FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 20, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket Nos. SE 2009-401-M
Petitioner,	:	SE 2009-402-M
	:	A.C. No. 09-01036-179032
v.	:	
	:	Docket No. SE 2009-553-M
MIZE GRANITE QUARRIES,INC.,	:	A.C. No. 09-01036-184807
AND ROBERT W. MIZE III, AND	:	
CLAYBORN LEWIS	:	Docket No. SE 2009-554-M
Respondent.	:	A.C. No. 09-01036-184807
	:	
	:	Docket No. SE 2010-849-M
	:	A.C. No. 09-01036-219258
	:	
	:	Docket No. SE 2010-850-M
	:	A.C. No. 09-01036-219259
	:	
	:	Mine: Mize Granite Quarries

Appearances: Charna C. Hollingsworth-Malone, Esq.; Sophia E, Haynes, Esq.; and, Angela R. Donaldson, Esq., Office of the Solicitor, U.S. Department Of Labor, Atlanta, GA
for the Petitioner
Robert W. Mize, III, President, *pro se*
for the Respondents

Before: Priscilla M. Rae, Administrative Law Judge

These consolidated civil penalty proceedings are before me pursuant to Sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801, et seq., (the "Act") charging Mize Granite Quarries, Inc. ("Mize"), and Robert W. Mize and Clayborn Lewis as agents of Mize, with violations of mandatory standards. The general issue before me is whether there were violations of the cited standards. Other issues include whether certain violations were "significant and substantial," whether certain violations were caused by the "unwarrantable failure" of Mize and whether certain violations were "knowing" violations committed by Mize and Lewis as agents of a corporate mine operator within the meaning of Section 110(c) of the Act. If violations are found to have been committed and if those violations are found to have been "knowingly" committed by Mize and Lewis as agents of a corporate operator, then appropriate civil penalties must also be assessed utilizing the relevant criteria under Section 110(i) of the Act.

This matter was heard by me in Augusta, Georgia where the parties presented evidenced and submitted exhibits. Both parties also submitted post hearing briefs and financial information pertaining to the Section 110(c) violations, which I have considered in making this decision.

I. **Stipulations**

The parties entered into written stipulations prior to the hearing which were admitted as S-19 and read into the record. They are that Mize engages in activities which affect interstate commerce and that they are subject to the Mine Health and Safety Act of 1977, as amended. The administrative law judge has jurisdiction to hear and decide this case pursuant to Section 105 of the Act,[1] and to assess appropriate penalties pursuant to Section 110(i) of the Act.[2] The citations and orders contested herein were issued by Mine Safety and Health Administration ("MSHA") certified inspectors John Mayer and Michael Cohen acting within their official capacity when so issued. The copies of these orders and citations made exhibits hereto are true and accurate copies. Robert Mize and Clayborn Lewis are agents as defined by the Act[3] and the operator demonstrated good faith in abating all violations. Mize is a small metal/non-metal mine reporting 10,043 annual hours of production in 2009. Additional stipulations were entered into at the hearing providing that all photographs offered by the Secretary are accurate depictions of the conditions in question at the time

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[1] Sec. 105 (d) states: If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination or any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104.

[2] Sec. 110(i) provides: The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

[3] Sec. 3(e) "agent" means any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine.

of the inspections and the inspector's notes offered at the hearing are true and accurate copies of the originals. Additional stipulations of fact were reached with regard to certain citations which will be set forth within the discussion of the individual citations.

II. Statement of Facts and Conclusions of Law

Robert Mize owns and operates Mize Granite Quarries, Inc., located in Elberton, GA. The operation is a stone quarry which blasts, cuts and removes large blocks of dimensional stone which is then sized and sold for the primary purpose of erecting monuments. The primary tools used in the extraction process are explosives, wire saws and jackhammers or pneumatic drills to size and drill holes into the blocks, cranes for extracting the block from the quarry, and front-end loaders to load the blocks onto the flat bed trucks. The blocks weigh approximately 20,000 lbs. at the time they are removed from the quarry. The company has been in business for ten years and employs one foreman, Clayborn Lewis, and at the time of the hearing seven miners.

The orders and citations decided herein arose during two inspections conducted by authorized MSHA inspectors. The Secretary also conducted a special investigation which resulted in assessments against Robert Mize and Clayborn Lewis under Section 110(c)[4] of the Act which are addressed herein, based upon four of the alleged violations.

A. The January 13, 2009 Inspection

2. John Mayer is an authorized MSHA inspector with three years of experience in his position. Prior to his employment with MSHA, he was a maintenance administrator for the Department of Defense responsible for ensuring equipment maintenance and safety. On January 13, 2009, Mayer arrived at Mize at approximately 9:00 am to conduct a "walk and talk" which he described as a courtesy visit to discuss conditions that they would be inspecting at a later date to inform the operator of specific compliance requirements. Tr. 20. When he arrived at the mine, Mayer met with Robert Mize and was later joined by Clayborn Lewis. As he stood with these two gentlemen on the top ledge of the mine looking down upon the bottom ledge, Mayer observed a pathway leading to the bottom ledge used by the miners to access the working ledge that in his opinion was unsafe. The path was approximately two feet wide, cluttered with loose material, wet, slick and elevated approximately eight feet above the quarry floor. The pathway and the bottom ledge were at a right angle to one another forming a corner with a wall rising up at the juncture requiring the two ledge men to access the bottom ledge from the path by "skimming" across a 15" wide area for a distance of four feet at an elevation of eight feet above the quarry floor. Tr. 27. The quarry floor was filled with water of unknown depth and likely to be filled with rocks, in the inspector's opinion. Tr. 22-26 and S-1 pg. 4. The ledge men told the inspector on the scene that they had accessed the working ledge in this manner for several days. Tr. 27. Mr. Lewis told Inspector Mayer that the condition had been that way only since that

[4] Sec. 110(c) Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

morning when he had a ladder removed that had been used to span the gap between the two ledges. He was in the process of building, but had not completed, a bridge to replace the ladder. Tr. 28-31. In Inspector Mayer's opinion, however, the ladder would not have provided safe access either as it did not provide a flat surface upon which to walk and did not have handrails to prevent a fall. Citation No. 6507102 was issued for unsafe access based upon this condition. S-1.

In order to abate the citation, Mr. Lewis completed construction of the wooden bridge. He asked one of the miners to secure the bridge between the path and the bottom ledge. The miner, in an effort to accomplish this, was operating a jackhammer under Foreman Lewis' supervision while standing within two feet of the edge facing the water. After approximately 30 seconds, Inspector Mayer advised Lewis that the miner needed to don fall protection. Mr. Lewis then told the miner to put on the equipment but he did not secure it. Inspector Mayer then told Mr. Lewis to instruct the miner to secure the gear which the miner did but he still failed to tie off. At that point Mayer issued a Section 107(a) imminent danger order [5] to remove the miner from the area, and issued Citation No. 6507104. Tr. 32-35, S-2 pg 1, S-3, pg 1 and photographs S-3 pgs 3-5.

C. The March 11 -12, 2009 Inspection

The remaining citations and orders were issued by MSHA Inspector Michael Cohen during an inspection he performed on March 11 and 12, 2009. Inspector Cohen is familiar with mining based upon his ten year employment history as a maintenance supervisor for a surface and underground limestone operation. Cohen has been an authorized MSHA inspector for two years and has inspected 28 granite quarries. Tr. 58-61. He arrived at Mize at approximately 9:30 am on the 11th when he saw two ledge men operating a rotary drill standing within three feet of the ledge with a 40' drop to the bottom ledge. Neither of them had on fall protection. Tr. 62-64, photograph S-5, pg 3. Inspector Cohen issued an oral imminent danger order (later reduced to writing) and a Section 104(d)(1) order.[6] S-4 and S-5. At the time this condition existed, Mize and Lewis were on the top

[5] SEC. 107. (a) If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

[6] Sec. 104(d)(1)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 or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, 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 finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety

ledge of the quarry looking down watching the miners at work. Tr. 66-67.

As the inspection on the 11th progressed, Inspector Cohen issued a second Section 104(d) order for a condition he observed on the same bottom ledge area in which Inspector Mayer issued his imminent danger order on January 13th. S-10. Inspector Cohen determined that because the pathway the miners used to access the working ledge was elevated approximately six feet [7]above the quarry floor, a handrail was needed along the 45' of the path to prevent a trip and fall into the water below. Tr. 82-84. The pathway cited by Inspector Cohen and Mayer leads to the bottom ledge which in turn leads to the working ledge. The miners were gaining access to the working ledge by climbing a set of stairs lacking a handrail. In order to exit the stairs onto the ledge, the miners had to twist their bodies around the stairs while holding on to one side and step onto the ledge, which also lacked a handrail. The ledge area at the top of the stairs was filled with large loose rocks, a broken ladder, and uneven ground. Tr. 89-91 and photographs S-11 pgs 4-5. According to Mr. Lewis, two miners used these stairs in this condition for approximately eight days. Tr. 92. Inspector Cohen issued a third Section 104(d) order for this alleged violation. Exhibit S-11.

Inspector Cohen, in the course of his two-day inspection at Mize, issued an additional six Section 104(a) citations for alleged violations discussed below. S-6, 7, 8, 9, 12 and 13.

Mize presented evidence and argument that the citations and orders issued are unfair and a product of an agenda on the part of MSHA to put a small operator who employs minority workers out of business. Tr. 181. He cited his safety award in 2007 and the lack of a history of injuries in support of his position that he operates a safe mine that is being unnecessarily targeted. Tr. 187 and Mize post hearing Brief of Respondents pg 47-54.

D. Citations and Orders

1. *Citation No. 6507102 (S-1)*

This Sec. 104(d)(1)citation issued on January 13, 2009, by MSHA Inspector Mayer for a violation of 30 C.F.R. §56.1101 reads as follows:

> Safe access was not provided on the southeast corner from one ledge to another at the first level from the pit floor which was filled with water. Two Ledge (sic) men were required to cross over a small footing between the two ledges which was approximately 15 inches wide for a distance of approximately 4 feet that was wet and covered with loose material and was at a height of approximately 8 ft. Foreman Clayborn Lewis stated that he knew about the

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standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

[7] There is a discrepancy between Inspector Mayer's and Inspector Cohen's testimony as to whether the ledge was elevated six or eight feet. I do not find it to be material; a fall from either height would be equally serious.

> condition because he had the crane operator remove the ladder that was being used to cross from one ledge to another prior to the ledge men returning to work in that area. Foreman Lewis stated that he felt that the ledge men would be okay crossing the small footing until he could get a bridge built to connect the ledges. Foreman Lewis engaged in aggravated conduct constituting more than ordinary negligence in that he was aware that the condition existed from more than one day and that (sic) employees were required to access that area at least twice daily for work. This violation is an unwarrantable failure to comply with a mandatory standard.

The inspector designated the violation as having a high degree of likelihood to result in a fatality, significant and substantial (S&S), affecting two persons and being the result of high negligence and an unwarrantable failure. He determined that the condition had existed for two days. Tr. 27. The proposed penalty is $9,634.00.

The Violation

30 C.F.R. §56.11001 of the Secretary's regulation cited in this violation requires safe access be both provided and maintained by the operator. Although the regulation does not provide a definition of the word "safe," the Commission has said of the term as it applies to her regulations, it can be defined as "whether a reasonably prudent person familiar with the factual circumstances surrounding the alleged hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation." *Alabama By-Products Corp.,* 4 FMSHRC 2128, 2130 (Dec. 1982).

The Commission has held, in construing a regulation worded identically to section 56.11001, regarding the means of access:

> [T]he standard requires that each "means of access" to a working place be safe. This does not mean necessarily that an operator must assure that every conceivable route to a working place, no matter how circuitous or improbable, be safe. For example, an operator could show that a cited area is not a "means of access" with the meaning of the standard, by proving that there is no reasonable possibility that a miner would use the route as a means of reaching or leaving a workplace.

The Hanna Mining Co., 3 FMSHRC 2045, 2046 (September 1981).

The operator presented several arguments with respect to this citation. Either the means of access between the two ledges was not unsafe, the miners did not cross between the two ledges as Inspector Mayer described, they could have used fall protection if they chose to, or that a bridge had been available that was specifically constructed for use to connect the two ledges and was to be installed imminently. It had not been put into place when the inspector arrived because mining operations were not yet underway –the worker Mayer saw was merely engaged in surveying operations at the time. Plans were in place to move the bridge when quarrying began. Tr. 47 and

Brief of Respondents, pg 5.

In an attempt to establish that the miners did not cross the bottom ledge as described by Mayer, Mize elicited through cross-examination that the inspector did not actually see how the two miners accessed the working ledge. The men were already on the upper working ledge when Mayer arrived. Tr. 41-42. However, when interviewed by Special Investigator Mary Mitchell on April 14, 2009, Mize confirmed Inspector Mayer's observations. He stated that as Inspector Mayer arrived on the property, the miners were on the ledge performing their usual duties. As he and Mr. Lewis were watching the two miners working, the miners were "laying the block out. Putting wedge in to brake with a hammer, preparing the block to be moved out of the quarry." S-14 at 4. He described the manner in which the miners crossed from the path to the bottom ledge by saying "they cross the ledge, there at the bottom. It (*sic*) ledge was about 2 foot (*sic*) wide. We were in the process of building a bride (*sic*) for them to cross." When asked "they must step from one ledge to the other then up the ladder to the working area?" he responded "yes that is right." He identified the route taken in photograph S-14 pg 10 which is identical to S-1 pg 4 identified by Inspector Mayer as the unsafe means of passage. He reasoned that they "did have to step a little be (sic) not far." S-14 at 4. He explained that they had been working on a bridge but it had not been completed. "The guys had maybe cross (*sic*) the ledge 10 or 12 times…We didn't think it was excessive…We were trying to get production so we could stay in business." S-14 at 5. Mr. Mize estimated the depth of the water in the quarry to be two or three feet deep. "If they fell it would be enough to break the fall but not enough to drown them," he said. S-14 at 7. Mize signed the written statement prepared by Inspector Mitchell averring it to be a true and accurate statement of the facts.

Clayborn Lewis gave differing accounts of the situation as well. Inspector Mayer testified that on the day of the inspection, Lewis told him that there had been one ladder that he placed across the corner between the two ledges. The men had used the ladder to cross in the morning and then Lewis had the ladder removed. He pointed out the ladder to Inspector Mayer at the time. Tr. 28-31 and photograph S-1 pg. 5. Lewis testified at the hearing that the miners working for Mize were highly experienced with approximately 120 years of experience among them inferring that for them, the means of access was not unsafe. He also stated that the men had safety harnesses and could have put them on within a reasonable amount of time. Tr. 164-165. Lewis was also interviewed by Special Investigator Mitchell on April 14, 2009. His statement was reduced to writing and was signed by him attesting that it was true and accurate. S-15. When asked whether he believed the men had safe access to their work area, he answered in the affirmative. He further explained that on the day of the inspection, the men had already started to work but when they crossed the ledges to access the working ledge, there were two ladders – one on each side of the corner. They climbed down one ladder, walked across the quarry floor and climbed up the other one. The two ladders were then removed at his direction. He said he was then going to have the crane operator put in a longer ladder but before he could accomplish this, the inspector arrived. (Presumably this is the same ladder he showed Inspector Mayer and that he said the miners had used that morning.) He added that the miners used the two- ladders means of access for two days. S-15 pgs 4-5. Mr. Lewis stated that the miners never crossed the ledge in the manner described by Mayer. S-15 at 5. He estimated the depth of the water to be about 1 ½ feet in the quarry floor. S-15 at 6.

The two miners in question were also interviewed by the special investigator. Their

statements were also reduced to writing; however, in order to protect their identity, all personal information was redacted. S-15 and S-16. It is evident from the orders and citations written and the questions asked of the miners that the two interviewed were Anthony Pass and Gary Almond.

Gary Almond told Mitchell that he and Pass had been crossing the corner between the two ledges for approximately four days to one week without a ladder or bridge. He would cross in the morning, go out and come back at lunch time, and would again cross at the end of the day. He stated that there were never any ladders on either side of the ledge provided as an alternate way of crossing the corner. He did request that the foreman build something to go across the corner or provide another way to get there. That is when Lewis began construction of the bridge that was later installed. He stated that he was sure Mize and Lewis were well aware of how they were getting across the corner as there was no other way to get there. Mize also would stand on the top ledge of the mine and look down to where they were working. Almond estimated the depth of the water to be about 1 ½ feet deep due to being pumped regularly. He described the water as being shallow enough to walk through. S-16.

Anthony Pass confirmed, when asked by Investigator Mitchell, that they crossed the ledges at the corner without the use of a ladder or bridge. He also estimated the condition had been present for about one week. Like Almond, he was sure Mize and Lewis were aware of the situation as there was no other way to access the working ledge. He did recall that when the weather was dry and there was no water in the bottom of the quarry, they could climb down one ladder and up another. But most of the time there was water in the pit due to the amount of rain they had so they had to climb around the corner in the manner described by Mayer. He estimated the path to be just wide enough to get by carrying a small cooler and the depth of the water to be three or four feet. He also asked the foreman to put something in place at the corner to cross. S-17.

Both miners stated that they did not use fall protection gear when traveling to and from the working ledge. It was issued to them but they kept it on the working ledge rather than tote it back and forth. S-16 and 17. Mr. Lewis stated to Investigator Mitchell that the miners did not wear fall protection to cross the corner between the ledges because it was not necessary; they had the ladders to use. S-15 at 5.

Based upon the evidence presented, I find that Mize violated the safe access standard. The photographs alone submitted by the Secretary, S-1 pgs 4 and 6, and S-3 pgs 3, 6 and 7, very clearly show the violative condition on the day of the inspection. They depict what was accurately described by Inspector Mayer as a path being approximately two feet wide with an uneven surface littered with rocks and other debris. Also evident from the photographs is that the quarry floor, which is approximately eight feet below the ledge, had water and rocks in it on the day of the inspection. This comports with the miners' statements that they had been accessing the bottom ledges as described by Mayer because the rain prevented them from using the two ladders as alleged by Lewis. Also evident in the photographs is the path between the ledges that is so narrow that the men had to turn sideways to inch across. There is no question that crossing the corner section between the ledges in this manner as described by Mayer as "skimming across" was unsafe. It presented a situation where a "reasonably prudent person familiar with the factual circumstances surrounding the alleged hazardous condition, including any facts peculiar to the mining industry, would

recognize a hazard warranting corrective action." *Alabama By-Products Corp.,* at 2130.

I find Lewis' assertions that the miners were provided with a safe means of access to be unsupported by the evidence. First, I find his statements to Mayer and Mitchell that the miners had either one ladder across the corner or two ladders down to the quarry floor and back up to the other ledge on the day of the inspection to be less than credible. Both miners stated to Mitchell that they had been accessing the working ledge by crossing the corner without a bridge or ladder of any sort for days. Moreover, Robert Mize confirmed this information in his statement to Mitchell adding that it was just 10 or 12 times which they didn't think was "excessive." They were trying to get production out to stay in business and the water, after all, was only a few feet deep which would be enough to break their fall but not drown them. Also, Lewis told Mayer that he had the ladder removed with a crane before the blasting. Mayer testified he was on the site at the time of the blast and did not hear the crane being used. Tr. 29. Second, although an operator does not have to assure that every conceivable route to a working place is safe, none of the alternative means Lewis alleged were available, such as fall protection or the ladders, to provide safe access.

With respect to the use of fall protection, the miners had to walk along a 45 foot long path, cross a corner section and walk along a second ledge to reach the ladder that brought them to the working ledge. Fall protection is not effective unless it can be tied off to an immoveable object to anchor the miner. Under the given circumstances, a safety harness would not be practical or even possible to use. It is apparent that Inspector Mayer did not consider the use of fall protection to be the appropriate means by which to make access to the ledge safe either as he did not write the citation as a violation of section 56.15005 requiring the use of safety belts and lines . He abated the citation when the bridge was installed. Lewis also clearly recognized a more substantial means of access was needed to ensure the miners' safety as he began construction of the bridge when the two miners requested a safer way to cross the bottom ledge. (Lewis' suggestion that they had fall protection that could have used if they had wanted to, also underscores the lack of enforcement in the use of fall protection as discussed below.)

Inspector Mayer was shown the ladder that Lewis told him was in place on the morning of the inspection when the workers crossed to the work site. Although the miners both denied using this ladder, even if it were to be believed, I accept the testimony of Mayer that it would not have been safe either. Walking across the ladder would require stepping on the edge of each of the stairs avoiding the gaps in between them. It would also require a tremendous amount of balance in doing so as the edge of the rungs appear to be about two inches wide and set on a slant. There is no handrail on either side of the ladder to assist in maintaining ones footing. S-1 at 5.

The use of ladders to climb down into the quarry floor and back out onto the other ledge may have offered the most reasonable means of travel under certain conditions. However, there is no evidence that this means of access had been provided to the miners for at least four days and possibly as long as one week due to weather conditions. If the ladders had been in place on the day of the inspection as Lewis told Investigator Mitchell, there would have been additional hazards posed by their use as there was water in the quarry floor which would have obscured the rocks and debris below creating the potential for trips and falls. Pass confirmed that there was water in the pit most of the time and they had not used the two ladders in about one week as a result. Additionally, the ladder shown to Mayer by Lewis lacked handrails which would have lead to another safety

violation. Thus I find that this alternate means of travel would not have provided the miners safe access during the period Mayer determined the condition to have existed, which was actually on the conservative side at two days. Furthermore, the regulation requires that the safe means of access be maintained which is an ongoing responsibility to ensure safe means of access are used as "opposed to a purely passive approach in which the operator initially provides safe access and then has no further obligation." *Lopke Quarries, Inc.,* 23 FMSHRC 705, 708 (July 2001).

Significant and Substantial

Inspector Mayer found this violation to be significant and substantial ("S&S"). A significant and substantial violation is described in section 104(d)(1) of the Act, 30 U.S.C. §814(d)(1), as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.,* 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc*., 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.,* 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct safety hazard, 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 will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

With regard to this violation, I have already found that a safety standard has been violated. The inspector testified that "skimming across" the corner between the two slippery and littered ledges created a hazard of slipping, tripping and falling from a height of eight feet to the quarry floor which was filled with water and rocks. Thus, the violation – lack of safe access to the working ledge –created a distinct safety hazard satisfying the second prong of the *Mathies* criteria. Mayer felt it reasonably likely that such an accident would occur and that the resulting injuries would be a fatality. Tr. 30. Common sense, as well as the inspector's testimony, indicates that a fall from the elevated ledge to the quarry floor would result in a reasonably serious injury, if not death. Consequently, I conclude that this violation was S&S.

Unwarrantable Failure

The citation alleges that the violation resulted from the company's unwarrantable failure to comply with the standard. The Commission has held that an unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp*., 9 FMSHRC 1997, 2004 (December 1987); *Youghiogheny & Ohio Coal Co.,* 9 FMSHRC 2007, 2010 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Emery* at 2003-04; *Rochester & Pittsburgh Coal Corp*. 13 FMSHRC 189, 193-94 (February 1991) and *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994); see also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The Commission has established several factors as being determinative of whether a violation is unwarrantable:

> [T]he extent of a violative condition, the length of time it has existed, whether the violation is obvious, or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co*., 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co*., 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp*., 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc*., 14 FMSHRC 1125, 1129 (July 1992). The Commission has also examined the operator's knowledge of the existence of the dangerous condition. E.g., *Cyprus Plateau Mining Corp*., 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator aware of brake malfunction failed to remedy problem); *Warren Steen*, 14 FMSHRC at 1126-27 (knowledge of hazard and failure to take adequate precautionary measures support unwarrantable determination).

Cyprus Emerald Resources Corp., 20 FMSHRC 790, 813 (August 1998).

Mayer testified that he assessed this violation as unwarrantable failure because management knew the miners were crossing the ledge without safe means and allowed it to exist for more than one shift. Tr. 30. Based upon the statements of Mize and the two miners involved, the condition actually existed for at least two days and as many as four days. Mize and Lewis were fully aware of the situation as the uncontroverted evidence established that both men stood on the top ledge of the quarry to look down upon the workers each day. The bottom ledge is fully visible from the top ledge, as Mize, Lewis and Mayer were standing on the top ledge when Mayer saw the condition and issued this citation. Robert Mize also confirmed his knowledge of the situation in his statement to Investigator Mitchell when he said the miners had to cross the ledges absent other means about 10 to 12 times. If the miners generally crossed twice a day that would mean the condition existed for five or six days. Lewis was responsible for the condition existing in the first instance. In this very small operation, by his own account, he is the one responsible for directing the workers, conducting the work place examinations, conducting pre-shift checks, providing training and safety briefings and overseeing production. If Lewis is to be believed, he also the one who removed the two ladders from the bottom ledge, removing with them any degree of safety they afforded.

Lewis tendered the testimony that he had been building a bridge to provide a safe means of access across the bottom ledge in defense of this violation. He testified that he was the only one with the skills to build the bridge and his regular duties in the mine interfered with its completion. I do not consider this an adequate attempt to take precautionary measures or to lessen the degree of negligence involved. Had he or Robert Mize ordered a cessation in production until the bridge was completed and installed, it would be a very different matter. However, as Robert Mize told Investigator Mitchell, they had to keep production up and it was not an excessive risk to let the miners cross the ledges this way for several days. The callous and reckless disregard for the safety of the miners is sufficient for me to determine that this violation was correctly and justifiably assessed as unwarrantable failure to comply with the standard.

2. *Order No. 6507103 and Citation No. 6507104 (S-2 and S-3)*

This section 107(a) order and section 104(a)[8] citation contain identical language and are issued in violation of 30 C.F.R. §56.15005. They allege:

> An employee was not wearing fall protection while working within 1 foot of the edge at the first ledge from the bottom in the southeast corner of the quarry. The ledge was wet and covered with loose material and is approximately 8 ft. in height from the quarry floor which is filled with water. This condition exposed the employee to injuries from falling and drowning.

The citation and order were issued on January 13, 2009 during Inspector Mayer's "walk and talk" as set forth above. The citation alleges a gravity of "highly likely" to result in a fatality from a violation that is S&S affecting one person. Mayer found moderate negligence and abated the citation when the miner was removed from the ledge and retrained on the proper use of fall protection. The proposed penalty is $2,976.00.

The Violation

30 C.F.R. § 56.15005, provides that "safety belts and lines shall be worn when persons work where there is a danger of falling." The reasonably prudent person test for this standard is "whether an informed, reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines." *Secretary of Labor v. Great Western Electric Company*, 5 FMSHRC 840, 842 (May 1983). Under 30 C.F.R. § 77.1710(g), a standard similar to 30 C.F.R. § 56.15005,

[8] Sec. 104(a) states: If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

the Commission also explained that the standard must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Secretary of Labor v. Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991).

The operator's position with respect to this citation and order is that Lewis was in the process of abating the first citation issued by Mayer when this occurred. Mayer had only given Lewis 30 seconds in which to instruct the miner to don his personal protective equipment ("PPE"). Had Lewis been given a reasonable amount of time to respond to the situation, he would have instructed the employee to put on the gear. If the inspector had been in a "more reasonable frame of mind" he could have allowed Lewis to correct the situation without issuing a citation. Tr. 43-44. Furthermore, Lewis testified that as the foreman, he is responsible for the safety program at the quarry and it is required that safety harnesses be utilized. He gives safety talks weekly to remind the workers to use them. At times they do not wear them but Lewis "stay(s) after them as much as possible." There had never been an accident in the past seven or eight years. Additionally, the men, he said, had the safety harnesses with them when they came to put the bridge in place but hadn't put them on. Tr. 161-163, 165-166. Lewis did admit in his statement to Mitchell regarding the later fall protection order issued by Cohen that he doesn't "stand over his men and watch them." S-15. Mize told Mitchell that he also forgets to use the fall protection equipment at times. S-14.

When Pass and Almond were interviewed by Investigator Mitchell with respect to this citation, they both stated that they had safety harnesses issued to them and that Lewis does remind them to use them. They confirmed that they do so when needed. S-16 and 17.

I find the Secretary has proven by a preponderance of the evidence that this standard was violated and the order and citation are affirmed. There is no question that working within one foot of a ledge eight feet above the quarry floor which is filled with water and rocks would put any reasonably prudent person on notice that there is a danger of falling warranting the use of a safety harness and line. There is also no question that the violation occurred. The evidence of record is that Mayer and Lewis were watching the miner for 30 seconds while he was working on the ledge without wearing fall protection. There is no requirement that Mayer give the foreman a certain amount of time in which to correct the miner's violative conduct before issuing the order or citation. A fall with dire consequences could occur in far less than 30 seconds. Had Mayer waited any longer, he too would have been negligent in the protection of the miner. And while it may be true that Mayer had the discretion to correct the violation without issuing a citation, there is also no dispute that he had the right to issue them. Furthermore, in view of the fact that this condition arose because Lewis was abating an unsafe condition Mize had just been cited for that day, Lewis should have been on high alert to ensure the miner was following safety protocol. His failure to immediately recognize and correct the situation without prompting indicates that it probably was not unusual for the miners to work on the ledges without harnesses and that Lewis is not as diligent in enforcing the safety program as he claims. In any event, the standard requires strict adherence to the standard and regardless of whether there was a safety rule in effect at the mine or whether the miner was at fault for ignoring it, the standard was clearly violated and Mize is strictly liable. *Mar-Land Industrial Contractor, Inc.,* 14 FMSHRC 754 (May 1992); *Southern Ohio Coal Company*, 4 FMSHRC 1459; citing *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35 (Jan. 1981).

Significant and Substantial[9]

The Secretary has also established by a preponderance of the evidence that the *Mathies* criteria have been satisfied. Inspector Mayer credibly testified that he assessed this citation as S&S because the ledge was cluttered with loose material, it was prone to being wet and slippery and was sufficiently elevated to pose a discrete danger of falling to the quarry floor below. Because the miner was using a jackhammer which causes severe vibrations, the likelihood of his losing his balance and slipping or tripping and falling over the edge was even more likely. Tr. 34-35. Should a fall occur it would likely result in a fatality, or at least broken bones and contusions due to the height of the ledge and presence of rocks and water in the quarry floor. I find the gravity of this violation to be very serious.

Negligence

This violation was assessed as moderate. Moderate negligence means that the operator knew or should have known of the violative condition or practice, but there are some mitigating circumstances. "Mitigating circumstances may include, but are not limited to, actions which an operator has taken to prevent, correct, or limit exposure to mine hazards." *See* 30 C.F.R. §100.3(d)(Table VIII)(2007).

In Mayer's opinion, Lewis was negligent in failing to instruct the miner to utilize PPE. However, Inspector Mayer assessed his negligence as moderate as he found Lewis' efforts to correct the condition as he (Mayer) pointed it out, mitigating. Tr. 36.

There is no question the foreman's negligence is imputable to the operator in this case. See *Nacco Mining Co.,* 3 FMSHRC 848 (April 1981). The Commission has stated that to find the operator negligent where a rank and file miner engages in negligent violative conduct, there must be a finding that the operator has taken reasonable steps to prevent that violative conduct. See *Whayne Supply Co*., 19 FMSHRC 447 (March 1997); *Nacco Mining Co., Supra*; and *Southern Ohio Coal Co.,* 4 FMSHRC 1459 (Aug. 1982) (SOCCO). The "operator's supervision, training and disciplining of its employees must be examined" to make this determination. *Nacco* at 850-851. In *Southwestern Illinois Coal Corp.*, 4 FMSHRC 610 (May 1985)(Southwestern II), the operator's 100% fall protection use and tie-off safety policy was made known to the miners through written rules, a training seminar and annual refresher training. In addition they had a disciplinary system in which a first offense for failure to wear fall protection resulted in a personnel action warning with progressive forms of discipline for each additional violation. However, the operator left the decision to wear the belts largely to the miners which was determined to be an insufficient policy lacking in enforcement. *Southwestern II* at 613.

I find the facts in this case to be somewhat like those in *Southwestern II* in that Lewis testified that he did have a PPE policy and provided weekly training to the miners reminding them to wear their harnesses. This was confirmed by both miners in their statements to Investigator

[9] The requirements for S&S as set for the above in the discussion of Citation 650710 apply hereinafter.

Mitchell. However, it does not appear that the company has a written policy, warning signs, or annual refresher training. It is also clear that the policy was not actively enforced at the quarry through disciplinary measures, inspections or otherwise. Furthermore, Lewis testified that he was in the process of moving the bridge so he was otherwise engaged in something else at the time. Tr. 44. The fact that the foreman was busy and was not paying attention does not lessen his responsibilities to the miners to protect them. He is the agent of the operator entrusted with ensuring the miners follow all safety protocols. The miner was working with Lewis under his direction and supervision installing the bridge. Lewis should have given this project his undivided attention. Particularly, since he was abating a previously issued citation and the inspector was watching the work being performed.

The conditions found during this inspection are striking examples of the company's lack of enforcement or concern for safety. Lewis and Mize both exhibited a rather unconcerned attitude towards the miners' not wearing their PPE when questioned by Investigator Mitchell. Their response was simply that they didn't know why they were not wearing it. Mize said he sometimes forgets too. Lewis stated "I don't stand over my men and watch them." S-15. Both miners, in their statements indicated that they leave their gear on the working ledge at the top ledge of the mine rather than carry it back and forth with them. Almond said that it is given to them to wear and they are supposed to use it and do so when needed. S-16. The miners are apparently left to decide when to use it. This all serves to portray a very passive, if not completely unconcerned, attitude on the part of the company towards the use of PPE.

In sum, I find the operator was moderately negligent in not taking reasonable steps to adequately supervise, train and discipline the miners to ensure the miners used their PPE to prevent this violation. I support Inspector Mayer's opinion that Lewis' effort to correct the miner when prompted is a mitigating factor.

3. *Order No. 6505708 and Order No.6505709 (S-4 and S-5)*

This imminent danger Section 107(a) order and Section 104(d)(1) order were written for a violation of 30 C.F.R. §56.15005. The citation, which incorporates the language of the order, reads as follows:

> Anthony Pass and Gary Almond (Ledge Men) were not wearing fall protection while operating a pneumatic drill approx. 3' from the quarry working ledge. Both men were exposed to a fatal fall approx. 40' to the granite quarry floor. Fall protection was available at the working ledge. Clayborn Lewis (Foreman) and Robert Mize III (Owner) both engaged in aggravated conduct constituting more than ordinary negligence in that they were both observing the (2) ledge men operate the pneumatic drill approx. 3' form the quarry ledge while not wearing fall protection. This violation is an unwarrantable failure to comply with a mandatory standard.

Inspector Cohen issued these orders dated March 22, 2009, during his March 11-12, 2009 regular inspection. He designated the citation as highly likely to result in a fatal injury affecting two persons resulting from the operator's reckless disregard for their safety. It is alleged as S&S as well.

The proposed penalty is $35,543.

The Violation

The same standard and discussion previously addressed in Citation No. 6507104 applies and will not be repeated here.

Mize offered no testimony specifically addressing this violation except as is set forth above with regard to their company safety policy. They did not deny the facts as alleged in the citation. In Robert Mize's statement given to Investigator Mitchell, he identified the photograph of the ledge in question, S-5 pg 3 and S-14 pg 14. He said the men were just getting ready to start back to work after the shot had been made to blast the rock. When asked why the men did not have on their PPE, he responded "they had forgotten to put it on, even I do that sometimes." When questioned who would have been responsible for making sure the miners were using their PPE, he said, "I guess it was Lewis but I can't blame him for this. I was there also. I was paying more attention to them pulling blocks, I guess. Ultimately I guess it is me anyway isn't it." S-14 pg 6. Lewis told Mitchell that the men were squaring up the block and preparing them to be taken out. He said Mize and he were standing on the quarry wall discussing the removal of the blocks and didn't really see the men standing on the edge. That is when he made the statement that he doesn't stand over his men and watch them because he doesn't want to make them nervous. He also did not know why they were not wearing their gear. S-15 pgs 7-8.

Ledge man Almond told Investigator Mitchell that he was not wearing fall protection because the two of them had worked their way down to the bottom of the quarry and were working at an elevation of two feet where the PPE was not needed. S-16. Inspector Cohen, however, saw the miners when he arrived on the property working on a ledge that was 40' high. He took a photograph of where the violation took place which clearly is not a ledge two feet off the ground. It may be that Almond was confused as to what point in time Mitchell was questioning him about and that he was unaware that he had been observed by Cohen at an earlier moment, when he made this statement. I accord Cohen's testimony regarding this violation greater weight.

Based upon the strict liability enforcement provisions of the Act as discussed above, I find Mize did commit the violation as alleged and the orders are affirmed.

Significant and Substantial

Inspector Cohen testified that he assessed this violation as S&S because the ledge was 40' above the bottom ledge of the quarry. The men were operating a rotary drill (jackhammer), which vibrates violently, while standing within three feet of the edge. In his opinion, fall protection is needed when working within six feet of the edge because that is the average height of a man. Presumably this would make a trip and fall from that distance likely to result in a fall over the edge. If a fall from the height occurred, it was reasonably likely that the resulting injuries would be fatal. Tr. 63-67. I agree and find this violation is S&S.

Unwarrantable Failure[10]

Inspector Cohen testified that he observed the condition described in the citation himself while standing at the top of the quarry some 30' above the miners. With him were Lewis and Mize who had both been on the top ledge for some time looking down at the workers when Cohen arrived on the scene. Tr. 66. He characterized the violation as unwarrantable based upon the fact that this was an obvious condition, clearly known to management and because neither Lewis nor Mize took any action to correct the hazard until Cohen ordered them to do so. Tr. 67-68. For this reason, the inspector marked the level of negligence as reckless disregard.

Upon reviewing the factors set forth in *Cyprus Emerald Resources Corp., Supra ,* I find this violation to be an unwarrantable failure to exercise due care in safeguarding the two miners working on the ledge. I come to this conclusion based upon the same analysis as set forth in the discussion of Citation No. 6507102 herein. Both Mize and Lewis watched the miners perform their work on a ledge 40' above the quarry floor without taking safety precautions. Neither man really noticed that the workers were doing this for the past two days because they were too busy discussing production. S-14. Essentially, they just didn't care so long as the blocks were being sized and removed from the quarry. Compounding the shocking disregard for the safety of the miners is that fact that this situation took place just two months after Inspector Mayer issued his orders and citations for the same lack of safety enforcement at this mine. Obviously, not only did Mayer's orders and citations not put Mize and Lewis on notice that greater efforts at compliance were necessary, but it had absolutely no effect on them what-so-ever so long as production was occurring. I can only describe their conduct, both individually and in concert, as egregious.

4. *Citation No. 6505710 (S-6)*

Inspector Cohen issued this Section 104(a) citation on March 11, 2009 alleging:

> The tool rest gap on the Delta 10" bench grinder measured appx.(*sic*) ¾" from the tool rest to the grinding wheel. The bench grinder is used daily to sharpen the plug drill bits. This condition exposed miners to cuts and abrasions to the fingers and hand from the sharpened material falling between the tool rest and the grinding wheel. Adjustable tool rest (*sic*) shall be set so that the distance between the grinding surface of the wheel and the tool rest is not greater than 1/8 inch. 30 cfr (*sic*) standard 56.14115(b) has been issued (1) time in a past inspection.

Cohen designated the gravity as reasonably likely to result in lost workdays or restricted duty, S&S and affection one person. He characterized the negligence as moderate. The proposed penalty is $362.

The Violation

[10] The requirement for unwarrantable failure as set forth above in discussion of Citation No. 6507102, applies hereinafter.

30 C.F.R. §56.14115(b) provides an adjustable tool rest be set so that the distance between the grinding surface of the wheel and the tool rest in not greater than 1/8 inch. Mize does not challenge the alleged violation but does the gravity of the violation. I, therefore find that the violation has been established by a preponderance of the evidence presented.

Significant and Substantial

Inspector Cohen testified that because the gap between the wheel and the rest exceeded the required 1/8 inch, it is reasonably likely that whatever is being grinded could fall between the wheel and the rest which would pull a hand against the grinding wheel. This would likely result in cuts and abrasions to the hand and fingers. Tr. 69-70. The grinder is used daily at Mize to sharpen the drill bits. Tr. 68. Mize established through cross-examination of Inspector Cohen that the drill bits that are sharpened on the grinder exceed 1/8 inch, in fact they measure from 3/4 inch to 1 inch in diameter. Tr. 105-106. The following exchange took place between Mr. Mize and Inspector Cohen with regard to the likelihood of an injury occurring as a result of this violation:

> Mize: Do you know what size most of the drill bits are:
> Cohen: They range anywhere from three-quarter and larger, I think.
> Mize: So the smallest one you know of is three-quarters an (*sic*) inch?
> Cohen: Yes, sir.
> Mize: So three-quarters of an inch cannot go into one-eighth of an inch, can it?
> Cohen: No.
> Mize: So it wouldn't be possible for the-for that to happen as you mentioned about the – you mentioned that the-the possibility of someone being injured would be-the way they're being injured was – is whatever you were drilling would fall in between that –between the grinder and the little rest?
> Cohen: That's correct.
> Mize: So three-quarters of an inch would be impossible to fall into an eighth, would it not?
> Cohen: I'm not gonna say impossible. It would be likely- unlikely, yes.
> Mize: Well, I don't think I could stick it through there. Could you?
> Cohen: Probably not.

Based upon the admission of Inspector Cohen that it would be unlikely, if not impossible, for the size of drill bits used by Mize to result in the type of injury cited, I find the Secretary has not met her burden of proving that this violation was S&S. The gravity of this violation is "unlikely" and non-significant and substantial. I will adjust the penalty accordingly.

Negligence

Inspector Cohen assigned moderate negligence to this citation because he found Lewis credible when he said he was unaware that the gap between the wheel and the rest exceeded the required measurement. Tr. 71. I find that based upon Lewis' being unaware of the condition and upon the fact that there is very little likelihood that it would cause an injury, that the negligence should be reduced to low.

5. Citation No. 6505711 (S-7)

Inspector Cohen issued this Section 104(b) citation on March 11, 2009 for failing to properly store oxygen cylinders. The citation reads as follows:

> A compressed oxygen cylinder was found stored at the east end of the quarry with the valve not protected by a cover. This condition exposed miners to serious injuries resulting from a broken valve releasing stored energy inside the compressed cylinder. Valves on compressed gas cylinders shall be protected by covers when being transported or stored and by a safe location when the cylinders are in use.

Cohen designated this violation as unlikely to result in an injury to one person and not S&S. However, the nature of an injury would be fatal and the result of high negligence. The proposed penalty is $807.00

The Violation

Cohen testified that the valve cap on one cylinder located near a crane was missing. The cylinder missing one cap was being stored in an upright position and was secured to a handrail and is pictured in S-7 pg 4. Tr. 73-74. Mize did not offer any evidence to challenge this citation. The violation has been established.

Negligence

High negligence means that the operator knew or should have known of the condition and took no action to correct, prevent or limit the exposure to the hazard. 30 C.F.R. §100.3(d). Lewis told Cohen when he found this condition that the tank had been uncapped for two days. For an injury to occur from this hazard the cylinder would have to either fall over and break the valve off or something would have to fall on top of the valve and break it off. That would turn the tank into a projectile. Tr. 73-74. He also stated that the cylinder had not been used on the day of the inspection but had been in use in the previous couple of days. Tr. 72. The manner in which they were secured to the handrail was proper and the fact that it was in an upright position made it unlikely that an injury would occur. Tr. 73. Cohen felt the negligence was high primarily due to the fact that the condition had been allowed to exist for two days according to Lewis. He found no mitigating circumstances.

No evidence was presented by the Secretary to establish whether the condition would have been discovered on a pre-shift examination before the cylinder was used again. There was also no evidence presented as to how the cylinder would fall or be struck by an object in such a way as to break off the valve when it was properly secured to a handrail at the top of the quarry. Cohen did state that there was oxygen in the tank but did not say how much was in it or how much pressure would be required to turn the tank into a projectile if the valve were broken off. I find that absent this information, it cannot be established that the negligence was high. I find that the fact that the

tanks were properly stored in an upright position making the occurrence of an injury unlikely to be a mitigating circumstance and find the negligence to be moderate.

6. *Citation No. 6505712 (S-8)*

This citation was issued by Inspector Cohen on March 11, 2009 and states:

The hoist hook on the Manitowoc 3900T Crawler Crane had a safety chain that was welded to the hook. Also, the lifting dog chains have wore (Sic) down into the saddle of the hook apprx. (sic) ¾ inch. The average granite blocks being lifted from the quarry weigh appx. (sic) 20000 lbs. This condition exposed miners to serious injuries in the event the hoist hook broke and dropped the lifted load. Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons. 30 cfr (sic) standard 56.14100(b) has been issued (2) times in past inspections.

The gravity of the violation was assessed as unlikely to cause an accident but would result in fatal injuries, not S&S, affecting one person and the negligence as moderate. The proposed penalty is $243.00

The Violation

The standard is set forth in the narrative portion of the citation. Cohen testified that the hook had been welded at the tip area where a homemade safety latch had been added. In order to properly weld a hook, the metal has to be heat treated, welded and then cooled down through a specific method otherwise the metal can become brittle and break. Tr. 75 and 77. The saddle area on the hook had been worn down by the dog chains. The grooves in the saddle were approximately 3/4 of an inch deep which was reducing the strength of the hook which was used several times per week to lift blocks weighing 20,000 pounds out of the quarry. Never had Inspector Cohen seen grooves this deep worn into a hook. Tr. 75-76.

Cohen found an injury would be unlikely because Lewis told him the crane hook had been in that same condition for two years. If it did fail, however, it could drop its load and strike a miner. Tr. 78.

Mize elicited through cross-examination that the inspector did not know if in fact the weld on the safety latch had been done in the proper manner or not. Tr. 108. Mize also attempted to establish that the grooves in the saddle had been worn by cable rather than dog chains as Cohen had never seen dog chains make indentations like those in the hook before. Tr. 109-111. I find the difference irrelevant.

I find that there is insufficient evidence presented by the Secretary to establish that the safety latch was improperly welded onto the hook by the inspectors' own admission. I further find that the Secretary provided no basis for the opinion that the strength of the hook was compromised by the grooves in the saddle area particularly in light of the fact that the equipment had been used in that condition several times per week for two years lifting 10 ton blocks. The photograph presented

depicts a hook that is extremely large and sturdy. The grooves do not appear to be particularly deep in comparison to the overall circumference of the hook. Ex. S-8 pg 4. There was also no evidence presented how the condition would affect one person. I cannot presume that the operator of the crane would be in a position to be injured if his load fell from the hook below him. There was no evidence presented that once a block is attached by cable or dog chains to the hoist, that there is anyone working below or anywhere near the hook who would be affected if the block fell. The Secretary has not met her burden of establishing this violation and it is hereby Vacated.

7. Citation No. 6505713 (S-9)

This citation alleges a violation of Section 56.6132(a)(4) of 30 C.F.R., the narrative section of which reads:

> The inside of the blasting caps magazine door contained (4) metallic carriage headed 5/16" bolts that secured the interior wood to the door. The magazine is located at the west end of the quarry and contained (25) 12' blasting caps. This condition exposed miners to serious injuries in the event the contents inside the magazine explodes (sic). Magazines shall be made of nonsparking material on the inside.

This violation was characterized as unlikely to cause injury, not S&S, of moderate negligence affecting one person who would be fatally injured if an accident did occur. The proposed penalty is $243.

The Violation

The standard requires that magazines be made of nonsparking material on the inside. The magazine, located within 100' of the parking area of the quarry contained metallic bolts on the inside of the door. The head of the bolts were exposed but located sufficiently far from the blasting caps stored therein to make an explosion unlikely. Tr. 79-81.

The parties stipulated that the magazine contained detonating charges capable of initiating an explosion. S-19. Because this safety standard imposes liability without fault, I find that it has been established and I find that the likelihood was appropriately assessed as unlikely.

The Negligence

Moderate negligence was assessed because Lewis told Cohen he was unaware that the bolts were exposed on the door of the magazine. He is the only one with keys to the magazine so no one else would have known of the violation. Tr. 81. It also follows, however, that Lewis must have been the one to create the hazardous condition. There was no evidence presented as to how long this condition existed, or how often Lewis would have opened the magazine or how recently to determine what opportunity he had to remediate this condition. There is another magazine on the property which did not have the same condition. Tr. 82. Under these circumstances, I find considerable mitigating circumstances to support the level of negligence as moderate.

8. . *Order No. 6505714 (S-10)*

This is the Section 104(d) order Inspector Cohen issued for the missing handrails along the 45' pathway located on the bottom ledge of the quarry where the bridge was eventually installed. The narrative portion reads:

> Approximately 45' of handrails was(sic) not provided next to the elevated walkway at the south end of the quarry next to the wood bridge. The walkway is right beside the quarry ledge and is appx. (sic) 2' to 3' wide. Miners use the walkway daily to access the current working ledge. This condition exposed miners to fatal injuries from a fall of appx. (sic) 6' to the water in the bottom of the quarry. The water is appx. (sic) 3' deep. Clayborn Lewis (Foreman) engaged in aggravated conduct constituting more than ordinary negligence in that he was aware the handrails were not provided and allowed the miners and himself (sic) to access the elevated walkway next to the south end quarry ledge. This violation is an unwarrantable failure to comply with a mandatory standard.

The order cites the gravity as reasonably likely to produce a fatal injury, S&S, affecting one person and the result of a high degree negligence and an unwarrantable failure. The proposed penalty is $4,440.00.

The Violation

The mandatory standard provides in relevant part that elevated walkways shall be provided with handrails, and maintained in good condition. 30 C.F.R. §56.11002. The Secretary introduced photographs S-10 pg 4 – 8 which clearly depict the uneven, cluttered and narrow elevated pathway lacking any type of handrail.

Mize contests the violation on two grounds. First, the condition had existed in January and was not cited by Mayer when he made his inspection and issued the safe access citation in the same area of the mine. Secondly, that the miners were supposed to take a different route that was 12' from the edge. Tr. 167-168. Neither of these arguments is persuasive on the issue of whether the mandatory standard was violated. The Secretary cannot be estopped from enforcing her safety regulations and therefore Mize's first argument fails. *See U.S. Steel Company, Inc.,* 115 FMSHRC 1541 (Aug. 1993). As to the testimony by Lewis that the miners were supposed to use a different route to access the working ledge, it is contradicted by his own statement to Mitchell in which he confirmed the photographs accurately depict the walkway used by the miners to travel to the working ledge. He further agreed that the pathway was approximately six feet above the quarry floor and that it was worn down and had numerous trip, slip and fall hazards on it. S-15. The statements given to Mitchell by Almond and Pass also contradict Lewis' testimony and support the observations of Inspector Cohen. S-16 and 17.

I therefore find based upon a preponderance of the evidence that the mandatory safety standard has been violated.

Significant and Substantial

As previously stated, the bottom ledge was approximately six feet above the quarry floor which could have anywhere from one to three feet of water in it depending upon the amount of rainfall. The pathway was narrow and littered with all types of debris and loose rocks with several elevation changes posing serious trip and fall hazards that could result in a fall onto the floor below. There was a possibility of striking rocks or other objects on the quarry floor or drowning if a fall occurred. Tr. 87-88. There is no doubt that the condition created a distinct safety hazard with a reasonable likelihood that it would result in an injury if unabated and a reasonable likelihood that the injury would be of a reasonably serious nature. This violation was properly assessed as S&S.

Unwarrantable Failure

Cohen determined that this violation was also an unwarrantable failure to comply with the mandatory standard because it had been allowed to exist for seven days uncorrected and it was patently obvious to management. Tr. 87-88. He assigned high negligence to the violation for these reasons.

I disagree with the inspector's assessment that this was an unwarrantable failure to comply with the safety standard. While the length of time the violation existed and that management was aware of the condition can be determinative factors in finding a violation is unwarrantable, I do not find that alone is sufficient in this case to say the conduct of the operator constituted more than ordinary, albeit high, negligence. As the Commission stated in *Emery Mining, Supra,* if a finding that the operator knew, or should have known of the condition is the basis for determining an unwarrantable failure, every ordinary negligence case would be unwarrantable. There needs to be additional aggravating factors to elevate ordinary negligence to the level of reckless disregard, intentional misconduct, indifference or a serious lack of reasonable care. Such factors may be the length of time the condition existed, the extent of the violation, the degree of danger posed or whether the operator was on notice that greater efforts were necessary for compliance. *Lopke Quarries Inc., Supra.*

I found the violation in Citation No. 6505709 to be unwarrantable because there, the two miners were operating a drill 40' above the quarry floor without fall protection. The vibrations from the pneumatic drill coupled with the extreme height presented an extremely high degree of danger. Further aggravating the situation was the fact that both Mize and Lewis were watching this occur but were too busy discussing production to notice or care. The condition presented in Citation No. 6507104 which I found to be an unwarrantable failure was aggravated by the fact that the miners had to cross between two ledges eight feet off the ground by walking sideways on a 15" wide path for a distance of four feet. Management's attitude was that the miners were sufficiently experienced to be able to accomplish this balancing act for the number of days that the condition existed.

With respect to this violation, however, the situation is sufficiently different. The inspector found that it was reasonably likely, not highly likely that a miner would trip on the path, fall over the edge and down to the floor below. The path was two feet wide which is sufficiently wide for someone to walk in a normal forward-facing manner. The miners were not performing any work

while traveling this route twice a day and there was nothing to divert their attention along the way. The danger posed by this condition, therefore, was not of such grave concern that a failure to address it constituted aggravated conduct. Although Mize's argument that the condition had not been cited by Mayer in January is not a defense to the violation, it does militate against a finding that Mize was on notice that greater efforts were necessary to comply with the standard. Mayer conducted a thorough inspection of this bottom ledge area and issued two citations and one imminent danger order. The condition of the pathway was the same then as it was in March. Mize had at least some reasonable basis for their belief that the bottom ledge was made safe when they abated Mayer's citations and order. The conduct of the operator here is not reckless, intentional or so indifferent to find that it rises above ordinary neglect. I note also, that Inspector Mayer assessed only moderate negligence on Citation No 6507104 when a miner was operating a pneumatic drill within one foot of the edge on this bottom ledge without fall protection. The gravity of that violation was highly likely and yet, he did not believe the conduct of the operator in that more serious violation was unwarrantable, and I agree.

A finding of high negligence is supported by the evidence; the assessment of unwarrantable failure is not. The penalty shall be adjusted accordingly.

9. Order No.6505715 (S-11)

This Section 104(d) order was issued for a violation of the safe access standard 30 C.F.R. §56.1101. The citation issued by Cohen states a set of stairs at the south end of the quarry did not have a handrail. In order to step off the ladder the miners had to "twist their bodies around the side of the stairs to access the ledge above" where there were various trip and fall hazards. Tr. 89-91. This upper working ledge is elevated eight feet above the quarry floor thereby necessitating fall protection to ensure safe access to the work area.

Inspector Cohen designated this condition as S&S, an unwarrantable failure to comply with the standard, reasonably likely to produce a fatal injury and the result of a high degree of negligence. The proposed penalty is $4,440.00.

Mize offered no evidence to contest this violation. The Secretary offered photographs of the condition. S-11 pgs 4 and 5. Interestingly, one photograph shows a second ladder in the background that does have handrails on both sides which indicates to me that the operator was well aware of the need for them. S-11 pg 7. Based upon the unchallenged testimony of the inspector and the photographs of the ladder and the condition of the upper ledge, I find the violation has been substantiated.

Significant and Substantial

Had this condition not been abated, it was reasonably likely that during the course of continued normal mining operations a miner would trip and fall from a height of eight feet thereby sustaining serious, if not fatal, injuries in Cohen's opinion. Tr. 90-92. Cohen testified that management was aware of the condition and that Lewis had told him that he used the ladder himself. Tr. 93. Cohen's notes indicate that Lewis informed him the ladder

was put into use in that location eight days prior to the inspection. S-11 pg 3.

Both Lewis and Mize informed Mitchell that the ledge was normally not cluttered with loose rocks. Mize stated that they had blasted three or four days prior to the inspection and had not gotten around to cleaning up the debris. S-14 and 15. The ladder was tied off at the top and anchored at the bottom. The miners kept three-point contact on the ladder at all times and the side on which they dismounted was clear of debris, Mize said. S-14.

Almond and Pass told Investigator Mitchell that the ledge was typically cluttered. Almond added that they never have time to clean it up because management always wanted them to focus on production. S-16. Pass said that he would "just try to clean a little walk way" to get through. S-17. These statements convince me that the condition was not recently created and that one side of the ledge was not kept clear of debris as Mize stated if the miners had to clear their own path to make their way through to the work area.

It is not difficult to imagine that a miner could lose his balance or misstep while climbing the ladder. Without a handrail to grab onto, there would be a substantial likelihood of falling. The risk of a miner losing his footing when twisting around the top of a ladder, stepping onto the debris strewn ledge and falling, is also readily apparent. A fall from a height of eight feet to a hard granite floor would cause serious (or fatal) injuries. The *Mathies* criteria are satisfied.

Unwarrantable Failure

Cohen testified that he designated this violation as unwarrantable for the same reasons he assessed it as S&S. Tr. 93. What convinces me that this was an unwarrantable failure to comply with a mandatory standard, however, is found in his notes. In them, he states that the handrails on this ladder had been missing for approximately one month. The ladder had been in its current location for eight days at the time of the inspection and was used daily by the miners according to Lewis. S-11 pg. 3. This tells me two things. First, that the operator was aware of the need for the handrails on the ladder. Secondly, that they had more than ample time to reinstall the handrails to make this ladder safe before putting it into service and did not do so. The comment by ledge man Almond, that he didn't have time to clear the ledge because management wanted them concentrate on production underscores Mize's complete indifference and reckless disregard for the safety of its miners.

10. *Citation No. 6505716 (S-12)*

This alleged violation was cited by Inspector Cohen on March 12, 2009. The citation alleges:

The 1" air hose connections, for the plug drills and jack hammer, were not equipped with a safety chain or other suitable locking device. The air tools are used daily at the current working ledge. This condition exposed miners to cuts and abrasions to the body in the event of a (sic) air hose connection failure.

It is assessed as reasonably likely to cause an injury resulting in lost workdays or restricted duty, S&S and the result of moderate negligence by the operator. The proposed penalty is $362.

The Violation

The standard, 30 C.F.R. §56.13021 provides "safety chains or other suitable locking devices shall be used at connections to machines of high-pressure hose lines of ¼-inch inside diameter or larger, and between high-pressure hose lines of ¾-inch inside diameter or larger, where a connection failure would create a hazard."

Inspector Cohen found 1 inch diameter air hoses that connect to plug drills and jackhammers that were missing locking connections. The working pressure of these air hoses is 120 psi. In the event of a connection failure, the air pressure would cause the hose to whip around producing cuts and abrasions to the miner operating the equipment as the connector is close to the body when in use. S-12 pg 3 and Tr. 96-97. Both miners were operating the jackhammer when Inspector Cohen arrived. They use these tools on a daily basis. Tr. 96. The typical air hose is secured by pushing the hose coupling into the equipment coupling and twisting it. A pin is then used to connect both couplings and prevent a connection failure. The pin, however, was missing making it reasonably likely to result in a connection failure as described. The inspector was familiar with the types of injuries caused by such a failure from having seen and been involved in such an incident. Tr. 97.

Mize offered no evidence to contest this violation. I find, based upon the inspector's testimony and notes that it has been established.

Significant and Substantial

The tools in question are used daily in the quarry thereby increasing the likelihood of a connection failure through repeated use. It would have been helpful if Inspector Cohen had provided information regarding how many pounds of force is exerted by a connection failure of a 1" diameter hose at 120 psi or under what conditions a connector failure would occur. However, I rely on the inspector's personal experience with this type of accident, and his training as an MSHA inspector, as a credible basis for his opinion. I concur that under continued normal mining operations, it is reasonably likely that this hazard would have resulted in cuts and abrasions which would be reasonably serious in nature.

Negligence

Lewis told Cohen that he was unaware that there was not a locking device on these hoses in mitigation of the violation. The ledge men set up and use these tools, not Lewis. Tr. 98. There is no evidence of record as to how long the condition existed. Because Lewis is primarily responsible for the safety of the miners and for making the pre-shift examinations of all equipment and areas of the mine, he should have known of this condition. Based upon the overall lack of concern for safety in the mine exhibited by Mize, it is likely that this condition was not a recent development. Taking all of these factors into consideration, I conclude that this violation was the result of moderate

negligence.

11. *Citation No. 6505717 (S-13)*

On March 12, 2009, Cohen issued this Section 56.12028 citation alleging that a continuity and resistance test was not performed on the Sullair air compressor model #25-100L immediately after installation six weeks prior to this inspection. The gravity was marked as unlikely to result in a fatal accident affecting one person with a moderate degree of negligence. The proposed penalty is $190.00.

The Violation

The mandatory standard requires that continuity and resistance of grounding systems shall be tested immediately after installation, repair and modification, and annually thereafter. 30 C.F.R. §56.12028.

Cohen testified that he was told by Lewis that this compressor had been installed six weeks before the inspection. Therefore there should have been a report of a continuity and resistance test done within that same time period. Tr. 100-101. Lewis testified that the compressor had been installed six years ago and that Cohen misunderstood him. Tr. 168. Cohen confirmed that when he asked Lewis for the new report, Lewis provided him with the prior year's annual test report. Tr. 102. Based upon these facts, it is impossible to find that the compressor was only six weeks old when the test report in Lewis' possession for this very piece of equipment was dated one year earlier. The citation is Vacated.

III. Penalties

A. Penalties under Section 110(i) of the Act

The Mine Act delegates the duty of proposing civil penalties for violations to the Secretary. 30 U.S.C. §§815(a) and 820(a). When an operator challenges the Secretary's proposed penalties, the Secretary petitions the Commission to assess them. 29 C.F.R. §2700.28. Once petitioned to assess the penalties, the Commission delegates the authority to the administrative law judges to assess the civil penalties de novo. Section 110(i), 30 U.S.C. §820(I). The administrative law judge is required by the Act to consider the following six statutory criteria in her assessment of the appropriate penalties:
(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).

The penalty assessment for a particular violation is within the sound discretion of the administrative law judge so long as the six statutory criteria and the deterrent purpose of the Act are given due consideration. *Sellersburg Stone Co*., 5 FMSHRC 287, 294 (Mar. 1983), *aff'd,* 736

F.2d 1147 (7th Cir. 1984); *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The parties stipulated to facts which affect the assessment of penalties. They are that the operator is a small mine reporting 10,042 annual hours of production in 2009, and that Mize demonstrated good faith in abating the cited citations. The negligence and gravity of the violations herein have been previously discussed. I find several of the penalty amounts proposed by the Secretary to be out of proportion to the size of the mine and the facts presented.

Mize has raised the issue of an inability to remain in business if ordered to pay the proposed penalties. Corporate tax returns for years 2007 through 2009 were provided and considered. The Secretary argues that the tax records alone are not sufficient evidence of an inability to continue in business under *Spurlock Mining Co., Inc.*, 16 FMSHRC 697 (April 19914). Further she points out that Mize has increased the number of employees between 2007 and 2009 and has reported substantial receipts in each of these years. And, finally, that Mize has been assessed $105,996.90 in penalties between 2001 and 2010 which have become final orders, $99,710.90 of which are delinquent. Sec'y's Post Hearing Brief at 62-63.

I have considered the criteria in 110(i) in view of the evidence of record in making my findings herein. The following penalties well not affect the operator's ability to continue in business and are appropriate under the Act:

1. Citation No.	6507102	$4,440.00
2. Citation No.	6507104	$2,976.00
3. Order No.	6505709	$10,000.00
4. Citation No.	6505710	$100.00
5. Citation No.	6505711	$250.00
6. Citation No.	6505712	Vacated
7. Citation No.	6505713	$243.00
8. Order No.	6505714	$3,000.00
9. Order No.	6505715	$4,440.00
10. Citation No.	6505716	$362.00
11. Citation No.	6505717	Vacated
Total:		$25,811.00

B. Penalties under Section 110(c) of the Act

Section 110(c) of the Act which provides in relevant part that whenever a corporate operator violates a mandatory health or safety standard or knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

The Commission has interpreted the meaning of the word "knowingly" as knowing or having reason to know. "A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence." *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 68 F. 2d 632 (6th Cir. 1982), *cert denied*, 461 U.S. 928 (1983). To clarify under what circumstances an individual may be personally liable for penalties, the Commission stated "a corporate agent in a position to protect employee safety and health has acted 'knowingly,' in violation of section 110(c) when, based upon facts available to him, he either knew or had reason to know that a violative condition or conduct would occur, but he failed to take appropriate preventative steps." *Secretary of Labor v. Roy Glenn agent of Climax Molybdenum Co.,* 6 FMRSHR 1583, 1586 (July 1984). The level of proof required of the Secretary to sustain personal liability is more than the assertion that, at the time of assignment of a specific task, the task could have been performed in either a safe or unsafe manner and the agent failed to prevent the miner from employing the unsafe one. The agent has the obligation to prevent those hazards which he or she has reason to know will occur. *Roy Glenn* at 1588.

The proposed special assessments are based upon the following citations in the stated amounts: 1) Citation No. 6507102, $3600.00; 2) Order No. 6505709, $6000.00; 3) Order No. 6505714, $4000.00; and, 4) Order No. 6505715, $4000.00. They have been assessed against both Robert Mize and Clayborn Lewis who have stipulated to being "agents" of Mize Granite Quarries, Inc. under the provisions of 110(c).

In *Sunny Ridge Mining Co*., 19 FMSHRC 254, 272 (Feb. 1997), the Commission held that "judges must make findings on each of the [statutory penalty] criteria [of section 110(i)] as they apply to individuals." The "relevant inquiry with respect to the criterion regarding the effect on the operator's ability to continue in business, as applied to an individual, is whether the penalty will affect the individual's ability to meet his financial obligations . . . [w]ith respect to the 'size' criterion, . . . as applied to an individual, the relevant inquiry is whether the penalty is appropriate in light of the individual's income and net worth." *Ambrosia Coal and Construction Co*., 18 FMSHRC 819, 824 (May 1997) (*Ambrosia I*). The Commission further held that, if an individual is married, the judge should consider the individual's share of the household net worth, income, and expenses. *Ambrosia Coal & Construction Co*., 19 FMSHRC 381, 385 (April 1998) (*Ambrosia II*).

Robert Mize raised a defense of an inability to pay the penalties as a small business owner fighting to stay in business. Neither party provided evidence at the hearing pertaining to the 110(i) penalty criteria for Mize or Lewis. I therefore issued an Order dated March 4, 2011 reopening the

record for 10 days for submission of relevant evidence by the Secretary, Mr. Mize and Mr. Lewis. The Secretary and Mr. Mize responded. Mr. Lewis did not. Under the circumstances, I find that making additional inquiries and delaying the case further would not be fruitful. Instead I make the finding that the penalties I assess will not adversely affect the ability to meet individual financial obligations of Mr. Lewis. *See William A Hooten, Jr.* 21 FMSHRC 1083, 1091 (Oct. 1999) (ALJ).

The Secretary provided the personal income tax returns for the Robert Mize for years 2007, 2008 and 2009. S-22-24. The Secretary stipulated that Mize has not had any injuries or lost workdays on the site and was the recipient of two safety awards. She also stipulated that each of cited conditions was rapidly abated in good faith. She argues that Mize has sufficient income to support the proposed penalties based upon the income tax returns provided.

Also undisputed is the fact that Robert Mize is the owner/operator of Mize Granite Quarries, Inc. and Mize Granite Sales, Inc. I consider the overall deterrent purpose of the Act and that fact that Mize has been assessed rather significant 110(i) penalties for the violations which will also be paid by Mr. Mize. I have taken this overlapping effect of the penalties into account in the assessment of the personal penalties. I find the penalties proposed by the Secretary are disproportionate to the size of the mine vis a vis the income of the agents, and their lack of personal histories for previous violations.

The tax returns document that Robert Mize's wife receives Social Security disability payments for a disabling medical condition. He also supports two adult daughters and one grandson whom he claimed on this income tax as dependents. I do not take into consideration those expenses incurred on behalf of his daughters or grandson as legal obligations or within the Commission's rulings in *Ambrosia I or II* in determining the appropriate amount of penalties.

1. Penalties against Robert Mize

I have previously stated my findings with respect to gravity and negligence. Based upon the evidence of record, I assess the following penalties:

a. Citation No. 6507102 $500.00

b. Order No. 6505709 $500.00

c. Order No. 6505714 Dismissed

This violation was of significant and substantial gravity resulting from moderate negligence but not an unwarrantable failure as discussed previously. For the same reasons I found this violation to be of a lesser degree of negligence than that assessed by the Secretary, I find that a 110(c) penalty is not appropriate.

d. Order No. 6505715 $500.00

Total:	$1500.00

2. Penalties Against Clayborn Lewis

Taking into account that Mr. Lewis is a paid employee of Mize, and not the owner, but otherwise for the same reasons set forth above regarding Mr. Mize, I assess the following penalties.

a. Citation No. 6507102	$300.00
b. Order No. 6505709	$300.00
c. Order No. 6505714	Dismissed
d. Order No. 6505715	$300.00
Total:	$900.00

ORDER

I. Citation Nos. 6505712 and 6505717 are vacated. Citation Nos. 6507102, 6507104, 6505710, 6505711, 6505713 and 6505716 are affirmed and Mize Granite Quarries is directed to pay the total penalties of $8,871.00, for the violations charged therein within 40 days of the date of this decision. Order Nos. 6505709, 6505714 and 6505715 are affirmed, and Mize Granite Quarries is directed to pay total penalties of $16,940.00 for violations charged therein within 40 days of the date of this decision.

II. The charge herein against Robert W. Mize under Section 110(c) of the Act, based upon Order No. 6505714 is dismissed. The charges against Robert W. Mize based upon Citation No. 6507102 and Order Nos. 6505709 and 6505715 are affirmed and he is directed to pay total penalties of $1500.00 within 40 days of the date of this decision. The charge herein against Clayborn Lewis under Section 110(c) of the Act which is based on the violation charged in Order No. 6505714 is hereby dismissed. The charges herein against Clayborn Lewis based on the violation charged in Citation No. 6507102 and Order Nos. 6505709, and 6505715 are hereby affirmed and Clayborn Lewis is directed to pay total civil penalties of $900.00 within 40 days of the date of this decision.

Priscilla M. Rae
Administrative Law Judge

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