FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9900 / FAX: 202-434-9949

September 25, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. WARRIOR INVESTMENTS COMPANY, INC., Respondent	CIVIL PENALTY PROCEEDING Docket No. SE-2014-347 A.C. No. 01-03419-349329 Mine: Maxine-Pratt Mine

DECISION AND ORDER
AND ORDER APPROVING SETTLEMENT

Appearances: C. Renita Hollins, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee for Petitioner

J.D. Terry, Esq., Warrior Investments Company, Inc., Jasper, Alabama for Respondent

Before: Judge McCarthy

I. Statement of the Case

This case is before me upon a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). This case involves 12 citations, Nos. 8526290, 8526291, 8526292, 8527596, 8527598, 8528533, 8528534, 8528535, 8528536, 8528537, 8528538, and 8528539. An evidentiary hearing was held in Birmingham, Alabama on August 19, 2015. The parties introduced testimony and documentary evidence, and witnesses were sequestered.[1]

[1] P. Exs. 1-13, R. Exs. 2-6, and Joint Exhibit 1 were received into evidence. Tr. 9-11, 15, 30, 136-139. Respondent's Exhibit 1 was marked at hearing, but was later withdrawn. Tr. 12, 136.

In my view, as expressed to the parties in three pre-hearing conferences, this case should not have been tried. Unfortunately, both parties were intransigent and unwilling to compromise, even during a formal settlement conference conduct by my clerk at my office. Accordingly, unnecessary time and resources were devoted to this litigation. After extensive prodding, the parties announced shortly before the outset of the hearing that five of the citations had settled. After opening statements at the hearing, I suggested possible settlement terms and again strongly suggested that the parties settle the remaining citations. The parties agreed to settle an additional six citations. Only Citation No. 8528536 remained in dispute. The outline of a Settlement Agreement encompassing the other 11 of those 12 citations was placed on the record and the undersigned left the record open for receipt of the written Settlement Agreement.[2] Tr. 14, 18.

The remaining citation, No. 8528536, alleges that a non-functioning parking brake on a scoop at Warrior Investments Company, Inc.'s Maxine Pratt Mine constituted a violation of 30 C.F.R. § 75.523-3(b)(4). That regulation requires that "(b) Automatic emergency-parking brakes shall— (4) Hold the equipment stationary despite any contraction of brake parts, exhaustion of any non-mechanical source of energy, or leakage..."

The issues presented are whether Respondent violated 30 C.F.R. § 75.523-3(b)(4), whether any such violation would be highly likely to result in a fatality, whether the violation was properly designated as significant and substantial (S&S), and whether the proposed penalty of $2,282.00 is appropriate.

As explained herein, I find that the cited parking brake failed to hold the scoop stationary as required. Accordingly, I find a violation of 30 C.F.R. § 75.523-3(b)(4). On the instant record, I further find the violation to be significant and substantial, and I affirm the inspector's findings of moderate negligence, with one person highly likely to suffer fatal injury. Accordingly, Citation No. 8528536 is affirmed, as written, and the proposed penalty of $2,282.00 is assessed after consideration of the criteria set forth in section 110(i) of the Act.

Based on the entire record, including the parties' post hearing briefs and my observation of the demeanor of the witnesses[3], I find the following:

II. Stipulations

1. Warrior Investments Company, Inc., Mine ID 01-03419, is subject to the Federal Mine Safety and Health Act of 1977 (the "Mine Act") as amended.

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[2] In a further display of uncooperative behavior, the parties continued to fight over the terms of the settlement after the hearing. As a result, the settlement documents were not filed until September 22, 2015, well over a month after the hearing.

[3] In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, and consistency or lack thereof within the testimony of witnesses and between the testimony of witnesses.

2. The Administrative Law Judge has jurisdiction over these proceedings, pursuant to Section 105 of the Mine Act.

3. Warrior Investments Company, Inc., is an "operator" as defined in Section 3(d) of the Mine Act.

4. Warrior Investments Company, Inc. operations affect interstate commerce.

5. Citations at issue in this proceeding were served by certified mine inspectors acting in their official capacity as authorized representatives of the Secretary of Labor during the time of the inspection and when the citation was issued.

6. Warrior Investments Company, Inc. demonstrated good faith in abating the cited conditions.

7. These matters would not affect Warrior Investments Company, Inc.'s ability to remain in business.

P. Ex. 11; Tr. 20.

III. Motions to Dismiss

A. First Motion to Dismiss

Before addressing the substantive issues in this matter, it is first necessary to deal with two Motions to Dismiss filed by Respondent. For the reasons that will follow, both of those motions are without merit and are hereby denied.

Respondent filed its initial Motion to Dismiss on August 13, 2015. In that motion, Respondent alleges that the Secretary's counsel failed to comply with the Order of Assignment and Pre-Hearing Order as well as the Order of Assignment to Settlement Attorney. R. Ex. 3. Specifically, Respondent argues that the Secretary refused to discuss settlement, failed to participate in the settlement conference in good faith, failed to file a subpoena in a timely fashion, and filed the Pre-Hearing Report on August 6, 2015, two days after the filing date. *Id.*

On the day the Motion to Dismiss was filed, I held a conference call with the parties. In that conference call, the Secretary's counsel refuted the allegations made in the Motion and offered to provide documentation to support her positions. Specifically, Secretary's counsel claimed that she had discussed settlement and made offers in good faith when her client was available, Conference Call (CC) Transcript at 7-9 of 35. In fact, she demonstrated the Secretary's willingness to compromise by averring that five of the citations had settled. CC Tr. at 8 of 35.

During the call, I rejected Respondent's arguments in that call and stated that the Motion would be denied. CC Tr. at 10 & 34 of 35. I explained that the denial was appropriate because the Secretary had settled several citations and I was not convinced that she was violating my

Orders. CC Tr. at 30 of 35. At hearing, I further explained that I did not observe any violation of any Orders and that I was precluded from ruling on issues arising from the confidential settlement negotiations with the settlement attorney. Tr. 142-143. Also, with respect to the Pre-Hearing Order, Commission records conclusively show that the Secretary filed the required document on the deadline, August 4, 2015. In short, Respondent's first Motion to Dismiss was without merit and appropriately denied.

B. Second Motion Dismiss

1. Allegations And Testimony Regarding Second Motion To Dismiss

On August 18, 2015, the first day of the hearing, Respondent filed a Second Motion to Dismiss. In that motion, Respondent argues that on February 27, 2015, former foreman Josh Holbrook was deposed by the Secretary's counsel. R. Ex. 2. Respondent's counsel was not available for that deposition because of a pre-existing conflict, of which the Secretary was aware. Respondent argues that during that deposition, Holbrook provided the Secretary with notes that Holbrook took contemporaneously with Smith's investigation of Citation No. 8528536. R. Ex. 2. Respondent further argues that the Secretary never returned those notes to Holbrook. More importantly, Respondent argues that the Secretary refused to make those notes available during discovery. *Id.* As a result, Respondent asks for dismissal of the Secretary's civil penalty proceeding with respect to Citation No. 8528536.

In order to determine the validity of Respondent's allegations, I subpoenaed Holbrook and he testified at hearing. Tr. 128-130, 191. Holbrook was questioned extensively regarding his notes. Specifically, Holbrook testified that he took notes every day for his personal records while working at the Mine, and he placed extra emphasis on those notes when inspectors were present. Tr. 92, 154, 165-167. His notes covered the citations received in this matter, as well other information, and said notes ranged from detailed to vague. Tr. 153-154, 165. Holbrook kept his notes in a leather wallet, and changed the paper as necessary. Tr. 155, 166.

Holbrook testified that he took notes on the day of the instant citation. Tr. 152-153. However, those notes were later lost and he could not recall when that occurred. Tr. 152-153, 156. Holbrook recalled the notes and characterized them as a "rough estimate" of the citation. Tr. 161. He testified that the notes included no additional descriptions of the conditions present. Tr. 156, 191. The notes also included loose copies of the inspector's citations. Tr. 156. At times, Holbrook's notes included points of disagreement with the inspector, but Holbrook testified that there were not any points of disagreement with respect to the citation at issue. Tr. 191-192. If he had disagreed with the citation, there would have been notes to that effect, but Holbrook testified that his lost notes did not reflect anything other than his agreement with the instant citation. Tr. 192-93.

Holbrook did have possession of his notes and discussed them when he was deposed by the Secretary's counsel in February 2015. Tr. 153, 165-168, 189. At that time, all of Holbrook's notes were in his notebook in chronological order. Tr. 168. At the deposition, the Secretary's counsel asked if she could make a copy of his notes, although Holbrook could not recall if copies

were actually made. Tr. 153-154, 168-169. Holbrook believed he pulled the notes out of the notebook and gave the loose notes to CLR Brandon Russell to make copies.[4] Tr. 157, 169, 190.

After Holbrook testified pursuant to subpoena, Russell was called to testify by the undersigned. Tr. 194-195. When asked whether Holbrook had given Russell his notes for copying at the deposition, Russell testified that that was possible, but Russell did not recall ever receiving the notes or making copies. Tr. 195-196. Russell opined that if he had taken the notes for copying, he would have given them back to Holbrook afterwards. Tr. 196-197. Holbrook testified that his notes may have been returned to him, but Holbrook could not locate them after his deposition. Tr. 169, 190-191. Holbrook testified that he never had reason to look at his notes again after the deposition. Tr. 154, 190.

At hearing, at the request of the undersigned, the Secretary's counsel made a representation as an officer of the court as to her recollection about what happened to Holbrook's notes at the deposition. She stated that she saw Holbrook reviewing his notes and initially asked if she could make copies. Tr. 197-198. As the deposition progressed, however, it became apparent that his notes were not detailed and did not contain any worthwhile information. Tr. 198. As a result, no copies of the notes were made and the Secretary's counsel never took possession of them. Tr. 199-200.

2. Denial Of Respondent's Second Motion To Dismiss

Under Commission Rule 56, "[p]arties may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence." 29 C.F.R. § 2700.56. Clearly, an eyewitness' contemporaneous notes would be relevant, non-privileged, and generally admissible. Therefore, Respondent made a proper discovery request. Further, it is undisputed that the Secretary failed to provide the requested notes. However, despite these circumstances, Respondent's Second Motion to Dismiss must fail for two reasons.

First, a party can only provide requested discovery documents that are in its possession or control. At hearing, Russell testified that he did not recall receiving Holbrook's notes or making copies. Tr. 195-196. Similarly, the Secretary's counsel as officer of the Court, represented that although she initially asked to make copies of the notes, she ultimately decided not to do so. Tr. 197-200. Finally, Holbrook testified that he thought that he may have given his notes to Russell, and that Russell may have returned them. Tr. 169, 190-191, 196-197. Holbrook simply did not recall what happened to his notes after the meeting and had no reason to look for them. Tr. 154, 169, 190. Based on this testimony, I find it most likely that Holbrook simply misplaced his loose notes after his deposition.

Regardless of what actually happened to Holbrook's notes, Respondent failed to establish that the Secretary was withholding evidence. The motion was based solely on Respondent's uncorroborated suspicion. Therefore, dismissal of this matter is inappropriate.

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[4] Brandon Russell was an MSHA Conference and Litigation Representative, who was present at Holbrook's deposition and at the hearing. Tr. 195.

In addition, Commission Rule 59 provides that "[u]pon the failure of any person, including a party, to respond to a discovery request or upon an objection to such a request, the party seeking discovery may file a motion with the Judge requesting an order compelling discovery." 29 C.F.R. § 2700.59. Only after a party has failed to comply with an order compelling discovery may the judge take actions that are "just and appropriate, including ... dismissing the proceeding in favor of the party seeking discovery." *Id.* In the instant matter, Respondent never filed a motion requesting an order to compel discovery. Therefore, I lack the authority to dismiss this matter in the manner urged by Respondent.

Essentially, Respondent decided to spring the Motion to Dismiss on the Secretary without following the proper procedure. If Respondent wishes to sanction the Secretary for allegedly failing to follow the rules, Respondent must also follow the rules in pursuing such sanction. Further, if Respondent had followed the proper procedure, and worked with the Secretary toward amicable resolution of outstanding issues rather than quarrel with the Secretary every step of the way, it may have learned sooner that the Secretary was not in possession of the documents.

I further note that the consequences of the missing notes were somewhat mitigated by my issuance of a subpoena compelling Holbrook to testify at hearing. While Holbrook's notes may have shed light on Holbrook's testimony, he was able to testify to the general content of his notes, if not the details. He credibly testified that the notes contained rough descriptions of the citations and that the notes would only confirm that he agreed with the inspector's assessments in all respects. Tr. 156, 191-193. Accordingly, based on this testimony, I find alternatively that any failure by the Secretary to turn Holbrook's notes over during discovery was harmless error that does not warrant granting Respondent's eleventh-hour motion to dismiss. Accordingly, Respondent's motions to dismiss are denied.

Having determined that dismissal in this matter is inappropriate, I now turn to the substantive matters at issue here.

IV. Findings of Fact

MSHA Inspector Todd Smith[5] conducted an EO-1 inspection of Maxine-Pratt Mine on March 6, 2014.[6] Tr. 69-70, 91. The mine ranges between 30 inches and 56 inches in height with an average height of 42 inches. Tr. 79, 160. The terrain in the mine is largely flat with some small, rolling hills. Tr. 85, 93-94, 182-183. There is between 40 and 200 feet of cover above the mine and at least two additional mines 60 and 460 feet below. Tr. 94.

[5] At the time of the hearing, Smith had been employed as a coal mine inspector at MSHA for about three years. Tr. 65. His prior mining experience was limited to about a year working as a general laborer at CONSOL Buchanan No. 1 Mine. Tr. 67-69. He also spent time at a mine owned by his father, although he did not work there. Tr. 68.

[6] An EO-1 inspection is a normal, quarterly, general inspection. Tr. 70.

During the instant inspection, inspector Smith and Josh Holbrook, approached a scoop located at the feeder in Section 35 West and found the scoop operator and helper preparing to load supplies or material into the scoop bucket.[7] Tr. 73, 75-76, 91, 93, 95-96, 108, 115, 158, 160. The scoop was approximately two feet tall, 16-22 feet long, 8-12 feet wide, and likely weighed around 2,000 pounds when unloaded, and 3,500 pounds when loaded. Tr. 79-80, 86-87, 160-161. This particular scoop was not loaded and it was unclear what supplies or material the miners were preparing to place in it. Tr. 86-87, 97-98. The scoop did not appear to be moving, and it was unclear whether it was energized when Smith and Holbrook approached. Tr. 96, 113, 117. There was a great deal of equipment in the area around the scoop, including section pumps, power boxes, belts, park rides, crib blocks, and toolboxes. Tr. 89-90, 179.

Smith and Holbrook decided to conduct an inspection of the scoop's braking system at the location in which they found the machine. Tr. 73, 86, 98, 106, 108, 158. The scoop was sitting on a small roll, or hill, in the mine. Tr. 79, 86, 108. There were two brakes on the scoop, a service brake and a parking brake. Tr. 174. The parking brake was also used as an emergency braking system. Tr. 174. The inspection was designed to test whether the parking brakes were capable of stopping the machine and holding it stationary within five seconds of application. Tr. 74, 101, 107. During the test, inspector Smith told the scoop operator to avoid the service brake to ensure that only the parking brake was tested. Tr. 110.

To conduct the inspection, Smith told the scoop operator to tram the machine forward and hit the "panic bar." Tr. 73, 77, 98, 106, 162. The panic bar was designed to de-energize the scoop and automatically set the brake. Tr. 73-74. Smith and Holbrook both testified that during the test, the operator hit the panic bar and the machine continued to move; it did not stop within five seconds. Tr. 74, 78, 86, 101, 162, 173. Smith believed the panic bar did not set the brake. Tr. 98-99, 101. Holbrook believed that the parking brake set, but failed to stop the scoop. Tr. 174, 184. Smith recalled that he then asked the scoop operator to reverse, set the brake manually, and try again.[8] Tr. 78. When the operator did so, the de-energized scoop rolled once again. Tr. 74-75, 78-79, 101-102, 104-105, 108-109. Smith testified that the scoop rolled 5 to 10 feet, and Holbrook testified that it rolled between 3 and 8 feet and only stopped when the scoop operator lowered the bucket. Tr. 79, 104, 109, 162, 175, 184, 193. Smith never tested the scoop without the operator in it because the brakes could not hold the machine while the operator was controlling it. Tr. 111.

After the test, the scoop operator began to back up and Smith and Holbrook noticed that the scoop moved despite the fact that the brake was still engaged. Tr. 74, 102-105, 111, 159.

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[7] As noted, Holbrook testified at the outset of the second day at the hearing pursuant to a subpoena issued by the undersigned after the first day of hearing. See Tr. 128-130, 191. At the time of the hearing, Holbrook was employed at North Pratt Mine. Tr. 146. He had previously worked as a foreman and assistant to Warrior's superintendent from August 2012 to March 2014. Tr. 146-147, 164. Holbrook had 14 years of mining experience and held a variety of jobs and certifications at various mines in three states. Tr. 148-150, 163-164.

[8] Holbrook did not recall this second part of the test, and he was not sure that the scoop had a manual activation for the parking brake. Tr. 176-178, 184.

Holbrook testified that the machine would not stop "whatsoever." Tr. 159. Smith recorded these facts in his inspection notes.[9] Tr. 100.

After the testing, Smith issued a section 104(a) Citation No. 8528536 (P. Ex. 5.). Tr. 71, 99. The citation alleged a violation of 30 C.F.R. § 75.523-3(b)(4) and states:

> The parking brake for the S&S 482 scoop (Co#1) located on 35 West section would not hold the equipment stationary. When inspected, the parking brake would set but would not prevent the equipment from further movement. This violation poses a hazard to miners working near or around the scoop of being struck or pinned by the machine if left unattended. This scoop is the primary scoop for the 35 West section.

P. Ex. 5. Smith testified that he issued the citation because the brakes were supposed to hold a fully-loaded piece of equipment on the steepest grade at the mine, and they could not hold an empty scoop on a small incline. Tr. 87, 106. At hearing, former Warrior representative Holbrook testified that he agreed with Smith's determination regarding the issuance of the citation. Tr. 162, 192.

The citation was designated as "highly likely" to result in injury. P. Ex. 5. Smith testified that this designation was appropriate because the brakes on the scoop did not work, there were people working around and loading the scoop, and the low height of the mine limited visibility, create multi-directional sound, and increased exposure. Tr. 83, 90-91, 119-120. Smith testified that the scoop, if left unattended, would roll, strike a miner, and cause crushing injuries. Tr. 80-81. Smith testified that a miner could be crushed between the scoop and the rib or between the scoop and another piece of equipment. Tr. 90. Further, he testified that miners often left their scoops while working, and it was normal for the scoop to be left energized at those times. Tr. 80-81, 113. Although miners were supposed to de-energize the scoop, it would take 20-30 seconds to re-energize the scoop if it was turned off and they did not always do so. Tr. 114-118, 180-181. Smith testified that several fatalities occurred each year in this manner. Tr. 81. At hearing, Holbrook agreed with Smith's determination regarding likelihood of injury. Tr. 163. However, neither Smith nor Holbrook could recall any serious injuries involving equipment at the Maxine-Pratt mine. Tr. 119, 186.

Holbrook testified that Respondent trained its miners in the proper procedure for operating scoops. Tr. 179. Under industry best practices, the scoop bucket should be on the ground and facing the rib. Tr. 115-116, 118-119, 180-182. Holbrook testified that placing the bucket down would take pressure off the tires and render movement and injury impossible. Tr. 183, 185-186. He opined that taking such safety precautions would insure that the scoop would not hurt anyone. Tr. 188.

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[9] Specifically, Smith wrote, "[t]he parking brake on the S&S 482 scoop, company No. 1, located on 35 West section would not hold the equipment stationary when inspected. Parking brake would set, but would not prevent further movement. The scoop would roll after set and would tram when operator applied power." Tr. 100.

In the instant matter, the bucket was down when Smith arrived and it was raised for the test. Tr. 117, 184. However, both Smith and Holbrook testified that miners did not always follow best practices. Tr. 121, 180-182. In fact, Holbrook recalled instances where miners failed to follow their training and jumped out of scoops without putting their buckets down. Tr. 193. Further, in the instant situation, the scoop was not facing the rib. Tr. 117-118.

The citation was also designated as S&S. P. Ex. 5. Smith testified that this designation was appropriate because the parking brake would not hold the equipment on uneven terrain and contributed to the hazard that the scoop would move and crush a miner. Tr. 83-84. At hearing, Holbrook testified that he agreed with Smith's determination regarding the S&S designation. Tr. 163.

The citation was also designated as "fatal." P. Ex. 5. Smith testified that this designation was appropriate because the 42-inch height of the mine meant that miners would be crawling and their vital areas (head and chest) would be exposed to the crushing force of moving or rolling equipment. Tr. 84-85, 120. Further, Smith emphasized the history of such fatalities in the industry. Tr. 85. In addition, the size of the equipment supported his "fatal" designation. Tr. 121-122.

The citation was also designated as affecting "one" person. P. Ex. 5. Smith testified that this designation was appropriate because either the scoop operator or another miner would be in the area. Tr. 88. Smith testified that generally at this mine, scoop operators work alone and exit their machines to collect material. Tr. 88-89. While doing so, they typically leave the machine on, with the brake set. Tr. 88-89. Smith testified that the cited scoop with the defective parking brake would have struck the operator in such a scenario. Tr. 89.

The citation was also designated as resulting from Respondent's "moderate" negligence. P. Ex. 5. Respondent's counsel conceded that if the citation was valid, it resulted from Warrior's moderate negligence. Tr. 88.

Finally, a $2,282.00 civil penalty was proposed by MSHA. P. Ex. 5.

V. The Parties' Closing Arguments

At the close of the hearing, the parties agreed to forego post-hearing briefs. Tr. 200-201. Instead, the parties offered closing statements in which they summarized their legal arguments.

The Secretary contends that Respondent violated the cited standard because the parking brake on the cited scoop failed and would not hold the equipment. Tr. 201. The Secretary also argues that a fatal injury was highly likely because of the mine height, the size of the scoop, the fact that miners were on foot nearby, the fact that other equipment was near the scoop, the fact that nothing was present to secure the scoop, and the fact that the scoop was tested while unloaded and only on a slight incline. Tr. 201-203. The Secretary emphasizes that both inspector Smith and Holbrook agreed that the Citation was properly written. Tr. 203.

The Respondent argues that the Citation should be vacated because the scoop was improperly tested while energized. Tr. 205-206. Respondent argues that it was improper to test the scoop while it was unloaded in the location where cited with an operator at its controls, rather than when loaded and unattended on the steepest incline at the Mine. Tr. 42-43, 205. Respondent also notes that Smith and Holbrook testified inconsistently on whether the panic bar that is used to activate the cited parking brake was effective. Tr. 204. Respondent further argues that an injury was not highly likely to occur because it was common practice for the scoop operator to de-energize the scoop, face the scoop toward the rib, and place the scoop bucket on the ground when exiting, thereby making movement impossible. Tr. 207-208.

VI. Conclusions of Law and Legal Analysis Re-Affirming Preliminary Bench Decision

Following the hearing, and after considering record evidence and opening and closing statements from both parties, I made preliminary conclusions and findings regarding Citation No. 8528536. Specifically, I stated the following at hearing:

> I am going to affirm the citation as written and the proposed penalty unless there's any aggravating factors that would increase the penalty. I will fully explain my decision in my written decision which will follow. The testimony of the inspector was essentially unrebutted by any witness from the Respondent. It was essentially corroborated by the testimony from Mr. Holbrook this morning. And the Court doesn't have any choice in light of those facts except to affirm the citation as written. And that's what I'm going to do. I'm going to find that the violation was—was a violation of the standard because it did not hold the equipment stationary despite any contraction of brake parts. It was a discrete safety hazard that the equipment would move in a mine which was only 40 to 56 inches in height. There was exposure of the scoop operator and a miner at the time of the incident. I'm going to find that it was highly likely under the facts as set forth by the inspector, and as affirmed by Ms. Hollins in her closing remarks, that highly likely that the violation contributed to a hazard; i.e., the scoop moving, that was highly likely to result in injury to a miner, the injury would be serious in nature. There would be crushing injuries either when the scoop moved and pinned the miner against another piece of equipment or against a rib. And I am likely to affirm the penalty as written, $2,282.00, consistent with the criteria in Section 110(i).

Tr. 209-210. Having carefully reviewed the record, I affirm my preliminary findings and conclusions, as set forth below.

Based upon further reflection and review of the transcript, I find that Respondent violated 30 C.F.R. § 75.523-3(b)(4) because the parking brake on the 482 scoop (Co#1) failed to hold the

machine stationary after application. Smith and Holbrook's testimony regarding this violation is essentially unrebutted. Specifically, during a test of the parking brake, the operator hit the panic bar and the scoop continued to move. Tr. 74, 78, 86, 101, 162, 173. Smith testified that the scoop was then stopped and the parking brake was manually set. Tr. 78. The parking brake, however, failed to hold the machine in a stationary position; it began rolling again while it was de-energized. Tr. 74-75, 78-79, 101-102, 104-105, 108-109. Holbrook testified that the machine rolled at least three feet and Smith testified that it roiled perhaps as much as ten feet. Tr. 79, 104, 109, 162, 175, 184, 193.

I reject Respondent's argument that the scoop was improperly energized during the test and therefore the citation should be vacated. As discussed *supra*, Smith testified credibly that the scoop was de-energized during the test. Tr. 79, 104. Respondent presented no evidence at hearing to rebut this testimony. Respondent's entire argument apparently rests on a section of Smith's notes where he wrote, "[t]he scoop would roll after set and would tram when operator applied power." Tr. 100. However, Smith credibly explained that this reference in his notes described the fact that the scoop easily reversed under power while the brake was set, showing the degree to which the brake's stopping power was diminished. Tr. 74, 102-105, 111. The note did not refer to the test itself.

I similarly reject Respondent's argument that the scoop was improperly inspected because it not tested while loaded and left unattended on the steepest incline at the Mine. As I explained at hearing, the fact that the inspector did not test on the steepest grade while the scoop was fully loaded showed that the brakes were in a worse condition than necessary to prove a violation of the cited standard. Tr. 112. Similarly, when inspector Smith was asked whether he tested the scoop while unattended, Smith replied, "Lord no," and explained that because the scoop would not remain stationary with an operator, he did not want to risk testing it when unattended. Tr. 111. I find that the failure of the parking brake to hold the machine stationary at grade, with less than full load or weight, necessarily meant that the parking brake would fail a more stringent test under the requirements of the standard.

Finally, I reject Respondent's argument that the witnesses differed on whether the panic bar used to activate the cited parking brake was effective. Respondent is correct that there were some minor differences in Smith and Holbrook's testimony regarding the panic bar. Specifically, Smith testified that the panic bar did not set the brake, while Holbrook testified that the parking brake set, but failed to stop the scoop. Tr. 98-99, 101, 174, 184. Holbrook also did not recall whether Smith had the scoop operator manually set the brake to conduct a re-test. Tr. 176-178, 184. These apparent inconsistencies, however, were substantially immaterial. As discussed at length *supra*, the unrebutted testimony of both Smith and Holbrook showed that at some point, the brake was activated and failed to hold the de-energized scoop in a stationary position. Neither witness had any doubt that the scoop failed the test. Whether each witness could recall the exact minutiae of the inspection a year and a half after the fact is not significant. As such, Respondent's arguments in no way undermine the substantial evidence in the record that the scoop's parking brake flunked the test.

In sum, based on my review of the entire record, I find that the Secretary has proven by a preponderance of the evidence that Respondent violated 30 C.F.R. § 75.523-3(b)(4) because the parking brake on the scoop failed to hold the machine stationary after application

I similarly conclude that the violation of 30 C.F.R. § 75.523-3(b)(4) was significant and substantial in nature. The violation contributed to a discrete crushing hazard that was reasonably likely to result in injury, and the injury was reasonably likely to be of a serious nature.

The Mine Act describes an S&S violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). The Commission has held that a violation is S&S "if, based on 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). Consistent 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.*, 6 FMSHRC at 1575.

To establish an S&S violation under *National Gypsum*, the Secretary must prove the four elements of the Commission's subsequent *Mathies* test: (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. *See Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *accord Buck Creek Coal, supra,* 52 F.3d 133, 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria). An S&S determination must be based on the particular facts surrounding the violation and in the context of continued normal mining operations. *Texasgulf, Inc.,* 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co.,* 6 FMSHRC 1573, 1574 (July 1984)).

For the reasons explained above, I have found the underlying violation of mandatory safety 30 C.F.R. § 75.523-3(b)(4).

With regard to the second *Mathies* factor, the violation contributed to a discrete crushing hazard from the scoop when it was left unattended, and to a discrete hazard of being unable to stop the equipment in an emergency, both measures of danger to safety.

With respect to the crushing hazard, inspector Smith offered credible, unrebutted testimony that miners were working on foot in front of the machine. Tr. 76. The miners were working in low coal and with limited visibility and hearing. Tr. 83, 90-91, 119-120. Smith persuasively testified that the scoop, if left unattended, would roll, and crush a miner. Tr. 80-81. He further credibly testified that a miner could be crushed between the scoop and the rib, or between the scoop and another piece of equipment. Tr. 90.

With respect to the emergency hazard, my finding rests on the Commission's decision in *Consolidation Coal Co.*, 35 FMSHRC 2326 (Aug. 2013). In that case, the operator violated 30

C.F.R. § 75.523-3(b) "because the emergency brake on a scoop, when applied using the panic bar, did not engage and bring the equipment to a complete stop." *Id.* at 2332. The Commission affirmed the judge's decision that this violation contributed to the hazard of being unable to stop the equipment in an emergency. *Id.* at 2333, *citing Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2364. The Commission found that, much like the lifeline issue addressed in *Cumberland*, the need for the panic bar on a scoop would arise in the context of an emergency that required use of the emergency brake. *Id.* The Commission noted, "[t]hus, as the judge concluded, the relevant hazard contributed to by the panic bar violation is the inability to stop the scoop in an emergency." *Id.*, *citing Maple Creek Mining Inc.*, 27 FMSHRC 555, 563 n.5 (Aug. 2005). In the instant matter, the panic bar either failed to activate the emergency brake or once activated, the brake failed to stop the scoop or hold it in a stationary position. Therefore, the violation contributed to the hazard of the scoop being unable to stop in an emergency.

With respect to the third *Mathies* factor, the Secretary must "a reasonable likelihood [that] the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1129 (Aug. 1985). "The Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (quoting *Musser Engineering, Inc. & PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010). Moreover, the Secretary is not required to prove that the hazard contributed to will actually result in an injury causing event. *Youghioghemy & Ohio Coal Co.*, 9 FMSHRC 673, 678 (April 1987). Rather, the Secretary need only establish that the hazard contributed to is reasonably likely to result in an injury. See *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014)("the question is not whether it is likely that the hazard... would have occurred; instead, the ALJ had to determine only whether, if the hazard occurred (regardless of the likelihood), it was reasonably likely that a reasonably serious injury would result.").

In the instant matter, the Secretary established that a miner being crushed by a scoop would be reasonably likely to suffer injury. The scoop was extremely large, and even when unloaded it weighed about 2,000 pounds. Tr. 79-80, 86-87, 160-161. A miner, who was pinned to other equipment or to the ribs by the movement of such a massive piece of machinery, would easily suffer crushing injuries. Tr. 80-81, 90. Further, a large scoop that could not be stopped in an emergency situation could easily strike other miners in the area and endanger the scoop operator. Therefore, there was a reasonable likelihood that the discrete hazards contributed to by this violation would result in injury.

Finally, with regard to the fourth *Mathies* factor, I find a reasonable likelihood that the injury resulting from the instant violation would be of a reasonably serious nature and most likely fatal. Smith's unrebutted testimony established that the height of the mine, the position of the miners, the vulnerability of the miners' heads and vital organs, and the large size and heavy weight of the equipment, made a fatal injury likely. Tr. 84-85, 120-122. Accordingly, I find that the fourth element of the *Mathies* test has been established. Consequently the Secretary has established that the cited condition was S&S.

In an issue that is related to, although not subsumed by, the S&S determination, I further conclude that the violation of 30 C.F.R. § 75.523-3(b)(4) was highly likely to result in a fatal

injury to one miner. It would be unnecessarily repetitive to discuss the likelihood of a fatal injury to one miner at length, given the S&S analysis above. It suffices to note that while the S&S analysis required only a finding that an injury was "reasonably likely," the facts shown above go much further and a finding of "highly likely" is appropriate. I note further that Holbrook testified that he agreed with the gravity assessment. Tr. 163. Therefore, I find that this citation was reasonably likely to result in fatal injuries to one miner.

Respondent argues that an injury was not highly likely because it was common practice for the scoop operator to de-energize the scoop, face the scoop toward the rib, and place the scoop bucket on the ground when exiting, thereby rendering scoop movement impossible. Tr. 207-208. At hearing, Holbrook confirmed that taking such actions were industry best practices. Tr. 115-116, 118-119, 180-182. Further, Holbrook agreed that taking all of these precautions would make an injury unlikely or impossible. Tr. 188.

Both Smith and Holbrook testified, however, that miners do not always follow such practices. Tr. 121, 180-182. Smith testified that miners were supposed to de-energize scoops before leaving them, but that re-energizing took 20-30 seconds, and that miners often left scoops energized. Tr. 80-81, 114-118, 180-181. Similarly, Holbrook testified that he was familiar with situations where miners failed to follow prescribed training and exited their scoops without putting their buckets down. Tr. 193. Further, the record establishes that the cited scoop was not turned so that it was facing the rib. Tr. 117-118. In short, in the dynamic mining environment like the one prevailing at the Maxine-Pratt Mine, it was highly likely that a miner would exit the scoop while it was energized, with its bucket up, and while it was not facing the rib. As a result, a fatal injury to one miner would be highly likely. As such, Respondent's argument in no way undermines my findings.

For all of the foregoing reasons, Citation No. 8528536 is affirmed, as written.

VI. Civil Penalty

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

Here, as is typical, the Secretary provided a proposed assessment. The Commission has frequently recognized that section 110(i) of the Mine Act confers upon the Commission the authority to assess all civil penalties provided under the Act. See *Wade Sand & Gravel Company*, Docket No. SE 2013-120-M, slip op. (Sep. 16, 2015); and *Mining & Property Specialists*, 33 FMSHRC 2961, 2963 (Dec. 2011). Neither the Judge nor the Commission is bound by the proposed assessment. 29 C.F.R. § 2700.30(b); *Wade Sand & Gravel Company, supra*; *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) ("[Neither]

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."). However, while the Secretary's proposed penalty is not binding, the Commission has recognized that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *Performance Coal Co.*, 2013 WL 4140438, *2 (Aug. 2, 2013); *Spartan Mining Co.*, 30 FMSHRC *supra*; *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000).

In light of the Commission authority described above, I take pains to ensure that my penalty assessments are as transparent as possible. As I discussed in my final *Big Ridge* decision, in an effort to avoid the appearance of arbitrariness, I look to the Secretary's assessment formula as a reference point. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 19, 2014) (ALJ). This formula is not binding, but operates as a lodestar, since factors involved in a violation, such as the level of negligence, may fall on a continuum rather than fit neatly into one of five gradations. Further, unique aggravating or mitigating circumstances may call for higher or lower penalties, and will be taken into account under my independent analysis of the the criteria set forth in section 110(i) of the Mine Act and Commission precedent.

I find that the penalty proposed by the Secretary of $2,282.00 is consistent with the stipulated findings and my findings herein regarding the statutory criteria set forth in section 110(i) of the Mine Act. 30 U.S.C. 820(i). Accordingly, I assess a $2,282.00 civil penalty against Respondent for Citation No. 8528536.

In addition to this citation, I have reviewed the parties' Joint Motion to Approve Partial Settlement. With respect to the 11 citations discussed in that Motion, a reduction in penalty from a reduction in penalty from $5,091 to $3,313.00 is proposed.

Specifically, the parties request that Citation Nos. 8527596, 8527598, 8528534, 8528539, 8526290, 8526291, and 8526292 be modified to reduce the likelihood of injury or illness from "Reasonably Likely" to "Unlikely" and to delete the significant and substantial designation. The parties request that Citation No. 8528537 remain unchanged, but request a reduction in penalty by stating that there are legitimate factual and legal disputes regarding gravity and negligence. Finally, the parties agreed to accept Citation Nos. 85285333, 8528535, and 8528538, as written.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.[10] The settlement amounts are as follows:

[10] Pursuant to 29 C.F.R. 2700.1(b) and Federal Rule of Civil Procedure 12(f), I strike paragraphs three and four of the motion as immaterial and impertinent to the issues legitimately before the Commission. The paragraphs incorrectly cite and interpret the case law and misrepresent the statute, regulations, and Congressional intent regarding settlement under the Mine Act. Instead, I have evaluated the proposed settlement in accordance with sections 110(i) and 110(k) of the Act.

Citation No.	Assessment	Settlement
8526290	$634.00	$375.00
8526291	$634.00	$375.00
8526292	$499.00	$100.00
8527596	$460.00	$275.00
8527598	$460.00	$275.00
8528533	$499.00	$499.00
8528534	$308.00	$100.00
8528535	$224.00	$224.00
8528537	$499.00	$450.00
8528538	$540.00	$540.00
8528539	$334.00	$100.00
Total:	$5,091.00	$3,313.00

VII. Order

Wherefore, it is **ORDERED** that Citation Nos. 8528533, 8528535, 8528536, and 8528538 be **AFFIRMED**, as written.

It is **ORDERED** that Citation No. 8527596, 8527598, 8528534, 8528539, 8526290, 8526291, and 8526292 be **MODIFIED** to reduce the likelihood of injury or illness from "Reasonably Likely" to "Unlikely" and to delete the significant and substantial designation

It is **ORDERED** that Citation No. 8528537 be **MODIFIED** to reduce the civil penalty.

To the extent Respondent has not already done so, within 40 days of the date of this decision, Respondent Warrior Investments Company, Inc., is **ORDERED TO PAY** a total civil penalty of $5,595.00 in this matter.[11]

Thomas P. McCarthy
Administrative Law Judge

Distribution:

J.D. Terry, Esq., Safety Director, Warrior Investments Company, Inc., 218 Highway 195, Jasper, AL 35503

C Renita Hollins, Esq., U.S. Department of Labor, Office of the Solicitor, 211 7th Avenue North, Suite 420, Nashville, TN 37219

[11] Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.