FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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March 25, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2008-477
Petitioner,	:	A.C. No. 12-02258-150575
	:	
v.	:	
	:	
BLACK BEAUTY COAL COMPANY,	:	Mine: Somerville Central
Respondent	:	

DECISION

Appearances: Lisa Williams, Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
R. Henry Moore, Jackson Kelly PLLC, Pittsburgh, Pennsylvania, 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 Black Beauty Coal Company, 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 Section 104(d)(1) citation and two orders issued by MSHA under section 104(d) of the Mine Act at the Somerville Central Mine operated by Black Beauty Coal Company. The parties presented testimony and documentary evidence at the hearing held in Evansville, Indiana on December 1, 2009.

At all pertinent times, Black Beauty Coal Company operated the Somerville Central Mine in Gibson, Indiana. The Somerville Central Mine mined coal and/or coal byproducts which affected commerce. The operation is subject to the Mine Act.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Black Beauty Coal Company ("Black Beauty") operates a surface coal mine, the Somerville Central Mine (the "mine") near Gibson, Indiana. 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 Black Beauty is an

operator as defined by the Act, and is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission. Stip. ¶¶ 1-3.

On September 11, 2007, Vernon Stumbo, an MSHA inspector, conducted a regular inspection at the Somerville Central Mine. He was accompanied during most of his inspection by Chad Wirthwein, the mine's safety director. Stumbo, along with his supervisor at the time, traveled to the mine to address issues involving berms and to terminate citations that had been previously issued for failure to provide berms on elevated roadways. While at the mine, Stumbo issued one citation and one order for berm violations. He determined that both violations were the result of an unwarrantable failure to comply with the cited standard. Stumbo returned to the mine a few weeks later and issued another unwarrantable failure order for a berming violation. The testimony in this case addresses these three berm violations: two issued on September 11, 2009 and one issued on September 27, 2009.

a. Citation No. 6671134

As a result of the inspection on September 11, 2007, Stumbo issued Citation No. 6671134 as a 104(d)(1) citation alleging a violation of 30 C.F.R. § 77.1605(k), which requires that "[b]erms or guards shall be provided on the outer bank of elevated roadways." The citation described the violation as follows:

> The dragline bench travel road does not have a berm for a distance of approximately 2/10 of a mile where a service truck with two miners traveled within 18' of the outer banks of a bench with approximately a 50' vertical drop to the pit floor. The mid-axle height of the largest vehicle traveling this road at this time is approximately 21 inches. In addition, four company full size pick-up trucks also traveled the bench travel road. Two management personnel were also in the area and having traveled the road were fully aware that there was no berm. Management was put on notice of berm issues by MSHA within the past week during a previous visit on 09/06/2007. Gov. Ex. 4.

Stumbo determined that it was reasonably likely that the violation would result in an injury that would be permanently disabling, that the violation was significant and substantial, that two employees were affected, and that the operator's negligence was high. A civil penalty in the amount of $4,329.00 has been proposed for this violation.

1. <u>The Violation</u>

Vernon Stumbo, now retired, was an MSHA mine inspector from 1994 until 2008. (Tr. 25). Prior to joining MSHA, Stumbo was employed in the mining industry for 15 years, working his way up from a general laborer to foreman, and eventually to superintendent. (Tr. 26).

Since approximately 1998 or 1999, the Somerville Central Mine has utilized an electrically-powered dragline to remove the burden between the coal seams. (Tr. 53, 83, 162-163). The dragline moves by means of feet, also referred to as shoes or pontoons, that lift the back of the dragline and move the machine in a reverse direction eight feet every 55 seconds. (Tr. 64-67). As the dragline moves in a reverse direction, the front section of the machinery housing located between the feet, also known as the tub, is dragged along the ground, creating six-inch-tall "speed bumps," while the feet create indentations ranging from three inches to three feet in depth. (Tr. 66, 93-94). The dragline requires an area approximately 150 feet wide in order to be moved.[1] (Tr. 84).

On September 11, 2009, the day of Inspector Stumbo's arrival, the mine was in the process of moving the dragline along the bench to a new location. Stip. ¶ 12. The berm on the bench had been lowered in order to provide ample room to maneuver the dragline as it moved along the bench. Generally, after the dragline is moved, the berms are rebuilt by a dozer. After moving only some of the distance to the intended destination, the dragline began experiencing electrical problems which required the mine to halt the move. (Tr. 72-73, 93). Upon arriving at the site in question, Stumbo observed a lack of berms on the bench. (Tr. 29). Stumbo and his MSHA colleagues parked their vehicle and began walking along the bench toward the dragline. (Tr. 29). They followed the tire tracks of a service truck that had been driven along the bench and parked near the dragline. (Tr. 29). Based on information provided by the mine, Stumbo determined that two persons were in the vehicle at the time it traveled along the bench to the dragline. (Tr. 33). Stumbo measured the tracks of the service truck to within 18 feet of the edge of the bench. (Tr. 29-30). He estimated the drop-off from the edge to be 50 feet. (Tr. 29-30).

The parties do not dispute that only a remnant berm existed for the two-tenths of a mile from the bottom of the road to the area where the service truck was located. Terry Traylor, the operations manager at the mine, testified that the remnant berm measured approximately 16 to 17 inches in height. (Tr. 74). Stumbo testified that, while a remnant berm existed on the part of the bench that the service truck had driven on, no berms existed on other parts. (Tr. 29, 31). Stumbo explained that a dragline, or other tracked vehicle, may travel on the bench if berms are not present. (Tr. 44-45). However, he stated, berms are required to be at least mid-axle height of the largest rubber-tired vehicle that travels on the bench. (Tr. 30-31, 38). Stumbo measured the mid-axle height of the rubber-tired service truck, the largest tired truck on the bench at that time, to be 21 inches. (Tr. 30). Stumbo issued the citation under section 104(d)(1) because the operator had been put on high notice regarding berm issues when two citations for berm violations were issued the previous week. (Tr. 31).

Black Beauty argues that, because the bench was used to move the dragline, it was not a roadway, and, therefore, not required to have a berm. Black Beauty argues that the bench was only being used to move the dragline. Further, the vehicles in the vicinity of the dragline were there to assist in the move of the dragline, and no other vehicles would have traveled on the

[1] The dragline itself disturbs an area approximately 100 feet in width. (Tr. 84). The Mine tries to have at least 25 feet of bench on each side of the dragline as it is moved. (Tr. 84).

bench. Finally, the width of the bench, coupled with the fact that high speed travel was unlikely given the rough condition of the bench, rendered the bench safe for travel. Resp. Post Hearing Br. at 8.

The issue of whether a bench is a roadway is driven by the particular facts of each case. *See El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 36 (Jan. 1981). Here, the fact that the rubber-tired service truck was traveling on the bench is, by itself, enough for me to consider it a roadway. While the bench in this case was approximately 200 feet wide, the tire tracks observed by Stumbo indicate that the service truck traveled within 18 feet of the edge. I find that the rough condition of the bench, while it may necessitate slower travel, increases the potential for mechanical failure or driver error. I agree with Inspector Stumbo and find that the bench would not be considered an elevated roadway if the dragline were the only piece of equipment on the bench; however, once rubber-tired equipment begins operating on the bench, especially within close proximity to the edge (i.e., 18 feet), even if it is there exclusively to provide assistance in the move of the dragline, the bench becomes a roadway. For those reasons I find that the bench at issue was an elevated roadway.

Black Beauty argues that, even if the bench is found to be an elevated roadway, there were adequate berms present. As support for their argument they cite Traylor's testimony that he observed a remnant berm that was as tall as the tire on the MSHA vehicle that was present the day of the inspection. It is Black Beauty's position that a berm the height of the MSHA vehicle tire would undoubtedly reach the mid-axle of any truck that traveled on the bench during the time in question. Resp. Post Hearing Br. at 10-11.

In *U.S. Steel Corp.* the Commission held that "the adequacy of a berm . . . under section 77.1605(k) is to be measured against the standard of whether the berm . . . is one a reasonably prudent person familiar with all the facts, including those peculiar to the mining industry, would have constructed to provide the protection intended by the standard." 5 FMSHRC 3, 5 (Jan. 1983). MSHA generally requires an adequate berm to be at least 50% of the height of the wheel, i.e., mid-axle height, of the largest vehicle to travel the roadway. I find that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard at issue would have recognized that the safety standard required a berm that was at least mid-axle height of the service truck that traveled along the bench to the dragline.

I credit Stumbo's testimony and find that, for approximately two-tenths of a mile on the bench/roadway, there were inadequate berms. While the remnant berm near the MSHA vehicle may have been adequate, the berm was not adequate in the area cited by Inspector Stumbo. The record established that there was 50 foot vertical drop-off from the edge of the bench and that the service truck had traveled within 18 feet of the edge of the roadway when approaching the dragline.

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. The Secretary has met her burden of proving that, on the day of inspection, the mine had not provided adequate berms on the bench/elevated roadway that the service truck had traveled on. 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:

> [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. Further, I find that the violation contributes to the danger of a vehicle veering off the elevated roadway and rolling, or falling, down the spoil incline.

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); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

Stumbo testified that the closer a vehicle travels to the edge of a highwall, the more unstable the ground becomes. (Tr. 32). The record is clear that a service truck drove within close proximity, i.e., 18 feet, of the edge of the inadequately-bermed bench. If a truck, traveling along an inadequately-bermed elevated roadway, as was the case here, were to go over the edge and fall the estimated 50 feet to the surface below, it is reasonably likely that the driver and any passengers would sustain broken bones and injuries of a serious and potentially fatal nature. *See e.g., Gatliff Coal Co.*, 13 FMSHRC 368 (Mar. 8, 1991) (ALJ). Berms exist to prevent exactly such an occurrence. There is no question that a service truck did travel along the inadequately-bermed bench. While Black Beauty argues that, given the speed the service truck was traveling, it is unlikely a truck would have gone over the edge, it fails to account for potential mechanical failure or driver error that could occur. The probability of occurrence of mechanical failure or driver error would seem to be much greater on a road as rough and torn up as Mr. Traylor described in his testimony. I find that the Secretary has satisfied the four *Mathies* criteria and established the violation as S&S.

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 2004-04; *Rochester & Pittsburgh Coal Co*., 13 FMSHRC at 193-94. 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.

The day the subject citation was issued, Stumbo had traveled to the Sommerville Central Mine to terminate citations issued for previous inadequate berm violations. The previous citations, issued on September 6, 2007, were issued for inadequate berms on an elevated dragline haul road, and inadequate berms or bumper blocks at the dumping locations on the dragline bench roadway. Gov. Ex. 2; Gov. Ex. 3. Stumbo testified that, based on past berm violations, the Sommerville Central Mine had been place on "high alert of berm issues at [the] mine" prior to the September 11, 2007 inspection. (Tr. 27). Relying on the citations issued on September 6, 2007, as well as Inspector Stumbo's testimony, I find that the mine was on notice regarding its berming issues. Further, I credit Stumbo's testimony and find that the condition of the bench was as he described it.

While the condition may not have been overly extensive, or been present for an extended period of time, the total lack of berms in areas along the bench was extremely obvious. The high degree of danger associated with inadequate berms is spelled out clearly in my S&S findings, *supra*. The mine was well aware of the condition, as evidenced by the testimony of C.B. Howell, the dragline foreman, who testified that it is the practice of the mine to lower the berm when the dragline is being moved, as was the case here. (Tr. 91). The dragline moves so slowly, it would have been easy for a dozer to build berms as the dragline was moved along the bench. In the alternative, the mine could have simply barricaded the road, thereby making it unable to be traveled by rubber-tired vehicles. Instead, Black Beauty did neither and, as a result, any vehicle on the property could have traveled along the inadequately-bermed roadway. It is up to the company to keep employees off the road if it chooses to keep only a remnant berm on the bench while the dragline is moved. Here, the road was not guarded against entry, there were management trucks in the vicinity, and inadequate berms existed. The mine has a recent history of berm violations, and was on high notice of the need to comply. In spite of that, the lack of reasonable care exhibited by management has resulted in continued berm violations, and clearly amounts to more than ordinary negligence.

b. Order No. 6671135

As a result of the inspection on September 11, 2007, Stumbo issued Order No. 6671135 as a 104(d)(1) order alleging a violation of 30 C.F.R. § 77.1605(k), which requires that "[b]erms or guards shall be provided on the outer bank of elevated roadways." The order described the violation as follows:

> A new drill travel road was created from the #001 pit #6 bench up to the top level of the pit on the west side of the pit that has an inadequate berm. The travel road has no berm on the outer bank from the base of the elevated travel road, where there is a grade of approximately 30% for a distance of approximately 75 feet with a subtle curve at the downgrade base. From the #6 bench to the top level of the pit is approximately 40 vertical feet. From the #6 bench to the pit floor is approximately 50 vertical feet. Two sets

> of tire tracks indicate that the road has been traveled by mobile equipment. Gov. Ex. 6

Stumbo determined that it was reasonably likely that the violation would result in an injury that would be permanently disabling, that the violation was S&S, that one employee was affected, and that the operator's negligence was high. A civil penalty in the amount of $4,440.00 has been proposed for this violation.

1. The Violation

Later in the day on September 11, 2007, Stumbo, while abating a separate violation, observed a newly-built, 30% grade, 110-120 foot road constructed from the #6 bench to the top of the pit to provide access for the Cat-Mounted drill rig. Stip. ¶ 17; (Tr. 99, 105-106, 107, 108-109, 113). Stumbo noted that, while there were partial berms at the bottom of the road, there were inadequate-to-no berms for 75 feet of the road. (Tr. 99, 107); Gov. Ex. 6. He observed tire tracks on the road, indicating truck travel. (Tr. 99). Stumbo estimated a drop-off of approximately 50 feet from the edge of the road to the bench below. (Tr. 99). After speaking with the safety department at the mine, Stumbo determined that the tire tracks on the road were from a pickup truck driven by Andrew Alano, the mine's drill foreman. (Tr. 99-100). Stumbo issued an order under section 104(d)(1) because the violation met the S&S criteria, discussed *infra*, and management knew, or should have known, that it was inappropriate for a manager to set an example by driving on an unbermed, elevated roadway. (Tr. 103).

Chad Wirthwein, the safety manager at the mine, was accompanying Stumbo at the time this order was issued. (Tr. 122). He testified that a berm, which would have been sufficient to prevent the "overtravel" of a full-size pickup with approximately 30-inch tires, existed on the outer edge of the road. (Tr. 124-125, 128-129). Further, he testified, a double berm existed at the bottom portion of the road. (Tr. 125). Wirthwein, utilizing photographs of the road in question, identified what he described as the two berms. (Tr. 127); Resp. Exs. 6, 7. Wirthwein also confirmed that he was aware that a pickup truck had traveled the subject road. (Tr. 128).

Andrew Alano, the drilling and blasting supervisor at the mine, as well as the individual who ordered the subject road to be constructed, confirmed that he drove his pickup truck on the road. (Tr. 138, 141). He testified that the berm on the road was sufficient for the size of the wheels on his pickup truck, which he estimated at 16 ½ to 17 inches at the mid-axle. (Tr. 145).

Black Beauty argues that there were two berms on this road, and that if a vehicle traveled over one berm, there would be a second berm to prevent it from going over the edge. The Secretary, relying on Stumbo's testimony, disputes this argument and contends that the two berms did not satisfy the standard.

I credit Stumbo's testimony and find that, while adequate berms may have existed at the bottom of the road, inadequate berms existed for part of the drill road. Stumbo described the cited area on the side of the road as "horizontal, straight out." (Tr. 147-148). In addition to

Stumbo's testimony I rely, in part, on the photographs provided by the Respondent, particularly Respondent's Exhibit 6. In that photograph it seems clear that little to no berm existed for at least part of the length of the road. Resp. Ex. 6. Stumbo's testimony regarding the picture confirms as much.

I find that no berm existed for a portion of the road. While the road may have been intended for the exclusive use of the Cat-Mounted drill, a supervisor at the mine admittedly traveled the road in his rubber-tired vehicle because "it was quicker" to get to his destination. (Tr. 142).

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. The Secretary has met her burden of proving that, on the day of inspection, the mine had not provided adequate berms on the drill road that Mr. Alano traveled on with his rubber-tired pickup truck. I find that the Secretary has established a violation.

2. Significant and Substantial Violation

An 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).

In accordance with the *Mathies* criteria set forth *supra*, I find that there is a violation of the mandatory safety standard as alleged by the Secretary. Further, I find that the violation contributes to the danger of a vehicle veering off the elevated roadway and rolling, or falling, down the spoil incline. Mr. Alano's admitted travel on the drill road, coupled with his lax explanation as to why he traveled the road, is an extremely poor example for a supervisor at the mine to set for the rank and file miners. While the drill road is described as a temporary road, there is nothing to prevent other miners from driving their vehicles on the same road. If normal mining operations would have continued, it seems the road would have been removed, but the example set by Mr. Alano makes it reasonably likely that other trucks would have traveled on the road and used it as a "short-cut" during the time that it existed. In addition, because this was a new road, the drivers of other vehicles would not have been familiar with the violative condition of the road (i.e., lack of adequate berms). If a truck traveling along an inadequately-bermed, elevated roadway experienced mechanical failure or user error and were to go over the edge and fall the estimated 50 feet to the surface below, it is reasonably likely that anyone in the vehicle would sustain injuries of serious and potentially fatal nature. I find that the Secretary has satisfied the four *Mathies* criteria and established the violation as S&S.

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 2004-04; *Rochester & Pittsburgh Coal Co*., 13 FMSHRC at 193-94. 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.

I credit Mr. Stumbo's testimony that the mine was on notice regarding its berming issues, and that the condition of the drill road was as he described it. The dangers associated with such lack of berms are spelled out clearly in my S&S findings, *supra*. The road was described as "temporary" and for the exclusive use of the drill. Black Beauty contends that the road would have been removed after the drill was moved. Nevertheless, the drill manager traveled the road in his pickup truck, setting an extremely poor example for the rank and file miners. Black Beauty could have easily avoided the situation by blocking the road when the drill was not traveling on it, yet, it did not do so. The fact that Black Beauty did not block access to the road, coupled with Alano's use of the road as a short cut, leads me to question whether the road was truly a "temporary" road. The mine has a recent history of berm violations, and was on high notice of the need to comply. In spite of that, management displayed a certain level of indifference to the requirements of the standard when one of its own foremen utilized the road as a shortcut to travel in his pickup truck. This set an extremely poor example for rank and file miners and amounts to more than ordinary negligence on the part of the mine.

c. Order No. 6671177

As a result of the inspection on September 27, 2007, Stumbo issued Order No. 6671177 as a 104(d)(1) order alleging a violation of 30 C.F.R. § 77.1605(k), which requires that "[b]erms or guards shall be provided on the outer bank of elevated roadways." The citation described the violation as follows:

> On the 001 pit south end spoil bank, haul trucks are traveling and dumping in an area with an inadequate and non-existent berm. On the east side of the spoil bank, an inadequate berm measuring approximately 45" tall for a distance of approximately 38'. Another area has no berm for a distance of approximately 60'. Both areas are where three haul trucks, with a mid-axle height of approximately 66", are traveling and dumping spoil. The vertical

> height of the spoil bank down to the dragline bench ranges from approximately 115' on the east side to 129' on the west side with a slope of approximately 40% grade. Gov. Ex. 8.

The Secretary filed a Motion to Amend Petition and Order to Plead in the Alternative proposing that if the facts do not demonstrate a violation of 77.1605(k) for elevated roadways, then they do fit a violation of 30 C.F.R. § 77.1605(l) for dumping locations. The alternative standard requires that "berms, bumper blocks, safety blocks, or similar means shall be provided to prevent overtravel and overturning at dumping locations." Black Beauty opposes this motion. The Federal Rules of Civil Procedure permit such an amendment and alternative pleading. Fed. R. Civ. P. 8(d)(2), 15(a). Generally, administrative pleadings are "liberally construed and easily amended, as long as adequate notice is provided and there is no prejudice to the opposing party." CDK Contracting Co., 23 FMSHRC 783, 784 (July 2001) (ALJ). The two safety standards are exceedingly similar in their requirements for protecting against overtravel of vehicles, a very serious concern at surface mines. If anything, section 77.1605(l) offers additional means to satisfy the standard (i.e., bumper blocks, safety blocks, or similar means) that section 77.1505(k) does not. The evidence presented by Black Beauty is equally applicable to its defense of violation of either standard. Further, the motion was made prior to hearing, and provided ample notice for Black Beauty to prepare any additional defenses. For those reasons I find that Black Beauty is not prejudiced by such an amendment and alternative pleading. As a result, I grant the Secretary's motion to charge Black Beauty with a violation of Section 77.1605(l), in the alternative.

Inspector Stumbo determined that it was highly likely that the violation would result in a fatal injury, that the violation was S&S, that one employee was affected, and that the operator's negligence was high. The order was later changed to modify the likelihood of injury from highly likely to reasonably likely. A civil penalty in the amount of $7,774.00 has been proposed for this violation.

1. The Violation

On September 27, 2009, Stumbo was again at the mine to conduct an inspection. On that particular day, three haul trucks were being used to transport materials to the dumpsite. (Tr. 193). In order to dump the materials, the haul trucks had to travel up a slightly inclined road from the shovel to the dumpsite. Once they reached the dumpsite they had to turn around, back up to the actual dump area, and dump their loads. David Miller, the dozer operator on the day in question, was in charge of "spotting" the haul truck drivers and letting them know when they should stop and dump their loads. (Tr. 192-193). Miller testified that, generally, after materials are dumped by the haul trucks, he uses the dozer to reestablish a berm or push the material down the spoil hill to stabilize the ground. (Tr. 193). He stated that, during the course of the dumping on September 27th, a supervisor called him away from his spotting duty to repair a berm in another area of the mine. (Tr. 194). He stated that the trucks were put on hold and were not to dump their loads while he was gone. (Tr. 194)

As Inspector Stumbo arrived at the dumpsite he observed a haul truck preparing to dump its load. (Tr. 163). Stumbo stopped the haul truck before it could dump its load and asked the driver where his spotter was. (Tr. 163). He testified that the haul truck driver told him that the dozer operator had been spotting the haul trucks, but had to leave. (Tr. 163). Stumbo observed no berms in the area where the haul truck would have been dumping, as well as inadequate berms in the area where other haul trucks had traveled to dump materials. (Tr. 169-170). He measured the mid-axle height of the haul truck (i.e., the largest rubber-tired vehicle that traveled in the area) to be approximately 66 inches, and found the inadequate berm to measure approximately 45 inches tall. (Tr. 162, 164, 170). Further, he estimated the vertical height of the edge above the area below to be 115 feet on one side and 125 feet on the other at an approximate 40% gradient. (Tr. 164). At 1:00 p.m. he issued Order No. 6671177 under 77.1605(k) for inadequate berms and total lack of berms. (Tr. 162)

I agree with and accept Black Beauty's argument that the dumpsite is different from the elevated roadway addressed by Secretary's regulation at section 77.1605(k). For that reason, I refuse to affirm the Secretary's Order, as issued, and instead address only the alternative pleading alleging a violation of section 77.1605(l). Black Beauty admits that the cited area is correctly categorized as a dumpsite. Therefore, the only issue is whether "berms, bumper blocks, safety blocks, or similar means [were] provided to prevent overtravel and overturning" in the cited area.

I credit Inspector Stumbo's testimony with regard to his description of the scene of the alleged violation. Stumbo testified that there were no berms in one area of the dumpsite, as well as inadequate berms in other areas. He measured the height of the mid-axle of the haul truck to be approximately 66 inches, while the inadequate berm was measured at an estimated 45 inches. The 21-inch difference between the mid-axle height and the top of the berm is significant and amounts to a violation of the standard. Black Beauty argues that, even if the berms were not adequate, other measures were in place that would prevent any kind of overtravel. Specifically, it alleges that its haul trucks do not dump without the assistance of spotters who let the truck driver know how far to back up and when to dump the truck's load. Again, I credit Inspector Stumbo's testimony, this time with regard to his having to stop a truck from attempting to dump its load without the assistance of a spotter or the presence of adequate berms. Miller, who was in charge of spotting, admitted that he was not present when Stumbo arrived at the dumpsite. (Tr. 194-195). Even if he had attempted to place the trucks on hold it seems that at least one truck was beginning to dump its load and had to be stopped by Inspector Stumbo.

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. The Secretary has met her burden of proving that, on the day of inspection, the mine had not provided adequate berms or other measures to prevent overtravel at the dumping site.

2. Significant and Substantial Violation

An 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).

In accordance with the *Mathies* criteria set forth *supra*, I find that there is a violation of the alternatively-pled mandatory safety standard as alleged by the Secretary. Further, I find that the violation contributes to the danger of a vehicle veering off the elevated dumpsite and rolling, or falling, down the spoil incline. If normal mining operations would have continued, it is likely that haul trucks would have continued to dump their loads at the dumpsite. Miller said that he told the trucks not to dump while he was at the shovel building another berm. However, Stumbo testified that he observed a truck preparing to dump a load without the assistance of a spotter or presence of adequate berms. I credit the testimony of Stumbo that trucks were working and traveling in the area where there were no means to prevent them from going over the edge. The vertical drop was 115 feet on one side and 129 feet on the other. If a truck were to travel over the edge, dropping more than 100 vertical feet, it would likely lead to the death of the driver. I find that the Secretary has satisfied the four *Mathies* criteria and established the violation as S&S.

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 2004-04; *Rochester & Pittsburgh Coal Co*., 13 FMSHRC at 193-94. 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.

I credit Stumbo's testimony that the mine was on notice regarding its berming issues, and that the condition of the dumpsite was as he described it. The dangers associated with such lack of berms, or other means associated with preventing overtravel at a dumpsite, are spelled out clearly in my S&S findings, *supra*.

While the length of time that the violation existed may have been rather short, I find that the mine places little to no importance on the issue of preventing overtravel at dumpsites. The truck driver that Stumbo stopped from dumping acknowledged that his spotter was not there at

the time. (Tr. 163). In spite of that knowledge, he was preparing to dump his load at the time Stumbo stopped him. I find this especially troubling given that less than a month earlier, on September 6, 2007, the mine had been issued a citation for the exact same thing (i.e., lack of means to prevent overtravel at the dumpsite), and had abated that citation by providing a spotter at the dumpsite. Gov. Ex. 3. A pattern of berming violations has begun to emerge at this mine which is indicative of the indifference of management to the dangers associated with overtravel on elevated roadways and at dumpsites. The mine knew that spotters,or other means of preventing overtravel, were necessary, yet it neglected to provide them, or, in the alternative, neglected to halt work when those preventive measures weren't present. In either case, the mine has exhibited more than ordinary negligence.

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).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg*, 5 FMSHRC at 292. Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is "bounded by proper consideration of the statutory criteria and the deterrent purpose[s] . . . [of] the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size and ability to continue in business. The violations were abated in good faith, and no evidence has been presented to the contrary. The history shows a number of violations associated with inadequate berms, including the violations discussed above. I find that the Secretary has established that the negligence is high for the three violations and that the gravity determined in the citation and orders is accurate. The total proposed penalty is $16,543.00

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 $16,543.00 for these violation. Black Beauty Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of $16,543.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

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