FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 10, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. TUSCALOOSA RESOURCES Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2012-490 A.C. No. 01-03390-288534 Mine: Highway 59 Mine No. 1

DECISION

Appearances: Sophia Haynes, Office of the Solicitor, U.S. Department of Labor
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Before: Judge Simonton

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Tuscaloosa Resources, Inc. at the HWY 49 No. 1 mine, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or "Act"). This case includes one 104(d)1 citation and one 104(d)1 order issued on November 11, 2011 for a total combined penalty of **$140,000.00**. The parties presented testimony and documentary evidence at the hearing held in Birmingham, Alabama beginning January 15, 2014.

I. CASE SUMMARY

Tuscaloosa Resources, Inc. (Respondent) operated the surface coal HWY 59 No 1. mine ("HWY 59 Mine") from August 2009 through November 2011. Tr. 603. In order to remove the economically valuable layers of coal present in this area, Respondent had to first remove a layer

of sandy topsoil 60 feet deep and then a 40 foot deep layer of shale rock before the first coal seam was exposed. Resp. Br., 5-6; Tr. 70, 606. Per MSHA regulations, Respondent submitted a ground control plan prior to beginning operations which was acknowledged by MSHA. Tr. 258. This plan stated that during the development of highwalls, hazardous conditions, including movement of the highwall, would be eliminated or workers would be removed from that area. Sec'y Ex. 9, 7 section (g) (6); Tr. 681, 685. The plan did not indicate that berms would be used to control or eliminate movement in highwalls. Tr. 263, 692.

In January 2011, a 103(g) complaint was filed with MSHA, claiming that a large section of a highwall had collapsed and had not been cleaned up. Tr. 78, 81. MSHA Inspector James Brodeur investigated this complaint and confirmed that a large slide had occurred in the Northwest area of the mine in a location with water saturated soil but confirmed that no injuries had occurred. Tr. 82. During the investigation of the complaint, Respondent's management informed Brodeur that they were moving away from this area to mine in another direction. Tr. 90. Inspector Brodeur did not issue any citations or orders during the January 2011 event. Tr. 89. On May 10, 2011, MSHA Inspector Jarvis Westerly examined the HWY 59 mine as part of a regular inspection and did not find any highwall violations. Tr. 350-51.

On October 5, 2011 a massive highwall failure occurred at the active face of the HWY 59 Mine. Tr. 381. A 230 foot wide section of the highwall slid out from the toe, overtopping a protective berm and sweeping a haul truck and driver over the adjacent bench lip. Tr. 98-99. The haul truck driver, Mr. Willis Jones, was severely injured, suffering a broken sternum, internal bleeding, concussion, and bruised heart. Tr. 98

Respondent immediately reported the incident and MSHA Inspector Brodeur investigated the accident that day. Tr. 93. Upon arriving at the scene, Inspector Brodeur noted that this slide had occurred in the West end of the pit in the same general proximity as the January slide. Tr. 97. Inspector Brodeur took photos of the accident scene and interviewed witnesses, including the excavator operator who was closest to the highwall at the time of the slide. Tr. 97, Sec'y Ex. 5, 15-16.

After concluding his investigation, Inspector Brodeur issued one 104(d)1 Citation and a separate 104(d)1 Order on November 11, 2011. For Citation No. 8521047, Brodeur alleged that Respondent had violated 30 CFR 77.1004(b) and failed to follow its Ground Control Plan by not implementing adequate controls or properly barricading the area in which the failure occurred. Sec'y Ex. 5. For Order No. 8521048, Brodeur alleged that Respondent had violated 30 CFR 77.1713(a) in failing to identify overhanging material, loose rocks, water seepage, and overfilled catch benches at the highwall during required daily inspections. Sec'y Ex. 6. Inspector Brodeur alleged that both violations were the result of the Respondent's high negligence and constituted an unwarrantable failure to comply with the Mine Act. Sec'y Ex. 5; Sec'y Ex. 6.

The Secretary issued proposed penalty assessments for these alleged violations on May 17, 2012. Sec'y Proposed Assessment Exhibit A. Respondent timely contested both alleged violations and the parties engaged in lengthy discovery efforts. On May 2, 2013, I issued a prehearing order that required the parties to submit a prehearing report that detailed agreed upon stipulations and remaining issues of contention. May 2, 2013 Pre-Hearing Order, 2. The pre-

hearing order also notified the parties that absent exigent circumstances witnesses and exhibits not disclosed within their prehearing report would be excluded from the record. *Id*. Three days prior to hearing, after the parties had exchanged the required pre-hearing reports and participated in a pre-hearing teleconference, the Secretary submitted a Motion to Amend to Cite the Standard in the Alternative for Citation No. 8521047. Sec'y Motion to Amend, January 10, 2014. Respondent opposed the motion to amend, alleging bad faith on the part of the Secretary and stating that such a change would prejudice their ability to defend themselves. Resp. Motion in Opposition, January 14, 2014. I denied the Secretary's motion, finding that the motion was not timely filed, the discovery process had not provided Respondent notice of an alleged failure to adhere to the "prudent engineering standard" governed by the alternative 30 CFR 77.1000 standard, and that the motion was not necessary as the alleged facts of the citation corresponded directly with the originally cited 30 CFR 77.1004(b) standard. Order Denying Motion to Amend, January 14, 2014.

I presided over a three day hearing in this matter on January 15, 16, and 17 in Birmingham, Alabama. The Secretary presented testimony from Respondent employee Michael Howell, MSHA Inspectors James Brodeur and Jarvis Westerly, and Regional MSHA Supervisor Steven Womack. Respondent presented testimony of employees Ricky Williams, Stephen Smith, Judson Jones, Jan Kizziah, Michael Howell and Charlie Bridges. At the conclusion of the hearing, the Secretary renewed her motion to cite Citation No. 8521047 in the alternative, which the Respondent again opposed. Tr. 778. I again denied the Secretary's Motion but informed the parties that I would evaluate whether or not Respondent complied with its written ground control plan as part of my determination of whether it violated 30 CFR 77.1004(b). Tr. 789-791.

The parties submitted post-hearing briefs as requested by the Court. In summary, the Secretary argued the Citation and Order should be upheld as Respondent negligently relied upon a rock berm to contain obviously wet and unstable material that regularly slid out from the toe. Sec'y Br. 11, 23. Respondent argued that the Citation and Order should be vacated, claiming that the October 5, 2011 slide was unforeseeable, that MSHA had observed its mining and ground control methods during previous inspections without objection, and that no standard regulated or notified Respondent of the dangers of saturated ground conditions. Resp. Br., 25, 29, 35. The Secretary, responding to the claim that MSHA did not have regulations pertaining to saturated ground conditions, filed a reply brief supported by MSHA bulletins outlining best management practices for stockpiles not produced or referenced at hearing. Sec'y Reply Br., 2-3. The Respondent filed a motion in opposition, stating that these exhibits violated my pre-hearing order requiring disclosure of exhibits pre-hearing and were irrelevant as they applied to stockpiles and not developing highwalls. Resp. Obj. to Reply Br., 3-4. Respondent also submitted their own Reply brief for consideration. Resp. Reply Br.

In response to the parties arguments, I have prepared a Statement of Law outlining the Commission's instructions regarding: 1) Statute Interpretation; 2) Burden of Proof; 3) Significant and Substantial violations; 4) Unwarrantable Failure; and 5) Civil Penalty and Special Assessment. After detailing these guidelines, I have set forth my case findings as follows: A) HWY 59 Mine Ground Conditions and Control Plan; B) January Slide, C) October Slide D) Analysis. Due to the volume of testimony, I have not included a separate summary of testimony, but have considered all testimony and evidence presented and referenced the testimony and

arguments critical to my ultimate rulings. As they were not necessary for my ultimate findings, I did not consider the alternative standard or government exhibits submitted after hearing in reaching this decision.

After considering the testimony and evidence presented, I **AFFIRM** Citation No. 8521047 and Order No. 8521048 as originally written. Upon reviewing the six penalty criteria and evidence presented regarding the specially assessed penalty amounts, I find that $50,000.00 is an appropriate penalty for each of the violations for a total combined penalty amount of **$100,000.00.**

II. STATEMENT OF LAW

A. Statute Interpretation

The Commission has stated that:

> The operator is entitled to the due process protection available in the enforcement of regulations... When a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express. Laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly

Energy West Mining Co., 17 FMSHRC 1317-18 (internal citations omitted).

However, the Secretary is not required to provide the operator actual notice of its interpretation of a mandatory safety standard, rather,

> The Commission has applied an objective standard of notice, i.e., the reasonably prudent person test. The Commission has summarized this test as 'whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.'

Energy West Mining Co., 17 FMSHRC 1318 (internal citations omitted).

B. Burden of Proof

The Commission has long held, "In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation." *Jim Walter Resources, Inc*., 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (August 1992).

The Commission has described the Secretary's burden as:

> "The burden of showing something by a "'preponderance of the evidence,' the most common standard in the civil law, simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.'"

RAG Cumberland Res. Corp., 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

The Secretary may establish a violation by inference in certain situations. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2153. Any such inference, however, must be inherently reasonable, and there must be a rational connection between the evidentiary facts and the ultimate fact inferred. *Mid-Continent Resources*, 6 FMSHRC 1132, 1138. (May 1984).

If the Secretary has established facts supporting the citation, the burden shifts to the respondent to rebut the Secretary's prima facie case. *Construction Materials*, 23 FMSHRC 321, 327 (March 2001) (ALJ Feldman).

C. Significant and Substantial

A violation is Significant & Substantial (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 or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In order to uphold a citation as S&S, the Commission has held that the Secretary of Labor must prove: 1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984).

An S&S designation must be based upon the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). However, the Secretary "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (holding that failure to maintain emergency equipment was S&S despite low likelihood of emergency occurring); See also *Musser Engineering, Inc. and PBS Coals*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (PBS).

The Commission has mandated that ALJs perform a full analysis of all four *Mathies* factors based on specific evidence, including the likelihood of an injury producing event occurring. *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1678 (Dec. 2010). The Commission has also maintained that an S&S determination must be based on more than a showing that a

violation 'could' result in an injury. *Wolf Run Mining Co.*, 32 FMSHRC 1678 (quoting *Peabody Coal Co.*, 17 FMSHRC 26, 29 (Jan. 1995)).

D. Unwarrantable Failure

Section 104(d) (1) of the Mine Act states:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health standard,… and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such findings in any citation given to the operator under this Act.

Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "willful intent", "indifference," or the "serious lack of reasonable care." *Id.* at 2004-04; Rochester *& Pittsburgh Coal Co*., 13 FMSHRC 189, 193-94. (February 1991).

The Commission considers the following factors when determining the validity of 104(d)1 and 104(d) 2 orders: (1) the length of time that the violation has existed and the extent of the violative condition,(2) whether the operator has been placed on notice that greater efforts were necessary for compliance, (3) the operator's efforts in abating the violative condition, (4) whether the violation was obvious or posed a high degree of danger and (5) the operator's knowledge of the existence of the violation. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

E. Penalty Assessment

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (March 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

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

30 U.S.C. 820(I).

These criteria are generally incorporated by the Secretary within a standardized penalty calculation that results in a pre-determined penalty amount based on assigned penalty points. 30 CFR 100.3: Table 1- Table XIV. When specific aggravating factors outside of the normal gravity and negligence determinations are present, the Secretary may instead rely upon 30 CFR 100.5 and propose specially assessed penalties. In either assessment method, the Secretary may only propose penalties up to $70,000.00 per citation for violations considered under Section 110(a) (1) of the Mine Act. The Secretary may only propose penalties above $70,000.00 per citation when there is evidence that the violation was a flagrant violation per the definition of Section 110(b) (2) of the Mine Act.

For all penalty assessments, the Secretary bears the burden of establishing the proposed penalty is appropriate based upon the statutory criteria of Section 110(i) of the Act. *In re: Contest of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 239, 241 (ALJ Broderick) (January 1992) (Order). Similarly, for specially assessed penalties in excess of the standard penalty calculation, the Secretary has the burden of establishing the existence of aggravating factors to justify such an increase. *S&M Construction, Inc.*, 18 FMSHRC 108, 1052-53 (ALJ Koutras) (June 1996); *Freeport McMoran Morenci, Inc.*, 35 FMSHRC 172, 181 (ALJ Miller) (January 2013).

III. FINDINGS AND ANALYSIS

A. Hwy 59 Mine Ground Conditions

The Hwy 59 Mine was comprised of several distinct levels of material. The top 60 feet of the mine was comprised of unconsolidated layering of red clay, sand, and pea gravel. Tr. 344-45, 465-66, 606. Below this overburden layer was a harder 40 feet level of shale rock. Tr. 70, 606. The shale rock was impermeable to water and groundwater collected on top of the shale rock at the bottom pea gravel layer of the overburden. Tr. 465-66, 614. This groundwater was routinely diverted by a berm system to the pit below where sump pumps pumped the water out of the mine continuously. Tr. 614-15. The bench at the top of the shale rock level was referred to as the Brookwood bench. Below the shale rock were alternating seams of coal and sandstone. Sec'y Ex. 9, 9. The bench at the bottom of the shale rock level and the top of the first coal seam was referred to as the Milldale bench. Respondent tested the overburden to determine if it had commercial value, and the test results indicated that the material was not cohesive enough to act as a binder in concrete or asphalt products. Tr. 655-66. Within the mine, the West side of the overburden layer was generally wetter than the east side. Tr. 692.

Before beginning operations, Respondent submitted a ground control plan to MSHA per MSHA regulations. Tr. 331. MSHA acknowledged the plan without reservations. The ground control plan stated in relevant part,

> When failure to control the developing highwall occurs such as the existence of overhan(g)s, loose material, unconsolidated rocks,

> materials falling into the pit, movement in the wall, or blasting practices fail to result in a clean and stable highwall, and corrective action cannot be taken to eliminate the existence of these conditions, the affected area will be barricaded to prevent persons from being exposed to the conditions and the plan will be revised to safely control the highwall and provide for safe conditions.

Sec'y Ex., 9, 7 (g) 6.

The ground control plan did not list berms as a proposed method of controlling or eliminating movement in the highwall. Tr. 692, 263.

Respondent used an excavator and haul trucks to remove the unconsolidated overburden from the active pit. Each "cut" through the overburden created a bench approximately 150 feet wide. Tr. 614. Respondent built up a working berm at the toe of the 60 foot tall overburden highwall as mining progressed. Tr. 397. This berm was used to divert groundwater, keep the working bench clean, protect equipment, and allow trucks to operate without become stuck in soggy conditions. Tr. 611, 736. The toe/working berm was positioned approximately 10-20 feet from the toe of the overburden and ranged from 8-12 feet high.[1] Tr. 398, 677. An excavator was positioned on the far bench side of the toe berm while it dug material from the highwall side. Tr. 397. The excavator had a reach of approximately 25 feet and both directly tore down material from the overburden highwall or relied upon material sliding to the working berm on its own as it dug at the berm. Tr. 669-70, 677.

B. January 2011 Slide

On January 19, 2011 a large slide occurred at an 80 foot wide section of the highwall at the West side of the mine. Tr. 81. MSHA received a hazard complaint alleging that a large slide had occurred and had not been cleaned up. *Id*. Inspector Brodeur traveled to the mine and investigated the site and interviewed eyewitnesses to the slide. Tr. 82. Inspector Brodeur testified that eyewitnesses informed him that the slide occurred in an area where an excavator was reaching over a berm to excavate soupy saturated material at the toe of the overburden. Tr. 83. This testimony is corroborated by Bordeur's January 20, 2011 inspection notes which recorded that prior to the slide:

> The highwall above the Brookwood bench consisted of dirt, clay, sand, small rock and gravel and was wet from snow and rain weather. The highwall was sloped back and Gauley stated that as he would dig, the highwall material would slide toward the

[1] Inspector Brodeur alleged within Citation No. 8521047 and testified that he believed the toe berm was 100 feet away from the toe of the overburden highwall. Tr. 283; Sec'y Ex 5, 1. After reviewing the testimony of all witnesses and the exhibits entered, I find that the working toe berm was located within 10-20 feet of the toe of the highwall. Tr. 398, 677, 738 . Given that each cut was approximately 150 feet wide, a 100 foot working berm configuration would not have allowed the excavator and trucks to operate in the manner credibly described by Truck Driver Ricky Williams. Tr. 370, 614. This finding regarding the location of the toe berm does not affect my ultimate finding that the toe of the overburden highwall was significantly saturated prior to the October slide.

> excavator. An approximate 4.5 foot high berm, constructed of rock, was built at the base of the highwall with the excavator on the bench side reaching over to dig on the highwall.

Sec'y Ex. 4, 10.

Brodeur also testified that the highwall collapsed in the area being excavated and breached the toe berm and flowed across the shale rock bench and then down onto a lower bench where it pushed a backhoe 75 feet. Tr. 83-84. Brodeur's testimony on the specifics of the slide are corroborated by his January 20, 2011 inspection notes which record that eyewitnesses stated:

> The top approx. 40 feet of the approx. 60 foot highwall slid out at the bottom of the 40 foot, traveled approx. 120 feet across the Brookwood bench and over the highwall down to the Milldale bench… The material pushed the backhoe approx. 75 feet along the Milldale bench.… The material got up under the hoe and slid it. The hoe operator stated he unbuckled his seatbelt, got off the hoe and ran when he saw the material coming. All witnesses stated the material slid and flowed like slow moving water… The area of the wall that slid out was 40 feet in height, 80 feet in width and 30 feet in thickness…

Sec'y Ex. 4, 10-12.

Brodeur inspected the on-shift examination book, noted an entry recording that a "wall slid on Milldale pit" and mistakenly concluded that Respondent had identified the conditions of the highwall as a hazard prior to the major slide. Tr. 88. In fact, Respondent had only completed this entry after the January 19 slide had occurred. Tr. 177. Respondent's Superintendent Charlie Bridges informed Brodeur Respondent was not going to mine in that area anymore and that they were going to mine in a different direction. Tr. 90-91. Based on his previous observations of HWY 59 mining conditions and relying upon his understanding that Respondent would cease mining in that area, Inspector Brodeur decided not to issue any violations. Tr. 89-90.

The Respondent has emphasized that they were not actively excavating in the location of the January slide at the time it occurred. Resp. Br., 13; Tr. 400. Upon questioning by the Court, Superintendent Bridges stated that crews were digging from the toe approximately 150 feet away from the main point of the January slide, but also stated that the area had already been excavated and that a pump had been set at this location prior to the slide.[2] Tr. 761. The Respondent has also argued that the January slide was primarily caused by the presence of an old settling pond at this location and was made up of different material than the normal highwall. Resp. Br. 14, Tr. 630-31. However, Respondent did not produce any witnesses who personally observed the January slide as it occurred. Tr. 377, 403, 423, 739. As noted above, Inspector Brodeur testified that eyewitnesses to the January slide stated to him that the slide was made up of the saturated

[2] Although the record is not entirely clear, it appears that there was already one dewatering pump in place at the top of the shale rock bench prior to the slide and that a separate pump was being installed on the bench below at the time of the January 19 slide. Tr. 84, 761.

material of the highwall. Tr. 83. Indeed, Inspector Brodeur's January 20 investigation notes indicate that the excavator operator digging the highwall, Alan Gauley, observed the slide and that the "berm on the Brookwood bench was constructed out of the same material as the highwall that slid down." Sec'y Ex. 4, 10-11.

As such, I find that the January slide occurred in an excavated area with saturated soil conditions, and that the slide consisted of the normal mixture of clay, sand, and gravel present at the highwall in this area. I also find that although the settling pond present at the top of the highwall in this location may have added to the saturation and instability of the wall, it is also apparent that the extensive wetness of the highwall below was a significant contributory factor of this slide. In making this determination, I note that the highwall slid out from a point 40 feet below the top of the highwall and moved like "slow moving water" in a manner similar, if much more voluminous, than the routine sliding considered part of the excavation cycle. Sec'y Ex. 4, 11-12.

C. October 2011 Slide

On October 4, 2011, Respondent employee Michael Howell inspected the active face of the highwall recording that that the highwall was "ok" at his last inspection time of 11:37 PM. Tr. 721-23; Sec'y Ex. 7, 10. This active face was approximately 500 feet to the Northwest of the location of the January slide. Tr. 97, 707-08, Resp. Ex F. Howell later stated at hearing that he did not observe any unusually excessive water saturation or other unsafe ground conditions prior to the fall. Tr. 722-23. However, Howell confirmed that a soupy mixture of sand and water regularly ran from the toe of the highwall at this area. Tr. 62. Howell also confirmed that the toe of the highwall would slide out from the bottom of the highwall as it was excavated. *Id*. A toe berm approximately 10-12 feet high was used to contain the toe of the highwall in this area and divert water to the pit below. Tr. 611-12. The next morning, Steve Smith performed the pre-shift examination for the day shift, noting that everything was "ok" at 3:38 am. Tr. 452-53; Sec'y Ex. 7, 9. The shift began production with Excavator Operator Gary White digging from behind the toe berm and loading haul trucks with the overburden. Tr. 98, 370; Sec'y Ex. 5, 15-16. Mr. White later informed Inspector Brodeur that the soupy material that ran out from the toe ranged up to 6 feet high on the highwall side of the berm.[3] Tr. 107; Sec'y Ex. 5, 16. Respondent Foremen Howell and Smith disputed this six foot figure at hearing. Tr. 449, 723. Truck Driver Ricky Williams stated he was unable to directly observe the soupy material from his haul truck on the opposite side of the berm. Tr. 387.

At 7:30 am, a 230 foot wide section of the highwall failed directly above the active excavation. Tr. 108-09. During excavation, the face of the highwall slid out rapidly from the bottom, overtopping the toe berm and sliding the excavator backwards. Tr.98; Sec'y Ex. 5, 15.

[3] Mr. White passed away prior to the hearing due to causes apparently unrelated to this matter and was not deposed during the discovery process. However, Inspector Brodeur's investigation notes confirm that Mr. White stated he was digging a soupy mixture of water, sand, and clay up to 6 feet deep from the highwall side of the toe berm prior to the accident. Gov. Ex. 5, 15-16. Additionally, although Respondent's employees have disputed that the soupy material was up to 6 feet deep on the highwall side of the mine there is no substantive dispute that there was a notable amount of soupy sand/water mixture present at the toe of the highwall. Tr. 62. As such, while Inspector Brodeur's testimony recounting Mr. White's statements are not critical to my ultimate findings, I found that they were a credible and corroborated account of the October 5 slide.

This first wave of material also pushed the haul truck driven by Mr. Willis Jones to the top lip of the Brookwood bench. Tr. 98, 713. After a brief interval of several seconds, a second wave of material slid out from the toe of the highwall, again breaching the berm. Tr. 98, 101-02. This second wave struck the haul truck as Jones attempted to jump clear, sweeping both the truck and Jones over the bench onto the Milldale pit below. Tr. 98-99; Sec'y Ex. 5, 15-16.

Respondent employees spotted Jones' fingertips sticking out from the slide and freed him quickly from the slide. Tr. 99-100. Emergency services arrived at the scene and transported Mr. Jones by helicopter to a nearby hospital, treating him for a bruised heart, concussion, bulging disc and internal bleeding. Tr. 100, 120.

D. Citation No. 8521047

1. Motion to Amend to Cite in the Alternative

The Secretary renewed her Motion to Amend Citation No. 8521047 to cite 30 CFR 77.1000 at the beginning of the hearing, at the end of the hearing, and again within her post hearing brief. Tr. 9, 778; Sec'y Br., 33. However, the Secretary essentially restated the positions originally articulated in his original motion to amend and did not offer significant additional arguments. As such, I again deny the Motion to Amend to cite the standard in the alternative for the reasons stated in my January 15th Order concerning this issue.

To reiterate the position I stated at the conclusion of the hearing, I did analyze the effectiveness of the toe berm in controlling the hazard of sliding saturated material, and considered testimony regarding Section (g)(6) of the Respondent's Ground Control plan as evidence that the described conditions were indeed a hazard. Tr. 790-91. However, I did not consider testimony or arguments regarding the operator's general mining plan or alternate mining methods referenced at hearing. Tr. 494,768; Sec'y Br. 14-15.

2. The Violation

Inspector Brodeur alleged in part within Citation No. 8521047 that:

> The Mine Operator failed to follow the Ground Control Plan for this mine by implementing adequate controls to prevent a highwall failure or poorly barricading the highwall to prevent persons from being exposed to ground failure hazards.

Sec'y Ex. 5.

Brodeur determined that an injury had occurred, the injury was permanently disabling, affected one person, the violation was S&S and the result of the operator's unwarrantable failure to comply with the Mine Act. Sec'y Ex. 5. The Secretary proposed a specially assessed penalty of $70,000.00 for violating 30 CFR § 77.1004(b). Sec'y Proposed Assessment, Exhibit A.

30 CFR § 77.1004(b) mandates:

> Overhanging highwalls and banks shall be taken down and other unsafe ground conditions shall be corrected promptly, or the area shall be posted.

Thus, the Mine Act requires mine operators to correct or barricade all "unsafe ground conditions" that a reasonably prudent miner would identify. *Energy West Mining Co.*, 17 FMSHRC 1318.

The Secretary contends that the wet material that regularly slid out from the toe was an unsafe ground condition the Respondent should have eliminated and or barricaded. Tr. 91-92; Sec'y Br. 13. The Secretary also argues that the toe berm was not a sufficient control method as it only kept material that had already slid out from the toe from spreading further out onto the bench. Tr. 676-77; Sec'y Br. 13. The Respondent rejects this contention on three points, arguing that 1) the water seepage present at the HWY 59 highwall was normal and did not present a hazard; 2) MSHA regulations do not regulate soil saturation, and; 3) the 10 foot berm was properly constructed and functioned adequately under foreseeable circumstances. Resp. Br. 5, 25, 27.

After reviewing the testimony, entered exhibits, and relevant Commission case law, I find that a reasonably prudent miner would have identified the wet sliding material as a hazard requiring elimination or evacuation. I also find the Respondent's rebuttal arguments on this matter unavailing and lacking credibility.

a. Significant Water Seepage was Present at the Highwall Prior to the October Slide

Respondent's Vice President of Operations Jan Kizziah's testified that the October slide consisted primarily of "wet and sloppy" material. Tr. 713. Indeed, the accident investigation photos show a layer of dark grey sludge fanning out across several hundred feet of the lower pit floor. Sec'y Ex. 5, 33. The material is obviously very saturated and wet as equipment used after the slide in abatement efforts left deep tire tracks. *Id*. However, Respondent's foremen Smith and Howell testified that prior to the slide that water seepage at the highwall was "normal" and that this substantial volume of wet material was not detectable. Tr. 453, 719-22. After reviewing the testimony and description of ground conditions at this area, I find that the Secretary has established that the toe of the slope was obviously saturated prior to the slide and the Respondent's argument that this condition was undetectable lacks credibility and are contradicted by their own statements.

Respondent Foreman Michael Howell conceded that prior to the October Slide, it was normal for a sand and water mixture to run from underneath the highwall. Tr. 62. Howell also stated that that the toe berm was used to contain the "soupy material" as the excavator scooped out this mixture. *Id*. Howell did not consider the regular sliding of the toe material a hazard since the berm normally contained those slides. Tr. 64. However, Foreman Smith stated that in addition to the January and October slides, there were times when the excavator splashed enough

water onto the haul side of the bench that clean-up efforts were necessary. Tr. 436-37. Given the 10 foot height of the toe berm, this account supports Inspector Brodeur's testimony that after the accident, excavator operator Gary White stated that he had been digging up to six feet of soupy material from the highwall side of the toe berm prior to the accident. Tr. 222, Sec'y Ex. 5, 15-16.

Additionally, although Superintendent Bridges described water seepage at this area as normal and safe, he also stated that the toe berm was necessary to divert water away from the haul path as "You had to keep it clean to be able to work. The trucks would not go on wet or soggy material." Tr. 736.

Similarly, Vice President Kizziah indicated that the bottom layer of the overburden was inherently wet as water was "gonna wind up at the interference of the shale and sand and gravel because it can't go any further." Tr. 614.

The photos of highwall areas immediately adjacent to the October slide show obvious areas where groundwater was seeping from the toe of the overburden highwall. Tr. 109; Sec'y Ex. 5, 33. Kizziah and Bridges both testified that it was normal for overburden in this region of Alabama to be moist. Tr. 608, 730. However, Kizziah conceded that the West part of the HWY 59 mine where the January and October slides occurred was wetter than the East part. Tr. 692. Additionally, the presence of large water stains on the adjacent highwalls indicates that groundwater was flowing under pressure in this area and that the soil in this area contained more water than it could hold. Sec'y Ex. 5, 33.

Thus, based on the testimony and exhibits presented, I find that prior to the October slide, there were obvious visual signs of extensive water accumulations at the active highwall, particularly at the toe of the slope.

b. Wet Saturated Material is an Unsafe Ground Condition at a Highwall

The Respondent is correct that 30 CFR § 77.1004(b) does not literally specify wetness or saturation as an unsafe ground condition. Tr. 208. However, water saturation and erosion due to water seepage are well-known ground control parameters. MSHA's Regional Supervisor stated that the water saturated condition of the unconsolidated material he observed at the HWY 59 mine increased the likelihood of highwall failure. TR. 477, 489-90. The Respondent has objected to Mr. Womack's testimony regarding mining methods and ground conditions as Womack did not inspect the mine prior to the accident or personally observe Respondent's mining methods. Still, Womack inspected the HWY 59 mine on October 11, observing the muddy conditions of the slide itself and the soil composition and water seepage present at the adjacent highwall. As such, I find that given his first hand observations of the HWY 59 mine and his experience and training as an inspector, his testimony regarding the probable effect of water upon unconsolidated material is relevant and admissible in these proceedings.

Similarly, Inspector Brodeur testified that some minor movement of highwalls was acceptable but that the sliding of saturated material at the toe of the slope was inherently dangerous and required evacuation. Tr. 135, 211-12. Brodeur also testified that at other mines

where water came out from the highwalls, operators installed pumps to remove the water. Tr. 131-32. I find this testimony consistent and supported by his statements made during deposition that while minor sloughage of a highwall could occur in dry sandy conditions, when the material at the toe of the slope was wet and saturated, the weight of the highwall material above could cause the toe to slide out from the bottom due to pressure. Resp. Ex. 4, 178.

More importantly, the January slide provided Respondent specific notice that saturated soil presented a significant hazard as the slide overtopped the toe berm and nearly overturned a backhoe on the bench below. Tr. 83-84. Respondent argues that the January slide differed from the October slide as they claimed the January slide involved sliding material from a settling pond near the top of the highwall. Resp. Br. 14: Tr. 630-31. I have already found that the January slide involved a slide from near the midpoint of a rain soaked highwall and that the settling pond was only a partial factor of the January slide. However, regardless of the point at which that slide began or the source of water saturation, the fact that the January slide overtopped the toe berm put Respondent on notice that wet saturated material was prone to failure and that toe berms were inadequate in containing significant slides.

Furthermore, the dangers of wet saturated material at a highwall are not a novel concept to the Commission. In a remarkably similar case, an excavator operator was fatally injured when an overburden highwall collapsed due to the destabilizing effects of wet and muddy ground conditions. *Featherlite Building*, 12 FMSHRC 2580, 2583 (ALJ Cetti) (December 1990). The ALJ, after considering expert testimony on the effect of saturated ground conditions, found the wet condition of the highwall was an obvious hazard that the operator had failed to correct prior to the collapse.[4] *Id.* at 2591.

Although the Respondent repeatedly tried to downplay the danger of saturated material sliding off the highwall by describing it as minor and controllable sloughage, TRI Superintendent Charlie Bridges acknowledged in regards to sliding material that,

> "Oh, it's always a hazard, if it's coming off the wall, it's a hazard,
> I mean, you know, that's the reason we had the berm."

Tr. 758.

Additionally, Vice-President Kizziah stated explicitly that without the toe berm, the wet sandy material present at the toe was a hazard and, "could slough out and it's gonna run out all your bench… (and) ... damage equipment." Tr. 622. Kizziah also stated that at a previous mine in the area he had previously witnessed wet material "(take) out pickup trucks." Tr. 622. Kizziah also stated that a prior excavation method using dozers to push overburden down from above had failed because:

[4] *Featherlite* involved a surface metal/nonmetal mine and an alleged violation of 30 CFR § 56.3200 which states that "Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry." As such, this standard issues a substantially identical ground control mandate to surface metal non/metal operators as 30 CFR 77.1004(b) does to surface coal operators applicable in the before case.

> "Now we have that sand down in the pit with us and all the water we've got down there. We were having a problem stabilizing low walls."

Tr. 608.

In summary, Inspector Brodeur and Supervisor Womack credibly stated that water saturation decreased the stability of the highwall; a previous slide of wet saturated material had occurred in that area of the HWY 59 mine; Commission precedent has recognized saturated ground conditions as a highwall hazard; and Respondent's management repeatedly acknowledged sliding or saturated wet material created highwall hazards. As such, I find that a reasonably prudent miner would have recognized the wet sliding material at the toe of the highwall as an unsafe ground condition that required further control and or evacuation. 30 CFR § 77.1004(b); *Energy West Mining Co.*, 17 FMSHRC at 1318.

c. The Toe Berm was an Inadequate Control for the Extensive Saturation Hazard

The Secretary argues that the berms were not listed in the ground control pan and were an inadequate control since they only contained sliding material and did not prevent the sliding from occurring in the first place. Tr. 692; Sec'y Br. 13. The Secretary also argues from MSHA Supervisor Womack's testimony that it was inherently unsafe for Respondent to rely upon the toe berm to stop sliding material and dig from the toe of the slope rather than scaling at an angle from the top. Tr. 472, 477; Sec'y Br. 13.

Respondent's witnesses testified that the berms were stoutly constructed, contained the highwall for over 99% of the highwall development, and that the January and October highwall failures were unforeseeable events beyond its reasonable control. Tr. 372, 673, 739, 749. The Respondent also contends that MSHA Supervisor Womack's testimony regarding excavation techniques at the toe of the highwall is inadmissible because he never observed Respondent's mine in operation. Resp. Br. 25, n. 7. Nevertheless, the Respondent contends that digging from the toe and allowing material to slough towards the excavator was a safe method given the use of the toe berm. Resp. Br. 27.

After considering the testimony, exhibits and arguments of the parties, I find that the Secretary did demonstrate the toe berm was an inherently inadequate control method for the saturated sliding material at the toe of the slope. Respondent stated in its ground control plan that among other concerns, movement in the developing highwall will be eliminated and/or barricaded. It is obvious that the toe berm did not eliminate sliding of the highwall. Sec'y Ex. 9, 7- (6). Instead, it kept the sliding toe from spreading out over the bench while the excavator reached over the berm and scooped out fill material. Tr. 732-33. Additionally, the positioning of the outer edge of the toe berm approximately 15 feet away from the toe of slope decreased the effective reach of the excavator. Resp. Br. 27; Tr. 398, 669-70, 677-78. As such, the toe berm decreased the ability of the excavator to scale the upper parts of the highwall and relieve pressure from the saturated material.

Respondent's Operations Vice President of Kizziah claimed that the ground control provision did not apply to active faces of the highwall but was rather limited to highwall areas that had already been completely excavated. Tr. 683-85. This claim is directly contradicted by the section's explicit coverage of "developing" highwalls and specific requirement for the "result" of a "clean and stable highwall." [5] Respondent alternately claims that sloughage is a necessary element of excavation, and the regular sliding of material at the toe was not the sort of hazardous movement referenced by the ground control plan. Resp. Reply Br., 3-4.

However, the very need to construct a compacted 10 foot high rock berm indicates that the sliding toe placed substantial pressure against the berm as Respondent's Superintendent Bridges testified in regards to the working/toe berm that:

> "You couldn't just push it up and leave it loose, because if you did, I mean, it would, you know, have a tendency to maybe lose one…If we felt like it was a little weak… We'd have to send them and load rocks and bring back rock and bring it back in there and shore up the berm again to make sure that it was safe and everything."

Tr. 737-739.

The fact that the toe berm was consistently used at the HWY 59 mine and significant highwall failures only occurred along 1% of the total highwall is hardly an impressive safety record or proof of the toe berm's adequacy. Tr. 371, 673. After the January slide, it was evident that that the existing 4 foot toe berm was incapable of controlling significant slides. Tr. 90. Additionally, given the approximate 60 foot height of the overburden highwall and the fact that the January slide produced so much material that it traveled to the level below and pushed a backhoe over 75 feet, it was obvious that increasing the height of the toe berm to 10 feet would do little in terms of preventing and or controlling a significant highwall failure. Tr. 706.

Furthermore, the Respondent's argument that the toe berm was adequate for foreseeable sloughage, but that the October slide overtopping the toe berm was unforeseeable is contradicted by the evidence presented. As I have just noted, the January slide made large slides of saturated material in this area a foreseeable possibility. Furthermore, during routine excavation following the January incident, the highwall apparently did exhibit instability and slid up to the highpoint of the berm on several occasions, prompting Respondent's employees to temporarily withdraw from the area until the highwall stabilized. Tr. 375-76; 617. As such, it is clear that Respondent's employees did not consider the 10 foot berm a fail-safe control of highwall conditions at this area. Additionally, both Inspector Brodeur and Inspector Westerly testified that during their investigation of the October 5 slide, Respondent's employees stated that at least

[5] Respondent's Operations Vice President Kizziah testified emphatically that this provision only applied to established highwalls and did not apply to active faces. Tr. 688. The Respondent has quoted the language of this provision in supporting this argument. Resp. Br., 3-4. However, after reviewing the Ground Control Plan as a whole, I find that the referenced "developing highwall" section applies to significant uncontrolled movement of active as well as established sections of the highwall.

one other significant slide had occurred in addition to the January and October slides at the HWY 59 mine. Tr. 187; Sec'y Ex. 5, 17-18. Tr. 365.

After considering all the above evidence, I find that the toe berm was an inadequate control for the saturated conditions at the toe of the highwall. The toe berm failed to eliminate the saturated condition of the material, relieve pressure from the overburden above, or stop sliding from the toe of the wall from occurring. Additionally, given the dimensions of the 60 foot highwall and the excavator's limited reach, it was impossible to construct a workable berm high enough berm to contain a top to bottom failure of the highwall. Tr. 612, 677.

In summary, I have found that ground conditions were significantly saturated at the toe of the highwall, this saturation was a hazard a prudent miner would have recognized, and that the toe berm relied upon to control this condition was inherently inadequate. As such, I affirm the underlying violation in Citation No. 8521047 and find that the Respondent violated 30 CFR § 77.1004(b) in failing to eliminate or barricade an unsafe ground condition.

3. Significant and Substantial

I have already found that Respondent violated a mandatory safety standard in failing to adequately control saturated ground conditions at the toe of the highwall. This violation contributed to the discrete safety hazard of the highwall sliding out from the toe and overtopping the toe berm. As an excavator and several haul trucks continuously operated on the bench side of the toe berm, a failure of the 60 foot highwall was reasonably likely to engulf, overturn, and sweep over equipment and personnel present on the bench. Tr. 370. Workers caught in such a mass of unconsolidated material were reasonably likely to suffer broken bones, blunt trauma, and asphyxiation ranging in severity from lost time to possibly fatal injuries. Tr. 120. As such, the evidence presented by the Secretary satisfies the four factor of the Mathies S&S test.

The Respondent contends in regards to the second Mathies element that even if there was a technical violation of 77.1004(b), the routine sloughage did not present a safety hazard because the berm contained routine sloughage. Resp. Br. 32. The Respondent also argues that the October and January slides contained different material than normal and thus, the characteristics of those slides should not be considered in the question of whether not the sliding material present at the toe wall presented a discrete safety hazard. Resp. Br. 32 n. 9, 10. Respondent's witnesses did claim that the berm adequately contained routine sloughage. Tr. 376, 444-45, 744-45. However, Respondent's witnesses also testified that the sliding saturated material had the potential of spreading out and damaging equipment, exerted so much pressure on the toe berm that the berm had to be recompacted, slid excessively to the point that workers evacuated the bench as a pre-caution, and had severely damaged equipment at other mines in the nearby region. Tr. 375-76, 622, 737-39. As such, I find that the evidence on the record, including the testimony of Respondent's employees, support the Secretary's contention the saturated ground conditions at this area constituted a discrete safety hazard.

The Respondent similarly contends in regards to the third Mathies element that the ground conditions were not reasonably likely to lead to an injury because there was no evidence of a significant amount of water or wet material breaching the berm under regular conditions.

Resp. Br. 33-34. The Respondent does acknowledge that there were prior instances in which irregular sliding caused miners to evacuate the bench, but appears to contend that under normal conditions workers had time to withdraw from the bench before a hazardous slide occurred. Resp. Br. 33. However, in the two major slides that did occur, despite their best efforts to outmaneuver the slides, at least three people were unable to avoid exposure to the rapid spread of unconsolidated material, and one person was seriously injured. Tr. 83, 98, 120. I note the specifics of the significant documented slides that did occur not as self-proving events, but as supporting evidence that ground falls are reasonably likely to occur in overpowering fashion. Additionally, as stated above, the 60 foot height of the highwall and saturated ground conditions made it reasonably likely for a highwall failure in this specific set of circumstances to involve a large amount of free flowing material. Thus, I find that the Respondent's rebuttal argument on this element unconvincing.

For the reasons stated above, I find that the Secretary has produced evidence establishing the four required elements of the Mathies S&S test and that the Respondent's rebuttal arguments are insufficient. Therefore, I affirm Citation No. 8521047 as reasonably likely and S&S. I also find that the violation did in fact cause Mr. Jones' injuries to occur and that those injuries are permanently disabling. Tr. 120.

4. Negligence

The Mine Act defines reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 CFR § 100.3: Table X.

The Secretary argues that the Respondent acted with high negligence as it was aware the toe was sliding on a regular basis and failed to take any additional corrective action other than relying upon the toe berm. Sec'y Br. 18-19. The Respondent states that there were no indications that ground conditions at the highwall were hazardous prior to the October slide. Resp. Br., 34. The Respondent points out that MSHA had inspected the mining methods in place on numerous occasions prior to the October slide and had never issued any citations for ground control violations. Resp. Br., 35. The Respondent specifically points to Inspector Westerly's acknowledgement that he observed Respondent mining in damp conditions in January and May 2011 and did not issue any citations as evidence Respondent had no reason to believe it was negligently excavating the overburden. *Id.*; Tr. 350, 354.

After considering the testimony and arguments of the parties, I initially find that the Respondent was actually aware of the saturated and regularly sliding material at the toe of the highwall. While Respondent believed the berm was an appropriate control method, this belief was not objectively reasonable, and I do not consider the use of the berm as a mitigating negligence factor. Additionally, previous inspections by MSHA without highwall citations do not stand as a mitigating factor in this situation. After noting that the May inspection occurred at the drier Northeast area of the mine and at a different level of the mine, I credit Inspector

Westerly's testimony that the ground conditions he observed in May were not nearly as saturated as those present immediately prior to the October 5 slide. Tr. 332-33,354, 359. Additionally, the January slide and other near overtopping events provided independent notice to Respondent regarding the hazards of saturated material and insufficiency of the berms. Tr. 83, 375, 617.

Thus, as Respondent was aware of the violative conditions and there were not any legitimate mitigating factors, I find that Citation No. 8521047 was the result of the Respondent's high negligence.

5. Unwarrantable Failure

For Citation No. 8521047, I find that the Secretary has produced sufficient evidence to satisfy the five factor test considered by the Commission in evaluating unwarrantable failure designations. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

a. Extent and Duration of the Violation

I find that saturated ground conditions were extensive in the area of the October 5 slide and a number of significant slides had occurred at the HWY 59 mine in the previous two years. Foreman Howell testified that it was normal for a soupy sand and water mixture to run from the toe of the highwall in the shifts prior to the October 5 slide. Tr. 62. Howell also testified that that it had been necessary to add rock to the toe berm in order to "sheer" the berm up the evening shift prior to the slide. Tr. 723; Sec'y Ex. 8, 4. Vice President Kizziah indicated that the saturated condition at the toe of the highwall was an inherent characteristic of this area as the shale rock level was impervious to the groundwater that migrated through the overburden. Tr. 614. Additionally, two major documented slides occurred in the space of nine months in this specific Northwestern region of the mine, excessive sliding had previously prompted Respondent employees to temporarily evacuate the bench on several occasions, and statements gathered during the investigation of the October slide indicate that additional major slides separate from the October and January 2011 slides had occurred in the previous two years. Tr. 83, 98, 187, 365, 375-76, 617.

b. Notice to the Operator

Inspector Brodeur testified in regards to his communications to Respondent following the January slide that,

> …it was obvious to me as well as TRI that (berming) was not a control method. I mean it didn't work. The highwall slid out… TRI realized that that didn't work as well and told me that they were not going to mine that West end of a pit. They were gonna cease mining in the West end of the pit and drive in a different direction, which would have been in the Northeast direction."

Tr. 90.

However, Inspector Brodeur did not issue any violation in regards to the events that led up to the January slide, did not issue a withdrawal order for this area of the mine, and did not

issue any safeguard directives regarding the hazards of the sliding saturated toe. Tr. 89. Inspector Brodeur appears to have not issued official orders on this matter because of his belief that the saturated condition of the highwall was isolated to that specific area and his reliance upon Superintendent Bridges' representation that Respondent would not mine in that area anymore. Tr. 89-90. Inspector Brodeur also maintained that while he did not issue any clear directives or warnings, that he believed the sum of his conversations with Superintendent Bridges established the need to avoid or eliminate saturated ground conditions. Tr. 315-16. I note that while MSHA did not issue any formal directives on this issue, Superintendent Bridges made efforts to inform Inspector Brodeur that they were moving to a different, drier area of the mine during the course of the January 2011 hazard complaint investigation. Tr. 741-42. As such, it appears Respondent's management was aware of Inspector Brodeur's concerns regarding the saturated ground conditions at the Northwest area of the Hwy 59 mine.

c. Prior Abatement Efforts

The Respondent claims that the toe berm, and particularly the enlarged 10-12 foot toe berm should be considered as a substantial abatement effort. Resp. Br. 45. However, as I have noted above, given the 60 foot height of the highwall and the demonstrated mass of material involved in the previous January slide, and the fact that other slides had come to the top of the berm, I find that the toe berm was not a legitimate abatement effort. Tr. 83, 617. The toe berm failed to eliminate the waterlogged nature of the material at the toe of the highwall, did not keep the toe of the highwall from sliding out, and was incapable of containing the type of significant slide Respondent was aware could occur after the January slide. Tr. 612, 676-77. As such, I find that the Respondent has failed to show it conducted noteworthy abatement efforts prior to the October 5 slide.

d. Obviousness of the Hazard and Degree of Danger

The wet sliding nature of the material at the toe of the highwall was acknowledged by Respondent employees Howell, Kizziah, and Bridges. Tr. 62, 617, 749-51. While they did not subjectively consider this routine sliding a hazard, that belief was unreasonable, given the occurrence of the January slide and the readily apparent pressures exerted upon the toe berm. Tr. 617, 737-39. Additionally, the regular sliding motion of the toe of a 60 foot highwall presented a high degree of danger to the workers on that bench, as it was obvious that a significant slide could produce enough material to sweep personnel and equipment over the adjacent bench. Tr. 83.

e. Operator's Knowledge of the Violation

Respondent was aware of, and in fact relied upon the wet and sliding condition of the toe of the highwall to continue production at this area. Tr. 62, 678, 749-51. Again, given that the Respondent's ground control plan required movement in highwalls to be eliminated or barricaded, and that saturated material had contributed to the previous January slide, it was unreasonable for Respondent to disregard the hazards presented by the saturated sliding toe as routine sloughage.

As such, I have found that the Secretary has presented sufficient evidence for all of the Consolidation Coal unwarrantable failure factors. Furthermore, when considering the evidence on this matter as a whole, I find that Respondent acted with a serious lack of reasonable care in responding to the obvious destabilizing condition of the water saturated highwall toe. Thus, I hold that Citation No. 8521047 was the result of the Respondent's unwarrantable failure to comply with the Mine Act.

E. Order No. 8521048

1. The Violation

Inspector Brodeur alleged in part within Order No. 8521048 that:

> Proper daily inspections are not being conducted at this mine site. …A section of the highwall approximately 230 feet across, 80 feet outward and 60 feet in height collapsed sending a wave of saturated sand and gravel material into an excavator and 100 ton haul truck.... An inspection of the highwall at the mine site after the accident indicates hazards existed that would be evident to even a casual observer, including loose material overhanging the pit, loose broken rocks at numerous locations on the highwall, water seepage from the highwall at several locations (including the first 60 feet of material which consist of unconsolidated sand and gravel), and the only bench on the 190 foot highwall is full, allowing material to fall into the pit. A review of the inspection records … indicates no highwall hazards were present even though hazards are clearly evident and have existed for a considerable time period.

Sec'y Ex. 6, 1-2.

Brodeur determined that this failure to note hazards violated 30 CFR § 77.1713(a), an injury had occurred, the injury was permanently disabling, affected 1 person, the violation was S&S and the result of the operator's unwarrantable failure to comply with the Mine Act. Sec'y Ex. 6. The Secretary proposed a specially assessed penalty of $70,000.00. Sec'y Proposed Assessment, Exhibit A.

30 CFR § 77.1713(a) mandates:

> At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

As such, the Secretary must show that the conditions listed in Order No. 8521048 existed prior to the October slide, that a reasonably prudent miner would have identified these conditions as hazards requiring corrective action, and that Respondent failed to record these conditions in their examination records.

As noted above, Respondent Foreman Michael Howell stated that prior to the October 5 slide he observed a soupy mixture of material running out from the toe of the slope. Tr. 62. Inspector Brodeur also testified credibly that during his investigation immediately after the slide, he observed water seepage, overhanging rocks, and full catch benches in areas adjacent to the slide. TR. 109-114, 116-18; Sec'y Ex. 6, 7-10. When presented with the Inspector Brodeur's investigation photos, Respondent Foreman, Steve Smith, confirmed that while the slide itself had not yet covered the floor of the pit, the October 5 investigation photos depicted the conditions that were present at the overburden and shale rock highwall prior to the slide. Tr. 409-10.

These photos show several large areas where a significant amount of water seepage flowed from the bottom of the unconsolidated overburden layer over and across the face of the shale rock highwall. Tr. 109-110. Sec'y Ex. 6, 7-9. The last photo of the series shows a profile view of the highwall at the edge of the overburden face and the vertical shale rock highwall below. Tr. 117; Sec'y Ex. 6, 10. From the photo it appears that the overburden has pushed out to the very edge of the shale rock face and that there is not a horizontal catch bench. *Id.* In two separate investigation photos, a section of the overburden highwall has washed down across the shale rock face at the right hand side of the photos, as the dark gray shale rock is covered with red and tan clay and sand. Tr. 119; Sec'y Ex. 6, 8-9. It also appears that several large boulders and/or clay consolidations project from the upper face of the overburden. Sec'y Ex. 6, 8-9

However, Foremen Smith and Howell both maintained at hearing that none of these conditions, including the sliding of the toe, were hazardous or required notation in their daily pre-shift examinations. Tr. 405-06, 412-13, 722. The Respondent also argued that Order No. 8521048 cannot pertain to hazards present at the area of the slide because it does not specifically reference the sliding material of the toe. Resp. Br. 51-52. The Respondent additionally states that the water seepage present on the walls was normal for this area. Resp. Br. 57; Tr. 448-49, Tr. 719-20. The Respondent finally contends that the there was a permanent catch berm in place at the toe of the overburden highwall adjacent to the slide area and any of the irregularities along the face of this highwall cannot be considered overhanging, as the photos indicate that the overburden is sloped back from vertical. Resp. Br. 58-59.

After considering the evidence presented and the parties' arguments, I find that the Secretary has established there were obvious hazards present at the area of the slide and the adjacent highwall which Respondent failed to either note or correct. I also find that the Respondent's arguments on these points are insufficient and contrary to the hazards identified in their own ground control plan.

As an initial matter, I find that Order No. 8521048 does include the area of the slide as it describes the collapse of the highwall and notes that this slide was comprised of "saturated sand and gravel." Sec'y Ex. 6, 1. Thus, the Order specifically lists the saturation hazard of the

overburden in the area that collapsed. Furthermore, as both Foreman Smith and Howell confirmed that the bottom of the overburden was wet and sliding out from the toe of the highwall, it is clear that the saturated nature of the toe in this area was obvious prior to the slide. Tr. 62, 405-06. Nevertheless, Smith and Howell failed to record the saturated material or regular sliding of the toe, recording that the highwall was "ok", despite a notation on Oct. 4th that it had been necessary to shore up the berm where the excavator was digging from the "sand" overburden. Tr. 63-64, 405; Sec'y Ex 8, 4. For these reasons, I find that at the area of the slide, hazardous saturated ground conditions were evident prior to the slide and that Respondent failed to record these hazards.

For the areas adjacent to the area of the slide, both Respondent employees and Inspector Brodeur stated that some water seepage was common at highwalls in mines in this area of Alabama. However, the fact that a condition is common in a particular area does not render that condition harmless. Inspector Brodeur credibly testified that water seeping from the highwall could wash out smaller binding material and make the highwall unstable. Tr. 111. Indeed, Respondent's own ground control plan specifically noted that:

> Water seepage from rainfall or the natural watershed from eroding at the highwall will be controlled by using a settling pond…

Sec'y Ex. 9, 6-15.

While it appears that Respondent did make efforts to divert groundwater in some active areas of excavation and did set pumps at the lower pit area, it is also clear that Respondent did not record the areas in which seepage was occurring, give any indication of how much seepage was occurring, or list the manner in which that seepage was controlled, if at all. By failing to record the seepage Respondent failed to maintain an inspection system that allowed its employees to gauge and track the severity of ongoing seepage and erosion.

It is also clear from the inspection photos and testimony that the bench above the shale rock on the North wall was full with loose unconsolidated overburden and that there was no horizontal catch bench between the overburden slope and vertical face of the shale highwall. Tr. 117; Sec'y Ex. 6, 10. I find the Respondent's claim that there was a functioning permanent catch berm at this area unconvincing. In the investigation photos, the relatively steep face of the overburden highwall has a constant unbroken slope that continues down to the vertical face of the shale highwall. Sec'y Ex. 6, 10. As such, once a stray rock or section of highwall began to roll or slide, there was neither a catch bench nor functional catch berm present that would contain even a small slide of unconsolidated material. Sec'y Ex. 6, 10. Indeed, as previously noted, the investigation photos show that in one area a large amount of sandy overburden has spilled down across the shale highwall. Sec'y Ex. 6, 7.

Although the majority of photos are taken from a distance and the one close up view of the overburden only shows a narrow vertical band of the overburden slope, the investigation photos do give some support to Inspector Brodeur's testimony that there were segments of broken up sandstone overhanging the highwall. Tr. 244-45. Respondent witnesses testified that there were no overhanging rocks in this area and the Respondent has argued that the overburden

was not steep enough for rocks to overhang. Tr. 448, 719; Resp. Br. 60-61. While it is clear from the photos that the overburden highwall is less than vertical, I found Inspector Brodeur's testimony on this matter credible when viewed in conjunction with the investigation photos, and I rely on his first hand observations and expertise in determining that there were rocks present on the unconsolidated overburden highwall which could topple over and slide or fall down to the pit below.

Within their daily examination records, Respondent's foremen uniformly described the highwall as "ok" and failed to note the presence of sliding saturated material in areas of active excavation or water seepage, full catch benches, or overhanging rocks at the North area of the overburden highwall. Two notations from the evening shifts on October 3rd and October 4th do state that the crew had "hauled rock to 150 to shear sand up" and "sheared rock up for Trackhoe digging sand." Tr. 720, 723; Sec'y Ex. 8, 4-5. However, as explained in detail above, these entries only demonstrate that Respondent failed to recognize or record the saturated ground material as a significant hazard that required corrective action beyond reinforcing the toe berm.

Therefore, I affirm the underlying violation in Order No. 8521048, as the Secretary has established the Respondent failed to record or correct obvious hazardous conditions a reasonably prudent miner would have recognized.

2. Significant and Substantial

I have already found that Respondent violated a mandatory safety standard in failing to record obvious hazardous ground conditions per the requirements of 30 CFR § 77.1713(a). By failing to adequately inspect the highwalls, this violation contributed to the discrete safety hazards of uncorrected unstable and sliding ground conditions at the overburden highwall. Given the 60 foot height of the overburden highwall, the saturated condition of the toe, the non-cohesive nature of the overburden, and the presence of many workers on both the Brookwood and Milldale levels, it was reasonably likely for a significant slide to occur, strike personnel and cause injuries. Tr. 62, 370-71, 665-666. Additionally, given that the shale rock highwall was approximately 40 feet high, it was reasonably likely that even a small slide of unconsolidated material on the North wall could fall to the pit below and strike workers on the drill crew below. Tr. 70, 413. Based on the height of the highwall and its unconsolidated nature, it was reasonably likely for a worker struck by either a mass of unconsolidated material or a stray boulder to suffer broken bones, blunt trauma, and asphyxiation ranging in severity from lost time to possibly fatal injuries. Tr. 120. As such, the evidence presented by the Secretary satisfies the four factors of the Mathies S&S test.

The Respondent primarily relied upon the same S&S arguments for Order No. 8521048 as it did for Citation No. 8521047. Resp. Br., 62. I again incorporate my S&S analysis from Citation No. 8521947 in rejecting these arguments for Order No. 8521048. The Respondent also argues that the conditions on the North wall adjacent to the slide cannot be considered S&S as Inspector Brodeur did not issue individual ground control violations based on these conditions. Resp. Br., 64. The Respondent also states that Inspector Brodeur allowed abatement efforts to occur on the floor of the pit without correcting conditions on the highwall above. *Id*. I reject these arguments on three separate grounds. First, I have already found that the Respondent

failed to adequately inspect or record the hazardous nature of the saturated sliding toe at the West area of the highwall and that this hazard was S&S within the context of both Citation No. 8521047 and Order No. 8521048. As such, the failure to adequately inspect the West area of the highwall where the October slide occurred provides an independently sufficient basis to sustain the Secretary's S&S determination for Order No. 8521048. Secondly, I have found above that failure to adequately inspect the North highwall was also S&S in that falling material would fall over 40 feet and was reasonably likely to strike workers present on the drill bench below. Tr. 413. Although MSHA did not issue separate ground control violations for the specific conditions of the North overburden highwall, that does not diminish the demonstrated hazards presented by the failure to adequately inspect this area. Finally, although not critical to my S&S determination, Inspector Brodeur testified credibly that abatement efforts were not conducted at the foot of the shale rock highwall where sliding material would be reasonably likely to cause an injury. Tr. 240.

For the reasons stated above, I find that the Secretary has established the four required elements of the Mathies S&S test and that the Respondent's rebuttal arguments are insufficient to overcome the weight of evidence presented. As such, I affirm Citation No. 8521048 as reasonably likely and S&S. I also find that the violation did in fact contribute to Mr. Jones' injuries and that those injuries are permanently disabling. Tr. 120.

3. Negligence

After reviewing the evidence and testimony presented, I find that the saturated condition of the overburden toe on the West wall and the water seepage, full bench and loose overhanging rocks on the North wall were readily apparent hazardous conditions that should have been identified during pre-shift examinations. Respondent's witnesses testified consistently that all of these conditions were visible prior to the October slide but stated that they did not consider them hazardous. Tr. 62, 410-11, 608. For the reasons detailed above regarding the likelihood of highwall failure and ground fall events, I find that this subjective belief was unreasonable. I found Inspector Brodeur and Inspector's Westerly statements that they had not observed these sorts of hazardous conditions on previous inspections of the mine consistent, straight forward and credible. Tr. 71, 270, 286, 332-33, 359. Had they done so I have no reason to doubt that they would have issued citations for those conditions to the Respondent. Although Respondent recorded daily pre-shift examinations after receiving a 30 CFR 77.1713 (c) citation in December of 2009, they did not alter or bolster their inspection methods after failing to anticipate the January 2011 slide. Tr. 406-07, 680, 690, 758-759. After the occurrence of the January slide and other instances of excessive sliding, Respondent was particularly remiss in continuing to consider water seepage and saturated ground material as routine non-hazardous conditions that did not merit recording or control beyond the continued use of the working berm or last-second evacuations. Tr. 83, 375-76, 617.

As such, Respondent has not established any mitigating circumstances in regards to the failure to identify, record, or correct the apparent hazardous conditions. For these reasons, I find that Order No. 8521048 was the result of the Respondent's high negligence.

4. Unwarrantable Failure

For Citation No. 8521048, I find that the Secretary has produced sufficient evidence to satisfy the five factor test considered by the Commission in evaluating unwarrantable failure designations. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

a. Extent and Duration of the Violation

The saturated condition of the soupy sand/water mixture on the West wall, and the water seepage, full bench, and overhanging material on the North wall were spread out over a distance of several hundred feet. Foreman Howell also testified that it was normal for the soupy sand/water mixture to run from the toe of the slope and a Respondent witness Howell testified it was necessary to shore up the working berm on the shift prior to the slide. Tr. 62, 723; Sec'y Ex. 8, 4. As such, I find that the excessive saturated condition at the toe of the slope on the West wall was present for at least several shifts prior to the October slide. It also clear from Inspector Brodeur's testimony and notes that similar conditions were present prior to the January slide. Tr. 168-69; Sec'y Ex. 4, 10. Additionally, given the developed appearance of the North shale rock highwall, the presence of extensive water stains and one notable sand slide area on the North highwall, it appears that these conditions had been present on the North wall for many shifts. Tr. 113-114; Sec'y Ex. 6, 7-10.

b. Notice to the Operator

Inspector Brodeur issued the Respondent a violation of 30 CFR 77.1713(c) for a failure to record pre-shift examinations in December 2009. Tr. 267; Sec'y Ex. 11. Although MSHA issued this violation under the recordkeeping section of the inspection standard, this previous citation provided the Respondent with specific notice that inspecting and recording hazardous ground conditions was a critical safety requirement.

c. Prior Abatement Efforts

As noted above, although the Respondent failed to anticipate the January slide, they did not offer any evidence of increased monitoring or testing of water saturation or slope stability. Tr. 680, 690, 758-759. While Truck Driver Williams' testimony regarding temporary evacuations after excessive sliding demonstrates employees were aware of hazards, it also shows that Respondent took a reactive rather than proactive approach in responding to this hazard. Tr. 375-76. As Respondent failed to show it had attempted to improve inspection efforts after the January slide, I find that Respondent has not established that it carried out notable abatement efforts.

d. Obviousness of the Hazard and Degree of Danger

As I have found repeatedly above, the January slide and other near overtopping events made the continued disregard of saturated conditions at the highwall toe an obvious hazard. Additionally, the possibility of material sliding down the unprotected North overburden highwall was also made obvious by the presence of sand slides on the North highwall. Tr. 114, Sec'y Ex

6, 9. Given the 60 foot height of the unconsolidated overburden highwall, and the 40 foot near vertical drop to the Milldale bench below, any ground slide in this area, whether large or small, presented a significant degree of danger to workers on both levels of the pit. Tr. 413.

e. Operator's Knowledge of the Violation

The Respondent was aware of the saturated toe, water seepage, full bench, and overhanging rocks present at the active area of the HWY 59 mine. Tr. 62, 410-11, 608. However, the Respondent's witnesses did not subjectively consider these conditions a hazard. Tr. 448, 647-48, 719-23. As such, the Respondent did not fail to record those conditions through willful intent or a plan to conceal hazards which would constitute reckless disregard. However, the obviousness of the hazards and previous slide events made it unreasonable for Respondent to continue disregarding saturated ground conditions in particular.

Based on these findings, I hold the Secretary has presented sufficient evidence for all of the *Consolidation Coal* unwarrantable failure factors. Furthermore, when considering the evidence on this matter as a whole, I find that Respondent acted with a serious lack of reasonable care in conducting thorough inspections of the developing highwall. Thus, I hold that Order No. 8521048 was the result of the Respondent's unwarrantable failure to comply with the Mine Act.

IV. PENALTY

In determining the appropriate penalty for a violation, 30 CFR §100.3 generally directs me to consider:

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

For these citations, the Secretary submitted a special assessment narrative form per 30 CFR § 100.5, stating that the violation was related to a non-fatal sliding material accident. Sec'y Narrative Findings, 1. The special assessment narrative form restated Inspector Brodeur's gravity and negligence determinations and proposed the maximum penalty of $70,000.00 per violation allowed under Section 110 (a)(1) of the Act. *Id*. at 2.

MSHA had issued Respondent seven violations in the 15 months previous to this incident, none of which were ground control violations. Sec'y Prop. Assessment, Exhibit A. This violation history would normally correspond to a minimal amount of penalty points under 30 CFR § 100.3: Table VI. The Hwy 59 mine is a midsize mine while Walter Energy, the Controlling entity, is a large operator. Sec'y Prop. Assessment, Exhibit A. Respondent was highly negligent in failing to identify, correct and or eliminate the saturated ground conditions in places of active excavation, but as MSHA

did not issue any formal directives regarding this condition, it did not act in willful violation of a site specific MSHA order. The Respondent has not asserted that the proposed penalty of $70,000.00 per violation would affect its ability to continue operations. The violations were significant and substantial violations of the Mine Act as they were reasonably likely to, and did in fact, result in a serious injury. The Respondent acted with good faith in promptly removing personnel from the area and ceasing all mining activities at the HWY 59 mine. Sec'y Br., 28.

The Special Assessment Narrative form restated the gravity and negligence determinations of Inspector Brodeur and listed several facts that supported these negligence determinations. Sec'y Narrative Findings, 1. However, neither the special assessment narrative form, nor the Secretary's presentation of evidence at trial nor his post hearing brief articulated a specific reasoning for increasing the monetary penalties beyond the amounts that would have been generated by the standard 30 CFR § 100.3 penalty tables. As such, I find that the Special Assessment Narrative Form and the specially assessed penalty amounts provide no substantive guidance to my de novo determination of the appropriate penalty amount.

As a starting point, it appears that Respondent would have received a normally assessed penalty under 30 CFR § 100.3 of $7,774 for Citation No. 8521047 after accounting for all gravity and negligence determinations, including the actual occurrence of an injury to a single individual.[6] As Order No. 8521048 involved a single repeat violation of 30 CFR § 77.1313, it would have likely received a slightly higher regularly assessed penalty of $8,421. However, I note that the gravity of both violations is greater than that considered by the normal penalty calculation, as the violations exposed all workers involved in the excavation of the overburden to potentially fatal injuries. Additionally, Respondent resumed mining the area where it had informed Inspector Brodeur it would no longer mine without notifying MSHA, decreasing MSHA's ability to promptly respond to changing conditions at the HWY 59 mine. Tr. 180.

For these specific reasons, I find that a penalty of $50,000.00 per violation serves as an appropriate penalty and deterrent to Respondent and other operators, warning them of the economic repercussions of ignoring obviously hazardous ground conditions.

[6] Upon reviewing the 30 CFR 100.3 penalty tables, Citation No. 8521047 would have received a total of 113 penalty points while Citation No. 8521048 would have received 114 penalty points.

V. ORDER

Tuscaloosa Resources, LLC is hereby **ORDERED** to pay the Secretary of Labor the total sum of **$100,000.00** within 30 days of this order.[7]

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

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[7] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390