FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
1331 Pennsylvania Ave, N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9900 / FAX: 202-434-9949

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Petitioner,	:	Docket No. CENT 2011-1129-M
	:	A.C. No. 23-02237-262205-01
	:	
v.	:	Docket No. CENT 2011-1130-M
	:	A.C. No. 23-02237-262205-02
	:	
	:	Docket No. CENT 2011-1131-M
UEHLIN QUARRY,	:	A.C. No. 23-02237-262205-03
Respondent.	:	
	:	Docket No. CENT 2012-0307-M
	:	A.C. No. 23-02237-276686
	:	
	:	Mine: Uehlin Underground

DECISION

Appearances: Amanda K. Slater, Office of the Solicitor, U.S. Department of Labor, Denver, CO, for Petitioner;

Stephen Uehlin and John Uehlin (unrepresented), for Respondent.

Before: L. Zane Gill, U.S. Administrative Law Judge

These cases arise from a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Uehlin Quarry at its stationary rock crushing plant near Amazonia, MO, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or "Act") They comprise eight violations (six citations and two orders) distributed among the four captioned dockets, and the Secretary proposed a total penalty of $12,269.00. The parties presented testimony and documentary evidence at a hearing held in Kansas City, MO, commencing on December 11, 2012.

Procedural History

On oral motion made at the hearing, and with the consent of the respondents, Docket CENT 2012-0307, consisting of Citation No. 8619342, was consolidated for hearing with the

other dockets listed above. (Tr. 7:11-8:1) Docket CENT 2011-1129 consists of Citation No. 8619348, CENT 2011-1130 covers Citation Nos. 8619345 and 8619343, and CENT 2011-1131 comprises Citation Nos. 8619344, 8619346, and 8619347.

Stipulations

Uehlin Quarry, ("Uehlin Quarry" or "Uehlin") operates a stationary surface rock crushing facility (the "quarry") near Amazonia, MO. (Tr. 28:22-29:3) The quarry is subject to regular inspections by the Secretary's Mine Safety and Health Administration ("MSHA") pursuant to section 103(a) of the Act and spot inspections, 30 U.S.C. § 813(a). Uehlin Quarry is the operator of the quarry (Response to Request for Admission, No. 8), the quarry's operations affect interstate commerce (Response to Request for Admission, No. 9), and it is subject to the jurisdiction of the Mine Act. (Tr. 8:1-9:1; Response to Request for Admission, No. 6) The Administrative Law Judge has jurisdiction over these proceedings, pursuant to Section 105 of the Mine Act. (Uehlin Quarry's Responses to the Secretary's First Interrogatories, Response to Request for Admission, No. 7) Uehlin Quarry, is a small, family owned, managed, and operated enterprise.

Introduction

On June 9, 2011, Ronald C. Buckler ("Buckler" or "victim"), a truck driver[1] working on one of Uehlin's rock crushers, was grievously injured when the heavy steel pry rod he was using to dislodge rocks jammed inside the feeder port to the crusher's impeller unit was thrown back at him, causing severe lacerations to the right side of his neck, fracturing his cervical spine (Ex. S-2), and resulting in permanent paralysis. (Ex. S-24; Tr. 36: 24-37:14)

Uehlin did not contact MSHA within 15 minutes. John Uehlin decided that it was more important to attend to the victim's care and to assure that emergency responders could quickly be directed to the quarry site than to task anyone doing one of those two things to make the call to MSHA. (Tr. 188:17-21; 219:3-17)

The Citations and Orders

Inspector Dale Coleman ("Inspector Coleman" or "Coleman") is an MSHA Health and Safety Inspector based in the Rolla North, Missouri field office. (Tr. 25:9-12) He was assigned to travel to the scene of the accident to conduct an investigation. Some of the citations and orders were issued as part of his investigation into the accident and injury to the victim and the rest were issued for alleged violations observed during the course of the accident investigation – the "spot" investigation. (Tr. 67:21-69:2)

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[1] A truck driver is considered a "miner" for purposes of this decision. 30 CFR §48.22(a)(1) See, *Sec of Labor (MSHA) v. Lehigh Southwest Cement,* 2011 WL 7463296 (FMSHRC) (Dec. 2011) (ALJ Paez).

- **Order No. 8619341** (Ex. S-1, the "103k order" or "k order") was issued under the authority of Section 103(k) of the Mine Act to preserve the accident scene to facilitate investigation of the accident.[2] (Tr. 50:18-51:8)
- **Citation No. 8619342** (Ex. S-3; Docket CENT 2012-0307) alleges a 104(d)(1) violation of 30 CFR § 57.14105, which regulates procedures during repairs or maintenance and requires that before any repair or maintenance is done on machinery or equipment, the equipment must be powered off and blocked against hazardous motion. (Tr. 68:11-69:2) This citation is characterized as reasonably likely to be fatal, potentially affecting a single miner, significant and substantial ("S&S"), arising from high negligence, and constituting an unwarrantable failure to comply with a mandatory health or safety standard ("unwarrantable failure").
- **Citation No. 8619343** (Ex. S-4; Docket CENT 2011-1130) alleges a violation of 30 CFR § 57.15005, which requires that safety belts and lines be worn where there is a fall danger. (Tr. 114:6-115:6) This citation is characterized as reasonably likely to be fatal, potentially affecting a single miner, S&S, arising from high negligence, and constituting an unwarrantable failure.
- **Citation No. 8619344** (Ex. S-6; Docket CENT 2011-1131) alleges a violation of 30 CFR § 57.14107(a), which requires that moving machine parts such as gears, sprockets, chains, pulleys, etc., be guarded to prevent contact. (Tr. 124:25-125:13) This citation is characterized as reasonably likely to result in permanent disability, potentially affecting a single miner, S&S, and arising from high negligence.
- **Order No. 8619345** (Ex. S-9; Docket CENT 2011-1130) alleges a 104(d)(1) violation of 30 CFR § 57.11012, which requires railings, barriers, or covers to protect any opening near a travelway through which a person or material could fall. (Tr. 131:22-132:6) This order is characterized as reasonably likely to be permanently disabling, potentially affecting a single miner, S&S, arising from high negligence, and constituting an unwarrantable failure.
- **Citation No. 8619346** (Ex. S-11; Docket CENT 2011-1131) alleges a violation of 30 CFR § 57.12016, which requires that powered equipment be powered off and locked and tagged out before any mechanical work is done on it. (Tr. 140:8-25) This citation is characterized as reasonably likely to be fatal, potentially affecting a single miner, S&S, and arising from high negligence.
- **Citation No. 8619347** (Ex. S-13; Docket CENT 2011-1131) alleges a violation of 30 CFR § 48.29, which requires that a mine operator keep a copy of form 5000-23 for each miner on file for examination, showing that the miner has received MSHA training. (Tr. 148:20-149:3) This citation is characterized as having no likelihood of causing injury[3], but arising from high negligence.
- **Citation No. 8619348** (Ex. S-14; Docket CENT 2011-1129) alleges a violation of 30 CFR § 50.10(b) which requires that a mine operator notify MSHA within 15 minutes of

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[2] The 103k order does not give rise to a penalty or other enforcement consequences.

[3] Coleman described this citation a "paperwork violation." (Tr. 156:6-8)

an injury at a mine site which has a reasonable potential to cause death. (Tr. 153:4-10) This citation is also characterized as having no likelihood of causing injury ("paperwork violation"), but arising from high negligence.

Summary of Events

On June 10, 2011, John Uehlin – co-owner,[4] operator, and manager of Uehlin quarry (Tr. 36:7-10; Response to Request for Admission, No. 11.3) – and three miners,[5] including Buckler, were working to clear rock jams in the vibrating hopper that feeds one of the rock crushers on the Uehlin quarry site. (Tr. 40:22-41:4; 159:23-160:3; Response to Request for Admission, No. 11.4) At various times, John Uehlin[6] and the miners stood inside the slant-walled hopper as they worked with pry bars and other tools to free up rocks that got hung up at the opening from the hopper into the crusher impeller. (Tr. 21:4-9; 197:22-198:1; 211:24-212:9) The hopper dumped rock into the impeller unit that fed it into the crusher itself, located some 12 feet away. (Tr. 23:17-24:1) The vibrator unit at the bottom of the feeder hopper was turned off, but the crusher and the impeller were left running. (Tr. 20:10-14; 55:24-56:13; 57:17-20; 204:3-21)[7] The impeller is the part that feeds rock into the crusher breaker bars where it is crushed. It spins at 500 rpm. (Tr. 56:19-57:10)

A waist-high support or barrier beam stretched across the nine foot width of the hopper (Tr. 58:11-15), a few feet away from the impeller intake opening. Its purpose was to keep miners working in the hopper from falling toward the crusher intake. (Tr. 212:13-24) The men stood behind the beam and leaned against it as they worked with their pry bars and other tools to free up the rock that periodically hung up in the impeller intake opening. (Tr. 40:22-41; 213:1-5)[8]

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[4] Steve Uehlin was on site but not at the immediate scene of the accident when it happened. (Tr. 45:12-20)

[5] Mike Raines, a truck driver, was standing next to Buckler in the primary crusher hopper. (Tr. 55:8-5)

[6] When the accident occurred, John Uehlin was standing on a catwalk above the feeder hopper. (Tr. 198:3-20; 213:6-15)

[7] The impeller was left running as the miners cleared the jam, according to Mike Raines, because if they shut it off it might choke the crusher itself and it would not start. (Tr. 61:25-62:6) A curtain of heavy chain hung at the entry to the crusher intake intended to keep rocks from being flung out of the crusher impeller. (Tr. 207:16-208:9) It is not certain whether the chains were in place on the day of the accident or had been thrown up on the intake and out of the way. (Tr. 167:13-168:6; 208:10-17)

[8] It is disputed whether one or more of the miners were standing on the cross beam as they worked with pry bars to clear the rock jam in the crusher impeller. In light of the totality of

At approximately noon on June 10, 2011, Buckler was nearly killed when the eight foot long steel pry bar he was using to dislodge jammed rocks (Tr. 41:11-17; 58:16-60:8) either came in contact with the running impeller unit or was propelled back by a rock that had been thrown out of the impeller. (Ex. S-19, p.3; Tr. 42:6-24; 46:21-47:4; 168:21-169:7) The bar hit Buckler on the right side of his neck and caused the injuries summarized above.

The men on the scene recognized that Buckler was not conscious or breathing and started administering CPR and first aid. (Ex. S-24, p. 3; Tr. 36:24-37:14; 47:5-13; 103:11-24) Buckler revived to the point where they could tell that he was unable to move or speak. (Tr .98:15-16) They were able to communicate with him by asking questions to which he responded by blinking his eyes. (Tr. 36:24-37:14)

Casey Uehlin, John Uehlin's daughter and scale house employee (Tr. 46:6-8; 218:20-22), called 911. (Tr. 218:9-16) She did not know that she had to call MSHA within 15 minutes. (Tr. 220:12-18) There were emergency procedures posted in the scale house, but Casey did not know about them. (Tr. 219:22-220:4) There was nothing posted in the scale house about the 15 minute rule. (Tr. 220:6-11) John Uehlin was aware that someone was obligated to call the accident in to MSHA within 15 minutes, but he made the deliberate decision not to make the call immediately in order to focus all resources on caring for Buckler until the emergency responders arrived and to make sure that they did not get lost on the way to the scene. (Tr. 219:3-17) Stephen Uehlin directed the EMT's from the highway to the accident scene. (Tr. 105:19-106:2) Casey stayed in the scale house to handle the phones during the response to the accident. (Tr. 218:23-219:1) There was no one else, management or other, who was not in some way either attending directly to Buckler or directing traffic or manning the phones.

The accident report later filed by John Uehlin shows the time of the accident as 12:00 pm. (Ex. S-23) The EMT report estimates the time of accident as12:15 pm and shows that the 911 call was received at 12:19 pm. The ambulance arrived at the scene at 12:31 pm. (Ex. S-24; Tr. 96:11-22) Buckler was put on a stretcher at 12:55 pm. (Tr. 113:7-13) Stephen Uehlin called MSHA to report the accident at 12:58 pm. (Ex. S-15; Tr. 155:23-156:8; 217:24-218:8) Buckler was loaded onto a life-flight helicopter at 1:05 pm. (Tr. 104:7-105:10)

Inspector Coleman was assigned to investigate the accident. (Tr. 25:3-15; 30:16-23) It was his first accident investigation. (Tr. 169:23-25) He arrived at the scene on June 10, 2011, the day after the accident. (Tr. 34:9-17) He viewed the scene and took evidence photos. (Tr. 31:25-32:18; 38:12-18; 44:12-45:8) No one was available for interviews, so Coleman returned to the quarry on June 14, 2011, to interview witnesses, including Matt Foster and Mike Raines. (Tr. 54:12-55:7)

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the evidence, it is of little additional import whether they were or not. (Tr. 66:8-10; 108:20-109:5; 109:20-110:22; 112:2-24; 205:5-22)

Analysis

John and Stephen Uehlin's defense is based on the following beliefs and facts:[9]

- Uehlin Quarry is a small, family-owned, -managed, and -operated business with only a few employees. (Tr. 221:13-222:1; 227:18-228:3)
- The quarry operated only part of the year. It was on "intermittent" status with MSHA at the time of this incident and was inspected only twice a year. (Tr. 29:6-13)
- The Uehlin brothers operated the quarry in a manner they believed to be consistent with the way other quarries in their area were operated. (Tr. 20:19-21:1; 23:19-21; 210:9-25)
- The Uehlin brothers worked side-by-side with the miners and did not expect them to do anything they would not do themselves or in a manner they were not comfortable doing themselves. (Tr. 21:23-24; 198:3-8; 199:25-200:14; 212:5-9)
- The Uehlin brothers had operated their quarry for many years essentially the same way it was being operated on the day of the accident and never had a serious accident. (Tr. 21:2-4; 85:14-18;191:5-12; 199:23-200:14)
- The Uehlin brothers were co-owners and managers of the Uehlin quarry. Both men supervised miners. (Tr. 221:13-222:2)
- Because the operation was so small, management always knew where everyone was and what they were doing. (Tr. 229:4-11)
- It was common practice for miners to stand in the hopper as they worked to free up rocks jammed in the impeller input. (Tr. 198:21-199:22)
- The Uehlins did not consider using a pry bar to free up rock jams in the impeller intake to be an unsafe practice. (Response to Request for Admission, No. 11.8)
- The miners had been trained to hold the pry bar away from their body as they worked to free up rock jams in the hopper. (Tr. 57:21-25) According to John Uehlin, if Buckler had been standing in the right place and using the pry bar as instructed, the bar would have flown harmlessly past him.
- Just before the accident, Uehlin reminded Buckler to put his safety glasses on and stand to the side as he used his pry bar. (Tr. 21:11-22)
- The Uehlins concede that it was a horrible accident, but maintain it was not their fault. (Tr. 23:17-19)
- Considering the circumstances, John Uehlin decided not to immediately call MSHA to report the accident. He felt it more important to attend to the victim's needs. (Tr. 22:11-23:3; 219:3-17)
- Stephen Uehlin got a recording when he first called the MSHA hotline. He left a message and got a return call from Robert Silkey. (Tr. 228:18-21; 230:4-20)
- The Uehlin brothers stopped mining activities at this location because, after heavy rainfall

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[9] The Uehlin brothers were not represented at the hearing. They were put under oath at the beginning of the hearing and advised that by doing so, the court could treat anything they said, be it while questioning witnesses, making objections or arguments, or giving direct testimony, as competent testimony for evidentiary purposes. (Tr. 19:20-20:7)

and flooding, the railroad company removed the track crossing used to access the quarry site, cutting off access to the quarry. The loss of revenue from the quarry and the dispute with the railroad over the crossing depleted their financial resources. (Tr. 201:15-202:13) Their finances have been impacted by the costs of civil litigation related to this accident. (Tr. 200:19-201:2)

- The Uehlin brothers claim that the penalties proposed in this case will affect their ability to remain in business; however they also claim to be insolvent already. (Response to Request for Admission, 3.10; Ex. S-29)

Common Legal Standards

Negligence

Section 110(i) of the Mine Act requires that in assessing penalties the Commission must consider, among other criteria, whether the operator was negligent. 30 U.S.C. § 820(i). Each mandatory standard carries an accompanying duty of care to avoid violations of the standard. An operator's failure to satisfy the appropriate duty can lead to a finding of negligence. In this type of case, we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue. *Southern Ohio Coal Co.,* 4 FMSHRC at 1463-64. *See also Nacco Mining Co.,* 3 FMSHRC at 848, 850-51(Apr.1981) (construing the analogous penalty provision in 1969 Coal Act where a foreman committed a violation), *cited in A. H. Smith Stone Company,* 5 FMSHRC 13, (Jan.1983).

Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required [...] to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* "MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices." *Id.* Reckless negligence is present when "[t]he operator displayed conduct which exhibits the absence of the slightest degree of care." *Id.* High negligence is when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* Low negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* No negligence is found when "[t]he operator exercised diligence and could not have known of the violative condition or practice." *Id.*

Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U .S.C. § 820(i), is most often viewed in terms of the seriousness of the violation. *Sellersburg Stone Co.,* 5

FMSHRC 287, 294-95 (March 1983), *aff'd,* 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.,* 9 FMSHRC 673, 681 (Apr. 1987). The seriousness of a violation can be evaluated by comparing the violated standard and the operator's conduct with respect to that standard in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.,* 12 FMSHRC 134, 140 (Jan. 1990) (ALJ). The Commission has recognized that the determination of the likelihood of injury should be made assuming continued normal mining operations without abatement of the violation. *Consolidation Coal Co.,* 8 FMSHRC 890, 899 (June 1986).

However, the gravity of a violation and its S&S nature are not the same. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.,* 18 FMSHRC 1541, 1550 (Sept. 1996). The gravity analysis can include the likelihood of an injury, but should focus more on the potential severity of an injury, and the number of miners potentially injured. The analysis should not equate gravity, which is an element that must be assessed in every citation or order, with "significant and substantial," which is only relevant in the context of enhanced enforcement under Section 104(d). *See, Quinland Coals Inc.,* 9 FMSHRC 1614, 1622 n. l (Sept. 1987).

Enhanced Enforcement - Significant and Substantial and Unwarrantable Failure

It is clear in the Mine Act that because negligence and gravity, which are clearly delineated in 30 C.F.R. § 100.3 and related tables, apply to all citations and orders, the enhanced enforcement provisions set out in Section 104(d) contemplate something distinct and more, when talking about S&S and unwarrantable failure. The Secretary must prove negligence and gravity for all citations and orders. In order to invoke the enhanced enforcement provisions in Section 104(d), he must also prove that the circumstances of the violation satisfy both the S&S and unwarrantable failure standards. If the Secretary fails to prove both, there can be no enhanced enforcement. Thus, the Secretary has to prove four distinct elements when the enhancement scheme in Section 104(d) is alleged: (1) negligence; (2) gravity; (3) "significant and substantial;" and (4) "unwarrantable failure."

Significant and Substantial

In *Mathies Coal Co.,* 6 FMSHRC 1 (Jan. 1984), the Federal Mine Safety and Health Review Commission ("Commission") explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum,* the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4.

In *U.S. Steel Mining Co.*, 7 FMSHRC 1125 (Aug. 1985), the Commission held:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." [. . .] We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial."

Id. at 1129 (emphasis in original) (citations omitted).

The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *See Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42 (D.C. Cir. 1999)

Unwarrantable Failure

The term "unwarrantable failure" comes from section 104(d) of the Act and, taken together with "significant and substantial," creates a standard for enhanced enforcement procedures, including withdrawal orders and potential enhanced liability.

In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that the essence of unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure has been paraphrased as "'reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991). *See also Buck Creek Coal Inc.* v. FMSHRC, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). In *Gatliff Coal Company*, 14 FMSHRC 1982 (Dec. 1993), the Commission drew a clear contrast between negligence and unwarrantable failure, noting that the difference is not merely semantic. Consistent with the discussion of enhanced enforcement above, the Commission stated that an unwarrantable failure may trigger the "increasingly severe enforcement sanctions of section 104(d) [whereas] [n]egligence [. . .] is one of the criteria that the Secretary and the Commission must consider in proposing and assessing [. . .] [all] civil penalt[ies]." Further, "[h]ighly negligent conduct involves more than ordinary negligence and would appear, on its face, to suggest an unwarrantable failure. Thus, if an operator has acted in a highly negligent manner with respect to a violation, that suggests an aggravated lack of care that is more than ordinary negligence." *Id.* At 1988-89.

The Commission has examined various factors to assist in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that 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); *Quin/and Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *Beth Energy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992), and 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); *see also Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). What is apparent from the foregoing list of factors is that they are fact-specific examples of conduct and circumstances tending to show unwarrantable failure as *something more* than ordinary negligence and that they are suggestions only and are not intended to be an exhaustive or exclusive catalog. The essential aspect of the unwarrantable failure analysis is, and always has been, whether there is aggravated conduct constituting more than ordinary negligence. Any analysis of unwarrantable failure must identify the evidence or factors that prove aggravated conduct and discuss them thoroughly. *IO Coal Company, Inc.*, 31 FMSHRC 1346, 1350-51 (Dec 2009).

A judge must identify and discuss the factors considered in his unwarrantable failure analysis and should further discuss how and why the traditional list of factors discussed above either do or do not bear on the analysis. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) *("Consol")*. The Commission has made clear that it is necessary for a judge to consider all relevant factors, rather than relying on one to the exclusion of others. *Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999); *San Juan Coal Co.*, 29 FMSHRC 125, 129-36 (Mar. 2007) (remanding unwarrantable determination for further analysis and findings when judge failed to analyze all factors). While an administrative law judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted.

The traditional factors used to determine unwarrantable failure do not lend themselves well to the facts of this case. For instance, most of them include a temporal element. The extent of a violative condition can be seen as an expression of how long a condition has existed as well as how widespread it is. The former formulation duplicates or supplements the inquiry into how long a violative condition has existed, which is often formulated as a separate factor. Whether an operator has been actually or constructively placed on notice that a violating condition or practice exists or that it should be more diligent in its compliance is also largely an expression of how long the violation has existed. Finally, the operator's effort to abate a violating condition is most meaningful in light of how long the condition has existed. Unfortunately, these time-based factors are of little analytical assistance in a situation such as this where the order arises from an act occurring out by or in the direct presence of an owner/manager of the mine.

Another complication arises from the overlap between the high-degree-of-danger element of the traditional unwarrantable failure test and the negligence and gravity elements of the basic, underlying violation. They can both be proved by facts showing the relative seriousness and likelihood of an injury causing event. The distinguishing element is the weight given in the analysis.

If I were to consider only, or primarily, the traditional elements of the unwarrantable failure test set out in *IO Coal Company,* for instance, I might be steered toward the conclusion that because this was an isolated, *ad hoc* event, noteworthy primarily because of the potential severity of consequences from a highly likely event, factors that have been given decisive weight in my analysis of negligence, gravity, and S&S, it should not be considered an unwarrantable failure to comply with the relevant safety standard. This would result in a distorted treatment of this important element of the violation, and points out the need to focus more on the elemental definition of "unwarrantable failure" than on the traditional factors discussed above.

However, the Commission has provided guidance for a case which does not lend itself to a traditional factor-dependent analysis. *Sec'y of Labor v. Midwest Material Co.,*, involved a foreman's actions in an isolated, *ad hoc* event involving a high degree of danger which resulted in the death of a miner. 19 FMSHRC 30 (Jan. 1997), 1997 WL 24292. The death occurred because a foreman was derelict in his supervision of the installation of an extension to a crane boom. Because the miner performed this operation incorrectly due, at least in part, to the foreman's negligence, a section of the boom collapsed on the miner, killing him. In rejecting the Judge's conclusion that the violation did not stem from the operator's unwarrantable failure to comply with the cited safety standard, the Commission stated: "[t]he [J]udge's reliance on the relatively brief duration of the violative conduct was misplaced, in view of the high degree of danger posed by the hazardous condition and its obvious nature. Given the extreme hazard created by [the foreman's] negligent conduct, that misconduct is readily distinguishable from other types of violations [...] where the degree of danger and the operator's responsibility for learning of and addressing the hazard may increase gradually over time." *Id.* at 36. The Commission's analysis demonstrates that what is important in making an unwarrantable failure determination is ultimately whether there is evidence of aggravated conduct constituting more than ordinary negligence, irrespective of how closely the traditional factor-based test tracks the facts of the case. In fact, a single factor, even one that is not typically encountered, may lead to the conclusion that a violation resulted from the operator's unwarrantable failure.

Capitol Cement Corp., 21 FMSHRC 883 (Aug. 1999) is also particularly instructive. There, a shift supervisor's failure to de-energize the rail of a crane and to wear a safety belt were deemed aggravated conduct. The Commission observed that both violations were obvious and dangerous. Further, the supervisor knew the consequence of his failure to de-energize and that not wearing a safety belt was dangerous. The Commission noted that "a high standard of care was required of [the] shift supervisor." *Id.* at 894. It then added, "Managers and supervisors in high positions must set an example for all supervisory and nonsupervisory miners working under their direction. Such responsibility not only affirms management's commitment to safety but also, because of the authority of the manager, discourages other personnel from exercising less

than reasonable care." *Id.* at 893 (citing *Wilmot Mining,* 9 FMSHRC 684, 688) (Apr. 1987). The Commission also noted that the supervisor "had been entrusted with augmented safety responsibility and was obligated to act as a role model for [his] subordinate, who was watching him." *Id.*[10]

Penalty

Commission administrative law judges assess civil penalties *de novo* for violations of the Mine Act. Section 110(i) of the Mine Act delegates to the Commission and its judges the authority to assess all civil penalties provided in [the] Act. 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires the Commission [ALJ] to consider six statutory penalty criteria in assessing civil monetary 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).

Judge's Authority To Increase Penalty

The Commission has explained that "[t]he determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact. This discretion is bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme." *Secretary of Labor v. Mechanicsville Concrete, Inc. t/a Materials Delivery*, 18 FMSHRC 877, 879 (1996) (citing *FMC Corporation v. Sec'y of Labor, et al UMWA,* 5 FMSHRC 292, 294). The judge is not bound by the Secretary's assessment of the degree of negligence. Modifying a negligence determination is authorized by the Mine Act. *Sec'y of Labor (MSHA) v. Spartan Mining Company, Inc.*, 2008 WL 4287784 (F.M.S.H.R.C.) at 22. (August 28, 2008)

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[10] This discussion of a foreman's heightened duty of care *vis-a-vis* a subordinate miner is borrowed liberally from Judge Moran's excellent summary in *Stillhouse Mining,* 33 FMSHRC 864, 865-866 (April 2011).

Operator's Ability to Continue in Business

The burden is on the company to prove that the assessed penalties would adversely affect its continuation. "The presumption that unless the company proves otherwise the penalties are assumed to have no adverse effect is one of the oldest in mine safety law. When a civil penalty petition is filed and Commission jurisdiction attaches, it becomes the duty of the judge to assess the penalties *de novo* based on the statutory penalty criteria." *Georges Collieries v. MSHA*, 24 FMSHRC 572, 576 (2002) (citations omitted.) The impact of the proposed penalties on the company's ability to continue in business is based on the evidence of record, and the ultimate amounts assessed by the judge reflect the exercise of his discretion bound by all of the statutory penalty criteria. If an adverse effect is demonstrated, a reduction in the penalty may be warranted. However, "the penalties may not be eliminated [. . .], because the Mine Act requires that a penalty be assessed for each violation." *Spurlock Mining Company Inc., v. Sec'y of Labor (MSHA)*, 16 FMSHRC 697, 699 (Apr. 1994), citing 30 U.S.C. § 820(a); *Tazco, Inc.*, 3 FMSHRC 1895, 1897, (1981).

Discussion

In this case, John Uehlin made a conscious and considered decision to lead his miners as they thrust metal pry bars and sledge hammers into the intake area of the energized and active crusher impeller unit to clear a rock jam. The risk of a miner getting seriously hurt under these conditions was obvious, extreme, and easily avoidable. The fact that John Uehlin, an owner and manager of the company, encouraged his miners to expose themselves to such a risk is remiss, notwithstanding the misplaced bravado of his claim that he would not expect or allow any of them to do anything he was not willing to do himself. The fact that he was on the scene and allowed work to be done in the manner that led to these events is disturbing. The fact that he prompted the victim to put on his hard hat and safety glasses shows that he was aware of some level of risk, but the parallel fact that he encouraged the men to work in such a life-threatening and obviously risk-fraught manner is dissonant. The Uehlins' justifications and excuses listed above are a thin film laid over a convincing body of evidence of intentional failure to comply with the standards discussed in this decision.

Order No. 8619341

Inspector Coleman issued Order No. 8619341 on June 10, 2011, as a 103(k) order to preserve the scene of the accident. (Tr.50:10-16; Ex. S-1) It is a procedural rather than enforcement order and does not implicate a civil penalty. It was terminated at the conclusion of Coleman's accident investigation. (Tr. 51:23-52:2)

Citation No. 8619342

Citation No. 8619342 (Ex. S-3; Docket CENT 2012-0307) issued on June 14, 2011, is the crux of the enforcement action arising directly from the events that caused Buckler's injuries. The violation alleged in this citation contributed directly to the accident and arose from the

primary accident investigation. (Tr. 68:11-69:2) It alleges a 104(d)(1) violation of 30 CFR § 57.14105, which regulates procedures during repairs or maintenance and requires that before any repair or maintenance is done on machinery or equipment, the equipment must be powered off and blocked against hazardous motion. (Tr. 68:11-69:2) Inspector Coleman characterized this citation as reasonably likely to be fatal, potentially affecting a single miner, significant and substantial ("S&S"), arising from high negligence, and constituting an unwarrantable failure to comply with a mandatory health or safety standard.

The Violation

Inspector Coleman concluded that Buckler was injured because the machinery he and the other miners were working on at the time of the accident was not locked or tagged out of operation. (Tr. 71:2-15; 72:11-13; 143:8-144:14; Ex. S-12) Coleman considered the miners' attempts to free the rock jam in the crusher impeller as repair work as defined in 30 CFR § 57.14105. (Tr. 72:2-7) He stated that it is a matter of common sense that using a pry bar to clear rock jams while the impeller is operating is obviously dangerous. (Tr. 85:19-86:18) Coleman concluded that if the crusher impeller had been locked out, the accident would not have happened. (Tr. 62:7-24; 74:12-23; 88:6-16; 169:8-11) In order to lock out the crusher impeller, it would be necessary to shut off the diesel engine powering the impeller. (Tr. 71:16-72:1) Simply shutting the door over the shut-off switch is not enough. Someone could still open it and turn the circuit on. (Tr. 144: 20-145: 3)

The Uehlins do not dispute that the crusher impeller was operating and was not locked or tagged out. (Tr. 22:8-11) However, Stephen Uehlin stated during his cross examination of Inspector Coleman that he felt that clearing rock jams by opening the side access door on the impeller unit would be dangerous because rocks behind the door might fall out. (Tr. 175:25-176:5; 209:242-210:8) Coleman did not agree that clearing rock jams by opening the side access door would be more dangerous. (Tr. 175:25-176:11; 176:13-177:9) It would be necessary to shut off the impeller unit in order to open the side access door. If the impeller had been turned off, there would have been no accident. (Tr. 72:14-73:7; 208:18-209:20) Coleman found "high" negligence with this violation because John Uehlin was in the immediate vicinity and was personally involved in the work to clear the rock jam. (Tr. 146:12-16) In Coleman's opinion, an injury resulting from this violation would likely be fatal because it would have drawn a miner into the crusher. (Tr. 146:8-11)

The Uehlins contended that if Buckler had held his pry bar off to one side, as he had been trained to do, the bar would have most likely missed him. (Tr. 57:21-25) However, Coleman believed that since there were men standing on either side of Buckler, and since there was no way to predict what trajectory the bar would follow, it was highly likely that someone would be injured. (Tr. 58:1-10; 168:7-20) Coleman disagreed that holding the pry bar off to one side was a safe way to free up rock jams while the impeller is working. To the contrary, he concluded that not only was it an ineffective half measure, it also tended to show that the Uehlins were clearly aware of danger involved in using a pry bar in this manner. (Tr. 75:9-14) Nonetheless, he considered the fact that the Uehlins had trained their miners to use a pry bar in this manner as a

measure of mitigation against a conclusion that they were indifferent to the degree of danger their miners faced using pry bars in this way. (Tr. 75:4-8)

Coleman interviewed the miners working along with Buckler, plant operator Matt Foster (Tr. 62:25-63:3), Roger Lewendowski, the front end loader operator (Tr. 63:17-64:17), and Mike Raines. (Tr. 48:25-49:7; 55:8-15; 159:23-160:3) Lewendowski had gone to get a sledge hammer to use with a pry bar to force the jammed rocks into the crusher impeller and was the only one who actually saw the accident happen. (Tr. 43:25-64:8; 49:12-23; 63:25-64:8; 202:21-203:10) Foster was standing behind Buckler in the feeder hopper when the accident happened. (Tr. 63:13-16) Lewendowski was the only miner on the scene who had been told to lock out the equipment and to be careful. (Tr. 64:22-65:2; 146:17-20) He had received a 40-hour new miner training. (Tr. 64:22-65:2) The other miners did not mention receiving any sort of safety training other than standing off to the side of their pry bar. (Tr. 65:3-13) John Uehlin was aware of the standard requiring equipment to be powered off before repairs or maintenance were done. (Tr. 225:24-227:5) Coleman felt that management had an obligation to train miners appropriately and failure to do so is an element of unwarrantable failure. (Tr. 147:11-14)

From the foregoing, I conclude that the events associated with the crusher impeller accident made out a violation of 30 C.F.R. § 57.14105. There is no question that the impeller unit was not powered off nor was it blocked against hazardous motion as the miners attempted to service the unit by removing the rock jam. These events made it more than reasonably likely that a fatality would result. John Uehlin and three miners were affected by the negligence of these events.

Negligence

Given the indifference shown by John Uehlin to the safety of his miners and the salutary safety purpose behind this standard, I conclude that this violation is the result of reckless negligence. John Uehlin displayed conduct devoid of any meaningful degree of care. I disagree with Inspector Coleman's leniency in treating the fact that the miners had been trained to hold their pry bars off to one side as a point of mitigation. Given the high likelihood of a grievous injury and the clearly speculative hope that holding a pry bar off to one side would avoid an accident, I cannot agree that it should be given weight as evidence of a realistic concern on the Uehlins' part about their miners' safety as they performed this a hazardous task. The combination of obvious and extreme danger with such close direction and involvement by a key management person can only be taken as evidence of objective indifference vis-à-vis the miners' safety.

Gravity

The hazard associated with the events in this case is palpable and real. Using a steel pry bar to dislodge jammed rock in an operating crusher intake unit causes anyone hearing about it to cringe at the thought of what could happen if the bar came in contact with the rapidly and forcefully moving crusher intake unit. This is underscored by the fact that the intake opening is

draped with lengths of heavy chain to form a protective but movable barrier to lessen the likelihood that rock coming into contact with the impeller unit will be thrown back at anyone close enough to be hit. (Tr. 40:8-15) The effect of the hazard is unfortunately all too evident in this case – it is precisely what happened to Buckler, and could have been worse. I disagree with Inspector Coleman's assessment that this violation was only reasonably likely to occur given that an accident happened. I conclude that the gravity assessment should be modified from reasonably likely to "occurred," and be determined to affect a single miner.

Significant & Substantial

These events clearly arose from an S&S violation of the standard. The underlying mandatory safety standard was violated. Using steel pry bars to dislodge jammed rocks in the intake of a powered and active impeller unit contributed directly to the discrete and obvious hazard that something forced into the impeller would be thrust back out with great force.[11] The likelihood that this hazard would result in an injury is unfortunately beyond debate here. The injury resulted exactly as any prudent person would anticipate. The reality of the injury to Buckler and its severity establish the reasonable likelihood of it being serious in nature. The *National Gypsum* test for an S&S violation is satisfied in full.

Unwarrantable Failure

The events summarized above constituted an unwarrantable failure to abide by the requirements of the standard in question. The following factors convince me that the actions in question here resulted from aggravated conduct by intention, indifference, and recklessness: (1) John Uehlin purposefully decided to ignore the very specific mandate in 30 C.F.R. § 57.14105 which requires that repairs or maintenance on mine machinery only be done after the power is cut off and the machinery is blocked against hazardous motion; (2) He was derelict in his duty as a foreman to model safe practices and to teach by example the importance and prudence of complying with safety standards;[12] and, (3) the hazard created by attempting to remove a rock jam

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[11] Exhibit S-34 is an MSHA Fatalgram describing a death caused by events essentially identical with those of this case. Uehlin argued that they were not aware of the potential warning that such communications provide because they did not have an internet connection and were not able to receive them. The obvious danger involved in the practice that caused Buckler's injury does not require that the Fatalgram to be known to the Uehlins. The existence and availability of the Fatalgram merely underscore the obviousness. (Tr. 76:5-23)

[12] A key aspect of that case was the fact that the violation occurred "in the presence of a foreman, who under Commission precedent, is held [to] a high standard of care." *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987). The Commission noted that a section foreman is "held to a 'demanding standard of care in safety matters,'" and that there is a "heightened standard of care required of the section foreman and mine superintendent." *Id.* (citing *Wilmont Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987); *S & H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995)).

while the crusher impeller is in operation was obvious and grave. The first is an example of behavior that illustrates Uehlin's personal willingness to sacrifice safety to expediency. The second shows his indifference or recklessness towards his responsibility to look out for the safety of his crew. The third speaks to his poor judgement. All of these factors are consistent with the Commissions decision in *Midwest Material Company, supra,* and the cases cited in it.

Penalty

The allegations in the Secretary's petition regarding the 30 CFR § 100.3 penalty factors were not factually contested by the company at the hearing. (Petition, Exhibit A) The Uehlins did state that their quarry had been closed because the railroad had blocked their access by removing a track crossing after a significant rainfall and flooding and that their mining revenues had been reduced by the costs associated with their defense of legal actions related to the access closure and civil litigation arising from Buckler's injuries. Beyond that, the Uehlins presented no substantive evidence to support the assertion that their ability to continue mining operations would be impacted by the penalty imposed in this case. With nothing more than the summary allegations regarding the impact of a penalty on Uehlin's ability to continue in business, I am constrained from making a penalty adjustment in their favor.

I accept the Secretary's allegations regarding the operator's size. I have considered the history or past violations at this mine summarized in Exhibits S-31 and S-41, including the citation for the standard discussed above. I have made findings and conclusions regarding the negligence and gravity associated with this citation. I am aware that the company stopped mining at this location and that the Uehlin brothers claim that they could declare bankruptcy for this company. After considering all of the penalty criteria, I assess a penalty of $14,743.00 for this citation.

Citation No. 8619343

Citation No. 8619343 (Ex. S-4; Docket CENT 2011-1130) alleges a violation of 30 CFR § 57.15005, which requires that safety belts and lines be worn where there is a fall danger. (Tr. 114:6-115:6) This citation is characterized as reasonably likely to be fatal, potentially affecting a single miner, S&S, arising from high negligence, and constituting an unwarrantable failure. It was issued on June 15, 2011, as part of the spot inspection. It was not a direct cause of the accident. (Tr. 114:23-115:6)

The Violation

Inspector Coleman wrote this citation because the standard requires the use of some form of fall protection when there is a fall danger. (Tr. 115:25-116:14) Incident to his investigation of the Buckler accident, Coleman concluded that none of the miners working in the primary crusher vibrating hopper with Buckler at the time of the accident was wearing fall protection, and that there was a fall hazard at the time of the accident. (Tr. 116:15-117) A photo of the hopper taken by Coleman shows where John Uehlin and the other miners were standing at the time of the

accident. (Tr. 118:11-17; Ex. S-5) Coleman concluded that it was only about two feet from where the miners were standing to the edge of the hopper, and that it was about 15 feet from the hopper edge to the ground. (Tr. 118:18-119:4; 179:12-15; Ex. S-4) Although there were wing walls on the hopper, they did not extend to where the miners were standing. (Tr. 119:18-120:8; Ex.S-19, pages 4-6)

Stephen Uehlin testified that safety harnesses were available for the miners, but it was left up to them to decide when to wear them. Further, management felt that with the six foot high side walls on the hopper it would be impossible for a miner to fall out. (Tr. 177:10-20; 179:16-180:1; Response to Request for Admission, No. 3.11; Ex. S-29) No one was wearing a fall harness at the time of the accident. (Tr. 214:11-18) In his response to the Secretary's Requests for Admission,[13] Stephen Uehlin admitted that on June 9, 2011, three miners were working on the vibrating feeder without using any safety belt or line (Response to Request for Admission, No. 11.3; Ex. S-29); that the miners were standing on top of approximately 18 inches of rock in the vibrating feeder hopper (Response to Request for Admission, No. 11.2; Ex. S-29); that the distance from the top of the hopper to the ground was approximately 15 feet 4 inches (Response to Request for Admission, No. 11.6; Ex. S-29); and, that if a violation were found to have occurred as alleged in Citation No. 8619343, the violation would be significant and substantial. (Response to Request for Admission, No. 11.7; Ex. S-29)

Coleman concluded that the wing walls at the places where the miners had been standing were not high enough to protect against falling out of the hopper to the ground 15 feet below. (Tr. 120:23-121:12; 178:22-179:10) There was also a gap in the wing walls large enough for a miner to fall through. (Tr. 120:9-14; 180:15-181:2; Ex. S-19)

Coleman characterized Citation No. 8619343 as significant and substantial ("S&S") because he felt it was reasonably likely to result in an accident that would entail lost workdays or restricted duty. He concluded that it was foreseeable that someone could trip and fall over the side of the hopper. (Tr. 121:13-22) He classified the violation as potentially fatal because of the 15 foot drop from the hopper edge to the ground below. (Tr. 122;13-16) He characterized the violation as involving high negligence because John Uehlin, an owner and manager of the company, was working in the immediate vicinity of the other miners and allowed them to work in the presence of the fall hazard. (Tr. 122:20-24) Finally, Coleman concluded that three persons were subjected to the fall hazard. (Tr. 122:17-19)

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[13] Commission Rule 58(b), 29 C.F.R. § 2700.58(b), states: Any party, without leave of the Judge, may serve on another party a written request for admissions. A party served with a request for admissions shall respond to each request separately and fully in writing within 25 days of service, unless the party making the request agrees to a longer time. The Judge may order a shorter or longer time period for responding. A party objecting to a request for admissions shall state the basis for the objection in its response. ***Any matter admitted under this rule is conclusively established for the purpose of the pending proceeding*** unless the Judge, on motion, permits withdrawal or amendment of the admission. (Emphasis added.)

In support of his allegation that this citation arose from an unwarrantable failure to comply with the relevant standard, Coleman testified that he considered the lack of fall protection obvious and dangerous, that the hazard had existed for an extended time based on comments from the Uehlins that the workers at their quarry had never used fall protection under such circumstances (Tr. 122:25-123:3), and that John Uehlin was aware of the hazard by virtue of the fact that he was working alongside the other miners. (Tr. 123:4-19)

I find that the feeder hopper is an area where miners are required to use fall protection. There was a reasonable potential that someone working there could topple over the edge and fall 15 feet to the ground. There was a section of the hopper wall that was lower than the rest, which increased the risk of a fall to the ground. The miners working in the hopper on June 9, 2011, were not wearing any type of fall protection. I conclude that this constitutes a violation of 30 CFR § 57.15005.

Negligence

I find that John Uehlin was working with and supervising the other miners at the time of this violation. I concur with Inspector Coleman that this supports a conclusion that this violation was the result of high negligence. There were no mitigating factors.

Gravity

For the reasons stated by Inspector Coleman in his testimony, summarized above, and supported by Exhibit S-4, I conclude that it was reasonably likely that a miner could suffer a fatal injury as a result of a fall from the vibrating hopper.

Significant & Substantial

This violation is appropriately characterized as S&S. The S&S nature of the violation is deemed conclusively established by the answer to the Secretary's Request for Admission, No. 11.7; Ex. S-29. Independently, the underlying mandatory safety standard was violated. The failure to require the use of suitable fall protection in this setting reasonably contributes to the hazard that a miner might fall out of the feeder hopper. The likelihood that this hazard would result in an injury is also reasonably certain, as is the likelihood that the resulting injury would be serious in nature. As above, the *National Gypsum* test for an S&S violation is satisfied in full in this instance.

Unwarrantable Failure

Stephen Uehlin testified that they had fall protection harnesses on site, and their practice was to leave it up to the individual miner whether to use fall protection. The availability of fall protection harnesses for the miners is not enough. Management was indifferent to their obligation to take effective and reasonable steps to require that their miners use fall protection. The use of fall protection is the subject matter of a mandatory safety standard; it is not optional. The

Uehlins' casual attitude about this vital safety issue is consistent with the recklessness evident in the Buckler accident scenario. Management's permissive stance regarding the use of fall protection is corrosive in the work place. It leads to dangerous complacency among the miners who should have been trained and instructed as a matter of company policy to wear fall protection at all times when working in the hopper.

The events summarized above constituted an unwarrantable failure to abide by the requirements of the standard in question. The following factors convince me that the actions in question here resulted from aggravated conduct by intention, indifference, and recklessness: (1) The lack of fall protection was obvious and dangerous; (2) The hazard existed for an extended time; (3) The hazard resulted from a longstanding practice condoned by management; and (4) John Uehlin was aware of the hazard. These factors are consistent with the Commissions decision in *Midwest Material Company, supra,* and the cases cited in it.

Penalty

I accept the Secretary's allegations regarding the operator's size. I have considered the history or past violations at this mine summarized in Exhibits S-31 and S-41, including the citation for the standard discussed above. I have made findings and conclusions regarding the negligence and gravity associated with this citation. I am aware that the company stopped mining at this location and that the Uehlin brothers claim that they could declare bankruptcy for this company. After considering all of the penalty criteria, I assess a penalty of $2,000.00 for this citation, as proposed by the Secretary.

Citation No. 8619344

Citation No. 8619344 (Ex. S-6; Docket CENT 2011-1131) alleges a violation of 30 CFR § 57.14107(a), which requires that moving machine parts such as gears, sprockets, chains, pulleys, etc., be guarded to prevent contact. (Tr. 124:25-125:13) This citation is characterized as "reasonably likely" to result in permanent disability, potentially affecting a single miner, S&S, and arising from "high" negligence.

The Violation

Citation No. 8619344 was written on June 14, 2011 (Tr. 123:24-124:4), as part of the spot inspection. (Tr. 124:5-7) It alleges failure to guard the tail pulley on the half- inch conveyer. (Tr. 125:4-13) The cited standard requires guarding on moving machine parts such as head and tail pulleys, takeup pulleys, shafts, and similar machinery. (Tr. 124:25-125:13) Coleman noted a missing tail pulley guard and material buildup around the guard area showing in his opinion that it had been removed for some time. (Ex. S-7; Tr. 126: 25-127:5) Coleman found that miners had been in the area close to the missing guard from the evidence of spillage in that area. (Tr. 126:8-16; 128:11-12) Without the guard, there is a danger that the tail pulley will grab a miner and pull him into it. (Tr. 127:6-13; 128:2-10) Coleman concluded that this violation arose from high negligence because a manager was aware of it, the material build up showed that it had existed for

a long time, and the guard had been removed and left in the area, indicating that it could have been easily fixed. The mine had been cited for this type of violation before. (Tr. 129:9-22; 130:20-23; Ex. S-8) Coleman characterized this violation as S&S because he concluded that it was reasonably likely that the missing guard would cause an accident with lost work days. He concluded that there was a foreseeable potential of someone being in the area and getting caught in the pulley. (Tr. 128:13-22) He was also aware of accidents involving pulleys that caused permanent disability and dismemberment. (Tr. 128:23-129:8)

The Uehlins argued that the crusher was not operating the day of the accident. (Tr. 181:13-182:22) Coleman testified that even though the crusher was not operating, it could still have been turned on because it was not locked or tagged out. (Tr. 182:14-22) John Uehlin was aware of the safety standard requiring machine guards. (Tr. 225:24-226:3) However, the Uehlins countered that there were only three miners working the day of the accident, and all of them were aware that the crusher unit was switched off. No one would have turned the crusher on as a matter of common sense. (Tr. 182:24-183:3) Coleman concluded that because the crusher had not been locked or tagged out of service, it was thus available for use – the key to the violation in his mind. (Tr. 183:9-11)

I find that the guard covering the access port to the tail pulley for the half-inch conveyor belt had been removed, placed off to the side of the tail pulley, and not replaced. (Ex. S-7, p.1) The condition described by Coleman in his citation documentation (Ex. S-6, p.5) had existed long enough for spillage material to accumulate in the area of the tail pulley and for someone to have removed some of it prior to the inspection. I find that the missing guard created an entanglement hazard. Management was aware of the missing guard. The guard could have been easily reattached; it was found close to the tail pulley. The quarry had been cited for this type of violation less than three months before this citation. (Ex. S-8) From this I conclude that 30 CFR § 57.14107(a) was violated.

Negligence

I concur with Coleman's negligence assessment. This violation resulted from high negligence. The quarry manager was aware that the guard had been removed. Material build up shows that the condition existed for a long time. The guard was removed and left in the area. It could have been easily replaced. The mine had been cited for this type of violation before. There were no mitigating factors.

Gravity

For the reasons stated by Inspector Coleman in his testimony and supported by Exhibit S-6, I conclude that it was reasonably likely that a miner could suffer a permanently disabling injury as a result of an entanglement in the tail pulley mechanism. I credit Coleman's testimony about his observation that spillage material had accumulated to a depth of approximately two inches and that miners were expected to access the area for clean up periodically. (Ex. S-6, p.5) I also concur with his finding that the missing guard posed a danger of entanglement in moving machine parts. *Id.*

Significant & Substantial

This violation is appropriately characterized as S&S. The S&S nature of the violation is deemed conclusively established by the answer to the Secretary's Request for Admission, No. 11(d); Exhibit S-30. Independently, the underlying mandatory safety standard was violated. The failure to replace the tail pulley guard reasonably contributes to the hazard that a miner might become entangled in moving machine parts. The likelihood that this hazard would result in an injury is also reasonably certain, as is the likelihood that the resulting injury would be serious in nature. As above, the *National Gypsum* test for an S&S violation is satisfied in full in this instance.

Penalty

I accept the Secretary's allegations regarding the operator's size. I have considered the history or past violations at this mine summarized in Exhibits S-31 and S-41, including the citation for the standard discussed above. I have made findings and conclusions regarding the negligence and gravity associated with this citation. I am aware that the company stopped mining at this location and that the Uehlin brothers claim that they could declare bankruptcy for this company. After considering all of the penalty criteria, I assess a penalty of $362.00 for this citation, as proposed by the Secretary.

Order 8619345

Order No. 8619345 (Ex. S-9; Docket CENT 2011-1130) was issued in response to an unprotected opening along a travelway. (Tr. 131:22-25) It arose from the spot inspection and alleges a Section 104(d)(1) violation of 30 CFR § 57.11012, which requires railings, barriers, or covers to protect any opening near a travelway through which a person or material could fall. (Tr. 131:22-132:6; 132:15-17) It is characterized as "reasonably likely" to be permanently disabling, potentially affecting a single miner, S&S, arising from "high" negligence, and constituting an unwarrantable failure.

The Violation

Coleman observed a three foot by seven foot opening along the catwalk directly above the crusher and conveyor belt with no railing, barrier, or cover. (Tr. 133:19-134:1; 137:19-24; Ex. S-10) He concluded that miners would have to step over the opening to get to the other side of the work area. (Tr. 135:18-136:16) Coleman estimated that the travelway involved in this citation was used about one time per month. (Tr. 136:17-19) The travelway was adjacent to the unguarded opening. The opening was large enough that men or materials could fall through it. (Tr. 136:25-137:9) Miners had stepped over the opening from the drive unit side to get to the catwalk above the crusher. The distance from the travelway to impact on the conveyor belt is approximately three feet – from the travelway to the crusher approximately eight feet. (Ex. S-9) Coleman refused to use the ladder where it was located to climb on the machinery. He made them move the ladder because he did not want to climb up on the machinery in a manner that he felt was unsafe. (Tr. 183:12-184:1) Coleman assessed that the unguarded opening created a hazard of

a broken leg or possible dismemberment. (Tr. 138:15-21) He believed that if the crusher and conveyer had been in operation, a miner could get entangled. (Tr. 137:10-18) Coleman felt that there was a foreseeable potential that someone would fall through the opening. (Tr. 138:6-10) In his opinion, it would have been practical to install a guarding device to protect the opening. (Tr. 137:25-138:5) Because supervisors used the travelway, Coleman assessed the negligence as "high." (Tr. 138:22-25; Ex. S-9) He found nothing to mitigate the level of negligence. (Tr. 139:1-3) Coleman classified the violation as an unwarrantable failure because supervisors were aware of the condition, they took no action to fix it, it was obvious, it was very dangerous, management knew that miners used this area, management used the area themselves, and there had never been any protection in place. (Tr. 139:4-25)

The Uehlins admit the existence of the unprotected opening and its proximity to a travelway. (Response to Request for Admission, No. 12.2, Ex. S-29) They stated that no one traveled the area because they always went up on the machinery from the other side, and they only did that once a month to change the oil. (Tr. 183:12-184:1) When the miners went up on the catwalk, it was always at the end of the day when everything was already shut down. (Tr. 195:5-20) However, Coleman testified that John Uehlin told him that they always climbed up the ladder on the unprotected side to access the upper travelway (Tr. 184:2-7) whenever there was a rock jam. (Tr. 184:8-11) The Uehlins also denied any responsibility for this violation because the equipment came from the manufacturer without a railing on the catwalk. (Tr. 195:21-25)

I find that Coleman's description of the violating conditions and his conclusion as to the existence of a hazard that violates the standard deserve full credit. There was an unprotected opening along a travelway large enough for a person or material to fall through. The opening created the hazard that a person or an object might fall several feet and cause an injury on impact. The Uehlins' arguments do not change my conclusion. Coleman factored into his assessment an appropriate balance between accessing the area from the back side to tend to infrequent service requirements and periodically accessing this area from the front side to clear rock jams.

Uehlin's argument that the equipment came from the manufacturer in this condition is of no import in my analysis. The standard requires the mine operator to provide appropriate rails, barriers, and covers, irrespective of the condition of the equipment when it was acquired by the operator. *See, Walsenburg Sand & Gravel Company,* 11 FMSHRC 2233 (November 1989) cited in *Riverton Corporation,* 16 FMSHRC 2082, 2095 (1994).

I conclude that this makes out a violation of 30 CFR § 57.11012. The unprotected opening created a foreseeable potential that a person or material could fall through the opening and suffer significant injury, particularly if the crusher were in operation at the time.

Negligence

The citation is characterized as "reasonably likely" to be permanently disabling, potentially affecting a single miner, S&S, arising from "high" negligence, and constituting an unwarrantable failure. I concur with Coleman's negligence assessment. This violation resulted from high negligence. The quarry manager was aware that the unprotected opening existed. It would have

been easy to install a suitable rail or cover. The condition existed for a long time. There were no mitigating factors.

Gravity

For the reasons stated by Inspector Coleman in his testimony and supported by Ex. S-9 and S-10, I conclude that it was reasonably likely that a miner could suffer a permanently disabling injury as a result of a fall through the unprotected opening or being struck by an object falling through the opening. I credit Coleman's testimony about the frequency of and reasons for miners being in this area and the fact that they were known to step over the opening to access the catwalk above the crusher conveyor belt. (Ex. S-9, p.3; Ex. S-10) I also concur with his finding that the missing guard posed a danger of entanglement in moving machine parts. *Id.*

Significant & Substantial

This violation is appropriately charged as S&S. The S&S nature of the violation is deemed conclusively established by admission in Uehlin's answer to the Secretary's Request for Admission, No. 12.7. (Ex. S-29, p.8) Independently, the underlying mandatory safety standard was violated. Uehlin admits that the opening was above, below, or near a travelway[14] (Response to Request for Admission, No. 12.2), that the opening was approximately three feet by seven feet in size (Response to Request for Admission, No. 12.3), that the opening created a three foot fall hazard onto the primary crusher conveyor on one side (Response to Request for Admission, No. 12.4), that the opening created an eight foot fall hazard to the ground on the west end of the catwalk (Response to Request for Admission, No. 12.5), that there were no warning signals posted or installed in the cited area. (Admission No. 12.6), and that on the date of the citation, John Uehlin, co-owner, was aware of the cited condition. (Admission No. 12.8)

The failure to maintain a suitable rail or cover at the opening reasonably contributes to the hazard that a miner might be injured by falling through the opening or being struck by something falling through the opening from above. The likelihood that this hazard would result in an injury is reasonably certain given the frequency of miners being in this area and the potential fall heights, as is the likelihood that the resulting injury would be serious in nature. As above, the *National Gypsum* test for an S&S violation is satisfied in full in this instance.

Unwarrantable Failure

Uehlin defends the lack of protection for the opening by claiming that its miners had been warned not to go around the area in question. (Response to Request for Admission, No. 12.9) Assuming this is true, it is simply not appropriate for a mine operator to attempt to shift its strict liability compliance obligations to its employees by claiming that they had been warned. The duty of compliance cannot be delegated or shifted in this manner. Regardless of whether miners have

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[14] Uehlin qualifies its admission by claiming that the travelway was unused. I find that the travelway was used enough to contribute to the hazard underlying the violation.

been verbally warned against an apparent hazard, the operator still has the statutory duty to eliminate the hazard. See *Sec'y of Labor, Mine Safety & Health Admin. (MSHA)*, 6 FMSHRC 1871, 1878 (Aug. 29, 1984) and cases cited therein (Commissioner Lawson dissenting). Once again, management was indifferent to their obligation to take effective and reasonable steps to protect against this hazard.

The events summarized above constituted an unwarrantable failure to abide by the requirements of the standard in question. The following factors convince me that the actions in question here resulted from aggravated conduct by intention, indifference, and recklessness: (1) The lack of railing, barriers, or covers to protect the opening was obvious and dangerous; (2) The hazard existed for an extended time; (3) The hazard resulted from a longstanding practice condoned by management; and (4) John Uehlin was aware of the hazard. These factors are consistent with the Commissions decision in *Midwest Material Company, supra,* and the cases cited in it.

Penalty

I accept the Secretary's allegations regarding the operator's size. I have considered the history or past violations at this mine summarized in Exhibits S-31 and S-41, including the citation for the standard discussed above. I have made findings and conclusions regarding the negligence and gravity associated with this citation. I am aware that the company stopped mining at this location and that the Uehlin brothers claim that they could declare bankruptcy for this company. After considering all of the penalty criteria, I assess a penalty of $2,000.00 for this citation, as proposed by the Secretary.

Citation No. 8619346

Citation No. 8619346 (Ex. S-11; Docket CENT 2011-1131) alleges a violation of 30 CFR § 57.12016, which requires that powered equipment be powered off and locked and tagged out before any mechanical work is done on it. (Tr. 140:8-25) This citation is characterized as "reasonably likely" to be fatal, potentially affecting a single miner, S&S, and arising from "high" negligence.

Inspector Coleman wrote this citation because the vibrating feeder hopper the miners had been standing and working in was not locked or tagged out. (Tr. 140:8-14) The vibrating feeder shakes rock down into the crusher. It is separate from the crusher. (Tr. 140:19-25) It was de-energized, but not locked or tagged out while the miners were working in it. (Tr. 143:8-144:14) The switch for the vibrating hopper was located in a structure a short distance from the feeder. The switch was not locked, and no warnings were posted. (Tr. 145:4-20)

Although the vibrating hopper was de-energized, Coleman concluded there was a foreseeable potential it could be turned on while miners were working in it. (Tr. 146:3-7) As a result, he classified this violation as S&S.

Uehlin argued that the switch circuits were in fact locked because their switch was located in a building whose door was latched but not locked. (Response to Request for Admission, No. 12(d); Ex. S-30, p.7) Coleman could not refute this assertion. (Tr. 184:12-1855) Coleman did not consider a danger sign on the switch shed a suitable means of locking and tagging out. He wanted to see a lock or tag on the switch circuit itself. (Tr. 185:11-186:4) Uehlin also argued that all three of its miner employees knew where the switch to the vibrating hopper was located and knew that it was powered off at the time because they were all working inside the hopper. (Response to Request for Admission, No. 12(g); Ex. S-30, p.7)

The Violation

30 CFR § 57.12016 requires that electrically powered equipment be deenergized before mechanical work is done on it. The thrust of the standard is the requirement that power switches be locked out or other measures taken to prevent the equipment from being inadvertently energized. In addition, the standard requires that suitable warning notices be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices are to be removed only by the persons who installed them or by authorized personnel. This is a triple-safe protection regimen. Although it does allow for some interpretation as to what "other measures" are sufficient to provide the protection contemplated by the standard, there is nothing in the standard that allows for a decrease in the multi-leveled protections called for. Although Uehlin argues that the power switch for the vibrating crusher feeder was in a separate shed structure that could be locked, but was not (Response to Request for Admission, No. 12(d)), and all three of its miner employees knew where the switch was and would know at all times where their colleagues were, and would have been savvy enough not to turn the switch back on without first checking to make sure that no one was working on the deenergized equipment, there was no warning sign on the switch box or the structure in which it was located. (Response to Request for Admission, No. 12(e)) This is not enough to maintain the multi-level protection required by the standard. Certainly, these half measures are not adequate "other measures" which would satisfy the protective intent of the standard. They are excuses for full compliance that tend to weaken the protection miners are given in the standard. Anything that tends to weaken those protections violates the standard.

Accordingly, I find that 30 CFR § 57.12016 was violated by the facts listed above and relied on by Coleman when he wrote the citation. Uehlin and his miners were doing mechanical work in the vibrating hopper. (Tr. 143:14-21; Response to Request for Admission, No. 12(c)) The hopper is appropriately considered electrical equipment. (Response to Request for Admission, No. 12(b)) The fail-safe, muti-level protections of the standard were weakened by the fact that the equipment was not properly locked or tagged out. These facts create the hazard and increase the likelihood that a miner could inadvertently reenergize the equipment and cause injury to a fellow miner. It is not enough to assume that miners' common sense will protect them. It is not enough to assume that miners will always know where their colleagues are and what they are doing at all times, even when working above ground on equipment such as this. It is exactly for failures of common sense and the lack of due and ordinary caution that mining standards contain multiple and redundant layers of protection.

Negligence

I concur with Coleman's assignment of high negligence. The quarry manager was working alongside the other miners in the vibrating hopper. Even construing the evidence of actual knowledge in his favor, he should have done something to determine whether the power switch was properly locked or tagged out. In addition, I deem him aware that there was an increased risk that the power switch could be turned on because he knew that the switch was in an unlocked structure and that there was nothing present that could serve as an appropriate danger tag.

There were no mitigating factors. The fact that the power switch was in a separate structure and that there was a lock on the door that could have been used to completely lock out the power switch do not amount to mitigation. Mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner.

Gravity

Inspector Coleman considered the possibility that one of the three miners working in the vibrating hopper could have left the others, gone to the power switch location, and re-engaged the power to the crusher hopper. He based his assessment of "reasonable likelihood" on this. (Ex. S-11, p. 4) I find that this is a reasonable position to take.

For the reasons stated by Coleman in his testimony and supported by Exhibit S-11, p. 4, I conclude that it was reasonably likely that as many as three miners could suffer a fatal injury as a result of the vibrating crusher hopper being inadvertently powered on.

Significant & Substantial

This violation is appropriately charged as S&S. The S&S nature of the violation is deemed conclusively established by admission in Uehlin's answer to the Secretary's Request for Admission, No. 12(f). (Ex. S-30, p.7) Independently, the underlying mandatory safety standard was violated. There was a substantial hazard that the equipment would be re-energized while miners were working on it. There were no warning signs or tags to give a person a visual clue that men could be working on the equipment. John Uehlin should have known that the equipment was not locked or tagged out.

The likelihood that this hazard would result in an injury is reasonably certain given the fact that miners were actively working in the vibrator hopper, using heavy metal tools in close proximity to the same moving parts that caused the injury to Buckler. Simple reference to the facts of the Buckler injury scenario shows the clear likelihood that any resulting injury would be serious in nature. The *National Gypsum* test for an S&S violation is satisfied in full.

Unwarrantable Failure

This citation does not allege an unwarrantable failure on the part of the operator. Coleman commented that he might have classified it as such, but he gave Uehlin the benefit of the doubt on the issue of whether management (John Uehlin) had actual knowledge that the vibrating hopper was not locked and tagged out. (Tr. 146:21-147:10) I see no reason to change that assessment.

Penalty

As above, I accept the Secretary's allegations regarding the operator's size. I have considered the history or past violations at this mine summarized in Exhibits S-31 and S-41, including the citation for the standard discussed above. I have made findings and conclusions regarding the negligence and gravity associated with this citation. I am aware that the company stopped mining at this location and that the Uehlin brothers claim that they could declare bankruptcy for this company. After considering all of the penalty criteria, I assess a penalty of $807.00 for this citation, as proposed by the Secretary.

Citation No. 8619347

Citation No. 8619347 (Exhibit S-13: Docket CENT 2011-1131) alleges a violation of 30 CFR § 48.29, which requires that a mine operator keep a copy of form 5000-23 for each miner on file for examination, showing that the miner has received MSHA training (Tr. 148:20-149:3), and that the mine operator maintain training records for each miner on mine premises for two years. (Tr. 150:9-151:16)

This citation is considered a paperwork violation; it does not implicate any degree of gravity (Tr. 152:6-8); it is characterized as having no likelihood of causing injury (Ex. S-13); it alleges no lost work days (Tr. 152:9-16); but, it arises from "high" negligence (Ex. S-13, p. 5). The citation alleges that Uehlin failed to maintain training records for Ronald Buckler. (Tr. 148:25-149:3) During the aftermath of the Buckler injury, MSHA asked Uehlin to produce the training records for Buckler. As of the time of the hearing, Uehlin had not done so. (Tr. 151:18-152:5)

Coleman testified that he asked to see the records for Buckler's initial miner training. (Tr. 186:5-18) When Uehlin could not produce them, Coleman cited Uehlin for not having the initial training records, not the annual updates.[15] (Tr. 186:19-187:1) Coleman testified that he may have seen the records for the annual refresher training, but that is not what he wanted to see. (Tr. 187:11-14) The SOL asked for the training records in discovery. (Tr. 216:10-12) Uehlin never provided them. (Tr. 214:20-215:15; 216:18-217:19) Stephen Uehlin claimed to have the relevant

[15] On cross examination, John Uehlin raised the possibility that Coleman had asked to see the records of Buckler's annual eight-hour refresher training instead of the initial new miner training. (Tr. 184:14-187:1)

training records in his hearing testimony and in the answer to the Secretary's Requests for Admissions (Ex. S-30, Response to Request for Admission, No. 13(a)), but claimed not to have understood what Inspector Coleman was asking for. (Tr. 205:23-206:16)[16]

The Violation

Uehlin was required to keep copies of Buckler's initial training records so as to make them available to MSHA on request. Despite being asked several times to produce them and claiming all along that they would have been provided if only the request had been clearer, Uehlin never produced them – even at the hearing. This is a violation of the standard.

Negligence

I concur with Inspector Coleman's assessment of high negligence for this violation. John Uehlin claimed to be aware that the quarry was required to keep initial training records on hand for MSHA inspection. I have discounted his excuse about not understanding that Coleman was asking for records of Buckler's initial miner training and not the records of annual refresher training. There is, therefore, nothing that would mitigate against the finding of high negligence.

Gravity

Since this is a paperwork violation, Coleman assessed it as having no likelihood of contributing to an injury and classified the violation as involving no lost work days.

Significant & Substantial

Inspector Coleman did not allege that this paperwork violation was a significant and substantial violation of the standard. There is no basis to second guess his assessment.

Penalty

As above, I accept the Secretary's allegations regarding the operator's size. I have considered the history or past violations at this mine summarized in Exhibits S-31 and S-41, including the citation for the standard discussed above. I have made findings and conclusions regarding the negligence and gravity associated with this citation. I am aware that the company stopped mining at this location and that the Uehlin brothers claim that they could declare bankruptcy for this company. After considering all of the penalty criteria, I assess a penalty of $100.00 for this citation.

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[16] I give no credibility to John Uehlin's claim that he had never understood that MSHA wanted to see the Buckler training records, and that was the reason the records were never produced. Uehlin was presumed to know of their obligation to maintain those records in accordance with the standard. The claim that they never understood that MSHA wanted to see the records is patently incredible.

Citation No. 8619348

Citation No. 8619348 (Ex. S-14; Docket CENT 2011-1129) alleges a violation of 30 CFR § 50.10(b) which requires that a mine operator notify MSHA within 15 minutes of an injury at a mine site which has a reasonable potential to cause death. (Tr. 153:4-154:5) This citation is also characterized as having no likelihood of causing injury ("paperwork violation") (Tr. 158:10-14), but arising from "high" negligence. One of the rationales underlying this requirement is to allow MSHA to immediately issue a "j" order which requires that the accident scene be preserved in the state it was in at the time of the accident. (Tr. 154:6-15)

John Uehlin filled out the MSHA standard accident report form, 7000-1 (Ex. S-23) on July 7, 2011. It shows the time of accident as 12:00 pm. (Tr. 154:23-155:13)[17] Steve Uehlin made the first call to MSHA at 12:55 pm, some 55 minutes after the accident. (Tr. 155:23-156:2; 187:15-188:5) Uehlin was aware of the 15 minute rule, but their first priority was to make sure that they had people stationed at each intersection going into the quarry so that the ambulance would not get lost on the way. (Tr. 219:3-17) John Uehlin affirmatively gave the order not to call the accident into MSHA within 15 minutes. (Tr. 219:19-20) Coleman classified the violation as arising from "high" negligence because the operator was aware that it was obligated to call the accident into MSHA within 15 minutes and failed to do so. (Tr. 158:18-22)

The Violation

John Uehlin admits that the initial call to MSHA's hotline was delayed so as to focus all of Uehlin's resources on attending to Buckler's needs and to facilitate his evacuation. (Tr. 219:3-20) This is a technical violation of the standard.

Negligence

Coleman assessed the negligence level in this instance as high because Uehlin management was aware of the 15-minute rule. (Ex. S-14, p.2) However, he did not factor any mitigation into his negligence assessment. As I review these facts, I am convinced that the decision to delay notifying MSHA of the event for a little more than an hour is properly seen as a mitigating circumstance that was motivated by the demands of the emergency and represents a balanced and prudent judgment call. As a result, I conclude that the negligence assessment for this violation must be adjusted to "low negligence" as contemplated by Table X of 30 C.F.R. § 100.3(2)(d).

Gravity

Since this is a paperwork violation, Coleman assessed it as having no likelihood of contributing to an injury and classified the violation as involving no lost work days. I concur.

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[17] Exhibit S-15, the MSHA escalation report, shows the time of accident as 11:45 am central time. It also shows that Steve Uehlin first notified MSHA of the accident at 12:58 pm central time. The time discrepancies are of no import. (Tr.157:12-158:2)

Significant & Substantial

Inspector Coleman did not allege that this paperwork violation was a significant and substantial violation of the standard. There is no basis to adjust his assessment.

Penalty

As above, I accept the Secretary's allegations regarding the operator's size. I have considered the history or past violations at this mine summarized in Exhibits S-31 and S-41, including the citation for the standard discussed above. I have made findings and conclusions regarding the negligence and gravity associated with this citation. I am aware that the company stopped mining at this location and that the Uehlin brothers claim that they could declare bankruptcy for this company. After considering all of the penalty criteria, I assess a penalty of $112.00 for this citation.

ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C.§820(I), I assess the penalties listed for the citation heard and the settled citations listed above for a total penalty of $20,124.00. Uehlin Quarry is hereby ORDERED to pay the Secretary of Labor the sum of $20,124.00 within 30 days of the date of this decision.

L. Zane Gill
Administrative Law Judge

Distribution:

Amanda K. Slater, Esq., U.S. Department of Labor, Office of the Solicitor, 1999 Broadway, Suite 800, Denver, CO 80202-5708

Stephen Uehlin, 15478 County Road 409, Amazonia, MO 64421