FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 29, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2007-128-M
Petitioner	:	A.C. No. 31-01230-104558
	:	
v.	:	
	:	
JOHNSON PAVING COMPANY, INC.,	:	Marion Pit
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2008-176-M
Petitioner	:	A.C. No. 31-01230-132930 A
	:	
v.	:	
	:	
WILLIAM T. PINSON,	:	Marion Pit
Respondent	:	

DECISION

Appearances: Dana L. Ferguson, Esq., U.S. Department of Labor, Atltanta, Georgia, on behalf of the Petitioner
John V. Hawkins, Esq., Johnson Paving Company, on behalf of the Respondent

Before: Judge Barbour

These are consolidated civil penalty proceedings arising under sections 105(a), 110(a) and 110(c) of the Federal Mine Safety and Health Act of 1977 (the Mine Act or Act) (30 U.S.C. §§ 815(a), 820(a), 820(c). In Docket No. SE 2008-176, the Secretary, acting on behalf of her Mine Safety and Health Administration (MSHA), petitions to assess William Pinson, Johnson Paving Company's ("Johnson Paving" or "the company") quarry foreman, a total of $1,000 in civil penalties for two alleged violations of the mandatory safety standards for surface metal and nonmetal mines. In Docket No. SE 2007-128, the Secretary seeks to assess Johnson Paving a total of $13,200 in civil penalties for the same two alleged violations and for three others. The Secretary asserts that all of the alleged violations occurred at Johnson Paving's Marion Pit, a small granite extraction and crushing facility located in McDowell County, North Carolina.

BACKGROUND

The citation and orders that set forth the alleged violations were issued by MHSA inspector Bonnie Armstrong as a result of her August 1, 2006, inspection of the pit. Inspector Armstrong began working for MSHA in 1996 after receiving MSHA required inspector training. Tr. 28-29. In addition to her duties as an inspector, she also acts as an MSHA special investigator.[1] Tr. 29.

The inspector described the Johnson Paving operation as one in which granite is extracted and crushed to size. Tr. 34. The resultant aggregate is sold to customers or is used by an adjoining plant that is also owned by Johnson Paving. At the adjacent plant, the company makes asphalt. Tr. 33-34. The mine is operated intermittently, and during the winter it might be shut down for up to two months. Tr. 31.

Greg Johnson, the president of the company, confirmed the company is essentially "two-tiered". Tr. 149. One part of the operation concerns paving, while the other concerns mining. Johnson explained that although he is the owner of the company, he concentrates on the paving side of the business. William Pinson, the foreman Johnson hired, runs the quarry.

Johnson explained that he does not "micro[-]manage." Tr. 150. Rather, he tends to "[delegate] authority" because it is "kind of impossible" for him to run both sides of the operation. *Id.* As for Johnson's relationship with Pinson, Johnson explained that he "kind of turn[s] . . . [Pinson] loose with the quarry." Tr. 149.

When Armstrong arrived at the mine on August 1, she met with Johnson. Armstrong introduced herself and explained why she was at the mine. Armstrong testified she tried to get some basic information about the mine from Johnson. She asked him how many miners worked at the mine. According to Armstrong, Johnson did not know. Soon after that, Johnson asked Pinson to join him and Armstrong. Tr. 32-33. When Pinson arrived, he told the inspector that ten to 11 company employees worked at the mine. Tr. 33. Pinson then accompanied the inspector into the pit. During the course of the inspection, Armstrong took notes and photographs. Tr. 34. According to the inspector, she issued "quite a few" citations for violations, many more than are at issue in the subject cases. Tr. 35. Armstrong testified that

[1]The company challenged Inspector Armstrong's qualifications as an inspector and moved for the vacation of the contested citation and orders on the grounds that she lacked the training Congress mandated for the position. Tr. 115. Based on the inspector's testimony regarding her background and the fact that she is a duly authorized representative of the Secretary, I denied the motion. Tr. 116.

Pinson did not seem surprised by the conditions she cited. Indeed, she remembered his stating he knew about some of the conditions, but "he just didn't have the people to do the work, to do the repairs." Tr. 35.

Following Armstrong's citation of the alleged volations, MSHA assessed civil penalties against both the company foreman and his employer. When Pinson and the company contested the proposed assessments, the Secretary petitioned for their imposition. The matters were heard in Knoxville, Tennessee.

THE CONTESTED CITATION AND ORDERS

SE 2008-176

ORDER NO.	DATE	30 C.F.R §
6120067	08/01/2006	56.14100(b)

The order states in part:

> The inside door latch on the John Deer[e] 370 trackhoe . . . did not function when tested. The equipment operator would reach through the window to the outside latch to open the door. Not being able to open the door from the inside could impede exiting the equipment should there be an emergency. This trackhoe is used in the pit and plant to load haul trucks. This condition had been reported to the quarry foreman by the equipment operator. The [f]oreman engaged inaggravated conduct constituting more than ordinary negligence[,] in that he knew the door latch did not function, and did not take corrective action. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov't Exh. 1.

After the order was issued, it was modified to include additional conditions on the trackhoe, conditions that the inspector believed also violated 30 C.F.R. § 56.14100(b). The modification states:

> The steps on the trackhoe were broken off and missing. This creates a slip and fall hazard for the equipment operator when entering or exiting the trackhoe. T[he] top of the track is about 3' from [the] ground level. This condition had been reported to the quarry foreman by the equipment operator. Also[,] mirrors on the trackhoe were broken out. Mirrors are used by the equipment

> operator to observe . . . vehicle or foot traffic behind the machine. This condition had been reported to the quarry foreman by the equipment operator. The [f]oreman engaged in aggravated conduct constituting more than ordinary negligence[,] in that he knew the steps and mirrors were broken, and [he] did not take corrective action. This violation is an unwarrantable failure to comply with a mandatory standard. The trackhoe is used regularly at the pit and the plant to load haul trucks.

Gov't Exh. 1 at 3

Armstrong testified that while in the pit with Pinson, she noticed a trackhoe being operated and she decided to inspect it. The trackhoe is a piece of equipment used to excavate, to dig and to load material. On the day Armstrong saw it, the trackhoe was loading excavated material that was then trucked to the processing plant. Tr. 53. The trackhoe runs on two tracks and the trackhoe's bucket is located at the end of a movable arm. The arm extends from the trackhoe operator's end of the trackhoe's body. The trackhoe operator sits in an "operator's booth" which is located above one end of the tracks. The operator reaches the booth by climbing onto one of two "steps." The steps are welded to the side of the trackhoe above the track on the operator's side of the equipment. Tr. 49.

The operator enters the booth via a door. A window in the door allows the trackhoe operator to see the operator's side of the equipment. The window can be opened for ventilation and other purposes. The booth also has two exterior mirrors that allow the operator to see what is behind and to the side of the equipment. The operator sees what is in front of the equipment through windows located at the front of the booth.

Armstrong and Pinson approached the trackhoe, and Armstrong advised the trackhoe operator she wanted to conduct an inspection of the equipment. Although Armstrong could not recall for sure, she testified the door to the operator's compartment might have been tied open. Tr.69. She wanted to know if the door was operating properly, so Armstrong asked the trackhoe operator if the inside door latch worked. The operator closed the door and used the latch. The door did not open. Rather, the trackhoe operator had to open the side window and reach through it to the outside latch. Tr. 40-41; 157. Armstrong also noticed that steps used to climb from the ground to the operator's compartment were missing and that the trackhoe's outside mirrors were broken.[2] *Id.*; see Gov't Exh. 2, Gov't Exh. 3.

[2]Armstrong wondered how long these conditions had existed, and she later looked for records of the pre-shift examinations of the trackhoe. She could not find any. In fact, she could not find pre-shift examination records for any piece of equipment used at the mine. Tr. 54.

Armstrong described the trackhoe as being used "regularly" in the pit and plant to load material and finished product. Tr. 41. Although she knew of no instance in which a miner suffered an injury because of a defective interior door latch (Tr. 74), Armstrong believed a serious injury was reasonably likely to occur because the lack of a functioning latch restricted the trackhoe operator's ability to exit the equipment in the event of a fire, a rollover or another emergency. *Id*.; Tr. 73. In concluding an injury was reasonably likely, she noted that the trackhoe was in use when she inspected it and was used daily. Tr. 42. Should such an injury occur, Armstrong believed that it would result in the trackhoe operator being permanently disabled. *Id*. For example, if a fire occurred, the operator easily could be severely burned before he or she could get out of the equipment. Tr. 74.

In addition, Armstrong testified that the broken mirrors compounded the hazard because the trackhoe operator might not be able to see a person or a vehicle approaching from the rear of the trackhoe and the operator might swing the equipment or back the equipment into the person or vehicle. Tr. 43. Armstrong observed, if a person were hit or run over by the trackhoe, crushing injuries were reasonably likely to occur. *Id*. Moreover, because the steps were missing from the side of the equipment, the trackhoe operator had to step up onto the top of the track to get into the operator's compartment, and the track was approximately three feet off of the ground. Tr. 49. Because of the height of the required "step up," Armstrong felt that the equipment operator was more than likely to slip and fall while climbing into the operator's compartment. Such a fall could result in the operator['s] spraining his or her ankle or breaking his or her leg. Tr. 43. She added that the trackhoe was entered and exited "at least a couple of times a day." *Id.*

Armstrong attributed the broken door latch, the broken mirrors and the missing steps to Johnson Paving's "high"negligence. Tr. 45. Armstrong recalled the trackhoe operator telling her that he reported the conditions to Pinson. In addition, according to Armstrong, Pinson told her he knew about the condition of the door latch (Tr. 45, 71-72) and that the mirrors and steps had been broken since the previous April. Tr. 45-46.

However, Pinson disputed Armstrong's testimony that he told her he knew about the condition of the door latch. He stated he did not know about the latch until the day of the inspection, when Armstrong asked the truck driver to open the door from the inside. Tr. 157, 206. Pinson testified that he specifically recalled telling Armstrong that he did not remember the trackhoe operator ever saying the latch did not work. Tr. 157; *see also* Tr. 158.

Armstrong was asked if she knew why the trackhoe's defects had not been corrected. She responded she did not know, but she remembered Pinson saying to her that he "didn't have the people to help him get things done." Tr. 47. Because the condition of the missing steps and broken mirrors was obvious and because Armstrong believed Pinson knew about the conditions and did not correct them, Armstrong found the conditions were due to Johnson Paving's

unwarrantable failure. Tr. 53. Indeed, with regard to all of the conditions she observed and cited in the contested citation and orders, Armstrong stated she based her findings that the conditions were due to the company's unwarrantable failure on the fact that Pinson "knew [the] conditions existed and that they continued to exist and they had not been corrected." Tr. 79.

Terry Lingenfelter testified that he works as a special investigator for the agency. In his capacity as a special investigator he conducts investigations of possible "knowing" violations on the part of the agents of operators. Agents of operators are subject to individual civil penalties under section 110(c) of the Act when they commit such violations. In October 2006, Lingenfelter conducted a section 110(c) investigation into the circumstances surrounding the trackhoe order and another order (Order No. 6120071). Tr. 181-184. In October 2006, Lingenfelter interviewed miners who worked at the mine when the trackhoe order was issued. He also interviewed Pinson. Lingenfelter testified that Pinson told him he did not know that the trackhoe's inside door latch was broken until August 1. Tr. 186. Lingenfelter also asked Pinson about the broken mirrors and missing steps. According to the investigator, Pinson did not have much to say. *Id.* However, the trackhoe operator told Lingenfelter that on several occasions he had "relayed" the information about the conditions to Pinson. According to the trackhoe operator, Pinson responded he "[had] it covered." Tr. 187. The only explanation Pinson gave to Lingenfelter for not correcting the conditions was that he did not have a mechanic to do the work. Tr. 187-188 Lingenfelter acknowledged that he did not actually see the trackhoe; however, from speaking with Inspector Armstrong, Lingenfelter understood that the conditions were "very obvious." Tr. 189, 190.

Based on what he was told by Pinson and by the trackhoe operator, Lingenfelter concluded Pinson, who as the foreman was an "agent" of the company, knew or had reason to know about the trackhoe's cited conditions and that he "took no action to insure the safety of the miners with [regard to the] . . . conditions." Tr. 188. Therefore, in Lingenfelter's view, Pinson violated section 110(c) of the Act. Tr. 188, 205-206.

THE VIOLATION

Section 56.14100(b) requires "defects on any equipment . . . that affect safety . . . [to be] corrected in a timely manner to prevent the creation of a hazard to persons." There is no doubt the trackhoe was defective in several ways that affected safety. The company does not dispute that the trackhoe had a non-functioning inside door latch, was missing the steps by which its operator accessed the vehicle, and had broken mirrors. Each of these conditions "affected safety," in that each was capable of causing or contributing to the cause of an injury-producing accident.

The record also establishes that two of the three conditions were not timely corrected.

Both the inspector and Lingenfelter testified the trackhoe operator told them he reported the conditions to Pinson and the operator told Lingenfelter he did so more than once. Armstrong recalled Pinson telling her the steps had been missing and the mirrors had been broken since the previous April. While Pinson denied he told Anderson he knew about the door latch until Armstrong asked the trackhoe operator to open the door on August 1, Pinson did not deny his prior knowledge of the condition of the steps and mirrors. In addition, the missing steps and broken mirrors were obvious when looking at the trackhoe. Pinson clearly should have had new steps installed and the broken mirrors replaced by August 1. In failing to do so, he was responsible for the company violating section 56.14100(b) as charged.[3]

S&S AND GRAVITY

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). A violation is properly designated S&S, "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). To establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood the hazard contributed to will result in an injury; and (4) a reasonable likelihood the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (January 1984); *accord Buck Creek Coal Co., Inc.* 52 F. 3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec'y of Labor*, 81 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.,* 7 FMSHRC 1125, 1129 (August 1985). Further, an S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.,* 9 FMSHRC 748 (July 1987); *U.S. Steel*, 7 FMSHRC at 1130.

Finally, the S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not

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[3]However, because I credit Pinson's assertion that he did not know about the condition of the door latch until the inspection on August 1, I find the Secretary did not establish the malfunctioning latch violated the standard. Pinson did not have an opportunity to repair the latch in a "timely manner."

necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (September 1996).[4]

I have already found that the Secretary established a violation of section 56.14100(b) with regard to the missing steps and broken mirrors. The violation contributed to the hazard of the trackhoe operator suffering a slip and/or fall injury, and it contributed to the hazard that those operating equipment or traveling on foot in the vicinity of the trackhoe would be hit as the trackhoe backed up or swung. In the context of ongoing mining operations, such hazards were reasonably likely to occur, in that the trackhoe operator regularly had to enter and exit the trackhoe operator's compartment via a route made more difficult and hazardous by the lack of the steps. In addition, other equipment and miners occasionally were in the vicinity of the trackhoe when it was moving backwards or swinging. If the operator of the trackhoe slipped and fell while entering or leaving the trackhoe operator's compartment, he or she was reasonably likely to sprain an ankle or to break a foot or leg bone. Or, if other equipment or miners were hit by the trackhoe as it backed up or swung, it was reasonably likely the equipment operators or the miners would experience crushing injuries or even death. Therefore, the violation was S&S.

The violation also was serious. As noted, the inspector's testimony established the trackhoe operator regularly accessed and left the operator's compartment by climbing up onto the top of the track and by climbing or jumping down from the track. This meant the operator had to "step up" and "step down" a distance of approximately three feet each time he had to enter or leave the equipment. As already stated, the lack of steps subjected him to a slip and/or fall hazard, a hazard that carried with it the possibility of a serious injury. The broken mirrors posed an even greater hazard. The trackhoe could move back and forth and it could swing from side to side. The mirrors, had they not been broken, would have allowed the trackhoe operator to check for vehicular or pedestrian traffic in the path of the trackhoe as it moved. Without the mirrors, the trackhoe operator experienced "blind spots" when it came to what was to his rear and sides. The condition was especially hazardous to others who worked in the pit in the vicinity of the

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[4]With regard to the gravity of all of the alleged violations, the company asserted that Armstrong was applying the regulations inconsistently, in that she found violations of the cited standards to be more serious at the company's mine than at the mines of other companies. Counsel for the company asked the inspector, "Why are these [alleged violations] . . . so much more dangerous in your mind at Johnson Paving than they are at other places?" The inspector replied, "I'm not comparing Johnson Paving with anyone. I'm looking at what Johnson Paving did and the conditions that surround . . . [what it did] . . . . I'm not comparing it to . . . any other place." Tr. 140. She added she assessed the gravity of a violation on "the conditions that surround[ed] a particular circumstance," and there is no evidence in the record that Armstrong, an obviously contentious and forthright inspector, acted otherwise. Tr. 141.

trackhoe either as the operators of mobile equipment or as travelers on foot.

UNWARRANTABLE FAILURE AND NEGLIGENCE

Unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence . . . in relation to a violation of the Act." *Emery Mining Corp.* 9 FMSHRC 1997, 2004 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or "a serious lack of reasonable care." *Id.* 2003-2004; *Rochester & Pittsburg Coal Co.*, 13 FMSHRC 189, 193-l94 (February 1991); *see also Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 157 (2d Cir. 1999); *Buck Creek Coal, Inc. v. MSHA*, 53 F.3d 133, 136 (7th Cir. 1995) (approving the Commission's unwarrantable failure test). Moreover, the Commission has examined the conduct of supervisory personnel in determining unwarrantable failure, and recognized that a heightened standard of care is required of such individuals. *See Youghiogheny & Ohio Coal Co.,* 9 FMSHRC 2007, 2011 (December 1987) (section foreman held to demanding standard of care in safety matters); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995) (heightened standard of care required of section foreman and mine superintendent). Negligence, of course, is the failure to meet the standard of care required by the circumstances.

I conclude the violation was caused by an unwarrantable failure to comply with the standard. The Secretary established that the missing steps and broken mirrors existed for some time prior to inspection, at the most since the previous April, and at the least several days before the inspection. In either event, Pinson timely knew of the conditions; yet he took no action to correct the conditions or to eliminate the hazards by repairing the trackhoe or by taking the trackhoe out of service. Further, the hazards posed by the conditions were serious, and Pinson's failure in the face of his knowledge of the conditions represented a serious lack of reasonable care. In addition, Pinson's failure to correct the conditions or to otherwise eliminate the hazards they posed represented a grievous failure to meet the standard of care required of him as the foreman. He was, as the Secretary rightly charges, highly negligent, and his negligence is attributable to the company.

PINSON'S INDIVIDUAL LIABILITY

The Act provides that an agent of a corporate operator may be subject to civil penalties in his individual capacity for knowingly authorizing, ordering or carrying out a violation of the Act. 30 U.S.C. § 820(c). The legal standards governing individual liability were summarized in *Maple Creek Mining, Inc.*, 27 FMSHRC 555, 566-67 (August 2005):

Section 105(c) of the Mine Act provides that whenever a corporate

> operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981, *aff'd on other grounds,* 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSRHC*, 108 F. 3.d 358, 362-364 (D.C. Cir. 1997). To establish Section 110(c) liability, the Secretary must prove that an individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSRHC 1125, 1131 (July, 1992) (*citing United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 559, 563 (1971). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him [or her] knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *Beth Energy Mines, Inc.*, 14 FMRHRC 1232, 1245 (August 1992).

As made clear in *Kenny Richardson* and *BethEnergy*, as a predicate to individual liability, a corporate operator's agent must be privy to knowledge or information that gives him reason to know of the existence of a violative condition under circumstances wherein his failure to act amounts to aggravated conduct constituting more than ordinary negligence.

The company, as its name indicates, is a corporation. Pinson, who was hired and who worked as the company's foreman, was de facto in charge of the pit and was working as the company's agent. As found above, Pinson knew that the steps on the tackhoe were missing and that the trackhoe's mirrors were broken. He was informed about the conditions and they were visually obvious; yet he did nothing to eliminate the hazards posed. Thus, there is ample evidence to conclude Pinson knew of the conditions, yet permitted them to continue.

I credit Armstrong's testimony that Pinson explained the presence of the conditions by telling her he did not have adequate personnel "to get things done." Tr. 47. Armstrong's memory of what Pinson said is consistent with Lingenfelter's testimony about a more specific conversation he had with Pinson, one in which Lingenfelter remembered Pinson saying he did not have a mechanic to make the necessary corrections. Tr. 187. I believe the statements reflect the fact that the company did not provide Pinson with the resources he needed to ensure a safe work place. It is also noteworthy that when Pinson testified, he offered no explanation for why he did not take the trackhoe out of service until the conditions could be fixed. The bottom line is that Pinson, a supervisor responsible for the safety of those working for him, essentially chose to

continue mining operations in the face of serious hazards. In so doing, he exhibited aggravated conduct constituting more than ordinary negligence. Therefore, he may be held individually liable for the violation of section 56.14100(b).

ORDER NO.	**DATE**	**30 C.F.R. §**
6120071	08/01/2006	56.14103(b)

The order states in part:

> The windshield for the . . . welding truck . . . was cracked throughout and had a hole in the top drive side. The truck is used regularly throughout the plant and quarry to perform repairs on the plant and equipment. The truck is around other mobile equipment and employees when traveling around the plant and pit. The damage could create a visibility hazard as well as a cutting hazard to the operator when cleaning the windshield. The quarry foreman stated he used the welding truck yesterday and knew the windshield was broken and cracked and [he] did not take corrective action. This violation is an unwarrantable failure to comply with a mandatory standard.
>
> Gov't Exh. 5.

At the plant and in the pit, there were occasions when welding was done to make necessary repairs. To facilitate the work, the company kept welding materials on the bed of a truck and moved the truck around the plant and pit as needed. According to Pinson, on August 1, 2006, the truck was located "up round some scrap metal" in an area he referred to as "the junkyard." Tr. 159. Armstrong testified that she and Pinson approached the truck, and Armstrong noticed that its windshield was cracked. She also noticed a hole at the top of the glass. Armstrong could not remember if she climbed into the cab of the truck and tried to look through the windshield (Tr. 63-64), but as best as she could recall, the cracks and the hole were more to the driver's side of the windshield than the passenger's side. Tr. 64-65; *See*, Exh. 6.

Armstrong asked Pinson if the truck had been used, and he responded it was used the day before the inspection. Armstrong believed the windshield's condition "could obstruct the [truck] operator's visibility" and if the windshield "fogged" and the driver wiped the windshield from the inside, the crack and the hole could pose a cutting hazard to the driver. *Id*.

Pinson did not deny the presence of defects, but he did not believe they obstructed the driver's visibility. He testified, on July 31 the truck could not be started and it was dragged to

where the inspector found it.[5] Pinson sat in the driver's seat and steered the truck. Tr. 169-170. He testified that he could see, and that the cracks and hole did not obstruct his vision. Tr. 160. The company introduced into evidence a photograph that Pinson identified as having been taken the day before the hearing. Tr. 164; Resp. Exh. 7. (Because the truck was taken out of service after it was cited for the defective windshield, the company maintained the photograph showed the condition of the window exactly as it was on August 1, 2006, an assertion the Secretary did not contest. Tr. 162.)

Armstrong testified that an injury was reasonably likely to result from the defective windshield. She noted that the welding truck was used regularly throughout the mine and that it had been used just before she got to the mine. Tr. 56, 58. She observed that the truck traveled in areas where there was foot traffic and that the cracks and hole reduced the ability of the truck driver to see those working or traveling around truck. If because of reduced visibility the truck stuck and ran over someone, a fatality was likely.[6] Tr. 57, 58. Armstrong also believed Johnson Paving was highly negligent in allowing the condition to exist. She recalled Pinson's telling her he knew the windshield was "busted and that he had used the truck" anyway. Tr. 59. She noted that despite being aware of the windshield's condition, Pinson did not do anything to repair it. Tr. 62. This also led her to conclude the condition was the result of Johnson Paving's unwarrantable failure. Tr. 61-62.

Lingenfelter testified the defective windshield represented a knowing violation on Pinson's part. His reasons for reaching that conclusion were basically the same as those regarding his conclusion that Pinson was knowingly responsible for the defective conditions on the trackhoe. Tr. 205-206.

To correct the condition, Johnson Paving took the welding truck out of service by removing all of the welding equipment from the truck and by removing the truck's battery. Tr. 60-61, 163.

THE VIOLATION

Section 56.14103(b) requires in part that damaged windows on self-propelled mobile

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[5]According to Pinson, the battery in the truck was dead. A jump[-]start failed, and the truck was towed by another piece of equipment. Tr. 168.

[6]However, Armstrong admitted she knew of no instances in which miners had been fatally injured by trucks because of cracked windshields. Tr. 75.

equipment that "obscure visibility necessary for safe operation, or create a hazard to the equipment operator" be removed or replaced. There is no doubt the cited truck qualified as self-propelled mobile equipment. While it is true the truck's battery was dead at the time the defective windshield was cited, the question of whether or not a violation is proven must be considered in terms of continued normal mining operations. Without evidence to the contrary, it is reasonable to assume that in the course of continued normal mining operations the battery would have been recharged or replaced and the truck would have regained its ability to propel itself.

Clearly, the truck's windshield was damaged. The parties agree it was cracked and that it contained a single hole. This leaves two questions. Did the defects in the windshield "obscure visibility necessary for safe operation" and, did the defects "create a hazard to the [welding truck] operator." 30 C.F.R. § 56.14103(b). The Secretary has the burden of proof. To establish the violation, a preponderance of the evidence must allow either question to be answered in the affirmative.

The evidence is in conflict as at to whether the cracks and hole obscured the truck driver's visibility so as to create a hazard. Armstrong testified the defects "*could* obstruct the operator's visibility." Tr. 56 (*emphasis added*). Pinson, who steered the truck as it was being dragged, testified that he could see where he was going and that his visibility was not obstructed. Tr. 159. Anderson recalled the cracks and the hole as more on the driver's side of the windshield than on the passenger's side, and the Secretary introduced a photograph that seemed to indicate this was so. Tr. 64-65; *See* Sec's Exh. 6. The company introduced a photograph that appeared to show the cracks and hole were more toward the passenger's side of the windshield. *See* Resp. Exh. 7.

After weighing all of the evidence as to the effect of the defects on the driver's visibility, I conclude it is in equipoise and the Secretary has not prevailed. A different conclusion might have been reached if Armstrong could have unequivocally testified as to what she saw when she sat in the driver's seat, but she could not. She did not remember if she climbed into the cab and tried to look through the windshield on the driver's side. Tr. 63-64. On the other hand, Pinson, who was in the driver's seat on July 31, was certain he could see. Tr. 159. It also does not help the Secretary's case that no testimony was offered as to how and from what angle the photograph purporting to show the defective windshield was taken. Such testimony would have given the finder of fact a better basis to evaluate the photograph's accuracy.

I also conclude the Secretary did not prove by a preponderance of the evidence that the cracks and hole created a hazard to the truck driver. Armstrong believed if the windshield fogged, the driver could cut his or her hand if he or she wiped the windshield from the inside. Tr. 56. However, the Secretary offered no testimony to support her speculation. For example, Armstrong did not testify that she felt the glass and experienced sharp, jagged edges. Section 56.140103(a) required the windshield to be made of "safety glass" or its equivalent. Safety glass

typically cracks rather than shatters. It is common knowledge that such cracks do not necessarily produce edges capable of cutting a person's hand. The same is true for holes in safety glass. Based on the trial record, I cannot find the Secretary proved the cracks and/or the hole in the welding truck's windshield constituted a cutting hazard. For these reasons, the order must be vacated.

SE 2007-128-M

CITATION NO.	DATE	30 C.F.R.
6120066	08/01/2006	56.14107(a)

The citation as modified states:

> The shaft on the quarry pump [was] not guarded to protect persons from contacting the moving parts. [The] pump is started with a switch located by the fan and belt drive; [the] throttle control is located by the rotating shaft. The pump is located on uneven[,] rocky terrain. Persons could be seriously or fatally injured if entangled in the moving parts. This pump is used on a regular basis. The quarry foreman stated he knew the pump was not guarded, and [he] used the pump anyway. The [f]oreman engaged in aggravated conduct constituting more than ordinary negligence[,] in that he knew the pump shaft . . . [was] not guarded and [he] did not take corrective action. This violation is an unwarrantable failure to comply with a mandatory standard.
>
> Gov't Exh. 8 at 1, 2

In addition to the trackhoe and the welding truck, Armstrong testified she inspected a pump that was used to remove water accumulations from the pit. Tr. 82-83. Removal of the water was necessary for the company to carry out its extraction and loading operations. Although no water was present in the pit on August 1, Armstrong remembered Pinson telling her he started and used the pump the previous week. *Id.* In addition, she recalled another miner telling her that he used it. Tr. 83.

Armstrong noticed the pump's shaft was not guarded. Tr. 83. Nor was the pump removed from service by being "tagged out" or by having a sign nearby indicating it should not be used. Tr. 91. Armstrong took a photograph of the unguarded shaft. *See* Gov't Exh. 9.

Armstrong believed the missing guard was "reasonably likely" to lead to an injury, because the pump had to be used and the pump's throttle control was adjacent to the unguarded pump shaft. A person had to stand about 12 inches from the unguarded shaft to start the pump and to "throttle it up." Tr. 85-87. According to Armstrong, the ground in the pit, including the ground next to the shaft, consisted of "uneven and rocky terrain," which added to the hazard. Tr. 84, 89. *See also* Gov't Exh. 9. Armstrong testified that the shaft rotated at a very fast rate, and if a person were caught by the shaft, he or she could be pulled into the shaft and quickly lose an arm. Death could result. Tr. 84-85.

In Armstrong's opinion, the lack of a guard was the result of Johnson Paving's "high negligence." Tr. 90. She testified she remembered Pinson saying he knew the pump should have been guarded. *Id.* She added that Pinson told her "he knew it was wrong to use . . . [the pump] without it being guarded." *Id*. In addition, she believed the lack of a guard was the result of an unwarrantable failure on the company's part. She again pointed to the fact that Pinson knew the shaft was unguarded, that he used it anyway and that he took no steps to provide the shaft with a guard. Tr. 91. Johnson Paving corrected the condition by placing a box-type guard around the rotating shaft. Tr. 92; *See* Gov't Exh. 10.

Pinson stated that the pump the inspector cited had been put in place the day before the inspector arrived. Tr. 153. It was decided to bring the pump to the pit after the bearings failed on a previous pump. According to Pinson, before the inspector saw the pump, it had been run for "a few minutes" to test it. Tr. 153. It was run without a guard so the guard would not have to be removed if something was wrong with the pump. *Id.* When asked by the Secretary's counsel why he did not guard the shaft after he tested it, Pinson explained that he "got tied up," that he also had to correct the condition of the park brake on a haulage truck (another condition cited on August 1) and he "figured it was more important to put the brakes on that truck than it was to put a guard on [the] pump." Tr. 156.

THE VIOLATION

Section 56.14107(a) requires "[m]oving machine parts [to] be guarded to protect persons from contacting . . . shafts . . . and similar moving parts that can cause injury." The pump was not removed from service; nor was its shaft guarded. The testimony established the pump was going to be used as mining continued in the pit. The unguarded, rapidly spinning shaft posed a hazard, as Armstrong testified, to those working or standing near it. If a miner were caught in the unguarded, rotating shaft, he or she could have been injured or even killed. Tr. 84-85. For these reasons, I conclude the violation existed as charged.

S&S AND GRAVITY

The Secretary established the violation was both S&S and serious. All of the S&S criteria were met. There was a violation of section 56.14107(a). The violation posed a safety hazard to miners, in that the unguarded shaft was within 12 inches of the throttle control. Because the control was used when the pump was started (Tr. 85-87), there was a danger the miner whose job it was to start and throttle up the pump would trip or slip and find himself or herself ensnared by the shaft. In fact, given the short distance between the throttle and the unguarded shaft and the uneven terrain in the pit, it was reasonably likely the hazard would occur.[7] Finally, being pulled into the rotating shaft could result in any number of serious injuries or, as Anderson persuasively testified, even in death. Tr. 84-85. Given these reasonably expected consequences if the feared accident occurred, I conclude that the violation was not only S&S, it also was serious.

UNWARRANTABLE FAILURE AND NEGLIGENCE

The violation was the result of unwarrantable failure on the company's part. As previously noted, Pinson as the supervisor in charge of the pit, acted on the company's behalf. Pinson's testimony established the pump had been in place for a day. He tested it to make sure it worked properly, but he did not guard the shaft after the test was completed. He forthrightly explained that he deferred installing the guard because he considered fixing the park brake on a haulage truck to be "more important." Tr. 156. Setting priorities in correcting violations does not excuse Pinson's failure to meet the standard of care required of him. If Pinson did not have adequate resources to correct both conditions and if he believed guarding the pump's shaft was not a top priority, he should have met the standard by taking the pump out of service. He chose not to do this, and he left the pump shaft unguarded. It is reasonable to expect that in the course of normal mining operations, the pump would have been started and throttled up by a miner as mining continued. Exposing the miner to the hazard of possible dismemberment or worse by deliberately leaving the shaft unguarded constituted a serious lack of reasonable care on Pinson's part and, hence, on the company's part.

Further, due to his status as a foreman, Pinson was held to a heightened standard of care. His choice to forego guarding the shaft and his decision not to take the pump out of service until it was guarded represented the kind of heightened lack of care that signifies high negligence.

ORDER NO.	DATE	30 C.F.R. §
61200701	08/01/2006	56.14101(a)(2))

[7]The likelihood of an injury-resultant slip or fall was further increased by the fact that surface water was an occasional problem in the pit.

The order states in part:

> The park brake on the . . . haul truck . . . would not hold a grade with a typical load. This truck is used to haul material from the pit to the plant and to the stockpile area at the plant. This condition creates a hazard of this piece of equipment rolling when parked. Persons working in the area or around this truck could be struck or run over[,] causing a serious or fatal injury. The truck is normally parked on level ground when not in use.
>
> Gov't Exh. 11.

During the course of the inspection on August 1, Armstrong and Pinson approached a truck that was used to haul rock to the stockpile. Armstrong did not know how many tons of material the truck held, but she guessed between 15 and 20. The truck was sitting on a small grade at the dump, and Armstrong asked the driver to move the truck a little and then to set its park brake. She wanted to see if the brake would hold the truck on the grade. The driver did as Armstrong requested, and the truck rolled down the grade. Tr. 96. Armstrong believed the lack of an effective working park brake violated section 56.14101(a)(2). However, Armstrong also believed the ineffective brake was "unlikely" to cause a fatal accident. Tr. 97; Gov't Exh. 10. She noted the truck usually was parked on level ground where it would not roll and where it was out of the way of miners and equipment. Tr. 97-98. Although an injury was unlikely, if a miner (probably a mechanic or the operator of equipment used in the vicinity of the truck) were struck by the moving truck, it was reasonable to expect the miner to suffer crushing injuries, injuries that could prove fatal. Tr. 98.

Armstrong testified the defective brake was due to the company's high negligence. She stated Pinson told her that a week before the inspection he became aware of the situation and he ordered the brake to be "tightened . . . up." Tr. 99. Therefore, on August 1, Pinson thought the brake was holding. Tr. 99. However, according to Armstrong, "[T]here was no follow-up . . . to see . . . [if the adjusted brake] was holding."[8] Tr. 99. She also maintained the truck driver said that the brake had not worked properly for "about a month" and "that . . . Pinson knew of the condition." Tr. 100.

The company did not offer any testimony about the condition.

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[8]Armstrong testified she believed one of the reasons for the lack of follow-up was that the company was not doing any pre-shift examinations. Therefore, defects in equipment were not being reported and corrected as required. Tr. 99-100.

THE VIOLATION

Section 56.14101(a)(2) states: "If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels." The elements of proof required to establish a violation are as stated in the standard. The Secretary must prove: (1) that the cited equipment was "self-propelled mobile equipment" and (2) that the park brake would not hold the equipment with its (a) "typical load" on (b) the "maximum grade" the equipment travels. 30 C.F.R. § 56.14101(a).

The Secretary proved that the haul truck qualified as "self-propelled mobile equipment." The very nature of the truck as described by Armstrong made it self-evident. Further, the Secretary proved that the park brake would not hold the truck on the "maximum grade" it traveled. Armstrong testified, when she inspected the truck it was parked on "a small grade." Tr.96. While there was no specific testimony about the maximum grade the truck traveled, I infer from the inspector's testimony that the small grade either was the maximum grade at the mine or, if not, that since the park brake would not hold the truck on the small grade, it would not hold it on the maximum grade. However, the Secretary did not establish that the brake was incapable of holding the equipment with its typical load. No testimony was offered by the Secretary regarding the truck's typical load nor was testimony offered regarding the load the truck was carrying when it was cited. Armstrong testified regarding the truck's use. She stated it was "used to haul material from the pit to the plant, and it was used in the stockpile area." Tr. 95. However, Armstrong did not describe or otherwise identify the truck's "typical load"; nor did she estimate the load the truck was carrying.[9] Without the missing testimony I cannot determine whether or not the park brake was "capable of holding the equipment with its typical load." 30 C.F.R. § 56.14101(a)(2). Because I cannot rule out the possibility that when Armstrong inspected the truck, it was carrying more than its typical load and the defective brake would have held a lesser but "typical" load, the order must be vacated.

ORDER NO.	DATE	30 C.F.R. §
6120072	08/01/2006	56.14132(a)

The order states in part:

[9]The closest Armstrong came to these topics was her statement that the truck was "a stockpile type truck that [held,] I don't know how much 15, maybe 20 tons," but she added, "I'm not sure how much was in there." Tr. 96.

> The manually operated horn on the . . . welding truck . . . did not function when tested. The truck is used regularly [throughout] the plant and quarry and is around other mobile equipment and employees when traveling around the plant and pit. Persons could be seriously or fatally injured if struck by the truck while being unaware that it was moving in their direction. The quarry foreman stated he used the welding truck yesterday and knew the horn did not function. The foreman engaged in aggravated conduct constituting more than ordinary negligence[,] in that he knew the horn was not function[ing] and did not take corrective action. This violation is an unwarrantable failure to comply with a mandatory standard.
>
> .

Gov't Exh. 12.

Armstrong testified that during the course of her inspection of the welding truck, the same truck she cited for a defective windshield and broken mirrors, she discovered the truck's manual horn did not work. Tr. 102. Pinson told Armstrong he knew that the horn did not work. Tr. 102. According to Pinson, this was because the truck's battery was dead. If the battery "had 12 volts going through it, [the horn] would" have worked. Tr. 167.

Because the truck was used in the plant and pit on a regular basis and in areas where there could be foot traffic, Armstrong believed it was reasonably likely the lack of a horn would result in an accident. Tr. 102-103. She also noted that the truck frequently was driven in those areas of the pit where there was other mobile equipment and in the "yard area" where material was stockpiled. Tr. 112. (The yard area was frequented by customers' trucks. Tr. 112.) Armstrong could not recall the truck having another type of sound system to alert miners to its presence. Tr. 103. If there was a small air horn on the seat next to the driver, and she was later told that there was, Armstrong did not remember its being there. Tr. 104. Pinson, however, was certain an air horn was on the seat. Tr. 166. He testified he made sure air horns were kept in the cabs or operators' compartments of all mobile equipment at the mine. *Id.* He added, "If your horn went out . . . you could use . . . [the air horn] until the end of your shift and you could [then] get your horn fixed. That's the reason I had . . . [the air horn] in that truck." Tr. 166. Nevertheless, even if an air horn was present, Armstrong believed Johnson Paving still was in violation of the cited standard because "the horn that is provided with the equipment needs to function." Tr. 104.

The inspector found that the lack of a functioning horn was reasonably likely to result in a fatal injury. She maintained "a lot" of service equipment was located on the truck, which meant the truck frequently was visited by miners. In addition, the truck was used "throughout the mining process." Tr. 105. Not only were these miners exposed to the hazard, the lack of a working horn also posed a hazard to the drivers of other trucks and mobile equipment in the pit

and yard. Tr. 112.

Armstrong also believed the company's negligence was "high." Tr. 106. She testified that Pinson told her he used the truck on July 31, the day before the inspection, and that he knew the horn did not work. Tr. 106. This, and the fact that Pinson "didn't do anything to try to correct the condition," justified her finding of unwarrantable failure in addition to high negligence on the company's part. Tr. 107. When asked whether Pinson explained why the horn was not repaired, she stated he only said "he had to do everything himself." Tr. 108.

THE VIOLATION

Section 56.14132(a) states that "Manually-operated horns . . . provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition." As I have already noted, the welding truck was "self-propelled mobile equipment." Further, the cited horn was operated by hand and, thus, was "manually-operated." The horn that came with the truck was "provided," and it is clear that it was a "safety feature." Everyone agreed the horn would not sound. Therefore, it was not "maintained in functional condition," and the violation existed as charged.

S&S AND GRAVITY

The Secretary did not establish that the violation was S&S. While it is true the truck's horn did not work, the record supports finding another method of warning miners on foot and operators of other equipment of the truck's presence was available to the welding truck's driver. Armstrong did not recall if there was an air horn on the seat next to the driver.[10] Tr. 104. However, Pinson, who had been in the truck the day prior to the inspection, was sure the air horn was present, and he persuasively testified he made certain such horns were routinely kept in the cab of all mobile equipment at the mine. Tr. 166. Balancing Armstrong's lack of memory against Pinson's certainty, I have no trouble in concluding the air horn was indeed present as Pinson asserted. Clearly, the air horn was reasonably likely to be used by the truck driver as mining operations continued, and the presence of an effective alternative to the horn provided with the truck meant that the non-working horn was not reasonably likely to cause or contribute to an injury-producing accident. The presence of the air horn also meant that the violation was not serious.

[10]This is not surprising since, as noted earlier, Armstrong could not recall climbing into the truck's cab. Tr. 63-64.

UNWARRANTABLE FAILURE AND NEGLIGENCE

However, the violation was the result of unwarrantable failure on the company's part. Armstrong testified without dispute that Pinson told her he used the truck on July 31 and that he knew the horn did not work at that time. Tr. 106. I conclude Armstrong's recollection is accurate and that, in fact, Pinson did know the horn was not working on July 31. Armstrong's testimony is consistent with Pinson's statement that the battery, which not only started the truck but also operated the horn, was dead the previous day when the truck was towed. Tr. 167. Further, her unrefuted recollection that Pinson's excuse for not repairing the horn was that "he had to do everything himself" (Tr. 108), correlates with her recollection of Pinson telling her, in connection with the trackhoe's defects, that he "didn't have the people to help him get things done." Tr. 47. While these statements call into question the way mine management chose to operate the mine, they in no way excuse Pinson's failure to correct the violative conditions. Armstrong properly noted that, in the face of his knowledge of the defect, Pinson did nothing to try to repair the horn or, in the alternative, to take the horn and the truck out of service. Tr. 107. In failing to act, Pinson, and through Pinson, the company, exhibited a serious lack of reasonable care, a lack of care that signifies not only unwarrantable failure, but also high negligence.

OTHER CIVIL PENALTY CRITERIA

There is no indication the size of any civil penalties assessed against the company will affect its ability to continue in business, and I find that it will not. There also is no indication the size of any civil penalties assessed against Pinson will affect his ability to meet his day-to-day financial obligations, and I find that it will not.

Recalling Armstrong's testimony that Pinson told her ten to 11 employees worked at the mine (Tr. 33), and noting the Secretary's indication on Exhibit A of the petition that the mine operated between 10,000 and 20,000 hours annually (Petition for Assessment of Civil Penalty, Exh. A at 2), I conclude the operator is small in size.

The parties stipulated that the company showed good faith in abating all of the alleged violations, and I find this was the case. Tr. 164-165.

The Secretary offered into evidence a computer printout showing the history of prior violations in the two years preceding August 1, 2006. The Secretary's counsel stated the printout revealed a small history, a characterization with which the company neither agreed nor disagreed. *See* Joint Exh. 1; Tr. 23-25. Based on the exhibit, I find the Secretary is correct and that the company has a small history. The Secretary offered no evidence or testimony indicating Pinson previously committed knowing violations pursuant to section 110(c) of the Act (30 U.S.C. §

820(c), and I conclude that he did not.

CIVIL PENALTIES

SE 2008-176-M

ORDER NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT
6120067	08/0120/06	56.14100(b)	$500

I have found the Secretary proved the violation to the extent it related to the missing steps and broken mirrors on the trackhoe. I also have found Pinson knowingly allowed the violation to occur. I conclude, however, that Pinson, as a "first-time offender" with no previous history of prior violations, should not be assessed the amount the Secretary proposes. As I have stated, the tenor of the hearing made it clear that Pinson was placed in a position where he did not have the means necessary to ensure safety in a timely manner. It is not clear whether this state of affairs reflected a purposeful policy on top management's part or whether it was the result of Greg Johnson's "hands-off" attitude. *See* Tr. 149. (Having heard Johnson testify, I suspect it was the latter rather than the former.) In either event, it put Pinson in a very difficult position as he tried to keep production going in the face of inadequate maintenance and repair resources. In view of all of the circumstances, I find a penalty of $250 is appropriate.

ORDER NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT
6120071	08/01/2006	56.14103(b)	$500

I have concluded the Secretary did not prove the alleged violation. Accordingly, no penalty can be assessed.

SE 2007-128-M

CITATION NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT
6120066	08/01/2006	56.14107(a)	$2,000

I have concluded the Secretary proved the violation, that it was serious and result of the company's high negligence. However, in view of the small size of the mine and the small history of previous violations, I also conclude the company should be assessed a lesser amount than the Secretary proposes. As Joint Exhibit 1 reveals, in the two years prior to the violations in question the highest penalty assesseded against the company was $463. Most violations were assessed at $228 or less. (Excluding the violations at issue, 26 of 41 prior violations were assessed at $60.) Thus, for this violation of section 56.14107(a) the Secretary has proposed a

penalty significantly larger than any previously assessed. Such a precipitous increase is not warranted, and I find a penalty of $1200 to be appropriate.

ORDER NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT
6120067	08/01/2006	56.14100(b)	$2,800

I have concluded the Secretary proved the violation, that it was serious and the result of the company's high negligence. For the reasons set forth immediately above I also find the Secretary's proposed assessment to be excessive, and I conclude a penalty of $1,200 to be appropriate.

ORDER NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT
6120070	08/01/2006	56.14101(a)(2)	$2,800

I have concluded the Secretary did not prove the alleged violation. Accordingly, no penalty can be assessed.

ORDER NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT
6120071	08/01/2006	56.14103(b)	$2,800

I have concluded the Secretary did not prove the alleged violation. Accordingly, no penalty can be assessed.

ORDER NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT
6120072	08/01/2006	56.14132(a)	$2,800

I have concluded the Secretary proved the violation, that it was not serious and that it was the result of the company's high negligence. For the reasons set forth with regard to Citation No. 6120066 and because the violation was not serious, I find the Secretary's proposed assessment to be excessive. I conclude a penalty of $800 is appropriate.

ORDER

Within 30 days of the date of this decision, Pinson **SHALL** pay to the Secretary a civil penalty of $250 for the violation of section 56.14100(b) set forth in Order No. 6120067. In addition, Order No. 6120071 **IS VACATED**. Upon payment of a total penalty of $250, Docket No. SE 2008-128-M **IS DISMISSED.**

Also within 30 days of the date of this decision, Johnson Paving **SHALL** pay $1,200 for the violation of section 56.14107(a) set forth in Citation No. 6120066, $1,200 for the violation of section 56.14100(b) set forth in Order No. 6120067, and $800 for the violation of section 56.14132(a) set forth in Order No. 6120072. In addition, line 10(a) of Order No. 6120072 **IS MODIFIED** to indicate an injury was "unlikely" and Order No. 6120070 **IS VACATED**. Upon payment of a total penalty of $3,200, Docket No. SE 2007-128-M **IS DISMISSED**.

David F. Barbour
Administrative Law Judge
(202) 434-9980

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