FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 12 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEST 2009-557-M A.C. No. 04-05475-175804-01 Docket No. WEST 2009-558-M A.C. No. 04-05475-175804-02
v.	Docket No. WEST 2009-866-M A.C. No. 04-05475-184059
QUALITY MATERIALS and CDG MATERIALS, INCORPORATED, Respondents	Mine: Rancho Plant

DECISION

Appearances: Matthew M. Linton, Esq., U.S. Dept. of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

Joshua Schultz, Esq., Law Office of Adele L. Abrams, P.C., Beltsville, Maryland, for Respondents.

Before: Judge Bulluck

These cases are before me upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") on behalf of his Mine Safety and Health Administration ("MSHA") against Quality Materials ("Quality"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The Secretary seeks a total civil penalty in the amount of $47,700.00 for eight violations of his mandatory safety standards.

A hearing was held in Riverside, California. The following issues are before me: (1) whether Respondent violated the standards; (2) whether the violations were significant and substantial, where alleged; (3) whether the violations were attributable to the level of negligence alleged; and (4) whether the violations were attributable to Quality's unwarrantable failure to comply with the standards, where alleged. The parties' Post-hearing Briefs are of record.

After the hearing, the Secretary filed an unopposed Motion to Amend Petitions to include CDG Materials, Incorporated ("CDG"), as a Respondent. The Secretary asserts that Quality and CDG were a unitary operator, as defined by the Commission, since Quality and CDG shared ownership, management, and conducted interrelated operations. *See Berwind Natural Res.*

Corp., 21 FMSHRC 1284, 1317 (Dec. 1999). The record indicates that Quality and CDG are owned by Dave Beck and share the same address and equipment. Tr. I: 172, 202-03; Ex. P-45. Therefore, I find that the entities constitute a unitary operator, and the Secretary's Motion is **GRANTED**. Accordingly, all references to "Quality" or "Quality Materials" refer to Respondents, collectively.

For the reasons set forth below, I **AFFIRM** the citations and orders, as issued, and assess penalties against Respondent.

I. Stipulations

The parties stipulated as follows:

1. The orders and citations issued in these matters were issued on the dates indicated on each.

2. The inspector whose signature appears in block 22 of the orders and citations at issue was acting in his official capacity as an authorized representative of the Secretary of Labor.

3. The proposed penalties for each order and citation are listed on the Exhibit A for each of the petitions.

4. The Secretary incorporates by reference all of Respondents' admissions in written discovery.

5. Respondents demonstrated good faith in abating the violations.

6. The exhibits to be offered by the parties are authentic.

7. Should the Court determine that MSHA had jurisdiction to issue the citations and orders, Quality agrees to waive its right to present evidence for Citation Nos. 7999983, 7999984 and 7999985, knowing that it will fully accept these citations, as written, and the penalties as assessed by MSHA.

Tr. I: 10-11.

II. Factual Background

On December 29, 2008, MSHA special investigator Randy Horn and MSHA investigator trainee Timothy Pickett were assigned to inspect a portable crushing mine site in the San Bernardino area. Tr. I: 19-20, 22, 72.[1] Horn and Pickett drove to that mine site, passing the

[1] Pickett was retired from MSHA at the time of the hearing. Tr. I: 69.

Rancho Plant along the way but, upon arrival, discovered that the mine was abandoned. Tr. I: 22. Horn turned his vehicle around and, as he was advising his supervisor by telephone that the mine was abandoned, he could see two miners several hundred yards away standing on top of a cone crusher, 12 to 14 feet in air. Tr. I: 23, 79. Horn saw that neither miner was wearing fall protection, and that one was not wearing a hard hat and safety glasses. Tr. I: 79, 134, 137. Believing the miners to be in danger, Horn drove onto the Rancho Plant site and proceeded toward the cone crusher. Tr. I: 23. As Horn and Pickett pulled up to the crusher and exited their vehicle, Michael Medcraft and John Holmes descended from the crusher, and Medcraft approached Horn. After a discussion with Medcraft, Horn issued citations and orders to Quality for Medcraft's and Holmes' failure to wear fall protection, and Medcraft's failure to wear a hard hat and safety glasses, while operating the crusher. Tr. I: 78-79, 131, 137; Ex. P-1, P-4, P-6. Horn proceeded to inspect the crusher and, observing that the tail pulley was unguarded, issued an order to Quality for lack of guarding. Tr. I: 141; Ex. P-8. He also issued citations to Quality for failure to notify MSHA prior to resuming operations following a plant shutdown, an inoperative emergency brake on a front-end-loader, and an unexamined fire extinguisher in the storage trailer.[2]

On January 12, 2009, Horn returned to the Rancho Plant to terminate the citation for the inoperative emergency brake on the front-end-loader. Tr. I: 154. Once again, he observed the crusher's tail pulley unguarded, and issued another order to Quality for failure to guard the equipment. Tr. I: 154-55; Ex. P-19.

III. Findings of Fact and Conclusions of Law

A. Jurisdiction

Quality contests MSHA's jurisdiction over the Rancho Plant during the December 29, December 30, and January 12, 2009 inspections. It argues that the crusher was being operated to compact a wall comprised of previously processed material, which is outside of MSHA's jurisdiction. The Secretary argues a contrary position, that MSHA had enforcement authority because, at the time of the inspections, Quality was crushing native material extracted from the earth and, therefore, milling, as defined in section 3(h)(1) of the Act and the Mine Safety and Health Administration - Occupational Safety and Health Administration Interagency Agreement ("Interagency Agreement"). 30 U.S.C. § 802(h)(1); *Interagency Agreement*, 44 Fed. Reg. 22,827 (April 17, 1979).

Horn testified that he observed rocks, gravel and sand, native material that had not been previously processed or used by industry, on the crusher belt and ground around the crusher. Tr. I: 25-26. He stated that his initial observation of the native material being dumped into the crusher was from a vantage point several benches down, and that his observation was confirmed when he arrived on the scene and saw the material in the machine and on the ground.

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[2] The citation for the unexamined fire extinguisher was issued on December 30, 2008.

Tr. I: 65-66. He opined that native material, which is often round and in smaller fragments, is visually distinguishable from larger, square concrete or cobblestone, with angled faces and jagged edges mixed with more powder and dust. Tr. I: 37, 53, 65. Viewing photographs of spillage from the crusher at hearing, he testified that the photographs showed native rock and no concrete or cobblestone. Tr. I: 30-31, 34; Ex. P-10B, P-21B. Pickett corroborated Horn's testimony, opining that round virgin material was being fed into the crusher, and that he did not observe anything resembling concrete or cobblestone. Tr. I: 73-75.

David Beck, owner of Quality Materials, opined that the company was under MSHA's jurisdiction until August 27, 2008, the date it notified MSHA that the mine was temporarily closed. Tr. I: 172, 175, 176; Ex. R-16. According to Beck, in December 2008, Beck's friend, Jerry Martin, had asked him as a favor to compact a cobblestone and concrete wall, so that he could spread the material over his property. Tr. I: 177-79. Beck opined that the rock that Horn had identified as native material being crushed by Quality was, in actuality, product left over from a previous crushing operation on the same site. Tr. I: 182. Beck admitted, however, that he was not present at the Rancho Plant on December 29, and that he was on-site January 12 only during the later part of the day. Tr I: 188.

Jerry Martin, a self-employed construction worker, and admitted friend of Beck's, similar to Beck's account, testified that he had asked Quality to crush a wall made of rocks, cement, and mortar so that he could spread the material over his driveway. Tr. II: 6-8, 11-12. By his account, the wall had been built previously into a structure on his property, and he had removed it using his backhoe and hauled it to the Rancho Plant in his dump truck. Tr. II: 8-9. Martin testified that he did not pay Quality or Beck for this work, but that he had been a customer of CDG Materials from 2004 to 2008. Tr. II: 10-11; Ex. P-43. Loader operator Michael Medcraft, and operations manager Tim Becker corroborated Martin's testimony, that Quality was re-crushing material that Martin had dropped off, and that Quality was not extracting or crushing any raw material. Tr. II: 13-15, 23-24.

The Act confers MSHA with jurisdiction over any coal or other mine, which is broadly defined. 30 U.S.C. § 803; *Jerry Ike Harless Towing, Inc.*, 16 FMSHRC 683, 687 (Apr. 1994). Section (3)(h)(1) of the Act defines a "mine," in pertinent part, to include "structures, facilities, equipment, machines, tools, or other property . . . used in or to be used in, . . . the work of extracting . . . minerals . . . or . . . the milling of such minerals, or the work of preparing . . . minerals . . . ." 30 U.S.C. § 802(h)(1). Milling is defined in the Interagency Agreement as the "art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives." 44 Fed. Reg. at 22,827. "Milling" can consist of various processes including crushing, grinding, pulverizing and/or sizing. *Id.*

Quality admits that if it had been crushing extracted native material during the subject inspections, it would have been milling as defined by the Act, and MSHA would have had jurisdiction. Resp't Br. at 6-7. Likewise, the Secretary does not contend that MSHA had jurisdiction if Quality had been processing recycled material. Therefore, the question of

jurisdiction is a factual one, i.e., whether Quality had been processing recycled or native material.

I credit Horn's and Pickett's testimony that virgin material is readily distinguishable from recycled material, and that they observed native material going through the crusher. Quality presented no physical or documentary evidence to support its contention that it was crushing recycled material from a wall on Martin's property. Beck opined that evidence of recycled cobblestone and concrete would probably have been present around the crusher, mixed in with virgin rock. Tr. I: 186-87. However, neither Beck nor any other Quality witness identified any cobblestone or concrete in the photographs, and Beck only guessed that the concrete, which they had allegedly been crushing, was "probably" or "possibly" on top of virgin rock. Tr. I: 186-87; Ex. P-10A, P-10B. When examining the rock underneath the crusher, Beck testified that it did not look like the material that Quality had been crushing for Martin, and he identified it as product left over from a previous crushing operation that had taken place on the same site. Tr. I: 182; Ex. P-10A, P-10B. The absence of any identification of cobblestone or concrete, combined with Horn's and Pickett's observation of native material, demonstrate that Quality was engaged in milling raw material. Moreover, I note that neither Medcraft at the mine site, nor Quality's operations manager Tim Becker at their post-inspection conference, informed Horn of the alleged favor for Martin. Tr. I: 41, 94, II: 20. Finally, assuming that the job was actually for Martin, his status as a frequent customer, together with the inspectors' observations, make it highly likely that Quality was conducting business as usual, rather than doing Martin a favor; thus, his testimony in support of his friend, Beck, is unpersuasive. Tr. II: 6, 11-12; Ex. P-43. Therefore, I find that Quality was crushing native material, and was subject to MSHA's jurisdiction under sections 3(h)(1) and 4 of the Act.[3]

B. Citation No. 7999979

Inspector Horn issued 104(d)(1) Citation No. 7999979, alleging a "significant and substantial" violation of section 56.15005 that was "reasonably likely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Quality's "reckless disregard" and "unwarrantable failure" to comply with the standard.[4] The "Condition or Practice" is described as follows:

The mine foreman and a miner were standing on the running cone crusher

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[3] Pursuant to my finding of MSHA jurisdiction, Quality withdraws contest of Citation Nos. 7999983, 7999984 and 7999985, and agrees to pay-in-full the $100.00 penalty proposed by the Secretary for each violation. Resp't Br. at 4; Tr. I: 10-11. I note that the Petition filed for docket WEST 2009-558-M contains a mathematical error in calculating the penalty for Citation No. 7999984; the correct amount is $100.00, rather than $112.00.

[4] 30 C.F.R. § 56.15005 provides that: "Safety belts and lines shall be worn when persons work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered."

adjusting ring without fall protection. The adjusting ring is approximately 12 to 13 feet above the ground level. The ground was covered with rocks of various sizes up to 12" in diameter. The foreman stated that they were watching the cone crusher feed belt, which was in full operation, because they were having a tracking problem. A fall from the elevated cone crusher to the rock covered ground below could result in fatal injuries. The foreman, Michael Medcraft, engaged in aggravated conduct constituting more than ordinary negligence in that he was standing on the elevated cone crusher adjusting ring without fall protection and that he allowed another miner to perform the same task without fall protection. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. P-1. The citation was terminated after Medcraft and Holmes climbed down from the cone crusher.

1. Fact of Violation

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

The Secretary argues that if a miner were to fall from the crusher, the distance to the ground is 12 to 14 feet, unbroken by any platforms or handrails. Respondent argues that since a miner falling from the cone crusher would land on a platform two feet below rather than fall to the ground, the miners were not in danger.

Horn testified that he saw Medcraft and Holmes standing on the adjusting ring approximately 12 to 14 feet in air, with the crusher operating and vibrating. Tr. I: 79. He explained that as the crusher vibrates, it spews material and dust and, if the material were to contact a miner, it could cause the miner to fall to the ground, which was covered with rock and debris. Tr. I: 79-80. On cross-examination, Horn opined that if a miner were to fall from the ring, his body would be much longer than the width of the lower platform and, thus, he would fall clear of the platform to the ground. Tr. I: 114-15. According to Horn, in order to land on the platform, a miner would have to fall straight down, which is unlikely, given that a fall from the crusher would be backwards. Tr. I: 114-15.

Beck testified that if a miner were to fall from the ten-inch-wide adjusting ring, he would fall just 21 inches to the lower platform that extends 36 inches from the side of the crusher. Tr. II: 50, 52-53, 59-60.

I credit Horn's testimony that a fall from the crusher was a distance of 12 to 14 feet, rather than the two feet suggested by Quality. If a miner, standing on the ring's ten-inch-wide step, were hit by rocks or debris spit from the crusher, the miner would likely lose balance and

fall backwards, rather than slip down to the lower platform in a controlled fashion. Medcraft admitted that he was not wearing fall protection on the day of the inspection. Tr. II: 101. Therefore, I find that the Secretary has proven a violation of section 56.15005.

2. Significant and Substantial

In *Mathies Coal Company*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is "significant and substantial" ("S&S") under *National Gypsum*, 3 FMSHRC 822 (Apr. 1981): 1) the underlying violation of a mandatory safety standard; 2) a discrete safety hazard - - that is, a measure of danger to safety - - contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'd* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding that violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987). The Secretary need not prove a reasonable likelihood that the violation, itself, will cause injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010).

The fact of violation has been established, and miners exposed to the vibrating crusher and flying debris were subjected to the hazard of falling 12 to 14 feet to the ground. The focus of the S&S analysis, then, is the third and fourth *Mathies* criteria, i.e., whether the hazard was reasonably likely to result in an injury, and whether the injury would be serious.

Horn testified that it was reasonably likely that the vibrating crusher spewing rocks, dust, and other material would cause a miner to lose balance and fall 12 to 14 feet to the ground, which would likely result in a fatality. Tr. I: 79-85. He opined that none of the guardrails on the crusher would prevent a fatal fall. Tr. II: 110-11. Likewise, Pickett noted that the crusher was processing material when Medcraft and Holmes were standing on the adjusting ring. Tr. I: 73. On the contrary, Medcraft testified that the cone crusher was not running when he and Holmes were standing on the adjusting ring, and that the guardrail around the edge of the platform would save him if he were to fall. Tr. II: 102-110; Ex. P-3; P-51.

The Commission has held that, to satisfy the third element of the *Mathies* test, the Secretary must prove that the hazard contributed to by the violation will be reasonably likely to cause a serious injury. I credit Horn's and Pickett's testimony that the crusher was operating when Medcraft and Holmes were standing on the adjusting ring. As Horn noted, the guardrails were adequate to protect miners standing on the platform, but would not have prevented a fall from the top of the equipment. Tr. II: 76-77. I find that failing to utilize fall protection when

standing on the adjusting ring of the vibrating cone crusher, suspended 12 to 14 feet in air, was reasonably likely to lead to a fatal fall. Therefore, I conclude that the violation was S&S.

3. Negligence and Unwarrantable Failure

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d at 136. The Commission has recognized the relevance of several factors in determining whether conduct is "aggravated" in the context of unwarrantable failure, such as the extensiveness of the violation, the length of time that the violation has existed, the operator's efforts in eliminating the violative condition, and whether the operator has been put on notice that greater efforts are necessary for compliance. *See Consolidation Coal Co.*, 22 FMSHRC 328, 331 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994). The Commission has also considered whether the violative condition is obvious or poses a high degree of danger. *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999) (citing *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Construction, Inc.*, 14 FMSHRC 1125, 1129 (July 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984)). Each case must be examined on its own facts to determine whether an actor's conduct is aggravated, or whether mitigating circumstances exist. *Eagle Energy, Inc.*, 23 FMSHRC 829, 834 (Aug. 2001) (citing *Consol*, 22 FMSHRC at 353).

The parties' arguments on the issue of unwarrantable failure focus on whether Medcraft was an agent of the operator, whose negligence is imputable to Quality. The Secretary argues that, regardless of his job title or salary, Medcraft was an agent because he represented to MSHA that he was in-charge of the mine site, and directed the mine's workforce. Sec'y Br. at 15-18. Quality makes a counter argument that Medcraft was not an agent, but a rank-and-file miner, whose negligence is not imputable to Quality. Resp't Br. at 11-15. It also points out that the violation was very brief, that it did not pose a high degree of danger, and that it had not been placed on notice that greater efforts at compliance were necessary. Resp't Br. at 16.

Horn testified that after Medcraft and Holmes had come down from the crusher, Medcraft introduced himself and, in response to Horn's inquiry as to who was in-charge, responded "I am." Tr. I: 92. Subsequently, Medcraft accompanied Horn on his inspection, and discussed the citations with him; Horn did not have any discussions with any other miners on-site. Tr. I: 92-93. During the inspection, Medcraft directed the other miners to shut down the crusher in order to retrieve and install a guard for the tail pulley, and he supervised installation of the guard. Tr. I: 94. Horn stated that "by all natural appearances, he directed what they did." Tr. I: 94. According to Horn, Medcraft never told him that he was not in-charge and did not object, either on December 29 or January 12, when Horn issued citations and orders to him, designating him as foreman. Tr. I: 93. He also noted that when he discussed the violations with

Tim Becker, Becker did not object to referencing Medcraft as foreman. Tr. I: 94. Horn opined that Medcraft, as the person in-charge of the operation, disregarded basic industry safety standards by standing on the adjusting ring without fall protection, a hard hat or safety glasses, and that this conduct conveyed to other miners that Quality was indifferent to these basic safety practices. Tr. I: 91, 99. Horn also discovered a harness stored in a garage on the Rancho Plant site approximately a quarter-mile away from the crusher. Tr. I: 106. Pickett testified similarly, that Medcraft was the first miner to make contact with Horn when they arrived at the crusher, and that he interacted the most with Horn. Tr. I: 130.

Beck testified that Medcraft was not a foreman, and could not hire, fire, discipline, direct or supervise employees. Tr: II: 27. According to Beck, all three miners on-site that day, Tyler Becker, Medcraft and Holmes, held the title of machine loader operator, were hourly employees paid approximately $15.00 per hour, and had the same duties. Tr. II: 30, 45-46; Exs. R-9, R-11. Tim Becker testified to the same effect. Tr. II: 80.

Medcraft agreed with his superiors' characterization of his authority, and stated that Beck and Tim Becker were always in-charge, even if neither was physically present at the Plant. Tr. II: 85-86. According to him, if a question or problem arose, he, Tyler Becker or Holmes, would call Beck or Tim Becker, who were always available by phone. Tr. II: 85. Medcraft denied telling Horn that he was in-charge, and stated that he spoke to Horn because he was acquainted with him from a prior inspection; he added that any of the three miners on-site could have done so. Tr. II: 86-87. According to Medcraft, he was merely relaying instructions from Horn to the other employees when he told them to install the guard. Tr. II: 88-89. He also stated that he was trained to use fall protection whenever a fall looks plausible or likely. Tr. II: 95-96; Ex. R-9.

Section 3(e) of the Mine Act defines an "agent" as "any person charged with responsibility for the operation of all or part of a . . . mine or the supervision of the miners in a . . . mine." 30 U.S.C. § 802(e). The Commission has recognized that the negligence of an operators's "agent" is imputable to the operator for penalty assessment and unwarrantable failure purposes. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328 (Mar. 2009) (citations omitted). In contrast, the negligence of a rank-and-file miner is not imputable to the operator for those purposes. *Id.* In considering whether an employee is an operator's agent, the Commission has relied upon the miner's function and whether it was crucial to the mine's operation and involved a level of responsibility normally delegated to management personnel, rather than the miner's job title or qualifications. *Id.* The Commission considers factors such as the ability to direct the workforce, whether the employee holds himself out as a person with supervisory responsibilities and is so regarded by other miners, and whether the actions of the employee in directing the workforce have an impact on health and safety at the mine. *Id.*

In *Nelson*, the Commission affirmed the judge's finding that the employees acted as agents, with negligence imputable to the operator when, after the inspectors requested to speak to the miners in-charge, they held themselves out as representatives of the operator and

accompanied the inspectors on inspection; also, they directed the workforce, assigning tasks to other miners. *Id.* at 329. The Commission also agreed with the judge's conclusion that the fact that ultimate decision-making authority rested with higher-level personnel did not negate the fact that the subject employees were given responsibilities normally delegated to managers. *Id.* at 331.

I credit Horn's testimony that Medcraft identified himself as in-charge of the mine site and, his behavior, accompanying Horn on his inspection and directing the miners to shut down the crusher and install the guard, demonstrated the type of managerial control that the Commission has found indicative of agency. Despite Medcraft's testimony that either Beck or Tim Becker was in-charge, although off-site, Medcraft neither immediately called his superiors when MSHA arrived on-site nor objected when Horn served him, as foreman, with citations and orders. Similarly, Tim Becker, when reviewing the violations, did not object to Medcraft having been served as foreman, which is also noted numerous times in the "Condition or Practice" section of the citations and orders. Therefore, I find that Medcraft was acting as an agent of Quality, and that his negligence is imputable to the operator.

Moreover, I find no factors mitigating against a finding of unwarrantable failure. Medcraft's decision to disregard safety training and work on the operating crusher without a harness demonstrated indifference to the danger posed by a potential 12 to 14 foot fall. Given the vibrating crusher's suspension, that rocks and debris were flying, and that the miners were standing on ten-inch-wide steps, the need for fall protection was obvious. Therefore, I find that the Secretary has met his burden of establishing that Quality displayed a reckless disregard of the standard, and aggravated conduct that constitutes unwarrantable failure.

C. Order No. 7999980

Inspector Horn issued 104(d)(1) Order No. 7999980, alleging a "significant and substantial" violation of section 56.15002 that was "reasonably likely" to cause an injury that could reasonably be expected to be "permanently disabling," and was caused by Quality's "reckless disregard" and "unwarrantable failure" to comply with the standard.[5]

The "Condition or Practice" is described as follows:

> The mine foreman was not wearing a hard hat while working up on the cone crusher. The cone crusher was in full operation along with the crusher feed belt and a Caterpillar 908G front-end loader was dumping material into the plant feed hopper approximately 15 feet away from where the foreman was standing. The foreman was working with two other miners at the time of this violation. Material being processed by the operational cone crusher plant could bounce/fly up and hit

[5] 30 C.F.R. § 56.15002 provides that: "All persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard."

the foreman causing serious injuries and/or causing the foreman to fall from the cone crusher plant. Foreman Medcraft engaged in aggravated conduct constituting more than ordinary negligence in that he was not wearing basic safety gear, a hard hat, while working on the operating cone crusher in the presence of two other miners. This violation is an unwarrantable failure to comply with a mandatory safety standard.

Ex. P-4. The citation was terminated after Medcraft donned his hard hat as he climbed down from the crusher.

1. Fact of Violation and Significant and Substantial

Quality has conceded the violation and the S&S designation, but contests the negligence and unwarrantable failure allegations. Resp't Br. at 17.

2. Negligence and Unwarrantable Failure

Horn testified that a hard hat was required when working on top of the operating crusher, because rocks and debris are frequently ejected, which could strike a miner in the head. Tr. I: 131-32. This was especially necessary for Medcraft, according to Horn, since he was standing immediately adjacent to the area where rocks and debris were being ejected. Tr. I: 132. A miner hit in the head with a projectile rock could suffer a concussion. Tr. I: 132. Horn opined that Medcraft's decision to ignore his personal protective equipment training showed complete disregard for the safety standard and his own safety, and set an example for other miners to act similarly, in a cavalier manner. Tr. I: 134-36. Medcraft admitted that he was provided with a hard hat that he was not wearing, and acknowledged that Quality has a policy requiring its use. Tr. II: 96-97, 101.

Medcraft had been trained to wear a hard hat when necessary, and had taken the hat with him onto the crusher. Ex. P-4; Tr. I: 135-36. Simply put, he chose not to wear it. Given the constant spew of rocks and debris, the conditions on the crusher posed a high degree of danger. I credit Horn's testimony that failure to follow this basic safety requirement set an example of non-compliance for other miners, thereby undermining the training that Quality provided. Therefore, having determined Medcraft to have been acting as Quality's agent, I find that the Secretary has met his burden of establishing that Quality displayed a reckless disregard of the standard, and aggravated conduct that constitutes unwarrantable failure.

D. Order No. 7999981

Inspector Horn issued 104(d)(1) Order No. 7999981, alleging a "significant and substantial" violation of section 56.15004 that was "reasonably likely" to cause an injury that could reasonably be expected to be "permanently disabling," and was caused by Quality's

"reckless disregard" and "unwarrantable failure" to comply with the standard.[6] The "Condition or Practice" is described as follows:

> The mine foreman was not wearing safety glasses while working up on the cone crusher. The cone crusher was in full operation along with the crusher feed belt and a Caterpillar 908G front-end loader was dumping material into the plant feed hopper approximately 15 feet away from where the foreman was standing. The foreman was working with two other miners at the time of this violation. Material being processed by the operational cone crusher plant could bounce/fly up and hit the foreman in the eye causing serious injuries. Foreman Medcraft engaged in aggravated conduct constituting more than ordinary negligence in that he was not wearing basic safety gear, safety glasses, while working on the operating cone crusher in the presence of two other miners. This violation is an unwarrantable failure to comply with a mandatory safety standard.

Ex. P-6. The citation was terminated after Medcraft put on his safety glasses.

1. Fact of Violation and Significant and Substantial

Quality has conceded the violation and the S&S designation, but contests the negligence and unwarrantable failure allegations. Resp't Br. at 17.

2. Negligence and Unwarrantable Failure

Horn testified that Medcraft was not wearing safety glasses when he was standing on the adjusting ring but, unlike his hard hat, Medcraft did not have his safety glasses with him on the crusher and had to obtain them from another location. Tr. I: 137-38. Given the crusher's constant spitting of rocks and other flying debris, the likelihood of a miner sustaining permanently disabling injuries as a result of being struck in the eyes was high. Tr. I: 137-38. Again, Horn opined that Medcraft had been trained to wear safety glasses, but that his blatant disregard of this basic safety standard set a negative example for other miners. Tr. I: 138-140.

Medcraft acknowledged that he was not wearing his Quality-provided safety glasses while on the crusher. Tr. II: 96-97, 101. I find that Medcraft was acting as Quality's agent, that his willful failure to wear protective eyewear while situated on the operating crusher demonstrated a reckless disregard for the standard, and that the Secretary has met his burden of establishing that the violation was the result of Quality's unwarrantable failure.

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[6] 30 C.F.R. § 56.15004 provides that: "All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes."

E. Order No. 7999982

Inspector Horn issued 104(d)(1) Order No. 7999982, alleging a "significant and substantial" violation of section 56.14107(a) that was "reasonably likely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Quality's "high" negligence and "unwarrantable failure" to comply with the standard.[7] The "Condition or Practice" is described as follows:

> The tail pulley for the cone crusher feed belt was not guarded. The belt was mounted approximately 5 feet above the ground and was easily accessible. The mine foreman stated that the guard had been damaged and removed while a new guard was being fabricated. The plant has operated without the tail pulley guard for two days. Contact with the unguarded tail pulley could result in entanglement causing serious life-threatening injuries. Foreman Medcraft engaged in aggravated conduct constituting more than ordinary negligence in that he continued to operate the crusher plant without the tail pulley guard. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. P-8. The citation was terminated after a guard was installed on the tail pulley.

1. Fact of Violation

The Secretary argues that the crusher was being operated with an unguarded tail pulley at a height of 5 ½ feet above ground, in violation of the standard. Sec'y Br. at 24-26. Quality argues that the standard does not require that the tail pulley be guarded because, when the crusher is operating, the tail pulley is seven feet above ground.[8]

Horn estimated the unguarded tail pulley to be situated 5 ½ feet above ground, and asserted that the height remained constant, i.e., that Quality never lowered the tail pulley to install the guard during the December 29 inspection. Tr: I: 141-42, II: 114-18; Ex. P-10B. In rebuttal to Quality's assertion that the crusher can only operate with both legs fully extended, Horn opined that crusher legs are usually adjusted to different heights in order to balance the machines on uneven ground. Tr. II: 116-17.

Beck testified that the crusher operates in either transport or operational mode. Tr. II: 33.

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[7] 30 C.F.R. § 56.14107(a) provides that: "Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

[8] 30 C.F.R. § 56.14107(b) provides that: "Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces."

To change from transport to operational mode, the hydraulic legs are extended, raising the height of the crusher. Tr. II: 34. He opined that when Quality was installing the guard, the legs were not extended and the crusher was not in operational mode. Tr. II: 34-35; Ex. P-10B. When the crusher is in operational mode, the tail pulley is seven feet seven inches above ground, which is, according to him, the only functional height. Tr. II: 36-37; Ex. R-13. Medcraft agreed with Beck, opining that the crusher cannot operate without its legs fully extended. Tr. II: 93-94. He also testified that after Horn informed them of the guarding violation, the miners retracted the legs and lowered the tail pulley so that they could install the guard. Tr. II: 91-92; Ex. P-10B.

I fully credit Horn's testimony that the crusher remained at the same height throughout his inspection. Quality provided no technical data to support its assertion that the crusher can only operate with both legs fully extended and the tail pulley at a height of seven feet seven inches. If, as Horn asserted, the crusher was not operating on level ground, a design requiring both legs extended to the same maximum height would render the machine unstable. Therefore, I find that the crusher was operating at a lower height, estimated at 5 ½ feet. In drawing this conclusion, I have considered Beck's and Medcraft's lack of credibility on the jurisdiction and agency issues. Accordingly, I find that the Secretary has proven that Quality violated section 56.14107(a), by failing to provide a guard for the cone crusher's tail pulley.

2. Significant and Substantial

The fact of violation has been established, and miners were subjected to entanglement in the conveyor belt or the tail pulley, itself. The focus of the S&S analysis in this instance is the third and fourth *Mathies* criteria, i.e., whether the hazard was reasonably likely to result in an injury, and whether the injury would be serious.

Horn testified that a miner would be reasonably likely to have his clothing caught on a metal clip in the conveyor belt and become trapped or pulled into the pulley, causing fatal injuries. Tr. I: 144. To support his conclusion, Horn referenced a fatality in which a miner was killed when he became entangled in a conveyor belt underneath the frame of a screening unit. Tr. I: 144-45; Ex. P-50 at 2-5. I find that the hazard of entanglement in the conveyor belt is reasonably likely to lead to disfigurement and fatal injuries; therefore, the violation was S&S.

3. Negligence and Unwarrantable Failure

Horn testified that Medcraft told him that the tail pulley had been unguarded for two days. Tr. I: 146; Ex. P-8. He also stated that when he advised Medcraft that he was shutting down the crusher, Medcraft changed his story that the guard was damaged and in need of repair, and quickly produced and installed a guard. Tr. I: 145-46. Horn opined that the violation constituted an unwarrantable failure, given that the condition was in plain view and fully known by Medcraft, and had existed for two days. Tr. I: 148-49.

I find, based on Horn's credible testimony, that the condition had existed for two days,

and that Quality was fully aware that the guard was not in place. Furthermore, I am persuaded that Medcraft knew that a replacement guard was readily available but, nevertheless, permitted operation of the crusher with its tail pulley unguarded until Horn cited the condition. Therefore, I find no mitigating factors, that Quality's negligence was high, and that the violation was the result of Quality's unwarrantable failure.

F. Order No. 7999993

On January 12, 2009, Inspector Horn returned to the Rancho Plant and issued 104(d)(2) Order No. 7999993, alleging a "significant and substantial" violation of section 56.14107(a) that was "reasonably likely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Quality's "reckless disregard" and "unwarrantable failure" to comply with the standard. The "Condition or Practice" is described as follows:

> The tail pulley for the Extec cone crusher unit was not guarded. The missing tail pulley guard was found laying on the ground, one bench above and approximately 300 yards to the northwest of the current cone crusher position. The unguarded tail pulley was 6 feet above the ground and easily accessible. Contact with the unguarded tail pulley could result in entanglement causing life threatening injuries. This same guard was cited on 12/29/2008, 104(d)(1) Order 7999982. The order was abated when the factory OEM tail pulley guard was installed. Foreman Medcraft engaged in aggravated conduct constituting more than ordinary negligence in that he allowed the cone crusher plant to operate without the tail pulley guard being installed and that this very same tail pulley guard was cited two weeks ago. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. P-19. The order was terminated when a guard was installed.

1. Fact of Violation and Significant and Substantial

Horn testified that during the post-inspection conference with Tim Becker following his December 29 inspection, he related the details of a fatal accident that he had investigated, in which a miner working on a crusher with an unguarded tail pulley became entangled in the pulley and killed. Tr. I: 110-12. He warned Becker that unless Quality took its obligation to guard the tail pulley seriously, Tyler Becker, his son, could, likewise, be pulled into the crusher and killed. Tr. I: 111. Nonetheless, when he arrived on-site for the January 12 inspection, he found the crusher operating in a different location, with its tail pulley, again, unguarded. Tr. I: 154. Horn observed that the guard was laying on the ground in the location where the crusher had been operating on December 29. Tr. I: 112, 154-55; Ex. P-21A, P-21B. Quality's argument, the same as proffered respecting the December 29 guarding violation, is, for the reasons previously articulated, without merit. Therefore, I find that the Secretary has proven that Quality, again, violated section 56.14107(a) and, applying the same rationale as discussed regarding the previous

guarding violation, that the violation was S&S.

2. Negligence and Unwarrantable Failure

Horn's contemporaneous inspection notes state that the "foreman states he understands about guards . . . MSHA just showed up at wrong time." Ex. P-20; Tr. I: 157-58. Horn testified that, given that the same guard had been cited two weeks earlier, there was no excuse for running the crusher without it. Tr. I: 159. Given the prior violation and Horn's subsequent discussion with Quality's management about the extreme danger of operating the crusher with an unguarded tail pulley, I find that Quality's conduct was willful and in reckless disregard of the safety standard, and that the violation demonstrated a serious lack of reasonable care that constitutes an unwarrantable failure.

IV. Penalties

While the Secretary has proposed a total civil penalty of $47,700.00 for the violations, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i). *Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that Quality is a small operator with an overall history of violations that is not an aggravating factor in assessing appropriate penalties. I also find that Quality demonstrated good faith in achieving rapid compliance after notice of the violations. Stip. 5.

Quality argues for reduction in penalties based on its its ability to continue in business. In support of this argument, Quality has submitted federal tax returns from 2007 to 2010 for David Beck, sole proprietor of Quality Materials; for CDG Materials, Incorporated; and for SBB Enterprises, Incorporated, another corporation owned by Beck. Resp't Br., Ex. A. Quality also claims that CDG filed for bankruptcy protection in February 2012. Resp't Br. at 21.[9] Quality argues that due to personal income losses for Beck from 2008 to 2010, corporate losses for CDG Materials in 2008 and 2009, and corporate losses for SBB Enterprises from 2007 to 2010, the proposed civil penalties will affect Beck's ability to meet his financial obligations which, considering that Quality is a sole proprietorship, is the proper focus in determining the appropriate civil penalty. *See Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1765 (Aug. 2012); *Wayne Steen*, 20 FMSHRC 381 (Apr. 1998).

The Commission has held that the mine operator has the burden of proving that the proposed penalty will affect its ability to continue in business. *Sellersburg*, 5 FMSHRC at 294. Despite the Secretary's requests, Quality failed to produce critical information about Beck's

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[9] Quality's Post-hearing Brief cites to "Financial Exhibit B" as evidence of this filing, but no such documentation was filed.

financial condition including living expenses, net worth, bank account balances and other asset-related information. Sec'y Br., Ex. A. The federal tax returns that Quality did produce are unaudited which, as other judges have found, are insufficient support for an inability-to-pay defense. *Apex Quarry*, 33 FMSHRC 3158, 3162-63 (Dec. 2011) (ALJ) (citing *Johnco Materials, Inc.*, 33 FMSHRC 1431, 1433-34 (Jun. 2011) (ALJ)). Without adequate documentation of Beck's financial status, the effect of the proposed penalties on his ability to meet his financial obligations cannot be determined. Quality did produce sufficient information on CDG Materials' financial condition for the Secretary to determine that CDG has a 76 percent probability of being able to pay the proposed penalties. Sec'y Br., Ex. A at 3-4. Therefore, I find that the proposed civil penalties will not affect Quality's ability to continue in business.

The remaining criteria involve consideration of the gravity of the violations and Quality's negligence in committing them. These factors have been discussed fully, respecting each violation. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

A. Citation No. 7999979

It has been established that this S&S violation of section 56.15005 was reasonably likely to result in an injury that could reasonably be expected to be fatal, that Quality displayed a reckless disregard of the standard, that the violation was the result of unwarrantable failure, and that it was timely abated. Therefore, I find that a penalty of $13,600.00, as proposed by the Secretary, is appropriate.

B. Order No. 7999980

It has been established that this S&S violation of section 56.15002 was reasonably likely to result in an injury that could reasonably be expected to result in permanently disabling injuries, that Quality displayed a reckless disregard of the standard, that the violation was the result of unwarrantable failure, and that it was timely abated. Therefore, I find that a penalty of $9,100.00, as proposed by the Secretary, is appropriate.

C. Order No. 7999981

It has been established that this S&S violation of section 56.15004 was reasonably likely to result in an injury that could reasonably be expected to result in permanently disabling injuries, that Quality displayed a reckless disregard of the standard, that the violation was the result of unwarrantable failure, and that it was timely abated. Therefore, I find that a penalty of $9,100.00, as proposed by the Secretary, is appropriate.

D. Order No. 7999982

It has been established that this S&S violation of section 56.14107(a) was reasonably

likely to result in an injury that could reasonably be expected to be fatal, that Quality was highly negligent, that the violation was the result of unwarrantable failure, and that it was timely abated. Therefore, I find that a penalty of $2,000.00, as proposed by the Secretary, is appropriate.

E. Order No. 7999993

It has been established that this S&S violation of section 56.14107(a) was reasonably likely to result in an injury that could reasonably be expected to be fatal, that Quality displayed a reckless disregard of the standard, that the violation was the result of unwarrantable failure, and that it was timely abated. Therefore, I find that a penalty of $13,600.00, as proposed by the Secretary, is appropriate.

ORDER

ACCORDINGLY, Citation Nos. 7999979, 7999983, 7999984 and 7999985 and Order Nos. 7999980, 7999981, 7999982 and 7999993 are **AFFIRMED**, as issued, and it is **ORDERED** that Quality Materials and CDG Materials, Incorporated, **PAY** a civil penalty of $47,700.00 within 30 days of the date of this Decision.[10] **ACCORDINGLY**, these cases are **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

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/ss

[10] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket numbers and A.C. numbers.