

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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September 10, 2019

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

v.

HOFFMAN CONSTRUCTION  
COMPANY, INC.,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2019-0180  
A.C. No. 47-03717-483719

Mine: Highway 53

**DECISION AND ORDER**

Appearances: Suzanne F. Dunne, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner

Gary Kaas, Hoffman Construction Company, Inc., Black River Falls, Wisconsin, for the Respondent

Before: Judge Rae

**I. INTRODUCTION**

**A. Statement of the Case**

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor (“the Secretary”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (“the Mine Act”), 30 U.S.C. § 815(d). At issue is one citation issued to mine operator Hoffman Construction Company, Inc. (“Hoffman”) under section 104(a) of the Mine Act.

A hearing was held in La Crosse, Wisconsin on August 6, 2019, at which time testimony was taken and documentary evidence was submitted. The parties made closing statements in lieu of filing post-hearing briefs. Tr. 61.<sup>1</sup> I have reviewed all of the evidence at length and have

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<sup>1</sup> In this decision, the abbreviation “Tr.” refers to the transcript of the hearing. The Secretary’s exhibits are numbered Ex. S-1 to S-11. The Respondent’s exhibits are numbered Ex. R-1 to R-4.

cited to the testimony, exhibits, and arguments I found critical to my analysis and ruling herein without including a detailed summary of the testimony given by each witness.

After consideration of the evidence and observation of the witnesses and assessment of their credibility, I uphold the section 104(a) citation as written for the reasons set forth below.

**B. Stipulations**

The parties have stipulated to the following facts:

1. Hoffman is an “operator” as defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the mine at which the citation at issue in these proceedings was issued.
2. Highway 53 mine, MSHA I.D. No. 47-03717, operated by Sand Products, WI, LLC, is subject to the jurisdiction of the Mine Act.
3. Hoffman is an operator at the Highway 53 mine, MSHA I.D. No. 47-03717.
4. At all relevant times, the products of the Highway 53 mine, MSHA I.D. No. 47-03717, entered commerce or are products that affect commerce, within the meaning of the Mine Act, 30 U.S.C. §§ 802(b), 803.
5. Hoffman is subject to the jurisdiction of the Mine Act, 30 U.S.C. § 801 et seq.
6. These proceedings are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to sections 105 and 113 of the Mine Act, 30 U.S.C. §§ 815, 823.
7. 30 C.F.R. § 56.9300(a) is a mandatory health or safety standard as that term is defined in section 3(l) of the Mine Act, 30 U.S.C. § 802(l).
8. The assessed penalties, if affirmed, will not impair Hoffman’s ability to remain in business.
9. The individual whose signature appears in Block 22 of the citation at issue in these proceedings was acting in her official capacity and as an authorized representative of the Secretary when the citation was issued.
10. A duly authorized representative of the Secretary served the subject citation and any termination thereof upon the agent of the Respondent at the date and place stated therein, as required by the Mine Act, and the citation and termination may be admitted into evidence to establish its issuance.
11. The exhibits to be offered by Hoffman and the Secretary are stipulated to be authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein.

12. The citation contained in Exhibit A attached to the Petition for Assessment of Penalty for this docket is an authentic copy of the citation at issue in this proceeding with all appropriate modifications and terminations, if any.

Jt. Ex. 1.

## II. BACKGROUND

The citation at issue in this proceeding (No. 9380863) was written by MSHA inspector Mindy Meierbachtol<sup>2</sup> on September 26, 2018 during a spot inspection of the Highway 53 mine—a sand mine in Wisconsin where Hoffman is an operator. Tr. 9; Ex. S-1. Meierbachtol was accompanied on the inspection by Rufus Taylor,<sup>3</sup> another MSHA inspector. Tr. 9. During the inspection, Meierbachtol observed a road without a berm and began taking photographs of the condition. Tr. 10-12; Ex. S-3, S-4, S-5, S-6. Meierbachtol noted that 75 feet of the road lacked a berm, and measured the drop off the side of the road as being between 7 and 10 feet in height. Tr. 13, 19, 36. Additionally, this drop-off contained a slope that Meierbachtol measured as having a 2-to-1 ratio—meaning that for every 2 feet of horizontal distance from the roadway, the slope would drop vertically by 1 foot. Tr. 13-14. Meierbachtol issued the citation to Hoffman shortly after taking measurements and photographs. Subsequently, a site foreman from Hoffman arranged for a bulldozer to build a berm so that the citation could be terminated. Tr. 55; Ex. S-7, S-8, R-2. The citation was terminated after approximately 30 to 40 minutes. Tr. 37.

## III. LEGAL PRINCIPLES

### A. Significant and Substantial

A significant and substantial violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial “if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Company*, the Commission set forth the following four-part test to determine whether a violation is properly designated significant and substantial:

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

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<sup>2</sup> Meierbachtol has been a MSHA inspector for approximately seven years, and also serves as a special investigator with the agency. Tr. 8, 9. Before becoming an inspector, Meierbachtol had a detail in the safety division at MSHA headquarters. Tr. 9. Meierbachtol also holds a master’s degree in safety science, with an emphasis on occupational and aviation safety, and graduated from the National Mine Academy. Tr. 8.

<sup>3</sup> Taylor has been a MSHA employee for approximately four years. Tr. 53.

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); *accord 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 (5th Cir. 1988); *Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1075 (D.C. Cir. 1987).

The Commission has stated that the focus of the *Mathies* analysis “centers on the interplay between the second and third steps.” *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016). The second step “addresses the extent to which the violation contributes to a particular hazard” and “is primarily concerned with likelihood of the occurrence of the hazard against which a mandatory safety standard is directed.” *Id.* Thus, the second step requires the judge to first identify the hazard, which the Commission defines “in terms of the prospective danger the cited safety standard is intended to prevent,” then determine whether the violation sufficiently contributed to this hazard by considering “whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard.” *Id.* at 2038. At the third step, the judge must determine whether the occurrence of the hazard would be reasonably likely to result in injury, assuming the hazard were to occur. *Id.*

The significant and substantial determination must be based on the particular facts surrounding the violation at issue. *Peabody Coal Co.*, 17 FMSHRC 508, 511-12 (Apr. 1995); *see also Wolf Run Mining Co.*, 36 FMSHRC 1951, 1957-59 (Aug. 2014). Evaluation of the reasonable likelihood of injury should be made assuming “continued normal mining operations,” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984), i.e., the evaluation should be made “in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued.” *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). The inspector’s judgment is also an important element of the significant and substantial determination. *Wolf Run*, 36 FMSHRC at 1959; *Mathies*, 6 FMSHRC at 5.

## B. Gravity

Although the gravity of a violation and the significant and substantial nature of a violation are not synonymous, they are frequently based on the same or similar factual circumstances. *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (Sept. 1987) (citing 30 U.S.C. §§ 814(d), 820(i)). The Commission generally expresses gravity as the degree of seriousness of the violation. *Hubb Corp.*, 22 FMSHRC 606, 609 (May 2000); *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). The Commission has pointed out that the focus of the gravity inquiry “is not necessarily on the reasonable likelihood of serious injury, which is the focus of the [significant and substantial] inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation*, 18 FMSHRC at 1550; *cf. Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140-41 (Jan. 1990) (ALJ) (explaining that some violations are serious notwithstanding the

likelihood of injury, such as a violation of an important safety standard, a violation demonstrating recidivism or defiance by the operator, or a violation that could compound the effects of other conditions).

### C. Negligence

Negligence is conduct that falls below the standard of care established under the Mine Act. Under the Secretary's regulations, an operator is held to a high standard of care. 30 C.F.R. § 100.3(d). Operators must be wary of conditions and practices that could cause injuries, and are required to take the necessary precautions to prevent or correct those conditions or practices. *Id.* The Secretary defines moderate negligence as having occurred in connection with a violation when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* § 100.3(d), Table X. The Commission generally assesses negligence by considering what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the cited regulation would have taken under the circumstances. *Leeco, Inc.*, 38 FMSHRC 1634, 1637 (July 2016); *see also Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015) (explaining that Commission ALJs "may evaluate negligence from the starting point of a traditional negligence analysis" rather than adhering to the Secretary's Part 100 definitions); *accord Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016).

## IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Fact of Violation

Citation No. 9380863 states that Hoffman's failure to provide a berm for approximately 75 feet of mine floor roadway constituted a violation of 30 C.F.R. § 56.9300(a).<sup>4</sup> Ex. S-1, R-1. The fact of violation has been conceded by Respondent and is not at issue in this proceeding. Tr. 7-8, 59-60. The Secretary assessed the violation as significant and substantial, of moderate negligence, and reasonably likely to result in injuries to one person that cause lost workdays or restricted duty. Ex. S-1, R-1. The civil penalty proposed by the Secretary is \$319.00. Ex. S-11.

### B. Significant and Substantial Designation<sup>5</sup>

Inspector Meierbachtol designated Respondent's failure to create a berm on the mine floor road as a significant and substantial violation. Respondent disputes the significant and substantial designation, yet fails to make any specific arguments negating the elements of the *Mathies* test. Tr. 7-8, 57-60, 64-65. I find that this violation meets the four elements of the

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<sup>4</sup> This regulation mandates that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." 30 C.F.R. § 56.9300(a).

<sup>5</sup> Hoffman raised concerns about the significant and substantial classification being considered a "willful and blatant disregard for the [safety] standard." Tr. 64. The Court wants to make clear that the significant and substantial classification does not denote reckless disregard, which is instead attributable to an unwarrantable failure to comply with a mandatory standard.

*Mathies* test and therefore, I uphold the Secretary's characterization of the violation as significant and substantial.

First, Hoffman violated section 56.9300(a), a mandatory safety standard, when it failed to build a berm on the 75-foot section of road at issue. The parties have stipulated that section 56.9300(a) is a mandatory safety standard. Jt. Ex. 1.

Second, this violation created a measure of danger to safety. Section 56.9300(a) is intended to prevent vehicles from over-traveling the roadway, overturning, and the resultant injuries to operators. See *Black Beauty Coal Co.*, 34 FMSHRC at 1741; see also *Lakeview Rock Prods.*, 33 FMSHRC 2985, 2988-89 (Dec. 2011).

Here, the lack of berm contributes substantially to the over-traveling and overturning hazard. The large articulating haul trucks<sup>6</sup>—which tend to be unstable due to their separate cab and dump-end components—were using the unprotected roadway many times in the days preceding the inspection.<sup>7</sup> Tr. 17, 21, 23, 34. These haul trucks were driving close to the edge of the roadway, as evidenced by the number of tire tracks Meierbachtol photographed mere feet from the unprotected drop-off. Tr. 14-16, 33; Ex. S-3, S-6. Further, 75 feet of the roadway lacked a berm, and the drop-off was between 7 and 10 feet in height with a steep 2-to-1 ratio. Given these facts, I find the Secretary has shown that the berm violation contributed to the identified hazard.

With respect to the third and fourth steps of *Mathies*, there is a reasonable likelihood that—assuming continued normal mining operations—a serious injury to a haul truck operator would result if a haul truck over-traveled the roadway. As Meierbachtol noted in her testimony, the 7 to 10-foot drop-off could reasonably cause a haul truck operator that over-traveled the roadway to be thrown about the cabin of the truck and receive injuries, including broken bones. Tr. 20; cf. *Black Beauty Coal Co.*, 34 FMSHRC at 1743 (“[S]ubstantial evidence supports the judge’s conclusion that if a vehicle veered off the road, it is reasonably likely to result in injury.”). In sum, I find that the hazard contributed to by the lack of berm was reasonably likely to result in a reasonably serious injury to haul truck operators.

In conclusion, after considering all the facts presented by the Secretary, including the height and grade of the drop-off, frequency of use of the unprotected roadway for active mining, and the size and nature of the articulating haul trucks, I find that the violation satisfies the *Mathies* test and was properly designated as significant and substantial.

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<sup>6</sup> Meierbachtol noted that these trucks could haul approximately 40 tons of material and had a mid-axle height of 36 inches. Tr. 21, 36-37.

<sup>7</sup> Despite Hoffman’s argument that trucks using the roadway were only involved in construction of the roadway itself, the facts make clear that road construction had finished and that the haul trucks were using the road in furtherance of active mining operations. Tr. 18, 24, 32-33, 40-41, 44.

### C. Negligence / Gravity

The roadway Meierbachtol cited is part of a circular route used by haul trucks at the mine. Tr. 54. Empty haul trucks travel via the cited roadway to reach the active mining area, where the trucks are loaded with material. Tr. 19, 32, 40, 54. After being loaded, the haul trucks then take another road to the wash plant, where the trucks dump the material. Tr. 19, 32, 38.

Hoffman argued that the road was still under construction and therefore, the berms had not yet been built. Tr. 24, 39, 44, 48, 50-51. Hoffman raised this—not for the purpose of contesting the violation—but to underscore its belief that it is a safe company and did not recklessly endanger its miners. Tr. 23-24, 57-60, 64-65. However, Hoffman also admitted that active mining had been underway in the days preceding the inspection, and that empty haul trucks traveled on the roadway at issue multiple times per day up until Meierbachtol issued the citation. Tr. 17-18, 23, 34, 41-42, 44, 54.

At one point during the hearing, Hoffman stated that the haul trucks using the road during Meierbachtol's inspection were actually constructing the berm by bringing in material. Tr. 24, 44-46, 48-51. However, this argument is specious, as both Meierbachtol and Taylor testified that the trucks were empty and were not carrying material to be used for construction. Tr. 17, 38, 54. In addition, the bulldozer that was called in by Hoffman's foreman to build the berm and terminate the citation was brought in from another location. Tr. 54-56. Hoffman did not bring material in from another part of the mine to build the berm; instead, the bulldozer pushed material up from the bottom of the pit to the edge of the roadway. Tr. 55-56; Ex. R-2.

Meierbachtol assessed the violation as involving moderate negligence because there was significant rainfall in the days preceding the inspection. Tr. 18-19, 22, 34; Ex. S-1. In Meierbachtol's opinion, the rain could have made the slope of the drop-off steeper due to the loose material the road was constructed from. Tr. 18-19. Other mitigating factors are that the road in question was recently constructed, and that the significant rainfall could have delayed Hoffman's efforts towards erecting a berm. Tr. 18, 50-51. These mitigating factors are offset by Hoffman's frequent use of the road for active mining purposes over a period of multiple days when the road did not have a berm. Here, the weight of the mitigating factors is less than the offset. Accordingly, I find Hoffman's negligence to be moderate.

With respect to the gravity of the violation, I concur with the Secretary's assessment and find that the gravity of this violation is reasonably serious, as the injuries to the vehicle operator are likely to be contusions, abrasions, and possibly broken bones.

### V. PENALTY

Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided for by the Act. *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763 (Aug. 2012) (citing 30 U.S.C. § 820(i)). In determining penalty amounts, section 110(i) directs the Commission to consider:

[T]he operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

*Id.*

The Commission and its ALJs are not bound by the penalties proposed by the Secretary, nor are they governed by MSHA's Part 100 regulations, although ALJ penalty assessments "must reflect proper consideration" of the section 110(i) criteria. *Am. Coal Co.*, 38 FMSHRC 1987, 1992-93 (Aug. 2016); *see also Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983). In addition to considering the 110(i) criteria, the judge must provide a sufficient factual basis upon which the Commission can perform its review function. *See Martin Co. Coal Corp.*, 28 FMSHRC 247, 265-66 (May 2006) (citing *Sellersburg*, 5 FMSHRC at 292-93). My analysis of the section 110(i) factors is set forth below.

A. Violation History; Size of Operator; Ability to Continue in Business

The parties have stipulated that the proposed penalties will not affect Hoffman's ability to continue in business. Jt. Ex. 1. I find that Hoffman is a medium-sized operator and has a minimal history of violations (including no previous violations of section 56.9330(a)). Ex. S-10, S-11.

B. Negligence and Gravity

My analysis of the negligence and gravity of the violation is set forth in section IV.C.

C. Good Faith

The Secretary credited Hoffman with good faith in abating the violation at issue in this case. Ex. S-11. Good faith is also reflected in the portion of the citation that describes the actions taken to abate the berm violation and in the testimony regarding the operator's abatement efforts. Tr. 37, 55; Ex. S-1.

D. Conclusion

After considering the six statutory penalty criteria, I assess a penalty of \$319.00 for the violation at issue in this case.



**ORDER**

Hoffman Construction Company, Inc. is hereby **ORDERED** to pay a total penalty of \$319.00 for the violation at issue in this docket within thirty (30) days of the date of this Decision and Order.<sup>8</sup>



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Priscilla M. Rae  
Administrative Law Judge

Distribution:

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Gary Kaas, Hoffman Construction Company, Inc., 123 CTH A, Black River Falls, WI 54615

/smp

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<sup>8</sup> 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.