FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 23, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS Docket No. SE 2010-877-M A.C. No. 01-02985-220540 (1KJ)
v.	
SAIIA CONSTRUCTION, LLC, Respondent.	Mine: Omya Alabama Plant Docket No.
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	Docket No. SE 2012-119-M A.C. No. 01-02985-272123A
v.	Mine: Omya Alabama Plant
FREDERICK LOONEY, Agent of SAIIA CONSTRUCTION, LLC, Respondent.	

DECISION

Appearances: Melanie L. Paul, Esq., Office of the Solicitor, Atlanta, Georgia, for Petitioner;

John Hargrove, Esq., Bradley Arant Boult Cummings, LLP, Birmingham, Alabama, for Respondents.

Before: Judge Paez

This case is before me upon the petitions for assessment of civil penalty filed by the Secretary of Labor ("Secretary") pursuant to sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(d), 820(c). In dispute are one section 104(d)(1) citation issued to Saiia Construction, LLC ("Saiia") and a companion section 110(c) penalty assessment issued to Frederick Looney ("Looney"), alleging his personal liability as an agent of Saiia. To prevail, the Secretary must prove his charges "by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom., Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that "the existence of a

fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

I. STATEMENT OF THE CASE

The single alleged safety violation in this case was issued to Saiia as a contractor at the Omya Alabama Plant limestone quarry on March 31, 2010. Citation No. 8546029 charges Saiia with a violation of 30 C.F.R. § 56.14100(c) for operating a front-end loader with safety defects in the stockpile area.[1] The Secretary designated the citation as significant and substantial ("S&S")[2] and as the result of Saiia's unwarrantable failure[3] to comply with a mandatory health or safety standard. In addition, the Secretary characterized Saiia's level of negligence as high and proposes a penalty of $12,563.00. Lastly, the Secretary proposes that Looney pay a penalty of $3,900.00 under section 110(c) of the Mine Act in connection with Citation No. 8546029.

Chief Administrative Law Judge Robert J. Lesnick assigned Docket Nos. SE 2010-877-M and SE 2012-119-M to me, and I held a hearing in Birmingham, Alabama.[4] The Secretary presented testimony from MSHA Inspector DeWayne Ogden, retired MSHA Inspector Harry Wade, MSHA Mechanical Engineer James L. Angel,[5] Saiia front-end loader operator Steve

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[1] Section 56.14100(c) provides:

> When defects make continued operation hazardous to persons, the defective items including self-propelled equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

30 C.F.R. § 56.14100(c).

[2] The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

[3] The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by an "unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

[4] In this decision, the hearing transcript, the Secretary's exhibits, and Oak Grove's exhibits are abbreviated as "Tr.," "Ex. G–#," and "Ex. R–#," respectively. The parties also admitted a list of stipulations in a joint exhibit, which is abbreviated as "Ex. J–1."

[5] Wade and Angel testified via telephone. (Unpublished Order at 2 (May 3, 2013); Unpublished Order at 2 (May, 8, 2013).) In addition, Angel was qualified as an expert "in the field of safe operation of diesel-fueled[,] earth[-]moving machines." (Tr. 173:12–174:3.)

Honeycutt, Saiia Supervisor Frederick Looney, and Thompson Tractor Company Field Service Advisor Stephen Sadler. Saiia and Looney (collectively, "Respondents") presented testimony from Thompson Tractor Company Technical Communicator Mark Schropp, Thompson Tractor Company Field Service Technician David Coston, and Saiia Safety Manager Richard Leemhius. The parties filed closing briefs. Respondents also filed a reply brief.

II. ISSUES

The Secretary argues that the condition of Saiia's front-end loader was properly cited as a violation, that the allegations underlying the citation are valid, and that the penalty he has proposed for Saiia is appropriate. (Sec'y Br. at 6–21, 23–24.) The Secretary also contends that his charges and proposed penalty under section 110(c) are valid and appropriate. (*Id.* at 21–25.) In contrast, Respondents dispute the fact of violation, the Secretary's allegations regarding gravity and negligence, and the section 110(c) charges against Looney. (Resp't Br. at 5–14; Resp't Reply at 2–4.)

Accordingly, the following issues are before me: (1) whether the cited condition violated the Secretary's mandatory health or safety standards regarding mobile equipment; (2) whether the record supports the Secretary's assertions regarding the gravity of the alleged violation, including whether it is S&S; (3) whether the record supports the Secretary's assertions regarding Saiia's negligence, including the unwarrantable failure determination, in committing the alleged violations; (4) whether the record supports holding Frederick Looney liable under section 110(c); and (5) whether the Secretary's proposed penalties against Saiia and Looney are appropriate.

For the reasons set forth below, Citation No. 8546029 is **AFFIRMED** as S&S, as an unwarrantable failure, and resulting from Saiia's high negligence, and **MODIFIED** to reduce the likelihood of injury to "reasonably likely." Additionally, the section 110(c) charges against Frederick Looney are **AFFIRMED**.

III. FINDINGS OF FACT

A. Saiia's Operations at the Omya Alabama Plant

Saiia is a contractor for the Omya Corporation and removes overburden and limestone material at the Omya Alabama Plant limestone quarry. (Tr. 39:24–40:5, 248:18; Ex. G–6 at 6.) In February and March 2010, Saiia operated a Catepillar ("CAT") 966H front-end loader five days a per week to scoop material, move it from place to place, and load haul trucks in the "off-road" area of the mine. (Tr. 48:8–15, 50:24–51:25, 52:9–21, 54:16–55:4, 97:17–23, 114:7–10, 116:19–25.)

At the time, the "off-road" area was used as a storage area for limestone material between the quarry's pit and plant areas. (Tr. 52:9–53:5.) The off-road area was gravelly, with large rocks—also know as pinnacles—embedded in the ground and protruding between two and six

inches above the surface. (Tr. 63:24–64:24, 114:23–24; Ex. G–1.) The area also contained large loose rocks. (Tr. 65:1–2.) These pinnacles and loose rocks would cause the loader to bounce, sway, or loose traction. (Tr. 64:12–15, 65:2–7.) In addition, the off-road area included at least six stockpiles of wet limestone material that were approximately ten-feet high. (Tr. 53:2–12, 86:13.) The off-road area was slightly graded and included elevated berms. (Tr. 53:25–54:12, 62:19–23.)

Saiia rented this CAT loader from Thompson Tractor on February 16, 2010. (Ex. J–1; Ex. G–12.) According to the rental agreement, Thompson Tractor performed all required maintenance on the loader. (Ex. G–12; Tr. 152:21–153:1, 207:13–208:4.) However, Saiia was permitted to make minor repairs to the loader, such as replacing broken hoses. (Tr. 153:2–10, 154:2–4, 154:24–155:5.) Saiia maintenance man Jamie Minton was responsible for coordinating Thompson Tractor's maintenance activities at the Omya Alabama Plant. (Tr. 140:6–25, 147:3–11, 148:3–11, 293:11–14.)

The loader was approximately thirty-five-feet long, fifteen-feet high, and ten-feet wide. (Tr. 51:3–17.) Using an eight-to-ten-foot-wide bucket, the loader operator picked up material and moved it from one place to another. (Tr. 51:14–19, 56:2–18, 115:3.) The loader traveled approximately ten or fifteen miles per hour in open areas, but it slowed to five or ten miles per hour when moving between stockpiles or transporting material. (Tr. 55:20–56:1.)

The loader's steering assembly includes both a steering wheel and a steering column, which are distinct parts of the steering assembly. (*See, e.g.*, Tr. 177:7–178:24.) The steering wheel sat atop the steering column, and the steering column was generally locked into place. (Tr. 177:22–178:24.) According to the CAT loader's Operation and Maintenance Manual, the steering column requires service if the column itself is capable of moving more than one inch in any direction. (Ex. J–1.)

B. <u>Mine Inspection – March 31, 2010</u>

In response to hazard complaints regarding the safety of mobile equipment, Inspector DeWayne Ogden performed an inspection of the Omya Alabama Plant on March 31, 2010. (Tr. 39:13–23.) Ogden informed Omya and Saiia management of the reason for his investigation, then examined Saiia's preshift examination records. (Tr. 40:14–41:9.) In his review, Ogden noted that the steering column on the CAT loader had been listed as "loose" or "broken" several times beginning in mid-February 2010. (Tr. 41:11–16, 42:6–44:7, 100:11–101:25, 105:16–110:20; Ex. G–2.)

Ogden then met with the loader operator who had prepared these reports, Steve Honeycutt. (Tr. 44:8–11.) After climbing up onto the machine, Ogden discussed the preshift reports and condition of the loader with Honeycutt. (Tr. 44:22–45:3, 117:14–22.) At that point, Honeycutt shook the steering column to demonstrate the lateral amount of movement in the column. (Tr. 45:1–3, 117:23–118:4.) Although Ogden did not measure the movement, he

estimated it to be approximately six inches from center to one side. (Tr. 46:7–13.) Honeycutt testified that the movement was four or five inches. (Tr. 102:10–11, 104:15–23, 109:9–12, 126:17–127:4, 127:19–128:23; Ex. G–13.)

Ogden then spoke with Supervisor Looney and asked if he was aware of the condition. (Tr. 47:15–18.) According to Ogden, Looney indicated that he was aware of the movement in the steering column but did not remove it from service because he had no other loader available for use.[6] (Tr. 47:18–23.) Ogden then discussed the condition of the loader with Thompson Tractor Field Technician Coston, who was at the Omya Alabama Plant site to work on another piece of mobile equipment. (Tr. 48:8–21, 274:11–13; Ex. G–14.) After Coston observed Honeycutt move the steering column, Ogden testified that Coston agreed that the loader was unsafe for operation.[7] (Tr. 48:22–49:7, 49:20–50:5; Ex. G–14.)

Ogden also sought input from Inspector Wade, who was also already present at the Omya Alabama Plant to investigate a highwall failure. (Tr. 47:24–48:7, 80:13–81:2.) Wade observed Honeycutt move the steering column and testified that the column moved approximately six to eight inches from center to side. (Tr. 49:20–50:4, 81:10–82:6.) According to Wade, Supervisor Looney told him that Saiia did not want to spend money to repair the loader because it was a rental. (Tr. 83:16–22.)

As a result of this inspection, Ogden issued a section 107(a) imminent danger order directing Supervisor Looney to remove the loader from service. (Ex. G–1.) He also issued Citation No. 8546029, which alleged the following:

> The Caterpillar 966H front[-]end loader (S/N: A6D1193) in the off[-]road stockpile area was being operated with a defect affecting

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[6] Looney does not dispute that he was aware of the condition. (Tr. 133:6–22;Ex. J–1.) However, he personally operated the loader in February and March 2010. (Tr. 139:12–15, 142:19–145:5, 145:25–146:2, 149:18–22, 151:23–25.) He testified that he did not remove the loader from service because he did not believe the loader to be unsafe. (Tr. 141:4–10, 145:11–13, 146:9–19, 149:9–25; Ex. J–1.) He also testified that he informed Saiia's maintenance man, Jamie Minton, about the condition of the loader every time Honeycutt reported it. (Tr. 148:3–8, 150:25.)

[7] At the hearing, Coston agreed that he observed wear in the pins and bushings of the steering column, as well as side-to-side movement in the column itself. (Tr. 261:20–262:15, 267:23–268:20.) However, Coston claimed that Ogden told him "I know this machine has some problems. . . . [D]on't tell me there is nothing wrong with it." (Tr. 261:8–12.) Coston also stated that he did not tell Ogden that the loader was unsafe to operate. (Tr. 263:1–3, 270:14–17.) Instead, Coston claims that he said it was up to the inspector. (Tr. 262:14–17.) Nevertheless, Coston admitted that the steering column's movement required repair and stated that it could present a safety hazard in certain circumstances. (Tr. 273:11–274:5; Ex. G–14.)

> safety and was not taken out of service. The defective steering components exposed the loader operator to fatal injuries when they failed. The Caterpillar certified technician inspected the steering on the loader and stated that it was unsafe to operate. The loader was used daily, at least 5 times a week, to maintain the stockpiles in the off[-]road area. Frederick Looney, Supervisor[,] stated that he knew this condition existed and it has been reported to him 4 separate times on pre-operational checks. Frederick Looney, Supervisor[,] engaged in aggravated conduct constituting more than ordinary negligence. This is a[n] unwarrantable failure to comply with a mandatory standard. This violation is a factor cited in [an] imminent danger [order].

(*Id.*) Ogden marked "fatal" injuries as "highly likely," designated the violation as S&S, and characterized Saiia's level of negligence as "high." (*Id.*)

On April 15 and 16, 2010, Saiia, Thompson Tractor, and their counsel met at Thompson Tractor's facility in Shelby County. (Tr. 196:6–14, 203:16–204:15, 210:12–220:20; Ex. R–9.) Safety Manager Leemhius and Technical Communicator Schropp testified that the group performed a self-examination of the CAT loader. (*See, e.g.*, Tr. 210:12–220:20.) According to Leemhius and Schropp, they measured the movement of the steering column, took timing tests of the steering wheel's responsiveness, and produced videos of the loader in operation in Thompson Tractor's parking lot.[8] (*See, e.g.*, Tr. 210:12–220:20; *see also* Ex. R–12; Ex. R–13.)

IV. PRINCIPLES OF LAW

A. 30 C.F.R. § 56.14100(c) – Defects Affecting Safety on Mobile Equipment

Section 56.14100(c) requires operators to (1) remove from service (2) items with defects (3) affecting safety. 30 C.F.R. § 56.14100(c); *see Dix River Stone, Inc.*, 32 FMSHRC 1779, 1784 (Nov. 2010) (ALJ). A defect is "a fault, a deficiency, or a condition impairing the usefulness of

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[8] I have significant concerns regarding the veracity of Saiia's mid-April examinations because no MSHA personnel were present for Saiia's self-examination of the CAT loader. Saiia claims to have made no repairs to the loader between the time of the citation and the April 15 and 16 self-examination. (Resp't Br. at 3.) Saiia also claims to have invited MSHA to this examination in an undated, unsigned letter and fax. (*See* Resp't Br. at 3; Ex. R–2; Tr. 278:20–279:5.) Curiously, Respondents did not explain why Saiia—which was represented by counsel at the time—did not document the delivery of the invitation to MSHA. Regardless of whatever miscommunication occurred, MSHA was not present for these examinations. I recognize and appreciate Respondents' representation that no repairs had been made to the loader. Yet without MSHA personnel present to observe these tests or the loader itself, the results of Saiia's self-examination are sufficiently questionable that I accord them no weight.

an object or a part." *Allied Chemical Corp.*, 6 FMSHRC 1854, 1857 (Aug. 1984) (citing *Webster's Third New International Dictionary* 591 (1971); U.S. Department of Interior, Bureau of Mines, *Dictionary of Mining, Mineral and Related Terms* 307 (1968).) Because section 56.14100(c) is a broadly worded safety standard, the Commission applies the "reasonably prudent person test" to determine whether a "a reasonable person with knowledge of the particular facts, including facts peculiar to the mining industry, would recognize the existence of a defect constituting a hazard requiring corrective action . . . ." *Lafarge North America*, 35 FMSHRC 3497, 3500–01 (Dec. 2013).

B. Section 110(c) of the Mine Act – Agent Liability

Corporate directors, officers, or agents are liable under section 110(c) when they know or had reason to know of a violative condition, and fail to act to correct the condition. *See* 30 U.S.C. § 820(c); *Cougar Coal Co.*, 25 FMSHRC 513, 517 (Sept. 2003). Section 110(c) liability "is generally predicated on aggravated conduct constituting more than ordinary negligence." *Ernest Matney*, 34 FMSHRC 777, 783 (Apr. 2012).

C. Significant and Substantial Violations

A violation is S&S "if, based on 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). To establish an S&S violation, the Secretary 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. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming ALJ's application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission has also provided guidance to Administrative Law Judges in applying the *Mathies* test. The Commission indicated that "an inspector's judgment is an important element in an S&S determination." *Mathies*, 6 FMSHRC at 5 (citing *Nat'l Gypsum*, 3 FMSHRC at 825–26); *see also Buck Creek Coal*, 52 F.3d at 135 (stating that ALJ did not abuse discretion in crediting opinion of experienced inspector). The Commission has also observed that "the reference to 'hazard' in the second element is simply a recognition that the violation must be more than a mere technical violation—i.e., that the violation present *a measure* of danger." *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984) (emphasis added) (citing *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 827 (Apr. 1981). Moreover, the Commission clarified "[t]he correct inquiry under the third element of *Mathies* is whether the hazard identified under element two is reasonably likely to cause injury." *Black Beauty Coal Co.*, 33 FMSHRC 1733, 1742 n.13 (Aug. 2012). Finally, the Commission has specified that evaluation of the

reasonable likelihood of injury should be made assuming continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

D. Unwarrantable Failure of Operator to Comply with Mandatory Standards

In *Emery Mining*, the Commission determined that an 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*, 52 F.3d at 136 (approving the 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 1998). These factors are viewed in the context of the factual circumstances of each case, and some factors may not be relevant to a particular factual scenario. *Consolidation Coal Co.*, 22 FMSHRC at 353. All relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated or whether mitigating circumstances exist. *Id.*

E. Penalty Assessment – Section 110(i)

Section 110(i) of the Mine Act outlines six criteria I must consider in assessing civil penalties: the operator's history of previous violations; the appropriateness of the penalty relative to the size of the operator's business; the operator's negligence; the penalty's effect on the operator's ability to continue in business; the violation's gravity; and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i). These same section 110(i) factors are also applicable when assessing penalties in section 110(c) cases. *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1764–66 (Aug. 2012). In the section 110(c) context, the "relevant inquiries include whether the penalty will affect the individual's ability to meet his financial obligations and whether the penalty is appropriate in light of the individual's income and net worth" but should "not include the size of the mine [or] . . . the penalties levied against the corporation." *Id.* at 1764–65.

V. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Further Findings of Fact

1. Steering Column Movement

At the hearing, the Secretary and Respondents presented conflicting testimony and evidence regarding the amount of movement found in the CAT loader's steering column. The Secretary contends that the steering column moved between four and eight inches from center to side. (Sec'y Br. at 7–8.) Moreover, the Secretary disputes the veracity of Saiia's self-examination on April 15 and 16. (Sec'y Br. at 8–10.) In contrast, Respondents contend that Saiia and Thompson Tractor's mid-April self-examination demonstrates that the steering column moved only one inch from center to side and one inch from front to back. (Resp't Br. at 3.)

The evidence before me overwhelmingly supports a finding that the CAT loader's steering column moved approximately six inches from center to side. First, operator Honeycutt indicated that the steering column moved between four and five inches and repeatedly marked the steering column as loose or broken in his preshift reports.[9] Second, Inspectors Ogden and Wade each observed Honeycutt manipulate the steering column from just a few feet away and estimated that the steering column moved between six and eight inches. Third, Field Technician Coston characterized the movement of the steering column as "excessive." (Tr. 270:18–273:2; Ex. G–14.) Finally, it is uncontroverted that the manufacturer's instructions suggest replacing the bushing and pin when movement in the steering column exceeds one inch. (Ex. J–1; Ex. G–5; Ex. R–3; Ex. R–14.) Indeed, the bushing and pin were replaced in this loader after the issuance of the citation. (Ex. G–4.) This evidence all strongly suggests that the loader's steering column moved between six and eight inches from center to side. Moreover, I have accorded no weight to Saiia's mid-April self-examination. *See* discussion *supra* footnote 8.

In addition, Respondents argue that Inspectors Ogden and Wade did not physically measure, test, or document the movement of the steering column. (Resp't Br. at 2–3, 5–6; Resp't Reply Br. at 2.) Thus, Respondents contend that the Secretary has not demonstrated that the steering column moved. (Resp't Br. at 2–3, 5–6; Resp't Reply Br. at 2.) I recognize that certain circumstances may require fine measurements. *See Lafarge North America*, 35 FMSHRC at

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[9] Honeycutt repeatedly characterized the amount of movement as four or five inches from center to side. (Tr. 102:10–11, 104:15–23, 109:9–12, 126:17–127:4.) However, when Respondents' counsel asked about the amount of movement, Honeycutt claimed the *total* amount of movement from left to right was four or five inches. (Tr. 128:10–22.) This "clarification" contradicted the bulk of his testimony. Critically, it also contradicted a statement he made during MSHA's section 110(c) investigation. (Ex. G–13 ("[Y]ou could move [the steering column] . . . about 4 or 5 inches in *all* directions.") (emphasis added).) Given the evidence before me, I therefore credit Honeycutt's testimony that the steering column moved four or five inches from center to side.

3501–02. Such precision is not necessary in this case. Inspectors Ogden and Wade were standing just a few feet away when they estimated the steering column's movement. Given their proximity to the steering column and the amount of movement they observed, Ogden and Wade need not have used a tape measure to establish that movement or to confirm it exceeded the one-inch limit that the CAT loader's manual suggests.

Based on the evidence before me, I therefore find that the steering column moved approximately six inches from its center position to either side.

2. Supervisor Looney's Rationale For Allowing Continued Operation of the CAT Loader

According to Inspector Ogden, Supervisor Looney indicated that he did not remove the CAT loader from service because Saiia had no other loader available for use. Additionally, Inspector Wade claimed that Looney admitted Saiia did not want to spend money to repair the loader's steering column because it was a rental. Thus, the Secretary insists that Respondents did not remove the loader from service and have it repaired for financial reasons. (Sec'y Br. at 18–19.) In contrast, Looney repeatedly and consistently testified that he did not remove the loader from service because he had personally operated it and did not believe it was unsafe. (Tr. 139:12–15, 141:4–10, 142:19–145:5, 145:11–13, 145:25–146:2, 146:9–19, 149:9–25, 149:18–22, 151:23–25.)

Three factors convince me that Looney allowed the loader to continue to operate because he believed it was safe. First, Looney was a credible and believable witness. As with almost all operator-agents, Looney had an incentive to provide self-serving testimony. Instead, Looney neither evaded questions nor equivocated regarding facts that subjected him to liability in this case. Such candor suggests to me that Looney is a credible witness. Second, loader operator Honeycutt also credibly testified that he found the loader to be safe. (Tr. 122:11–22, 123:16–21.) Honeycutt's opinion—like Looney's—may not have been objectively reasonable given the facts of this case. *See* discussion *infra* Part V.B.1. Yet, Honeycutt's opinion supports a finding that Looney likewise found the loader to be safe. Finally, it is unclear whether Saiia would have been responsible for any of the relatively small repair charges or that the repairs would have taken more than a few hours. (Tr. 223:10–14, 254:12–255:5, 298:8–11; Ex. G–4.) In light of these relatively small or nonexistent costs, I have serious doubts regarding Saiia's financial incentive to forgo repairs in this case.

Given the above factors, I credit Supervisor Looney's testimony that he allowed the CAT loader to continue in service because he believed the loader remained safe to operate.

B. Citation No. 8546029 – Saiia

1. Violation

In this case, Inspector Ogden found the CAT loader in operation during his inspection. I have also found that the loader's steering column moved approximately six inches from center to side, and it is uncontroverted that the steering column required repairs. Indeed, operator Honeycutt characterized the steering column as "broken" several times in his preshift reports. I therefore determine that the steering column contained a defect and that the loader had not been removed from service.

Consequently, this case turns on whether a reasonably prudent person with knowledge of the facts particular to the mining industry would recognize that the steering column's movement affected the safety of the loader. At the hearing, Respondents' counsel repeatedly elicited testimony regarding timing tests designed to gauge the performance of the steering system. (*See, e.g.*, Tr. 71:22–72:22.) Respondents claim that the movement in the steering column did not affect that actual steering system. (Resp't Br. at 4–5; Ex. G–7 at 5; Ex. G–8 at 6; Ex. G–9 at 6) Respondents therefore conclude that the steering column movement "cannot affect safety" because the steering system functioned properly. (Resp't Reply Br. at 2.)

Nevertheless, Respondents' argument fundamentally misunderstands the Secretary's theory. Regardless of whether the steering wheel would properly engage the loader's steering mechanism, the Secretary contends that the *movement in the steering column itself* affected the operator's ability to control the loader when making a sharp turn. (Sec'y Br. at 11; *see also* Tr. 179:23–180:9, 182:4–183:14, 252:3–12.) The Secretary also argues the conditions found in the off-road area increased these dangers because they would jostle the steering wheel in the operator's hands. (Sec'y Br. at 11; Ex. R–15 at 2.) As MSHA Engineer Angel succinctly explained:

> The thing about mining is that conditions change rapidly, trucks coming in, stockpiles building up to confine the space of the operation. Because conditions change, the routine operation of the vehicle, the loader, may not continue. But the loader operator may get himself into a position where emergency steering is required, abrupt change of direction is needed to avoid a truck, to reposition the machine because he's off position or something like that. And in that case, the loss of . . . control, an accident is more likely.

(Tr. 185:25–186:10.) Given the context in which this loader operated, I conclude that the function of the steering system is irrelevant to whether the movement of the steering column itself affected safety.

Respondents also note that Honeycutt and Looney found the loader safe to operate.

(Resp't Br. at 6, 10; Resp't Reply Br. at 3.) Although I believe both witnesses testified honestly, *see* discussion *supra* Part V.A.2, the question before me is whether a reasonably prudent person would recognize that the steering column defect constituted a hazard requiring corrective action. Here, the CAT loader operated in a rocky, uneven, and slick stockpile area in tandem with other pieces of oversized mobile equipment. The area also contained grades and berms. Inspectors Ogden and Wade and MSHA Engineer Angel each credibly testified that the moving steering column would affect the loader operator's ability to maintain control of the machine in this off-road environment. (Tr. 57:12–58:8, 61:18–62:10, 82:24–83:2, 85:12–18, 86:6–86:18, 180:14–181:9; 185:1–5, 186:3–25.) On the day of the inspection, Thompson Tractor Field Technician Coston also indicated that in certain circumstances the movement of the steering column would constitute a safety hazard. (Tr. 273:3–274:5.) Similarly, Saiia Safety Manager Leemhius conceded that if the steering column was "actually broken," the condition presented a safety hazard. (Tr. 300:4–7.)

Looking at the evidence before me, I therefore determine that a reasonably prudent person familiar with the facts of this case would recognize the existence of a defect requiring corrective action. Given the mobile equipment, slight grades, and berms present in the stockpile area, emergency maneuvers could mean the difference between an accident and continued safe operations. In this environment, a loader operator needs complete control of the machine at all times. Yet, the loader in question operated in uneven terrain that could jostle a driver's hands at precisely the time a quick turn is necessary. Thus, a reasonably prudent person would recognize that several inches of movement in the steering column presented dangers requiring corrective action.

In view of the above, the Secretary has demonstrated all three required elements. Accordingly, I conclude that the movement in the loader's steering column constitutes a violation of 30 C.F.R. § 56.14100(c).

2. Gravity and S&S Determinations

Saiia's violation of section 56.14100(c) establishes the first element of the *Mathies* test for an S&S violation. The second element of the *Mathies* test asks whether the violation contributed to a discrete safety hazard; that is, whether the violation provides a measure of danger to safety. Here, Inspectors Ogden and Wade and MSHA Engineer Angel credibly testified that the violative conditions contributed to a safety hazard of flipping the loader, colliding with other pieces of machinery, or overtraveling the berms surrounding the off-road area. Indeed, in concluding that the movement in the loader's steering column constituted a violation, I have determined that a reasonably prudent person would recognize that such movement in the steering column constituted a defect affecting safety. Similarly, I determine that the violations contributed to discrete safety hazards of flipping the loader, colliding with other machinery in the off-road area, and overtravelling the area's berms. The Secretary has therefore met his burden of proof on the second element of *Mathies*.

The third and fourth elements of *Mathies* ask whether the safety hazard is reasonably likely to contribute to a reasonably serious injury. The Secretary claims that injuries in this case are highly likely to be fatal, and I recognize that Ogden issued an imminent danger order in this case. (Ex. G–1; Tr. 61:18–62:10.) Although the likelihood and severity of injury will be readily apparent in some contexts, *see, e.g.*, *Blue Diamond Coal Co.*, 36 FMSHRC 541, 569 (Feb. 2014) (ALJ) (indicating that falling mine roof is likely to cause serious or fatal injuries), fatal injuries are not comparably self-evident in the case before me. Yet, the Secretary provided no details regarding the height of the berms in question or the size and speed of the haul trucks and other vehicles operating in the off-road area. Instead, he relies on the opinions of Inspectors Ogden and Wade to demonstrate that the injuries in this case would be reasonably serious. These are significant gaps in the Secretary's case, and I am left to puzzle my way through the evidence to determine whether fatal injuries are highly likely to result if a CAT loader moving at five to fifteen miles per hour overturned, overtravelled the berms, or collided with another piece of machinery. Critically, I note that the Secretary's own expert never indicated that the movement in the steering column was highly likely to lead to an accident. Instead, MSHA Engineer Angel stated that steering column movement made a loss of control accident "more likely." (Tr. 186:9–10.) In light of the aforementioned gaps and Angel's testimony, I am not convinced that fatal injuries are *highly* likely.

Nevertheless, I recognize that the opinion of an experienced inspector is entitled to significant weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278–79 (Dec. 1998) (relying on the opinion of an experienced inspector to conclude that the substantial evidence supported an ALJ's S&S determination). Inspector Wade, specifically, has significant experience inspecting mines. (Tr. 78:2–79:21.) He observed the conditions in which the loader operated and concluded that injuries from losing control of the machine would be serious. (Tr. 81:12–83:9, 85:9–18.) Despite my reservations, Wade's opinion and the size of the loader itself convince me that these hazards would result in fatal or serious injures. Given the evidence before me, I therefore determine that the Secretary has satisfied his burden of proving that reasonably serious injuries were reasonably likely to occur, and has satisfied *Mathies*' third and fourth elements. However, he has not demonstrated that reasonably serious injuries are highly likely.

Based on my above determinations, I therefore conclude that this violation was appropriately designated as S&S. In addition, Citation No. 8546029 is **MODIFIED** to lower the likelihood of injury from "highly likely" to "reasonably likely."

3. Negligence and Unwarrantable Failure Determinations

The Secretary has designated this violation as an unwarrantable failure and characterizes Saiia's negligence as high. In support of his allegations, the Secretary points to the length of time this condition existed, claims that Safety Manager Leemhius and Supervisor Looney failed to examine the steering column in response to Honeycutt's repeated reports, and suggests that Saiia

prioritized continued operations over miner safety.[10] (Sec'y Br. at 18–20; Ex. R–16 at 2.)

As I noted, "intentional misconduct" is one of the types of conduct upon which an unwarrantable failure determination may be made. *See* discussion *supra* Part IV.D. The Secretary claims that Saiia chose to continue production rather than remove the loader from service for repairs because it had no other loader equipment available. Nevertheless, I do not find the Secretary's argument to be persuasive. Nothing in the record convinces me that Saiia eschewed repairs in favor of continued production.[11] Likewise, the absence of a second loader is insufficient to infer such a willful disregard of miner safety. Many operators may not have redundant tools or auxiliary machinery on hand—particularly large or expensive equipment like a CAT loader—but conscientiously remove such equipment from service when repairs are needed. I therefore decline to infer intentional misconduct simply because Saiia did not have a second loader available for use.

Looking to the other types of aggravated conduct, four aggravating factors support the Secretary's unwarrantable failure allegation. First, the loader's steering column appears to have

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[10] Respondents' briefs focused little attention on these issues, tersely claiming that the Secretary's negligence and unwarrantable failure allegations should be overturned because "the operators of the loader and the owner of the loader who drove it do not believe [it] . . . was unsafe or that any standard was violated." (Resp't Br. at 12; *see also* Resp't Reply Br. at 3.) Although I believe Looney testified honestly regarding his opinion of the loader's safety, a "good faith" belief alone does not establish a safe harbor for violative conduct. A good faith belief only mitigates unwarrantable failure and negligence if it is *also* objectively reasonable. *See Mach Mining, LLC*, 35 FMSHRC 2937, 2941–43 (Sept. 2013).

Given my conclusion that a reasonably prudent miner would have recognized that the steering column defect presented dangers requiring corrective action, Looney's "good faith" belief that the loader was safe is not objectively reasonable based on the facts before me. *See* discussion *supra* Part V.B.1. Moreover, I have accorded little weight to Schropp's testimony that the loader was safe to operate because his inspection occurred more than two weeks later with no representative of MSHA present. *See* discussion *supra* footnote 8. I therefore determine that Looney and Schropp's opinions regarding the safety of the loader do not mitigate Saiia's conduct.

[11] I note that Thompson Tractor repaired the loader's fuel system on March 19, 2010. (Ex. R–10; Tr. 206:2–9.) From one perspective, those repairs might support an inference that Saiia prioritized production over safety because it sought repairs to an item that affected the operation of the loader—the fuel system—while ignoring an item that only affected miner safety. Yet Honeycutt and Looney each credibly testified that they did not believe the loader to be dangerous. *See* discussion *supra* Part V.A.2. Although these opinions were not objectively reasonable, they do not necessarily imply *intentional* misconduct in failing to have the steering column fixed. Consequently, I do not view the repairs to the loader's fuel system to be evidence that Saiia prioritized production over miner safety.

been defective from the first day it was delivered to the Omya Alabama Plant in mid-February 2010. Honeycutt reported the steering column as loose or broken six times in the six weeks between the loader's arrival and Inspector Ogden's inspection on March 31, 2010. (Ex. G–2.) Accordingly, this violative condition lasted for several weeks. Second, these continued reports establish that Saiia had knowledge of the condition. Third, the Secretary has satisfied his burden of proving this violation to be properly designated as S&S, but I have modified the citation to lower the likelihood of injury from "highly likely" to "reasonably likely." *See* discussion *supra* Part V.B.2. Finally, I have also found that the steering column moved several inches from center to side. *See* discussion *supra* Part V.A.1. This safety defect was therefore obvious.

On the other hand, three mitigating factors weigh against the Secretary's allegations. First, nothing in the record suggests that Saiia was on notice that greater efforts were necessary for compliance. In fact, Saiia's history of previous violations reveals no previous violations of section 56.14100(c). (Ex G–3.) Second, the Secretary introduced no evidence of other safety defects on the loader. Thus, the violation was not extensive. Third, Supervisor Looney did take *some* steps to abate the violative condition. Specifically, Looney referred the steering column to maintenance personnel at the mine site. Looney's efforts to abate the violation were insufficient and his opinion that the loader was safe is objectively unreasonable, but he did take affirmative steps to address the violative condition.

Based on the determinations above, the Secretary's unwarrantable allegation may appear to be a somewhat close call. Importantly, the Commission has indicated that a supervisor's failure to stop a violation supports a finding of unwarrantable failure. *Virginia Slate Co.*, 24 FMSHRC 507, 513 (June 2002) (noting the high standard of care applicable to supervisors and indicating that "supervisor's involvement in a violation should be considered in an unwarrantability analysis of the violation.") (citations omitted). In this case, Looney's role as a supervisor responsible for removing the loader from service supports an unwarrantable failure determination. He is an agent of the operator (Ex. J–1), he was aware of a defect affecting safety, and he allowed the condition to persist for six weeks. These dangers are precisely the type the Secretary had in mind when he promulgated section 56.14100(c). *See* Safety Standards for Loading, Hauling, and Dumping and Machinery and Equipment at Metal and Nonmetal Mines, 53 Fed. Reg. 32,496, 32,505 (Aug. 25, 1988) ("Powered haulage accidents and machinery and equipment accidents in metal and nonmetal mines are among the leading causes of fatalities and serious injuries. . . . Self-propelled mobile equipment is specifically required to be examined prior to use on each shift where it is to be placed in operation. This specific requirement is included in the standard in view of the fact that defects affecting safety become more critical when they occur on a piece of equipment which is mobile throughout the mine."). Despite his own subjective belief, Looney failed to satisfy his obligation to remove from service a piece of mobile equipment with an obvious safety defect. No matter how well-intentioned his actions, his failure constituted a serious lack of reasonable care.

In light of Supervisor Looney's failure to recognize the danger involved, I conclude that the Secretary has met his burden of proving unwarrantable failure. Similarly, I conclude that the

Secretary has demonstrated Saiia's level of negligence to be high. *See* 30 C.F.R. § 100.3(d) at Table X (suggesting "high negligence" where the "operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.").

C. Section 110(c) – Supervisor Frederick Looney

Supervisor Looney stipulated that he is an agent of the operator. (Ex. J–1.) He also admitted he was the employee responsible for removing the loader from service, but contended that he did not believe that the loader was unsafe. (Tr. 132:22–133:1, 134:23–25,141:4–10, 145:11–13, 146:9–19, 149:9–25.) Nevertheless, his good faith belief does not mitigate his negligence. Indeed, a knowing violation occurs when an individual knew or had reason to know of the violative *condition*, not when the individual knowingly violates the law. *See Ernest Matney*, 34 FMSHRC at 783 (citations omitted). In this case, the facts available to Looney were sufficient to recognize that the defect in the steering column affected safety and required repair. Instead, Looney allowed the loader to continue in operation for six weeks.

The Mine Act demands a high level of care from supervisors, and Looney's mistaken belief that the loader was safe did not satisfy this important duty. Rather, his failure to recognize these safety hazards ultimately exposed miners to potential dangers for an extended period of time. I therefore determine that Looney failed to act. Moreover, his involvement proved to be a critical factor in my conclusion that Saiia engaged in aggravated conduct. In light of Looney's status as an agent, his knowledge of the steering column's safety defect, and his failure to remove the loader from service, I conclude that the Secretary has satisfied his burden of proving Supervisor Looney's individual liability under section 110(c) of the Mine Act.

D. Penalties

1. Saiia's Penalty

The Secretary has proposed that Saiia pay a penalty of $12,563.00 for Citation No. 8546029. Two of the section 110(i) factors weigh strongly against assessing the Secretary's proposed penalty. First, I note that MSHA's own Assessed Violation History Report lists only eight violations at the Omya Alabama Plant in the previous fifteen months. None of these eight violations involved section 56.14100(c), nor were these violations subject to enhanced enforcement under section 104(d) of the Mine Act. Moreover, only one such citation merited an S&S designation. Thus, this modest history of previous violations mitigates against the Secretary's proposed penalty. Second, nothing suggests that Saiia failed to make a good faith effort to achieve rapid compliance with the safety standard after Inspector Ogden issued this citation. In fact, it appears Saiia immediately took the loader out of service. (Tr. 135:16–24.)

On the other hand, I have upheld the Secretary's S&S, unwarrantable, and negligence designations. Such conclusions might ordinarily support the Secretary's proposed penalty. However, I modified Citation No. 8546029 to reduce the likelihood of injury from "highly

likely" to "reasonably likely." Accordingly, I am not convinced that Saiia's conduct was so grave as to justify the Secretary's proposed penalty of $12,563.00. Instead, the reduced likelihood of injury suggests to me that leniency is appropriate. Further, I have credited Supervisor Looney's honestly held belief that the CAT loader in question was not dangerous. Although this opinion was not objectively reasonable, I understand why Saiia acted as it did. No matter how mistaken Saiia and Looney were, Respondents' conduct was neither intentional nor reckless. Moreover, Looney did take some (though ultimately ineffective) steps to request repair of the steering column.

Looking at the remaining section 110(i) factors, nothing in the record suggests the proposed penalty is inappropriate for the size of Saiia's business. In addition, the assessed penalties will not impair Saiia's ability to remain in business. (Ex. J–1.) Yet, in weighing the section 110(i) criteria, I am not convinced the Secretary's proposed penalty is appropriate. Significantly, Saiia's limited history of violations, the reduced likelihood of injury, and an absence of intentional misconduct or recklessness each suggest that a smaller civil penalty is appropriate. I also note that the Secretary's point system for penalties suggests a penalty of $5,645.00 for this citation as modified. *See* 30 C.F.R. § 100.3. However, the Secretary's point system is not binding on Commission Judges, *see Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008), and I determine that a $5,645.00 penalty does not adequately reflect Saiia's unwarrantable conduct. Considering all of the facts and circumstances set forth above, I hereby assess a civil penalty of $7,500.00.

2. Supervisor Looney's Penalty

Given the facts and circumstances before me, I likewise conclude that the penalty the Secretary has proposed for Supervisor Looney is inappropriate. His opinion in this case was objectively unreasonable, and his failure to act resulted in a lengthy hazard to miners. However, the reduced level of gravity and absence of intentional misconduct or recklessness again suggest that some leniency is appropriate. In addition, the Secretary provided no evidence regarding Looney's involvement in past violative conduct or that he impeded attempts to abate the violation in good faith after the citation had been issued.

Looney did not present evidence regarding either his ability to meet his financial obligations or his net worth, but he did testify as to his annual earnings. (Tr. 130:7.) Moreover, he indicated that he does not have any agreement whereby Saiia will pay the penalty assessed to him individually. (Tr. 130:15–18.) In the interest of maintaining Looney's privacy, I will refrain from publishing details regarding his salary. However, I note that the Secretary's proposed penalty would represent a somewhat significant percentage of Looney's pay. I therefore infer that this penalty would affect Looney's ability to meet his financial obligations.

In view of the above penalty criteria, I conclude that a smaller penalty is appropriate in this case. Thus, I assess a civil penalty of $1,000.00 against Looney under section 110(c).

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation No. 8546029 is **AFFIRMED** as S&S and unwarrantable, but is **MODIFIED** to reduce the likelihood of injury from "highly likely" to "reasonably likely." In addition, the section 110(c) charge against Frederick Looney is **AFFIRMED**. Saiia is **ORDERED** to **PAY** a civil penalty of $7,500.00 within 40 days of the date of this decision. Likewise, Looney is **ORDERED** to **PAY** a civil penalty of $1,000.00 within 40 days of the date of this decision.

Alan G. Paez
Administrative Law Judge

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