FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. AMERICAN COLLOID COMPANY, Respondent	CIVIL PENALTY PROCEEDING Docket No. WEST 2011-0805M A.C. No. 48-00594-247740 Docket No. WEST 2011-1395M A.C. No. 48-00594-260938 Mine: Colony East Mill

DECISION AND ORDER

Appearances: Nadia Hafeez, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, CO., for Petitioner;

Laura Beverage, Esq., Jackson Kelly PLLC, Denver CO., for Respondent.

Before: Judge L. Zane Gill

This proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves one section 104(d)(1) citation, two 104(d)(1) orders, and one 104(d)(2) order, 30 U.S.C. § 814(d)(1),(2), issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to American Colloid Co. ("American Colloid" or "Respondent") at its Colony East Mill. The parties presented testimony on October 30 and 31, 2012, in Rapid City, South Dakota.

Originally, there were five dockets in this case, but three of them settled: WEST 2010-1561, WEST 2011-0775, and WEST 2011-1453. (Tr. 8:7-14)

In summary, and for the following reasons, I conclude that:

- American Colloid did not violate 30 C.F.R. § 56.14207. Therefore, I vacate Citation No. 6329226 and Order No. 6329235.
- For Order No. 6427277, there was a violation of 30 C.F.R. § 56.15005; an injury was highly likely; it could reasonably be expected to result in a fatality; the violation was significant and substantial; a single person was affected; the negligence level was high; and, the violation was the result of an unwarrantable failure.
- For Order No. 6588114, there was a violation of 30 C.F.R. § 56.15005; an injury was reasonably likely; it could reasonably be expected to result in a fatality; the violation was

- significant and substantial; a single person was affected; the negligence level was high; and, there was no unwarrantable failure.

Stipulations

The following stipulations were read into the record at the hearing: (Tr. 8:15 – 9:19)

1. At all times relevant to the above referenced matters, American Colloid admits that it is the operator of Colony East Mill, Mine I.D. 48-00594, located in Crook County, Wyoming;
2. American Colloid is subject to the jurisdiction of the Mine Act;
3. The Administrative Law Judge has jurisdiction in this matter;
4. The subject orders and citation were properly served by the duly authorized representative and Secretary bond agent of American Colloid on the dates and places stated therein and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein;
5. The exhibits to be offered by American Colloid and the Secretary are stipulated to be authentic, but no stipulations are made as to the relevance or the truth of the matters asserted therein;
6. American Colloid demonstrated good faith in the abatement of the violations; and
7. The proposed penalties will not affect American Colloid's ability to remain in business.

Preliminary Matter: MSHA Did Not Deny American Colloid its Walkaround Rights

American Colloid argues that it was denied its walkaround rights in violation of 30 U.S.C. § 813(f) when Citation No. 6329226 and Order No. 6427277 were issued, and asks that those citations be vacated. (Resp. Br. at 2-3; Tr.199:13-19; Tr. 272:13-18; Tr. 277:18-23; Tr. 313:17-24) The Secretary alleges that the inspectors were on their way to find mine management when they observed the hazard cited in Citation No. 6329226, and under the Mine Act were obligated to address it. (Sec. Br. at 11-12; Tr. 54:19 – 55:4; Tr. 138:23 – 139:7; Tr. 273:4-11) The Secretary also alleges that while the inspectors were driving back onto mine property to continue their inspection, they observed the condition described in Order No. 6427277, pulled over, and issued a verbal imminent danger order to a truck driver. (Sec. Br. at 19-20; Tr. 45:11-22; Tr. 46:22-24; Tr. 122:23 – 123:18; Tr. 220:9 – 221:15) The Secretary argues that the inspectors did not deny the operator its right to be present during an inspection, and therefore did not violate 30 U.S.C. § 813(f). (Sec. Reply Br. at 19-20)

Section 103(f) of the Mine Act states in pertinent part:

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners *shall be given an opportunity* to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine.

30 U.S.C. § 813(f) (emphasis added). The right of a mine operator to accompany an inspector has been "consistently recognized by the Commission and the courts." *Consolidation Coal Co.*, 16 FMSHRC 713, 719 (Apr. 1994); *SCP Investments, LLC*, 31 FMSHRC 821, 827 (Aug. 2009); *DJB Welding Corp.*, 32 FMSHRC 728, 730 (June 2010)(ALJ Paez). The Commission has concluded, however, that walkaround rights under section 813(f) are "for the purpose of aiding such inspection" and only "grant a qualified right" because the statute states that operators "shall be given an opportunity to accompany" inspectors during mine inspections. *SCP Investments, LLC*, 31 FMSHRC at 827, 831; 30 U.S.C. § 813(f).

Additionally, there is a difference between an outright refusal to allow an operator to participate in an inspection, which is a violation of Section 813(f), and the issuance of a citation without a mine representative present. *Id.*; *See DJB Welding Corp.*, 32 FMSHRC at 730-31; *See Veris Gold USA, Inc.*, 2013 WL 8505727, at *12 (Sept. 2013)(ALJ Miller).

Further, under Section 104(a) of the Mine Act, if upon inspection or investigation, an inspector believes that an operator has violated the Mine Act, "or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to the Act, he *shall* [...] *issue a citation to the operator*." 30 U.S.C. § 814(a) (emphasis added). Therefore, if an inspector observes a hazard, he does not have the discretion to not issue a citation.

There is no requirement under the Mine Act that the operator must be present during every inspection. There is also no requirement that an inspector who observes a hazard must delay the issuance of a citation or order until he makes contact with the operator. To the contrary, an inspector who observes a violation of the Mine Act or health and safety regulation is required to issue a citation or order. There is no evidence in this record that the inspectors either intentionally or inadvertently denied the Respondent its walkaround rights.[1] In both instances the inspectors observed a hazard and took the action required by statute to remedy it as soon as possible. The inspectors had a duty under the Mine Act to respond to the hazards they observed and did so by issuing Citation No. 6329226 and Order No. 6427277. (Tr. 23:1-13; Tr. 45:11-22; Tr. 46:22-24)

The operator does not have an absolute right to accompany an inspector during an inspection, and under the circumstances of this case it was reasonable for the inspector to issue

[1] The findings of fact here and below are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into account the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies in each witness's testimony and between the testimonies of other witnesses. In evaluating the testimony of each witness, I have also taken into account his or her demeanor. Any perceived failure to provide detail about any witness's testimony is not a failure on my part to consider it. The fact that some evidence is not discussed does not mean 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). I have also fully considered the contents of the official file, including the pre- and post-hearing submissions of the parties, and the exhibits admitted into evidence.

the citation and order in the absence of a mine representative. Therefore, I conclude that the Secretary did not deny American Colloid its walkaround rights under Section 103(f) of the Mine Act for Citation No. 6329226 and Order No. 6427277.

Basic Legal Principles

Significant and Substantial

The citation and order in dispute and discussed below have been designated by the Secretary as significant and substantial ("S&S"). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999). The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd* 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ Zielinski) ("The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.")

In *Mathies Coal Co.*, the Commission established the standard for determining whether a violation was S&S:

> 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.

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

The third element of the *Mathies* test presents the most difficulty when determining whether a violation is S&S. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: [T]he 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." (citing *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984)). The Secretary, however, "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct.

2010)). Further, the Commission has found 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)). This evaluation is also 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. *Elk Run Coal Co.*, 27 FMSHRC at 905; *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).

Negligence

Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required [...] to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* "MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices." *Id.* Reckless negligence is present when "[t]he operator displayed conduct which exhibits the absence of the slightest degree of care." *Id.* High negligence is when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* Low negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* No negligence is when "[t]he operator exercised diligence and could not have known of the violative condition or practice." *Id.*

The Commission has provided guidance for making the negligence determination in *A. H. Smith Stone Co.*, stating that:

> Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence... In this type of case, we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue.

5 FMSHRC 13, 15 (Jan. 1983) (citations omitted).

Mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions.

Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983),

aff'd, 736 F.2d 1147 (7th Cir. 1984) and *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ Fauver). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130.

Unwarrantable Failure

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an unwarrantable failure:

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by 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) ("*R&P*"); *see also Buck Creek* [*Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).

See Manalapan Mining Co., 35 FMSHRC 289, 293 (Feb. 2013). Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist. *Big Ridge, Inc.*, 34 FMSHRC 119, 125 (Jan. 2012) (ALJ Zielinski). These include:

> (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).

Manalapan Mining Co., 35 FMSHRC at 293; *ICG Hazard, LLC*, 36 FMSHRC 2635, 2637,

(Oct. 2014); *Sierra Rock Products, Inc.*, 37 FMSHRC 1, 4 (Jan 2015); *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813; *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consolidated Coal*, 22 FMSHRC at 353; *IO Coal*, 31 FMSHRC at 1351; *Manalapan Mining Co.*, 35 FMSHRC at 293. "Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation." *Big Ridge, Inc.*, 34 FMSHRC at 125; *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

Penalty

The principles governing the authority of Commission administrative law judges to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess said penalty. 29 C.F.R. § 2700.28.

Under Section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (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 in abatement of the violative condition. 30 U.S.C § 820(i). Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 ("[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."); *See American Coal Co.*, 35 FMSHRC 1774, 1819 (July 2013)(ALJ Zielinski).

The Commission has repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the Section 110(i) criteria. *E.g., Sellersburg Stone Co.*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000) (citations omitted). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622.

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Engineering*, 32 FMSHRC at 1289 (judge justified in relying

on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC at 725 (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC at 713 (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria). For example, violations involving "extreme gravity" and/or "gross negligence," or, as stated in the former section of 105(a), "an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances," may dictate higher penalty assessments. *See* 30 C.F.R. Part 100 Final Rule, 72 Fed. Reg. 13592-01, 13,621.

In addition, Commission ALJs are obligated to explain any substantial divergence between a penalty imposed and that proposed by the Secretary. As explained in *Sellersburg Stone Co.*, 5 FMSHRC at 293:

> When ... it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves that Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission. If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

Special Assessment

Through notice and comment rulemaking, the Secretary promulgated regulations specifying the "Criteria and Procedures for Proposed Assessment of Civil Penalties." 30 C.F.R. Part 100. Those regulations provide two options for determining the amount of a civil penalty to be assessed by the Secretary: regular assessment and special assessment. 30 C.F.R. §§ 100.3, 100.5(a), (b). Penalties for the vast majority of violations are determined through the "regular assessment" process whereby penalty points are assigned pursuant to criteria and tables that reflect the factors specified in sections 105(b) and 110(i) of the Act. 30 C.F.R. §100.3.

The regulations also allow MSHA to bypass the regular assessment process if it determines that conditions warrant a special assessment. 30 C.F.R. §100.5(a), (b). The regulations do not further explain what conditions may warrant a special assessment.[2] Nor do they identify how the amount of a special assessment will be determined, other than to state that "the proposed penalty will be based on the six criteria set forth in 100.3(a). All findings shall be in narrative form." *Id.* The narrative findings for special assessments are typically brief and conclusory. The lack of transparency in the Secretary's special assessment process coupled with

[2] In 2007, the Secretary substantially amended the penalty regulations, significantly increasing penalties for most violations, eliminating the single penalty assessment, and deleting language from section 105(a) that specified eight categories of violations that would be reviewed to determine whether a special assessment is appropriate including, violations involving an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances. 72 Fed. Reg. at 13,621.

the Secretary's refusal to disclose the bases for specially assessing a penalty, can frustrate attempted explanations. However, whether the Secretary proposes a regularly or a specially assessed penalty is of little consequence and is not binding on the Commission because the Commission imposes civil penalties *de novo*.

Citation No. 6329226 and Order No. 6329235

On May 11, 2010, MSHA Inspectors Shane Julien[3] and Alan Roberts[4] were dispatched to the mine to respond to a hazardous condition complaint alleging that the mine's roads and walkways were extremely slippery from a coating of water and bentonite[5] material. (Tr. 20:19 – 21:9) As they were looking for mine management, they observed a truck in a condition which prompted Julien to issue Citation No. 6329226, alleging a violation of 30 C.F.R. § 56.14207 pursuant to Section 105(d)(1) of the Mine Act. The regulation states that:

> Mobile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank. *Unattended mobile equipment parked on a grade must have the wheels or tracks chocked or turned into bank in addition to setting the park brake (if provided) in order to prevent equipment from unexpectedly rolling and striking miners working in the area.* Grade can be determined a number of ways, to include testing the equipment to determine if it rolls when the transmission is placed in neutral. This standard applies to all off-road and on-road self-propelled equipment used on mine property, including vehicles such as vans, suburbans, and pick-up trucks that are used at mine sites. Any piece of mobile equipment used on the mine site will have to comply with the standard. The standard would allow for mobile equipment parked on a grade to be turned into a bank, chocked, parked with the front or rear wheels in a ditch or trough.

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[3] At the time of the hearing, Julien had been a mine safety and health inspector at MSHA for 10 years. (Tr. 16:17-24) Prior to working for MSHA, Julien worked for nine years in an underground zinc mine and ended his career there as a shift foreman. After that he spent two years running a small crusher for a company in New York. (Tr. 17:2-9) He is also a certified accident investigator and is a member of the National Mine Rescue team. (Tr. 17:23 – 18:5)

[4] At the time of the hearing, Roberts had been an MSHA mine inspector for nine years. (Tr. 118:25 – 119:7) Prior to joining MSHA, he worked for 21 years at the Hutchinson Salt Mine, and at the end of his employment there, he was the mine superintendent. (Tr. 119:13-23)

[5] Bentonite is a clay-based material that is used for products such as kitty litter and floor spill absorbent. (Tr. 19:16-19) Colony East focuses on the processing of a powdered bentonite. (Sec. Br. at 1)

30 C.F.R. § 56.14207 (emphasis added). Section 56.14207 is a mandatory safety standard and is one of the priority standards under the Rules to Live By initiative that began in March, 2010. (Ex. S-10) Julien's citation alleges:

> The Freightliner flatbed truck was parked and unattended on a 4% grade without the wheels being chocked. The truck was in neutral, the air break applied and was being loaded by two company forklifts with pallets containing bags of product. The area is accessed several hundred times per day to load trucks. The area is directly beside a main stairway access into the warehouse that is used by foot traffic. The concrete in the area is extremely slippery from accumulation of Bentonite, company product. Based upon continuous mining operations[,] this condition poses a crushing hazard to miners that would reasonably result in a fatality. The mine operator engaged in aggravated conduct constituting more than ordinary negligence in that they told the driver to park on the grade and knew of the requirement to chock wheels yet did not provide the miner with chocks or ensure the use of them on graded areas. The violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-1.

On May 13, 2010, at 10:16 am, Inspector Julien issued Order No. 6329235 to American Colloid at the Colony East Mill alleging a violation of 30 C.F.R. § 56.14207 pursuant to Section 105(d)(1) of the Mine Act. The order alleges:

> The Western Star over the road truck was parked, unattended on a 3% grade without chocks on any of the wheels. The truck was on site to obtain a load of product and was informed by company installed signs to proceed to the area to park. The truck was idling, transmission in neutral and the air brake [was] applied. The driver stated that no one from the company had told him of the need to chock his wheels and he had signed in at the Shipping Department as told by the operator installed signs. The area is directly across from the plant[']s office where management and the safety representative travel several times while on site. The area is exposed to foot and mobile equipment traffic at all hours of the day to include during the dark. Based upon continuous mining operations this condition poses a contact hazard to miners that would reasonably result in a [*sic.*] fatal crushing injuries. The mine operator engaged in aggravated conduct constituting more than ordinary negligence in that they observed the condition, knew of the requirement to chock on a grade, told the driver to park there and even talked to him upon arrival[,] yet failed to ensure that wheel chocks were used, supplied[,] or enforced to protect the

miner. This violation is an unwarrantable failure to comply with a mandatory standard. This standard was cited 2 times in two years at this mine.

Ex. S-13.

The Violations

Both the citation and order allege that an injury was reasonably likely, the violating condition could reasonably be expected to result in a fatality, the violations were S&S, a single person was affected, and the negligence level was high. (Ex. S-1; Ex. S-13)

Respondent was cited twice within three days for violating Section 56.14207 for failing to chock the wheels of an unattended vehicle parked on a grade. (Tr. 22:5-14; Tr. 52:20-24; Tr. 45:11-22) American Colloid argued that it did not violate the standard because the grade was insufficient in both locations to trigger the chocking requirement. (Resp. Br. at 12-13) The Secretary countered that the standard makes no mention of "sufficient" or "insufficient" grades, but rather the chocking requirement comes into play any time mobile equipment is parked on a grade, even a one percent grade. (Sec. Reply Br. at 6; Tr. 115:8-12)

On May 11, Julien observed an unattended flatbed truck parked on a grade; the truck's wheels were not chocked. (Tr. 23:1-13; Ex. S-6) Julien testified that the flat-bed loading area had a visually noticeable grade. (Tr. 114-18 – 119:3) Julien and Inspector Roberts measured the grade with an Abney level[6] and detected a four percent grade in the loading area. (Tr. 23:14-19)

On May 13, upon arrival at the mine to complete his investigation, Julien observed several managers standing outside the office when a truck pulled into the parking lot. The driver left the truck idling as he entered the shipping department. He did not chock the wheels. (Tr. 45:11-22; Tr. 46:22-24; Tr. 220:9 – 221:15) Julien testified that he could visually perceive a grade in the area. (Tr. 113:6-9) He measured the grade with an Abney level and determined that it was three percent. (Tr. 46:25 – 47:2; Tr. 48:20-23; Tr. 1112:71-13)

Casey Doolan,[7] the environmental health and safety coordinator at the mine, disagreed with Julien's grade measurements; he did not perceive a visual grade. After-the-fact (2011), Respondent hired a professional surveying company to measure the grade in the area. (Tr. 221:16-20; Tr. 224:2-13) Exhibit R-3 shows the instrument-measured grade levels. (Tr. 225:12-

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[6] An Abney level is "a surveying clinometer consisting of a short telescope, bubble tube, and graduated vertical arc [...]." *Abney Level definition*, MIRIAM- WEBSTER.COM, *available at* http://www.merriam-webster.com/dictionary/abney%20level.

[7] At the time of the hearing, Doolan was the regional environmental health and safety ("EHS") manager for all U.S. facilities at Amcol International, the parent company of American Colloid Company. (Tr. 187:4-12) At the time the citation was issued, he was the EHS coordinator for the Colony East and Colony West facilities. (Tr. 187:13-19) As the EHS coordinator, he ensures all of the safety programs are implemented properly and that the company is in compliance with the regulations. (Tr. 187:22 – 188:4)

18) The grade in the load-out bay was one percent, and the grade in the parking area ranged from 1.2 percent to 2.4 percent. (Tr. 228:20-25; Ex. R-3) The grade in the location relevant to this citation was 1.2 percent. (Tr. 228:12-15; Ex. R-2) The survey company performed the same measurements in 2012 and got the same results. (Ex. R-2)

Given the disparity between the evidence from the Secretary's witnesses and that from the operator's survey company, I must first determine from the preponderating evidence what the grade was. I find that the grade measured by the professional surveying company is more reliable than the Abney level measurements taken by Inspector Julien at the time the citation and order were written. It is significant that the surveying company used more sensitive instruments to make their measurements, and their results repeated from one year to the next. I also find it questionable that the Julien's measurement of the loading area was higher than that of the parking lot, when the professional surveying company's measurements found the opposite to be true. Therefore, I find that the loading dock had a one percent grade and the parking lot where the truck was parked had a 1.2 percent grade.

Commission judges have found that chocking is not required when mobile equipment is parked on a *de minimis* or insignificant grade. *Excel Mineral Co.*, 1 FMSHRC 2001, 2003 (Dec. 1979) (ALJ Michels) ("It surely meant, or means, a grade of some significance so that if the equipment does begin to roll, it will keep rolling."); *Construction Materials*, 23 FMSHRC 321, 326-27 (Mar. 2001)(ALJ Feldman). The *de minimis* rule is also supported by the regulation, which states that a "[g]rade can be determined a number of ways, *to include testing the equipment to determine if it rolls when the transmission is placed in neutral.*" 30 C.F.R. § 56.14207 (emphasis added). Additionally, in *Excel Mineral Co.*, the court found that a one percent grade was insufficient to trigger the chocking requirement. 1 FMSHRC at 2003. However, in *Gary Sisk Drilling Co., Inc.*, the court found that a two to three percent grade was significant enough to require chocking. 35 FMSHRC 1311, 1315-16 (May 2013)(ALJ Manning).

These authorities establish a *di minimis* rule, however the exact gradient required to constitute a violation is still unclear. It seems appropriate to find, in the absence of evidence to the contrary, that any gradient sufficient to cause a vehicle to roll when in neutral and with the brakes released is enough to trigger the chocking requirement. Here, in the absence of specific evidence that the vehicle would start to roll on such a slight grade, I apply the *di minimis* rule.

Yet that does not rule out the possibility that a measured grade, appropriately interpreted by a qualified witness, could escape the *di minimis* rule and require chocking, even if the vehicle will not roll on its own. Variations in surface and mechanical friction could prevent a vehicle from rolling on its own on a *di minimis* grade, but that is not the only focus of the regulation. Qualified witness testimony could conceivably convince a fact finder that even if a vehicle at free rest will not roll away on its own, a force foreseeable in the course of normal operations could impart enough momentum to the vehicle to move it, thereby creating the exact hazard the regulation addresses.

Grade measurements of 1.0 percent and 1.2 percent alone do not trigger the chocking requirement because, in the absence of evidence establishing that a vehicle in neutral would start rolling on such a minimum grade, they are *de minimis*. There is nothing in the record that would

justify departing from this *di minimis* finding. Julien's testimony about vehicles coming and going from the area during continuing mining operations is not specific or weighty enough to justify a departure from our precedent. For these reasons, I find that American Colloid did not violate 30 C.F.R. § 56.14207, and I vacate Citation No. 6329226 and Order No. 6329235. As such, I need not determine negligence, gravity, S&S, unwarrantable failure, or penalty determinations for either.

Order No. 6427277

On May 11, 2010, at 1:43pm, Inspector Roberts issued Order No. 6427277 to American Colloid at the Colony East Mill alleging a violation of 30 C.F.R. § 56.15005 pursuant to Section 105(d)(1) of the Mine Act. The regulation states that "[s]afety belts and lines shall be worn when persons work where there is danger of falling [...]." 30 C.F.R. § 56.15005. Section 56.15005 is a mandatory safety standard. The citation alleges:

> Safety belts and lines are not being used when there is a hazard of falling. A truck driver was observed working 8 feet 9 inches above ground while securing his load of palletized product on his flatbed trailer. The truck drivers [*sic.*] boots are covered with wet Bentonite and there is other mobile equipment working in the area on extremely slick roads. This condition exposes the truck driver to a fall hazard with obstructions he could strike his head on and would be expected to cause fatal injuries. The mine operator had supplied fall protection but refuses to require it, train in it's [*sic.*] use or maintain it in functional condition. The mine operator engaged in aggravated conduct constituting more than ordinary negligence in that he is aware of this practice but refuses to take corrective action to protect miners. This violation is an unwarrantable failure to comply with a mandatory standard. This condition was a factor that contributed to the issuance of imminent danger order no. 6427275 dated 5/11/2010. Therefore no abatement time was set. This standard was cited 1 time in two years at this mine.

Ex. S-16.

Violation

The order alleges that an injury was highly likely, could reasonably be expected to result in a fatality, the violation was S&S, a single person was affected, and that the negligence level was high. *Id.* Roberts issued this order because he observed a contract truck driver on top of his palletized load without wearing a safety belt line. (Tr. 122:15-22; Tr. 122:25 – 123:4; S-20) The driver was standing eight feet nine inches from the ground. (Tr. 123:19-21) Roberts verbally issued an imminent danger order to the driver and instructed him to get down safely from the top of his load. (Tr. 123:6-18)

Based upon the above, I find that American Colloid violated Section 56.15005 because a driver was working on top of his load where there was a danger of falling and was not wearing a safety belt or line.

Negligence

High negligence occurs when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3(d). The Respondent had a tarping station for drivers to tie off their loads before exiting the mine. (Tr. 163:8-13; Tr. 206:18 – 208:2) The station was intended to service two trucks at a time, with two safety lanyards, one on each side of the station, and there were three adjustable harnesses on the catwalk for drivers to attach to the lanyards. (*Id.*; Tr. 133:16-24) If a miner fell, the lanyard is supposed to catch and stop the miner from falling. (Tr. 127:17 – 128:7) Exhibit S-22 is a photograph of a broken retractable lanyard. The truck driver was tying off his load on the side of the station with the broken lanyard. *Id.* Another truck was using the other side where the lanyard was in working condition.[8] (Tr. 142:6-9)

Bill Rhoads[9] admitted that one of the lanyards was broken. (*Id.*; Tr. 127:17 – 128:7; Tr. 136:18-24; Tr. 283:5-8) He also testified that he did not receive any information that the tarping station had one inoperable lanyard that morning after the visual inspections were compete. (Tr. 285:19 – 286:3) However, Rhoads did observe that the broken lanyard was wrapped around the I-beam at the top of the tarping station at the time of the inspection. (Tr. 283:5-8) It can be inferred from this that the Respondent knew that the lanyard was not operational, and instead of fixing the problem, tied it off so as to put it out of reach of miners. Since the Respondent knew that the lanyard cable for attaching the harness was broken, it should have blocked the area off and not allowed the trucks to tarp their loads on that side of the station. (Tr. 153:11-13)

The mine did not provide any evidence to show mitigating circumstances. (Tr. 130:24 – 131:2) I find American Colloid's negligence to be high.

Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. Roberts designated the citation as highly likely. (Tr. 123:22-24) The driver was standing eight feet nine inches above the ground when the verbal imminent danger order was issued. (Tr. 123:19-21) Roberts testified that the hazard he was addressing was the driver falling to the ground from the top of his load. (Tr. 130:17-19) Roberts marked the citation as potentially fatal because in his experience there have been many

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[8] The truck driver was not on top of his load and was walking on the ground when the inspector viewed the imminent danger of the other driver. (Tr. 142:14-23)

[9] At the time of the hearing, Rhoads was the plant supervisor and had been for three years. (Tr. 270:9-13) At the time of the hearing, he had worked for American Colloid for 22 years and had various jobs, including plant manager at two different plants. (Tr. 270:15-23) As the plant supervisor, Rhoads oversees the day-to-day operations, schedules production on a weekly and monthly basis, upholds policies and procedures, and does billing. (Tr. 271:2-6)

fatalities from miners falling from this and even lower heights. (Tr. 124:18-25) Additionally, there were numerous objects in the area that could strike a miner's head if he fell. *Id.* It is highly likely that falling from a height of eight feet nine inches could result in serious injury or a fatality, especially if a miner were to hit his head as he was falling. Therefore, I find that it is highly likely that the injury would be serious in nature. Additionally, I agree that one person was affected – the driver. (*See* Ex. S-16)

Significant and Substantial

The first and fourth prongs of the *Mathies* test have been met. The broken lanyard constituted a measure of danger to safety and a discrete safety hazard which could have resulted in serious injuries to a miner. The remaining question is whether there was a reasonable likelihood that the hazard would result in an injury.

Roberts testified that the truck driver had bentonite caked onto his shoes as he was walking on plywood and paper bags on the top of his load. (Tr. 123:25 – 124:13) He also testified that it was windy and had been raining the past few days before the order was issued. *Id.* Bentonite is slippery when wet. (Tr. 62:23-24) Additionally, the driver was parked in a high traffic area, and the roads were slick from wet bentonite. (Tr. 124:6-8)

It is reasonable to conclude that a driver walking on top of his load wearing shoes caked with bentonite, which becomes slippery when wet, could slip and fall over the edge to the ground, without safety equipment. A fall from that height could be fatal. Moreover, the truck was parked in a heavily traveled area, and the roads were slick. Another vehicle could have slid on the bentonite/water mixture on the ground and hit the driver's truck as he was tarping off his load without wearing a safety harness. The Secretary has proved by a preponderance of the evidence that there was a reasonable likelihood that the hazard contributed to would result in an injury. The S&S designation was warranted here.

Unwarrantable Failure

The Commission has determined that an unwarrantable failure is aggravated conduct constituting more than ordinary negligence and is determined by looking at all the facts and circumstances to see if any of the seven aggravating factors exists.

The Extent of the Violating Condition and the Length of Time the Violating Condition Existed

The record reflects that the violating condition was not extensive. The driver of the truck was the only person affected. Rhoads testified that the morning exam did not note the defective lanyard. It can be inferred that the lanyard was not broken for a long time.

The High Degree of Danger

It is clear the lanyard was broken. There was no safety equipment for the contract driver to wear. The tarping station had two bays, each with a safety lanyard. The operator failed to

block access to the bay with the broken lanyard. This omission gave anyone using that side of the tarping station access to the fall hazard under continuing mining activity.

The Violation was Obvious

Truck drivers used the tarping station often. Mine employees were regularly in the area. It was obvious that the lanyard was broken and wrapped around the I-beam. A driver walking on top of his load without safety equipment would be obvious to anyone walking by or observing the taping area, especially to mine employees and management.

The Operator's Knowledge

Unwarrantable failure is characterized by "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care."

Contemporaneous notes and Robert's testimony show that the operator refused to require contract truck drivers to use fall protection. (Ex. S-16; Tr. 129:25 – 130:8; Tr. 155:12-21) Rhoads showed a clear understanding of both the requirement and the operator's failure to comply by referring to a state court case in which a driver sued the company over an injury sustained while using a safety harness and implying that it had made an affirmative decision not to require the use of safety harnesses as a result. (Ex. S-16; Ex. R-23; Tr. 130:9-13; Tr. 152:2-7) Rhoads and Troy Mills[10] denied this position at the hearing. They stated that although they had mentioned the court case, they did not mean that it case prevented them from requiring the use of fall protection. (Tr. 295:3 -296:6; Tr. 302:16 – 303:16; Tr. 314: 16-25)

Rhoads' and Mills' testimony denying the company's reaction to the state court case was not credible. I am convinced that mine management mentioned the state court case at the time the order was written to offer the inspector an excuse why the mine did not have to require miners to wear safety equipment. This is consistent with Roberts' testimony that he spoke with a driver who stated that he had been loading at the mine for years and had never put on a safety harness while loading. (Tr. 128:11 – 129:2) I am convinced that the Respondent believed it did not have to enforce the fall protection standard.

I find that the Respondent's failure to require the use of safety equipment was intentional. Respondent showed a lack of reasonable care by not repairing the faulty lanyard or not blocking off that side of the tarping station.

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[10] At the time of the hearing, Mills was the interim plant manager for the Gascoyne North Dakota Operation at American Collioid, and prior to that he was the operation supervisor of Colony West. (Tr. 307:23 – 308:6) He also served as the environmental health and safety manager for Colony East and Colony West for approximately eight months. (Tr. 308:12 – 309:3) At the time of the hearing, Mills had been working for American Colloid for approximately 10 years. (Tr. 309:9-11)

The Operator's Efforts to Abate the Violating Condition

American Colloid abated the citation by changing its company policy and getting rid of the tarping station. Truck drivers were required to use the docking bay inside the warehouse which makes it possible to tarp their loads from ground level, and would eliminate the need for drivers to get on top of their loads. (Tr. 131:11-18)

Conclusion

The Secretary proved by a preponderance of the evidence that American Colloid engaged in aggravated conduct constituting of more than ordinary negligence, and therefore, an unwarrantable failure existed.

Penalty

The Secretary specially assessed the penalty for this citation at $40,300.00. American Colloid operates 609,078 hours per year. Additionally, Section 56.15005 was cited one time in the two years preceding issuance of the order. As noted above, American Colloid was highly negligent and acted intentionally. Regarding gravity, I found the violation was S&S. According to the stipulations agreed to by the parties, American Colloid demonstrated good faith in abatement of the violative condition and its business would not be significantly affected by the proposed penalty.

The Secretary proved a high degree of operator negligence and the existence of aggravating circumstances. The special penalty assessment was justified. Therefore, I assess a penalty in the amount of $40,300.00.

Order No. 6588114

On February 8, 2011, at 11:21am, Inspector James Peck[11] issued Order No. 6588114 to American Colloid at the Colony East Mill alleging a violation of 30 C.F.R. § 56.15005 pursuant to Section 105(d)(1) of the Mine Act. The regulation states that "[s]afety belts and lines shall be worn when persons work where there is danger of falling [...]." 30 C.F.R. § 56.15005. Section 56.15005 is a mandatory safety standard. The order alleges:

> The mine operator failed to ensure that safety belts and lines were worn when a truck driver was working where there was a danger of falling. At the truck bay of the warehoused, a truck driver was not

[11] At the time of the hearing, Peck had been working as a CLR for MSHA for approximately a year. (Tr. 157:16-25) Prior to that, he worked for MSHA as an inspector for approximately three years. (Tr. 158:2-9) Before working for MSHA, Peck was in the South Dakota National Guard. (Tr. 158:11 – 159:2) As part of the South Dakota National Guard, he commanded a horizontal construction company that contained a quarry section. *Id.* Concurrently, he worked for Home State Mining Company for 13 years underground as a miner, and the last six years on the surface in the metallurgical department. *Id.*

> wearing fall protection while on top of a pallet load of bagged bentonite, product name Premium Gel. The driver was in the process of tarping the load on the back of a flat bed [*sic.*] semi-trailer. The fall to ground hazard was approximately 68 inches to a cement floor. The pallet loads were covered in plastic and the tops of the loads were uneven making a slick surface for slips and falls. Also, recent snow would make for the bottoms of foot wear to be wet. With continued normal mining operations, a truck driver would reasonably likely suffer a foreseeable fatal injury from a fall. The mine operator has a facility for tarping truck loads with overhead fall protection, but has discontinued use of the facility stating difficulty in getting truck drivers to use the fall protection. The mine operator's site specific hazard awareness training did not include fall protection requirements or not to get on top of the loads. Standard 56.15005 was cited 2 times in two years at mine 4800594 (1 to the operator, 1 to a contractor). Management engaged in aggravated conduct constituting more than ordinary negligence in that they did not ensure safe tarping of truck loads. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-30.

Violation

The order alleges that an injury was reasonably likely, could reasonably be expected to result in a fatality, the violation was S&S, a single person was affected, and the negligence level was high. *Id.* Peck cited the mine for Section 56.15005 because safety lines and belts must be worn where there is a danger of falling. (Tr. 162:2-8)

Peck was walking into the loading area with Doolan when he observed a truck driver standing on top of her load of pallets, approximately 68 inches from the ground, without using safety equipment. (Tr. 161:19-25; Tr. 162:11-15; Ex. S-32) The driver was in danger of falling. (Tr. 162:11-15) Peck asked the driver why she was on top of her load, and she responded that she was tarping off her load. (Tr. 181:16-18)

Based upon the above, I find that American Colloid violated Section 56.15005 because the driver was working on top of her load where there was a danger of falling and was not wearing a safety belt or line.

Negligence

High negligence occurs when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3(d). Peck marked this citation as high negligence because the mine was on notice that the standard existed from the previous order issued. (Tr. 171:18 – 172:12) Peck testified that he felt the operator did

not take any actions to ensure the contractors were not getting on top of their loads. *Id.* The mine was also not using its tarping station, citing concerns about state litigation, and was disregarding miner safety. *Id.*

In mitigation, the company told Inspector Peck that the loading area was intended and designed to allow miners to tarp off their loads without having to get on top of their loads. (Tr. 173:4-10) However, the mine no longer had fall protection equipment for miners to use when they got on top of their loads, and its training handout did not ban miners from getting on top of their loads. (Tr. 172:13 – 173:3) Additionally, while the mine might have intended that miners would no longer have to get on top of their loads to tarp off, this was clearly not the case here. If the Respondent wanted to prevent this action from occurring, it should have indicated that via the site specific training or signage.

Based on the above, I find that American Colloid's acted with high negligence.

Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. If a miner were to slip and fall from 68 inches and hit her head on the way down, or hit her head on the concrete floor, it could result in a serious injury, i.e. a fatality. There have been fatalities from falls of this distance in the past. (Tr. 164:25 – 165:8) I agree that the injury could reasonably result in a fatality and one person was affected here – the driver. (*See* Ex. S-30)

Significant and Substantial

The first and the fourth prongs of the *Mathies* test have been met. There was a measure of danger to safety; a discrete safety hazard, was contributed to by the slippery conditions and lack of safety equipment, which could result in injuries to a miner or miners. What is left to be determined is whether there was a reasonable likelihood that the hazard contributed to would result in an injury.

Peck marked the citation as reasonably likely because the loads were uneven and covered in plastic, making them dangerous to walk on. (Tr. 164:8-18) Additionally, it had recently snowed, potentially causing slippery conditions on top of the plastic. *Id.* Also, bentonite and snow on the driver's shoes while she was walking on top of the load could cause slippery conditions, *Id.*, which could cause a person to fall. A fall from 68 inches could reasonably be expected to cause fatal injuries, particularly because the driver could hit her head on something on the way down (Tr. 164:19 – 165:8) or could have hit her head on the concrete floor. *Id.* Therefore, I find that there was a reasonable likelihood of a fatal injury.

The Secretary proved by a preponderance of the evidence that the S&S designation was warranted here.

Unwarrantable Failure

The Commission has determined that an "unwarrantable failure" is aggravated conduct constituting more than ordinary negligence and is determined by looking at all the facts and circumstances of each case to see if any of the seven aggravating factors exist. Peck testified that he marked the order as an unwarrantable failure because the Respondent should have been on high alert from their previous order relating to Section 56.15005 and because the safety training did not warn miners not to get on top of their loads. (Tr. 172:13 – 173:3) This was the only testimony given as to why the unwarrantable failure designation was assessed. I do not find this to be such conduct as to constitute "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care."

Some of the unwarrantable factors can be inferred by other testimony, such as the extent of the violation and the degree of danger. The record reflects that the violative condition was not extensive because there was only one person affected – the driver. Here, a driver was tarping off her load with muddy, slippery boots at a height of 68 inches, without the use of safety equipment, which was highly dangerous. It is also clear that a miner walking on top of her load at a height where there was a danger of falling without safety equipment was obvious to anyone in the taping area, especially to mine employees and mine management.

To abate the order, American Colloid changed its site specific hazardous training form by adding a statement that truck drivers were not allowed to get on top of their loads. (Tr. 173:11-17)

Based on the above, I find that the Secretary did not prove that American Colloid engaged in aggravated conduct constituting more than ordinary negligence. Therefore, I find that an unwarrantable failure designation is inappropriate here.

Penalty

The Secretary specially assessed the penalty for this citation as $30,200.00. American Colloid operates 707,333 hours per year. Additionally, Section 56.15005 was cited two times in the two years preceding issuance of the order. As I found above, American Colloid was highly negligent. As to the gravity of the violation, I found the violation was S&S. According to the stipulations agreed to by the parties, American Colloid demonstrated good faith in abatement of the violative condition and its business would not be significantly affected by the proposed penalty.

The Secretary, however, did not prove that an unwarrantable failure existed, and therefore, I cannot uphold the specially assessed penalty of $30,200.00. Based on the above, I assess a penalty amount of $7,000.00 for this order.

WHEREFORE, it is **ORDERED** that American Colloid pay a penalty of **$47,300.00** within thirty (30) days of the filing of this decision.

It is further **ORDERED** that Order No. 6427277 be modified from a 104(d)(1) order to a 104(d)(1) citation and Order No. 6588114 be modified from a 104(d)(2) order to a 104(a) citation.

L. Zane Gill
Administrative Law Judge

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