

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th STREET, SUITE 443  
DENVER, CO 80202-2500  
303-844-5267/FAX 303-844-5268

December 8, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2009-344-M
Petitioner	:	A.C. No. 14-00073-178858
	:	
v.	:	
	:	
LAFARGE MIDWEST, INC.,	:	Lafarge Midwest Inc.
Respondent	:	

**DECISION**

Appearances: Matthew Finnigan, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Christopher Peterson, Jackson Kelly, PLLC, Denver, Colorado, for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Lafarge Midwest, Inc., (“Lafarge”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act” or “Act”). The case involves one citation issued by MSHA under section 104(d) of the Mine Act at the Lafarge Midwest cement plant operated by Lafarge Midwest, Inc. The parties presented testimony and documentary evidence at the hearing held in Wichita, Kansas on June 15, 2010. At the conclusion of the hearing, the parties presented oral arguments, and a decision was rendered from the bench. This decision incorporates the decision issued from the bench, and adds to that decision. There is some minor editing of transcript pages 206 through 225, which is incorporated into this decision and set out below. For the reasons stated on the record, and as further explained below, Citation No. 6448009, is affirmed as issued and Lafarge Midwest Inc. is ordered to pay a penalty of \$10,000.00.

The parties entered into the following stipulations that were accepted by the Court:

1. The Administrative Law Judge has subject matter and personal jurisdiction over the dispute in this case.
2. Lafarge Midwest, Inc. (“Lafarge”) is engaged in mining operations in the United States, and its mining operations affect interstate commerce.

3. Lafarge is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-965.
4. Lafarge operates the Lafarge Midwest, Inc. cement plant in Wilson County, Kansas, Mine ID No. 14-00073 (the "Mine").
5. Melvin Lapin ("Lapin") is an authorized representative of the United States Secretary of Labor, assigned to the Topeka, Kansas field office of the Mine Safety and Health Administration's Metal/Non-Metal division.
6. Lapin inspected the Mine on February 4, 2009, and issued Citation No. 6448009 to Lafarge, alleging a violation of 30 C.F.R. § 56.14103(b) under Section 104(d)(1) of the Mine Safety and Health Act of 1977, 30 U.S.C. § 814(d)(1).
7. The Secretary of Labor proposed a penalty of \$8,209.00 for Citation No. 6448009.
8. Lafarge purchased the John Deere "Gator" at issue in this case on July 21, 2008.
9. The Gator was provided for use by the Mine's Quality Control Laboratory.
10. The Mine's Quality Control Laboratory used the Gator every two hours of all three shifts, seven days each week.
11. Lafarge cleaned the Gator's windshield on the following dates and with the following substances:
  - i. August 4, 2008: glass cleaner;
  - ii. August 7, 2008: different glass cleaner;
  - iii. August 12, 2008: vinegar and water; and
  - iv. September, 2008: Ro-Mix Back-Set solution, which is a molecular cement dissolver.
12. Greg Hicks was the Mine's Quality Control Laboratory Supervisor between September 1, 2008 and February 4, 2009.
13. Lafarge demonstrated good faith in abating the violation.
14. The exhibits to be offered by the parties are stipulated to be authentic but no stipulation is made as to their relevance or as to the truth of the matters asserted therein.

(Tr. 6-7).

## I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Lafarge Midwest, Inc., operates the cement plant at issue (the "mine"), which is located in Wilson County, Kansas. (Tr. 23). The mine is subject to regular inspections by the Secretary's Mine Safety and Health Administration ("MSHA") pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). The parties stipulated that Lafarge is an operator as defined by the Act, and is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission.

### *a. Citation No. 6448009*

On February 4, 2009, Inspector Melvin Lapin issued Citation No. 6448009 to Lafarge for a violation of Section 56.14103(b) of the Secretary's regulations. The citation alleges that:

[t]he Plexiglas windshield for the Quality Control Lab's John Deere Gator, located in the parking area on the east end of the Quality

control Lab, was damaged from scratches in the glass from cleaning the abrasive dust off that was generated from the cement milling process. A person would clean the glass with a dry cloth, or sometimes, glass cleaner was used. When the gator was driven toward the sunlight during the day, or toward bright lights at night, the glare created from the reflection of the light in the scratches made it very difficult for the driver to see. When a person was driving this vehicle under these conditions, they could easily run over another person walking in the area, impact an obstruction, or travel into the path of another vehicle. This vehicle was used every two hours of all three shifts, 7 days a week to obtain samples for quality control purposes.

The inspector found that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that one person would be affected, and that the violation was the result of high negligence on the part of the operator.

1. The Violation

At hearing, I read the following findings into the record:

With regard to citation number 6448000 issued on February 4th, 2009 by Inspector Melvin Lapin, I make the following findings: Inspector Lapin issued a citation for a violation of Section 56.14103(b) of the Secretary's regulations and essentially charged that the Plexiglas windshield in the quality control lab's John Deere gator was damaged from scratches to the glass to the point that it created a hazard to anyone driving the equipment.

Lapin testified that he has been a mine inspector for more than four years and he has worked in the mining industry for nearly 30 years prior to working with MSHA. He is an inspector in the Topeka, Kansas office.

Inspector Lapin on February 4th was continuing an inspection that he had begun at the mine on January 20th, 2008. He went to the -- on that day, he inspected equipment first in the maintenance shop.

208

Exhibit 13 is a map or a layout of the facility that was used to indicate the various areas in the mine.

Inspector Lapin, inspected the equipment in the maintenance shop, the trucks and other equipment, and including in that inspection two gators that the maintenance shop used. A gator is a four-wheel

vehicle, a small -- similar to a small pickup, bigger than a golf cart. It has a bench seat, and in this case the gators that Mr. Lapin observed on that date had Plexiglas windshields.

One of the employees, while Mr. Lapin was -- while Inspector Lapin was in the lunchroom, one of the employees asked him to look at the windshield because that employee felt that it was not safe. Lapin saw both -- saw that both of the gators in the maintenance shop had Plexiglas windshields that were scratched.

He rode in the first gator. They attempted to wipe off the windshield prior to getting in, he used a dry cloth. He took a drive with the shop mechanic, drove

209

northeast and then turned into the sun, and the glare from the sun shown on all the scratches and encompassed the entire windshield making it difficult to see. The glare covered all but the corners, and the glare blinded him as well as the driver.

He instructed the driver to turn around as soon as he saw the glare. He returned to the maintenance shop and then looked at the second gator and again took a ride in that gator. This time the operator of the gator used a windshield cleaner to try to clean the glass prior to the ride. The same thing occurred when the gator, with Lapin in it, was turned toward the sun. The glare was so bad that Lapin testified he couldn't see, instructed the driver to turn around and return to the shop.

At that point, Lapin determined that the mine had violated the standard, that there was a hazard, they could not see out of the windshield in the sun or in the light and that would result in an accident. He issued citations for both gators at the maintenance shop.

210

Later he spoke with someone -- or at some point during that day, he spoke with some -- another employee about the gator that was being used by the quality control lab, so he went to that lab to examine that gator. While -- during that, the course of his inspection, he spoke with both Don Ballard and with Greg Hicks concerning the gator at the quality control shop.

When Mr. Lapin observed the gator, he saw that the gator's windshield had the same -- the scratches and the same - what word

- the same problems that he had seen in the earlier -- in the two gators that he had observed earlier in the maintenance shop, they had the same type of scratches and the same kind of damage. There was a light in the garage but no natural light but he could easily see the scratches and he could easily tell that the gator was in the same condition as the other two he had driven.

The photos on Exhibit 5 show the scratches on the Plexiglas, and they resemble what he saw in the gator parked in

211

the garage. The photos also showed the glare that he experienced except the photos don't show it accurately. He testified that the glare was a lot more than the photos depict.

He did not get into the driver's side of the gator but he could see the pattern and scratches on the windshield and he, after just driven in two other gators, he did not think it was safe -- first he didn't believe that he needed to look at it again, but he also thought it was unsafe for others to get in and drive the gator, it might expose someone to a hazard and he didn't want to do that understandably. So he already knew that the scratches were the same and that the sunlight and the light at night would create a hazard given the condition of the windshield as he observed it.

I understand that there are some cases that talk about an inspector getting into the cab and actually looking at the windshield, but there are also cases that say if a miner has been operating the

212

equipment and has looked through the windshield, their testimony, if credible certainly, is just as valid as that of an inspector.

I think Mr. Lapin was correct in what he did, not having someone drive it in an unsafe condition, and given his experience and what he observed on that day, I see no problem with him coming to the conclusion that windshield was as -- as unsafe, if not more, than the other gators he had looked at during that day.

This particular gator at the quality control lab is used every two hours, every shift for seven days. It's driven primarily by the persons -- the persons who work in the quality control lab who collect samples every two hours. Particularly the testimony of Mr.

Ballard, who was one of the persons who collected samples every two hours at the mine, supports the testimony of Inspector Lapin.

Ballard testified that he had retired from Lafarge in February 2009 after working there for many years. He worked primarily

213

on the day shift. The mine operated three shifts each day. He drove the gator every two hours for any time period, but he testified approximately 15 minutes as he rode around the plant area collecting samples.

He complained constantly to his supervisor regarding the condition of the windshield on the gator until he gave up in frustration. His supervisor was Mr. Hicks, who also testified. Mr. Ballard operated the gator, he used it for samples and at other times depending on what he's required to pick up.

Ballard described how he traveled most of the areas of the mine, normally in a complete circle every two hours, it took him about 15 minutes. It depended on how much he had to pick up. There were coal piles in the area that could be 20 feet high and as long as 100 feet. Other vehicles operated around the stockpiles, loaders, maintenance vehicles, supervisors, other four-wheelers, and he had to be careful as he said he had to watch it going

214

around the corner.

There's also foot traffic, many people worked. The area R where he primarily traveled was a busy place for vehicles, there were loaders, maintenance vehicles, pickups, open-bed pickups, loaders, forklifts, and trailers parked in the area to unload. Area R is a very busy location given that it is adjacent to the -- given that it's adjacent to the storage area, and there's also a repair area at that -- in that location.

Ballard drove the gator as much as anyone, and shortly after he -- the mine acquired the new gator the glass started to scratch up, it fogged over. He washed the windows as much as he could. The abrasive cement, dust and dirt caused scratches on the windshield. The Plexiglas didn't hold up according to Ballard. The damage got worse over time and it became - became more scratched.

He used different window cleaners; usually just dusting it off made it a little bit better. The scratches obscured

215

his view, mostly with direct light. Driving into the sunlight made it difficult for him to see, hard to look out the window. The same experience is true at night when the large lights were on.

Mr. Ballard indicated that there was a lot of traffic, as I mentioned before, foot traffic and equipment that he had to watch out for. He often encountered other workers on foot. He could see that he did -- he said he could see them but it wasn't clear, he could just make them out. Driving at night, the glare of the lights in the dark made it -- made it difficult, and in Ballard's words it certainly didn't help any. Lights from other vehicles and lights were on at the plant.

The parties agree that the mine had cleaned the windshield on a number of days and times with different things. According to Ballard, none of those things alleviated the problem with the scratches and the difficulty with seeing out the windshield.

I credit Lapin's testimony first that the windshield was damaged and next that

216

the windshield obscured the visibility necessary for safe operation, and also that the condition of the windshield created a hazard to the equipment operator. Lapin indicated that it was his opinion that visibility was obscured by the scratches to the extent that the operator of the vehicle could not operate it safely. He said that the glare of the sun on the scratches would impede the safe operation of the gator. Due to impeded vision, a crushing injury would result if the operator did not see a person in the area and ran over him or if he ran into or was run into by another vehicle.

Lapin's observation of the windshield are supported by Ballard in every regard. I find that a violation did occur as alleged by the Secretary, supported by Mr. Lapin and Mr. Ballard. I understand that Mr. Hicks testified that he didn't see the scratches, but I credit the testimony of the other witnesses in that regard.

(Tr. 207-216).<sup>1</sup>

Section 56.14103(b) requires that “[i]f damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed.” 30 C.F.R. § 56.14103(b). I find that, based upon the testimony of Lapin and Ballard, there is a violation.

A number of Commission judges have decided the issues raised by this standard. In *Walker Stone Company, Inc.* 17 FMSHRC 1389 (Aug. 1995) (ALJ), an ALJ vacated a similar citation because the inspector did not look through the windshield to determine whether visibility was impaired, and the operator of the vehicle testified credibly that he drove the truck and his view was not obstructed by the cracks. In the case at hand, the inspector, did not sit in the driver’s seat of this particular gator but he did look through the windshield and Ballard, who drove the gator daily, testified that the condition of the windshield obscured his vision. In *D & H Gravel*, 31 FMSHRC 272 (Feb. 2009) (ALJ), the Secretary alleged that a cracked windshield presented a hazard in the form of a risk that an individual would cut their hand while cleaning the windshield. There, the ALJ found that the risk was so insignificant that the citation for violation of section 56.14103(b) was vacated. *Id.* at 277. Here, the risk is much more substantial, i.e., that an equipment operator would not be able to see when the sun or the glare from the lights hit the windshield. The hazard described by Ballard was more than enough to substantiate a violation of the standard.

In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff’d*, *Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). The Secretary has met her burden of proving that, on the day of inspection, the gator had a damaged windshield that obscured visibility to the point that it could not be operated safely and, consequently, created a hazard to the driver and others working in the area in which he drove. I find that the Secretary has established a violation.

## 2. Significant and Substantial Violation

A significant and substantial (“S&S”) violation is described in section 104(d)(1) of the Act as a violation “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). 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 Commission has explained that:

---

<sup>1</sup>The numbers located at breaks in the transcript quotations refer to the page numbers of the transcript.



[i]n 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.

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

As noted above, I find that there is a violation of the mandatory safety standard as alleged by the Secretary. Second, I find that a discrete safety hazard existed as a result of the violation, i.e., the danger associated with the driver of the gator not being able to see when operating the vehicle in sun or in the glare of the lights at night. Third, I find that the hazard created by driving with an obstructed view will result in an injury to the driver or to a person who crosses the path of the gator. Fourth, I find that it is reasonably likely that any injury resulting from the aforementioned hazards would be serious or even fatal.

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

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

This evaluation is 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 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. 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); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

Lapin designated this violation as a

217

significant and substantial violation. I've already addressed a number of the issues that -- with regard to significant and substantial when we talk about -- when I talked about the violation in this case.

Lapin testified that he regarded this violation as S and S because the condition of the windshield was of such a nature that it created a hazard to the driver. When the sun was shining or in the light, the glare in the windshield would cause the driver to be unable to see. There were pedestrians in the area and I think all witnesses testified regarding the number of pedestrians in the area and the number of other vehicles in the area and there were quite a few. They could not be seen and would be hit by the gator if the gator were driving into the sun or into the light.

Ballard explained a number of -- the number and types of vehicles in the area along with the pedestrians and the large coal piles that he had to maneuver around. It's clear that Ballard drove the gator more near pedestrians and many other types

218

of vehicles including loaders and maintenance vehicles.

I credit Ballard's testimony that the windshield was in such a condition that it created a hazard for the driver, that he couldn't see a pedestrian or another vehicle at certain times when he was driving and that that condition created the hazard, the discrete safety hazard, a measure of danger to not only the pedestrians but to the driver of the vehicle himself.

The mine operator asserts that Ballard continued to drive the gator, that there were no accidents, that the brakes worked, that other safety measures were in place, and that Ballard testified that he could see a pedestrian and other equipment, that the gator moved slowly, and that the area was not really congested.

Again, I credit the testimony of Ballard and I credit the testimony of Lapin and I find that the violation was significant and substantial as Inspector Lapin so designated.

(Tr. 216-218).

In a similar situation, an ALJ found that a sand and gravel operator committed an S&S violation of §56.14103(b) based on a cracked window on a front-end loader. The ALJ credited the inspector's detailed testimony about the window's condition and found the violation to be S&S because the cracked window obscured the operator's vision, thereby creating a risk of him running into other equipment, running off the road, or running over another employee. *South West Sand & Gravel Inc.*, 23 FMSHRC 540 (May 2001) (ALJ).

I find that the preponderance of the evidence establishes that it was reasonably likely that the hazard presented would contribute to an injury. Even if the brakes on the gator worked and the gator did not travel at a high speed, it is likely that the driver would hit a person crossing his path or run the gator into the coal pile or other obstruction because his view was obstructed. The defenses raised by Lafarge do not take away from the seriousness of the violation and the reasonable likelihood that an injury will occur. There is no question that the gator was operated in a high traffic area with both equipment and pedestrians. Ballard agreed that sometimes he could see, but, if the sun or a light was shining on the windshield, it was extremely difficult to see what was ahead. In the course of continued mining operations, an accident was sure to occur. Further, as mentioned previously, it is reasonably likely that these hazards would result in injuries of a reasonably serious nature.

### 3. Unwarrantable Failure

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-94 (Feb. 1991). Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). 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. *Consol.*, 22 FMSHRC at 353.

Lapin described the condition as obvious and as having existed for an extended period of time. He designated the negligence level as "high" and found the violation to be an unwarrantable failure to comply with the mandatory standard. Lapin learned from employees at Lafarge that there was a problem with the gator and, after speaking with Ballard, realized that it had existed for some time. Ballard had constantly made complaints that went unheeded. Lapin credibly testified to each and every factor used to determine unwarrantability. The violation

existed for at least the six months, during which it was brought to the attention of Ballard's immediate supervisor as well as that individual's supervisor.

219

As to the unwarrantable failure, there's a lot of testimony in this case about what the operator knew regarding this violation. I'll start with Mr. Ballard because Mr. Ballard certainly made the most complaints about this gator.

Exhibit 10, the area checklist, he filled out those checklists and put them in the notebook and then Mr. Hicks would look at it and maybe write -- and write down what he had done to take care of the situation.

On August 4th, Ballard wrote on the lab vehicle the gator needs a new front window, it's scratched up. Hicks wrote that he tried to clean it with glass cleaner. And Mr. Ballard reported the condition every day until August 18th. He designated the condition as U for unacceptable most of the time, on more than one occasion.

Then again on September 1st until September 5th, he reported every day that the lab vehicle was unacceptable and listed the windshield. As far as I can see at this point, the mine cleaned the windshield

220

and I'm not clear why cleaning the windshield would alleviate the scratches except that Mr. Hicks testified that he didn't see the scratches so he was working on the assumption that the windshield needed to be cleaned. The windshield was not removed until February 4th after the inspector issued a citation.

On September 8th, both shifts again mentioned the windshield needed to be replaced. It wasn't Mr. Ballard who was -- it was not only Mr. Ballard who was complaining about the windshield, but I noticed on the checklist, on both checklists, Exhibit 6 and 10, that there were other lab technicians who also reported a problem with the windshield. On September 10th, for example, both lab techs reported it, not just Ballard. Ballard testified that he got frustrated and finally stopped reporting it because nothing was being done.

On August -- I find it important that on August 12th, 2010, Ballard wrote on Exhibit 6, the mobile equipment checklist, if

221

someone has an accident because of the windshield, it won't be our fault. Another person on August 19th said that the windshield is uncleanable. The checklist went to Hicks and then maybe to Hicks' -- sometimes to Hicks' supervisor Parker who were supposed to do something about it.

The condition of the windshield was noted for many days. August 12th, again it says that it needs attention as soon as possible, that there could be an accident. On August (sic) 14th, Mr. Ballard filled out another form, an RIR form, for a safety auditor who came to this Lafarge plant from the headquarters office, he wrote up the windshield again, and he was told that someone would take care of it. It sounds like the person from the Lafarge headquarters office agreed that something should be done about it. It was Mr. Thompson, he looked at it, said he would take care of it, he said that it definitely needed attention, but, again, nothing was done. Ballard said he saw -- he saw no issue -- I'm sorry, strike that.

222

Ballard testified that he continued to complain until he thought he couldn't do it anymore.

Mr. Hicks testified that he saw no issue with the gator, that he would not have let Mr. Ballard operate it if he felt it was unsafe and that at one point he told Mr. Ballard that he could walk or take the windshield out. And when -- in fact, when the citation was abated, Ballard and Hicks together removed the windshield.

Hicks testified that he kept cleaning the windshield to make Ballard happy, doing what he could do in other words. Hicks said that no one else complained, but a review of the checklists show that that's not exactly the case, there were several other people who did complain. One -- again, I will refer to Exhibit 6 and Exhibit 10.

Hicks testified he tried different products to clean the windshield in an effort to make Ballard happy. He noted several times that he did not see the scratches or see any problem with the

223

window but tried anyway to clean the windshield. I find that Hicks did not do enough, he didn't take the problem seriously, and I credit

Ballard when he said he was told sarcastically that he could walk or take the windshield out; that it was management's responsibility to remove the windshield if indeed that was determined what the solution should be, but that the management knew for months, many, many months that there was a complaint about the windshield and not enough was done.

The complaints kept coming and cleaning it obviously was not doing any good. There was never direction from management to remove the windshield until the citation was issued. Lapin described the condition as extensive because it was the entire windshield, that it was obvious, he saw it as soon as he approached the gator, and it had -- as I discussed above, I think the most telling thing is it had existed for a period of time.

Lapin designated the negligence level as

224

high and found the violation to be unwarrantable. I agree with Lapin that the citation is, indeed, unwarrantable with high negligence on the part of management. I uphold Mr. Lapin's citation in every regard.

(Tr. 219-224).

A number of the Commission's ALJs have found a violation of this type to be not only S&S, but an unwarrantable failure. For example, a cracked windshield on a front-end loader constituted an S&S and "unwarrantable" violation of §56.14103(b) because the violation was obvious and nothing had been done to correct it. *Bob Bak Constr.*, 19 FMSHRC 582 (Mar. 1997) (ALJ).

I find that the Secretary has demonstrated, by a preponderance of the evidence, that the violation was unwarrantable.

## II. 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 "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) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that, "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size (large operator) and ability to continue in business. The violation was abated in good faith, and no evidence has been presented to the contrary. The history does not demonstrate an unusual violation history. I find that the Secretary has established that the negligence was high and that Lafarge did not take seriously the safety complaints of its employees. Further, I find that the gravity determined in the order is accurate.

Next is the penalty. There are six penalty criteria addressed by the commission. The -- I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size, which is large, and their ability to continue in business, the violation was abated in good faith, and the history of violations show no other violations for this particular standard. The violation history is normal for an operator of this size, but I do note that Mr. Lapin issued two citations earlier in the day for the same violation. I find that the Secretary has established that the negligence amounted to high negligence for the violation and that the gravity was as designated by the inspector.

And I, given the six-penalty criteria,

225

based on the testimony I heard today, crediting the testimony of Lapin and Ballard, I assess the \$10,000 penalty for the violation. Once the order is reduced to writing, the company will be ordered to pay -- the company is ordered to pay \$10,000 within 30 days of the date of that written order.

(Tr. 224-225)

### III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of \$10,000.00 for this violation. Lafarge Midwest Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of \$10,000.00 within 30 days of the date of this decision.

Margaret A. Miller  
Administrative Law Judge

Distribution:

Matthew Finnigan, Office of the Solicitor, U.S. Department of Labor, 1999 Broadway,  
Suite 1600, Denver, CO 80202

Christopher Peterson, Jackson Kelly PLLC, 1099 18<sup>th</sup> Street, Suite 2150, Denver, CO 80202