FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	DOCKET NO. WEVA 2011-0287
Petitioner,	:	A.C. No. 46-06578-236066
	:	
v.	:	
	:	
VIRGINIA DRILLING COMPANY, LLC	:	Mine: Red Fox Surface Mine
Respondent.	:	

AMENDED DECISION

Appearances: Virginia Fritchey, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Gene W. Bailey, Hendrickson & Long, PLLC, Charleston, West Virginia, for Respondent.

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

This case involves a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Virginia Drilling Company, LLC, at its Red Fox Surface Mine, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (2012) (the "Mine Act" or "Act"). The case comprises a single 104(d) (1) citation written on April 14, 2010, Citation No. 8107680. The parties presented testimony and documentary evidence at the hearing held in Beckley, West Virginia, on October 2, 2012.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulations

The parties submitted the following stipulations prior to the hearing and on the date of hearing:

1. Virginia Drilling is a drilling and blasting company licensed by the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF").

2. Virginia Drilling's corporate offices are located in Vansant, VA.

3. Virginia Drilling was providing ATF-licensed blasting services at the Red Fox Surface Mine in April 2010 when Citation No. 8107680 was issued.

4. In April 2010, Red Fox Surface Mine was operated by Justice Highwall, Inc., a subsidiary of Justice Energy.

5. Justice Highwall, Inc was an "operator" as defined in Section 3(d) of the Act at the coal mine which the citation in this proceeding was issued.

6. The products of the mine at which Citation No . 8107680 was issued entered commerce, or the operation or products thereof affected commerce, within the meaning and scope of Section 4 of the Act.

7. The penalty which has been assessed for this violation pursuant to 30 U.S.C. § 820 will not affect the ability of Virginia Drilling to remain in business.

8. MSHA Coal Mine Inspector John Stone, whose signature appears in Block 22 of Citation No. 8107680, was acting in his official capacity as an authorized representative for the Secretary of Labor when the citation was issued.

9. True copies of Citation No. 8107680, with any and all modifications and abatements, were served on Virginia Drilling or its agent as required by the Act.

10. Citation No. 8107680, along with any and all modifications and abatements, were issued on the dates stated therein and were issued by a duly authorized representative of the Department of Labor, MSHA.

11. The Citation contained in Exhibit S-1 attached hereto is an authentic copy of Citation No. 8107680, including any and all modifications or abatements.

12. Citation No. 8107680 was timely abated.

13. Citation No. 8107680, along with any and all modifications and abatements, may be admitted into evidence, without objection, although Respondent may dispute specific allegations contained within the order.

14. On April 14, 2010 MSHA issued Citation No. 8107680 citing a violation of 30 C.F.R. § 77.1303(pp) of the Federal Mine Safety and Health Act.

15. Citation No. 8107680 states as follows

    A cutoff shot was discovered on Monday 4/12/2010 at the 9 seam put in which 12 holes did not shoot. An adequate inspection of this blast area was not performed by the blaster after the shot was discharged at the end of the day shift on Saturday 4/10/2010.
    Exhibit S-1 is a copy of the order.

16. Citation No. 8107680 was issued as an S&S, unwarrantable failure §104(d)(1) citation. It was assessed as being reasonably likely to cause a

permanently disabling injuries to 7 miners. The negligence level was designated as high. The Citation was assessed for a total civil penalty of $23, 229 against Respondent.

17. Corey New is a licensed and certified surface blaster who has worked with Virginia Drilling since March 2008.

18. Mr. New earned his West Virginia blasting license in 2006.

19. Mr. New was the blaster who conducted the post-blast examination at issue at Red Fox Surface Mine on the afternoon of April 10, 2010.

20. Chad Coleman was the Virginia Drilling blaster-in-charge at the Red Fox Surface Mine on April 10, 2010.

21. Mr. Coleman, a salaried employee, was a member of Virginia Drilling mine management.

22. Mr. Coleman was not present when the April 10, 2010 post-blast examination at issue occurred.

23. Mr. New has conducted post-blast examinations hundreds of times previous to the blast at issue on April 10, 2010.

24. Mr. New had worked at Red Fox Surface Mine performing blasting services for three to four years.

25. Exhibit S-2 is a copy of map of the blast site that Corey New drew at his August 21, 2012 deposition of the post-blast examination site at issue. The X on the berm marks the location that Mr. New identified as the place that he stood when he conducted the post-blast examination.

26. The shot configuration at issue was two separate non-electric shots, a short hole shot and a deep hole shot, tied together by surface cap delays.

27. All of the blasts contained in the short hole shot detonated.

28. Based upon the visual observation from the location on the berm designated on Exhibit S-2, Mr. New concluded that all of the holes in the blasting pattern had detonated.

29. Red Fox Surface Mine Superintendent Kirby Bragg informed Mr. Coleman of the discovery of the undetonated blasts on the morning of April 12, 2010.

30. Virginia Drilling Safety Director Anthony Kidd was not present at Red Fox Surface Mine on either April 10 or April 12, 2010.

31. Virginia Drilling Vice President Kester "Red" Kennedy was not present at Red Fox Surface Mine on April 10, April 12 or April 14 of 2010.

32. Exhibit S-3 are the notes of Inspector John Stone taken on April 14, 2010 at the Red Fox Surface Mine. These notes pertain to the issuance of Citation No. 8107680. The parties agree that there are no authenticity issues with regard to these notes, although Respondent does not agree to the veracity of any statements made by Inspector Stone in the notes.

33. Exhibit S-4 is the April 10, 2010 blasting log completed by Virginia Drilling employee, Corey New, for the shot at issue in this case.

34. Exhibit S-5 is MSHA's Assessed Violation History Report, R-17 report, accurately sets forth the history of violations by Virginia Drilling for the time period specified. Such history of violations may be used to calculate penalty assessment amounts for the citations at issue.

(Sec'y Proposed Stip. 1-3; Parties Second Set of Stip. 1)

Findings and Discussion

On April 14, 2010, MSHA Inspector John Stone issued Citation No. 8107680 as a result of an investigation at the Red Fox Surface Mine, stemming from reports of undetonated explosives. Upon investigation, approximately 10 to 12 undetonated explosives were discovered by a mine employee nearly two days after the original blast occurred. Citation No. 8107680 noted a violation of 30 C.F.R. §77.1303(pp) and the Secretary of Labor assessed a penalty of $23,229 and determined the violation to be significant and substantial and an unwarrantable failure.

Citation No. 8107680

After receiving a report from an employee at the Red Fox Surface mine of a potential Mine Act violation, Inspector Stone arrived at the mine site on April 14, 2010. Inspector Stone conducted an investigation, interviewed several individuals, and issued a the citation alleging a violation of 30 C.F.R. §77.1303(pp). The citation states:

> A cutoff shot was discovered on Monday 4/12/2010 at the 9 seam put in which 12 holes did not shoot. An adequate inspection of this blast area was not performed by the blaster after the shot was discharged at the end of the day shift on Saturday 4/10/2010.

Inspector Stone also determined that the violation was significant and substantial and an unwarrantable failure.

(Ex. S-1)

Inspector Stone determined that as a result of this violation a permanently disabling injury was reasonably likely to occur, the violation was significant and substantial ("S&S"), 7 persons would be affected, and the violation was the result of high negligence on the part of the operator. (Ex. S-1) The Secretary assessed a civil penalty of $23, 229.00. (Pet. Assessm't. Civ. Pen. Ex. "A")

The Violation

Citation No. 8107680 was issued under 30 C.F.R. § 77.1303(pp), which states:

> Blasted areas shall be examined for undetonated explosives after each blast and undetonated explosives found shall be disposed of safely.

To prove a violation of 30 C.F.R. §77.1303(pp), the Secretary must show that there was no examination, or that if an examination was performed, it was not adequate. *Sec'y of Labor v. Star Fire Mining*, 21 FMSHRC 61, 63 (Jan. 1999).

Virginia Drilling Company ("VDC") asserts that this violation should be vacated because their certified blaster, Corey New ("New"), conducted a post-blast examination to determine whether there were any undetonated explosives, and despite the fact that he was unable to find any misfires, he was competent and acted in accordance with every protocol. (Tr.25:18-23) VDC argues that New's visual observation from a single vantage point was an adequate examination.

New testified that he could not see the entire blast area and only looked at the holes from one vantage point. He thought he had seen everything necessary to determine that the blasts went off successfully.[1] Larry Schneider, an experienced blaster and blasting instructor (Tr.200:4-6; Tr.201:20-23), testified at the hearing that the best person to determine whether a shot has gone off properly would be the blaster-in-charge. (Tr.205:3-11) Schneider testified that the visual observations of the blaster after the blast and the appearance of no apparent problems is all that a reasonable and prudent blaster would need to do to conduct an adequate post-blast examination. (Tr.205:12-16; Tr.211:23-212:8) Thomas Lobb, a physical scientist and expert blaster,[2] testified that a blaster can conduct a post-blast examination from one vantage point if he can see the entire

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[1]New stated that he did not walk the entire shot, did not see the back of the wholes and could not see the area that was shot so he couldn't make a determination that the holes did not discharge. (Tr.51:16-21)

[2]Lobb was a certified blaster in West Virginia in the early 1970s. (Tr.123: 12-13) Lobb started working at MSHA in 1997 as the explosive and blasting expert and senior physical scientist. (Tr.123: 17-19)

blast site. (Tr.134:8-13) However, both Lobb and Schneider testified that if the blaster cannot see the entire blast site, it would not be possible for him to perform an adequate post-blast examination. (Tr.134:13-15, Tr.219:12-16; Tr.219:20-22) Furthermore, Lobb testified that it if 12 of 25 holes did not detonate it would be obvious to the blaster because the highwall would still be intact. (Tr.148:2-7) In contrast, such misfires would not be so obvious if there were 500 or 1000 holes and only a few of the holes did not detonate. Under that scenario it would be reasonable for a blaster not to notice it. (Tr.149:1-22). Finally, Lobb testified that a reasonable and prudent blaster would have noticed the misfires (Tr.147:12-18).[3]

The Commission has held that an adequate examination must discover hazardous conditions. *Sec'y of Labor v. Dynatec Mining Corporation*, 20 FMSHRC 1058 (Sept. 1998).[4] VDC maintains that it conducted an adequate blast examination on April 10, 2010, but if that were the case, it would have discovered the 12 misfires that were so obvious to a non-certified blaster from afar. The Federal Safety and Mine Act of 1977 is a strict liability statute. The mere fact that the post-blast examination was done does not expiate the violation, as VDC argues, because the examination was not done adequately. An adequate examination would have detected such a gross departure from the industry standard for misfires. I find that although a post-examination was conducted, it was not adequate to discover the misfires and prevent the hazard that was created by the violation. I conclude that VDC violated 30 C.F.R. § 77.1303 (pp) by failing to conduct an adequate post-blast examination and missing 10 -12 misfires at the Red Fox Surface Mine.

Negligence

The Commission provided guidance for making the negligence determination in *A. H. Smith Stone Co.*, stating that

> 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 thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the

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[3]Lobb also testified that such a high rate of misfires would have been obvious to a certified blaster. (Tr.149:22-150:2)

[4]In *Dynatec*, ALJ Manning determined that the Secretary had established that the Respondent had not conducted an adequate examination of the raise structure. If the Respondent had, ALJ Manning reasoned that it would have revealed the hazardous conditions that lead to the collapse of the raise structure. As such, although the Respondent had conducted an examination it was "not adequate to pinpoint the problems in the raise structure so that the problems could be corrected *before the miners were exposed to the hazards.*" 20 FMSHRC 1058, 1088 (Sept. 1998) (ALJ Manning).

> 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.

5 FMSHRC 13, 15 (Jan. 1983) (citations omitted).

"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 when "[t]he operator exercised diligence and could not have known of the violative condition or practice." *Id.*

VDC argues that this violation did not result from high negligence because New acted in accordance with industry standards. I disagree. High negligence results when the operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances. Table X of 30 C.F.R. §100.3 New should have known not to release the blast area because there were obvious indicators that a misfire had occurred. New stated that he was responsible for the blast and was the blaster-in-charge of the blast. (Tr.52:1-10) Both expert witnesses determined that the blaster-in-charge was the best person to determine if there were any misfires.[5] New also testified that he only viewed the blast area from one vantage point and admittedly could not see the deep holes yet assumed the blast went off as expected.[6] Both expert witnesses also testified that the failure of a blaster to examine the entire blast area was not

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[5] Schneider testified on direct examination that a certified blaster-in-charge would be the best person to determine if the blast performed as planned. (Tr.205:3-11). Lobb testified that the blaster-in-charge is the best person on the mine site to determine the pre and post-blast examinations. (Tr.185:15-22)

[6] New revealed to Insp. Stone that he was a certified blaster, that he did not walk the shot and relayed that he thought that all the holes had been discharged so he did not into look in that area where the deep holes misfired. (Tr.46:2-16)

reasonable and prudent and that such an oversight would not be considered adequate.[7] In light of the fact that the indicators of a misfire were so obvious to a person without blasting experience,[8] New should have known of the violative condition. VDC's own expert admitted that if a lay person could see something out of the ordinary, a blaster should have seen it as well. (Tr.223:1-6)

Given the obvious indicators of this violation, New should have known that there were misfires when he shot the holes on April 10, 2010. Additionally, there were no mitigating factors presented to warrant a finding of a lower degree of negligence. There is no reason to reduce the level of negligence. I conclude that this violation resulted from high negligence .

Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sep. 1996) (*citing Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984) and *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (April 1987)). The seriousness of a violation can be examined by looking at the importance of the standard which was violated 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 gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

Stone determined the gravity as reasonably likely to result in injury because there were 10 to 12 live holes, men and equipment were working within the blast area, and it was reasonably likely that an injury would occur if the misfires detonated. (Tr.56:12-21) Lobb also indicated that he had investigated numerous mine accidents in which misfires detonating caused injury or death.[9] Stone classified the violation as permanently disabling because of the live holes and large

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[7] Lobb stated that a reasonable and prudent blaster would have noticed that 12 of the 48 holes did not detonate. (147:12-18) Lobb stated that if half of the blasts didn't detonate it would be obvious because the high wall would still be intact. (Tr.148:2-7)

[8] Mr. Bragg stated to Stone that the misfire should have been found and that anybody that would have examined that shot would have found these conditions and noticed that the wall was not straight. When he arrived at the mine on Monday morning, he said he was traveling down the road and realized the wall had a curve in it and got out of his vehicle to investigate it. (Tr.51:3-16).

[9]Lobb has investigated blasts sites where workers dug into areas of undetonated holes and were seriously hurt or killed. (Tr.150:22-151:1)

equipment removing the overburden in the area which could set off the explosives and expose miners to blunt-type trauma from impact, flyrock, or even the movement of the machine itself. (Tr.58:4-15) He determined that seven miners could be affected. He considered the nature of the operation, how the men worked the equipment, what equipment is usually used in that type of shot, and the fact that trucks travel in and out of the area. (Tr.58:22-59:8) There is no doubt that if mining operations had continued without detecting and disposing of the misfires, it was at least reasonably likely that an injury could have occurred which could seriously injure several miners.[10] Therefore, I concur that the violation was reasonably likely to cause injury.

Significant and Substantial

In *Mathies Coal Co.*, the 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.

6 FMSHRC 1, 3-4 (Jan. 1984).

In *U.S. Steel Mining Co.*, 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."

7 FMSHRC 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); *see also 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, 45 (D.C. Cir. 1999).

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[10]MSHA has recorded approximately 30 to 40 accidents related to misfires since 1978. (Tr.158:22-59:3)

The underlying violation here is the failure of VDC to conduct an adequate post-blast examination, which gave rise to a discrete safety hazard, i.e., that undetonated explosives were left in an area that was cleared for miners to resume work. As discussed above, there is reasonable likelihood of permanently disabling injury resulting from this violation. A discussion of the severity of the injury that would result from this violation follows.

On April 10, 2010, New detonated holes at the Red Fox Surface Mine. (Tr.20:19-23) After conducting a visual post-blast examination from the berm (Tr.310:6-14),[11] New sounded the all clear for the miners to resume work. (Tr.311:20-21) Between Saturday, April 10, 2010, and Sunday, April 11, 2010, mining crews operated heavy equipment to remove the shot rubble. (Tr.21:7-11) Approximately 12 misfired shots were discovered on Monday, April 12, 2010, by Red Fox Mine employee Kirby Bragg. (Tr.59:9-60:5) New learned of the misfires on April 12, 2010. (Tr.312:21 - 313:1) On April 14, 2010, Stone learned of the violations and issued VDC Citation No. 8107680 for violation of 30 C.F.R. § 77.1303(pp). (Tr.55:17-56:11) VDC failed to conduct an adequate post-blast examination to discover undetonated blasting material.

Lobb testified that the undetonated blasts are dangerous to miners (Tr.158:19-22) and that ordinary mining operations, such as drilling and digging with mining equipment or running over rocks close to undetonated blasts, could cause them to explode. (Tr.159:7-15) Lobb also testified that the Bureau of Mines has determined that only 15 pounds of pressure on detonators can cause them to explode. (Tr.141:13-16) Stone testified that the CAT front end loader was removing overburden from the lower level of the blast site, and rock trucks were loading the rocks and depositing the rocks in other areas of the job. (Tr.43:1-15) The CAT loader weighs approximately 200 tons. (Tr.42:10-23) Lobb testified that he had investigated numerous misfire accidents and noted that injury from undetonated holes could be fatal.[12] Lobb also testified that even if the blast does not injure anyone in the immediate vicinity, flyrock from the blast could.[13]

If only 15 pounds of pressure is needed to detonate misfires, a 200 ton machine is certainly capable of detonating the misfired shots in this case. If the misfires had detonated, it would have potentially killed or severely disabled miners in the blast area and up to 2,000 feet away from the blast area. Therefore, the Secretary has met his burden of proving the *Mathies* elements. The result of this violation was that undetonated blasts were undiscovered until several days and several shifts later. If the misfired blasts had been detonated by the miners resuming work in the area

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[11]Lobb stated that the blaster should have looked at the holes from multiple directions to determine that there were no undetonated blasts. (Tr.157:18-22)

[12] Lobb also noted that he has investigated blasts sites where workers dug into areas of undetonated holes and were seriously hurt or killed. (Tr.150:22-151:1)

[13] Lobb testified that flyrock can travel over 2,000 feet (Tr.164:16-17) and that it doesn't need to be large o kill someone. (Tr.164:10-11)

cleared by VDC's certified blaster, there would be a reasonable likelihood that the blasts would cause injury to the miners and that the injury would be permanently disabling. For these reasons, the violation was appropriately classified as significant and substantial.

Unwarrantable Failure

The term "unwarrantable failure" comes from section 104(d) of the Act. 30 U.S.C. 814(d) (2012). Taken together with "significant and substantial," it creates a standard for enhanced enforcement procedures, including withdrawal orders and potential enhanced liability.

In *Emery Mining Corp.*, the Commission determined that the essence of unwarrantable failure is aggravated conduct constituting more than ordinary negligence. 9 FMSHRC 1997, 2001 (Dec. 1987). 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 Co.*, the Commission drew a clear contrast between negligence and unwarrantable failure, noting that the difference is not merely semantic. 14 FMSHRC 1982 (Dec. 1992). 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]." *Id.* at 1988 (quoting *E. Assoc'd Coal Corp.*, 13 FMSHRC 178, 186 (Feb. 1991)). 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." *Gatliff Coal*, 14 FMSHRC at 1989 (quoting *E. Assoc'd Coal*, 13 FMSHRC at 186).

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 it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *Bethenergy Mines, Inc.*, 14 FMSHRC 1232, 1243–44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). The Commission has also considered an operator's knowledge of the existence of the dangerous condition. *See, e.g., Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug.1994) (affirming unwarrantable failure determination where operator was aware of a brake malfunction failed to remedy the problem); *Warren Steen*, 14 FMSHRC at 1126–27; 1129 (knowledge of a 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. They are suggestions only and are not intended to be an exhaustive or

exclusive catalog. The essential aspect of the unwarrantable failure analysis is 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).

New could not see into the deep holes to see if shots had discharged. He assumed everything went off and made no attempt to look at the blast area from another perspective, even though he could not see the entire blast area.[14] Thomas Lobb and Larry Schneider testified that it is customary for a blaster to view the area from different perspectives if everything cannot be viewed from one perspective.[15] The misfires were left undetected from April 10, 2010 to April 12, 2010, during which time miners had resumed work in the blast area.[16] The danger posed to the miners resuming work was severe, in that it could result in severe injury or death.[17] Given his years as a blaster,[18] New should have been able to see the misfires or at least the indicators of a misfire. New's premature clearance of the blast area and failure to notice any indicators of a misfire is particularly serious because the indicators of a misfire were so obvious to Bragg, who though not employed in the blasting industry, was able to see that there was something amiss from a casual look at the blast area.[19] It is significant that VDC's expert witness admitted that if a lay person could see something out of the ordinary, a trained blaster should have seen it as well. (Tr.223:1-6) If an adequate examination had been done on April 10, 2010, it would have revealed the numerous misfires.

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[14] New stated that he did not walk the entire shot. He did not see the back of the holes and could not see that area that was shot, so he could not make a determination that the holes did not discharge. (Tr.51:16-21) New told Stone that he was a certified blaster; he did not walk the shot; and he thought that all the holes had been discharged, so he did not into look in the area where the deep holes misfired. (Tr.46:2-16)

[15] Usually a blaster can conduct his post-blast examination from a single vantage point if he is able to see the entire blast site. (Tr.134:8-13) However, if a blaster cannot see the entire blast site, he cannot perform an adequate post-blast examination. (Tr 134:13-15)

[16]The condition of the holes was obvious and extensive, had existed since April, 4, 2010, at 3:30 pm, but was not discovered until Monday, April 4, 2010, by Kirby and Bragg. (Tr.59:9-60:1-5) New determined that the shots detonated and cleared the blast area. (Tr.13-21) New learned of undetonated holes on Monday, April 4, 2010. (Tr.312:21-313:1) The CAT front end loader was removing overburden from the lower level of the blast site and rock trucks are loading the rocks and depositing the rocks in other areas of the job. (Tr.43:1-15)

[17]Lobb testified that undetonated blasts are dangerous to miners. (Tr.158:19-22)

[18]New has been certified blasted in West Virginia for about six years. (Tr.305:13-15)

[19]Stone assessed the violation as unwarrantable failure because: (1) the operator exhibited less care than should be expected; (2) the violating conditions were extensive, namely two rows of holes were visible to Kirby from the road; (3) a resulting injury could be very serious; and (4) the condition existed for an extended period. (Tr.60:6-19)

I am persuaded by the testimony of Lobb, Schneider, and Stone that if the entire blast area could not be viewed, the proper protocol would be to view the blast area from various vantage points. New's failure to conduct an adequate post-blast examination, and the conspicuous nature of the violation to individuals outside of the blasting industry, demonstrate a serious lack of reasonable care in the manner in which New conducted the post-blast examination. More troubling than New's failure to discover the misfires through his own examination is the fact that the violation went undiscovered for several days, and this violation would have persisted if it had not been discovered by Bragg. Based on this evidence, I conclude that New demonstrated a serious lack of care in conducting his post-blast examination amounting to an unwarrantable failure to comply with the standard.

Penalty

The principles governing the authority of Commission administrative law judges to assess civil penalties *de novo* for violations of the Mine Act are well established. 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, that in assessing civil monetary penalties, the Commission [ALJ] shall consider the six statutory penalty criteria:

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

30 U.S.C. § 820(i).

Applying the 30 C.F.R. § 100.3 penalty calculation to the findings and conclusions above, the penalty recommended by the matrix is $23, 229.00. I accept the Secretary's evidence regarding the mine size, the size of the controlling entity, the ratio of violations per day, the number of persons involved, and the severity of a potential event. I concur with the Secretary's assessment of this violation as significant and substantial, reasonably likely to result in permanently disabling injury and high negligence which amounts to unwarrantable failure. After considering all of the penalty criteria, I assess a penalty of $23, 229.00 for this citation. I apply the percentage point reduction for good faith abatement to come to that figure.

ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C.§ 820(i), I assess a total penalty of $23, 229.00. Virginia Drilling Company is hereby ORDERED to pay the Secretary of Labor the sum of $23,229.00 within 30 days of the date of this decision.

L. Zane Gill
Administrative Law Judge

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