

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 19, 2001

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEST 94-645-M
 :
DYNATEC MINING CORPORATION :

BEFORE: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”). Following an investigation into a fatal accident that occurred at the Magma/Superior mine, inspectors from the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued one citation and 13 orders, pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), to Dynatec Mining Corporation (“Dynatec”), an independent contractor at the mine. Administrative Law Judge Richard Manning affirmed the citation and seven of the orders, and their associated special findings, and vacated the remaining six orders. 20 FMSHRC 1058, 1091 (Sept. 1998) (ALJ). The Commission granted Dynatec’s petition for discretionary review challenging the judge’s determinations. For the reasons that follow, we affirm in part and reverse in part.

I.

Factual and Procedural Background

During relevant times in 1992 and 1993, Magma Copper Company (“Magma”) operated the Magma/Superior Mine, an underground copper mine in Gila County, Arizona. 20 FMSHRC at 1058. In December 1992, Magma awarded a contract to Dynatec to construct a 364-foot raise, raise structure, and other facilities at the mine. *Id.* at 1061. The raise was a nearly vertical opening (approximately 80 degrees from horizontal) which was driven through surrounding rock upward from the track level (the 4000 level) to connect with higher levels (the 3763, 3700, and 3636 levels). The raise contained a wooden structure with two side-by-side compartments

separated by a dividing wall: an ore pass and a manway. *Id.* at 1059; Jt. Ex. A at 9. The inside dimensions of the ore pass were approximately six-by-eight feet, while the dimensions of the manway were approximately six-by-six feet. 20 FMSHRC at 1059. Ore-bearing rock (referred to as “muck”) was dumped into the ore pass at the intermediate levels and fell to a feeder at the 4000 level. *Id.*; Jt. Ex. A at 11. There the ore was moved to cars and transferred by track to the mill. 20 FMSHRC at 1059. The manway served as a secondary escapeway for miners in the event of an emergency and a means to gain access to various parts of the raise. *Id.*

Magma designed the raise structure.¹ *Id.* at 1061. The outside of the structure was constructed with ten-by-ten foot timber, and the inside was also lined with timber. *Id.* at 1060. The manway was enclosed with wooden lagging, or 3-inch thick horizontal boards, nailed outside the timber framework. *Id.*; Jt. Ex. A at 10; Tr. 533. The ore pass was lined with 6-by-8 inch armored cribs, using a “birdcage” design. 20 FMSHRC at 1060. The raise structure was vertically framed at intervals of seven-feet, four-inches, and each frame was referred to as a “set.” *Id.* The succession of sets, one on top of the other, were consecutively numbered from the bottom. *Id.*; Jt. Ex. A at 10. The sets were interconnected at joints where the timber was notched with projections to fit together. Jt. Ex. A at 10.

As the raise structure was built, blocking was installed against the surrounding rock at each segment where the vertical and horizontal members of the framework were joined. 20 FMSHRC at 1060; Jt. Ex. A at 12-13. The blocking at each set prevented the raise structure from moving outward horizontally and kept the vertical posts in line. 20 FMSHRC at 1060. A single bearing set was located just above the feeder at the base of the first set.² *Id.* at 1061; Jt. Ex. A at 15. The base of the first set was hitched into surrounding rock with the entire set enclosed in concrete. Jt. Ex. A at 15. As each set was drilled and blasted, rock from the blast (referred to as “backfill”) would fall between the framework of the raise structure and the host rock. 20 FMSHRC at 1060.

In June 1993, Dynatec completed construction of the raise from the 4000 level to the 3763 level. *Id.* at 1061. In late June, Magma began dumping muck from the 3763 level, while Dynatec continued to build the raise structure above the 3763 level to the 3636 level. *Id.* Between June 28 and July 11, boulders and timber were sometimes hung-up in the feeder chute, and explosives were used at the feeder to free the hang-ups. *Id.*; Jt. Ex. A at 19.

On July 29, 1993, a Magma loader operator dumped 30 to 50 loads of sandfill, a slurry consisting of cement and sand, into the raise at the 3763 dump site. 20 FMSHRC at 1061; Jt. Ex. A at 20. Muck was not pulled from the ore pass during that shift. 20 FMSHRC at 1061.

¹ During the bid process, Dynatec had submitted proposals for alternate methods of building the raise structure, which Magma rejected. 20 FMSHRC at 1061.

² A bearing set is designed to transfer the weight of the raise structure above the bearing set to the surrounding rock. 20 FMSHRC at 1061.

Starting on July 30, the ore pass was blasted to clear hang-ups on a regular basis. *Id.* Magma discovered that the sandfill had hardened near set 11 in the ore pass and that the hardened sandfill was responsible for the continuing hang-ups in the ore pass. *Id.*

On August 3, Magma made a concerted effort to blast a hang-up in the ore pass caused by the hardened sandfill. *Id.* The ore pass was blasted approximately four times on the B shift. *Id.* After hearing that the raise had been damaged, Dynatec Lead Miner Douglas Massey inspected the raise and later called Dynatec Project Superintendent Mark Spaulding at home to describe the damage he observed. Jt. Ex. A at 22.

On August 4, Spaulding and another Dynatec miner inspected the raise. 20 FMSHRC at 1061; Jt. Ex. A at 23. They discovered two pieces of armored cribbing missing between the ore pass and the manway at set 20, muck in the manway at that location, and a cracked divider at set 8. 20 FMSHRC at 1062. In addition, they determined that the raise structure had settled cumulatively eight to ten inches below the 3763 level. *Id.*; Stip. Doc. 113; Jt. Ex. A at 23. Magma's team leader for the raise project, Matthew Kannegaard, was notified of the damage. Jt. Ex. A. at 23. Kannegaard and Spaulding then inspected the raise together. *Id.*

As a result of the damage, the raise was closed on August 4. 20 FMSHRC at 1062. Magma provided Dynatec with a memorandum listing nine items to repair. *Id.* These items included: removing the sandfill from the ore pass; installing short spreaders under all short manway wallplates; stabilizing the broken divider at set 8; repairing broken ladders; securing ladders to wallplates; and spraying shotcrete in sets 20 and 21. *Id.*; Stip. Doc. 115. In addition, the memorandum provided that the raise was to be returned to service on the C shift on Monday, August 8, 1993. Stip. Doc. 115.

On August 6, Dynatec Raise Superintendent Ronald Spry, Spaulding, Kannegaard, and Magma Chief Engineer Tom Fudge went to a restaurant to have lunch and bid farewell to Spry, who was moving to another job. Statement No. 42, at 31; Statement No. 44, at 33-34.³ Spaulding told Kannegaard that it was important that Magma stop blasting and overloading the raise. 20 FMSHRC at 1062. In addition, Spaulding suggested pouring a sand grout backfill between the raise and the surrounding rock. *Id.* Spaulding understood that Magma would blast hang-ups in the raise only as a last resort. *Id.*

From approximately August 4 through 9, Dynatec employees repaired the raise in accordance with the memorandum. Jt. Ex. A at 24-27. Dynatec employees blasted the raise to remove the hang-up, and completed most of the items set forth in the memorandum. 20 FMSHRC at 1062. On the B shift of August 9, Magma resumed using the raise for production. *Id.*

³ The parties stipulated to the admissibility of deposition and interview transcripts for 31 individuals. These depositions and interviews are listed in Stipulation No. 3, and are referred to in this decision as "Statement No.," followed by the number they are given in that list.

On August 10, Magma employees Jeff Christiansen and Nicholas Truett, who were assigned to pull muck from the bottom of the raise, began the B shift by attending a safety meeting from approximately 3:00 until 5:00 p.m. Jt. Ex. A at 28; Tr. 741. Christiansen and Truett then went to the 4000 level of the raise and began to pull muck. Jt. Ex. A at 28. Dynatec miner Ernest Villaverde was working on the feeder while two other Dynatec miners, Nathan Spry and Joe Castaneda, were inside the raise completing repairs, including installing spreaders and repairing ladders. *Id.*; Statement No. 6, at 23; Statement No. 40, at 5. A hang-up was reported at set 8. 20 FMSHRC at 1062. Christiansen unsuccessfully tried to use an air lance to free the hang-up. *Id.*; Jt. Ex. A at 28. Christiansen and Truett later returned to the raise with explosives. Jt. Ex. A at 28. As they were preparing to blast the raise, Villaverde reminded them that Spry and Castaneda were working inside the raise. *Id.*; Statement No. 48, at 8. Christiansen informed Spry and Castaneda about the impending blast, and they came down from the raise. Jt. Ex. A at 28; Statement No. 5, at 3-4. After the blast, Spry and Castaneda assisted Villaverde at the feeder and did not reenter the raise. Jt. Ex. A at 29; Statement No. 5, at 5-6. The ore pass hung up again. 20 FMSHRC at 1062. Before it was blasted a second time, the Dynatec miners completed their work at the feeder, and went to the 3600 level, as directed by Bill Wilson, the Dynatec raise superintendent who replaced Spry. *Id.*; Jt. Ex. A at 29; Statement No. 50, at 5-6, 20-21.

Magma Team Leader Alfred Edwards and Group Leader John Dalton separately traveled to the 4000 level to assist Christiansen and Truett with the hang-up. Jt. Ex. A at 1, 30-31. The four miners entered the raise from the 4000 level to set up the blast, and the raise failed at around 9:45 p.m. 20 FMSHRC at 1062. It appears that the dividing wall separating the ore pass and the manway failed, and muck moved from the ore pass into the manway and buried the four Magma employees, fatally injuring them. *Id.* at 1062-63.

Following an investigation into the accident, MSHA issued to Dynatec a section 104(d)(1) citation and an order alleging violations of 30 C.F.R. § 57.3360; an order alleging a violation of 30 C.F.R. § 57.11001; six orders alleging violations of 30 C.F.R. § 57.3401; and five orders alleging violations of 30 C.F.R. § 57.18002(a). Stip. Docs. 1-14. Magma also was cited for multiple violations of explosives and training standards in addition to receiving one 104(d)(1) citation and three orders alleging violations of section 57.3360; one 104(d)(1) citation and six orders alleging violations of section 57.3410; and four orders alleging a violation of section 57.18002(a). 20 FMSHRC at 1059; Jt. Ex. A at 53-113; Tr. 65. The Secretary of Labor proposed civil penalties totaling \$700,000 against Dynatec. 20 FMSHRC at 1059.

In 1996, an indirect subsidiary of Broken Hill Proprietary Company Limited merged with Magma Copper. *Id.* As a result of this merger, Magma became BHP Copper. *Id.* at 1058. The enforcement actions against Magma were settled after the merger. *Id.* at 1059. As part of the settlement agreement, BHP Copper agreed to pay civil penalties of \$800,000; to plead guilty to two misdemeanor counts under section 110(d) of the Mine Act, 30 U.S.C. § 820(d); and to pay associated criminal penalties. *Id.* BHP Copper also agreed to pay certain sums to the State of Arizona. *Id.* In July 1998, a United States Magistrate Judge of the U.S. District Court for the District of Arizona approved the settlement of the criminal matters, and Judge Manning approved

the settlement of the civil proceedings. *Id.*

Dynatec challenged the citation and orders, and the matter proceeded to hearing before Judge Manning. The judge affirmed the citation and orders alleging violations of section 57.3360, 57.11001 and 57.3401, and vacated one order alleging a violation of section 57.3360 and the five orders alleging violations of section 57.18002(a). 20 FMSHRC at 1091. In addition, the judge affirmed the significant and substantial (“S&S”) and unwarrantable failure findings associated with the violations of sections 57.3360, 57.11001, and 57.3401. *Id.* at 1077, 1080, 1085. The judge assessed civil penalties totaling \$90,000 against Dynatec. *Id.* at 1090-91.

II.

Disposition

A. Alleged violation of 30 C.F.R. § 57.3360:⁴ Citation No. 4410466

1. Violation

The judge affirmed the citation alleging a violation of section 57.3360, reading the second and third sentences of section 57.3360 together to require that damaged, loosened, or dislodged timber of the raise structure must be replaced so that the ground support system (that is, the raise structure itself) does not present a hazard to miners. 20 FMSHRC at 1075-76. Noting that the citation related to Dynatec’s maintenance responsibilities after the raise structure had already settled, the judge found that the raise structure was on the verge of failure and that any normal event such as loading the raise with muck had the potential to cause a massive failure of the structure. *Id.* at 1076. He concluded that it was foreseeable that the raise would become loaded with muck within a relatively short period of time and Dynatec knew that loading would put the structure at risk for failure. *Id.* The judge determined that the Secretary established a violation because Dynatec failed to make repairs that addressed the structural problems in the raise structure. *Id.*

⁴ Section 57.3360, entitled “Ground support use,” provides:

Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks. Damaged, loosened, or dislodged timber use[d] for ground support which creates a hazard to persons shall be repaired or replaced prior to any work or travel in the affected area.

Dynatec argues that the Secretary failed to prove that a “hazard to persons” existed in the raise structure in violation of section 57.3360. PDR at 23-25; D. Reply Br. at 14-18. Preliminarily, it contends that the judge erred in considering the third sentence of the standard because the Secretary never argued that Dynatec violated it. PDR at 23-24. It next asserts that the raise was safe to use as a transfer facility, as evidenced by the lack of incident on August 9. *Id.* at 24. It maintains that its initial repairs eliminated any hazards to persons, in conformance with section 57.3360, and that Magma created a hazard to persons through its misuse of the raise. D. Reply Br. at 9 n.14. Dynatec also asserts that the Secretary did not prove a “hazard to persons” existed at the time that Dynatec’s employees were withdrawn on August 10. PDR at 24. It contends that the Secretary merely proved that a hang-up of three to four sets might present a danger to miners, but that the Secretary failed to prove that such a hang-up existed at the time that Dynatec employees were withdrawn from the raise on August 10. D. Reply Br. at 15-16. Dynatec further contends that it was not foreseeable that the raise would be loaded and that Magma would act contrary to its assurances that the raise would not be misused. PDR at 11; D. Reply Br. at 11 & n.22.

The Secretary responds that the judge properly found that Dynatec violated section 57.3360. S. Br. at 11. She asserts that evidence is undisputed that a “hazard to persons” existed after the raise settled. *Id.* at 11-12. The Secretary submits that Dynatec’s repairs did not address the structural problems caused by settlement, and that the raise structure was on the verge of failure. *Id.* at 12. She suggests that the judge correctly rejected Dynatec’s claim that there was no “hazard to persons” because the raise structure was safe to use to transfer ore. *Id.* at 12-13. The Secretary submits that Dynatec’s claim is belied by expert testimony and evidence it was foreseeable that the structure would become loaded. *Id.* at 14-15.

We affirm the judge’s conclusion that Dynatec’s failure to repair or replace ground support timbers so that the raise structure would not create a hazard to persons working there violated section 57.3360. In particular, substantial evidence⁵ supports the judge’s determination that after the raise settled, the raise structure presented a hazard to persons in that an event such as loading the raise had the potential to cause a massive failure within the structure.⁶ 20

⁵ When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

⁶ We reject Dynatec’s preliminary argument that, because the Secretary never argued that Dynatec violated the third sentence of section 57.3360, the judge erred in considering that portion of the standard. PDR at 23-24. The subject citation provided Dynatec with adequate notice that it included allegations that Dynatec allegedly violated the third sentence. *See* Stip. Doc. 1 (Citation No. 4410466) (providing in part, “Management failed to properly repair or replace the

FMSHRC at 1076. The judge credited the testimony of James Van Liere, a consulting engineer retained by the Secretary, who testified that after the raise was put back into use, it could fail because use would apply load, or outward pressure, to the ore pass walls. 20 FMSHRC at 1066, 1068, 1076; Tr. 321, 357. Van Liere stated that it was unknown how many sets of blocking (wooden wedges) were still in contact with the center posts, although they were probably reasonably intact. Tr. 269. He noted that when the ore pass was empty, there may have been no danger, even if blocking were missing, because there was no load against the ore pass walls. Tr. 321, 323-24. Van Liere testified, however, that when the raise was returned to use, a precipitating event such as loading or blasting could cause cribbing to come free of its restraint in the bird cage, resulting in failure of the raise structure. Tr. 318, 356-57. He explained that the failure that occurred on August 10 could have been precipitated “simply by having a loose set of blocking fall away.” Tr. 269-70.

We reject Dynatec’s assertion that the judge abused his discretion by crediting Van Liere’s testimony. PDR at 13-16; D. Reply Br. at 15 n.31. A judge’s credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). Testimony by Dynatec’s own witnesses supports Van Liere’s testimony that loading the raise would diminish safety. Dynatec’s consulting engineer, Peter Stork, testified that, as repaired, it was safe for a miner to use the manway on August 10 only if no more than 30 tons of muck accumulated in the ore pass. Tr. 889, 895; R. Ex. 9. He explained that “thirty tons is based on a small accumulation of muck within the concreted set at the bottom of the raise.” Tr. 889. Stork testified that safety was progressively diminished as the accumulated load exceeded 30 tons. Tr. 889-90; R. Ex. 9. In addition, Stork’s report stated that the repaired raise was susceptible to damage under hung load conditions. *See* Jt. Ex. D. at 19. John Folinsbee, a consulting mining engineer retained by Dynatec, also testified the raise was compromised after it had settled and that it could not be used as it was intended (that is, to store material) without major repairs. Tr. 943. Folinsbee stated that if the raise were put into service, another hang-up would increase the possibility of divider wall breach and further settlement. Tr. 991. Thus, we do not find the extraordinary circumstances requiring that we overturn the judge’s credibility determination.

Furthermore, substantial evidence supports the judge’s determination that it was foreseeable that the raise would be loaded with muck in a relatively short period of time, and that it was unreasonable for Dynatec to believe that the raise structure would only be used to transfer ore. 20 FMSHRC at 1069, 1076. The record reveals that on August 9 and 10, a high volume of ore was being dumped into the raise structure as soon as it was released for production. On

cribbing and timber in the raise which was progressively damaged, loosened, or dislodged as a result of poor mining practices.”). Further, Dynatec cannot claim lack of notice of the judge’s consideration in view of its argument before the judge that it did not violate the third sentence. D. Post-Hr’g Br. at 26-30.

August 9, 12 cars of ore were loaded from the raise during the remainder of the B shift, and 81 cars were pulled during the C shift. Jt. Ex. A at 26-27. A Dynatec miner who helped repair the raise stated that while Dynatec was completing its repairs, Magma was mining and stacking muck in muck bays at all three levels of the raise, waiting for the ore pass to be released for production. Statement No. 29, at 13-15, 31, 36-37. He testified further that when the raise was released on August 9, there were two loaders with two-and-half yard buckets dumping at all three levels. *Id.* at 37; *see also* Statement No. 33, at 6-7; Statement No. 12, at 44-45 (establishing that ore was being dumped at all three levels); *see also* Stip. Doc. 62, at 4 (Magma accident report) (stating that, “with the exception of the time periods during which . . . blasting [occurred,] muck from several stopes was being dumped into the 865 Raise” on August 10). It further appears that the potential to dump ore was greater than it had been previously because the highest level in the raise, the 3636 level, was made available for dumping for the first time on approximately August 9 or 10. *See* Statement No. 17, at 19; Jt. Ex. B at II-3, II-4.

It appears that dumping ore into the ore pass was not synchronized with muck being pulled from the bottom in order to avoid muck accumulation. One of two loader operators at the 3763 dump site stated that, before he was told to shut down on the night of August 10, he had dumped 40 to 45 loads, and that he would get a load and dump it about every two minutes. Statement No. 33, at 4-5, 8. Folinsbee testified that a two-and-a-half yard scoop dumping a load every two minutes would fill up the ore pass from the bottom to approximately sets 8 to 10 in two-and-a-half hours. Tr. 940. A Dynatec miner who helped repair the raise testified that, while two loaders each were dumping at all three levels, there were only two miners at the bottom to load the muck onto the track. Statement No. 29, at 13-15, 36-37. He stated that the two miners at the bottom had to walk 300 to 400 yards to dump the material, while the loaders on the “37 level” had to travel only 30 feet from the muck bay to dump. *Id.* at 48-49. He stated that by the time the muckers at the bottom got back from dumping their load, muck would be piling up in the ore pass. *Id.* at 48-49. In addition, on August 10, the miners assigned to pull muck from the bottom of the raise participated in a team meeting for approximately two hours at the beginning of the shift and did not load ore into cars during that time. Jt. Ex. A at 28; Tr. 741. Furthermore, miners at the bottom sometimes had difficulty ascertaining whether the ore pass was empty or hung-up, which would appear to further hinder synchronization between dumping into the ore pass and pulling muck from the bottom. *See* Statement No. 27, at 11; Statement No. 48, at 4; Stip. Doc. 102. Thus, substantial evidence supports the judge’s determination that if the miners pulling muck from the bottom of the ore pass could not keep up with the ore being dumped, it would not take long for the ore pass to become full or nearly full again. 20 FMSHRC at 1069.

Moreover, we disagree with Dynatec that its repairs to the raise structure eliminated any “hazards to persons,” and that only subsequent misuse by Magma created a new hazard. PDR at 24; D. Reply Br. at 9 n.14. As the judge found (20 FMSHRC at 1067), evidence was undisputed that the repairs made by Dynatec did not address the settlement of the raise. Kannegaard, who drafted the repair memorandum with Fudge, acknowledged that the list of repair items did not address the raise’s settlement. Statement No. 22, at 67, 79; *see also* Tr. 665; Statement No. 37, at 47-49; Statement No. 38, at 152. John Marrington, Dynatec’s vice president and general

manager, also acknowledged that Dynatec turned over the raise “before all the repairs were effected that were necessary to make a stable structure were done.” Statement No. 23, at 53, 155-56.

Rather, the settlement of the raise was going to be addressed by the pouring of sand grout backfill around the raise structure during subsequent weekends, after the raise had already been returned to production. 20 FMSHRC at 1069 n.4, 1076. Kannegaard stated that during the August 6 lunch, no formal plan had been decided upon to address the settlement problem, and that discussions were ongoing. Statement No. 22, at 67. He explained that he had further discussions with Fudge about pouring sand grout backfill at various locations behind the raise structure during weekends after the raise had been returned to production. *Id.* at 102-04. Other Dynatec witnesses testified that the settlement of the raise would be addressed by pouring sand grout backfill after the raise had been returned to production. Statement No. 36, at 19, 25-26; Statement No. 37, at 47-49; Statement No. 38, at 139, 152; *see also* Statement No. 26, at 73; Statement No. 49, at 30-31, 77. Nonetheless, Dynatec’s plans to address the raise’s settlement after it had been returned to production do not negate a finding of violation in view of the standard’s requirement that structural timbers creating a hazard to persons shall be repaired or replaced “*prior* to any work or travel in the affected area.” 30 C.F.R. § 57.3360 (emphasis added).

Dynatec acknowledges that, at most, the repairs it made were sufficient to return the ore pass to production only if it were used to transfer ore. D. Reply Br. at 9-10. Dynatec’s engineer Stork testified that, although the repairs were sufficient to allow the raise to be used to transfer material, the repairs did not address the inability of the raise to resist vertical loads from accumulated muck, particularly under a hang-up condition, without sustaining permanent settlement. Tr. 872-73, 893. John Marrington, Dynatec’s Vice President, agreed that once the raise was turned over to Magma after the repairs had been made, another hang-up in the ore pass could have resulted in failure of the dividing wall. Statement No. 23, at 53, 155-56. Given evidence that loading was foreseeable, the repairs made by Dynatec did not eliminate a hazard to persons within the meaning of the standard.

In addition, contrary to Dynatec’s assertion (PDR at 24), the fact that no incident occurred on August 9 does not establish that the raise structure did not present a “hazard to persons.” Even in the context of considering whether a hazard contributed to by a violation is reasonably likely to result in an injury (for purposes of deciding whether a violation is significant and substantial, *see* n.7, *infra*), the Commission does not require the Secretary to prove the actual occurrence of an accident or injury. *Arch of Kentucky*, 20 FMSHRC 1321, 1330 (Dec. 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 678 (Apr. 1987). Rather, in view of the limited repairs made by Dynatec, evidence regarding the potential for loading and hang-ups amounted to substantial evidence supporting the judge’s determination that a “hazard to persons” existed in the raise structure.

Similarly, we reject Dynatec's argument that it did not violate the standard on August 10 because no "hazard to persons" existed until after its miners left the raise. This argument finds no support in the record. Dynatec maintains that the hazardous condition developed after its withdrawal from the raise, when Magma continued to dump muck on top of the hang-up and continued to use explosives inside the raise. D. Reply Br. at 14 & n.29. In fact, a hazardous condition existed while Dynatec miners were in the raise because there existed a foreseeable potential for loading, and, in fact, a hang-up actually developed. Statement No. 6, at 24-25; Statement No. 40, at 5; Statement No. 48, at 8.

In any event, even if we were to assume that Dynatec employees left the raise before a hazardous condition developed, Magma employees were still in the raise and exposed to a hazardous condition resulting from Dynatec's failure to adequately repair or replace ground support timbers. If Dynatec's violative actions in failing to repair or replace timbers resulted in a "hazard to persons," Dynatec is liable for the violation regardless of which operator employed the miners placed at risk. As the Commission has previously recognized, "Employer-employee is not the test. The duty of an operator, whether owner or contractor, extends to all miners." *Republic Steel Corp.*, 1 FMSHRC 5, 11 (Apr. 1979). Furthermore, Dynatec cannot avoid liability for the violation by claiming that Magma's actions in "misusing" the raise created the "hazard to persons." While Magma's actions may have contributed to the "hazard to persons" in the raise, Dynatec remained responsible for its own actions in failing to repair or replace ground support timbers that present a hazard to persons before miners worked or traveled in the area. In sum, we conclude that substantial evidence supports the judge's determination that Dynatec violated section 57.3360 by failing to repair or replace ground support timbers so that the raise structure did not create a hazard to persons working in the structure. 20 FMSHRC at 1075-76.

2. S&S

The judge concluded that Dynatec's violation of section 57.3360 was S&S.⁷ 20

⁷ A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. See *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further 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.

FMSHRC at 1077. He determined that the violation contributed to a discrete safety hazard and that, without rehabilitating the raise structure, it was reasonably likely that a substantial failure of the structure would occur, resulting in an injury of a reasonably serious nature. *Id.*

Dynatec argues that the judge erred in concluding that its violation of section 57.3360 was S&S. PDR at 24-25. In support of its argument, Dynatec states only that “the Secretary did not prove that a ‘hazard to persons’ existed at the time that Dynatec’s employees were withdrawn . . . on August 10, 1993. Thus, the Secretary did not establish a violation of [section] 57.3360, let alone a significant and substantial one.” *Id.* The Secretary responds that the judge’s determination is supported by substantial evidence. S. Br. at 28-30.

We have concluded that substantial evidence supports the judge’s determination that the Secretary proved that a “hazard to persons” existed in violation of section 57.3360. Moreover, substantial evidence supports the judge’s determination that there was a reasonable likelihood that the hazard contributed to by Dynatec’s violation of section 57.3360 would result in a reasonably serious injury. 20 FMSHRC at 1077. The judge’s conclusion is supported by Van Liere’s testimony that, once the raise was returned to production, a precipitating event such as loading could cause failure of the raise structure. Tr. 356-57. Van Liere’s testimony was supported by Stork’s testimony that the safety of the raise would be diminished by the accumulation of muck exceeding 30 tons, and that the raise was not repaired in order to be used to hold material, particularly when a hang-up existed. Tr. 818-19, 867-68, 821, 823. Finally, MSHA Inspector Tyrone Goodspeed testified that he believed that the violation of section 57.3360 was S&S because the inadequate maintenance of the raise structure could result in a reasonably serious injury, such as death. Tr. 440, 449. In fact, on August 10, the raise structure, as repaired, failed, resulting in the deaths of four miners. Jt. Ex. A at 2, 30-33. Accordingly, we affirm the judge’s S&S determination.

3. Unwarrantable Failure

The judge held that Dynatec’s violation of section 57.3360 resulted from its unwarrantable failure. 20 FMSHRC at 1078. He determined that Dynatec did not address the structural and settlement problems in the raise structure, and that Dynatec knew that the raise structure presented a serious safety hazard to miners if the ore pass was loaded, or if blasting occurred in the raise. *Id.* In addition, he reasoned that Dynatec failed to adequately warn Magma of the severity of the hazard. *Id.* Thus, the judge concluded that Dynatec’s failure to take appropriate actions to ensure that the raise was rehabilitated before it was returned to production demonstrated a serious lack of reasonable care. *Id.*

Id. at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

Dynatec maintains that the judge erred in concluding that its violation of section 57.3360 was caused by its unwarrantable failure. It explains that it merely performed the limited repairs that Magma had decided were necessary, and that it only undertook such repairs after it received assurances that Magma would not misuse the raise and would later allow Dynatec to pour in sandfill during subsequent weekends. PDR at 25-26. The Secretary responds that the judge's determination is supported by substantial evidence. S. Br. at 31-36.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct 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*, 52 F.3d at 136 (approving Commission's unwarrantable failure test).

We conclude that substantial evidence supports the judge's determination that Dynatec's violation of section 57.3360 was caused by its unwarrantable failure. As the judge found, Dynatec managers knew that the repairs were temporary and did not address the fundamental problems of the raise. 20 FMSHRC at 1069; Tr. 665; Statement No. 37, at 47-49; Statement No. 38, at 152; Statement No. 42, at 30; Statement No. 43, at 64. Dynatec conceded that the settlement problem was to be addressed during weekends after the raise had been returned to production. Statement No. 36, at 19, 25-26; Statement No. 37, at 47-49; Statement No. 38, at 139. As Marrington stated, installation of the backfill, which would have made the raise safe, was to occur after the raise had been returned to production. Statement No. 23, at 155-56.

Moreover, substantial evidence supports the judge's determination that Dynatec knew that the raise structure, as repaired, posed a serious safety hazard to miners if the ore pass were loaded. 20 FMSHRC at 1070, 1078. In explaining that the raise should not have been loaded after Dynatec repaired it, Spry testified that if miners "dumped two cars [of muck] in it, they [needed to] pull two cars out [of] the bottom." Statement No. 43, at 129. He agreed that any other practice would have been unsafe. *Id.* Further, as discussed above (slip op. at 7-8), substantial evidence supports the judge's determination that it was foreseeable that the raise would become loaded, and it was unreasonable for Dynatec to conclude that no loading would occur.

In addition, substantial evidence supports the judge's determination that Dynatec managers knew that the raise structure, as repaired, posed a serious safety hazard to miners if the ore pass was blasted. 20 FMSHRC at 1070, 1078. Spaulding and Spry acknowledged that the raise could "completely fall apart" or fail if blasted. Statement No. 37, at 50; Statement No. 39, at 51-52, 61; Statement No. 42, at 32.

Given this knowledge, before undertaking the repairs, Dynatec should have sought assurances from Magma that there would be no blasting. Instead, on August 6, after Dynatec had already started repairs, Dynatec only warned against blasting as part of idle conversation during Spry's good-bye luncheon.⁸ Statement No. 43, at 130-31. Dynatec could not reasonably have concluded that there would be no blasting. Spaulding testified that during the August 6 lunch, he had been informed that Magma would blast in the raise, albeit as a last resort. Tr. 729; Statement No. 39, at 40-41, 85-86; Statement No. 36, at 26; Stip. Doc. 112 (entry by Spaulding dated 8-6-94); Statement No. 38, at 142. Spaulding also stated that Kannegaard had informed him that he had met with team leaders and had circulated a memorandum stating that the raise could be blasted only as a last resort until it had been backfilled with concrete. Tr. 729; Statement No. 36, at 26; Stip. Doc. 112 (entry by Spaulding dated 8-6-94); Statement No. 38, at 142; Statement No. 39, at 40-41, 85-86. Consistent with Spaulding's testimony, Kannegaard stated that he had spoken with Dalton, who was responsible for the Magma crews working in the raise, and told him that blasting in the raise should be a last resort. Statement No. 22, at 94, 107. Thus, as the judge found, Spaulding understood that Dynatec would blast as a last resort. 20 FMSHRC at 1062.

In light of its knowledge that the raise would pose a serious hazard to miners if loading or blasting occurred until after permanent repairs were made, substantial evidence supports the judge's determination that Dynatec exhibited a serious lack of reasonable care by agreeing to a plan whereby it would immediately perform limited repairs and make permanent repairs after the raise had been returned to production. 20 FMSHRC at 1069-70, 1078. As the judge noted, Dynatec did not control the raise. *Id.* at 1069. Nonetheless, Dynatec had control over the decision of whether to undertake the limited repairs. It was unreasonable for Dynatec to rely upon assurances that it would be able to rehabilitate the raise by pouring sand grout backfill during subsequent weekends. Instead, Dynatec was required to adequately repair the raise structure *before* miners returned to work. Dynatec knew or should have known that making the

⁸ Substantial evidence supports the judge's related finding that Dynatec failed to take appropriate action to establish that Magma appreciated the hazard posed to miners by returning the raise to production before permanent repairs were made. 20 FMSHRC at 1070, 1076, 1078. As the judge found, Dynatec's verbal warnings to Magma were framed more in terms of longevity of the raise, rather than ensuring that miners' lives were not placed at risk. *Id.* at 1070, 1076. Kannegaard stated that when he examined the damaged raise with Spaulding, Spaulding stated that continual blasting of the raise would hurt the raise beyond repairability. Statement No. 22, at 106-07. In addition, on August 4, when Spaulding spoke with Magma's manager for underground mines, Steve Lautenschlaeger, Spaulding testified that he did not inform Lautenschlaeger that it would be unsafe to use the raise if it were not rebuilt. Tr. 545, 727. Spaulding stated that his concern when he spoke to Lautenschlaeger was the longevity of the raise. Tr. 727; *see also* Stip. Doc. 84. Spry testified that at the August 6 lunch, he told Kannegaard and Fudge that he thought the repairs were "good . . . [for] straighten[ing] out [or] fix[ing] up" the raise, but that the repairs were only a temporary rather than a permanent solution. Tr. 632-33.

temporary repairs would likely result in miners' exposure to serious risk of harm, and it exhibited aggravated conduct in making such repairs.⁹ Accordingly, we affirm the judge's determination that Dynatec's violation of section 57.3360 was caused by its unwarrantable failure.

4. Civil Penalty

Dynatec argues that the penalty assessed for its violation of section 57.3360 is excessive. PDR at 38-39. It asserts that the penalty criteria reflect congressional intent to treat small, generally compliant operators differently than large, non-compliant ones, and that the fine assessed against Dynatec is only \$10,000 less than the one for Magma for the same violation. *Id.*

We conclude that substantial evidence supports the judge's penalty of \$40,000 for Dynatec's violation of section 57.3360. The judge made findings with respect to all six penalty criteria, and specifically relied in part on Dynatec's favorable history of previous violations, and on the fact that it was a mid-sized independent contractor. 20 FMSHRC at 1089. Moreover, we decline Dynatec's invitation to compare its penalty with the penalty paid by Magma as part of a settlement agreement. *See Northern California Power Agency v. FERC*, 37 F.3d 1517, 1522 (D.C. Cir. 1994) ("It would be nonsensical for an agency to adjust every judgment it rendered in order to conform to the results of related . . . settlements."). The assessment of a civil penalty is a matter of discretion involving the application of the statutory criteria to the facts of each particular case.¹⁰ *See Pyro Mining Co.*, 6 FMSHRC 2089, 2091-92 (Sept. 1984).

Finally, because we would affirm the judge's S&S and unwarrantable failure findings, we conclude that the judge's findings that the violation was serious and caused by high negligence are supported by substantial evidence. *See Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 & n.11 (Sept. 1987) (noting that the penalty criteria of gravity and negligence are based frequently upon the same or similar factual circumstances as findings of S&S and unwarrantable failure,

⁹ Commissioners Riley and Verheggen would emphasize that they do not consider Dynatec to be a guarantor of Magma's conduct, particularly given Dynatec's inability to control Magma's actions or the raise. Nonetheless, they conclude that, given Dynatec's knowledge, the lack of formality of Dynatec's warnings is a factor demonstrating Dynatec's disregard of a known hazard, and supports the judge's unwarrantable failure finding.

¹⁰ We reject Dynatec's argument that the penalties assessed against Dynatec impermissibly exceeded the statutory maximum of \$50,000 per violation because Magma had been assessed penalties of \$50,000 for the same standards that Dynatec allegedly violated. PDR at 39-40. Section 110(a) of the Mine Act expressly recognizes that there may be multiple violations of one standard, that each violation may constitute a separate offense, and that each violation by an operator shall be assessed a civil penalty up to \$50,000. 30 U.S.C. § 820(a). Dynatec and Magma were separately cited for violations that they each allegedly committed. Thus, each may be assessed a civil penalty of up to the maximum statutory amount for each violation.

respectively). The judge appropriately considered that Magma had decided which repairs were necessary, and that Dynatec had received assurances that Magma would not misuse the raise and would later allow Dynatec to pour sandfill, in his reduction of the proposed penalty of \$50,000 to the assessed penalty of \$40,000.¹¹ 20 FMSHRC at 1090.

B. Alleged violation of 30 C.F.R. § 57.11001:¹² Order No. 4410468

1. Violation

The judge determined that a safe means of access was provided and maintained to working places within the manway during the time that Dynatec performed repairs, but that safe access was not provided after the raise was returned to production on August 9. 20 FMSHRC at 1079-80. Based on that finding, he reduced the scope of the order alleging a violation of section 57.11001 from August 4 through August 10, to August 9 and 10. *Id.* The judge concluded that Dynatec violated the standard on August 9 and 10 by failing to remove its employees from the manway and by failing to provide sufficient warning to Magma that the manway did not provide a safe means of access. *Id.* at 1080.

Dynatec argues the judge erred in finding a violation of section 57.11001 because the Secretary failed to prove that a hazardous condition existed when Dynatec employees gained access to working places on August 9 and 10. PDR at 20-22. As to August 9, it contends that there was no violation because there was no evidence that Dynatec worked inside the raise after it was returned to service on the B or C shifts, and that there were no incidents during those shifts. *Id.* at 20; D. Reply Br. at 9-10. It maintains that the Secretary failed to prove a violation on August 10 because there is no evidence that the raise was loaded when it gained access “to” working places on that date. PDR at 20; D. Reply Br. at 10, 16-17. It maintains that even if the standard is read to require safe access “from” working places, in addition to “to” working places, the Secretary did not prove a violation because the Secretary did not prove that the raise was full enough to pose a hazard at the time of Dynatec’s withdrawal. PDR at 21; D. Reply Br. at 10 n.18, 16-17. Dynatec also argues that the judge erred in considering Dynatec’s failure to warn Magma because section 57.11001 does not impose a duty to notify. PDR at 33. The Secretary responds that substantial evidence supports the judge’s finding that Dynatec violated section 57.11001 because the raise structure was unsafe, and there is no dispute that, on August 9 and 10, Dynatec permitted employees to gain access to working places using the raise structure. S. Br. at 17.

¹¹ We reject Dynatec’s assertion that Magma’s negligence was imputed to Dynatec for unwarrantable failure and penalty assessment purposes. PDR at 36-37. The judge did not impute Magma’s negligence to Dynatec but, rather, reduced penalties assessed against Dynatec based in part on Magma’s actions. 20 FMSHRC at 1090.

¹² Section 57.11001 provides that a “[s]afe means of access shall be provided and maintained to all working places.”

To prove a violation of section 57.11001, the Secretary must establish that a safe means of access to working places was not provided to and maintained for miners gaining access. The Secretary, however, need not prove that safety is diminished to the degree that an accident or injury actually will occur while the miners are using the route. *Cf. Arch of Kentucky*, 20 FMSHRC at 1330 (holding that the Secretary does not have to show that a violation caused an accident in order to prove that the violation is S&S.). In considering whether the Secretary proved a violation, the appropriate focus is on the standard's requirement that safe access be "provided and maintained," rather than on whether access is "to" or "from" working places. *See Homestake Mining Co.*, 4 FMSHRC 146, 151 (Feb. 1982) (considering means of access for reaching and leaving workplace in identically worded predecessor to section 57.11001); *Hanna Mining Co.*, 3 FMSHRC 2045, 2046-47 (Sept. 1981) (considering means of access for reaching and leaving workplace in identically worded standard). Thus, we find irrelevant Dynatec's arguments regarding the distinction between access "to" and "from" working places, and the conditions that existed when Dynatec's miners initially arrived in the manway, or eventually departed. PDR at 20-21; D. Reply Br. at 10, 16-17. In addition, we reject Dynatec's assertion that the judge erred in finding a violation on August 9 because no accident occurred on that date. PDR at 20-22.

We conclude that substantial evidence supports the judge's determination that Dynatec violated section 57.11001. As discussed above (slip op. at 7-8), on August 10, a high volume of muck was being dumped into the ore pass, and it was foreseeable that the ore pass would become loaded, potentially resulting in the failure of the divider wall between the ore pass and the manway. As acknowledged by Dynatec witnesses, the raise structure had not been repaired to withstand loading, but was safe only to transfer ore. Tr. 889-90; R. Ex. 9; Jt. Ex. D at 19; Statement No. 43, at 129. During the B shift, the ore pass was loaded, and became hung up. Statement No. 6, at 23; Statement No. 40, at 5. A hang-up within the ore pass applied load to the ore pass walls and could have resulted in failure of the divider wall between the ore pass and manway. 20 FMSHRC at 1066; Tr. 321, 357, 991; Jt. Ex. D at 19. Thus, on August 10, a safe means of access was not provided and maintained in the manway.

It is undisputed that Dynatec permitted its employees to gain access to the manway on August 10 while the manway was unsafe. Dynatec employees were in the manway on August 10 when the ore pass was being loaded, and while it was hung up.¹³ Statement No. 50, at 5; Statement No. 36, at 15-16; Statement No. 6, at 24-26; Statement No. 40, at 5. Dynatec employees were withdrawn from the ore pass only when the hang-up was going to be blasted. Statement No. 6, at 24-25; Statement No. 40, at 5; Statement No. 48, at 8. Accordingly, we

¹³ Because evidence of Dynatec's employees in the manway on August 10 amounts to substantial evidence supporting the judge's determination that Dynatec violated section 57.11001, we need not reach Dynatec's remaining arguments that the judge erred in finding a violation due to Dynatec's presence in the manway on August 9, and Dynatec's failure to adequately warn Magma that the manway did not provide a safe means of access.

affirm the judge's determination that Dynatec violated section 57.11001.¹⁴

2. S&S

The judge determined that Dynatec's violation of section 57.11001 was S&S. 20 FMSHRC at 1080. He reasoned that once the raise was returned to production as repaired, it was reasonably likely that the raise would fail thereby killing or seriously injuring miners in the manway. *Id.*

Dynatec argues that the judge erred in concluding that its violation of section 57.11001 was S&S because the Secretary failed to prove the third *Mathies* factor. PDR at 22. It submits that Van Liere testified that there was only a possibility that the raise might fail, while Stork testified that it was very unlikely that the raise would fail under the conditions that probably existed at the time of Dynatec's withdrawal. *Id.*

Substantial evidence supports the judge's determination that the repaired raise structure was reasonably likely to fail, resulting in injury to miners who gained access to the manway during production on August 10. 20 FMSHRC at 1080. As discussed above (slip op. at 6-10), substantial evidence supports the judge's determination that, as repaired, the raise structure presented a hazard to persons after the raise was returned to production in that a precipitating event, such as loading the raise, could cause the dividing wall to fail. Stork's testimony supports the judge's S&S conclusion in that Stork testified that the repairs to the raise structure were adequate only if the raise was used to transfer ore and did not become loaded. Stork acknowledged that safety would be progressively diminished if muck accumulated beyond the concreted set at the bottom of the raise, and that the raise was vulnerable to further distortion under another hang-up. Spry also acknowledged that the ore pass would not be safe unless muck

¹⁴ Dynatec's asserts that the judge erroneously penalized Dynatec twice for allegedly exposing its employees to hazardous conditions in the raise on the B shift on August 10, and that the citation alleging a violation of section 57.3360 and the order alleging a violation of section 57.11001 are duplicative. PDR at 35-36. We disagree. The Commission has recognized that citations are not duplicative when the standards involved impose separate and distinct duties on an operator. *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003 (June 1997); *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (Mar. 1993). While the citation and order alleging violations of sections 57.3360 and 57.11001 are related in that the failure to repair or replace ground support timber also contributed to making access to a work place unsafe, section 57.3360 requires repair or replacement of damaged ground support timbers, while section 57.11001 requires that safe access be provided and maintained. In effect, Dynatec violated section 57.3360 by an act of omission by failing to repair or replace ground support timbers, and violated section 57.11001 by an act of commission by allowing its miners to gain access to an area in which safe access to working places had not been provided and maintained. See *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463 (Aug. 1982) (holding that violations of omission and commission were not duplicative).

was removed from the ore pass as soon as it was dumped. On August 10, while Dynatec miners were in the manway, the ore pass became loaded and hung-up. Thus, there was a reasonable likelihood of injury resulting from Dynatec's actions in permitting its employees to gain access to the manway on August 10, while safe access was not provided or maintained. Accordingly, we affirm the judge's S&S determination.

3. Unwarrantable Failure

The judge determined that Dynatec's violation of section 57.11001 was caused by its unwarrantable failure. 20 FMSHRC at 1080. He reasoned that Dynatec demonstrated a serious lack of reasonable care by allowing its miners to work in the structure after the hangup developed, and by failing to suitably warn Magma employees that they were endangering their lives by continuing to work in the raise structure below the hangup. *Id.* at 1080-81.

Dynatec argues that the judge erred in finding that its violation of section 57.11001 was unwarrantable because the judge failed to evaluate the reasonableness of Dynatec's decision to allow its employees to work in the raise on August 9 and 10. PDR at 22-23. It asserts that it was highly unlikely that a hazardous condition would arise while its employees were in the raise; that it had received assurances from Magma that the raise would not be misused; and that Dynatec withdrew its employees when blasting was to occur. *Id.* at 23.

Substantial evidence supports the judge's unwarrantable failure determination. As discussed above (slip op. at 12), Dynatec knew that the repairs it performed were inadequate to make the raise structure safe if the raise became loaded, or was blasted. In addition, substantial evidence supports the judge's determination that it was foreseeable that the raise would become loaded. Although Dynatec claims that it received assurances that the raise would not be misused, Spaulding understood that Magma considered blasting in the raise as an option, albeit one of last resort. Tr. 729; Statement No. 39, at 40-41, 85-86; Statement No. 36, at 26. Given the inadequacy of the repairs, the conditions that existed during production, and Dynatec's knowledge that the raise structure posed a serious hazard to miners if it became loaded or was blasted, Dynatec engaged in aggravated conduct by permitting its employees to gain access to the manway during production on August 10. Contrary to Dynatec's assertions, its conduct in withdrawing its miners before the raise was blasted does not demonstrate that its conduct was not aggravated. While its actions ultimately saved Dynatec miners' lives, its actions in permitting its employees to gain access in the first instance nonetheless demonstrated a serious lack of reasonable care.¹⁵ Accordingly, we affirm the judge's finding that Dynatec's violation of section 57.11001 was caused by its unwarrantable failure.

¹⁵ The judge appropriately considered Dynatec's actions in withdrawing its miners by reducing the penalty from \$50,000 to \$20,000, although concluding, nonetheless, that Dynatec's violation was unwarrantable. 20 FMSHRC at 1080-81, 1090.

C. Alleged violation of 30 C.F.R. § 57.3401:¹⁶ Order Nos. 4410469 through 4410474

The judge noted that the purpose of section 57.3401 is to ensure that ground and ground support do not pose a hazard to miners. 20 FMSHRC at 1083. He found that on August 6, Dynatec knew that the raise structure was compromised, but did not know what portions of the structure had failed. *Id.* The judge noted that while Dynatec examined the manway prior to the beginning of each shift, the examinations were not comprehensive enough to pinpoint hazards given that the raise had settled eight to ten inches, and that Dynatec knew that the settlement posed a significant safety hazard. *Id.* at 1083-84. In addition, he concluded that Dynatec failed to examine the ground surrounding the raise structure. *Id.* at 1084. Accordingly, the judge concluded that Dynatec violated section 57.3401, and affirmed the six orders alleging violations of the standard. *Id.* at 1083-84.

Dynatec argues that, by reading “ground support structures” into the meaning of “ground conditions,” the judge interpreted the standard contrary to its plain meaning. PDR at 27. Dynatec also asserts that it was deprived of fair notice because a reasonably prudent person would not have recognized that the standard required examination of ground support structures. *Id.* at 28. It maintains that, even if the standard is applicable, Dynatec met its requirements by examining, measuring and monitoring the timber, and that it did pinpoint hazards. *Id.* at 29-30. Dynatec contends that, from its examinations, it determined that blocking had been compromised, and recommended to Magma that it completely rebuild the raise. D. Reply Br. at 6. Dynatec also asserts that a reasonably prudent person would not have removed timber to examine ground conditions absent some indicia that ground conditions were problematic. *Id.* at 4 n.3.

The Secretary argues that the judge’s finding that Dynatec failed to perform adequate examinations is supported by substantial evidence. S. Br. at 20. She maintains that the judge correctly accepted the Secretary’s interpretation that an examination under the standard requires an examination of the support structure, which she submits is apparent from the plain meaning of the standard. *Id.* at 22-23. She contends that Dynatec failed to make complete examinations of the raise structure. *Id.* at 24-25. In addition, the Secretary asserts that, even though surrounding

¹⁶ Section 57.3401 provides:

Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift. Underground haulageways and travelways . . . shall be examined weekly or more often if changing ground conditions warrant.

rock appeared stable, Dynatec did not know that because it did not attempt to examine the ground. *Id.* at 20-21.

The judge faulted Dynatec for failing to implement a plan for examining blocking and for not determining whether the rock walls surrounding the raise structure were contributing to the damage of the raise structure. 20 FMSHRC at 1084. The judge explained that if Dynatec had conducted a more extensive examination, Dynatec “may have been able to use a written report of such an examination to convince Magma Copper to shut down the raise until permanent repairs were completed.” *Id.* Whether an examination of the blocking or the surrounding rock might have persuaded Magma to shut down the raise pending Dynatec’s completion of permanent repairs is too speculative a basis for us to uphold the violations of section 57.3401.

Rather, the adequacy of Dynatec’s examinations must be judged in light of the purpose of the standard, which means that the examinations should be, as the judge stated, “designed to pinpoint the problems so that they can be fixed before miners are exposed to the hazards.” 20 FMSHRC at 1084 (emphasis omitted). It is undisputed that Dynatec examined the inside of the manway prior to each shift. 20 FMSHRC at 1083. Both parties agree that:

Dynatec inspections revealed that the structure had settled eight to ten inches from its original installation; that there was separation between the joints; that a divider plate was broken; that blocking was sheared; that ladders were loose and broken; that landings and the divider wall were displaced; and that divider cribbing and ore was present in the manway.

S. Br. at 3; D. Reply Br. at 3. Moreover, Dynatec contends that, from its examinations, it determined that blocking was compromised, and that it had slipped, shifted, or sheared. D. Reply Br. at 5. Based upon its examinations, Dynatec recommended to Magma that either the entire raise had to be rebuilt or a metal liner had to be inserted into the ore pass. Tr. 630-32, 726-27. In addition, Dynatec discussed with Magma pouring sand grout backfill at various locations behind the raise structure. 20 FMSHRC at 1069 n.4, 1076; Tr. 728. Had Dynatec’s recommendations been implemented before production resumed, it is undisputed that those repairs would have restored the stability of the raise structure. 20 FMSHRC at 1069 n.4, 1076. Thus, Dynatec’s examinations of the raise structure pinpointed the problems that needed to be fixed to insure that miners would not be exposed to hazards.¹⁷

¹⁷ We also note that, contrary to the judge’s findings, Dynatec’s development and implementation of a specific plan for examining blocking at strategic locations would not necessarily have allowed Dynatec to better identify hazards in the raise structure. 20 FMSHRC at 1083-84. While drilling holes in the lagging would have allowed for some examination of blocking behind the manway and at the center posts (Tr. 95-96, 111-12, 460, 639), it would not have allowed examination of blocking behind portions of the ore pass, because the ore pass was enclosed with armored cribbing. Tr. 196, 639; Statement No. 42, at 40-41; Statement No. 43, at

As for the surrounding rock, Dynatec asserts that a reasonably prudent person would not have removed timber in the raise structure to examine ground conditions absent some indicia that ground conditions were problematic. D. Reply Br. at 4 n.3. Damage to the raise structure was discovered on August 3 directly following shifts when Magma had made a concerted effort to blast the hang-up. 20 FMSHRC at 1061; Tr. 622-23, 716-17. Overwhelming evidence in the record reveals that Dynatec witnesses believed that the raise structure had settled and been damaged as a result of the hang-up and blasting between July 30 and August 3. See Tr. 804, 935-36, 941, 977; Statement No. 9, at 10-11; Statement No. 11, at 9, 22; Statement No. 22, at 49; Statement No. 26, at 46-48; Statement No. 38, at 109; Statement No. 49, at 15-16; Statement No. 50, at 8-10; Statement No. 42, at 18-25; Statement No. 23, at 154. Given the correlation in time between the blasting, hang-up, and observed damage, we agree with Dynatec that a reasonably prudent person would not have recognized that he or she was required to examine the ground conditions of the surrounding rock to determine whether they contributed to the damaged raise structure, when it appeared that damage to the raise structure had been caused by the blasting and hang-up. Moreover, the record is devoid of any evidence that hazards might have remained unaddressed as a result of Dynatec's failure to examine the rock surrounding the raise structure. Even assuming that the initial damage suffered by that structure had resulted in part from the surrounding rock wall, if Dynatec's suggestions had been carried out before production began again, the stability of the raise structure would have been reestablished. Thus, substantial evidence does not support the judge's determination that Dynatec violated section 57.3401 by failing to examine the ground surrounding the raise structure. Accordingly, we reverse the judge's determination that Dynatec violated section 57.3401 and vacate the associated civil penalties assessed by the judge.

D. Alleged Violation of 30 C.F.R. § 57.18002(a):¹⁸ Order Nos. 4410475 through 4410479

The judge vacated the five orders alleging violations of section 57.18002(a) as duplicative, based on his determination that the examinations required by 57.18002(a) were the same as those required under section 57.3401. 20 FMSHRC at 1088, 1091. He also concluded, however, that if he had found that the violations issued under section 57.3401 had been invalid, he would alternatively affirm the violations issued under section 57.18002(a), and their associated special findings, and that his analysis would be the same under either standard. *Id.* at 1089.

132; Statement No. 49, at 61-63.

¹⁸ Section 57.18002(a) provides:

A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate an appropriate action to correct such conditions.

Dynatec argues that the judge correctly vacated the orders alleging violations of section 57.18002(a). PDR at 31. It contends that, if the Commission finds it necessary to consider the orders alleging violations of section 57.18002(a), it should find that the judge erred in concluding that Dynatec violated section 57.18002(a). PDR at 31-32. The Secretary responds that the judge properly found in the alternative that Dynatec violated section 57.18002(a). S. Br. at 26. In its reply brief, Dynatec argues that the alleged violations of section 57.18002(a) are not before the Commission because the Secretary failed to preserve them by filing a cross-petition for discretionary review. D. Reply Br. at 8 n.13.

Chairman Jordan and Commissioner Beatty would vacate that portion of the judge's decision holding that the orders alleging violations of section 57.3401 and 57.18002(a) are duplicative, and vacating the orders alleging violations of section 57.18002(a), and remand for further consideration by the judge. Commissioner Riley and Commissioner Verheggen conclude that the orders alleging violations of section 57.18002(a), and the judge's determination of duplication, are not before the Commission. The effect of the split decision is to leave standing the judge's vacation of the orders alleging violations of section 57.18002(a). *See Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992).

The separate opinions of Commissioners follow.

III.

Separate Opinions of the Commissioners

Chairman Jordan and Commissioner Beatty, in favor of vacating and remanding:

We would vacate that portion of the judge's decision vacating the orders alleging violations of section 57.18002(a), and would remand for further consideration by the judge.

Preliminarily, we conclude that the issue of whether the judge properly vacated the orders alleging violations of section 57.18002(a) is within the scope of the Commission's review. Under the Mine Act and the Commission's procedural rules, review is limited to the questions raised in the petition and by the Commission sua sponte. 30 U.S.C. § 823(d)(2)(A)(iii) and (B); 29 C.F.R. § 2700.70. Dynatec argues that the Secretary did not file a cross-petition for review of the judge's ruling vacating those orders. D. Reply Br. at 8 n.13.

However, our review of the question of whether section 57.18002(a) was violated is a "direct and logical outgrowth" of our reversal of the judge's determination that Dynatec violated section 57.3401 and is therefore properly before us. See *Black Mesa Pipeline Inc.*, 22 FMSHRC 708, 716 & n.8 (June 2000). As a result of our reversal of the judge's ruling on that violation, Dynatec is now no longer subject to a penalty for violating section 57.3401. Consequently, the judge's rationale for vacating the orders alleging violations of section 57.18002(a) — the inequities of penalizing Dynatec for violations of both section 57.3401 and section 57.18002(a), which he found to be duplicative, 20 FMSHRC at 1088-89 — no longer exists, as the alleged violations of section 57.3401 are now vacated. The Secretary was not obligated to file a cross-petition in anticipation of this procedural scenario. See 15A Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* 2d § 3904 at 203-04 (2d ed. 1992) ("Cross-appeal also is not required to preserve the right to orderly disposition of issues that become relevant only because of reversal.").

This position is consistent with the Commission's decision in *Black Mesa*. In that case, the Commission reversed a judge's finding of a violation of a regulation that the Secretary claimed was due to the operator's failure to provide a person qualified to conduct a high voltage electrical examination. 22 FMSHRC at 713. In reversing this violation, the Commission invalidated part of the Secretary's program for qualifying electricians, which had more stringent standards for high voltage work. *Id.* It then went on to reverse the judge's finding of a violation of a record-keeping requirement, which the inspector had alleged was violated because the records were not kept by a high-voltage qualified electrician. *Id.* at 716. Although the operator had not included this issue in its petition for discretionary review, the Commission stated that it could review it because it was a "direct and logical outgrowth" of the disposition of the related first violation. *Id.* at 716 & n.8. Similarly, we may review the issue of whether Dynatec violated section 57.18002(a), because that question is naturally resuscitated by our reversal of the

violation of section 57.3401.¹

When the judge concluded that sections 57.3401 and 57.18002(a) had duplicative examination requirements with respect to the violations alleged herein, he confined his consideration to the first sentence of section 57.18002(a). 20 FMSHRC at 1087-89. He did not discuss whether Dynatec could have violated the second sentence of the regulation by failing to promptly initiate appropriate action to correct conditions affecting safety. Moreover, the parties have not fully briefed that question. Under these circumstances, we deem it appropriate to vacate that portion of the judge's decision vacating the orders alleging violations of section 57.18002(a), and remand for further consideration consistent with our opinion. On remand, we would instruct the judge that he may give the parties an opportunity to submit additional briefs regarding whether Dynatec violated the provisions of section 57.18002(a).

Mary Lu Jordan, Chairman

Robert H. Beatty, Jr., Commissioner

¹ We also note that some courts and commentators have concluded that an appellee's failure to file a cross-petition does not amount to a jurisdictional defect precluding the court from enlarging a judgment in favor of the appellee. See *Coe v. County of Cook*, 162 F.3d 491, 497 (7th Cir. 1998), *cert den.* 526 U.S. 1040 (1999); 15 James Wm Moore et al., *Moore's Federal Practice* § 205.04[2] at 205-46 through 205-47 (3d ed. 2000); 15A Charles Alan Wright, et al., *Federal Practice and Procedure* § 3904 at 211-18 (2d ed. 1992). In *Coe*, the Seventh Circuit explained that because the purpose of requiring a cross-petition is "to notify the appellant that the appellee wants to alter and not merely defend the judgment . . . , there is no compelling reason to enforce it when the appellant has been adequately notified of the appellee's intentions." 162 F.3d at 497. Dynatec cannot claim lack of notice of this since it raised in its own petition for discretionary review the question of whether the judge erred in his alternative finding that Dynatec violated section 57.18002(a). PDR at 31-32.

Commissioners Riley and Verheggen, in favor of not reaching the issue of whether the judge properly vacated the five orders alleging violations of section 57.18002(a) as duplicative:

We do not reach the issue of whether the judge properly vacated the five orders alleging violations of section 57.18002(a) as duplicative because this issue is not before the Commission. Under the Mine Act, review is limited to the questions raised sua sponte by the Commission, or in a petition for discretionary review filed by “[a]ny person adversely affected or aggrieved by a decision of an administrative law judge.” 30 U.S.C. § 823(d)(2). Here, the Secretary did not appeal that portion of the judge’s opinion in which he vacated the orders alleging violations of section 57.18002(a). Nor did the Commission order sua sponte review of that portion of the judge’s decision. The issue is thus not before the Commission.¹

We do not agree with our colleagues when they state that “the question of whether section 57.18002(a) was violated is a ‘direct and logical outgrowth’ of our reversal of the judge’s determination that Dynatec violated section 57.3401 and is therefore properly before us.” Slip op. at 23. First, the relevant question is not “whether section 57.18002(a) was violated.”² Instead, had the issue been brought before us by the Secretary, she would necessarily have had to argue that the judge erred in finding the section 57.18002(a) orders as duplicative of the section 57.3401 orders, and she would have had to offer reasons why the two sets of orders were not duplicative.

Nor do we view the question posed by our colleagues as “a ‘direct and logical outgrowth’ of our reversal of the judge’s determination that Dynatec violated section 57.3401.” Slip op. at 23. To the contrary, the full Commission’s reversal of the judge’s holding on the section 57.3401 violations has no impact on the independent and separate allegations made by the Secretary with respect to section 57.18002(a). In the *Black Mesa Pipeline Inc.* case cited by our colleagues, the Commission invalidated a policy of the Secretary that was at odds with the regulation the policy sought to implement. 22 FMSHRC 708, 713 (June 2000). In light of this holding, the Commission went on to reverse the judge’s determination that Black Mesa violated an intrinsically related record-keeping requirement. *Id.* at 716 & n.8. The alleged record-keeping violation in *Black Mesa* was effectively no longer a violation because the Commission invalidated the policy on which the violation was ultimately based. In *Black Mesa*, the record-keeping violation was “a direct and logical outgrowth” of the Commission’s holding on the policy in the same way, for example, the failure to enter an accumulation on a record of a

¹ Our colleagues state that “[t]he Secretary was not obligated to file a cross-petition in anticipation of” the Commission’s decision to reverse the judge’s finding that Dynatec violated section 57.3401. Slip op. at 23. Neither the Mine Act nor the Commission’s Procedural Rules, however, make any provision for filing cross petitions similar to the provision for filing cross appeals contained in Rule 4(a)(3) of the Federal Rules of Appellate Procedure.

² The judge’s “alternative finding” that he would have affirmed the section 57.18002(a) violations had he vacated the section 57.3401 violations is dicta on which we offer no opinion.

pre-shift examination would be directly affected by a finding that the alleged accumulation did not exist.

Accordingly, we thus disagree with our colleague's decision to reach this issue, which, for the foregoing reasons, we do not reach.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

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