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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 8, 2024

ACTING SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. NALLY & HAMILTON ENTERPRISES, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. KENT 2022-0079 A.C. No. 15-19884-553944 Docket No. KENT 2022-0084 A.C. No. 15-19884-556030 Mine: Colmar

DECISION AND ORDER AFTER HEARING

Before: Judge Young

Appearances: Thomas J. Motzny, Esq., and Taylor D. Cooper, Esq., U.S. Department of Labor, 618 Church Street Suite 230, Nashville, Tennessee 37219, for the Petitioner

Joseph H. Mattingly, III, Esq., Joseph H. Mattingly III, PLLC, P.O. Box 104 W. Main St., Lebanon, Kentucky 40033, for the Respondent

S. Thomas Hamilton, Esq., Saltsman, Willett, Deaton & Hamilton, P.S.C., 212 E. Stephen Foster Avenue, Bardstown, Kentucky 40004, for the Respondent

SUMMARY

Citation No. 9138188 – Failure to Follow Ground Control Plan (30 C.F.R. § 77.1000)

Fact of violation	Affirmed	pp. 12–14 (Slip op.)
S&S	Yes	p. 14
Negligence	Moderate	pp. 14–15
Unwarrantable Failure	No	pp. 15–20

Order No. 9138189 – Failure to Perform Adequate On-Shift Exam. (30 C.F.R. § 77.1713(a))

Fact of violation	Vacated	pp. 20–24

INTRODUCTION

This case is before me pursuant to section 104(d) of the Mine Safety and Health Act of 1977 ("Mine Act" or "Act").[1] On January 11, 2022, two miners were driving a pickup truck on the main mine road at the Colmar Surface Mine in Bell County, Kentucky, where they worked for Respondent Nally & Hamilton Enterprises, Inc. A tree fell from the top of a highwall and crushed the cab of their vehicle. One miner was killed, and the other suffered catastrophic injuries. *See infra* Section I.A.

After investigating the accident, the Mine Safety and Health Administration ("MSHA") issued three citations for failure to follow the mine's ground control plan, failure to perform an adequate on-shift examination for hazards, and failure to report the accident immediately to MSHA.[2] Ex. S-1, S-2, S-4.

For the reasons set forth below, I find that the operator did not follow its ground control plan. I conclude that the violation was significant and substantial ("S&S") with moderate negligence but was not the result of the operator's unwarrantable failure.

I also find that the hazard in this case could not have been discovered from a daily on-shift examination required under 30 C.F.R. § 77.1713(a) of the active working areas of the mine and vacate the order finding that examination to have been inadequate.

I. FACTS

A. The Accident

Respondent operates the Colmar Surface Mine in Bell County, Kentucky. On January 11, 2022, miners Joshua Pendleton and Cecil Todd Collett were working the first shift at the Colmar Mine, which began at 7 AM and normally ended at 5 PM. Tr. Vol. I, 23.

Pendleton and Collett were transporting blasting materials from the operator's powder magazine to a blasting site. Tr. Vol. I, 25. They were traveling in a pickup truck on the main mine road at around 3 PM when a tree fell on the pickup truck, crushing the cab. Tr. Vol. I, 25–27. MSHA estimated that the tree was approximately 67 feet tall and weighed more than 6,000 pounds. Tr. Vol. I, 100–01.

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[1] In this decision, the transcript is abbreviated as "Tr. Vol. I" and "Tr. Vol. II" for the first and second days of the hearing, respectively. The Acting Secretary's exhibits are abbreviated as "Ex. S-#" and the Respondent's exhibits are abbreviated as "Ex. [Letter]." The Acting Secretary and Respondent's Posthearing Briefs are abbreviated as "Acting Sec'y Br." and "Resp't Br.," respectively.

[2] Before the hearing, MSHA vacated Citation No. 9138183 (docketed at KENT 2022-0079) for failure to promptly report an accident in accordance with 30 C.F.R. § 50.10(a). Tr. Vol. I, 15. The decision to vacate was not made as part of a compromise, mitigation, or settlement of a penalty but was a prudent exercise of prosecutorial discretion.

Collett was killed in the accident. Tr. Vol. I, 109. Pendleton's serious injuries included a cracked sternum, fractured femur, a "crushed" right lung, a ruptured hamstring, and serious damage to his hip and leg, including muscles which were "tor[n] loose" from the top of his leg. Tr. Vol. I, 27. Pendleton was in severe pain and screamed for help for Collett before passing out from the pain. Tr. Vol. I, 26.

John Brown, a miner operating a bulldozer about 500 to 1,000 feet from the site of the accident, heard the tree fall and looked up. Tr. Vol. I, 56-57. He saw that the tree had struck a pickup truck and ran to help. Tr. Vol. I, 57. When he got to the truck, he checked the driver's side and found Collett unresponsive. Tr. Vol. I, 59. Brown did not know that another miner was in the truck until he heard Pendleton call out to him. Tr. Vol. I, 59.

Brown was not able to get the truck door open to free Pendleton. Tr. Vol. I, 59. He ran back to his bulldozer, called for help on the mine radio, and got a bar and a chain to try to free Pendleton. Tr. Vol. I, 59.

Pendleton was told that it took other miners 45 minutes to extricate him and Collett from the truck. Tr. Vol. I, 27. MSHA Special Investigator Silas Brock,[3] who was sent to investigate the accident, said he was told the mine had tied chains to the roof of the truck and lifted it with a piece of equipment to free Collett and Pendleton. Tr. Vol. I, 68, 94.

The tree had fallen from a stand of four trees near the edge of the highwall. Tr. Vol. I, 83, 190. The highwall was approximately 50 feet tall. Tr. Vol. I, 85.

Before the accident, nobody at the mine seemed to take much notice of the trees left on the highwall. *See* Tr. Vol. I, 37–38. Pendleton did say that it would have been "unusual" for trees to be left close to the edge of a highwall. Tr. Vol. I, 31. But nobody from MSHA seemed to have noted the trees either. For example, MSHA Inspector David Faulkner— who was in the process of performing an E01 inspection of the Colmar Mine and had been to the mine multiple times between October 2021 and the date of the accident—had never expressed concern about the trees despite traveling past them multiple times. Tr. Vol. I, 213–14, 217–19.

The four trees had been left on top of the highwall, between an access road that had been cut on top of the ridge and the pit that had been mined beyond the trees. Ex. S-10. The access road was made before the mine opened by a bulldozer to drill "prospect holes" to assess the coal in the underlying seam. Tr. Vol. I, 84–85, 166; Ex. S-10.

At the time of the accident, the access road was not regularly accessed by miners from below, and no miners went up to work on the access road or on the highwall as part of their regular duties. *See* Tr. Vol. I, 82 (Inspector Brock stating he did not think miners would

[3] Two of the witnesses who testified in this hearing have the surname "Brock." In this decision, MSHA Special Inspector Silas Brock will be referred to as "Inspector Brock." Colmar Mine Foreman Jody Brock will be referred to as "Foreman Brock." The two men are not related. *See* Tr. Vol. I, 67. Another similarly named individual, MSHA Roof Control Supervisor Argus Brock, did not testify but was mentioned at the hearing. *See e.g.*, Tr. Vol. I, 64. Mr. Argus Brock is also not related to Inspector Brock. Tr. Vol. I, at 65.

"regularly access the top of [the] highwall"); Tr. Vol. I, 189–190 (Colmar Mine Foreman Jody Brock stating the highwall was not one of the areas where miners were "going to be working" at the time of the accident).

The mining in the area of the accident had taken place in 2021. Tr. Vol. I, 32. Mining in this pit had concluded by mid-August of that year. Tr. Vol. I, 174–75. At the toe of the highwall, Respondent had placed rock and dirt that it intended to use in reclamation. Tr. Vol. I, 36, 170. The material formed an elevated area between the main haulage road and the highwall. Tr. Vol. I, 40-41. Witnesses and the attorneys questioning them variably referred to the area where the reclamation spoil had been placed as a "bench," a "berm," or a "barricade." *See e.g.,* Tr. Vol. II, 72 (Foreman Brock equating the material to "a bench or a berm"); Tr. Vol. II, 31 (in question, an attorney for the Acting Secretary referring to the area as "the barricade or the berm").

Miners traveled the haulage road daily on their way to the parking lot and while working at the mine. Tr. Vol. I, 28, 57–58. Depending on their work, miners would travel that road from eight to 75 or 80 times per day. Tr. Vol. I, 28.

The berm was not constructed to serve as a safety bench or with any intent to prevent large objects from falling from the highwall into the road. Tr. Vol. I, 36–37. *See also* Tr. Vol. II, 72 (Foreman Brock stating the primary purpose was reclamation). It did serve as a barricade between the highwall and the road and effectively prevented smaller objects from falling onto the road. Tr. Vol. I, 43, 49, 139–140. However, the backfill area was not wide enough to prevent trees that could fall from the top of the highwall from landing on the road. Tr. Vol. I, 101–02.

Inspector Brock was joined in the investigation by two of MSHA's assistant district managers and a surface inspector.[4] Tr. Vol. I, 66. He described the accident scene as "horrific." Tr. Vol. I, 67.

The Kentucky State Office of Mine Safety and Licensing conducted its own investigation while MSHA was on the site. Tr. Vol. I, 71–72. The state agency used a drone to take photographs of the stand of trees at the top of the highwall and the pit that had been mined and shared the photographs with MSHA. Tr. Vol. I, 71–72. *See also* Ex. S-10, S-11, S-12, S-13, S-14.

It is unclear what exactly caused the tree to fall in this case. Inspector Brock's opinion, for example, was that the root ball became dislodged, causing the tree to slide down the edge of the highwall and, once it hit the elevated area at the base of the highwall, fall forward onto the roadway. Tr. Vol. I, 138–39.

Moreover, while much of the evidence in this case was not in dispute, the location of the tree in relation to the edge of the highwall was disputed. The Acting Secretary argued it was located closer to the edge of the highwall than Respondent. *See* Ex. S-10 (showing both a black

[4] The two assistant district managers were Craig Plumley and Dennis Cotton, and the surface inspector was Larry Brent Boggs, none of whom testified at the hearing. Tr. Vol. I, 66.

circle marked by Inspector Brock and an orange square marked by Foreman Brock indicating the areas where each believed the tree was located prior to falling); Tr. Vol. I, 81–82; Tr. Vol. II, 79–80, 95–96.

There was also a dispute over whether the tree was alive or dead at the time of the accident. *Compare* Tr. Vol. I, 29 (Pendleton testifying the tree looked "alive," "was green," and had visible rings on the inside); Tr. Vol. I, 204–05 (Foreman Brock testifying the tree "was alive," did not have "dead limbs," and appeared solid); with Tr. Vol. I, 95 (Inspector Brock stating the tree appeared "dried out, seasoned out. There was nothing green about it. You could tell by the bark it was it was a dead tree."); Tr. Vol. I, 153 (Inspector Brock stating the tree was "[d]ry and brittle"). *See also* Ex. S-19 (showing the inside of the tree after the accident).[5]

B. The Freeze/Thaw Cycle and the Condition of the Highwall

At the hearing, witnesses described the effect the "freeze/thaw" cycle can have on the integrity of the ground on and around highwalls. *See* Tr. Vol. I, 68–69 (Inspector Brock), 183–84 (Foreman Brock); Tr. Vol. II, 43 (Consulting Engineer and Respondent's expert witness Dayne Willis). As the soil freezes and thaws, it expands and contracts, and the changes in temperature can create fissures in the rock and can separate soil from tree roots and rocks. Tr. Vol. I, 68–69; Tr. Vol. II, 43. This can create mud slides and other unplanned earth movement. Tr. Vol. I, 68–69, 97–98.

In the days and weeks leading up to the accident, witnesses reported there were wintry conditions with cold weather, rain, and snow. Tr. Vol. I, 23–24, 55–56, 182–83, As Inspector Brock stated, there was "a lot of freezing and thawing" at that time of year. Tr. Vol. I, 68. Moreover, witnesses testified and evidence was presented showing there was ice on the highwall at the time of the accident. Tr. Vol. I, 97–98, 183; Ex. S-20, S-21.

The terrain in the area from which the tree had fallen was very steep, but photographs taken from the ground showed that the contour was not discernible from that vantage point. Tr. Vol. I, 122–23. *See also* Ex. S-16, S-17, C, J, K (photographs taken from the ground). From the top of the highwall, behind the place where the tree had been before it fell, the area appeared to be stable. Tr. Vol. I, 152.

C. The Ground Control Plan and Drop Bench

The mine's ground control plan required trees and vegetation to be removed a safe distance from the edge of the highwall unless a "drop bench" has been provided. Ex. S-7 at 5; Tr.

[5] It should be noted that neither party's witnesses were arbor experts or had formal education in trees. Tr. Vol. I, 152; Tr. Vol. II, 88. However, Inspector Brock testified that he "grew up in these hills [and knew] a dead tree from a live tree." Tr. Vol. I, 95.

Foreman Brock stated he could tell whether a tree is dead or alive because he "was around them for a long time." Tr. Vol. II, 88. He also had prior experience working at a sawmill. Tr. Vol. I, 204–05. Moreover, Foreman Brock was responsible for cleaning up the fallen tree, which he stated would have snapped during that process "if it was dead." Tr. Vol. I, 205.

Vol. I, 134–35. A drop bench is a shelf cut into the vertical highwall to catch material falling from the top of the highwall. Tr. Vol. I, 135–36. While Inspector Brock stated a drop bench is only required for a high wall that is more than 70 feet tall, high walls with a lower height can incorporate drop benches. Tr. Vol. I, 86, 106, 135.

There are no regulations which define the requirements for a drop bench, including its composition, width, or height. Tr. Vol. II, 17. Instead, Respondent's expert and Consulting Engineer Dayne Willis stated the requirements for a drop bench are "site specific" based on variables such as "the materials you're talking about and . . . the topography that you're dealing with, the configuration of the mine cuts, [and] the room you have to work with." Tr. Vol. II, 17–18.

According to Inspector Brock, the typical drop bench is 20 feet wide, but they may be up to 40 feet wide. Tr. Vol. I, 135–36. Here, the elevated area made of backfill material was 53 feet wide. Tr. Vol. I, 137.

Pendleton testified the purpose of the backfill was "just to re-slope the . . . [area] back close to natural as possible." Tr. Vol. I, 36. While he stated the berm was not a safety bench, it did serve the safety purpose of keeping haulage trucks from exiting the road. Tr. Vol. I, 36, 43. Moreover, while not a purpose of the berm, it did catch "small things like rocks" coming down the highwall. Tr. Vol. I, 43, 50.

Per Inspector Brock, the backfill area was not a "drop bench," partly because the contour of the backfill was not consistent with the expected contour of a highwall, and partly because the berm (comprised of "soil, dirt, crushed up rocks") was not made of the same material as the highwall ("solid rock"). Tr. Vol. I, 139. *See also* Tr. Vol. I, 107 (Inspector Brock stating this area was not a drop bench and that "[a] drop bench would be part of the highwall itself.").

The mine's foreman, Jody Brock,[6] referred to the area as a "safety bench." Tr. Vol. I, 198. He said the backfill area served a safety purpose. Tr. Vol 1 199–200. In addition to being staged for reclamation, it was put in place to keep people away from the toe of the highwall and to keep objects from rolling off the highwall onto the haul road. Tr. Vol. I, 199–200.

Willis stated he would define the area of backfill as a "drop bench" even though it was wider than a typical drop bench.[7] Tr. Vol. II, 22–23. He stated this area complied with the mine's ground control plan and thus no removal of vegetation was required. Tr. Vol. II, 25–26. While the material was intended for use in reclamation, it also could have served a safety purpose. Tr. Vol. II, 60.

[6] As noted in Slip op. at 3, note 3, *supra*, Colmar Mine Foreman Jody Brock will be referred to as "Foreman Brock" in this decision.

[7] Willis also testified that a drop bench could be called a "safety bench or a catch bench." Tr. Vol. II, 22.

D. Inspections and Examinations of the Mine and Highwall

In accordance with federal and state regulations, employees at the mine regularly performed pre-shift and on-shift examinations of the active working areas of the mine.[8] *See* Ex. S-6 (records of pre-shift and on-shift examinations in the days leading up to and including January 11, 2022). The on-shift examination would typically be conducted throughout the duration of each shift and would document conditions noted during that shift. Tr. Vol. I, 177.

Foreman Brock testified that the purpose of these reports was to "[m]ake sure the berms and highwalls and everything's safe." Tr. Vol. I, 176. He would also document things that were "out of the ordinary or if there's a foul, or something that's happened" during the shift in these reports. Tr. Vol. I, 176. Regarding his on-shift examinations, Foreman Brock stated he would look to see if there was something out of the ordinary during his visual examinations of the highwall from the road, but noted he paid more attention to the areas where active mining was going to occur. *See* Tr. Vol. I, 189-90 (Foreman Brock stating he paid more attention to the areas "[w]here everybody's working at").

In the days up to and including the date of the accident, January 11, 2022, employees at the mine consistently performed pre-shift and on-shift examinations of the road. *See* Ex. S-6 (containing Pre-Shift Mine Examiners Reports and Daily and On-Shift Reports from January 1 through January 11, 2022). The pre-shift examination report Foreman Brock completed on the morning of January 11 noted the highwall "[a]ppears to be stable at this time." Tr. Vol. I, 179. *See also* Ex. S-6 at 1. The on-shift examination report completed by the night shift foreman for the previous shift similarly noted the highwall "[a]ppeared to be stable at time of exam." Tr. Vol. I, 179. *See also* Ex. S-6 at 2. Foreman Brock also recalled making an examination and briefly "look[ing] up" at the patch of trees on the highwall on the morning of the accident. Tr. Vol. I, 189.[9]

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[8] As discussed in Sections II.B. and III.B. *infra*, federal regulations require an examination of the "active working areas" of a mine at least once per shift. 30 C.F.R. § 77.1713(a). Kentucky state regulations also require a pre-shift examination of areas. KY. REV. STAT. 352.280(2); Tr. Vol. I, 115.

[9] At the hearing, Foreman Brock testified that he completed the pre-shift examination report for January 11, 2022, between 5 and 6 AM. Tr. Vol. I, 179, 181–82. *See also* Ex. S-6 at 1. He also stated the night shift foreman completed an on-shift examination report for the previous shift. Tr. Vol. I, 180–81. *See also* Ex. S-6 at 2. That examination started at 4:30 PM the evening prior. Tr. Vol. I, 180.

In her Posthearing Brief, the Acting Secretary acknowledged the apparently missing on-shift examination report for January 11, 2022:

> As best as can be discerned from the documents, there is no report representing an on-shift examination for the day shift on January 11, 2022. The previous on-shift examination for January 10, 2022, shows the time of the examination from 5:00

(continued…)

The mine was regularly inspected by MSHA, and an inspection was underway at the time of the accident. Tr. Vol. I, 147–48. MSHA Inspector David Faulkner was conducting an active regular E01 inspection at the Colmar Mine at the time of the accident. Tr. Vol. I, 213–14. While he was not on-site on the day of the accident, he had been to the mine multiple times before. Tr. Vol. I, 214. He recalled traveling on the road on which the accident occurred and observing the highwall from that vantage point, albeit briefly, on his visits to the mine before the accident. *See* Tr. Vol. I, 224 (Inspector Faulkner stating he "just drove past" the site of the accident).

An inspector typically performs a general review of the site for imminent dangers (an "imminent danger round") at the beginning of an inspection. Vol. I, 145. No imminent dangers or hazards were noted or cited at the pit during the inspections Inspector Brock reviewed in the accident investigation. Tr. Vol. I, at 146.

E. Citations Issued By MSHA

After its accident investigation, MSHA issued a citation under section 104(d)(1) of the Act, alleging that Respondent had been highly negligent in failing to remove the tree a safe distance from the edge of the highwall. Tr. Vol. I, 109-10; Ex. S-1. MSHA also issued an order under section 104(d)(1) of the Act alleging that Respondent had been highly negligent in failing "to identify, report, and correct the trees that created hazardous highwall conditions" in its on-shift examinations. Tr. Vol. I, 111; Ex. S-2. A third citation under section 104(a) of the Act was also issued alleging that Respondent had failed to immediately report the accident to MSHA, but as previously stated, this citation was vacated at the hearing. Tr. Vol. I, 15; Slip op. at 2, note 2, *supra*.

II. APPLICABLE LEGAL STANDARDS

A. The Ground Control Plan

Respondent had an approved ground control plan for the Colmar Surface Mine that was in effect for over six months by the time of the accident. *See* Ex. S-7 (Ground Control Plan acknowledged by MSHA June 30, 2020). It was required to design and maintain its operations in accordance with that plan:

> Each operator shall establish and follow a ground control plan for the safe control of all highwalls, pits and spoil banks to be developed after June 30, 1971, which shall be consistent with prudent engineering design and will insure safe working

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[9] (…continued)
a.m. to 5:30 p.m. *See* S-7 at DOL 00198. Likely, because of the accident Foreman Brock overlooked filling out the form on January 11, 2022, for the day shift.

Acting Sec'y Br. at 16, note 9.

When asked by the Secretary's attorney whether he completed an on-shift examination for January 11, 2022, by virtue of signing the pre-shift examination report, Foreman Brock answered yes. *See* Tr. Vol. I, 181.

> conditions. The mining methods employed by the operator shall be selected to insure highwall and spoil bank stability.

30 C.F.R. § 77.1000.

The relevant provision of the operator's ground control plan states, "Unless a drop bench is provided, trees and other vegetation will need to be removed a safe distance from the top of the highwall." Ex. S-7 at 5.

B. Requirement to Perform On-Shift Examinations

Respondent was also required to inspect the active working areas of its mine at least once during every shift:

> At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

30 C.F.R. § 77.1713(a).

This regulation is "broadly worded and requires, among other things, that a designated certified person examine working areas for hazardous conditions as often as is necessary for safety and that any conditions noted be corrected by the operator." *Peabody Coal Co.*, 1 FMSHRC 1494, 1495 (Oct. 1979). As discussed in Section III.B. *infra*, the operator is only required to perform an on-shift examination in the active working areas of the mine. Whether an adequate examination has been performed is determined using the "reasonably prudent miner" test: "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Nally and Hamilton Ent., Inc.,* 37 FMSHRC 1764, 1784–85 (Aug. 2015) (ALJ) (quoting *Tuscaloosa Resources*, 36 FMSHRC 1615, 1618, 1636 (June 2014) (ALJ)).

C. Significant and Substantial ("S&S")

A violation is significant and substantial ("S&S") "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In order for a violation to be considered S&S, the following four elements must be met:

> (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which

> the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, LLC, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016)).[10] *See also Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (articulating the original four *Mathies* steps).

Following the *Peabody/Newtown* refinement of the *Mathies* steps, the second step requires a two-part process of (1) determining the specific hazard the standard is aimed at preventing, and (2) determining whether a reasonable likelihood exists that the hazard against which the mandatory standard is directed will occur. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016).

D. Negligence

Negligence is defined as "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). The Mine Act holds operators to a high standard of care and requires them "to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." *Id.*

E. Unwarrantable Failure

In *Emery Mining Corporation*, 9 FMSHRC 1997 (Dec. 1987), the Commission held an "unwarrantable failure" is aggravated conduct constituting more than ordinary negligence. 9 FMSHRC 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 Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving the Commission's unwarrantable failure test).

When determining whether conduct is "aggravated" in the context of an unwarrantable failure, a Commission judge holistically analyzes the specific facts and circumstances in the case at issue. *IO Coal Co.,* 31 FMSHRC 1346, 1350 (Dec. 2009). The seven "aggravating" factors which must be considered are:

> (1) the extent of the violative condition, (2) the length of time the violation existed, (3) whether the violation posed a high degree of danger, (4) whether the violation

[10] In her Posthearing Brief, the Acting Secretary argued "[t]he *Newtown/Peabody* reformulation is inconsistent with the Mine Act's definition of S&S" and the second step as originally articulated in *Mathies* should be followed instead. Acting Sec'y Br. at 12. However, the Acting Secretary also stated "the second step . . . was met under either test." *Id.* at 13. Because the Commission's application of the *Peabody/Newtown* refinement is binding precedent, I must apply that formulation of the second step of the S&S analysis.

was obvious, (5) the operator's knowledge of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance.

Manalapan Mining Co., Inc., 35 FMSHRC 289, 293 (Feb. 2013) (citing *IO Coal*, 31 FMSHRC at 1351-57; *Cyprus Emerald Res. Corp*., 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999)).

III. DISPOSITION

The essential question governing several issues in this matter is one of perspective. From the perspective of the time immediately following the accident, it is obvious that the trees on the edge of the highwall, including the tree that killed Collett and severely injured Pendleton, should have been removed.

Similarly, from the perspective of someone closely observing and inspecting the trees on the ridgeline at the edge of the highwall, it might have been obvious that the freeze/thaw cycle cited by the Acting Secretary's witnesses had compromised the ground in which the trees were rooted. An examiner or inspector at the top of the highwall could have realized how large the trees were and might have concluded that the trees presented a looming danger that should have been removed.

Nobody involved in this case—not Foreman Brock, nor Inspector Faulkner, nor any other witness—had the benefit of those perspectives. The core issue is thus whether Respondent's agents should have availed themselves of the opportunity to alter their perspective so that the real danger presented by the circumstances here might have been anticipated.

A. Citation 9138188 – Failure to Comply with Approved Ground Control Plan

The Citation describes the condition or practice as:

> The mine operator did not follow the Ground Control Plan acknowledged on June 30, 2020, that required all trees be removed a safe distance from the top of the highwall and did not provide a drop bench. On page three, General Precaution No. 6 of the Ground Control Plan states, "Unless a drop bench is provided, trees and other vegetation will need to be removed a safe distance from the top of the highwall." The tree was present on the highwall since the area was mined in August 2021. Two weeks prior to the accident, from January 2, 2022, to January 11, 2022, over three inches of rain and approximately eight inches of snow, coupled with a freeze-thaw cycle, resulted in wet, muddy conditions that loosened support of the trees. On January 11, 2022, two miners were traveling in a pickup truck on the mine haul road when a tree, with a calculated weight of 6,241 pounds, fell from the top of the highwall and struck the pickup truck cab. The pickup truck driver died, and the passenger sustained serious injuries.

> The mine operator engaged in aggravated conduct constituting more than ordinary negligence by not complying with their Ground Control Plan. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-1.

1. Respondent Failed to Comply with Its Ground Control Plan

Respondent cites the language of its ground control plan and argues that it complied with the plain language of the plan. Resp't Br. at 14. The plan says: "Unless a drop bench is provided, trees and other vegetation will have to be removed a safe distance from the top of the highwall." Ex. S-7 at 5.

Respondent argues that it complied with the plan because the unconsolidated backfill between the edge of the haul road and the toe of the highwall was provided, and intended, to prevent material falling from the highwall from endangering miners on the haul road. Resp't Br. at 13–14. It contends that this material constituted a "drop bench" in accordance with its ground control plan. *Id.* at 14.

The tree that fell was a hazard that could have imperiled any of Respondent's miners at any time. *See* Acting Sec'y Br. at 6 ("trees and other vegetation still presented a hazard at the top of the highwall"); Tr. Vol. II, 39 (Respondent's expert witness Willis stating the tree that fell was a hazard). The miner injured in the accident, Pendleton, testified that he would travel the road approximately eight times a day. Tr. Vol. I, 28. The area where the accident occurred is near the parking lot used by miners. Tr. Vol. I, 76. The zone of danger thus included an area where miners regularly worked and traveled.

The Acting Secretary argues that Respondent did not comply with the plan because the tree that fell was not a safe distance from the edge of the highwall. Acting Sec'y Br. at 6. This is logically and legally correct.

Logically, one cannot accept that a tree was removed a safe distance from the edge of the highwall if it fell from that distance and seriously injured two miners – one of them fatally. Legally, general safety standards – including plans developed by the operator and approved by MSHA – require *effective* compliance.

Not only is this true as a general legal principle, but it is also expressly true here. The standard requiring a ground control plan requires that the plan "will *insure* [sic] safe working conditions." 30 C.F.R. § 77.1000 (emphasis added).

> The requirement to "insure [sic] safe working conditions" is a mandate over and above the particular requirements contained in the plan itself, which means although an operator may comply with all parts of its submitted and acknowledged plan, it may still be in violation of the standard if the plan does not provide a safe workplace. While it is true the Secretary must acknowledge the plan, it is the

> operator first and foremost who must make certain the plan "insure[s] safe working conditions," and if the plan does not, the operator violates the standard.

Central Appalachian Mining, LLC, 29 FMSHRC 430, 437 (June 2007) (ALJ). *See also Thunder Basin Coal Co.*, 46 FMSHRC ___, slip op. at 6, No. WEST 2023-0157 (Feb. 22, 2024) (ALJ) (quoting the first sentence of this quote from *Central Appalachian Mining, LLC*, 29 FMSHRC at 437).

The standard, and the plan developed in conformance to it, require the operator to protect miners from hazards. Here, that was not done.

The "bench"—or, as the Acting Secretary has characterized it, the "barricade," *see* Acting Sec'y Br. at 8—did not provide effective protection from falling material in this case. It was effective in catching some smaller objects and might have been the functional equivalent of a drop bench or safety bench for such objects. However, the material did not prevent the tree from entering the roadway.

I thus agree with the Acting Secretary's definition, to a point. The material in this case functioned more like a barricade in that it was material intended to be used in reclamation, not a bench that was designed to protect miners from all potential hazards. It is undisputed that the material was not engineered or designed principally to protect miners from falling material. *See* Tr. Vol. II, 60 (Willis testifying the material was intended for use in reclamation but could have served a safety purpose).

A drop bench, or safety bench, is typically cut into the highwall to catch material falling from the top of the highwall. Tr. Vol. I, 224. Here, the functional protection was an added benefit that generally operated to keep miners away from the toe of the highwall (although it did appear to catch some material before it contacted the haul road), not an engineered solution designed to protect miners from the threat posed by tall trees left at the edge of the highwall.

But the Acting Secretary's definition is not especially important to the resolution of this issue. It is doubtful that any engineered bench could have ensured that this tree would not have contacted the haul road. As the operator notes, a typical drop bench is only 20 feet wide, while this area was 53 feet wide at its widest. Resp't Br. at 14. *See also* Tr. Vol. I, 135–37.

Relying on the definition alone suggests that the operator would have complied with the standard, if only the berm/backfill/barricade had been better designed to catch falling material or constructed more solidly. The evidence cannot support such a conclusion. The 67-foot-tall tree was simply too large to have been intercepted by any reasonable structure.[11]

[11] Of course, the tree could have fallen in a different direction. *See* Tr. Vol. II, 50–51 (Willis stating no one could have predicted how the tree would have fallen or at what angle). But relying on such fatalism is no different than suggesting that it might have fallen at a different time. A mine operator must anticipate events that are reasonably likely to occur and must assume that those events will transpire at the worst possible time.

Whether the operator does so by constructing a safety bench or by removing vegetation and objects a safe distance from the edge of the highwall, Respondent's duty here was to protect its miners from injury. A bench's effectiveness should not be judged by the manner of its construction, or by its size. The standard specifies neither a height nor a minimum width nor a means of construction.

What is important—in fact, determinative—is the ineffectiveness of this barrier against the tree that fell from the highwall. I therefore find that an effective drop bench was not provided, and that at least one tree was not removed a safe distance from the edge of the highwall. I therefore find a violation of section 77.1000 for failing to conform to the requirements of the ground control plan.

2. It is Beyond Serious Question that the Violation of the Ground Control Plan was S&S

I have found a violation of a mandatory safety standard, which satisfies step one of the S&S analysis. *See* discussion *supra* Section III.A.1. Here, the hazard the standard is aimed at preventing is miners being struck by material falling from the highwall. The violation of the safety standard contributed to this hazard because the tree had not been removed a safe distance from the edge of the highwall. *See id.* Thus, step two is satisfied. The size of the tree that fell from where it was left was reasonably likely to cause, and in fact did cause, serious and fatal injuries to two miners, satisfying steps three and four. Accordingly, this violation was S&S.

3. Respondent's Negligence Was Moderate

Commission judges are not bound to adhere to the degrees of negligence set forth in Part 100 of the Secretary's regulations but may evaluate negligence in a holistic manner. *See Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015); *accord Mach Mining, LLC v. Sec'y*, 809 F.3d 1259, 1264 (D.C. Cir. 2016).

At the hearing, Inspector Brock stated he believed this was heightened negligence because "the hazard should have been so obvious to the operator that it should have been corrected before an accident like this happened." Tr. Vol. I, 142.

Here, a reasonable mine operator, familiar with the protective purpose of the Act and the ground control plan, would have taken steps to evaluate the integrity of the ground and the support for the trees at the top of the highwall more thoroughly.

The operator was therefore negligent. But the degree of negligence here is less than the high level of negligence the Acting Secretary suggests.

In its Posthearing Brief, Respondent lists several mitigating factors that it argues compels a lower negligence assessment, which I discuss below:

- *The fact that the area of the accident was not in an active mining area.* Resp't Br. at 17. The Record supports this conclusion. *See e.g.,* Tr. Vol. II, 74 (area where the accident occurred was not an active mining area, but a haul road area).

- *The presence of the 53-foot-wide elevated bench and berm constructed at the foot of the highwall to mitigate any danger from falling rocks, debris, trees, or vegetation.* Resp't Br. at 17. While not a "drop bench" per se, the berm constructed here did serve a safety purpose and was wider than a drop bench. *See supra* Section I.C. (discussing the safety purposes of the bench and noting it was wider than Inspector Brock's definition of a 20-foot-wide safety bench).

- *The fact that the alleged "violative condition" was so inconspicuous that not even MSHA's own mine inspector recognized it during his inspection of the Colmar Mine in the days prior to the accident*. Resp't Br. at 17. "Inconspicuous" is something of a reach, but MSHA's own inspector, like the mine's personnel, took no notice of the trees until after one had fallen. *See* Tr. Vol. I, 37–38, 217–19.

- *The rapidly changing weather conditions that even the Secretary acknowledges were a contributing factor to the accident*. Resp't Br. at 17. The effect of the freeze/thaw cycle could not be discerned from the ground in this case, though in the future, the operator should consider changing conditions wrought by the cycle when examining for hazards. *See e.g.,* Tr. Vol. I, 68–69 (Inspector Brock discussing the "huge effect" the freeze-thaw cycle can have on a highwall). *See also supra* Section I.B. (discussing the freeze-thaw cycle).

- *The unforeseeable manner in which the subject tree fell from the highwall where under nearly any other fall path would likely have been caught in the safety bench at the foot of the highwall.* Resp't Br. at 17. The fact that the tree toppling from the highwall with fatal consequences was unforeseen does not mean that it was "unforeseeable," and the material was not a "safety bench" designed to prevent what happened here, but the hazard's gravity was not apparent from the road or the area below the highwall. *See supra* Section I.C. *See also* Slip op. at 13 (noting the 67-foot-tall tree was too large to be caught by the 53-foot-wide bench here).

Examining objectively what was known and evident before the accident, I therefore conclude that the operator's negligence here was moderate. From the perspective afforded by the roadway, the tree would not have appeared to be a hazard and would not have looked tall enough to menace the roadway. Tr. Vol. II, 49-50. I therefore conclude that the operator's negligence was moderate.

4. The Operator's Violations Were Not a Result of its Unwarrantable Failure

The Commission requires its judges to consider seven factors to determine whether a violation resulted from an operator's unwarrantable failure. *IO Coal Co.*, 31 FMSHRC at 1351. Commission judges are required to consider all the factors but are granted discretion in weighing the factors. *Northshore Mining Co. v. Sec'y*, 46 F.4th 718, 729 (8th Cir. 2022). I have considered

the required factors and find that the violation did not result from the operator's unwarrantable failure.

a. The Violative Condition Was Not Extensive

The purpose of the extensiveness criteria in the unwarrantable failure analysis is to consider "the scope or magnitude of a violation." *Eastern Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010). *See also Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079 (Dec. 2014) (noting this factor "has traditionally been determined by examining the extent of the affected area as it existed at the time the citation was issued.").

In this context, the extensiveness of the hazard is not especially important. A single tree could have—and in fact, did—result in the tragic fatal accident that occurred here. Thus, the fact that only a small stand of trees remained in a dangerous position on the highwall is not an aggravating or mitigating factor for the violation.

b. The Length of Time that the Violative Condition Existed is Not an Aggravating Factor

Similarly, the duration of the violation is not crucial in evaluating the operator's culpability here. On the one hand, the fact that the trees remained at the edge of the highwall for months after the area was mined could be considered as an aggravating factor. But the Acting Secretary's own witnesses focused on the freeze/thaw cycle as a contributing factor to the hazard. It is not known when the ever-changing freeze/thaw cycle may have caused the tree to lose its grip on the surrounding ground, or whether other conditions contributed to the tree's roots failing to hold it to the ground.

The duration of the violation must nonetheless be considered, even where the evidence is imperfect. *Coal River Mining, LLC,* 32 FMSHRC 82, 93 (Feb. 2010). I have considered the available evidence and find that the duration of the violation is not an aggravating factor for the violation, because the point at which the danger arose cannot be determined. However, I do consider that the operator could have considered the effect of the passage of time on the ground conditions and did not ever examine the top of the highwall after mining was complete.[12]

While Respondent was not required to conduct daily on-shift examinations of this area, *see* discussion *infra* Section III.B., at some point it should have taken advantage of the road at the top of the highwall to examine conditions there. From that vantage point, the size and location of the tree would have been apparent, and the operator might have had second thoughts about leaving the stand of trees there, even if the ground did not appear to be compromised from the road below.

[12] The Acting Secretary noted the relevant time period for duration was from at least July 2021 to January 2022 based on Foreman Brock's testimony on how long the patch of trees had been on top of the highwall. *See* Acting Sec'y Br. at 21. I find the mere fact the trees were present for months—and likely years, given their large size—before the accident not determinative in the duration analysis because of the effect the freeze/thaw cycle can have on the ground conditions. *See supra* Section I.B. (discussing the freeze/thaw cycle).

But its failure of imagination here is not an aggravating factor in isolation. Over time, the apparent lack of any issues indicating a ground control problem at the top of the highwall may have bred complacency, but it did not reflect indifference or disregard for safety. *See* Tr. Vol. I, 189 (Foreman Brock testifying that he examined the highwall from the vantage point of the road during his on-shift examinations of the mine road). *See also* Ex. S-6 (pre-shift and on-shift examination records for the days leading up to and including January 11, 2022, noting the highwall's "stable" appearance from the vantage point of the road).

c. The Violation Posed a High Degree of Danger

The fatal accident in this case conclusively establishes the highly dangerous condition created by the trees remaining on top of the highwall. This is the most important aggravating factor for two reasons.

First, "[t]he factor of dangerousness may be so severe that, by itself, it warrants a finding of unwarrantable failure." *Manalapan Mining Co.*, 35 FMSHRC 289, 294 (Feb. 2013). Second, even "a finding of 'moderate negligence' does not foreclose an unwarrantable failure finding." *Excel Mining, LLC v. Dep't of Labor*, 497 Fed. Appx. 78, 79 (D.C. Cir. 2013), *citing Eastern Associated Coal Corp.*, 13 FMSHRC 176, 186-87 (Feb. 1991). Thus, where a hazard is highly dangerous, the operator must exercise greater care.

The size of the trees should have prompted a concern about the instability of the highwall and the stress the trees could place on the ground as conditions changed through erosion or the freeze/thaw cycle. The failure to include the area at the top of the highwall in periodic examinations of some sort is therefore an aggravating factor because of the extraordinary danger posed by a huge tree perched precariously near the edge of the highwall. The weight it carries in the analysis, though, is reduced by the other conditions set forth below.

d. The Hazard Was Not Obvious

The lack of obviousness is the crucial mitigating factor here. In hindsight, it is apparent that the trees remaining at the edge of the highwall created a severe risk of injury. It is known—now—that deteriorating ground conditions could place miners on the haul road or working on reclamation in grave danger. *See supra* Section I.B. (discussing the freeze/thaw cycle). The ground slope depicted in the photographs also may have made it very unlikely that the tree would fall away from the haul road. *See* Ex. S-16, S-17, C, J, K.

But that slope would only be visible from the air or from the top of the highwall. *See* Ex. S-14. (aerial drone photograph showing perspective from above the slope). From the ground, before the accident, the trees were part of the general background everyone perceived at the mine. This included Inspector Faulkner, who visited and inspected the mine but never himself traveled to the top of the highwall to examine the conditions there, and never perceived or cited the trees as a hazard from his perspective on the ground below.

From that everyday perspective, it was not possible to tell how far the trees were from the edge of the highwall. Witnesses varied in their testimony about how close they were to the edge. *See* Tr. Vol. I, 81–82; Tr. Vol. II, 79–80, 95–96. *See also* Ex. S-10.

Nor was it possible to assess ground conditions at the top of the highwall from the ground below. *See* Slip op. at 5. MSHA used a drone to photograph the area from the air during its accident investigation. *See* Slip op. at 4.

Finally, the ground-level view miners and Inspector Faulkner had of the trees obscured their size. At the distance where anyone working or traveling would have perceived the trees, they did not appear as a large, looming threat. *See* Tr. Vol. II, 49–50 (Willis stating the tree would not have been perceived by an inspector as a hazard because it would not have looked tall enough to reach the roadway from the vantage point of the road).

Where a competent inspector would have seen and noted a hazard, it should be viewed as obvious. *The American Coal Co.*, 39 FMSHRC 8, 18 (Jan. 2017). It does not necessarily follow that a condition is not obvious because it was not cited by an inspector, but the common obliviousness to the danger is borne out by the actions of all material witnesses to the pre-accident conditions in the area. I therefore find that the hazard was not obvious from the ground.

e. The Operator Was Unaware of the Violative Condition Before the Accident

This factor is closely related to obviousness because there was no evidence that the operator had actual knowledge of the hazard. However, the operator could have had constructive notice that the trees presented a serious risk to miner safety.

There is not any evidence suggesting that the operator was aware of facts that should have led it to conclude that the ground conditions at the top of the highwall had deteriorated to the point where one or more trees might fall from the edge. Nor has the Secretary provided sufficient "predicate circumstances" to establish that the operator should have known of the violative condition. *Eastern Associated Coal Corp.*, 32 FMSHRC 1189, 1199 (Oct. 2010). I therefore find that the operator did not have actual or constructive knowledge of the danger posed by the trees.

f. Respondent Did Make Some Effort to Protect Miners Below the Highwall from Falling Material

As noted above, the operator's "drop bench" was not an effective protective measure in this context and did not satisfy the requirements of the ground control plan. *See* discussion *supra* Section III.A.1. Nevertheless, I disagree with the Acting Secretary that the purpose, nature, construction, height, or location of the barricade rendered it wholly ineffective as a safety measure.

Witnesses testified that the barricade did catch material that had fallen from the highwall. *E.g.,* Tr. Vol. I, 43, 50. Photographs supported this. *See* Ex. S-13, S-14 (both aerial drone photographs showing rocks on top of the barricade).

The barricade was at least partially effective as a preventive measure that acted to protect miners from falling material.

The operator therefore did not evince a reckless disregard for or wanton or willful indifference to the safety of its workforce. Where an operator maintained a good faith, though mistaken, belief that its measures would be effective, a finding of unwarrantable failure may be rejected, provided the operator's belief was reasonable. *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997) (citing *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1629 (Aug. 1994).

Nor is it improper to credit the operator for the barricade because it was primarily intended to facilitate reclamation. Respondent is permitted to operate efficiently, provided it also does so safely. A reclamation plan that also promotes safety is consistent with the Act, even if the failure to foresee the inadequacy of the barricade as a protection against this accident was negligent.

g. The Operator Was Not on Notice that Greater Efforts at Compliance Were Necessary

The Acting Secretary argues that the operator was placed on notice that greater efforts at compliance were necessary here because it had previously been cited for an unwarrantable failure violation in similar circumstances ten years earlier, at a different mine. Acting Sec'y Br. at 21. The contention is meritless for several reasons.

The judge in the previous case did find that the violation in question was the result of the operator's unwarrantable failure. *Nally and Hamilton Ent., Inc.,* 37 FMSHRC at 1798-1800.[13] But that finding was based on a previous citation at this mine for the same violation and the fact that roots, root balls, and vegetation were obvious and visible from the ground. *Id.* 1789. The violation also occurred in an active pit, with miners working below. *Id.*

Most importantly, MSHA itself made no connection between the prior cited condition at another mine and the conditions at this one until it submitted its post-hearing brief in this case. *See* Acting Sec'y Br. at 21. Thus, the prior case is of limited significance here.

Much greater weight must be attributed to the fact that this mine was regularly inspected, and this condition was never questioned, much less cited, by the inspector. The lack of any communication to the operator about this condition serves only to underscore the fact that the violation was not obvious to the naked eye from the ground below.

The fact that an inspector did not previously cite a violative condition is no defense to a finding of violation. But in this case, it does show that a reasonable person whose principal responsibility is the observation and citation of violations of safety and health standards failed to see the trees as a hazard at any point.

The majority of MSHA inspectors are generally diligent, professional, and observant in their work. There was no evidence that Inspector Faulkner—who had been an MSHA surface

[13] This decision was reviewed by the Commission in 2017. *Nally and Hamilton, Ent., Inc.*, 39 FMSHRC 1938 (Oct. 2017). The Commission's review was limited to the judge's finding that a different violation from the one cited in this case was not S&S, a question on which the Commission was evenly divided. *Id.* at 1938–39.

mine inspector for more than 15 years at the time of the accident—did not adhere to this standard. Inspector Faulkner was assigned as the regular inspector for this mine, so I find the fact that he did not ever note the trees as a potential hazard affirms that the operator's own view, though erroneous, was not reckless or unreasonable.

Because only the extremely dangerous nature of the hazard may be used as an aggravating factor, and because that danger was not manifest until after the accident, I conclude that the violation was not the result of the operator's unwarrantable failure.

B. Order No. 9138189 – Failure to Perform Adequate On-Shift Examination

Respondent contends that it was not required to inspect the area above the highwall for hazards because it was not an active working area. Resp't Br. at 15. The evidence shows that mining of this highwall had been complete since August 2021. Tr. Vol. I, 174–75. The area had not been inspected by MSHA since at least then, and the operator had never been cited for failing to conduct on-shift examinations of the top of the highwall.

MSHA cited the operator for violating section 77.1713(a) because it claimed that the failure to inspect significantly and substantially contributed to the hazard of one of the trees falling from the top of the highwall into an area where miners worked or traveled. The Order describes the condition or practice as:

> During on-shift examinations since at least as early as January 1, 2022, the mine operator did not identify, report, and correct the trees that created hazardous highwall conditions. The mine operator did not follow the Ground Control Plan that required all trees be removed a safe distance from the top of the highwall. Two weeks prior to the accident, from January 2, 2022, to January 11, 2022, over three inches of rain and approximately eight inches of snow, coupled with a freeze-thaw cycle, resulted in wet, muddy conditions that loosened support of the trees. During the accident investigation, loose mud and rock material continued to fall from the highwall adjacent to the mine road. During inclement weather, it is incumbent for the mine operator to diligently examine and carefully focus on changing highwall conditions along the mine haul road where miners travel daily. On January 11, 2022, two miners were traveling in a pickup truck on the mine haul road when a tree, with a calculated weight of 6,241 pounds, fell from the top of the highwall striking the pickup truck cab. The pickup truck driver died, and the passenger sustained serious injuries.
>
> The mine operator engaged in aggravated conduct constituting more than ordinary negligence by not identifying, reporting, and correcting hazardous ground conditions and permitting work in the affected area. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-2.

MSHA must first establish a duty to inspect the area. The Commission has held that, under section 77.1713(a), an on-shift examination is only required for active working areas of the

mine. *Black Castle Mining Co.*, 36 FMSHRC 323, 325-26 (Feb. 2014); *Red River Coal Co.*, 39 FMSHRC 368, 386 (Feb. 2017) (ALJ).

In *Black Castle*, a miner was fatally injured when his bulldozer ruptured an unmarked gas line in the area where the bulldozer was being operated. 36 FMSHRC at 324. MSHA alleged this was a violation of section 77.1713(a) because the gas line was not adequately marked and "should have been reported and corrected during the required daily inspection." *Id.* at 324-25.

In that case, the Acting Secretary argued "active working area" under section 77.1713(a) should "include all areas where it is reasonably foreseeable that miners will work or travel when carrying out their work-related tasks." *Id.* at 326. The Commission also noted "active workings" is defined in 30 C.F.R. § 77.2(a) as "'any place in a coal mine where miners are normally required to work or travel.'" *Id.* at 326.

When considering the Acting Secretary's proposed definition, the Commission stated the relevant question was "whether it was reasonably foreseeable that a miner would be in the accident area when carrying out his or her work related tasks during the shift(s) covered by the operator's examination." *Id.* at 326. The operator in *Black Castle*, however, had no reason to anticipate the fatally injured miner would be at the location of the accident because it was not part of his assigned work area and "had nothing to do with his work assignment," and mine employees were even "surprised" the miner was in that area. *Id.* (internal quotations omitted).

The Commission ultimately affirmed the judge's finding that the area where the miner was operating the bulldozer was not an "active working area" based on either the definition proposed by the Acting Secretary or the definition of "active workings" in section 77.2(a). *Id.* at 327. Notably, however, the Commission chose not to adopt a definition for the term "active working area" in section 77.1713(a) or to incorporate the definition of "active workings" set forth in section 77.2(a) in 77.1713.[14]

[14] In its *Black Castle* decision, the Commission neither chose to adopt definition of "active working area" nor incorporated the definition "active workings" in section 77.2(a) into section 77.1713(a). *See* 36 FMSHRC 327-28 (discussing why the area at issue was not an "active working area" under either definition). However, the administrative law judge ("ALJ") who first heard this case discussed both definitions. *Black Castle Mining Co.,* 32 FMSHRC 132, 135-36 (Jan. 2010) (ALJ). The ALJ noted that the Respondent's argument that the accident did not occur in an "active working area" relied on another ALJ decision, *Central Ohio Coal Co.*, 12 FMSHRC 1014 (May 1990) (ALJ). However, the ALJ noted this argument was not persuasive because *Central Ohio Coal Co.*, was not a binding decision. 32 FMSHRC at 136.

In *Central Ohio Coal Co.*, the operator was cited a violation of section 77.1713(a) in which the MSHA inspector equated "active working area" as used in section 77.1713(a) with "active workings" as defined in 30 C.F.R. § 77.2(a). 12 FMSHRC at 1016. The ALJ ultimately rejected the Secretary's contention that "active working area" as used in section 77.1713(a) and "active workings" in section 77.2(a) should be equated because it would render the reference to "active surface installation" in section 77.1713(a) "superfluous" and found an "active working area" to be "the working areas where coal is mined and extracted." *Id.* at 1017–18.

Here, Respondent contends it did not violate section 77.1713(a) because "the area where the accident occurred was not an active mine area at the time of the accident." Resp't Br. at 15. In contrast, the Acting Secretary argues "[t]he area was subject to the on-shift examination because it was the mine's main travel road." Acting Sec'y Br. at 16.

I find that the area above the highwall itself was not an "active working area" at the time of the accident. As Respondent correctly noted, both its and the Acting Secretary's witnesses testified at the hearing that no mining was occurring in the pit at the time of the accident. Resp't Br. at 15. *See also* Tr. Vol. I, 174–75. Moreover, the access road at the top of the highwall was not regularly accessed by miners, and no mine employees were working on or at the top of the highwall. *See* Tr. Vol. I, 82; Tr. Vol. I, 189–90.

All these facts suggest that Respondent had no reason to anticipate miners would be working in the pit below the highwall until reclamation began. Thus, under the logic of *Black Castle*, the area above the highwall where the trees were located is not an active working area under section 77.1713(a), and Respondent had no duty to examine the trees from the top of the highwall.

The road on which Pendleton and Collett were traveling was an "active working area" under section 77.1713(a). It does not matter that active mining did not occur here because Respondent's employees traveled on the road as part of their jobs. Pendleton and Collett were performing their work duties of transporting explosive materials when they were on the road at the time of the accident. Tr. Vol. I, 25. Witnesses also testified that miners would routinely travel on the road to get to and from the parking lot and through the course of their shifts at the mine, with some miners making numerous trips on the road during a shift. *E.g.*, Tr. Vol. I, 28. Under the logic of *Black Castle*, this road was an area where the operator anticipated and expected miners to travel as part of their shifts, and miners did in fact travel on that road frequently every working day.

The pre-shift and on-shift examination records show that the road on which Pendleton and Collett were traveling was regularly inspected by Respondent's employees, including on January 11, 2022, the date of the accident. *See supra* Sections I.A., I.D. *See also* Ex. S-6. Accordingly, I find there can be no dispute that Respondent itself considered the mine road to be an area for which an on-shift examination was required. Thus, Respondent satisfied the first prong under section 77.1713(a) that it perform an examination of the active working area during each shift.

Section 77.1713(a), however, not only requires Respondent to perform an on-shift examination of the active working areas, but to also examine for, note, report, and correct any hazardous conditions observed as part of that inspection. Affirming MSHA's citation that Respondent violated section 77.1713(a), thus, ultimately hinges on whether the fallen tree and other trees located in the patch on the highwall were hazardous conditions that the operator should have noted, reported, and corrected during its on-shift examinations of the mine road. *See* Acting Sec'y Br. at 15 (arguing section 77.1713(a) was violated because the tree which fell was a hazardous condition). I find they were not.

While MSHA suggests that the trees were visible from the road where miners work or travel, this is an insufficient basis for finding a violation of section 77.1713(a). If the danger could have been perceived from the road, where miners did regularly work and travel, the result might be different. *See Kentucky Fuel Corp.*, 36 FMSHRC 159, 171–72 (Jan. 2014) (ALJ) (finding a violation of section 77.1713(a) when the operator failed to document in its examinations the "readily apparent" condition of a catch bench that was full and unable to sufficiently catch loose material); *Extra Energy, Inc.*, 34 FMSHRC 3285, 3293 (Dec. 2012) (ALJ) (finding a violation of section 77.1713(a) when the foreman failed to note "obvious conditions" and in which the MSHA inspector stated the hazardous condition "was easily visible to the most casual observer" in the citation itself).

However, evidence presented at the hearing establishes a reasonably prudent miner could have not perceived the danger of the trees on the highwall from the vantage point of the mine road. I have already found the hazard of the trees was not obvious from the road. *See* discussion *supra* Section III.A.4.d. Thus, this case is different from the previous *Nally and Hamilton* case cited by the Acting Secretary because the inspector could see roots and other material hanging from the edge of the highwall while he was standing in the pit. *See Nally and Hamilton Ent., Inc.*, 37 FMSHRC at 1789.

There was conflicting testimony about where the tree was located, suggesting it was not readily apparent from below how close the tree was to the edge of the highwall. I also find the tree was not obviously visibly ill or dead—which, if true, could suggest a greater likelihood of it falling and thus needing to be corrected—given conflicting testimony and the tree's health status not being conclusively established by either party at the hearing.[15]

There was no duty to include the area above the highwall in the operator's daily on-shift examinations, and there is no credible record evidence showing that the danger here could or should have been perceived from the main mine road where miners regularly traveled. Absent such a duty, I vacate Citation 9138189.

[15] As noted in Slip op. at 5, note 5, *supra*, Foreman Brock—who testified that the tree was alive—had prior experience with trees through his work at a sawmill. I find his testimony to be credible. Based on that and other testimony and evidence presented, including pictures and the weight of the tree, *see* discussion *supra* Section I.A., I would find the tree was alive at the time it fell.

However, this conclusion that the tree was alive at the time of the accident has no bearing on my conclusion that the tree was not a hazard that a reasonably prudent miner would recognize and thus note, report, and correct when performing an on-shift examination of the road. The relevant question is whether the tree's appearance suggested there was something wrong with it that posed a danger of falling, and that appearance would have been visible to an individual looking up at the tree from the road. I find the tree appeared to be in a fine, healthy, and stable condition when viewed from the road before the accident because there is no evidence to the contrary.

C. Penalty

While I have found the operator's negligence to be moderate and that the violation here did not result from its unwarrantable failure, the consequences following the operator's failure of imagination here are tragic and profound. One miner was killed, and another so severely injured that he had not returned to work at the time of the hearing in this matter and has likely been permanently disabled. *See supra* Section I.A.

I assess the penalty independently, considering the six factors in section 110(i) of the Act. I agree with the Acting Secretary that the operator is a large operator and that it acted promptly and in good faith to abate the violation once cited. The remaining trees were removed within one week of the accident.

The operator has stipulated that the penalty proposed by the Acting Secretary would not affect its ability to remain in business. Tr. Vol. II, 7. I have also considered the operator's history of violations and find no basis for adjusting the penalty based on that history. *See* Ex. S-9.

I have found that the operator was only moderately negligent in its breach of the duty of care. *See* discussion *supra* Section III.A.3. However, I find that the gravity is such that a substantial penalty is necessary to ensure that examinations and safety planning for this operator consider all potential hazards that could threaten miners in active mining areas, especially those found on the perimeter of active working areas or places where miners regularly work or travel.

It is apparent that Respondent did not appreciate fully the danger posed by the trees, and its ground control plan was not followed in the manner best designed to protect miner health and safety. Upon consideration of the statutory factors, I therefore assess a penalty of $16,000 for the violation of 30 C.F.R. § 77.1000.

The assessed penalty will encourage the operator to consider more thoughtfully all potential hazards that could pose a grave danger to its workforce when designing and executing its ground control plans. The penalty will also encourage the operator to periodically examine vegetation left near the edge of highwalls that might contribute to a catastrophic ground failure.

In the future, Respondent should consider facts such as slope, ground integrity and composition, the size of the remaining vegetation, whether any remaining trees are alive or dead, and how close to the edge any vegetation or other material might be. Respondent should also determine whether vegetation left near the edge of highwalls after mining could be loosened or dislodged by weather, erosion, or other foreseeable events.

It might not be necessary to examine the top of every highwall during each examination, or to clear trees from every highwall as an alternative. The presence of trees may help with reclamation. Ironically, the presence of live trees often may be helpful in controlling the fall of loose, unconsolidated material from areas above highwalls, because the roots function to hold the tree to the ground.[16]

[16] At the hearing, Consulting Engineer Willis testified he would generally expect a root system to stabilize trees to the ground. Tr. Vol. II, 47.

(continued…)

Nevertheless, it is much better to know what can be known than to assume what conditions might be like—especially during the seasonal changes of concern to MSHA because of the freeze/thaw cycle and its potential effect on the stability of highwalls. Where, as here, there is a road permitting access to the area above the highwall, it is thus better to evaluate the condition at least periodically. With advances in technology, it might also be feasible to use drones to inspect the areas above highwalls for changes in ground conditions or potential hazards.

It cannot be known whether such examinations would have identified the conditions which led to the accident here. But the failure to discover the condition permitted an obscured hazard to manifest at the worst possible time, with grave consequences. The penalty reflects Respondent's failure to appreciate the gravity of that danger and take the steps required to protect its workforce under the elevated standard of care provided by the Act.

IV. CONCLUSION

For the reasons above, Citation Number 9138183 is **VACATED** and Docket No. KENT 2022-0079 is **DISMISSED**. Citation Number 9138189 is also **VACATED**.

[16] (…continued)

The U.S. Department of Agriculture has also published a guide on the Forestry Reclamation Approach, a set of best practices developed by reclamation scientists to restore abandoned and unused mine lands into forests. U.S. DEP'T OF AGRIC. FOREST SERV., THE FORESTRY RECLAMATION APPROACH: GUIDE TO SUCCESSFUL RESTORATION OF MINED LANDS (Mary Beth Adams ed., 2017), https://www.fs.usda.gov/nrs/pubs/gtr/gtr_nrs169.pdf.

Citation No. 9138188 is **AFFIRMED** as an S&S violation of 30 C.F.R. § 77.1000 with moderate negligence for Respondent's failure to comply with its ground control plan. A penalty of $16,000 is assessed for this violation. Respondent is **ORDERED TO PAY** the sum of $16,000 within 30 days of the date of this order.[17]

/s/ Michael G. Young
Michael G. Young
Administrative Law Judge

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[17] Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 23, 2024

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. VULCAN CONSTRUCTION MATERIALS, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. SE 2023-0121 A.C. No. 31-00368-571444 Mine: Boone Quarry

SUMMARY DECISION

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary"), on behalf of the Mine Safety and Health Administration ("MSHA"), against Vulcan Construction Materials, LLC ("Vulcan"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). The Secretary seeks a civil penalty in the amount of $143.00 for an alleged violation of one of her mandatory safety standards requiring that water or neutralizing agents be made available where corrosive chemicals or other harmful substances are stored, handled, or used.

The Secretary filed a Motion for Summary Decision and Determination of Penalty ("Secretary's Motion"), with attached Exhibits A through D. In response, Vulcan filed a Request to Deny Secretary's Motion for Summary Decision and Determination of Penalty ("Vulcan's Response"), with attached Exhibits R-1 through R-5. The issues for resolution in this case are whether Vulcan violated 30 C.F.R. § 56.15001 and, if so, the gravity and negligence of the violation, and the appropriate penalty.

Based on a thorough review of the documents filed by the parties, I find that there is no genuine issue of material fact. For the reasons set forth below, I conclude that the Secretary is entitled to summary decision as a matter of law, affirm the Citation, and assess a penalty of $143.00 against Vulcan.

I. Legal Standard

Pursuant to Commission Rule 67(b), "[a] motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions and affidavits, shows: (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67.

It is well settled that summary decision is an extraordinary measure and the Commission has analogized it to Rule 56 of the Federal Rules of Civil Procedure, which the Supreme Court has construed to authorize summary judgment only "upon proper showings of the lack of a genuine, triable issue of material fact." *Hanson Aggs. New York, Inc.,* 29 FMSHRC 4, 9 (Jan. 2007) (citations omitted). When considering a motion for summary decision, the Commission has noted that "the Supreme Court has stated that 'we look at the record on summary judgment in the light most favorable to . . . the party opposing the motion,' and that 'the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.'" *Id.* at 9 (quoting *Poller v. Columbia Broad. Sys., Inc.,* 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962)). Moreover, Commission Judges should not grant motions for summary decision "unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances." *KenAmerican Res., Inc.,* 38 FMSHRC 1943, 1947 (Aug. 2016) (quoting *Campbell v. Hewitt, Coleman & Assocs., Inc.,* 21 F.3d 52, 55 (4th Cir. 1994)); *see Scott v. Harris,* 550 U.S. 372, 380 (2007) (holding that there is no genuine issue for trial unless a rational trier of fact could find for the nonmoving party).

II. Factual Background

On December 29, 2022, Inspector Steaven Caudill conducted a regular E01 inspection of Vulcan's Boone Quarry. Sec'y Mot., Ex. A. During the inspection, Caudill observed that the eyewash station in the maintenance shop was inoperable because the cold outside temperatures had frozen its water supply, and no additional water source or neutralizing agent was present at the eyewash station. Sec'y Mot., Ex. A. A Vulcan manager, James Bear, informed Caudill that there were bottles of water stored in the office shop adjacent to the maintenance shop, and asked if those bottles were sufficient for eye rinsing. Sec'y Mot., Ex. A. Thereafter, Caudill issued a 104(a) citation alleging a violation of section 56.15001. Sec'y Mot., Ex. C.

III. Secretary's Statement of Undisputed Facts

The Secretary contends that the following facts are not in dispute:

1. Respondent Vulcan Materials ("Vulcan") is engaged in mining at Boone Quarry (the "Mine"). The Mine identification number is 31-00368. The mine is located in Watauga County, Boone, NC.

2. Respondent is subject to the jurisdiction of the Commission.
3. True copies of the citation at issue in this proceeding were served on Vulcan, as required by the Mine Act.
4. On December 28, 2022, MSHA Inspector Steaven Caudill conducted a regular E01 safety and health inspection.
5. During the inspection, Casey McMaham, Supervisor for Respondent, turned on the faucet to the eyewash station. Despite turning the station on, no water flowed from the faucet head. The water system supplying water to the maintenance shop eyewash station was frozen due to cold temperatures. The lack of water supply to the shop eyewash station made the station inoperable.
6. When Inspector Caudill indicated that the eyewash station was not operable, Respondent's representative, Manager James Bear, asked if bottled water was sufficient for eye rinsing. He then directed the Inspector's attention to bottles of water, wrapped in plastic, located in the office shop area approximately 50 to 75 feet from the eyewash station.
7. The Inspector found that the shop employees came into contact with hazardous chemicals such as oil for diesel and fluid pumps, battery acid in charging batteries (which are stored, used, and charged on an "as needed" basis), and aerosol chemicals for cleaning equipment. These chemicals require flushing the eyes with water or neutralizing agent for 15 minutes, if contacted. Rinsing with water or neutralizing agent is necessary to prevent burns and/or blindness.
8. On December 28, 2022, the water supply to Respondent's eyewash station was frozen.
9. Respondent's maintenance shop employees were present and working on December 28, 2022, to do housekeeping due to the cold temperatures outside.
10. Based on the inspection, Inspector Caudill issued Citation No. 8313773 to Respondent, pursuant to § 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 56.15001.
11. Inspector Caudill assessed the gravity of the violation as "unlikely" to result in injury with a not "significant and substantial" designation. Inspector Caudill found the negligence level as "low."
12. To terminate the violation, the operator placed two large bottles of eyewash at the station until the water supply system could be repaired.
13. MSHA assessed the statutory minimum penalty of $143.00 for a § 56.15001 violation.

Sec'y Mot. at 2-4.

Vulcan expressly asserts that it does not dispute Facts 1 through 5 and 7 through 12. Vulcan Resp. at 2-3. Regarding Fact 6, Vulcan's comments not only indicate that there is no genuine dispute, but add that, in addition to bottles of water, there were also bottles of eyewash located in vehicles elsewhere throughout the plant and storage areas. Vulcan Resp. at 2. Also, Vulcan challenges that the refrigerated water in the office shop was 75 feet away because the maintenance shop is only 50 by 60 feet. Vulcan Resp. at 2. This rough estimate, however, is consistent with the Secretary's contention that the water bottles were approximately 50 to 75 feet

away from the eyewash station. Therefore, I find that there is no genuine issue as to any material fact.

IV. Findings of Fact and Conclusions of Law

Inspector Caudill issued 104(a) Citation No. 8313773, alleging a violation of 30 C.F.R. § 56.15001 that was "unlikely" to cause an injury that could reasonably be expected to be "permanently disabling," and was due to Vulcan's "low" negligence. The "Condition or Practice" is described as follows:

> No water supply or neutralizing agent was being provided at the maintenance shop eyewash station where corrosive chemicals and other harmful substances are stored and used. The water system suppling [sic] water to the eyewash station was froze off due to cold temperatures last week. The shop employees use hazardous chemicals daily which requires flushing the eyes for 15 minutes, if contacted (according to the MSDS). Batteries are stored, used, and charged in the shop on an "as needed" bases [sic]. Water or a neutralizing agent is necessary to rinse the eyes to prevent burns and/or blindness.

Sec'y Mot., Ex. C. Caudill terminated the Citation the same day after Vulcan brought in two large bottles of eyewash from a Conex storage container outside the maintenance shop, and placed them at the eyewash station. Sec'y Mot., Ex. C.

A. Fact of Violation

The Secretary contends that she is entitled to summary decision because the eyewash station was inoperable, and no other water or neutralizing agent was present and ready for use as first aid, in the event of chemical accidents. Sec'y Mot. at 7. On the other hand, Vulcan takes the position that bottles of water and eyewash solution located near the maintenance shop were available, within the meaning of section 56.15001. Vulcan Resp. at 2. 30 C.F.R. § 56.15001 prescribes that:

> Adequate first-aid materials, including stretchers and blankets, shall be provided at places convenient to all working areas. Water or neutralizing agents shall be available where corrosive chemicals or other harmful substances are stored, handled, or used.

30 C.F.R § 56.15001.

The meaning of the term "available," as used in section 56.15001, has been interpreted by Commission Judges. *See Taft Prod. Co.*, 35 FMSHRC 965 (Apr. 2013) (ALJ); *see also Fred Chismar*, 22 FMSHRC 81 (Jan. 2000) (ALJ). In *Taft,* I found that the operator violated section 56.15001 because no water or neutralizing agent was easily accessible under emergency conditions in which eye flushing is critical. 35 FMSHRC at 969. Access to the eyewash station in that case was obstructed by metal rods and a water cooler, and the nearest alternative water source was in a bathroom outside the maintenance shop. *Id.* at 970. I found that the eyewash

station was not "available," within the term's ordinary meaning of "present and ready for use" and that, consistent with the protective purposes of the Mine Act, a miner should have immediate and unobstructed access to flushing liquids. *Id*. In the throes of an emergency, I reasoned, a miner should not have to scrounge around, visually impaired and in pain, to find readily available first aid. *Id.*

In *Chismar*, the operator claimed that water was available to treat a miner's chemical burn, where a water reclamation tank was 75 to 200 yards away from the site of the incident. 22 FMSHRC at 91. However, the Judge rejected the operator's argument because the water tank was not in the immediate proximity of where the injured miner was working and the operator had not designated the tank as a first-aid source, leaving the injured miner unaware of where to find first aid. *Id.* at 92.

Vulcan does not contest that the eyewash station was inoperable, but argues that alternative sources of water or neutralizing agent were sufficiently available in other locations. Vulcan Resp. at 3. Vulcan provided photographs, one showing an opened case of bottled drinking water, wrapped in plastic, in the office shop's refrigerator, and another showing three filled 5-gallon water cooler jugs, situated next to the refrigerator. Vulcan Resp., Exs. R-1 and R-2. Vulcan claims that these sources double as available first aid for chemical injuries. Vulcan Resp. at 2. Additionally, a third photograph depicts small bottles of eyewash solution stored on vehicles that, during the inspection, were parked outside the maintenance shop. Vulcan Resp., Ex. R-3.

I find unavailing Vulcan's contentions that alternative sources of water and eyewash solution were available. The word "available" is defined as "present and ready for use." *The American Heritage Dictionary* (5th ed. 2022). With the eyewash station inoperable, there was no other first-aid eye-flushing source inside the maintenance shop. A miner, whose eyes were exposed to harmful chemicals, after accessing the nonfunctional eyewash station, would have to grope around locations outside the maintenance shop for flushing liquid, possibly in a state of panic, delaying relief from pain and likely increasing the probability of burn injuries.

Even more untenable is the contention that a miner, seeking relief from chemical exposure, should reasonably be required to locate and uncap refrigerated bottled water or lift and invert a 5-gallon water cooler jug from another room, as well as locate eyewash agent stored among other materials on vehicles parked outside the maintenance shop. This is precisely why the eyewash station is situated in the maintenance shop to meet the requirements of the standard and, in a nonfunctional state, it provides no safety protection related to chemical accidents.

Accordingly, with no alternative source of water or neutralizing agent readily available to miners working in the maintenance shop, I find that Vulcan violated section 56.15001.

B. Gravity and Negligence

The Secretary assessed the gravity of the violation as "unlikely" and "permanently disabling." Sec'y Mot., Ex. C. Caudill determined that an injury was unlikely to occur because Vulcan's policy requires miners to wear eye protection at all times while on-site, and that the injury would be permanently disabling because of the potential for chemical exposure to cause

blindness or permanent eye damage, if not immediately addressed. Sec'y Mot., Ex. A. Given the undisputed facts, I sustain the Secretary's gravity designations.

The Secretary also assessed the negligence of the violation as "low." Sec'y Mot., Ex. C. I find no indication that Vulcan was aware that the water line was frozen, because the only running water in the maintenance shop was at the eyewash station and, fortunately, it is not needed on a frequent basis. See Sec'y Mot., Ex. A. Therefore, I sustain the Secretary's negligence designation.

V. Penalty

While the Secretary has proposed a civil penalty of $143.00, the Judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). *See Sellersburg Co.,* 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 136 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that Vulcan is a large operator, with no prior violations of section 56.15001, and an overall violation history that is a mitigating factor in assessing an appropriate penalty. I also find that the proposed penalty will not affect Vulcan's ability to continue in business, and that Vulcan demonstrated good faith in achieving rapid compliance after notification of the violation. See Sec'y Mot. at 9-10. The remaining criteria involve consideration of the gravity and negligence of the violation. I have found that the violation was unlikely to result in permanently disabling injuries, and that Vulcan's negligence in committing it was low. Accordingly, I find that a penalty of $143.00, as proposed by the Secretary, is appropriate.

VI. Order

ACCORDINGLY, the Secretary's Motion for Summary Decision and Determination of Penalty is **GRANTED**, and it is **ORDERED** that Vulcan Construction Materials, LLC **PAY** a civil penalty of $143.00 within 30 days of the date of this Decision.[1]

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

[1] Payment should be made electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

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April 26, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2023-0009 A.C. No. 16-00970-562752 Docket No. CENT 2023-0030 A.C. No. 16-00970-564759 Docket No. CENT 2023-0062 A.C. No. 16-00970-566522 Docket No. CENT 2023-0066 A.C. No. 16-00970-568130
v.	
MORTON SALT, INC., Respondent.	Mine: Weeks Island Mine and Mill

DECISION AND ORDER

Appearances: Tyler Nash, U.S. Department of Labor, Office of the Solicitor, 525 S. Griffin Street, Suite 501, Dallas, TX 75202

Donna Vetrano Pryor, Husch Blackwell LLP, 1801 Wewatta Street, Suite 1000, Denver, CO 80202

Before: Judge Simonton

I. INTRODUCTION

These cases are before me on a petition for assessment of civil penalty filed by the Secretary of Labor or Petitioner, acting through the Mine Safety and Health Administration, against Morton Salt, Inc., ("Morton Salt" or "Respondent"), pursuant to the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 801.[1] These cases involve five Section 104(a) citations with a total proposed penalty of $38,307.00.

[1] In this decision, the joint stipulations, transcript, Petitioner's exhibits, Respondent's exhibits, Petitioner's brief, and Respondent's brief are abbreviated as "Jt. Stip.," "Tr. I and II," "Ex. P–#," "Ex. R–#," "Pet. Br.," and "Resp. Br.," respectively.

The parties presented testimony and documentary evidence regarding the citations at issue at a hearing held on November 29-30, 2023, in Lafayette, Louisiana. MSHA inspectors Brandon Olivier and William Clark, Morton Salt production supervisor Brian Provost, and Morton Salt miners Robert Segura and Heath Toups testified for the Secretary. For the Respondent, site safety trainer Landon Olivier, production supervisor Brian Provost, general maintenance supervisor Lee Franks and Morton Salt miners Marcus Olivier and Quinn Norwood testified. After fully considering the testimony and evidence presented at hearing and the parties' post-hearing briefs, I **AFFIRM** Citation Nos. 9649738, 9649739, 9676603, 9676605, and 9673757, as modified herein.

II. STIPULATIONS OF FACT

At hearing, the parties agreed to the following stipulations:

1. Relating to Docket No. CENT 2023-0009, the parties settled the below citations as follows:
    a. Citation No. 9649647 was modified by the Secretary with a reduction to non-S&S and a commensurate reduction in penalty.
    b. Citation No. 9649674 was modified by the Secretary with a reduction to non-S&S and a commensurate reduction in penalty.
    c. Citation No. 9649715 was accepted by Morton Salt as written.
    d. Citation No. 9649721 was modified by the Secretary with a reduction to non-S&S and a commensurate reduction in penalty.
    e. Citation No. 9649723 was modified by the Secretary with a reduction to non-S&S and a commensurate reduction in penalty.
    f. Citation No. 9649725 was modified by the Secretary with a reduction to non-S&S and a commensurate reduction in penalty.
    g. Citation No. 9649726 was modified by the Secretary with a reduction to non-S&S and a commensurate reduction in penalty.
    h. Citation No. 9649730 was accepted by Morton Salt as written.
    i. Citation No. 9649731 was vacated by the Secretary.

2. Relating to Docket No. CENT 2023-0030, the parties have settled the below citations as follows:
    a. Citation No. 9676607 was accepted by Morton Salt as written.
    b. Citation No. 9673759 was accepted by Morton Salt as written.
    c. Citation No. 9649797 was accepted by Morton Salt as written.
    d. Citation No. 9676611 was modified by the Secretary with a reduction to non-S&S and a commensurate reduction in penalty.
    e. Citation No. 9676621 was accepted by Morton Salt as written.
    f. Citation No. 9676622 was vacated by the Secretary.

3. Relating to Docket No. CENT 2023-0062, the parties have settled the below citations as follows:
    a. Citation No. 9676616 was modified by the Secretary with a reduction to non-S&S, moderate negligence, and a commensurate reduction in penalty.

b. Citation No. 9676617 was modified by the Secretary with a reduction to moderate negligence and a commensurate reduction in penalty.
c. Citation No. 9676636 was accepted by Morton Salt as written.
d. Citation No. 9676637 was accepted by Morton Salt as written.
e. Citation No. 9676638 was accepted by Morton Salt as written.
f. Citation No. 9676639 was accepted by Morton Salt as written.
g. Citation No. 9676631 was accepted by Morton Salt as written.
h. Citation No. 9676632 was modified by the Secretary with a reduction to non-S&S and a commensurate reduction in penalty.

4. Relating to Docket No. CENT 2023-0066, the parties have settled the below citations as follows:
    a. Citation No. 9674865 was modified by the Secretary with a reduction to non-S&S and a commensurate reduction in penalty.
    b. Citation No. 9648950 was modified by the Secretary with a reduction to non-S&S and a commensurate reduction in penalty.

5. These dockets involve an underground salt mine known as the Weeks Island Mine and Mill (the "Mine"), which is owned and operated by Morton Salt.

6. The Mine, located near New Iberia, Iberia Parish, Louisiana, MSHA Mine ID No. 16-00970, is a "mine" as defined in § 3(h) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"), 30 U.S.C. § 802(h).

7. The Administrative Law Judge has jurisdiction over this proceeding, pursuant to § 105 of the Mine Act, 30 U.S.C. § 815.

8. Morton Salt has been the "operator" as defined in § 3(d) of the Mine Act, 30 U.S.C. § 802(d), of the Mine at which the citations at issue in this proceeding were issued at all relevant times.

9. Morton Salt's operations have affected interstate commerce at all relevant times.

10. The assessed civil penalty would not affect Morton Salt's ability to remain in business. However, given the mine's POV status, these citations could result in the mine's temporary or permanent closure.

Tr. I-7-11.

III. FINDINGS OF FACT AND CONCLUSIONS

Morton Salt operates Weeks Island Mine and Mill, a domal salt mine located near New Iberia, Iberia Parish, Louisiana. Jt. Stip. 6. The citations at issue at hearing were issued by MSHA Inspectors Brandon Olivier and William Clark during inspections conducted on June 7, 2022, August 29, 2022, and August 30, 2022.

A. Citation No. 9649738

i. Factual Background

At Weeks Island, Morton Salt uses a mining cycle in the bench areas comprised of blasting, scaling, mucking, drilling, and loading. Tr. I-67-68, I-74-75. After blasting, which uses explosives, pieces of salt that can crack away from the wall and fall may form on the ribs and ledges of the bench. Tr. I-202. These salt pieces are known as scales and can potentially fall onto miners or equipment working below if they are not removed. Tr. I-201-202. Prior to commencing the next phase in the mining cycle after blasting, the area is fire bossed to inspect for dangerous gases and to remove hazards. Tr. I-75, I-78. After the fire boss, salt is removed using a Load Haul Dump ("LHD") vehicle in a process known as mucking. Tr. I-76. As a room is mucked, miners will gradually move towards the face of the bench. Tr. II-112-113.

The formation of scales is not limited to after blasting, and miners should continually inspect the room for hazards and dangerous conditions as scales can continue to form over time. Tr. I-75, I-258. Falling scales are dangerous because they can lead to serious injuries or death depending on their size. Regarding Morton Salt's policies for finding and identifying hazards, miners are trained to inspect the room they are working in and should always be looking for scales. Tr. I-312. When miners are assigned to work in an area, they are required by the operator to fill out a workplace examination card prior to beginning work which documents any hazards that the miner encounters. Tr. I-226. If a miner cannot address a hazard on their own, they are taught to barricade the area and the hazard is added to a working list to be addressed at a later date according to its priority. Tr. I-256, Tr. II-9-10.

Citation No. 9649738 was issued by Inspector Brandon Olivier on June 7, 2022, while he was conducting an E-01 inspection at Weeks Island. Tr. I-61, I-65; Ex. P-1-1. While examining the 19-O area of the mine, he found loose ground along the ledge and ribs of the bench area that would expose miners to fatal injuries if it fell. Tr. I-79, I-101-111; Ex. P-5. Specifically, the loose ground was described as large scales with openings at the bottom, indicating that they could come down at any time. Tr. I-87, I-106-107, Ex. P-5. The scales were approximately 50-60 feet above the lower level where mucking was ongoing. Tr. I-77, I-109. This condition was only discernable with the bright lights from an LHD vehicle and was not sufficiently visible with only a miner's cap light and the inspector's spotlight that he brought with him. Tr. I-88. There were no barricades or other warning signs that would alert employees to the dangerous conditions. Tr. I-85. The inspector stated that as mucking continued, miners would be exposed to the material on the ledge. Tr. I-83-84. They would have also been exposed from the ribs on the left and right regardless of the mucking process. Tr. I-84.

Small vehicle tracks from an ATV, which do not have suitable protection from falling hazards, indicated that miners were passing under this loose material and were exposed to the hazards. Tr. I-80-81; Ex. P-1-3. When the inspector issued the citation, it was not determined when the tracks were made or when the scales were formed. Tr. I-170, I-172. He did not see anyone physically under the scales. Tr. I-177-178. The inspector gave conflicting testimony regarding whether there was a miner actively working in the area at the time of the citation or whether a miner was waiting to start work. Tr. I-73-174. However, he did testify that his notes

were an accurate reflection of how the conditions actually were when he issued the citation. Tr. I-173. Olivier's notes state that "the room mucked with LHD. Since Monday the ledge had separated with loose resting on angle. Loose observed on rib" and "small vehicle tracks near the wall – LHD mucked out." Ex. P-1-3. Miners were still able to access the room and there was remaining muck inside. Tr. I-83-84, I-176-177. The inspector also did not recall asking for the LHD operator's workplace examination card, but he still would have issued the citation regardless of the information on the card because the room was open for travel. Tr. I-174-175.

After identifying the loose ground conditions, the inspector called Brian Provost, the production supervisor, to the area. Tr. I-89. Together, they went to the top of the bench to observe the conditions from that angle. Tr. I-89. When at the top, Provost told the inspector that he had only looked at the conditions from the bottom and did not inspect the top prior to assigning miners to muck out the room. Tr. I-90. Provost further explained to Inspector Olivier that he had fire bossed the room on June 4, and these conditions were not present then, which was confirmed in Provost's own testimony. Tr. I-89-90, I-243, I-245, I-275. On June 7, he conducted a pass through at the bottom of the 19-O that lasted approximately a minute. Tr. I-240. He also confirmed in his testimony that mucking had occurred in the 19-O on multiple shifts post blast to the time of MSHA's inspection on June 7. Tr. I-240. Provost's testimony on this point is also confirmed by Respondent's production reports for June 6. Tr. I-222-224; Ex. P-10.

Brian Provost testified that he only checked the conditions from the bottom of the bench without using a spotlight on June 7. Tr. I-240-241. He had assigned an employee to work in the room, but he said that at the time of the citation the employee had yet to begin, and no one was actively working in 19-O. Tr. I-256. Because he had inspected the area from the top when he fire bossed on June 4, he believed that he did not need to check the top again. Tr. I-242-243. From the workplace cards, no employee that had been assigned to muck from June 4 to June 6 documented a hazard. Tr. I-228-236; Ex. P-13. Provost had previously seen miners check the top of the ledge, but that checking the top was optional and not required. Tr. I-253. This was confirmed by site safety manager Landon Olivier in his testimony. Tr. II-48.

Heath Toups mucked in 19-O on June 6 during the night shift and his completed workplace exam card did not reflect that he identified any hazards in the area on that date. Tr. I-315-316; Ex. P-13. He has never really gone to the top of the bench to inspect. Tr. I-324. Emphasizing the importance of the pre-shift examinations, Toups stated that based on his experience, scales can spontaneously form and that the conditions of an area can change daily. Tr. I-312. On June 8, Toups removed the scales in 19-O to abate the citation using a mechanical scaler that can generate a lot of force. Tr. I-329-331.

Morton Salt offered additional testimony regarding the safety of their LHD vehicles. Maintenance general supervisor Lee Franks testified for Morton Salt that he believed an LHD operator was unlikely to be injured by a falling scale because LHDs are designed for use in mines and are stronger than the general industry equipment. Tr. II-136; Ex. R-G. He also believed that it would be unlikely that an operator would be outside of the cab, and that all work could be performed from within the cab. Tr. II-136-137, II-147. However, the testimony of another miner, Quinn Norwood, indicates that sometimes a miner may exit an LHD in order to get better visibility of the area and to check for scales on the ribs. T. II-113-114. Regarding these

particular scales, Heath Toups testified that he would not feel safe operating an LHD with the scales at issue above him because if one fell, it could severely damage equipment and cause fatal injuries. Tr. I-320.

ii. Fact of Violation

The Commission has long held that "[i]n an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation." *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992). The burden of showing something by a "preponderance of the evidence," the most common standard in the civil law and the standard applicable here, simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

During his inspection on June 7, 2022, Olivier issued 104(a) Citation No. 9649738, which alleged:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitting in the affected area. There was loose ground found on the ledge of 19-0 in the bench area. The loose was observed 50-60ft high from the lower level. This room was shot and fire bossed on 6/4/2022 and mucked on 6/6/2022. This condition exposes miners to serious injuries if the loose were to fall on the miners or on the equipment while they are in the area.
>
> Standard 57.3200 was cited 66 times in two years at mine 1600970 (66 to the operator, 0 to a contractor).

Ex. P-1-1; Tr. I-65.

Olivier designated the citation as a significant and substantial violation of 30 C.F.R. § 57.3200 that was reasonably likely to cause an injury that could reasonably be expected to be "fatal," would affect one miner, and was caused by Respondent's high negligence. Ex. P-1-1.

30 C.F.R. § 57.3200 states that "[g]round conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry."

The Secretary asserts that Morton Salt violated this standard by sending miners to work in 19-O prior to removing the scales along the ribs and ledge of the bench. Pet. Br. at 9. The Respondent argues that the Secretary has not proven that the scales posed a hazard to miners working in the area, relying on Brian Provost's testimony and the workplace identification cards to show that no hazards were identified in 19-O prior to the citation. Resp. Br. at 20. Morton Salt also argues that it is unlikely that a scale could hit a miner because the muck pile prevented miners from getting close enough to the scales. Resp. Br. at 21.

The inspector first noticed the scales from the bottom of the bench. When he examined the conditions from the top of the bench, he determined that these scales could cause fatal injuries if one were to fall. There was no barrier or other sign that would provide warning of the dangers in the room. While the inspector did not measure the loose ground, he did provide estimates as to their size and indicated they were heavy, thus posing potentially fatal safety hazards from 50-60 feet above the 19-O floor. I credit the inspector's notes made at the time of the inspection as well as Respondent's production reports for June 6 which reflect that mucking was ongoing in 19-O. While it may be true that supervisor Brian Provost did not see any hazardous conditions when he fire bossed the room on June 4, it is clear that hazardous ground conditions existed on June 7 when the citation was issued and that miners had been mucking in the 19-O post blast leading up to the time the inspector issued the citation.

The inspector unequivocally testified that as mucking continued to advance toward the face miners would be exposed to the ledge scales. In fact, a miner had been assigned and was staged to begin mucking on the morning of June 7 when the inspector discovered the scales. Production supervisor Provost had already conducted a one-minute pass through from below without detecting the hazardous conditions on the ledge and ribs. Had the inspector not been present there is no question the hazardous conditions would have continued as mining operations continued. In addition, small all terrain vehicle (ATV) tracks next to the rib demonstrate that miners had already been exposed to scales along the left and right ribs directly above. The inspector's conclusions are supported by miner Heath Toups's testimony that scales can form unpredictably, that conditions in a room can change daily, and that it was dangerous to muck underneath these scales.

Regarding the lack of hazards noted on the workplace examination cards, it is just as likely that they were filled out inaccurately as they were filled out accurately, and they are not dispositive to show that no hazard had existed prior to June 7. This is especially true because the miner who mucked the 19-O, Heath Toups, confirmed he does not go to the top of the bench to inspect for scales. He only inspects from below increasing the likelihood that the existence of ledge or rib scales as well as their size and condition may not be observed from below given that the ledge is 50 to 60 feet above.

The preponderance of evidence demonstrates there was mucking ongoing while there were dangerous ground conditions present thus, the area should have been checked from above before assigning a miner to the area. Accordingly, I affirm that there was a violation of 30 C.F.R. § 57.3200.

iii. Gravity and S&S

The inspector assessed the hazard as reasonably likely to cause an injury or illness, because of the small ATV vehicle tracks located close to the loose ground above and because if the area had continued to be mucked, miners would be exposed to the material off the ledge. Tr. I-90-91. He designated that the injury would reasonably be expected to be fatal, because material of a significant size, roughly five to six feet long and two foot thick, falling from a distance of fifty or sixty feet could cause significant injuries even if the miner were inside the covered cab of an LHD. Tr. I-91. I affirm these designations.

The citation was also designated as significant and substantial. To establish that a violation is significant and substantial, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature. *Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383 (June 2020). The Commission has explained that "the proper focus of the second step of the [S&S] test [is] the likelihood of the occurrence of the hazard the cited standard is designed to prevent." *Newtown Energy, Inc*., 38 FMSHRC 2033, 2037 n.8 (Aug. 2016).

The Secretary has proven that a violation of a safety standard has occurred. My analysis turns to the second step, whether the violation was reasonably likely to cause the occurrence of the discrete safety hazard of scales falling onto a miner. While the inspector did not witness a miner or equipment underneath the scales, the likelihood of the occurrence of the hazard is determined assuming normal continued mining operations. *Consolidation Coal Co.,* 8 FMSHRC 890, 899 (June 1986). Although there is a dispute whether a miner was actively working in 19-O at the time of the citation, at the very least a miner was assigned to muck in the room after a supervisor checked the room and failed to notice the scales or examine the area from above. In addition, there was evidence mucking had already occurred post blast up to the date of the inspection. Further, the ATV tracks seen by the inspector and documented by his contemporaneous notes demonstrate that miners were traveling near the wall, close to the scales. Because there is evidence that miners were close to the scales prior to the citation and because another miner was assigned to work in the room while the scales were present, it is reasonably likely that a scale would fall onto a miner. Scales falling from a height of 50 to 60 feet are reasonably likely to cause fatal injuries, which are serious in nature, satisfying the third and fourth steps of the S&S analysis. I affirm the inspector's gravity and S&S designations.

iv. Negligence

Under the Mine Act, operators are held to a high standard of care, and "must be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." 30 C.F.R. § 100.3(d). MSHA's regulations define reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 C.F.R. § 100.3: Table X.

Olivier assessed the negligence as high because as part of the mine's workplace examination, it is required to inspect the room and it was clear from his discussion with Brian Provost that the top of the bench had not been inspected. Tr. I-91. It was noted that the conditions were obvious and could have been spotted from either the top or the bottom. Tr. I-93. Although the condition was noticeable from the bottom of the bench, the inspector still marked the negligence as high because the mine supervisor failed to inspect it from the top of the bench. Tr. I-168-169.

Given the risks of scales falling from a height of 50-60 feet, management or its contractor designees should inspect from both above and below before miners are permitted to muck. Testimony from Weeks Island miners clearly demonstrates that they do not always inspect from above, meaning that it is management's responsibility to do so to ensure safe working conditions. Additionally, Brian Provost is a supervisor at Weeks Island and is responsible for ensuring safe working conditions for the miners. He had only spent around a minute inspecting 19-O before assigning a miner to muck in the room. I affirm the inspector's designation that this violation is highly negligent.

B. Citation No. 9649739

i. Factual Background

In conjunction with Citation No. 9649738, Citation No. 9649739 was issued during the same inspection based on the loose ground in 19-O. Tr. I-92, I-113. The facts of the violation are largely the same as Citation No. 9649738. The inspector determined that Morton Salt did not adequately examine the bench area before assigning miners to work in the area. Tr. I-115. The area had been accessed three times before anyone noticed the hazardous conditions, based on the workplace inspections. Tr. I-117-118; Ex. P-13. The production supervisor on duty, Brian Provost, had informed the inspector that he had inspected the area from the bottom of the bench and was about to send in a miner to muck before the inspector observed the ground conditions. Tr. I-115-116, I-256. Provost confirmed that he did not inspect the area from above, only from the bottom, and that the last time he had checked the top was during the fire boss on June 4. Tr. I-240-243. Had someone viewed the conditions at the top, they would have had a clear view of the hazards and the scales that remained after blasting. Tr. I-116. By only making a pass through the area below, he did not sufficiently examine for hazardous conditions prior to assigning miners to work in the area. Tr. I-115-116, I-240.

At the time of the inspection, Morton Salt had not designated one of their own employees to comply with this standard and instead relied on contractors. Tr. I-97; Ex. P-2. One of the contractors told the inspector that he had never been on the bench where the scales were located. Tr. I-97. These contractors were tasked specifically with scaling and bolting, not with inspecting for scales. Tr. I-202-204. Morton Salt presented testimony that they provide training to their employees on examining ground conditions and identifying hazards. Tr. II-36-37; Ex. R-X. During the relevant time period from June 4 to June 7, none of the miners who worked in 19-O recorded any hazards on their workplace identification cards. Tr. I-227-236; Ex. P-13.

ii. Fact of Violation

Olivier issued 104(a) Citation No. 9649739 on June 7, 2022, which alleged:

> 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. There was loose ground found in

> 19-[O] that was not identified after blasting. The area was blasted on 6/4/2022 and mucked on 6/6/2022 and the ground condition was not identified prior to work commencing. This condition exposes miners to injuries if the loose were to fall while miners are in the area.

Ex. P-16-1; Tr. I-113.

Olivier designated the citation as a significant and substantial violation of 30 C.F.R. § 57.3401 that was reasonably likely to cause an injury that could reasonably be expected to be "fatal," would affect one miner, and was caused by Respondent's high negligence. Ex. P-16-1.

30 C.F.R. § 57.3401 states that "[p]ersons experienced in examining and testing for 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 and surface area highwalls and banks adjoining travelways shall be examined weekly or more often if changing ground conditions warrant."

Morton Salt contends that there was no violation of this standard because all miners are trained to examine ground conditions and Brian Provost had examined the top of the ledge during his fire boss on June 4 and did not find a hazard. Resp. Br. at 34-36. Brian Provost had inspected the room again on June 7 prior to assigning a miner to work in 19-O and did not find any hazards. Resp. Br. at 36. It is undisputed that on June 7, Provost did not inspect 19-O from the top of the bench and his inspection from the bottom of the bench was a one-minute pass through. I credit the inspector's testimony that failing to check the top of the bench allowed this condition to go unnoticed from June 4 until June 7. It is also clear that Provost's one-minute pass-through inspection was insufficient because these conditions were visible from the bottom of the bench and were not observed by the operator on June 7 until the inspector issued the citation. Accordingly, there has been a violation of this standard.

iii. Gravity and S&S

The inspector determined that the citation was reasonably likely to result in an injury because there were people actively working in the area, exposing them to the hazard. Tr. I-121. He designated that the violation was reasonably likely to cause fatal injuries because the hazards were 50-60 feet high and are comprised of significant material. Tr. I-121-122. I affirm these designations.

As a violation of 30 C.F.R. § 57.3401 has occurred, I assess whether the violation was reasonably likely to cause the occurrence of a discrete safety hazard. The hazard, the same as Citation No. 9649738, is loose ground conditions such as scales falling onto miners working in the area. I find that the hazard is reasonably likely to occur as a result of insufficient examinations by the operator. Falling scales are reasonably likely to cause an injury of a reasonably serious nature. I affirm the S&S designation.

iv. Negligence

Olivier designated the negligence as high because the supervisor should have known to examine the room thoroughly before assigning miners to work in the area and did not make any effort to barricade the area or set up warning signs. Tr. I-122-123. Respondent argues that there are mitigating circumstances that should lower the negligence to moderate, because they have trained miners to examine for ground condition issues and because the inspector concluded that no one examined the area despite failing to review the workplace examination cards for 19-O. Further, although there was a miner that was about to muck in 19-O, he had yet to begin work when the citation was issued.

Brian Provost was the only employee to view the top after the blasting had occurred and prior to the citation when he fire bossed on June 4. The inspector's notes regarding his rationale for designating this violation as high negligence show that Morton Salt had acknowledged that everyone should be examining for these conditions, yet the 19-O had been accessed three times during different shifts without anyone noting the condition which belies the training that Provost and the exposed miners received. I credit the inspector's testimony that failing to observe from the top allowed the conditions he found on the morning of June 7 to go unnoticed over the course of the mucking shifts between June 4 and the morning of his inspection. Such a glaring discrepancy fails to merit crediting Respondent's training as a mitigating factor.

C. Citation No. 9676603

i. Factual Background

When inspecting the wash bay area on August 29, 2022, Inspector Olivier issued a citation for the washouts 3-5 feet deep and 5-6 feet long he observed in the area. Ex. P-25. Washouts are potholes caused by fresh water dissolving salt on the floor of the mine. Tr. I-125. These washouts provided unsafe access next to the operator's pressure washer trailer in the wash bay. Tr. I-124, I-125. In order to use the degreaser spray bottle located on the trailer, miners would need to step over or go around large potholes. Tr. I-125-126, I-128, I-137; Ex. P-30. The area is dark, with the only lighting coming from around a corner and a miner's cap lamp. Tr. I-142-143; Ex. P-30. Miners accessed this area weekly to wash their equipment. Tr. I-127-128. Caution tape and a tag dated July 28, 2022, for trip hazards, sink holes, and roof scales was found near the pressure washer. Tr. I-126-127; Ex. P-29. The workplace identification card for the wash bay also flagged these hazards. Tr. I-128-129.

Morton Salt presented testimony that miners would only need to stand near a washout to use the degreaser bottle and that miners did not need to use the degreaser bottle every time they were in the wash bay. Tr. I-267. Both production superintendent Brian Provost and miner Marcus Olivier testified that miners did not need to stand on the trailer or near the wheels in order to use the pressure washer. Tr. I-267, II-73. Regarding the frequency of washouts, Marcus Olivier stated that they were not uncommon, but had been seen and corrected before. Tr. II-77. Mine management was not aware of these particular washouts at the time of the citation. Tr. II-71, II-78-79. The caution tape and tag found nearby were related to a different condition that had already been corrected and was not related to the washouts the inspector observed. Tr. II-73-74.

ii. Fact of Violation

Olivier issued 104(a) Citation No. 9676603 on August 29, 2022, which alleged:

> Safe means of access shall be provided and maintained to all working places. There was unsafe access found around the pressure washer next to the wash bay on 1500'. There were washouts in the [area] around the wash trailer. The washouts appeared to be at least 3-5ft deep in areas. The area had a caution tape and tag identifying the hazards lying on the floor dated 7/28/2022. This area is access[ed] weekly by miners to wash equipment. This condition exposes miners to injury if they were to fall in one of holes in the ground.
>
> Standard 57.11001 was cited 3 times in two years at mine 1600970 (3 times to the operator, 0 to a contractor).

Ex. P-25-1; Tr. I-123.

Olivier designated the citation as a significant and substantial violation of 30 C.F.R. § 57.11001 that was reasonably likely to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," would affect one miner, and was caused by Respondent's high negligence. Ex. P-25-1.

30 C.F.R. § 57.11001 states that "[s]afe means of access shall be provided and maintained to all working places." It is undisputed that a violation of this standard occurred because there were washouts near the pressure washer.

iii. Gravity and S&S

Olivier designated the citation as reasonably likely to cause an injury that could be reasonably expected to result in lost workdays or restricted duty. Ex. P-25-1. At hearing, he testified that he selected "reasonably likely" because miners access the pressure washer at least one time per week and thus are exposed to injuries from falling in holes leading to sprains or strains. Tr. I-142-143. These types of injuries would be reasonably likely to cause a miner to lose workdays or be placed on restricted duty. Tr. I-143. I affirm the gravity for this violation.

It has already been established that there has been a violation of a mandatory safety standard. The discrete safety hazard that this standard is designed to prevent is trips and falls from stepping in or around a washout or other obstacle. I find that this hazard is reasonably likely to occur, and step 2 of the *Mathies* test is satisfied. The area is not well-lit, miners regularly access this area to use the pressure washer, and miners need to maneuver around one of the washouts in order to use the degreaser bottle as needed. These facts support that the occurrence of the hazard is reasonably likely. I find that tripping into a deep washout like those present near the pressure washer trailer is likely to cause an injury. A specific type of injury is not required to find that an injury is reasonably serious, and a sprain or similar injury may be considered reasonably serious. *S&S Dredging Co.*, 35 FMSHRC 1979, 1981-82 (July 2013). As the identified injury here is strains or sprains, I find that this type of injury is reasonably serious. As

all four elements of the *Mathies* test have been satisfied, I find that the violation was properly determined to be significant and substantial.

iv. Negligence

The violation was designated as high negligence because it was a recurrent issue, and the operator was aware of the condition. Morton Salt contends that the negligence should be mitigated because a miner had previously identified and tagged out a prior washout in the wash bay that had already been addressed and training on housekeeping and conducting workplace inspections to identify hazards is provided. Resp. Br. at 41. There was also no evidence that management was aware of the cited condition prior to the inspection. Resp. Br. at 41. I credit Marcus Olivier's testimony that washouts were not a terribly common occurrence at the mine and that management did not have prior knowledge of this particular washout. For all of these reasons, I lower the negligence of this citation from high to moderate.

D. Citation No. 9676605

i. Factual Background

In the 23-H area, which is a primary escape route and highly traveled, scales existed all along the ceiling approximately 20 feet above the ground over the roadway. Tr. I-145-146, I-286. Miners Robert Segura and Jeb Dionne first identified this condition on July 11, 2022, a month and a half before the citation was issued. Tr. I-145-146, I-286. They barricaded off the area using four blue cones, red caution tape, and a tag. Tr. I-288. This condition was then noted on their workplace exams, which were not shown to the inspector during his inspection. Tr. I-153.

When Inspector Olivier issued the citation on August 30, 2022, there were still scales of a significant size on the ceiling of the area, with a crack running through which showed where the material had fallen. Tr. I-159-161, I-163. There were only two cones and a barrel remaining in the area, and the caution tape was partially buried on the ground with a large piece of salt that had fallen from the scale on top of it. Tr. I-145-146, I-149-150; Ex. P-32. In that condition, the barricade that had been constructed was no longer effective because it did not prevent miners from accessing the area. Tr. I-151, I-158. Morton Salt was actively mining in an area to the right of 23-H, and there were tracks from small and large vehicles nearby. Tr. I-152, I-157-158. Miners would need to travel within ten feet from where the material fell. Tr. I-152. While roof bolts were installed in this area, roof bolts are not designed to prevent scales from forming or from falling. Tr. I-164.

Robert Segura, one of the employees who first identified the scales, testified that he had barricaded the area using four cones and red tape. Tr. I-287-288. This area experienced a high frequency of travel, with miners traversing both by vehicle and on foot multiple times throughout the day. Tr. I-291-292. He had seen the red tape still up five to six times prior to the citation, but on the day of the inspection, he confirmed that the tape was no longer up and two cones were missing from the area. Tr. I-297-298, I-304-305. Another Morton Salt miner, Quinn Norwood, also testified that the tape should be up to be considered a sufficient barrier. Tr. II-105. He removed the scales in 23-H and stated that it took three to four minutes and a great deal of force to detach the scale. Tr. II-98-100. Based on this information, which was only acquired when the

hazard was finally addressed, he believed that the scale did not pose a danger to miners because he did not think that the scale could have fallen on its own. Tr. II-99-100.

ii. Fact of Violation

Olivier issued 104(a) Citation No. 9676605 on August 30, 2022, which alleged:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. There was loose ground found along the primary escape route in 23H on the 1500' level. The loose was approximately 20ft high on ceiling and it had appeared that a piece had already fallen on its own. There was a tag and tape dated 7/11/2022 on ground half buried under already fallen loose. This area is traveled daily by miners working the bench top and weekly by management for inspections. This condition exposes miners to injuries if the loose were to fall while miners are traveling in the area.
>
> Standard 57.3200 was cited 80 times in two years at mine 1600970 (80 to operator, 0 to a contractor).

Ex. P-31-1; Tr. I-145.

Olivier designated the citation as a significant and substantial violation of 30 C.F.R. § 57.3200 that was reasonably likely to cause an injury that could reasonably be expected to be "fatal," would affect one miner, and was caused by Respondent's high negligence. Ex. P-31-1.

30 C.F.R. § 57.3200 states that "[g]round conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry." The scales in 23-H clearly constituted a hazard to persons and travel was still permitted through the area at the time of the citation. As such, there was a violation of 30 C.F.R. § 57.3200.

iii. Gravity and S&S

The inspector designated the citation as reasonably likely to cause an injury because the area was not barricaded and did not prevent miners from traveling through the area, which was an active working area. Tr. I-164. The type of injury was assigned permanently disabling because the material was falling from a height of twenty feet and could cause head, neck, and back injuries. Tr. I-165. The inspector deemed that the operator's negligence was high because the condition had existed for over a month on a primary escape route without being addressed. Tr. I-165. I affirm these designations.

I have already found that there has been a violation of a mandatory safety standard. Regarding the second step, Morton Salt argues that a barrier had been placed to prevent miners from accessing the area and the scales were difficult to remove, making it unlikely that a scale would fall onto a miner. However, the testimony demonstrated that miners were traveling

through this area multiple times a day and there was evidence that a piece of the scale had already fallen. While there may have been a sufficient barrier at one point, this was not the case when the citation was issued because of the missing cones and the fallen caution tape. This barrier no longer served to prevent access to the area. I find that the occurrence of the hazard is reasonably likely to occur. If a scale were to fall on a miner, it is reasonably likely that it would result in a serious injury. I affirm the S&S designation.

The testimony also demonstrates that miners were traveling through the area multiple times a day. The scales were identified over a month prior to the citation, and there was no effort by the operator to remove or ascertain the danger presented by the scales. Additionally, there was evidence that part of the scale had already fallen.

iv. Negligence

The inspector marked that the operator's negligence was high. Morton Salt argues that the area had been taped off, their training regarding the hazards of scales, and the engagement of contractors to handle scales should reduce their negligence to moderate. Resp. Br. at 31-32. The scales, however, were identified over a month prior to the citation and there was no effort by the operator to remove or ascertain the danger presented by the scales. I find that because this was a heavily used travel way and the existence of these dangerous conditions for a significant period of time, as well as the fact that the barrier was ineffective, do not support reducing the negligence determination. I affirm the negligence as high.

E. Citation No. 9673757

i. Factual Background

On August 30, 2022, Inspector Clark was conducting a quarterly E-01 inspection at Weeks Island. Tr. I-21-22. While inspecting the motor control center ("MCC"), he saw folded-up matting on the floor creating a trip hazard. Tr. I-22-23, I-33. The slick side of the matting was face up, while the anti-slip side was face down. Tr. I-26-28; Ex. P-23-1, Ex. P-24-1. There were footprints across the mat, indicating that someone had walked across it in that condition. Tr. I-24. Before turning on the lights, the MCC was completely dark, and the condition was not easily visible. Tr. I-24. There was a functional light switch near only one of the two entrances to the MCC. Tr. I-23-24, I-48. If a miner were to enter through the door without a functional light switch, they would be reliant on the cap light to be able to see and avoid the hazard. Tr. I-23-24.

No one traveling with the inspector could speak to how long the condition had existed that way or when the mat had been stepped on. Tr. I-36. The inspector testified that Landon Olivier, a member of Morton Salt management, told him that the condition had existed that way for "multiple shifts." Tr. I-45. The inspector looked through the workplace exams and did not find that the condition had been reported. Tr. I-35; Ex. R-J. He determined that the condition had existed for more than one shift. Ex. P-21. Initially, the inspector marked the violation as unlikely, but on further reflection he changed his mind and marked the violation as reasonably likely based on the footprints on top of the mat. Tr. I-38-39. He made the revision on the same day he issued the citation, and he testified that he communicated the change to Morton Salt's representatives. Tr. I-39.

The MCC is used to store variable frequency drives, locks, and other pieces of electrical equipment. Tr. I-29, Tr. II-49. Based on the inspector's experience, he determined that a miner would need to access this area to perform maintenance and to access equipment necessary to lock out machinery or vary the speed of a motor. Tr. I-31. The number of times a day a miner could access the room varies, from multiple times per day to once per week. Tr. I-31. Because miners would expect the floor of the MCC to be clear, a miner would not necessarily be alert to the tripping hazard, especially in the event of an emergency. Tr. I-38.

Landon Olivier, the site safety trainer, was accompanying the inspector when he issued the citation for the matting in the MCC and confirmed that the mat was folded over and that there were footprints on top of it. Tr. II-48-49, Tr. II-50. He testified that he did not know when the footprints on the mat were created, but the footprints did not look freshly made. Tr. II-50-51. The hazard had not been reported on the workplace examination cards. Tr. II-52-53; Ex. R-J.

ii. Fact of Violation

Inspector Clark issued 104(a) Citation No. 9673757 on August 30, 2022, which alleged:

> At the screen tower one MCC the electrical insulated matting was rolled up laying across the floor. This created a trip hazard. Foot prints were present on top of the matting where miners had been walking on the bottom of the side of the matting. The matting had been this way for more than one shift. Miners access this area as needed to lock equipment out. The MCC lights were turned off at time of inspection. This condition exposed miners to slip trip fall injuries.
>
> Photo Taken
>
> Standard 57.20003(a) was cited 24 times in two years at mine 1600970 (24 to the operator, 0 to a contractor).

Ex. P-21-1; Tr. I-32.

Clark designated the citation as a significant and substantial violation of 30 C.F.R. § 57.20003(a) that was reasonably likely to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," would affect one miner, and was caused by Respondent's moderate negligence. Ex. P-21-1.

30 C.F.R. § 57.20003(a) states that "[at] all mining operations – [w]orkplaces, passageways, storerooms, and service rooms shall by kept clean and orderly." It is undisputed that the folded-up matting constituted a violation of this standard.

iii. Gravity and S&S

The inspector issued a citation for the matting, determining that its condition could reasonably be expected to cause slip, trip, and fall injuries such as sprains and broken bones. Tr. I-34. Those types of injuries would result in lost workdays or restricted ability to work. Tr. I-34-35. I affirm these designations.

The violation was also marked significant and substantial. The first step of the S&S analysis has been met. The inspector identified the discrete safety hazard as trips and falls. It is reasonably likely that in a room like the MCC, miners would not anticipate encountering folded up matting on the floor. The likelihood of the hazard occurring is increased because the room is dark and there is a functional light switch near only one of the two entrances. The footprints traversing the mat show that miners have already walked across the mat in that condition, exposing them to the hazard. I find that it is likely that a trip or fall could lead to a bad sprain or a broken bone that would reasonably cause the miner to miss work or be placed on restricted duty. I affirm the inspector's gravity and S&S determinations for this citation.

iv. Negligence

The inspector assigned the violation as moderate negligence because it had not been reported, was not on the workplace exams, and had existed for a long period of time. Tr. I-35. Morton Salt contends that the negligence should be lowered to low because of their housekeeping training and the fact that the condition was missing from the workplace examination cards, which the Respondent alleges shows that management was not aware of the issue. Resp. Br. at 38-39. While it is true that this hazard does not appear on the workplace examination cards, that fact leads to the conclusion that the cards were inaccurately completed. There were footprints across the mat and the inspector was told during the inspection by management that the condition had existed in that state for some time indicating management's awareness of the condition. I affirm the moderate negligence determination.

F. PENALTY

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (Mar. 1983). 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).

For Citation No. 9649738, the Secretary proposed a regularly assessed penalty of $19,026.00. Morton Salt has an extensive history of these violations, as there were over 30 citations for a violation of this standard issued in the 15 months prior to this citation. The parties stipulated that this penalty will not impact Morton Salt's ability to continue in business. I find that this S&S violation was reasonably likely to result in a fatal injury and was the result of Morton Salt's high negligence. Morton Salt demonstrated good faith by abating the condition the

following day. In light of these considerations, I find that the proposed penalty of $19,026.00 is appropriate.

For Citation No. 9649739, the Secretary has proposed a penalty of $7,285.00. Morton Salt has a history of 3 previous violations of this standard. The parties stipulated that this penalty will not impact Morton Salt's ability to continue in business. I find that this S&S violation was reasonably likely to result in a fatal injury and was the result of Morton Salt's high negligence. Morton Salt demonstrated good faith by abating the condition the following day. In light of these considerations, I find that the proposed penalty of $7,285.00 is appropriate.

For Citation No. 9676603, the Secretary proposed a regularly assessed penalty of $2,194.00. Morton Salt does not have a significant history of previous violations. The parties stipulated that this penalty will not impact Morton Salt's ability to continue in business. I find that this S&S violation was reasonably likely to result in a fatal injury and was the result of Morton Salt's moderate negligence. Morton Salt demonstrated good faith by abating the condition the following day. In light of these considerations recognizing the reduced negligence level from high to moderate, I find that a penalty of $1,400.00 is appropriate.

For Citation No. 9676605, the Secretary proposed a regularly assessed penalty of $8,549.00. Morton Salt has an extensive history of these violations, as there were over 30 citations for a violation of this standard issued in the 15 months prior to this citation. The parties stipulated that this penalty will not impact Morton Salt's ability to continue in business. I find that this S&S violation was reasonably likely to result in a fatal injury and was the result of Morton Salt's high negligence. Morton Salt demonstrated good faith by abating the condition the following day. I have considered the representations and documentation submitted and conclude that due to the six-week delay in correcting the condition a penalty of $10,000.00 is appropriate under the criteria set forth in Section 110(i) of the Act.

For Citation No. 9673757, the Secretary proposed a regularly assessed penalty of $1,253.00. Morton Salt has a history of over 10 previous violations. The parties stipulated that this penalty will not impact Morton Salt's ability to continue in business. I find that this S&S violation was reasonably likely to result in lost workdays or restricted duty and was the result of Morton Salt's moderate negligence. Morton Salt demonstrated good faith by abating the condition the following day. In light of these considerations, I find that the proposed penalty of $1,253.00 is appropriate.

Listed below is a summary of the penalty amounts for the adjudicated citations.

Citation/ Order No.	Originally Proposed Assessment	Judgment Amount	Modifications
9649738	$19,026.00	$19,026.00	Affirm as Issued
9649739	$7,285.00	$7,285.00	Affirm as Issued
9676603	$2,194.00	$1,400.00	Modify Negligence from "High" to "Moderate" Reduction in Payment
9676605	$8,549.00	$10,000.00	Increase in Payment
9673757	$1,253.00	$1,253.00	Affirm as Issued
SUBTOTAL	**$38,307.00**	**$38,964.00**	

G. PARTIAL SETTLEMENT

The parties have filed a motion to approve partial settlement regarding the twenty-five settled citations. The originally assessed amount for these twenty-five actions was $75,082.00 and the settlement amount is $39,018.00. The settlement includes:

Citation/ Order No.	Originally Proposed Assessment	Settlement Amount	Modifications
9649647	$1,471.00	$318.00	Modify Injury/Illness from "Reasonably Likely" to "Unlikely" Modify S&S from "Yes" to "No" Reduction in Payment
9649674	$321.00	$143.00	Modify Injury/Illness from "Reasonably Likely" to "Unlikely" Modify Significant & Substantial from "Yes" to "No" Reduction in Payment
9649723	$5,290.00	$1,252.00	Modify Injury/Illness from "Reasonably Likely" to "Unlikely" Modify Significant & Substantial from "Yes" to "No" Reduction in Payment
9649715	$144.00	$144.00	Affirm as Issued
9649721	$5,290.00	$1,252.00	Modify Injury/Illness from "Reasonably Likely" to "Unlikely" Modify Significant & Substantial from "Yes" to "No" Reduction in Payment

Citation/ Order No.	Originally Proposed Assessment	Settlement Amount	Modifications
9649725	$2,194.00	$477.00	Modify Injury/Illness from "Reasonably Likely" to "Unlikely" Modify Significant and Substantial from "Yes" to "No" Reduction in Payment
9649726	$1,471.00	$318.00	Modify Injury/Illness from "Reasonably Likely" to "Unlikely" Modify Significant & Substantial from "Yes" to "No" Reduction in Payment
9649730	$442.00	$442.00	Affirm as Issued
9649731	$442.00	$0.00	Vacate
9649797	$2,194.00	$2,194.00	Affirm as Issued
9676607	$19,026.00	$19,026.00	Affirm as Issued
9673759	$987.00	$987.00	Affirm as Issued
9676611	$5,731.00	$1,246.00	Modify Injury/Illness from "Reasonably Likely" to "Unlikely" Modify Significant & Substantial from "Yes" to "No" Reduction in Payment
9676621	$8,549.00	$8,549.00	Affirm as Issued
9676622	$987.00	$0.00	Vacate
9676616	$7,285.00	$143.00	Modify Injury/Illness from "Reasonably Likely" to "Unlikely" Modify Significant & Substantial from "Yes" to "No" Modify Negligence from "High" to "Moderate" Reduction in Payment
9676617	$2,194.00	$214.00	Modify Negligence from "High" to "Moderate" Reduction in Payment
9676631	$661.00	$661.00	Affirm as Issued
9676632	$661.00	$143.00	Modify Injury/Illness from "Reasonably Likely" to "Unlikely" Modify Significant & Substantial from "Yes" to "No" Reduction in Payment
9676636	$133.00	$133.00	Affirm as Issued
9676637	$133.00	$133.00	Affirm as Issued
9676638	$133.00	$133.00	Affirm as Issued
9676639	$133.00	$133.00	Affirm as Issued

Citation/ Order No.	Originally Proposed Assessment	Settlement Amount	Modifications
9648950	$8,549.00	$834.00	Modify Injury/Illness from "Reasonably Likely" to "Unlikely" Modify Significant & Substantial from "Yes" to "No" Modify Negligence from "Moderate" to "Low" Reduction in Payment
9674865	$661.00	$143.00	Modify Injury/Illness from "Reasonably Likely" to "Unlikely" Modify Significant & Substantial from "Yes" to "No" Reduction in Payment
SUBTOTAL	**$75,082.00**	**$39,018.00**	
TOTAL	**$113,389.00**	**$77,982.00**	

The Secretary has vacated Citation Nos. 9649731 and 9676622. The Secretary's discretion to vacate a citation or order is not subject to review. *See, e.g., RBK Constr. Inc.*, 15 FMSHRC 2099 (Oct. 1993).

The parties have submitted facts in support of the proposed changes. I have considered the representations and documentation submitted and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act. The motion to approve partial settlement is **GRANTED**, the citations contained in this docket are **MODIFIED** as set forth above.

H. ORDER

It is hereby **ORDERED** that Citation Nos. 9649738, 9649739, 9673757, and 9676605 are **AFFIRMED** as issued and that Citation No. 9676603 is modified to reduce the negligence to moderate. Morton Salt, Inc., is **ORDERED** to pay the Secretary the total sum of $77,982.00 within 40 days of this order.[2]

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

[2] Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

Distribution: (Electronic and Certified mail)

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
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WASHINGTON, DC 20004-1710
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April 3, 2024

CANYON FUEL COMPANY LLC, Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA, Respondent	CONTEST PROCEEDING Docket No. WEST 2024-0152-R Order No. 9730947; 02/26/2024 Mine: Skyline Mine #3 Mine ID: 42-01566

AMENDED[1] ORDER DENYING CONTESTANT'S MOTION FOR EXPEDITED REVIEW

Before the Court is Contestant, Canyon Fuel Company LLC's Notice of Contest. ("Canyon Fuel" and "Contest") and its Motion to Expedite this proceeding ("Motion"). Thereafter, Canyon filed an Amended Motion to Expedite the proceeding, "to correct two miner [sic][2] errors." Amended Motion at 1.

Canyon Fuel is contesting a section 104(d)(2) order, Order No. 9730947, issued on February 26, 2024, seeking to have it vacated and to have "all actions taken, or to be taken, with respect thereto or in consequence thereof, be declared null or void and of no effect." Contest at 3. The acting Secretary of Labor filed an Answer, challenging the assertions made by the Contestant. For the reasons which follow, the Court **DENIES** the Motion.

The challenged section 104(d)(2) order states:

> The mine operator engaged in aggravated conduct constituting more than ordinary negligence by failing to follow their approved ventilation plan dated, March 15, 2023, amended February 5, 2024, titled, "Conversion of Three Existing Ventilation Seals in Mine 4 to Hydraulic Bulkheads", page #7, Table #1 of Summary of Bulkhead Alarm Levels that when the water pressure equals or exceeds 4.4 psi at Bulkhead #10 or 2.5 psi at Bulkhead #9, the following response is required, "Level

[1] This Amended Order makes but one change, adding the letter R to the docket number.

[2] Sic is a Latin adverb referring to "intentionally so written — used after a printed word or passage to indicate that it is intended exactly as printed or to indicate that it exactly reproduces an original." *Sic,* DICTIONARY (Apr. 2, 2024), https://www.merriam-webster.com/dictionary/sic.

2 alert. Immediate response required. Discharge pipes at seals notified." An MSHA inspection found seals 7 and 8 are not equipped with any discharge pipes. The mine operator misrepresented to MSHA in writing that seals 7 and 8 have discharge pipes that would be used to remove water from the sealed area as an emergency response to high water pressure behind bulkhead #9 and #10, when in fact the mine operator knew that those discharge pipes didn't exist. This order will be reviewed for special assessment. This violation is an unwarrantable failure to comply with a mandatory standard.

Contest at 4.

Section 104(d) of the Mine Act

Within the subject of Citations and Orders, Section 104(d)(1) provides:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this chapter. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(d)(1).

The challenged provision of the Mine Act, Section 104(d)(2) provides:

If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 U.S.C. § 814(d)(2).

Canyon Fuel's challenge to the Section 104(d)(2) Order

In its Notice of Contest, Canyon Fuel "avers that the Order is illegal and invalid and should be vacated for the following reasons:

a) The Order is not in conformance with requirements of Section 104(d), other provisions of the Act or applicable mandatory standards and regulations.
b) The inspector's evaluations are without foundation in fact or law.
c) The unwarrantable failure designation is not appropriate or proper.
d) The high negligence designation is improper and contrary to law.

Contest at 2.

Canyon Fuel's Amended Motion to Expedite Proceedings

After repeating the information in its Contest, Respondent goes on to state:

4. The seals at issue were originally built soon after April 2020 under a plan approved by MSHA on April 23, 2020, which did not require the presence of discharge pipes. MSHA was aware of this fact and inspected such seals where they had no discharge pipes.

5. To install discharge pipes after construction of the seals is neither feasible or safe.

6. When the plan of conversion of the seals to bulkheads was submitted on September 1, 2022 there was no reference to discharge pipes in bulkheads 7 and 8. There was a list of deficiencies from MSHA Tech Support on November 21, 2022 which again did not reference discharge pipes in bulkheads 7 and 8. A revised submittal on December 16, 2022 did reference them but it is unclear at this point who requested that provision. There was no attempt to misrepresent the condition of the seals; there was a mutual mistake in including those discharge pipes. MSHA personnel knew there were no discharge pipes in seals 7 and 8 and knew it was not feasible to install them. There were such pipes in seals 9, 10 and 11 and they were at lower elevations than bulkheads/seals 7 and 8.

7. The injury or illness from the alleged violation was designated as "unlikely." The previous order was issued December 6, 2023 and there is a question because of the lapse in time and regular and spot inspections whether a "clean" inspection had occurred.

8. Canyon Fuel has a number of steps it takes if pressures rise to certain limits at seals 9 and 10. They include:

a. Ceasing to pump water behind the bulkheads;
b. Pumping water from behind the bulkheads;
c. Releasing water from bulkheads 9, 10 and 11 from the existing discharge pipes.

9. Canyon Fuel has submitted a plan to terminate the order and the approval of such plan does not include installing discharge pipes in seals 7 and 8 which is neither feasible or safe.

10. An expedited hearing is necessary to resolve the validity of the Order and to facilitate mitigation of the alleged condition.

Amended Motion at 3-4.

The Respondent, Secretary of Labor's, Response in Opposition to Contestant's Amended Motion to Expedite Proceedings ("Opposition")

The Secretary's Opposition, states:

On March 15, 2023, MSHA approved a ventilation plan for mining at the Skyline Mine #3 and approved an amended ventilation plan on February 5, 2024. On February 26, 2024, the Secretary's authorized representative, Mine Inspector Michael C. Olsen, issued Order Number 9730947 to Contestant pursuant to Section 104(d)(2) of the Mine Act after he found Mine 4 seals 7 and 8 were not equipped with water discharge pipes as required by Contestant's approved ventilation plan. Contestant filed its Notice of Contest of Order No. 9730947 on March 4, 2024, challenging the order and its negligence designations and arguing there are disputes regarding the facts surrounding the cited violation. Contestant filed its Amended Motion to Expedite Proceedings on March 6, 2024, arguing generally, without specific factual or legal support, that "[i]f an expedited hearing is not granted, Canyon Fuel will be irreparably harmed."

Opposition at 2.

The Secretary contends that the:

Contestant does not identify any extraordinary or unique circumstances resulting in continuing harm or hardship that necessitate an expedited hearing. The fact of the matter is that the violation at issue does not affect work on the working sections of the mine. *Notably, many of the facts in dispute regarding Order No. 9730947 are related to issues at the mine that have been ongoing since mid-November 2023* ***when a seal catastrophically failed, causing an inundation at the mine*** *when three miners narrowly escaped, and resulting in the issuance of enforcement actions that are the subject of an open 110(c) investigation. The parties have sought to stay one of them pending the outcome of the 110(c) investigation.*

> At issue with this and at least two of the other orders is whether Contestant complied with its approved ventilation plan. While there may be factual disputes regarding what Contestant represented to MSHA about discharge pipes and seals 7 and 8, and what MSHA knew about the presence of such discharge pipes, those facts go to the negligence and gravity of the violation – and do not rise to level of creating extraordinary or unique circumstances that warrant an expedited hearing.

Id. at 2-3. (emphasis added).

The Secretary sums up its position, stating it:

> concurs that Complainant has submitted a revised ventilation plan to MSHA which is currently under review. Importantly, this plan and process will continue in the normal course and does not support the need for an expedited hearing here. Stated differently, **approval of a revised plan that does not include installing discharge pipes in seals 7 and 8** has no bearing on the violation at issue here, i.e. whether Respondent complied with the approved ventilation plan in effect at the time of the inspection. Finally, the complexity and number of issues in this case and related cases call for a more deliberate pace. Both parties will benefit from written discovery, depositions, and expert testimony to resolve these issues and the parties will need sufficient time to complete the discovery process.

Id. at 3. (emphasis added).

Discussion

The Secretary correctly states the standard for review when a Commission judge is presented with a Motion for Expedited Review.

As articulated by former Chief Administrative Law Judge Paul Merlin in *Southwestern Portland Cement*, 16 FMSHRC 2187 (Oct. 1994) (CALJ).

> Section 2700.52(a), supra, does not specify the basis upon which an expedited hearing may be sought and granted. The Commission has held that consideration of an expedited hearing request remains within the discretion of the judge. Wyoming Fuel, 14 FMSHRC 1282 (August 1992). Commission Judges have held that in order to be entitled to such consideration, an operator must show extraordinary or unique circumstances resulting in continuing harm or hardship. *Consolidation Coal Company*, 16 FMSHRC 495 (February 1994); *Energy West Mining Company*, 15 FMSHRC 2223 (October 1993); *Pittsburgh and Midway*, 14 FMSHRC 2136 (December 1992); *Medicine Bow Coal Company*, 12 FMSHRC 904 (April 1990). In the foregoing cases, it was held that the possibility operators could be subject to withdrawal orders under section 104(d) of the Act, 30 U.S.C. § 815(d), did not justify expedited hearings.

Id.

Subsequent case law has adhered to these principles. *See, for e.g., IMI Aggregates,*45 FMSHRC 789, (Aug. 2023) (ALJ).

In the Court's estimation, the Contestant presents, at times conflicting, arguments, which collectively fail to demonstrate any extraordinary or unique circumstances resulting in continuing harm or hardship. The arguments begin with what the Court considers to be, at least for the purposes of this motion, an irrelevant reference to an April 2020 ventilation plan. Amended Motion at 2-3. It then moves to more than two years later when a new plan was submitted. *Id.*

The new plan apparently involved conversion of seals to bulkheads. Though admitting that MSHA's Tech Support listed deficiencies with the plan, the Contestant twice asserts that there was no reference to discharge pipes in bulkheads 7 and 8. *Id.* at 3. It then immediately admits that a revised submittal [from Contestant] on December 16, 2022 *did* reference them, while changing the subject to assert that it "is unclear at this point who requested that provision." *Id.* From there, Contestant then asserts "[t]here was no attempt to misrepresent the condition of the seals" and that all of this came about as "a mutual mistake in including those discharge pipes." *Id.*

Contestant continues its argument asserting that "MSHA personnel knew there were no discharge pipes in seals 7 and 8 and knew it was not feasible to install them," but then admits that "[t]here were such pipes in seals 9, 10 and 11 [but that] they were at lower elevations than bulkheads/seals 7 and 8." *Id.*

Canyon Fuel then fans out its argument mentioning that the "alleged violation was designated as 'unlikely' and that there is an issue whether a clean inspection had occurred. *Id.* Contestant's sprawling arguments then move to the steps it has taken to address "if pressures rise to certain limits at seals 9 and 10." *Id.* These remarks can fairly be construed as tacit admission that the hazards from November 2023, when a seal catastrophically failed, causing an inundation at the mine when three miners narrowly escaped, are not figments.

The Contestant then notes that it has submitted a plan to terminate the order, adding that its plan does not involve installing discharge pipes in seals 7 and 8. *Id.* at 4. The *irreparable harm* it asserts is "to resolve the validity of the Order and to facilitate mitigation of the alleged condition." *Id*. The former is a garden variety issue in 104(d)(2) orders and the *facilitation of mitigation* does not appear to be a subject warranting expedited review.

In sum, the Court agrees that the violation at issue here is "whether the Respondent complied with the approved ventilation plan in effect at the time of the inspection." Opposition at 3. The Court has determined that no extraordinary or unique circumstances resulting in continuing harm or hardship has been presented. *Canyon Fuel does not contend that the violation at issue affects work on the working sections of the mine.* In addition, the Court agrees with the Secretary that "the complexity and number of issues in this case and related cases call for a more deliberate

pace. Both parties will benefit from written discovery, depositions, and expert testimony to resolve these issues and the parties will need sufficient time to complete the discovery process." *Id.*

Accordingly, Contestant's Motion is **DENIED.**

SO ORDERED.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 18, 2024

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v.	CIVIL PENALTY PROCEEDING Docket No. SE 2023-0013 A.C. No. 09-01264-563440
BRADLEY T. WILEY, Respondent	Mine: Jackson Quarry
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v.	CIVIL PENALTY PROCEEDING Docket No. SE 2023-0048 A.C. No. 09-01264-563564
TERRA EXCAVATING, LLC, Respondent	Mine: Jackson Quarry
VULCAN MATERIALS COMPANY, Contestant v.	CONTEST PROCEEDING Docket No. SE 2022-0146 Citation No. 9637716; 06/23/2022
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA, Respondent	Mine: Jackson Quarry Mine ID: 09-01264

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. SE 2022-0193 A.C. No. 09-01264-561057
v.	
VULCAN CONSTRUCTION MATERIALS LLC, Respondent	Mine: Jackson Quarry
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. SE 2023-0150 Docket No. SE 2023-0151 A.C. No. 09-01264-574618
v.	
VULCAN CONSTRUCTION MATERIALS LLC, Respondent	Mine: Jackson Quarry
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. SE 2023-0172 A.C. No. 09-01264-575226
v.	
TERRA EXCAVATING, LLC, Respondent	Mine: Jackson Quarry

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v.	CIVIL PENALTY PROCEEDING Docket No. SE 2024-0010 A.C. No. 09-01264-584632
VULCAN CONSTRUCTION MATERIALS LLC, Respondent	Mine: Jackson Quarry
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v.	CIVIL PENALTY PROCEEDING Docket No. SE 2024-0011 A.C. No. 09-01264-585552
BRADLEY T. WILEY, Respondent	Mine: Jackson Quarry

ORDER GRANTING ACTING SECRETARY'S MOTION FOR PARTIAL SUMMARY DECISION AND DENYING RESPONDENTS' MOTIONS FOR PARTIAL SUMMARY DECISION ON QUESTION OF MSHA JURISDICTION

I. PROCEDURAL HISTORY

These dockets arise under the Mine Safety and Health Act of 1977, as amended (the "Mine Act" or "the Act"). An employee of Respondent Terra Excavating, LLC ("Terra"), a subcontractor for Respondent Bradley T. Wiley ("Wiley") was killed in a June 17, 2022, accident at the Jackson Quarry, a site composed of land leased in part and owned in part by Respondent Vulcan Construction Materials, LLC ("Vulcan"). The Mine Safety and Health Administration ("MSHA") issued citations and orders to all three Respondents, all of which then asserted that MSHA did not have jurisdiction over the Jackson Quarry, which they claimed was not a "mine" as defined in the Act.

The Secretary of Labor filed an unopposed motion on October 12, 2023, requesting that the common jurisdictional question be bifurcated from the individual dockets and consolidated for decision by a single administrative law judge. Unopposed Mot. to Bifurcate and Consolidate. This proceeding is the product of the motion and the Chief Administrative Law Judge's approval of the Acting Secretary's request.

The parties requested a hearing on the jurisdictional question but were receptive to the suggestion of motions for summary decision as a possible means of resolving the question without a hearing. Each party then moved for summary decision.

The Acting Secretary's motion was filed and served on March 8, 2024. Acting Secretary's Motion for Summary Decision ("Sec'y Mot."). Respondents Vulcan, Terra, and Wiley filed and served their motions on March 20.[1] Respondent Vulcan Construction Materials LLC's Motion for Summary Decision and Opposition to Acting Secretary's Motion for Summary Decision ("Vulcan Mot."); Respondent Terra Excavating LLC's Motion for Summary Judgment ("Terra Mot."); Respondent Brad T. Wiley's Motion for Summary Judgment ("Wiley Mot."). Vulcan's motion was characterized as both a motion for summary decision and an opposition to the Acting Secretary's motion. Vulcan Mot. at 2. The Acting Secretary filed an opposition on April 1. Acting Secretary of Labor's Opposition to Respondents' Motions for Summary Decision ("Sec'y Opp'n"). For the reasons given below, the Acting Secretary's motion for summary decision on the question of jurisdiction is granted, and Respondents' motions are denied.

II. FACTS

A. Uncontested Facts

In 1995, Lafarge, an entity unrelated to Vulcan, began conducting mining operations at a stone quarry on two parcels of land in Jackson County, Ga. ("Former Quarry"). Vulcan Mot. at 4; Ex. A to Vulcan Mot. (Jimmy Fleming Decl.), ¶ 3. In 2013, Vulcan purchased a lease on the two parcels of land from Lafarge. Vulcan Mot. at 4 and Ex. A (Jimmy Fleming Decl.) ¶ 4; Ex. B (Greg Duckett Decl.) ¶ 5.

Vulcan was not an operator of the Former Quarry at any time before 2013. Vulcan Mot. at 4, and Ex. A (Jimmy Fleming Decl.) ¶ 5. Upon purchasing the lease from Lafarge, Vulcan terminated the Former Quarry's MSHA mine identification number ("Mine ID") with MSHA. Vulcan Mot. at 4 and Ex. B (Greg Duckett Decl.) ¶ 5. Between 2013 and all relevant times thereafter, there were no active mining operations at the site. Vulcan Mot. at 4 and Ex. A (Jimmy Fleming Decl.) ¶ 6; Ex. B (Greg Duckett Decl.) ¶ 6.

In 2021, Vulcan acquired five additional parcels of land contiguous to the two parcels leased from Lafarge. Vulcan Mot. at 4 and Ex. A (Jimmy Fleming Decl.) ¶ 7. On February 4,

[1] In March 6, 2024, motions for an extension of time, Terra and Wiley both said that they intended to adopt the reasoning and position presented by Vulcan in its motion. The extensions were granted, and the resulting motions deferred generally to Vulcan's argument. *See* Terra Mot. at 4; Wiley Mot. at 4. Therefore, references to Respondents' positions rely on Vulcan's presentation in its motion, which is wholly supported by the other two Respondents, and citations are to "Vulcan Mot."

Unless cited otherwise, all exhibits in this decision are exhibits submitted with Vulcan Mot. and cited as they were identified in that motion.

2022, Vulcan applied with the Jackson County, Ga., Board of Commissioners to have the seven parcels of land (hereinafter "Jackson Quarry") rezoned as Heavy Industrial (HI) with a Special Use permit to allow mining. Vulcan Mot. at 4 and Ex. A (Jimmy Fleming Decl.) ¶ 8; Ex. C (Rezoning and Special Use Permit Application). Vulcan's intended function for the Jackson Quarry was to operate it as a stone quarry and crushing/milling facility. Vulcan Mot. at 5 and Ex. A (Jimmy Fleming Decl.) ¶ 9; Ex. B (Greg Duckett Decl.) ¶ 7; Ex. D (Barry Lawson Decl.) ¶ 4.

On the property of Jackson Quarry, there was an abandoned scale house that was in disrepair and could not be repaired or reused. Vulcan Mot. at 5 and Ex. D (Barry Lawson Decl.) ¶ 5. On or about February 2022, Vulcan contracted with Wiley to remove the scale house and grade ground on the property. Vulcan Mot. at 5 and Ex. D (Barry Lawson Decl.) ¶ 6.

From February 2022 to May 2022, Wiley worked at the Jackson Quarry, clearing vegetation and mulching. Vulcan Mot. at 5 and Ex. D (Barry Lawson Decl.) ¶ 7; Ex. E (Brad T. Wiley Decl.) ¶ 1. In March or April 2022, Wiley contracted Terra for grading work including clearing debris and moving dirt in preparation for the construction of a building pad at the Jackson Quarry. Vulcan Mot. at 5 and Ex. D (Barry Lawson Decl.) ¶ 8; Ex. E (Brad T. Wiley Decl.) ¶ 11; Ex. F (Wayne Yost Decl.) ¶ 2. Wiley did not contract Terra to construct the building pad at the Jackson Quarry. Vulcan Mot. at 5 and Ex. D (Barry Lawson Decl.) ¶ 8; Ex. E (Brad T. Wiley Decl.) ¶ 11; Ex. F (Wayne Yost Decl.) ¶ 2

Wayne Yost was the General Manager for Terra on the project. Vulcan Mot. at 5 and Ex. F (Wayne Yost Decl.) ¶ 1. Greg Duckett was Vulcan's Safety and Health Manager responsible for the Jackson Quarry at all times relevant to this matter. Vulcan Mot. at 5 and Ex. B (Greg Duckett Decl.) ¶ 3. Robert Ashley was the MSHA Field Office Supervisor for the Macon, Ga., field office at all times relevant to this matter. Vulcan Mot. at 5 and Ex. B (Greg Duckett Decl.) ¶ 8; Ex. G (Robert Ashley Memorandum of Interview); Ex. N (Robert Ashley Dep.) 21:2-21.

In February 2022, Duckett called Ashley and told him Vulcan intended to operate the Jackson Quarry as a stone crushing/milling facility but was not yet ready to crush for commerce. Vulcan Mot. at 6 and Ex. B (Greg Duckett Decl.) ¶ 8, 9; Ex. G (Robert Ashley Memorandum of Interview); Ex. N (Robert Ashley Dep.) 27:5-17, 32:12-18. Duckett told Ashley that Vulcan was getting ready to start preparing the site and would be moving in equipment and taking steps in preparation of building a plant and scale house. Vulcan Mot. at 6 and Ex. B (Greg Duckett Decl.) ¶ 9.

On February 22, 2022, Vulcan applied for a Mine ID in anticipation of future mining. Vulcan Mot. at 6 and Ex. B (Greg Duckett Decl.) ¶ 11; Ex. H (Mine ID Request Information Form).

Brett Calzaretta is an MSHA training specialist from the Macon field office. Vulcan Mot. at 6 and Ex. I (Brett Calzaretta Dep.) 7:19-8:2, 18:18-21. In April 2022, Calzaretta visited the Jackson Quarry for a special initiative on fatalities involving power haulage. Vulcan Mot. at 7 and Ex. E (Brad T. Wiley Decl.) ¶ 2; Ex. F (Wayne Yost Decl.) ¶ 3; Ex. J (Brett Calzaretta Time Report Activities); Ex. I (Brett Calzaretta Dep.) 23:13-19, 27:20-28:3.

During Calzaretta's visit, the only activities he witnessed at the Jackson Quarry were cleaning up (i.e., stumping and grubbing trees, cleaning up vegetation, consolidating trash piles and hauling them off) and workers hauling dirt in, dumping it, and smoothing it for later compacting. Vulcan Mot. at 7 and Ex. E (Brad T. Wiley Decl.) ¶ 4. The only equipment Calzaretta saw at the site during his visit were an excavator, haul trucks for dirt moving, and dozers moving dirt. Vulcan Mot. at 7 and Ex. E (Brad T. Wiley Decl.) ¶ 5.

Calzaretta did not see a crushing plant or equipment during his visit. Vulcan Mot. at 7 and Ex. I (Brett Calzaretta Dep.) 37:11-12. Calzaretta did not observe any blasting, drilling, crushing, extraction activities, milling, screening, or sizing of materials. Vulcan Mot. at 7 and Ex. I (Brett Calzaretta Dep.) 47:16-22, 48:5-13. Nor did he observe any maintenance or repair of equipment or materials being hauled. Vulcan Mot. at 7 and Ex. I (Brett Calzaretta Dep.) 48:14-19.

During his visit, Calzaretta did not observe any mine-related hazards. Vulcan Mot. at 7 and Ex. I (Brett Calzaretta Dep.) 47:2-12. Calzaretta did not inquire as to the training status of Wiley or any Terra employee. Vulcan Mot. at 7 and Ex. E (Brad T. Wiley Decl.) ¶ 6-10; Ex. F (Wayne Yost Decl.) ¶ 4-6; Ex. I (Brett Calzaretta Dep.) 33:16-18. Calzaretta did not have authority to issue citations at the Jackson Quarry during his visit. Ex. I (Brett Calzaretta Dep.) 20:21-22. Calzaretta also stated he visited Jackson Quarry, not to conduct an inspection, but because it "[c]ame up on the data retrieval system as a new mine" when he checked to see if any new mine properties had opened. Ex. I (Brett Calzaretta Dep.) 44:7-18, 47:11-12.

On March 16, 2022, Ashley approved Vulcan's request for a Mine ID. Vulcan Mot. at 8 and Ex. H (Mine ID Request Information Form). On April 18, 2022, the Jackson County Board of Commissioners approved Vulcan's application to rezone the Jackson Quarry as Heavy Industrial (HI) with a Special Use permit to allow mining. Vulcan Mot. at 8 and Ex. K (Rezoning & Special Use Permit Approval Letters).

On June 17, 2022, a fatal accident at the Jackson Quarry killed Terra employee Brian Thigpen. Vulcan Mot. at 8 and Ex. B (Greg Duckett Decl.) ¶ 12; Ex. D (Barry Lawson Decl.) ¶ 10; Ex. E (Brad T. Wiley Decl.) ¶ 12; Ex. F (Wayne Yost Decl.) ¶ 9. At the time of the fatal accident, Thigpen was operating a compactor to settle earth for future construction of the building pad when the compactor rolled over. Vulcan Mot. at 8 and Ex. F (Wayne Yost Decl.) ¶ 9.

At the time of the fatal accident, construction of the building pad had not started, and the site was not ready for construction to begin. Vulcan Mot. at 8 and Ex. D (Barry Lawson Decl.) ¶ 11. Ashley had no knowledge of any drilling, blasting, extraction, milling, crushing, screening, or sizing of material, maintenance or repair of equipment or haulage of materials taking place at the Jackson Quarry when the accident occurred. Vulcan Mot. at 8 and Ex. N (Robert Ashley Dep.) 47:1-48:2, 49:15-20.

On June 17, 2022, Duckett called MSHA to report the fatal accident and says that he did so as a courtesy because Vulcan had applied for a Mine ID in anticipation of future mining. Vulcan Mot. at 8 and Ex. B (Greg Duckett Decl.) ¶ 12; Ex. L (MSHA Escalation Report).

MSHA, upon receiving a report of a fatality, proceeded under the assumption that it had jurisdiction over the Jackson Quarry. Vulcan Mot. at 9 and Ex. M (Sec'y Amended Response to Resp. First Set of Interrogatories). MSHA did not consider the possibility that it did not have jurisdiction over the Jackson Quarry until Vulcan, Wiley and Terra contested MSHA's jurisdiction. Vulcan Mot. at 9 and Ex. M (Sec'y Amended Response to Resp. First Set of Interrogatories).

Attorneys in the Office of the Solicitor determined that MSHA had jurisdiction over the Jackson Quarry. Vulcan Mot. at 9 and Ex. M (Sec'y Amended Response to Resp. First Set of Interrogatories).

B. Contested Facts

Vulcan contends that during his visit, Calzaretta spoke with Wiley and Yost and informed them that MSHA did not yet have jurisdiction over the Jackson Quarry but would at some point. Ex. E (Brad T. Wiley Decl.) ¶ 8; Ex. F (Wayne Yost Decl.) ¶ 5. The Acting Secretary disputes that Calzaretta discussed jurisdiction during his visit to the Jackson Quarry. Sec'y Opp'n at 4; Ex. I (Brett Calzaretta Dep.) 56:17-58:4.

Ashley and Duckett agreed Vulcan would apply for a Mine ID, and Duckett would contact Ashley thirty days before Vulcan started crushing and sizing material so MSHA could do a courtesy inspection. Vulcan Mot. at 6 and Ex. B (Greg Duckett Decl.) ¶ 9; Ex. G (Robert Ashley Memorandum of Interview); Ex. N (Robert Ashley Dep.) 33:3-9; 40:4-11; 52:17-25-53:1-4. The Acting Secretary disputes that Ashley made any such agreement as to timing and asserts that Vulcan already had applied for a Mine ID at the time of the conversation. Sec'y Opp'n at 4; Ex. N. (Robert Ashley Dep.) 50:12-13, 52:14-15.

Vulcan also asserts that Ashley and Duckett also agreed Vulcan would provide MSHA with its Mine ID information thirty days before Vulcan started crushing and sizing material. Vulcan Mot. at 6 and Ex. B (Greg Duckett Decl.) ¶ 9. Based on this conversation with Ashley, it was Duckett's understanding that MSHA would not have jurisdiction over the Jackson Quarry until thirty days before Vulcan started crushing and sizing material. Vulcan Mot. at 6 and Ex. B (Greg Duckett Decl.) ¶ 10. The Acting Secretary states that Ashley would not have agreed to a date and that he testified that he did not do so. Sec'y Opp'n at 4; Ex. N. (Robert Ashley Dep.) 54:8-15.

III. LEGAL STANDARDS

A. Standard for Summary Decision

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
(1) That there is no genuine issue as to any material fact; and
(2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b). The Commission "has long recognized that . . . '[s]ummary decision is an extraordinary procedure,'" *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.,* 3 FMSHRC 2470, 2471 (Nov. 1981)) (alterations in original).

The Commission has also equated summary decision with summary judgment under the Federal Rules of Civil Procedure. *Id.*, *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Sec'y of Labor v. Hanson Aggregates N.Y., Inc.*, 29 FMSHRC 4, 8-9 (Jan. 2007). Where the resolution of an issue depends on contested material facts, entry of summary decision is improper. *Energy West Mining Co.*, 16 FMSHRC at 1419. A fact is "material" if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. MSHA Jurisdiction

The Acting Secretary has noted that Respondents did not initially object to MSHA's jurisdiction, and that Vulcan had applied for a Mine ID from MSHA. However, jurisdictional objections may be raised by any party at any time, even where a party has previously assented to agency jurisdiction. *Sebelius v. Auburn Reg'l Med. Ctr.,* 568 U.S. 145, 153 (2013).

The Mine Act confers limited jurisdiction on the Mine Safety and Health Administration, created by the Act, over all extraction of minerals in nonliquid form (and minerals in liquid form extracted by miners working underground). Mine Act, §§ 2(g), 3(h), 30 U.S.C. §§ 801(g), 802(h).

Another federal agency under the Department of Labor, the Occupational Safety and Health Administration ("OSHA"), has general jurisdiction over all workplaces not regulated by MSHA or another specialized federal agency. *See* Occupational Safety and Health Act of 1970 § 4(b)(1), 29 U.S.C. § 653(b)(1) ("Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.").

MSHA and OSHA therefore have entered into an interagency agreement providing guidance to determine whether MSHA or OSHA should assume jurisdiction over a site. Mine Safety and Health Administration Occupational Safety and Health Administration Interagency Agreement, 44 Fed. Reg., 22,827, 22,827 (Apr. 17, 1979). The agreement assigns MSHA jurisdiction over working conditions "on mine sites and in milling operations." *Id.*

The Mine Act's jurisdiction over "coal or other mine[s]" includes:

> lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, *or to be used in*, or resulting from, *the work of extracting such minerals* from their natural deposits in nonliquid form, or if in liquid form, with workers

> underground, or used in, *or to be used in*, the *milling of such minerals*, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

30 U.S.C. § 802(h)(1)(C) (emphasis added).

The legislative history of the Mine Acted stated the Committee's intention to construe the Act broadly in favor of jurisdiction:

> Finally, the structures on the surface or underground, which are used *or are to be used in* or resulting from the preparation of the extracted minerals are included in the definition of 'mine'. The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibly [sic] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978) (emphasis added).

The Mine Act also defines who is considered an "operator" and "miner" under the Act. An "operator" is defined as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. § 802(d). A "miner" is defined as "any individual working in a coal or other mine." 30 U.S.C. § 802(g).

IV. DISPOSITION

A. The Acting Secretary's Motion for Summary Decision

The Acting Secretary has asserted that there are no contested issues of material fact and that she is entitled to judgment as a matter of law. Generally, the Acting Secretary has argued that the plain language of the Mine Act supports her jurisdictional claim, and that the intent of the Act and its preference for inclusion of sites which could be classified as "mines" further bolsters her claim. Sec'y Mot. at 5-8.

As the Supreme Court noted in *Chevron*, the initial inquiry into statutory meaning must be "whether Congress has directly spoken to the *precise question* at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 842-43 (1984) (emphasis added).

The precise question here is whether the location where the accident occurred is a "mine" as defined by the Act. In addressing that question, it is appropriate to consider the nature of the property, its ownership, and its intended use.

Vulcan acquired its interests in the Jackson Quarry, a property comprised of several contiguous parcels of land, for a purpose. It intended to use the land as a stone quarry—i.e. to "extract[ ] such minerals [i.e. rock] from their natural deposits" within or on "lands, excavations, . . . or other property" within the quarry. 30 U.S.C. § 802(h). Vulcan also intended that the Jackson Quarry property was "to be used in[] the milling of . . . minerals." *Id.*

There is no dispute about this intended use of the property. Vulcan has acknowledged that it had applied for, and been granted, permission from Jackson County to conduct mining operations and milling at the Jackson Quarry. More to the point, Vulcan had applied for, and had been issued, a Mine ID from MSHA approximately three months before the accident.

Thus, a refined expression of the precise question in this case is: "May jurisdiction under the Mine Act adhere to lands, excavations, and property for which a commercial entity with ownership and leasehold rights in the property has sought and received permission to extract minerals from their natural deposits in nonliquid form and to mill such minerals on the lands and property, has applied for and been issued a Mine ID from the federal agency charged with enforcing the Act, and has worked for three months after issuance of a Mine ID to prepare the site for mining and milling operations?"

The language of the Act embraces future activities, i.e. lands *to be used* in the extraction or processing of minerals. But it cannot necessarily be said that MSHA's jurisdiction adheres when the minerals are discovered in exploration, or at the first application for a permit for any sort of activity at the site. This might conform to a literal interpretation but could empower MSHA to assert jurisdiction over virtually any tract in the country—any place where a deposit of minerals in nonliquid form might be found.

Such an overbroad definition would be unlikely to serve the purposes served by the Act. One might therefore find ambiguity in circumstances where no substantial steps have been taken to cement the intent to use the "lands, excavations, or other property" for mineral extraction or milling. Therefore, the Acting Secretary, who has asserted that the plain language of the statute controls this decision, must prove that the site is unambiguously within the definition of a "mine" as defined by the Act.

The jurisdictional facts in this case do so. This was a property not only *intended* for use but *committed to it* by planning, investment, official acts, and work preparing the site for mining and milling. Every element of the definition of "mine" is attested to by uncontroverted evidence—and, as ratification, the owner of the mine had literally submitted its property to MSHA's jurisdiction by applying for, and being issued, a Mine ID from the agency three months before the accident.

This case is thus unlike *KC Transport, Inc.*, 44 FMSHRC 211 (Apr. 2022), *rev'd and remanded* 77 F.4th 1022 (D.C. Cir. 2023). The issue in that case was whether there was jurisdiction over coal haul trucks owned by an independent company and a maintenance and storage facility for those trucks which was not located on the property of the mine. 44 FMSHRC at 211-12. The Commission held the facility was not a "mine" because it was not "located on or appurtenant to a mine site . . . engaged in any extraction, milling, preparation or other activities within the scope of subsection 3(h)(1)(A)." *Id.* at 225.

On appeal to the D.C. Circuit, the court found the statute to be ambiguous as to whether the trucks and facility were subject to jurisdiction as a "mine." *KC Transport*, 77 F.4th at 1030-31. The court held that, as in prior cases, the Secretary "'never grappled with' the regulation's 'clear ambiguity.'" *Id.* at 1029, *citing Akzo Noble Salt, Inc. v. FMSHRC,* 212 F.3d 1301, 1304-05 (D.C. Cir. 2000).[2] Thus, remand was necessary to permit the Secretary to apply her interpretation to the language the court held to be ambiguous in that context.

Here, though, there is no interpretive work to be done. Whatever Congress may have intended as regards roads, trucks, facilities, equipment, or rights of way, there can be no doubt about the Act's authority over a "mine" as it is traditionally understood and defined, where the mine owner has notified the agency that it intends to operate a mine on the land in question, has received a legal identification from the agency confirming its authority over the mine, and has worked for months preparing the site for extraction and milling.

In discovery, the Acting Secretary has admitted that she did not make an affirmative determination of jurisdiction before the accident. *See* Ex. M (Sec'y Amended Response to Resp. First Set of Interrogatories). While the Acting Secretary has not provided any authority establishing that a Mine ID alone is a sufficient foundation for agency jurisdiction, such authority is unnecessary in this case. The definition of "mine" clearly applies to the Jackson Quarry under the material facts agreed to by the parties.

In *KC Transport*, the D.C. Circuit recognized the distinction giving rise to ambiguity in applying the statute's jurisdictional reach to mobile equipment. *See KC Transport*, 77 F.4th at 1031-33 (noting the crucial distinction between the "three movable items—'equipment, machines, [and] tools'" enumerated in section 3(h)(1)(C) of the Mine Act and the features in that section defined by physical location).[3] The Court observed that the Secretary had at no point in

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[2] The court also cited *Secretary of Labor v. National Cement Company of California, Inc.,* 494 F.3d 1066, 1077 (D.C. Cir. 2007), which was similarly remanded for a traditional resolution of ambiguity conferring deference to the Secretary's interpretation.

[3] The court noted the "movable items included in the middle of the list" in subsection (C) could be interpreted as being analyzed "in relation [to], and as connected, to the preceding physical manifestations" in the list:

> As applied here, there is at least a question of whether "equipment, machines, [and] tools," when read within the wider Chapter 22 context, constitute "coal or other mine[s]" only when there is an established connection to the fixed physical manifestations listed before and after them. 30 U.S.C. § 802(h)(1)(C). It is unclear, however, whether such an established connection impacts the circumstances under which the three movable types of property remain "mines" when not physically connected to the manifestations listed in subsections (A)–(C). At a minimum, the statutory language, broader context, and numerous practical concerns render subsection (C)'s meaning ambiguous.

KC Transport, 77 F.4th at 1033.

the litigation "grapple[d] with the conflicting, practical implications" of the definition she had advanced *as it related to those items*. *Id.* at 1032.

No such practical concerns are presented by a traditional "mine" in a fixed physical location. To the extent there could be any ambiguity about *when* the Secretary's authority over the mine would arise, that too is resolved here by the application for and issuance of a Mine ID from MSHA:

> Consider the process through which MSHA ensures compliance with the Mine Act's safety regulations. To start, Congress instructs that "[e]ach operator of a coal or other mine subject to this chapter *shall* file with the Secretary the name and *address* of such mine[.]"

KC Transport, 77 F.4th at 1030, *citing* 30 U.S.C. § 819(d) (emphases added by the court).

Had there been no fatal accident in this case, if an MSHA inspector had shown up on June 17, 2022, and demanded entry to perform an inspection, what would have happened? Is there any doubt that a district court would have enforced the demand to enter a property designated as a "mine" in the agency's records and committed on the public record to use for mineral extraction and milling?

The answer must be "no."[4] *See id.* (Secretary's authorized representatives "shall have a right of entry to, upon, or through any coal or other mine." (*citing* Mine Act § 103(a), 30 U.S.C. § 813(a))). The absence of any such doubt confirms that there is no ambiguity as to the precise question presented in this case. The agency is therefore entitled to summary decision on the question of jurisdiction over the Jackson Quarry as a "mine," based on the clear language of the Act, as applied to the undisputed facts of this case.[5]

As a final matter, the Acting Secretary cannot be entitled to summary decision on the question of fair notice because the material facts on which the issue might depend are contested. The Acting Secretary has denied that conversations took place as described by Respondents. *See* Section II.B, *supra*, slip op. at 7.

A hearing is not necessary, because the issue is resolved by resort to the plain language of the statute alone. But while Respondents' approach in seeking to extend the concept of fair

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[4] This decision is limited to the circumstances present in this case. It is far from clear that mere application or even approval of an application for zoning to permit mining and/or milling would be sufficient to establish jurisdiction over a site. The jurisdictional holding as a matter of law in this case should be viewed narrowly as dependent on the application for and issuance of a Mine ID by MSHA.

[5] The Acting Secretary has disputed several facts asserted by Vulcan as uncontested. *See* Sec'y Opp'n at 4; Section II.B., *supra*, slip op. at 7. None of those facts is material to my decision. The Secretary is entitled to judgment as a matter of law even if Vulcan's facts are accepted as true.

notice to the general matter of jurisdiction over a "mine" is novel, it is not unique. *See Austin Powder Co.,* 37 FMSHRC 1337 (June 2015) (ALJ). That case—also decided on the plain language definition of "mine"—is discussed more fully at slip op. at 18, *infra.*

B. Respondents' Motions for Summary Decision

The Commission requires cross motions for summary decision to be considered independently, determining whether either side has demonstrated an entitlement to a decision. *Hanson Aggregates*, 29 FMSHRC 10, *citing* 11 James Wm. Moore, et al., *Moore's Federal Practice* § 56.l 1[5][a], at 56-105 to 107 (3d ed. 1999). Respondents' arguments are grounded, at least in part, on an assertion that jurisdiction is not wholly dependent on location and should thus be examined to determine whether jurisdiction over them is proper, independent of whether the Jackson Quarry was intended "to be used" for mineral extraction and/or milling. *See* Vulcan Mot. at 10-11 (stating "(1) the nature of the activities in question in relation to activities normally associated with mining; (2) the relationship in time of the activities in question to active mining operations; and (3) the nature of the land at the time of the activities in question" must all be considered when determining jurisdiction).

Vulcan suggests that the Acting Secretary has read the foundational definition on which jurisdiction rests in "isolation." *Id.* at 11. It argues that the definition in section 3(h)(1)(C) has a "functional, locational, and temporal component" that must be considered. *Id.* But if one concludes—as the facts here require—that the Jackson Quarry is a "mine" under the Act, the rest of the problem posed by Respondents' motions rests on that definition and essentially solves itself.

Respondents cite *Cyprus Industrial Minerals Company v. FMSHRC*, 664 F.2d 1116 (9th Cir. 1981), as support for their assertion that the definition of "mine" has a functional component that must be considered. Vulcan Mot. at 16. Their reliance is misplaced. The Ninth Circuit's decision did typify the operator's activities as something that could "hardly be described as anything but mining," *Cyprus Indus. Minerals,* 664 F.2d at 1118. But Respondents disregard the central point of the court's holding, which cited several precedents in diverse circuits and the legislative history of the Act and concluded that "it does not matter if what is included in the definition fails to conform to the conventional concept of mining." *Id.*

The court adopted the view of the Third Circuit in *Marshall v. Stoudt's Ferry Preparation Co*., 602 F.2d 589 (3d Cir. 1979):

> Although it may seem incongruous to apply the label 'mine' to the kind of plant operated by Stoudt's Ferry, the statute makes clear that the concept that was to be conveyed by the word is much more encompassing than the usual meaning attributed to it—*the word means what the statute says it means*.

Cyprus Indus. Minerals, 664 F.2d at 1118, *quoting Stoudt's Ferry*, 602 F.2d at 592. (emphasis added).

Resort to legislative history is also unhelpful to Respondents' argument. The Act's legislative history rather famously directs that its scope should be read expansively, as the court

noted in *Cyprus Industrial Minerals*. *See* Section III.B., *supra*, slip op. at 9 (excerpt from a report of the Senate Subcommittee on Labor regarding the Mine Act); *Cyprus Indus. Minerals*, 664 F.2d at 1118 (quoting from the same report).

The Jackson Quarry, then, is a "mine" under the Act. Based on that conclusion, the definition of "operator" clearly applies to Vulcan (*"any* owner, lessee, or other person who operates, controls, or supervises a . . . *mine*"). 30 U.S.C. § 802(d) (emphasis added).

Similarly, the inclusion of "*any* independent contractor performing services or construction at such *mine*" within the definition of "operator" must be read to apply to Wiley and Terra. *See id.* (emphasis added). The definition is enormously broad and provides no exclusions or limitations on the terms "services or construction."

The D.C. Circuit has expressly rejected the position that a functional limitation may preclude enforcement actions against independent contractors whose services are not sufficiently related to mining or milling operations. *See Otis Elevator Co. v. Sec'y*, 921 F.2d 1285, 1290 (D.C. Circuit 1990) ("We think that the phrase 'any independent contractor performing services . . . at [a] mine' means just that—*any* independent contractor performing services at a mine.").[6]

The definition of "miner" as "*any* individual working in a coal or other *mine*," 30 U.S.C. § 802(g) (emphasis added), likewise does not qualify "working" in any way. Thus, the employees of any entity, or any independent contractor self-employed and working at the mine, would be "miners," and the protections of the Act would apply to *any* such persons engaged in *any* type of work at the mine.

Respondents' arguments about temporal and functional limitations on MSHA's jurisdiction are thus unsustainable in this case. The "temporal" aspect of the definition is rendered literally in the statute: the provisions of the Act apply not only to lands, excavations, etc., currently engaged in the extraction or milling of minerals but also to those "*to be used*" and "resulting from" such use. 30 U.S.C. § 802(h)(1) (emphasis added).

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[6] In *Otis Elevator Company*, a company which serviced elevators carrying mining companies' employees into mines was found to be an independent contractor, and thus an operator, under section 3(d) of the Mine Act because it "contracts to perform services at mines." 921 F.2d at 1291.

In another case, *Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991 (10th Cir. 1996), the Tenth Circuit also adopted the D.C. Circuit's reasoning in *Otis Elevator Co.* to read "independent contractor" broadly. That case involved a manufacturer of mining equipment who sent a service representative to advise mine employees "with the equipment both above ground in the mine's maintenance shop and below ground in the mine." 99 F.3d at 994. The Tenth Circuit stated section 3(d) did not limit the definition of "independent contractor" to those "contractors who are engaged in the extraction process and who have a continuing presence at the mine." *Id.* at 999 (citing *Otis Elevator Co.*, 921 F.2d at 1290). Thus, the manufacturer was held to be both an independent contractor and operator under the Mine Act because the "clear" meaning of the statute encompassed contractors who "performed services at the mine." *Id.* at 1000.

This temporal component expands the Act's jurisdiction and strengthens the Acting Secretary's plain language argument. By extending the definition forward and backward to times when the property in question may not yet have been or may no longer be *functionally* engaged in extraction or milling—which alone would satisfy the definition of a mine—the statute's language establishes that a property may be a mine before those activities commence and after they have ceased.

In *Lancashire Coal Company v. Secretary of Labor,* 968 F.2d 388 (3d Cir. 1992), the court found "considerable support" for and credited the Secretary's reading of the Mine Act as recognizing "three potential time periods for the involvement of structures in mining activity: (1) the term 'used in' meaning current use, i.e. 'being used in'; (2) the term 'to be used in' meaning *contemplated* use; and (3) the term 'resulting from' meaning former use." 968 F.2d at 390-91 (emphasis added).[7]

No tool of statutory construction can contend with the weight of contrary authority marshalled by the Acting Secretary here. Leaving aside the Act's clear language and the oft-repeated Committee instruction that its scope is to be broadly construed, any traditional

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[7] Both Vulcan and the Acting Secretary also cited several cases—including some of the same cases—in which administrative law judges at the Commission found a physical location to be a mine when mining operations had not yet begun or had ceased and not resumed. *See* Sec'y Mot. at 7; Vulcan Mot. at 16-17; Sec'y Opp'n at 6. The cases cited include:

- *N.J. Wilbanks Contractor, Inc.*, 39 FMSHRC 2069, 2076 (Dec. 2017) (ALJ) (upholding jurisdiction over a mine that would eventually extract and process granite when development activities including "site grading, drilling and blasting rock, and constructing dams, as well as laying down belt structures, crushers, and shakers, and hauling clean rock to designated locations" were being performed);

- *Hills Materials Company*, 34 FMSHRC 3097, 3102-03 (Dec. 2012) (ALJ) (affirming jurisdiction found where mine was temporarily closed and had not "commenced operations," but would start the next day);

- *Royal Cement Co.*, 31 FMSHRC 1459, 1462 (Dec. 2009) (ALJ) (specifically noting Act's language including facilities where future milling is contemplated in upholding jurisdiction over facility where repairs were being performed in order to reopen quarry and cement plant that had been closed for three years); and

- *The Pit*, 16 FMSHRC 2008, 2008-10 (Sept. 1994) ("The plain language of the Act" clearly provided jurisdiction over equipment at a site which will be used for extraction of minerals and milling).

The anticipatory activities in these cases support the extension of jurisdiction to contemplated mining or milling but could not be read to constrain the breadth of the Act's plain language, even if the cases were precedential.

interpretation of the definition of "mine" would consider the statute as a whole and would note that the definitions of "operator" and "miner" are wholly dependent on the characterization of the property in question.

Linguistically, the breadth of the definitions is consistent and mutually supportive, and the Acting Secretary has not read the definition of "mine" in isolation. That definition is part of an integrated statutory scheme that Congress intended to be broadly inclusive of properties used in, to be used in, or resulting from mineral extraction or processing (including milling), and all persons working on or within such properties.

This case, unlike *KC Transport*, does not approach the frontiers of the Act's jurisdictional limits. And unlike *KC Transport*, the precise question at issue may be resolved by considering the plain language itself.

Respondents appear to understate the difficulty of unseating a plain language interpretation. While it may not be necessary to literally show that adopting the plain language would produce an absurd result, Respondents must at least demonstrate that the outcome would be "an unreasonable one 'plainly at variance with the policy of the legislation as a whole.'" *U.S. v. American Trucking Ass'ns,* 310 U.S. 534, 544 (1940).

The pleadings and evidence provided here cannot support such a finding. On the contrary, the plain language is buttressed by the legislative history, the use of words in context, Congress' evident choice in describing activities in the broadest possible terms, and the obvious intent to apply the Act's protections to properties, like the Jackson Quarry, that were not yet engaged in extraction or milling but which were legally recognized by local and federal officials as committed to such use in the near future.

Respondents have cited no authority where the Secretary's exercise of jurisdictional authority over a piece of real property within the Act's definition of a "mine" was rejected. *See* Sec'y Opp'n at 5-6 (noting absence of such authority and citing *Cyprus Industrial Minerals*, 664 F.2d at 1117-20 and cases cited therein; and *Lancashire Coal Co.*, 968 F.2d at 390, in support of jurisdiction over areas where mining is "contemplated"). Indeed, Vulcan's motion cites extensively to both the Commission's and D.C. Circuit's decisions in *KC Transport*, even though no legal principle supporting its contentions has survived judicial review to this point.[8] *See* Vulcan Mot. at 12-14, 20-21.

The Jackson Quarry's qualification as a "mine"—as the term has been straightforwardly defined—is therefore determinative of jurisdiction, contrary to Respondents' assertions. *See*

[8] The Acting Secretary's assertion that *K.C. Transport* is "not good law," Sec'y Opp'n at 8, may be premature. The D.C. Circuit did reverse and remand the case when reviewing the Commission's decision. 77 F.4th at 1031. *See also* Section IV.A. *supra*, slip op. at 11. The operator has petitioned the Supreme Court for certiorari, and the Court has not yet decided whether to accept the petition. *See* Petition for Writ of Certiorari, *KC Transport, Inc., v. Julie A. Su, Acting Sec'y of Labor*, ___ U.S. ___, No. 23-876, 2024 WL 645391 (Feb. 12, 2024); Brief for the Respondents, *KC Transport, Inc., v. Julie A. Su, Acting Sec'y of Labor*, ___ U.S. ___, No. 23-876 (Apr. 15, 2024).

Sec'y Opp'n at 8, noting correctly that Commission's decision in *KC Transport* was based on location, where trucks were asserted to be a "mine").

C. Fair Notice

As a final point, Respondents have asserted an affirmative defense of "fair notice" and raised such an argument as a basis for summary decision, asserting that MSHA had effectively disclaimed jurisdiction at the Jackson Quarry. Vulcan Mot. at 19. The argument is untenable.

First, as noted above, slip op. at 13, *supra,* the jurisdiction question rests on plain language. But the fair notice defense operates to limit deference to an agency interpretation of an ambiguous standard, where the position is inconsistent with or departs from a previous interpretation or common understanding.

"'The due process clause prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.'" *DQ Fire and Explosion Consultants, Inc.*, 36 FMSHRC 3083, 3087 (Dec. 2014), aff'd, 632 F. App'x 622 (D.C. Cir. 2015) (unpublished), *quoting General Electric Co. v. EPA,* 53 F.3d 1324, 1328 (D.C. Cir. 1995) (citation omitted). Deference is not an issue here, where the Secretary relies on a straightforward reading of the statute because the clear language therein provides an operator fair notice. *See Dynamic Energy Inc.*, 32 FMSHRC 1168, 1172 (Sept. 2010); *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1031 (June 1997).

Second, if there were any ambiguity in the statutory definition (again, there is not), a decision on the fair notice question would depend on contested material facts. Relying on Ashley's sworn testimony, the Secretary has denied that any representations were made about jurisdiction in conversations with Respondents' representatives.

Finally, the requirement of fair notice generally applies to particular regulatory provisions. *See DQ Fire and Explosion Consultants, Inc.,* 36 FMSHRC at 3087-88. Every binding precedent case cited by Respondents involves a particular regulatory provision. *See* Vulcan Mot. at 19-20.[9]

Vulcan asserts that the "standard" is the scope of MSHA's jurisdiction under Section 3(h)(1)(C). Vulcan Mot. at 20. But it has provided no authority in support of its position. This is a foundational, statutory definition, not a safety standard, and the fair notice argument is not readily adaptable to the broader context, where the question is not "What conduct is prohibited or required?" but "Does this statute apply at all to the property in question?"

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[9] Vulcan cited the following cases which discuss fair notice within the context of specific regulations under the Mine Act: *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990) (30 C.F.R. § 56.9002); *Alan Lee Good*, 23 FMSHRC 995, 1005 (Sept. 2001) (Jordan, C, & Beatty, C, separate opinion) (30 C.F.R. § 56.14107(a)); *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694-95 (July 2002) (30 C.F.R. § 75.364(b)(1)); *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1682 (Dec. 2010) (30 C.F.R. § 75.521); *DQ Fire and Explosion Consultants*, 36 FMSHRC at 3088 (30 C.F.R. § 48.5).

Respondents have cited one case in which an administrative law judge rejected a contractor's challenge to MSHA's jurisdiction on notice grounds. *See* Vulcan Mot. at 23, citing *Austin Powder Co.*, 37 FMSHRC at 1358. There, the independent explosives contractor similarly argued that MSHA had disclaimed jurisdiction over its facility, and that it lacked fair notice when jurisdiction was reasserted. 37 FMSHRC at 1358.

Unlike the present case, the facility was not itself a "mine" in the traditional sense but a storage facility on property located nearby and connected to the extraction area by a road on property owned by the mine owner. *Id.* Even so, the judge rejected the fair notice argument and determined that the plain language of the statute—the definition of "mine" at issue here—established that jurisdiction was proper. *Id.*

The judge considered the factors established for determining whether notice of the standard's requirements had been provided and determined that even if the language did not plainly establish jurisdiction over the facility, the Commission's objective "reasonably prudent person" test would support a finding that fair notice had been provided. *Id.* at 1359, *citing Alan Lee Good,* 23 FMSHRC 995, 1005 (Sept. 2001) (Jordan, C., & Beatty, C., separate opinion).

Thus, the fair notice argument would fail even if one were to agree that ambiguity could be inferred from "the inconsistency of the agency's enforcement, including pre-enforcement contact from MSHA officials, and the lack of guidance informing the regulated community with ascertainable certainty of its interpretation." Vulcan Mot. at 20. The due process analysis first asks "whether a reasonably prudent person *familiar with the mining industry and the protective purposes of the standard* would have recognized the specific prohibition or requirement of the standard." *DQ Fire and Explosion Consultants,* 36 FMSHRC at 3087, *quoting Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990) (emphasis added). *See also Alan Lee Good,* 23 FMSHRC at 1005, *citing Island Creek Coal Co.*, 20 FMSHRC 14, 24-25 (Jan. 1998).

A reasonably prudent person familiar with the mining industry would be familiar with the breadth of its jurisdictional provisions and the common definition of "mine," including its applicability to prospective operations. Inconsistency of agency enforcement and a lack of notice to the regulated community are indeed valid factors one may use to determine whether a party has notice of an agency's interpretation of an ambiguous regulation. However, they do not apply here to a plainly worded statute that has been consistently read, by courts, the Commission, and its judges, to mean what it says. [10]

[10] While the Secretary has proved MSHA's jurisdictional claim over the Jackson Quarry, Respondents' notice and other arguments might pertain to one or more of the citations or orders issued in these cases. Those standards have not been considered here because they are not "jurisdictional" questions and are beyond the scope of the issue assigned for disposition in this proceeding. However, the Acting Secretary must yet bear the burden of proving that the violations occurred and that the persons cited were responsible, and this decision should not be read as offering any opinion on the validity of the citations and orders issued in the individual dockets, or the vitality of a fair notice defense in response to any of the citations or orders.

In sum, Congress has spoken plainly in simple declarative sentences. Such clear language leaves no room for ambiguity or interpretation. Thus, Respondents' arguments about the type of activity involved at the mine, *see* Vulcan Mot. at 13, are refuted by the fact that the activities at issue in this case were undertaken *at a mine, by miners* as those terms are plainly and unequivocally defined. Respondents' motions must therefore be denied.

V. CONCLUSION

The Jackson Quarry is a "mine," as defined in the Act. Each Respondent was an "operator," as that term is defined in the Act, and the employees of each respondent who were engaged in any type of work at the quarry were "miners" as that term is defined in the Act. The Secretary's motion for summary decision on the question of MSHA's jurisdiction over the Jackson Quarry is therefore **GRANTED**, and Respondents' motions for summary decision on the same question are **DENIED**.

/s/ Michael G. Young
Michael G. Young
Administrative Law Judge

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