Ex. P-1 at 7; see Tr. 192.

Saiia employee Derrick Miller told Smallwood that sometime in early April, while he was driving a haul truck, after observing the exposed wiring and ANFO of a misfire in the area being mined, he had volunteered to move to another location and operate another piece of equipment. He stated that mining in the area had continued for about an hour after the misfire was discovered, and that he had no knowledge of it being reported to management. He also stated that he noticed that the area had been barricaded at the end of the shift. Ex. P-1 at 7-8.

After interviewing several hourly Saiia employees, Smallwood interviewed Steve Harbin by telephone. Harbin told the inspector that upon discovering a misfire on Friday, April 9 after a blast earlier that day, and reporting it to Darrell Ragland over the CB radio, Ragland told him to “keep on digging.” Harbin stated that he moved away from the misfire and continued working at a different location. According to him, on the following Monday, when Omya supervisor Oscar Crawley had come on-site, he showed him the misfire, and Crawley had him berm-off the area. He said that the blasters tied the misfire into the blast that was conducted the next day and that, after the blast when he began loading, he found another misfire. This time, he stated, he reported the unfired shot to both Ragland and Looney. Harbin alleged that he was told that “if he found a booster, to send it to the dump and not stop digging,” although he did not specify who had given this order. At the conclusion of the interview, Harbin told Smallwood that he had resigned on the following Monday, April 19, and informed his co-workers that he was resigning because Saiia did not address his safety concerns when he encountered misfires, and because of the follow-up instructions that he was given to send boosters to the dump if he encountered them. Ex. P-1 at 9-10.

Smallwood also interviewed several Saiia employees on May 18. Haul truck driver Michael Bradberry expressed uncertainty of the misfire discovery date, but stated that he heard Steve Harbin report a misfire to Darrell Ragland over the CB radio, and that Ragland replied that “this happens all the time . . . keep on digging.” Ex. P-1 at 13.

He also interviewed the Cheatham brothers, both Saiia haul truck drivers. Ex. P-1 at 14-15. Rayford Cheatham stated that Harbin reported a misfire to Ragland, and that he witnessed Harbin show it to Ragland on-site. According to Cheatham, he heard Ragland tell Harbin that it was “ok and go back to work.” He also stated that Crawley had Harbin barricade the area after he found out about the misfire. He asserted that the area was mined after the blasters gave the “all clear” signal. Cheatham did not know the circumstances under which the

blasters removed the misfire, and he did not specify when any of these events had occurred. Ex. P-1 at 14.

Ricky Cheatham told Smallwood that he heard Harbin report to Ragland over the CB radio that he had found a misfire, and that Ragland's reply was that "the shot had already been fired and . . . keep digging." He also stated that Harbin found a second misfire and, again, reported it to Ragland over the CB radio. According to Cheatham, Harbin asked Ragland to contact someone else about the misfire, but Cheatham did not identify to whom he was referring. Cheatham also stated that Harbin talked to Oscar Crawley on-site later in the shift, and that Crawley had Harbin barricade the area against entry. Ex. P-1 at 15.

Saiia haul truck driver Jeromy Watkins stated that he heard Harbin tell Ragland over the CB radio that he had found a misfire, and that Ragland told him to "keep on digging." Ex. P-1 at 16.

Smallwood returned to the mine and had a close-out meeting with management representatives of the companies on May 19. Ex P-1 at 18-19. Based on his investigation, Smallwood issued 104(d)(1) Order No. 6517482 to Darrell Ragland the same day. Ex. P-1 at 18-19; Ex. P-2.

B. The Saiia Investigation

Following issuance of the Order, in late May Saiia also took statements from several employees concerning their knowledge of the handling of the misfires. Some of the latter statements were essentially consistent with the statements given during Smallwood's investigation. Exs. R-13 (Robert Alex Barton); R-18 (Bradberry); R-20 (Gardner). Others provided additional information. Jeromy Watkins added that on Tuesday, after the blast and Harbin's discovery of another misfire, Harbin called Looney, who told him to "load the trucks and take everything to the dump." Ex. R-21. Rayford Cheatham remembered both misfires discovered by Harbin to have occurred on Monday. Ex. R-19. Some accounts of events, however, changed. For example, Steve Littleton stated that he did not think that there was any problem on April 9, and that he did not recall hearing Ragland direct Harbin over the CB radio to keep working. Ex. R-14. Derrick Miller placed Harbin's discovery of the misfire on Friday, and the tie-in reblast on Monday. Ex. R-16.

Darrell Ragland provided considerably more information than he had given Smallwood. He noted that he was off from work on Monday, April 12 due to a doctor's appointment, that he was told on Tuesday of a misfire being found on Monday and Crawley clearing the area of workers and equipment. On Tuesday, he stated, after the "all-clear" was given and stripping resumed after the blast, Harbin discovered another misfire and moved his excavator from the immediate area. Then, according to him, Alex Barton removed the misfire from the area as a result of a call from Looney. Ragland also maintained that he told Harbin, "if you find another booster, call me." Ex. R-5.

C. The Daniels Investigation

In late January and early February of 2011, MSHA Special Investigator Don Daniels conducted a 110(c) special investigation to determine whether Ragland and Looney should be charged with individual liability in connection with the misfire violation. Sec’y Br. at 4; Tr. 205-07. He interviewed Ragland, Looney, Littleton, Miller, and Smith in the Omya conference room, in the presence of Saiia’s attorney; Crawley in the Omya conference room, alone; and Harbin by telephone. See Exs. R-6 (Ragland); R-8 (Looney); R-15 (Littleton); R-17 (Miller); R-22 (Smith); R-23 (Harbin); R-29 (Crawley). It was during Daniels’ interview that Harbin specifically stated that it was Looney who had told him to take misfires to the dump. Ex. R-23 at 2. On the other hand, Smith told Daniels that Harbin spoke to Looney about the first misfire, and that Looney told him to stop working so that he, Looney, could investigate. Ex. R-22 at 3. Looney told Daniels that he had “never seen a danger” in “digging and loading material in an area where a misfire has occurred.” Ex. R-8 at 4. He also stated that he had no knowledge of a second misfire. Ex. R-8 at 4. Thereafter, based on Daniels’ findings, MSHA filed 110(c) charges against both Ragland and Looney. Sec’y Br. at 4; 205-07.

III. Findings of Fact and Conclusions of Law

A. Saiia

1. Fact of Violation

Inspector Smallwood issued 104(d)(1) Order No. 6517482 on May 19, 2010, alleging a “significant and substantial” violation of section 56.6311(b) that was “reasonably likely” to result in an injury that could reasonably be expected to be “fatal,” and was caused by Saiia’s “reckless disregard” and unwarrantable failure to comply with the standard.³ The “Condition or Practice” is described as follows:

A misfire was detected during the mining process in the area that was shot on April 9th 2010 and was reported to Darrell Ragland/site supervisor. Mr. Ragland failed to ensure that only work necessary to remove the misfire and to protect the safety of the miners was performed. The area was not barricaded against entry. Mr. Ragland engaged in aggravated conduct constituting more than ordinary negligence in that when he was notified of this condition he instructed the excavator operator to continue mining operations. This violation is an unwarrantable failure to comply with the standard.

³ 30 C.F.R. § 56.6311(b) provides that “[o]nly work necessary to remove a misfire and protect the safety of miners engaged in the removal shall be permitted in the affected area until the misfire is disposed of in a safe manner.”

Ex. R-1. The Order had been terminated prior to Smallwood's investigation when Apache tied the misfire into the regularly scheduled blast on Tuesday, April 13, 2010.

In order to establish a violation of one of his mandatory safety standards, the Secretary must prove that the violation occurred "by a preponderance of the credible evidence." *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

The Secretary asserts that the misfire triggering the violation was found and reported by Harbin to Ragland on Friday, April 9. Sec'y Br. at 13. It is further contended that Ragland ordered the miners to work in the face of the misfire, which continued until Monday, April 12, when the hazard was reported to Crawley, who, consequently, cleared the area and had it barricaded. Sec'y Br. at 19. The Secretary also contends that when Harbin discovered and reported the second misfire, Looney told him to dispose of it improperly and continue working. Sec'y Br. at 13.

Respondents characterize the Secretary's investigations as products of misunderstanding, mistake, or exaggeration. Resp't Br. at 9. They argue that Harbin discovered the first misfired shot on Monday. That day, they contend, Harbin could not have informed either supervisor of the misfire because Ragland had a doctor's appointment and was not at work, and Looney was working at the Omya quarry. Resp't Br. at 3, 6-7. According to Respondents, Crawley was informed of the misfire in the afternoon that Monday, he had the area barricaded, and Apache called in to recheck it. Resp't Br. 3, 7. They also posit that Looney was only at the Brown quarry on Tuesday after Harbin had discovered the second misfire and, therefore, that he could not have told Harbin to take misfires to the dump. Resp't Br. at 9. Furthermore, Respondents contend that no work had been performed between Crawley's intervention and the Tuesday blast, and they theorize that what Harbin and others actually heard over the CB radio was Ragland's "return to work" order after Apache's "all clear" signal. Alternatively, they contend that someone other than Ragland or Looney told Harbin to keep digging when he found the misfire. Resp't Br. at 8-9.

a. Testimony

Steve Harbin's overall testimony was credible and consistent with his statement given to Smallwood. He stated that his experience with blasting has taught him that if a blast produced a misfire, it likely produced others, and that he found two misfires in the same area as a result of the Friday blast. Tr. 77-78. Harbin did acknowledge that when the equipment is operating at the quarry, it can be difficult to hear who is speaking and what is being said over the CB radio. Tr. 74, 95-6. However, he maintained that he could clearly hear that it was Ragland to whom he was speaking because the equipment was not operating while they were talking. Tr. 93-94. He stated that, in an effort to distance themselves from the hazard, he moved the excavator 75 yards away from the area where he had been digging, and the truck drivers moved "a couple hundred yards" away, where they all continued working. Tr. 70-71. Harbin also testified that he

confronted both Ragland and Looney, in person, after he discovered the second misfire. Tr. 78. According to him, Looney “[l]ooked [him] square in the eyes,” and said, “we can’t get no production this way if you keep digging these up.” Tr. 78. He was so incensed by this order, he contended, that he made up his mind to quit his job. Tr. 79-90.

Derrick Miller drove a 50-ton rock truck for Saiia from February 2010 until February 2012. Tr. 112-13. He testified that he was aware of the misfire in early April, although he was unsure of the date on which it was discovered. Tr. 115-16. Initially, he stated that he had heard someone report the misfire over the CB radio and someone instruct the miner to haul it to the dump, then explained that the CB radio “didn’t work that good in that truck at the time,” and that he was unable to hear beyond 200 yards. Tr. 116-19. However, upon further questioning, Miller stated that he did not actually hear the exchange over the CB radio, but that Ricky Cheatham had told him that Steve Harbin had reported the misfire and was told to haul it to the dump. Tr. 120-21, 124. He addressed the contradictions in his testimony by noting that “it’s been three years . . . I can’t recall. I don’t know what happened yesterday.” Tr. 125. Miller reviewed his statement to Smallwood, and confirmed that mining had continued for an hour after the misfire was found, and that the area was barricaded. Tr. 129-30.

Steve Littleton began working for Saiia as a rock truck driver in March of 2010, and was a current employee of the company when he testified. Tr. 132-33. Contrary to his earlier detailed account of events surrounding the April 2010 misfires, Littleton testified that he did not remember much about the subject, nor what he had said during his interview with Smallwood. Tr. 135-36; see Tr. 137-42, 144-45. In addressing his drastic departure from his earlier statements, Littleton suggested the possibility that, at the time Smallwood conducted his interviews, a discussion with “Steve or somebody, you know, on the ground, parking lot, whatever,” may have occurred and influenced his statement. Tr. 140-41. When reminded that Harbin was not in the state of Alabama when Smallwood conducted his interviews, Littleton switched gears, stating that the parking lot exchange possibly occurred “immediately after the incident, before he quit.” Tr. 143. When asked a question on direct-examination designed to highlight his sudden lapse of memory, Littleton responded that “[t]hat was then. This is now. I mean, I don’t hardly remember what happened last week, if you want to know the honest truth.” Tr. 145.

Ricky Cheatham was employed by Saiia as a haul truck driver from June 2005 until August 2010; in April 2010, he was either stockpiling marble in the Brown quarry or hauling dirt to the dump. Tr. 152-54. He recalled Harbin calling in a misfire over the CB radio, and Looney telling him to “go down and pick it up and haul it to the dump.” Tr. 155-56. According to him, the other supervisor, Ragland, told the stripping crew to go back to work over the CB radio, and these events occurred on Tuesday or Wednesday. Tr. 156-57. Cheatham also stated that “Steve [Harbin] told everybody, no, we’re not going back down there and loading none of that rock until they come down there and do something about it.” Tr. 157-58. That same day, he testified, Crawley flagged the area and removed the workers, and he recalled only one misfire. Tr. 158, 159-60.

Rayford Cheatham, Ricky's brother, also worked five years for Saiia until 2010, and was driving a haul truck in the Brown quarry in April of 2010. Tr. 163. He testified that the stripping crew was given the "all clear" signal by Apache after the shot, that Harbin was digging in the highwall and came across a misfire, and that everyone in the pit that day also saw the "pink stuff running out of the highwall . . . all over the rocks." Tr. 164, 168. According to him, Harbin reported it over the CB radio, and "they came down there and looked, and Fred Looney told him to go ahead and load it, take it to the dump and hide it," over the CB radio. Tr. 164-65, 168. Cheatham averred that he heard Looney make the statement, and that "everybody joked about it. Every time - - they came over the radio to say something like that and knowing that [Omya] monitored the radio." Tr. 167-69. By his account, Harbin refused to keep digging and moved the crew to another spot, after which Crawley was made aware of the situation, had the area barricaded, and moved the crew out of the area. Tr. 166, 178-79. On cross-examination, Cheatham placed Ragland at the quarry on the day of the misfire discovery, blocking traffic on the road to prevent entry or exit until Apache had completed the blast. Tr. 176-78. Finally, he had no recollection of Harbin showing Ragland the misfire, and stated that all events about which he testified had occurred on the same day, although he could not pinpoint which day. Tr. 178-79.

Mitchell Smallwood, an MSHA inspector of almost six years with 23 years of mining experience, including certification as a mine foreman and an underground shot blaster, testified largely based on his interview notes, verifying the statements made to him during the hazard complaint investigation. Tr. 180-81. He stated that the non-management employees were sequestered for questioning. Tr. 189-90. Steve Harbin was not the first person to bring up the CB radio conversation in which Harbin allegedly reported the misfire to Ragland and was told to keep digging; it was, in fact, the first non-management employees interviewed, Tommy Smith and Steve Littleton. Tr. 190-92. Smallwood explained why, based on the interviews, he determined that Saiia had permitted its miners to continue working in the area after a misfire had been discovered, that the hazard was reasonably likely to result in a fatality, and that management had directly ordered its miners to work in the face of grave danger. Tr. 200-04.

Quarry manager Oscar Crawley had worked for Omya just shy of eight years when he testified for Saiia. Tr. 221. Crawley stated that during his drive through the Brown quarry on the afternoon of Monday, April 12, he was summoned by Harbin, who advised him of a misfire; he had the area barricaded with rocks, and notified the blaster and Saiia's mining manager of the misfire. Tr. 222-23. He testified that he had not been present at the Brown quarry the previous Friday, and that he did not recall talking to Looney or Ragland about his handling of the misfire. Tr. 225. Crawley verified his earlier statement that Harbin had told him that he had reported the misfire to his supervisor over the CB radio, but had not specified the day on which that had occurred. Tr. 228-29. Finally, he stated that retraining blasters was recommended to Apache during the April 14 contractors meeting, as an extra safety precaution to remind them of the proper procedures. Tr. 229-30.

Darrell Ragland, employed by Saiia for over 15 years at the time of hearing, had been lead operator overseeing the daily mining operations at the Brown quarry since the project had

begun in late February or early April of 2010. Tr. 233-34. He testified that in April of 2010, Saiia's practice was to guard entrances to the quarry and monitor CB radio communications from Apache during blasting, and Apache was responsible for post-blast examinations and relaying the "all clear" signal for Saiia workers to begin excavation. Tr. 235-36. Ragland remembered Friday, April 9 as uneventful and, according to the daily log, he drove the water truck that day. Tr. 237-38; Ex. R-7 at 1. He also stated that he took a vacation day the following Monday for a doctor's appointment. Tr. 239; Ex. 7 at 2, 11. Ragland testified that on Tuesday, the miners informed him that a misfire had been found on Monday, that Crawley had already barricaded the area, and that the misfire was reshot that Tuesday. Tr. 242-43; Ex. R-7 at 5. He denied ever sending anyone into a blasting area before receiving an "all clear" signal, as well as directing anyone over the CB radio to keep digging in the face of a misfire. Tr. 245-46; see Tr. 256-258. Ragland stated that he did not remember having any conversation with Harbin on Friday or Tuesday, nor since the misfire incident. Tr. 247. When given the opportunity on cross-examination to review his statement given during Saiia's internal investigation, Ragland acknowledged that Harbin had found a second misfire and removed the excavator from the area, and that Looney had Alex Barton remove the misfire; he also admitted that he had spoken to Harbin after he had found the second misfire, telling him "if you find another booster, call me." Tr. 254-55. Ragland also testified that he was replaced as quarry supervisor after the April misfires by a person with "more experience with just the overall mining plan and [who would] help Omya get the work going in the direction they needed to." Tr. 258.

Frederick Looney had worked for Saiia for over 25 years, had operated equipment for 10 years, and had been quarry superintendent for five or six years. Tr. 259-60. Looney testified that both quarries were operating on Friday, April 9, that he was at the Omya quarry most of the day, and that he remembered nothing unusual about blasting activities. Tr. 261-62. He stated that the following Monday evening, when he arrived at the Brown quarry, Crawley was closing down and had earlier barricaded the area of the misfire. Tr. 262-63. Looney acknowledged moving back and forth between Omya and Brown during the course of the day and, after initially testifying that he had not gone to the Brown quarry on Tuesday, he stated that he had, in fact, visited the quarry in the evening. Tr. 265-67. However, upon further questioning, he stated that he did not remember whether he was at Brown in the morning or evening, or whether the blast had already taken place; then he supposed that it "might have been mid-morning, maybe somewhere right around 12:00, 11:30, 12:00, something like that." Tr. 267-68. He did state that the barricade had been taken down and the quarry was operating normally. Tr. 268-69. Looney denied having a conversation with Harbin, or a conversation over the CB radio on Friday or Tuesday; he also denied ordering anyone to work around a misfire or in a blast area before an "all clear" signal was given, or ordering anyone to haul a misfire to the dump. Tr. 269-70, 272-73. In reference to his interview with Daniels, in which he appeared to minimize the danger of working in an area around a misfire, Looney asserted that he would not put someone in that position, but then added that he had never seen a danger in it. Tr. 275-77.

b. Analysis

Resolution of the issues in this case is entirely fact-based and requires credibility determinations and reconciliation of inconsistent statements and testimony. As a preliminary matter, I find the miners' statements taken during Smallwood's investigation in May to be the most credible source of evidence in determining the course of events that triggered the hazard complaint. These statements were made closest in time to the incidents in question and even then, memories had already begun to fade as to exact dates and times; this is especially true given that there had been two separate, but interrelated, misfires, and discrete details of the first were often commingled with the second and vice-versa. Furthermore, unlike the statements taken later in May during Saiia's internal investigation, statements to Smallwood were made without the involvement of any management personnel. While it is abundantly clear that with each subsequent investigation, the passage of time progressively eroded the miners' ability to compartmentalize the two incidents, to make matters worse, the reliability of Daniels' investigation the following November was further compromised by the presence of Saiia's attorney in the Omya conference room when the miners' statements were being taken. The hearing was held almost two years after that. Most discrepancies in the witnesses' accounts were, understandably, products of the passage of time. This is evident by the fact that witnesses, such as the Cheatham brothers, testified to events that, by most other accounts, occurred on days during which they were absent from work. The most noteworthy lapse of memory and extreme about-face in testimony came from a miner still employed by Saiia, who obviously had concerns about jeopardizing his job. However, despite the passage of time and the tedious task of making the investigation statements jibe, then squaring them with the testimony at hearing, common threads of evidence emerge that weave the probable tapestry of events. Moreover, any allegations that Harbin called in the hazard complaint to MSHA, had an axe to grind with Saiia, or influenced any witnesses' statements or testimony is without support in the record. See Resp't Br. at 7-8. As will be explained, I fully credit Harbin's testimony as to the days on which he discovered the misfires, to whom he reported them, and what instructions he was given as a result. I also find his reason for ending his employment at Saiia, that he was required to work around live, undetonated explosives, in line with his overall testimony, supported by the record, and wholly credible.

Smallwood's visit to the mine was unannounced and the miners were sequestered. Smith (Ex. P-1 at 6) and Littleton (Ex. P-1 at 6-7) were the first two of five hourly miners to tell Smallwood that they heard Harbin call in a misfire to Ragland over the CB radio, and Littleton thought that it had happened on Friday or Saturday. Bradberry (Ex. P-1 at 13), Ricky Cheatham (Ex. P-1 at 15), and Watkins (Ex. P-1 at 16), likewise, gave strikingly similar statements. Rayford Cheatham's statement, while similar, was lacking in detail that the report was made over the CB radio. Ex. P-1 at 14. Even before their statements, Looney had told Smallwood that Harbin had notified Ragland of the misfire. Ex. P-1 at 4. Smith, Bradberry, Ricky Cheatham and Watkins told Smallwood that they heard Ragland tell Harbin to "keep digging" or "keep loading." Littleton said that Ragland told Harbin that "sometimes they looked like that and to just keep digging." Rayford Cheatham said that Ragland told Harbin that "it was ok and go back to work." Steve Harbin, then, whose statement was taken later by phone, corroborated the on-

site hourly employees' accounts of his report of the misfire to Ragland, rather than the other way around, and his rendition of Ragland's response, "sometimes they [look] like that and to keep on digging," was nearly the same as Littleton's, verbatim. Ex. P-1 at 9.

For Ragland to have directed Harbin to keep working in the face of an unfired shot, that incident would have had to have occurred on Friday, April 9, as the Secretary contends, since Ragland was not at the quarry the following Monday. Fortuitously, Crawley provides the key to establishing when the misfire was discovered. Crawley, clearly referring to the first misfire, told Daniels that "Harbin said he reported the misfire to his supervisor over the radio." Ex. R-29 at 2; see Tr. 228-29. Clearly, Harbin summoned Crawley to the site of the unfired shot to get something done about it -- something that he had not been able to accomplish by reporting it to his supervisor three days earlier.

Harbin also told Smallwood that after the Tuesday blast, he found another unfired shot near the first misfire and reported it to Ragland and Looney, who were both at the quarry; he was told that if he found a booster to send it to the dump and not stop digging. Ex. P-1 at 10. Harbin's subsequent statement to Daniels was consistent with that statement. Ex. R-23 at 2. Watkins stated during Saiia's investigation that Harbin called Looney on Tuesday when he found the second misfire, and Looney told Harbin to take everything to the dump. Ex. R-21. Although Looney told Daniels that he had not been at the Brown quarry when the first misfire was found and that he had no knowledge of the second misfire (Ex. R-8 at 5), Ragland told Daniels that he and Looney were notified of the misfire at the same time on Tuesday. Ex. R-6 at 4-5. During Saiia's investigation, Ragland stated that it was Looney who had called Alex Barton to have the misfire removed from the area. Ex. R-5. Barton, on the other hand, told Saiia that Ragland had called him to report that another unfired booster had been found. Ex. R-13. Smith, recanting his earlier statements to Smallwood in the presence of Saiia's attorney, told Daniels that he heard Harbin reporting a misfire to Looney, and that Looney directed him to "cease work and he would investigate it." Ex. R-22 at 3.

In addition to Harbin, too many workers reported Looney to have directed Harbin to dig up the misfire and dispose of it in the dump to be disbelieved. Additionally, Looney's blanket denial of ever ordering work to continue following discovery of a misfire is belied by his lack of appreciation of the seriousness of the hazard. When asked by Daniels whether it is dangerous to dig and load in an area where a misfire has occurred, his response was "I have never seen a danger in it." Ex. R-8 at 4. His opportunity at hearing to soften the negative import of his statement missed the mark, as his testimony essentially reiterated his position that in all his years of experience, he had never seen an unfired booster actually explode. See Tr. 276-77.

Although the hourly workers' accounts of the two misfires arising out of the Friday blast vary in many respects, they place Ragland at the Brown quarry on Friday, Ragland and Looney both at the quarry on Tuesday, and have both supervisors verbally responding to one or the other of Harbin's reports of the misfires. The overwhelming weight of the evidence establishes that Harbin discovered the first misfire on Friday, April 9, that he reported it to Ragland over the CB radio, that Ragland instructed him to keep operating despite the obvious danger, and that mining

continued until Crawley intervened the following Monday. Likewise, the record also establishes that on Tuesday, April 13, Harbin discovered the second misfire in the vicinity of the first, that he reported it to Looney and, perhaps, Ragland, that Looney directed him to haul it to the dump to hide it, and that mining continued before it was removed by Apache. It is equally clear that Harbin's motivation in quitting his job and securing employment out of state, away from his family, was squarely rooted in his desire to remove himself from the hazardous work environment. Because work was permitted, in addition to that which was necessary for safe removal and disposal of the misfires from the affected area, I find that section 56.6311(b) was violated.

2. Significant and Substantial

In *Mathies Coal Company*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*, 3 FMSHRC 822 (Apr. 1981): 1) the underlying violation of a mandatory safety standard; 2) a discrete safety hazard - - that is, a measure of danger to safety - - contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); see also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Company*, 7 FMSHRC 1125, 1129, (Aug. 1985), the Commission provided additional guidance:

We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." 6 FMSHRC 1834, 1836 (Aug. 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U. S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984); *U. S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding that violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988); *Youghioghery & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987). The Commission clarified that "[t]he Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010). The Commission also emphasized the well-established precedent that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S."

Id. (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

The underlying violation has been established. The second criterion of the *Mathies* test has been met, in that allowing mining to continue in an area where there are live boosters heightened the risk of exposing miners to an unintended, unexpected detonation. The focus of the S&S analysis, then, is the third and fourth *Mathies* criteria, i.e., whether the hazard contributed to was reasonably likely to result in an injury, and whether the injury would be serious. Smallwood testified that working around an unfired shot endangered the lives of the excavator operator and truck drivers, whose only protection was the windshields in their equipment, that the unfired shot was located near material that had been “broken” from a prior shot, and that there would be “nothing there to prevent that material from traveling in any direction.” Tr. 202-03. Harbin, also experienced in mining around explosives, testified that the explosives were powerful enough to have killed two or three truck drivers in the immediate area, and that even workers hundreds of yards away would be endangered by flying rocks. Tr. 62-64, 71. Even Ragland acknowledged that a booster could go off and “possibly ignite any other explosives” nearby. Tr. 249. Clearly, excavating and loading in an area containing a misfire is reasonably likely to result in the shot detonating, and can reasonably be expected to result in very serious, if not fatal, injuries. Therefore, I find that the violation was S&S.

3. Negligence and Unwarrantable Failure

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” indifference,” or a “serious lack of reasonable care.” *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d at 136. The Commission has recognized the relevance of several factors in determining whether conduct is “aggravated” in the context of unwarrantable failure, such as the extensiveness of the violation, the length of time that the violation has existed, whether the violation posed a high risk of danger, whether the violation was obvious, the operator’s knowledge of the existence of the violation, the operator’s efforts in eliminating the violative condition, and whether the operator has been put on notice that greater efforts are necessary for compliance. *See McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1993 (Aug. 2014) (citing *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (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)). Each case must be examined on its own facts to determine whether an actor’s conduct is aggravated, or whether mitigating circumstances exist. *Eagle Energy, Inc.*, 23 FMSHRC 829, 834 (Aug. 2001) (citing *Consolidation Coal*, 22 FMSHRC at 353). Although some factors may be irrelevant to a particular scenario, all relevant factors must be examined. *ICG Hazard LLC*, 36 FMSHRC 2635, 2637-38 (Oct. 2014) (citing *IO Coal*, 31 FMSHRC at 1351).

The Secretary charges that Saiia’s conduct was a reckless disregard of the dangers posed by permitting mining to continue in the face of misfires, that constituted an unwarrantable failure

to comply with the standard. The negligence of an operator's agent is imputable to the operator for penalty assessment and unwarrantable failure purposes. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328 (Mar. 2009) (citations omitted). The parties have stipulated to Ragland's and Looney's status as agents of Saiia. Stip. 9. Ragland's very public order to Harbin to "keep on digging," where one misfire had been found, and Looney's equally public order that Harbin haul any unearthed misfires to the dump under circumstances where, indeed, not one but two unfired shots had been discovered as a result of the Friday blast, demonstrated a pattern of aggravated conduct that rose to the level of indicia of unwarrantable failure - - intentional misconduct, indifference, and a serious lack of reasonable care. Crawley's handling of the first misfire put Saiia on notice that greater efforts for compliance were necessary when the second misfire was encountered. The violation was obvious, significant, and extensive, affecting several miners within a broad radius of where they were working. The message was loud and clear: production over human life. Furthermore, after the Friday blast, the miners worked unprotected in the hazardous environment until Monday; likewise, they worked unprotected near the second misfire until Apache removed it some 30 minutes later. No credible accounts of the circumstances surrounding the April 9 blast attribute any timely precautionary behavior on the part of Saiia and, therefore, I find no mitigating factors. Indeed, Omya's intervention on Monday was a godsend and, given the reckless conduct of Saiia's supervisory personnel running the quarries, it is not surprising that Harbin chose to seek employment elsewhere. Therefore, I impute Ragland's and Looney's reckless disregard of the violative condition to Saiia, and find that the Secretary has met his burden of establishing a serious lack of reasonable care by the operator that constituted an unwarrantable failure to comply with the standard.

B. Ragland and Looney

Section 110(c) of the Act provides that, whenever a corporate operator violates a mandatory health or safety standard, an agent of the operator who knowingly authorized, ordered, or carried out such violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). In determining liability under section 110(c), the proper legal inquiry is whether the corporate agent knew or had reason to know of a violative condition. *Lafarge Constr. Materials*, 20 FMSHRC 1140, 1148 (Oct. 1998) (citing *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997)). To establish section 110(c) liability, the Secretary need only prove that an individual acted knowingly, not that the individual knowingly violated the law. *Id.* (citing *Warren Steen Constr. Inc.*, 14 FMSHRC 1125, 1131 (July 1992)). An individual acts knowingly where he is "in a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of the violative condition." *Id.* (quoting *Kenny Richardson*, 3 FMSHRC at 16). The Commission has explained that a person has reason to know "when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence." *Id.* at 1149 (citation omitted). In addition, section 110(c) liability is generally predicated on aggravated conduct constituting more than ordinary negligence. *Id.* at 1148 (citing *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992)).

The overwhelming weight of the evidence establishes that Ragland, in his supervisory position over the Brown quarry, and Looney, his superior, were responsible for protecting the safety of Saiia employees who were removing and hauling material after the Friday, April 9 blast. On two separate occasions post-blast, in the face of one, then a second reported misfire, Ragland, then Looney, in earshot of several miners, knowingly ordered work to continue, despite the obvious hazard. Even more egregious was Looney's instruction to Harbin that he dispose of the misfire in an unsafe manner. To say that their collective behavior was callous fails to decry the environment in which they obviously deemed their conduct to have been acceptable. In light of the fatal consequences of working around live explosives, the agents' failure to take immediate corrective measures to eliminate the hazards amounted to an aggravated lack of care far exceeding ordinary negligence. Therefore, I find both Ragland and Looney, individually, liable under section 110(c) of the Act.

IV. Penalty

While the Secretary has proposed a civil penalty of \$42,600.00 against Saiia, \$3,000.00 against Ragland, and \$3,300.00 against Looney, the Judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). The penalty criteria are: the operator's history of previous violations; the appropriateness of the penalty to the size of the operator's business; whether the operator was negligent; the effect of the penalty on the operator's ability to continue in business; the gravity of the violation; and the demonstrated good faith efforts in achieving rapid compliance after notification of the violation. 30 U.S.C. § 820(i).

The Secretary's arguments address the *Sellersburg* penalty criteria respecting Saiia, but are limited to only the gravity, negligence and good faith abatement criteria respecting Ragland and Looney. Saiia focused its arguments solely on the fact of violation, and failed to address the *Sellersburg* penalty criteria respecting any Respondent. Furthermore, the Secretary presented no evidence of Ragland's and Looney's income and net worth, and Ragland and Looney produced no evidence of their income, net worth and family support obligations, which bear upon the criteria upon which individual penalties are set.

A. Saiia

Applying the penalty criteria, I find that Saiia is a small- to medium-sized operator, with no history of similar violations and an overall record that is not an aggravating factor in assessing an appropriate penalty. As stipulated by the parties, the proposed penalty will not affect Saiia's ability to continue in business. Stip. 8. I also find Saiia's demonstration of good faith in achieving rapid compliance totally lacking, given its failure to timely address discovery of the two misfires in any reasonable manner.

The remaining criteria involve consideration of the gravity of the violation and Saiia's negligence in causing it. I find subjecting workers to the adverse consequences of working around unfired boosters for any amount of time to constitute a very serious violation. I also find the conduct of its agents to be so highly negligent as to be indefensible.

Therefore, having considered Saiia's small to medium size, its insignificant history of violations, the seriousness of the violation, its high degree of negligence in committing the violation, its lack of good faith compliance, and lack of any mitigating factors, I find that a penalty of \$42,600.00, as proposed by the Secretary, is appropriate.

B. Darrell Ragland

“[J]udges must make findings on each of the [statutory penalty] criteria [of section 110(i)] as they apply to *individuals*.” *Wayne R. Steen*, 20 FMSHRC 381, 382 (Apr. 1998) (quoting *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (Feb. 1997)). Gravity and good faith abatement may be assessed by using “the same record evidence that is used in assessing an operator’s penalty for the violation underlying the section 110(c) liability.” *Sunny Ridge*, 19 FMSHRC at 272. On the other hand, judges must assess the size and effect criteria by way of analogy by considering an individual’s income, family support obligations, the appropriateness of the penalty in light of the individual’s job responsibility, and ability to pay. *Id.* In 110(c) cases, penalties must be appropriate “in light of an individual’s income and net worth.” *Ambrosia Coal & Constr. Co.*, 19 FMSHRC 819, 824 (May 1997). The proper inquiry for the effect of a penalty on an individual is “whether the penalty will affect the individual’s ability to meet his financial obligations.” *Id.*

It is presumed, based on Saiia’s clear record, that Ragland has no history of previous violations. It is also presumed, based on the Secretary’s failure to present evidence regarding Ragland’s income and net worth, that Ragland’s net worth is small. On the other hand, since Ragland has produced no evidence of his income, net worth, and family support obligations, it is presumed that the penalty will not affect his ability to meet his financial obligations. See *Sellersburg*, 5 FMSHRC at 294 (stating that, absent proof that the imposition of penalties would adversely affect an operator’s ability to continue in business, it is presumed that no such adverse effect would occur). The seriousness of the violation has been fully discussed, as has Ragland’s rank and reckless disregard of the hazard in committing it, and his failure to abate the violation in good faith. Therefore, I find that a penalty of \$3,000.00, as proposed by the Secretary, is appropriate.

C. Frederick Looney

Based on the same lack of evidence, I find, by presumption, that Looney has no history of previous violations, that his net worth is small, and that the penalty will not affect his ability to meet his financial obligations. The violation was very serious, Looney supervised both quarries and displayed a reckless disregard of the hazard in committing it, and failed to abate the violation

in good faith. Therefore, I find that a penalty of \$3,300.00, as proposed by the Secretary, is appropriate.

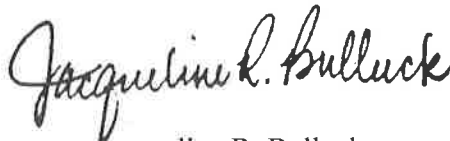
ORDER

WHEREFORE, it is **ORDERED** that Order No. 6517482 is **AFFIRMED**, as issued, and that Saiia Construction, LLC, **PAY** a civil penalty of \$42,600.00 within thirty (30) days of the date of this Decision.

Further it is **ORDERED** that Respondent Darrell Ragland **PAY** a civil penalty of \$3,000.00 within thirty (30) days of the date of this Decision.

Further, it is **ORDERED** that Respondent Frederick Looney **PAY** a civil penalty of \$3,300.00 within thirty (30) days of the date of this Decision.⁴

ACCORDINGLY, these cases are **DISMISSED**.



Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (Certified Mail)

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⁴ 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. Please include Docket number and A.C. number.