

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 21, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2007-171
Petitioner	:	A.C. No. 36-01977-112019
	:	
v.	:	
	:	
READING ANTHRACITE COMPANY	:	Mine: Wadesville P-33
Respondent	:	

DECISION

Appearances: Adam F. Welsh, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Petitioner;
Martin J. Cerullo, Esq., Cerullo, Datte & Wallbillich, Pottsville, Pennsylvania, on behalf of the Respondent.

Before: Judge Bulluck

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor on behalf of her Mine Safety and Health Administration (“MSHA”), against Reading Anthracite Company (“Reading Anthracite”), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Act” or “Mine Act”), 30 U.S.C. § 815. The Secretary seeks civil penalties in the amount of \$88,600.00 for four alleged violations of the Act and her mandatory safety standards.

A hearing was held in Reading, Pennsylvania. The parties’ Post-hearing Briefs and Reading Anthracite’s Reply Brief are of record. For the reasons set forth below, I **AFFIRM**, as **AMENDED**, the two citations and two orders issued by the Secretary in connection with the fatal accident that occurred at the Wadesville P-33 mine on December 6, 2005, and assess penalties against Respondent.

I. Stipulations

The parties stipulated as follows:

1. Respondent is an “operator” at the Wadesville P-33 mine as defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d).

2. Respondent is subject to the jurisdiction of the Mine Act.
3. The presiding Administrative Law Judge has jurisdiction over the proceedings pursuant to section 105 of the Mine Act, 30 U.S.C. § 815.
4. The citations and terminations involved herein were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the dates, times, and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance.
5. The Wadesville P-33 mine produces approximately 42,273 tons of coal annually.
6. Reading Anthracite Company produces approximately 112,766 tons of coal annually.
7. The imposition of the proposed civil penalties will have no effect on Respondent's ability to remain in business.
8. Respondent demonstrated good faith in the abatement of the citations.
9. On December 6, 2005, Respondent's haul truck driver, Robert Chattin, was involved in a fatal accident when the Euclid 671 haul truck he was operating overturned.
10. On December 6, 2005, before the fatal accident, the indicator lights for the transmission retarder and parking brake in the Euclid 671 were not functioning.
11. Following the December 6, 2005, accident involving the Euclid 671, grease and oil contamination was discovered on the truck's left front brake.
12. Following the December 6, 2005, accident involving the Euclid 671, the right front brake was discovered to have a piece of rubber from the inside of the hose blocking the flow of brake fluid.
13. Following the December 6, 2005, accident involving the Euclid 671, measurements on the rear brake drums were taken, which indicated that those drums were somewhere between 30.403 inches and 30.525 inches in diameter.
14. Respondent violated 30 C.F.R. § 77.1710(i) in that Chattin was not wearing his seat belt while operating the Euclid 671 on December 6, 2005.¹

¹ 30 C.F.R. § 77.1710(i) provides: "Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below: . . . (i) Seatbelts in a vehicle where there is a danger of overturning and where roll protection is provided."

15. Chattin's failure to wear a seat belt on December 6, 2005, contributed to the fatal nature of the December 6, 2005, accident.

16. Chattin did not complete a Driver Inspection Report for the Euclid 671 on December 6, 2005.

17. On December 6, 2005, the load being hauled by the Euclid 671 during the accident did not exceed the truck's operating parameters.

18. The Euclid 671 was operated on the following dates, by the following drivers, with the operating hours for the truck set forth in parentheses:

- a. May 4, 2005, by Jon Pennypacker (873 hours);
- b. June 9, 2005, by William Lurwick (882 hours);
- c. June 10, 2005, by William Lurwick (888 hours); and
- d. September 14, 2005, by Michael Mihalsky (890 hours).

19. Michael Mihalsky did not complete a Driver Inspection Report for the Euclid 671 on September 14, 2005.

20. Respondent has never disciplined any of its employees for failing to wear a seat belt.

21. Respondent has never disciplined any of its employees for failing to conduct an adequate pre-operation inspection of mobile equipment.

22. The transmission hose for the Euclid 671 truck developed a leak at some point before the accident on December 6, 2005.

23. The authenticity and admissibility of Petitioner's Exhibits 1-7, 16-18, 20-25, 33-34, and 36.

24. Petitioner is without knowledge of any person who witnessed Chattin commence operation of the haul truck on December 6, 2005, without conducting a pre-operational inspection.

25. From December 6, 2003, to December 6, 2005, Respondent was not cited by MSHA as a result of any of Respondent's miners failing to comply with seat belt safety guidelines, conduct pre-operational inspections of mobile equipment, or properly perform regular maintenance inspections of mobile equipment.

26. Petitioner is without knowledge of any fact(s) proving the hole in the transmission

hose existed at any point in time before the commencement of the operation of the haul truck on December 6, 2005.

27. Even if the transmission retarder indicator light and parking brake indicator light inside the cab of the haul truck were connected and functional on December 6, 2005, such condition of the lights would not have prevented the accident from occurring.

28. After the investigation of the accident of December 6, 2005, Petitioner is without knowledge of any person who witnessed Chattin complaining of leaking fluids or braking problems on the haul truck on the day of the accident.

29. On December 6, 2005, before the haul on which the accident occurred, Chattin made four (4) hauls of material along a path that was similar to the path he was traveling on before the accident.

30. On December 6, 2005, the rear brakes on the haul truck were in a state where the distance between the pads and drums was sufficient to stop the haul truck, assuming all other systems on the haul truck were operating adequately.

31. On December 6, 2005, the parking brake on the haul truck was operating properly.

32. After the investigation of the accident of December 6, 2005, Petitioner is without knowledge of any fact(s) that would prove the alleged defect of the check valve of the air system on the haul truck was present before the accident, rather than becoming present during the accident or while the haul truck was being set upright after the accident.

33. The authenticity and admissibility of Respondent's proposed Exhibits 1-4, 6-15, and 18-23.

II. Findings of Fact and Conclusions of Law

The stipulations of the parties provide an adequate background as to the facts and circumstances surrounding the citations and orders at issue in this proceeding. Having reviewed the record, I have made additional findings of fact.

Robert Chattin, the deceased driver of the Euclid 671 truck, died as a result of injuries he sustained in the accident. This finding is consistent with the report of the coroner, who ruled: "Because the injuries found on autopsy were directly causal to demise AND were the result of the vehicle's tipping over and sliding down an embankment, the Manner of Death is hereby ruled Accidental." Ex. G-18 (emphasis in original). The coroner also noted the results of an autopsy, which revealed that Chattin died from asphyxia as a result of blunt force trauma to the chest, sustained when he was partially ejected from the truck when it tipped over. Ex. G-18. This finding is also consistent with MSHA's conclusion that Chattin died as a result of the accident. Tr. 87.

In making this finding, I have considered the testimony of Robert Shellhammer, Reading Anthracite's maintenance supervisor, in whose opinion the accident occurred because Chattin "passed out." Tr. 267. Shellhammer was the first to arrive at the scene of the accident some two to three minutes after being alerted about it, although it is not clear from the record exactly when the accident occurred. Tr. 247-50. He approached the truck and saw that Chattin's "face was completely blue." Tr. 249. Shellhammer believed that the accident was caused by Chattin passing out "[b]ecause just the way the truck hit the berm and the route it followed and the condition he was in in a short period of time," and because after the accident, while still in the cab, Chattin "wasn't bleeding at all. Even his glasses weren't . . . knocked off his face. I thought that was very odd. And he had a couple minor cuts and he wasn't even bleeding." Tr. 267-69. Shellhammer also testified that Chattin "was taking the pills because I seen them all over the ground the day of the accident," and that on at least one occasion, he observed Chattin short of breath while performing a task involving minimal exertion. Tr. 268.

Reading Anthracite offered no medical evidence to corroborate Shellhammer's conclusions. While I do not discredit Shellhammer's testimony, I find that his anecdotal testimony is outweighed by the coroner's report. I am, thus, unpersuaded that Chattin lost consciousness or died at the wheel of the Euclid 671 truck before it careened out of control.

I also find that Reading Anthracite had no preventive maintenance program or policy in place adequate enough to have prevented the equipment failure that led to Chattin's death. Edward Mitchell, a mechanic at Reading Anthracite for 35 years, explained the company's maintenance policy: "If a driver complains about a problem with the truck, you repaired it. If he had a problem on his driver's sheet, his daily report sheet, you repaired the problem." Tr. 22-24. MSHA Inspector George McIntyre, who investigated the fatal accident, testified that Reading Anthracite was unable to produce for him a schedule of preventive maintenance procedures. Tr. 113. McIntyre's conclusion about Reading Anthracite's lack of a maintenance program was consistent with Mitchell's testimony: "Well, we felt that after looking at the way the operator . . . was doing their maintenance work, that all they were doing was what we call patch maintenances. If something happened they would fix it, but as far as trying to prevent something from happening, they weren't doing any form of that type of work." Tr. 129-30.

Although Reading Anthracite introduced evidence that it performed regular maintenance on its trucks, and that it had serviced the Euclid 671's brakes approximately 80 operating hours before the accident (Tr. 321), it failed to document with any clarity or exactitude whether the Euclid 671 truck in which Chattin died had been regularly maintained according to any such schedule. See Tr. 124-25 (McIntyre's testimony that Reading Anthracite was unable to produce for MSHA any records of preventive brake maintenance performed on the Euclid 671 truck). This is particularly and most significantly true, as I explain further below, with respect to the company's 500-hour check, which Shellhammer testified is when "they do [the] transmission . . . they look at lines and they see if there's any leaks or anything like that that we fix before it goes back out." Tr. 253-55. Eugene Hennen, an MSHA mechanical engineer who assisted in the investigation of the accident, by referencing the Euclid 671 Manual's section on Transmission Lines and Fittings, explained that the truck manufacturer advises an operator "to inspect the

hoses for cracks and deterioration and inspect for damages and replace if necessary,” and that this should have been done “[p]robably about every 100 hours.” Tr. 170, 187-90. No such inspections were performed by Reading Anthracite. In Hennen’s opinion, had the company adhered to such a maintenance schedule for the transmission of the Euclid 671, the hazard that led to the accident would have been prevented. Tr. 190. Hennen further emphasized that “a complete check of the machine” should have been performed because the truck had sat idle for approximately three months, during which time seals and hoses could have deteriorated. Tr. 191-93.²

As for routine checks performed by the drivers before operating the trucks, although Reading Anthracite required that its drivers perform pre-operational inspections, even Mitchell, Reading Anthracite’s own mechanic, questioned the thoroughness of such inspections. Drivers, he stated, “would maybe walk around and glance at the truck, but I’ve never actually seen one do a complete check.” Tr. 31-32. Indeed, the parties stipulated that neither Chattin, on the day of the accident, nor the last driver to have used the truck before the accident, completed a Driver Inspection Report. See Stip. 16, 19. From this, I infer that Reading Anthracite was, at best, lax in enforcing its pre-operational inspection policy.

MSHA concluded that the accident that led to Robert Chattin’s death occurred because on the Euclid 671 truck, the transmission retarder failed and the condition of the brakes was “compromised.” Tr. 175. I find that the failure of the transmission, and particularly the retarder, was the primary cause of the accident.³ After the accident, a hole approximately 1 inch in diameter was discovered in a transmission hose. Tr. 185; Ex. G-33. Inspector McIntyre testified that the ruptured hose “was rubbing against another hose,” and that the rupture “occurred before the accident,” which was apparent “[f]rom the way it was rubbing on the other hose.” Tr. 127-28. Shellhammer agreed that the hose ruptured before the accident. Tr. 277. McIntyre opined that Chattin “made four previous trips and had no trouble, so the hose must have been okay up until that point. It was on the last trip when the hose failed that the truck got into trouble.” Tr. 128. David Imschweiler, a maintenance supervisor at Reading Anthracite, testified that on the morning of December 6, 2005, Chattin waved him down to tell him that the Euclid 671 had run out of gas. Tr. 313-14. Imschweiler arranged to have the truck refueled, which also necessitated the installation of new fuel filters, which he also supervised. Tr. 316. Although the filters were replaced close to where the transmission hose ruptured, Imschweiler did not see any

² In light of the overwhelming weight of the evidence to the contrary, I discredit Shellhammer’s testimony that Reading Anthracite made “sure that the machines [were] taken care of by what the manual says.” Tr. 251.

³ A transmission retarder is an auxiliary braking device that, when activated by the driver, applies a retarding (or slowing) force to the vehicle without the use of friction. Retarders are used to keep friction brakes cool so that “they are ready to respond to panic stop conditions, and stopping distances are greatly reduced.” WILLIAM C. PETERS, FIRE APPARATUS PURCHASING HANDBOOK 155 (1994).

leaking of transmission fluid. Tr. 317. According to MSHA Investigator Hennen, the Euclid 671 transmission's fluid capacity was approximately 30 gallons and after the accident, the truck's transmission held less than 5 gallons. Hennen testified that low oil pressure in the transmission led to the failure of the retarder. Tr. 176-77.

Based on the record in its entirety, I make the following findings: (1) the transmission hose on the Euclid 671 ruptured as Chattin made his last trip; (2) the hose had worn over time as a result of rubbing against another hose; and (3) when the hose ruptured, the transmission lost approximately 85 percent of its oil, which, in turn, led to the failure of the retarder to operate. The effect of the loss of the retarder was catastrophic. As Edward Mitchell explained, Chattin "needed the transmission. He needed his retarder. Without the oil he had no retarder, he had no transmission. . . . We wouldn't be having [this] conversation if that hole wasn't there." Tr. 40. On his final trip, Chattin attempted to engage the retarder: "The retarder lever was on," Mitchell explained (Tr. 56), but it failed and the truck ran out of control on a steep downgrade and overturned as the road leveled out and ended at an embankment. Tr. 74-75, 79.

I note that Mitchell stated that, "he had no transmission." Tr. 40. This may explain one circumstance for which none of the witnesses had any explanation, i.e., that the truck was in sixth gear after the accident. Mitchell testified that, at the time of the accident, the truck was, in fact, in sixth gear, indicating that it was traveling fast, and that customarily, a driver would not travel downhill in sixth gear. Tr. 45-46. Shellhammer also observed that the truck was in sixth gear after the accident. When asked whether the gear shift "could have been knocked into that position in the accident," he explained that it could not simply be pushed into gear. Shellhammer said that he "didn't know why it would be in sixth gear because that's the highest gear and you're going as fast as you can go. . . . I would never use it coming downhill, no. You'd use your low gears coming downhill." Tr. 269-70. Given the general downhill grade of the road on which Chattin was traveling, he had no reason to have the truck in sixth gear. Tr. 271-72. As Mitchell pointed out, however, "he had no transmission." I find it reasonable to infer that, in a frantic effort to operate the truck's transmission, Chattin somehow forced the gear shift into sixth gear, then was unable to move it any further. This only made Chattin's situation more dire, as it allowed the truck to travel at an ever higher speed, thereby placing an ever greater strain on the only element slowing the truck down - - its brakes.

I find that the brakes on the truck, while not in the best repair, were in satisfactory enough condition to stop the truck under normal operating conditions. See Stip. 11-13. Both Mitchell and Shellhammer testified that the truck's brakes were working. Tr. 51, 258-59. Shellhammer further explained that, after the accident, the truck's "brakes were all locked up," and that it took a piece of heavy equipment to move the truck. Tr. 258. However, Chattin operated the Euclid 671 on that last trip under far from normal operating conditions, given that the retarder and, indeed, the entire transmission, had failed. He apparently did his best to stop the truck by using the brakes alone. When Mitchell arrived at the scene of the accident, the truck was still running and the "brakes were hot and they smelled." Tr. 37. Under the circumstances, however, the brakes were not able to do the job.

McIntyre offered his opinion that “if all the brakes had been working properly, even though the hose failed going to the retarder, the truck [would have been] capable of stopping.” Tr. 111. In light of the fact that the brakes were “locked up” after the accident, and a heavy piece of machinery had to be used to move the truck, I am not convinced that McIntyre’s opinion is well founded. However, it is undisputed that the brakes were not in good repair. The right front brake was not operating at all because the brake line was plugged with a piece of rubber; rust found on the brake after the accident was further evidence that it had not been functioning. Tr. 39, 108-09, 194-96, 302. Grease and oil contaminating the left front brake diminished its braking capacity. Tr. 108, 199, 303. Wear on the rear brake drums also diminished their braking capacity. Tr. 38, 110, 202-03, 256, 335-36. In light of these facts, I find that the condition of the brakes on the Euclid 671 contributed to the accident, although, in terms of causation, the inability of the brakes to stop the truck was secondary to the far more serious failure of the truck’s transmission.

A. Citation No. 7008313

Section 104(a) Citation No. 7008313 alleges that Reading Anthracite failed to perform an adequate pre-operational inspection of the Euclid 671 truck that overturned on December 6, 2005, in violation of 30 C.F.R. § 77.1606(a).⁴ In light of my finding that neither Chattin nor any other Reading Anthracite employee performed a pre-operational inspection of the Euclid 671 truck that Chattin drove on December 6, 2005, I conclude that Reading Anthracite violated section 77.1606(a). See also Stip. 19 (no pre-operational inspection performed on the truck on September 14, 2005, the last time it was operated before December 6, 2005).

The Secretary further alleges that the violation occurred as a result of Reading Anthracite’s moderate negligence. According to the Secretary’s civil penalty criteria, found at 30 C.F.R. Part 100, a mine operator is moderately negligent when it “knew or should have known of the violative condition or practice, *but there are mitigating circumstances.*” Sec’y Br. at 14 (quoting 30 C.F.R. § 100.3(d)) (emphasis added). In light of Mitchell’s testimony that drivers rarely, if ever, performed complete pre-operational inspections (Tr. 31-32), and my finding that Reading Anthracite was lax in ensuring that such inspections were regularly performed, I find that no mitigating circumstances exist that would justify ascribing a moderate degree of negligence to Reading Anthracite for this violation. Indeed, the Secretary’s arguments point to no such circumstances.

Had Chattin known that the company expected and required him to adequately inspect the truck that he was about to drive, especially in light of the fact that it had been sitting idle for almost three months, it is very likely that he would have found that a critical transmission hose had begun to show wear and needed to be replaced. David Imschweiler, who supervised the

⁴ 30 C.F.R. § 77.1606(a) provides: “Mobile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation. Equipment defects affecting safety shall be recorded and reported to the mine operator.”

replacement of fuel filters on the truck on the day of the accident, testified that the transmission hose that ruptured “was probably close, right above my head, within a couple inches or feet, because I was underneath the transmission watching them put the fuel filters on the truck.” Tr. 317. I also note Hennen’s testimony that, consistent with the Euclid 671 manual, Reading Anthracite should have performed a thorough inspection of the truck, including inspecting the transmission hose, because it had been idle for so long. Tr. 187-90. From this, I infer that the transmission hose would have been either visible or accessible, and its defects apparent, had Chattin been directed to perform a thorough inspection of the truck before operating it. In light of these circumstances, I find Reading Anthracite highly negligent for failure to ensure that Chattin perform a thorough inspection.

Inspector McIntyre determined that the gravity of the violation was “significant and substantial” (“S&S”). The S&S terminology is taken from section 104(d)(1) of the Act, which distinguishes as more serious any violation that is “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine or safety hazard.” 30 U.S.C. § 814(d)(1). A violation is properly designated S&S “if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 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. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g* 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 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 the violation.” *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1998); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

Applying the *Mathies* criteria, I have found a violation and that, but for Reading Anthracite’s failure to direct Chattin to perform a thorough inspection of the Euclid 671 truck before driving it on December 6, 2005, Chattin would have discovered the worn transmission hose that ultimately ruptured and caused the transmission to fail. As I have already found, the failure of the transmission was the primary cause of the accident that killed Chattin. Accordingly, I find that the violation was S&S.

B. Citation No. 7008315

Section 104(d)(1) Citation No. 7008315 alleges that Reading Anthracite failed to equip

the Euclid 671 truck with adequate brakes, in violation of 30 C.F.R. § 77.1605(b).⁵ I have already found that, although the brakes on the Euclid 671 were in poor repair, they were adequate under normal driving conditions. This is further supported by the fact that Chattin made four haulage trips and apparently experienced no problems with the brakes before the transmission failed. Tr. 328. However, when the transmission failed, the brakes proved inadequate, despite Chattin's efforts to stop the truck by applying them. See Tr. 37. As I have noted, when Chattin's truck careened out of control, the driving conditions that he encountered were anything but normal. Section 77.1605(b), however, draws no distinction between normal and abnormal driving conditions. The regulation simply requires that brakes be "adequate." Because, under the circumstances of this case, the brakes were inadequate, I conclude that Reading Anthracite violated section 77.1605(b).

Respecting the gravity of the violation, I agree with the Secretary. I have found that the condition of the brakes contributed to a fatal accident. Accordingly, I find that the violation was S&S.

The Secretary argues that Reading Anthracite failed to make any effort to inspect the brakes on the Euclid 671 "on a regular basis," and that this "demonstrates a reckless disregard of its obligations to maintain those brakes in adequate working condition and justifies the classification of this citation as 'unwarrantable.'" Sec'y Br. at 19. The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, and refers to more serious conduct by an operator in connection with a violation. 30 U.S.C. § 814(d). In *Emery Mining Corp.*, the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. 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 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as 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 are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses 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); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to

⁵ 30 C.F.R. § 77.1605(b) provides, in relevant part: "Mobile equipment shall be equipped with adequate brakes."

determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

I conclude that the violation was not caused by Reading Anthracite's unwarrantable failure to comply with the standard. The record does not support the Secretary's contention that the company performed no preventive maintenance whatsoever on the Euclid 671's brakes. On the contrary, David Imschweiler testified that the truck's brakes had been serviced approximately 80 operating hours before the accident. Tr. 321. Furthermore, as I have already noted, Chattin did not report any problems with the brakes on the day of the accident. See Tr. 328. In light of these facts, and my finding that the brakes were adequate for normal driving conditions, I find that the Secretary has failed to establish the requisite aggravating factors that would support a finding of unwarrantable failure. Given that I have found that the condition of the brakes contributed to the accident, I, nevertheless, find Reading Anthracite's violation of section 77.1605(b) to have occurred as the result of the company's negligence. As to the degree of negligence, I have already noted several mitigating factors, including that the brakes operated adequately until the transmission failed, and that the brakes were serviced 80 operating hours before the accident. Accordingly, I ascribe to Reading Anthracite a moderate degree of negligence with respect to this violation.

C. Order No. 7008316

Section 104(d)(1) Order No. 7008316 alleges that Reading Anthracite failed to maintain the Euclid 671 truck in safe operating condition, in violation of 30 C.F.R. § 77.404(a).⁶ Unlike the preceding violation, in considering the Secretary's allegations, I must consider the truck as a whole, specifically, how its operating condition on December 6, 2005, was affected by Reading Anthracite's maintenance policies and practices. Having reviewed the record, and consistent with my previous findings, I find that when Chattin began his haulage trips that day, he was driving a ticking time-bomb. The truck had become the instrumentality of Chattin's death, as it laid idle for almost three months and, when brought back into service, instead of defusing the bomb, Reading Anthracite allowed its timer to commence tolling the minutes leading to catastrophe. Reading Anthracite allowed this to happen because the company had a woefully inadequate preventive maintenance program. Standard operating procedure at the Wadesville P-33 mine was for truck drivers to operate their rigs and report any problems they encountered. In essence, Reading Anthracite turned its drivers into human guinea pigs that the company relied upon to test whether its trucks were in safe operating condition. This amounted to a grievous violation of section 77.404(a), one that led inexorably to the death of Robert Chattin, and one that involved unconscionably gross negligence.

To summarize the facts that lead me to this conclusion, I first point to Edward Mitchell's testimony that Reading Anthracite had no regular preventive maintenance program. When

⁶ 30 C.F.R. § 77.404(a) provides: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

MSHA Inspector McIntyre asked Reading Anthracite for a schedule of preventive maintenance procedures, the company was unable to produce one. I credit McIntyre's compelling testimony that Reading Anthracite relied upon patch maintenance. Furthermore, the Euclid 671 manual advises operators to inspect the transmission hoses for damage on a regular basis and replace them, if necessary. Tr. 187-89. Reading Anthracite's performance in this regard failed miserably, especially in light of the fact that the truck had not been operated for a prolonged period. Tr. 190-93.⁷

Accordingly, I find that Reading Anthracite violated section 77.404(a), that the violation was S&S, and that it occurred as a direct result of Reading Anthracite's unwarrantable failure to comply with the requirements of the regulation.

D. Order No. 7008317

The parties agree that Chattin was not wearing a seatbelt at the time of the accident, and have stipulated that Reading Anthracite violated 30 C.F.R. § 77.1710(i), which requires the use of seatbelts "in a vehicle where there is a danger of overturning and where roll protection is provided." See Stip. 14. The parties also have stipulated that "Chattin's failure to wear a seat belt . . . contributed to the fatal nature" of the accident and, therefore, agree, in essence, that the violation was properly designated S&S. See Stip. 15. The sole issue before me is whether the Secretary had sufficient grounds for determining that the violation was due to Reading Anthracite's unwarrantable failure.

I have not yet addressed the specific circumstances surrounding this violation. Beyond the stipulated fact that Chattin was not wearing a seatbelt when the truck that he was driving overturned, having reviewed the record, I make several findings.

Reading Anthracite's Safety Guidelines include a provision mirroring section 77.1710(i), requiring that seat belts be worn in any vehicle where there is a danger of overturning and where roll protection is provided. Ex. R-9. The company enforced this policy during safety meetings that were held approximately once every other month, by reminding its drivers to wear seat belts. Tr. 236-37. Reading Anthracite's safety director, Stanley Wapinski, told of one driver, Bill Zack, who objected to wearing a seat belt because he thought it "would be safer being able to jump out without a seatbelt." Wapinski testified that he "reminded [Zack] of the movies that he saw at the training and what could actually happen to him if he got thrown out of the truck or jumped out of the truck and the truck rolled on him," after which Zack never again questioned the company policy. Tr. 238-39. For drivers operating Euclid 671 trucks, Reading Anthracite's policy was difficult to enforce beyond such reminders because, given that the cabs of these trucks are approximately 12-15 feet off the ground, it would be physically impossible to observe

⁷ Although Shellhammer testified that "at 500 hours, they do [the] transmission . . . [to] look at lines and they see if there's any leaks or anything like that," Reading Anthracite adduced no evidence showing that any such maintenance had ever been performed on the subject Euclid 671 truck. See Tr. 253-55.

whether a driver was wearing a seat belt while driving. Tr. 238.

MSHA Inspector McIntyre testified that not all drivers wore seat belts all the time, but I find that his testimony on this point was speculative. Tr. 134, 163-64. His conclusion that the company was “not following their own procedures” was equally speculative. Tr. 136. I lack a basis upon which to infer, as the Secretary suggests, that because Reading Anthracite never disciplined anyone for not wearing a seat belt, the company failed to enforce the policy. Sec’y Br. at 24 (citing Tr. 241-43). The only fault I find in Reading Anthracite’s enforcement of its seat belt policy is that reminders were given just once every two months. The company failed to introduce any evidence showing that greater efforts were made to ensure that its drivers were *constantly* reminded of the necessity to use seat belts, such as signage in the cabs of the trucks.

This is not to suggest that this violation involved anything less than a very high degree of negligence. The negligence was Chattin’s, however, not Reading Anthracite’s. It is well settled that the negligence of a rank-and-file miner is not imputable to an operator for the purposes of penalty assessment or unwarrantable failure determinations. *Wayne Supply Co.*, 19 FMSHRC 447, 451, 453 (Mar. 1997); *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982). Furthermore, there is nothing in the record to suggest that Chattin was anything other than a rank-and-file miner. I, thus, conclude that the violation was not caused by Reading Anthracite’s unwarrantable failure to comply with section 77.1710(i). In light of my finding that Reading Anthracite’s enforcement of its policy lacked vigor, I ascribe to the company a moderate degree of negligence.

III. Penalty

A. Section 110(i) Criteria

While the Secretary has proposed a total civil penalty of \$88,600.00, 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(j). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1993), *aff’d*, 763 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that Reading Anthracite is a medium-sized operator, with a history of prior violations that is not an aggravating factor in assessing an appropriate penalty. Stip. 5-6; Ex. G-35. As stipulated by the parties, the total proposed penalty will not affect Reading Anthracite’s ability to continue in business, and the company demonstrated good faith in achieving rapid compliance after notice of the violations. Stip. 7-8. The remaining criteria involve consideration of the gravity of the violations and Reading Anthracite’s negligence in committing them. These factors have been discussed fully respecting each citation and order. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

B. Assessment

1. Citation No. 7008313

The Secretary has established a very serious violation of 30 C.F.R. § 77.1606(a). Although she has alleged that the violation was due to Reading Anthracite's moderate negligence, I find the operator's negligence to be high. The Secretary petitioned the Commission to assess a penalty of \$9,100.00 for this violation. Applying the civil penalty criteria, and in consideration of my finding of high negligence, I find that a penalty of \$12,000.00 is appropriate.

2. Citation No. 7008315

The Secretary has established a very serious violation of 30 C.F.R. § 77.1605(b). However, she has failed to establish that the violation was due to Reading Anthracite's unwarrantable failure. I find that the violation was due to Reading Anthracite's moderate negligence. The Secretary petitioned the Commission to assess a penalty of \$26,500.00 for this violation. Applying the civil penalty criteria, and in consideration of my findings as to Reading Anthracite's negligence, I find that a penalty of \$8,500.00 is appropriate.

3. Order No. 7008316

The Secretary has established a very serious violation of 30 C.F.R. § 77.404(a), and that it was due to Reading Anthracite's unwarrantable failure. She petitioned the Commission to assess a penalty of \$26,500.00 for this violation. Applying the civil penalty criteria, and in consideration of my findings as to Reading Anthracite's unconscionably gross negligence, I find that a penalty of \$50,000.00 is appropriate.

4. Order No. 7008317

The parties stipulated that Reading Anthracite violated 30 C.F.R. § 77.1710, and that the violation was S&S. However, the Secretary has failed to establish that the violation was due to Reading Anthracite's unwarrantable failure. Instead, I find that the violation was due to Reading Anthracite's moderate negligence. The Secretary petitioned the Commission to assess a penalty of \$26,500.00 for this violation. Applying the civil penalty criteria, and in consideration of my findings as to Reading Anthracite's negligence, I find that a penalty of \$8,500.00 is appropriate.

ORDER

Accordingly, it is **ORDERED** that Order No. 7008316 is **AFFIRMED**, as issued, that the Secretary **MODIFY** Citation No. 7008315 and Order No. 7008317 to citations issued under section 104(a) of the Act with a "moderate" degree of negligence, Citation No. 7008313 to increase the degree of negligence to "high," and that Reading Anthracite Company **PAY** a civil penalty of \$79,000.00 within 30 days of this Decision. Accordingly, this case is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

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/sdb