FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 7, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2011-194-M
Petitioner,	:	A.C. No. 10-02131-233459
	:	
v.	:	
	:	
NORTH IDAHO DRILLING, INC.,	:	Mine: Crusher #1
Respondent.	:	

DECISION

Appearances: Pamela F. Mucklow, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Eric Lenz, North Idaho Drilling, Inc., St. Maries, Idaho, for Respondent.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against North Idaho Drilling, Inc. ("Respondent") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Act" or "Mine Act"). The parties introduced testimony and documentary evidence at a hearing held in Coeur D'Alene, Idaho, and submitted post-hearing briefs.

A total of 11 section 104(a) citations were adjudicated at the hearing. Respondent agreed to withdraw its contest of Citation No. 8565189 at the hearing. (Tr. 138-39). The Secretary proposed a total penalty of $23,692 for these 12 citations. As discussed below, at the time the citations were issued, Respondent controlled a small portable crusher at a pit in Benewah County, Idaho.

I. BASIC LEGAL PRINCIPLES

A. Significant and Substantial

The Secretary alleges that the violations discussed below were of a significant and substantial ("S&S") nature. An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete

safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is most difficult to apply. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.,* 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based upon the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.,* 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984)). "The Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.* 32 FMSHRC 1257, 1281 (Oct. 2010)).

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). The Commission has emphasized that, in accordance with the language of section 104(d)(1), 30 U.S.C. § 814(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be S&S. *U.S. Steel Mining Co.*, 6 FMSHRC at 1575.

B. Negligence

The Secretary defines conduct that constitutes negligence under the Mine Act as follows:

> Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required 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. The failure to exercise a high standard of care constitutes negligence.

30 C.F.R. § 100.3(d).

C. Burden of Proof and Credibility Determinations

In order to establish a violation of a safety standard, the Secretary must prove that the violation occurred "by a preponderance of the credible evidence." *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (*citing Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)). This same standard applies to the Secretary's burden to establish that a violation was S&S and was the result of the operator's high negligence. When determining

whether the Secretary met this burden, I was required to make a number of credibility determinations. Determining the credibility of witnesses is one of the most important and difficult responsibilities that a Commission administrative law judge must complete. Although a judge will occasionally find himself in a situation where he believes that a witness is lying, most of the time resolving credibility issues involves determining whether a particular witness's testimony is worthy of trust. The primary issue is whether the testimony is believable. Often, a judge credits the testimony of witness A over witness B because he believes that the witness A is in a better position to know the particular facts at issue. Credibility determinations involve not only weighing the trustworthiness of a witness but also determining whether a particular witness has the knowledge necessary to give his testimony weight. The witness may be competent to testify about the conditions at a mine but he may not have a complete understanding about factors such as the sequence of events that transpired, the hazard presented by a cited condition, and the length of time that the condition existed. Credibility can be defined as "that quality in a witness which renders his evidence worthy of belief." *Black's Law* Dictionary 330 (5th ed. 1979). Thus, a witness's experience in the mining industry, his experience evaluating mine safety issues, and his knowledge of the mine at issue can be crucial in evaluating credibility.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

North Idaho Drilling argues that MSHA lacked the authority or jurisdiction to inspect Crusher #1 at Wemhoff Pit (the "Mine") because the Mine was in maintenance mode due to a planned sale to ACI Northwest ("ACI"). All of the citations in this case were issued at this portable crusher, which was not operating at the time of the inspection. Power to the Mine was locked-out and Respondent maintained that it never planned to operate the Mine again. Indeed, Respondent maintained that, once sold, the crusher was going to be moved to a different pit.

The Secretary argues that MSHA had jurisdiction and the authority to inspect the Mine at the time the inspector issued these citations. The Mine had neither been sold nor leased, Respondent had not completely ruled out continuing operations at the Mine, and Respondent did not provide evidence to prove its sale, lease, or intended use. The Mine, furthermore, qualifies as a "mine" pursuant to 30 U.S.C. 802(h)(1) of the Act, which gives MSHA jurisdiction over "facilities, equipment, machines, tools, or other property…used in, or to be used in" mining.

For jurisdictional purposes, the Mine Act includes the language "used in or to be used in, the milling of such minerals, or the work of preparing coal or other minerals" in its definition of a mine. 30 U.S.C. § 802(h)(1). The phrase "the milling of such minerals" includes the crushing and sizing of rock at a portable crusher with the result that a crusher is considered to be a "mine" under the Act. The evidence presented at the hearing establishes that the portable crusher had been used in the milling of minerals and, once certain repairs were made, would again be used for that purpose. A portable crusher that is being maintained or worked upon with the aim of becoming active in the future, even if it is inactive at the time, is subject to being inspected by MSHA. Congress made clear that the definition of "mine" in the Mine Act, furthermore, "[shall] be given the broadest possibl[e] interpretation, and … doubts [shall] be resolved in favor of …

coverage of the Act." *Shamokin Filler Company, Inc.*, 34 FMSHRC 1897, 1902 (Aug. 2012) (citing 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)).

I find that North Idaho Drilling, Inc., and the Mine were subject to the Act because the Mine's "workings, structures, facilities, equipment, machines, tools, or other property" were "to be used in" mining. Respondent had a mine I.D. number with MSHA, did not change the mine's status with MSHA, did not provide any proof that it no longer owned the mine, and did not raise its jurisdictional concerns in its answer. Even if Respondent planned to sell the Mine, its efforts were still undertaken with the aim of allowing the Mine to resume operations, which becomes even more evident because after the eventual sale of the mine, which occurred months after the inspection, Respondent allowed Donald Burton, its mine manager, to temporarily work for the new owner.[1] Mines that are "closed" for maintenance are still subject to the Act.

B. <u>Citation No. 8565186</u>

On August 11, 2010, Inspector Randall Kalita Urnovitz issued Citation No. 8565186 under section 104(a) of the Mine Act, alleging a violation of section 56.4101 of the Secretary's safety standards. The citation states, in part:

> The electrical van had oil and grease stored inside and no warning signs were posted. There were 5 five-gallon plastic containers of lube oil and a partial box of grease that contained 3 full tubes.

(Ex. G-1). Inspector Urnovitz determined that an injury was unlikely to occur but that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the operator's negligence was moderate and that one person would be affected. Section 56.4101 of the Secretary's safety standards requires that "[r]eadily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists." 30 C.F.R. § 56.4101. The Secretary proposed a penalty of $108.00 for this citation.

[1] If Respondent had already agreed to sell the Mine to ACI at the time it received the citations, Respondent would still be liable under the Act based upon the maintenance work it was performing upon the Mine as an "operator" of the mine. Under the Mine Act, the term "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). (emphasis added). Respondent clearly operated and/or controlled the Mine when the inspector issued the citations at issue in this case: Respondent was performing work upon the crusher and Donald Burton was supervising the work at the mine. In any event, the Mine Act would also have jurisdiction over Respondent as an "independent contractor" because, at the time of the inspection, it was working on the crusher and refabricating guards for the alleged benefit of ACI.

1. Summary of Evidence

Inspector Urnovitz testified that on August 11, 2010, he issued Citation No. 8565186 as a violation of section 56.4101 because Respondent did not have warning signs where a danger of fire or explosion existed. (Tr. 27; Ex. G-1). Five buckets of lube oil as well as three tubes of grease lubricant were located in an electrical van. (Tr. 28-29). The buckets had lids. (Tr. 37). Inspector Urnovitz believes that grease and lube oil are combustible. (Tr. 29).

A fire is likely to cause injuries resulting in lost workdays and restricted duty, including burns and smoke inhalation, according to the inspector. (Tr. 30-31). Inspector Urnovitz testified that these injuries were unlikely to be suffered because the van was not near an open flame or any individuals who were smoking and there were multiple escape routes. (Tr. 32).

Inspector Urnovitz testified that Citation No. 8565186 was the result of Respondent's moderate negligence. Respondent knew or should have known of the violation because it had a van with a posted sign. (Tr. 33). Donald Burton, the supervisor of the Mine who accompanied the inspector, was aware that the grease and lubricants were in the van. (Tr. 34). The grease and lubricant were only in the van temporarily. (Tr. 34). The condition was obvious. (Tr. 34). Inspector Urnovitz believed that the flammable materials were located in the van for a "couple of weeks." (Tr. 43). The inspector did not know the ignition temperature of the substances. (Tr. 46).

Eric Shawn Lenz, the owner and president of North Idaho Drilling, testified that Burton was in charge of the site whenever Lenz was not present. (Tr. 247). Lenz testified that the Mine was connected to the power grid, but was locked out at the time of the inspection and there were no other ignition sources. (Tr. 249-50).

Donald Burton[2] testified that the electrical van is not used as storage for the materials cited; they were placed in the van temporarily to remove them from other areas. (Tr. 354). The van was never used as storage while the Mine was operating. (Tr. 359). There were no ignition sources around the van and the van was locked out. (Tr. 355). None of the miners smoked. (Tr. 356). Burton was unsure how many days the grease and oil were stored in the van, but guessed the duration was only one or two days. (Tr. 358). He also corroborated that he told the inspector that the materials were placed in the van for convenience. (Tr. 358).

2. Discussion and Analysis

I find that Respondent violated section 56.4101 because the oil and grease in the electrical van presented a fire or explosion hazard, but there were no signs prohibiting open flames or smoking. The parties' arguments center around whether the electrical van was used for storage of flammable materials and how long the grease and oil were in the van. Whether the van was the usual storage place for the cited materials is, however, immaterial concerning a

[2] Donald Burton was absent from the hearing due to the inability to travel after a long-scheduled surgery. He testified via telephone the second day of the hearing; before testifying, Lenz related at least some of the testimony from the previous day to Burton. Tr. 292.

violation of section 56.4101. Section 56.4101 requires the posting of signs where a fire or explosion hazard "exists," not where the hazard regularly exists or exists for a certain period of time. The cited flammable materials, furthermore, were in the van for at least several shifts. The cited grease and oil presented a fire hazard, but were being kept in a van that did not have visible warning signs at the time of the inspection; Respondent violated section 56.4101. The violation was not S&S and the gravity was low.

I find that Citation No. 8565186 resulted from Respondent's moderate negligence. Operators are responsible for the negligence of their managers, foremen and supervisory employees for purposes of violating the Mine Act, but also for the purpose of determining negligence findings and penalty amounts. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982). Burton, who supervised the Mine, moved materials for a temporary time to clean the work area and did not realize the need to post a warning sign to prohibit open flames and smoking. Respondent should have known to either post warning signs or return the materials to an area where warning signs were already posted.

A penalty of $100.00 is appropriate for this violation.

C. Citation No. 8565187

On August 11, 2010, Inspector Urnovitz issued Citation No. 8565187 under section 104(a) of the Mine Act, alleging a violation of section 56.12004 of the Secretary's safety standards. The citation states, in part:

> The 220 volt power cord for belt #3 had two areas that were damaged, apparently by mechanical action, exposing the inner conductors. One area was approximately 1.5 inches long and the second area was 0.75 inches long, with copper showing on the ground (green) wire.

(Ex. G-3). Inspector Urnovitz determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. Section 56.12004 of the Secretary's safety standards requires that "[e]lectrical conductors exposed to mechanical damage shall be protected." 30 C.F.R. § 56.12004. The Secretary proposed a penalty of $1,795.00 for this citation.

1. Summary of Evidence

Inspector Urnovitz testified that he issued Citation No. 8565187 as a violation of section 56.12004 because a 220 volt power cord had mechanical damage. The exterior protective layer of the power cord had two damaged areas that exposed inner conductors. (Tr. 47). The damaged areas measured 1.5 inches and .75 inches long. (Tr. 48). Copper wire of the ground wire was visibly exposed. (Tr. 48,63). The cited cord was connected to the electrical system but was not energized at the time because the crusher's power was locked out. (Tr. 53, 63). The cited

condition created a fatal hazard of electrocution if the insulated inner conductors were further damaged to expose copper wires. (Tr. 54).

The inspector testified that the cited condition was reasonably likely to cause an injury because the damage to the cord would get worse and miners worked in the cited area every day. (Tr. 59). He believed that the cord had been handled since the damage occurred. (Tr. 62).

Inspector Urnovitz testified that Respondent's moderate negligence caused Citation No. 8565187 because Respondent should have known about the cited condition through workplace exams. (Tr. 61). The condition existed for at least two weeks. (Tr. 61-62). The inspector believed that the cord was damaged by chaffing over time and not by being dragged or cut. (Tr. 67). He testified that the damage occurred before the plant was shut down. (Tr. 66-67).

Lenz testified that the damage to the power cord did not occur while the plant was operating. (Tr. 259). Respondent checked all cords before use; Lenz believed that the cord damage occurred during a dig-out that involved moving the cone crusher and screen. (Tr. 259). Burton also believed that the damage to the cord was likely caused during the dig-out. (Tr. 363). Burton would have inspected the cord when the cone was replaced, before the Mine was reenergized. (Tr. 363). Burton did not recall the appearance of or damage to the cited cord at the time of the hearing. (Tr. 366).

2. <u>Discussion and Analysis</u>

I find that Citation No. 8565187 was a violation of section 56.12004 because the cited electrical conductors were exposed to mechanical damage. The inner conductor of the cited cord was exposed in numerous areas and the inspector testified that copper ground wire was exposed. Respondent's argument that the mine was not in operation and therefore conductors were permitted to be damaged fails. Although the Mine was locked out, which deenergized the cited conductor, the Act does not require that a violation of a safety standard impose a hazard. *Allied Products Inc.*, 666 F.2d 890, 892-93 (5th Cir. 1982).

I find, however, that Citation No. 8565187 was not S&S because it was not reasonably likely to contribute to an injury. The entire mine was locked and tagged out, which means that the cited violation could not cause an injury until the mine was reenergized. The conductor was most likely damaged during the period of time that the mine was deenergized, given the work that was being performed. Although the Secretary argues that the conductor would be likely to cause an injury once the Mine was reenergized, both Burton and Lenz testified that it was Respondent's policy that all the conductors would be checked before being used and before the plant was reenergized. Under continued normal mining operations, therefore, the conductor would likely be repaired or replaced before being reenergized and was not reasonably likely to cause an injury. The Secretary did not meet his burden of proof on this issue. The gravity was low.

I also find that Respondent's negligence was low. The conductor was likely damaged after the Mine was locked out. Respondent should have removed the conductor from its power connection and repaired or disposed of it.

Citation No. 8565187 is hereby **MODIFIED** to a low negligence designation. A penalty of $50.00 is appropriate for this violation.

D. Citation No. 8565188

On August 11, 2010, Inspector Urnovitz issued Citation No. 8565188 under section 104(a) of the Mine Act, alleging a violation of section 56.14107(a) of the Secretary's safety standards. The citation states, in part:

> The 12 inch diameter head pulley on belt 118 was not guarded. The north side was completely open and the south side was partially guarded by the drive motor and belt, which did have a guard. The center of the pulley shaft was approximately 4 feet above the ground. The unguarded area was approximately 40 inches long and 30 inches high. The condition had existed for approximately 2 weeks following a plant reconfiguration that included lowering this head pulley.

(Ex. G-8). Inspector Urnovitz determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was S&S, the operator's negligence was high, and that one person would be affected. Section 56.14107(a) of the Secretary's safety standards requires that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." 30 C.F.R. § 56.14107(a). The Secretary proposed a penalty of $13,268.00 for this citation.

1. Summary of Evidence

The inspector testified that Citation No. 8565188 was a violation of section 56.14107(a) because Respondent failed to guard a head pulley. The cited head pulley was approximately 3.5 to 4 feet from a walkway and was completely unguarded on its north side. (Tr. 78-81). Respondent stipulated that the cited condition existed, could cause serious injuries, was S&S, and was the result of high negligence if the plant operated with it in the cited state. (Tr. 84, 87, 88).

Inspector Urnovitz testified that he believed that the plant operated while the violation existed. The inspector testified that Burton told him the plant operated while the pulley was in the cited condition. (Tr. 89). The inspector also testified that the pulley had accumulated material or product on the equipment, especially the cribbing. (Tr. 91). In the inspector's experience, these accumulations showed that the pulley had operated since it was last moved and that the pulley had been set-up 4 feet from the ground when it was last run. (Tr. 91, 93; Ex. G-9). During the close-out conference concerning this condition, Burton told the inspector that the plant had operated with the head pulley 4 feet from the ground. (Tr. 94). The inspector acknowledged there were pieces of wire and rubber attached to the head pulley, admitting that

they could have held a guard; he testified that he did not inspect them closely because he did not believe that they were relevant at the time he issued the citation. (Tr. 108, 128-129).

Lenz testified that the cited guard was removed after production had ceased at the Mine. (Tr. 289). Several other guards were also removed. (Tr. 290). The guards were removed to be modified to meet ACI's requests. (Tr. 290, 303-04). Following modifications, Respondent would replace the guards. (Tr. 290). The inspector acknowledged that the crusher looked different when he viewed it prior to Respondent's sale to ACI. (Tr. 294). Burton testified that the pulley did not operate without a guard and that all the head pulleys at the Mine were guarded when the Mine operated. (Tr. 374, 399)

Inspector Urnovitz testified that the screen that Respondent used to cover the head pulley to terminate the citation required five or six bolts and bolt holes to secure, none of which existed during the inspection. (Tr. 440). The inspector did notice other guards missing, but did not issue citations because he could see the areas were being serviced. (Tr. 441).

2. Discussion and Analysis

I find that Respondent did not violate section 56.14107(a). The Secretary argues that the cited pulley operated without the presence of a guard, evidenced by Burton's confirmation that it did so and the debris viewed by the inspector. Burton's testimony conflicted with the account he gave to the inspector. Lenz and Inspector Urnovitz both testified that several guards were missing in the Mine but not cited because those guards were being refabricated. I credit the testimony of Lenz that the guard was removed after the plant was shut down so that work could be performed and the guard refabricated.

Citation No. 8565188 is hereby **VACATED**.

E. Citation No. 8565190

On August 11, 2010, Inspector Urnovitz issued Citation No. 8565190 under section 104(a) of the Mine Act, alleging a violation of section 56.14100(c) of the Secretary's safety standards. The citation states, in part:

> The CAT 988B loader had not been marked with a tag after being taken out of service for a safety defect (bad parking brake). The key was also in the ignition switch. . . . Loaders are used every shift to load customer trucks and to feed the plant when it is running.

(Ex. G-16). Inspector Urnovitz determined that an injury was unlikely to occur but that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the operator's negligence was moderate and that one person would be affected. Section 56.14100(c) of the Secretary's safety standards requires:

> When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

30 C.F.R. § 56.14100(c). The Secretary proposed a penalty of $807.00 for this citation.

1. Summary of Evidence

Inspector Urnovitz issued Citation No. 8565190 as a violation of section 56.14100 because the Cat 988B loader was taken out of service for a defective parking brake, but was not tagged out. (Tr. 139). The equipment's key was in its ignition and the door was unlocked. (Tr. 142). Burton informed the inspector of the defective parking brake. (Tr. 141). The inspector did not test the parking brake himself. (Tr. 151). The inspector testified that he designated the likely injury resulting from the cited condition to be permanently disabling because the defective parking brake could cause the large, heavy machine to strike or over-travel a miner. (Tr. 145).

Although Inspector Urnovitz designated the citation as reasonably likely to lead to an injury and S&S at the time he issued it, he reconsidered and testified that it was unlikely to cause an injury and was non-S&S. (Tr. 147). The inspector testified that the small crew working at the Mine was informed of the cited condition and the work area was relatively flat. (Tr. 147-148).

The inspector designated Citation No. 8565190 as the result of Respondent's moderate negligence because Respondent was aware of the defective parking break for two days before the inspection. (Tr. 149).

Lenz testified that the cited piece of equipment had a new, functional parking brake. (Tr. 312). He feared that the parking brake would freeze, which is why the machine was not being used. (Tr. 312). He requested that a mechanic come to the Mine to inspect the accumulators of the cited equipment. (Tr. 310). Lenz believes that Burton and Inspector Urnovitz miscommunicated, which led the inspector to believe that the parking brake would not hold the loader when it did. (Tr. 312).

Burton testified that the loader was out of service because the accumulators on the parking brake had to be examined by mechanics. (Tr. 406, 414). He testified that the parking brake on the equipment was not defective. (Tr. 407). He worried that the parking brake was dragging and "working too well." (Tr. 414-15). The inspector did not test the brake. (Tr. 420).

2. Discussion and Analysis

I find that Respondent did not violate section 56.14100 because continued operation of the cited equipment was not hazardous to persons. Section 56.14100 requires that defects pose a hazard to persons to violate its standard. Although the Secretary argues that the cited loader violated section 56.14100 based upon the testimony of Inspector Urnovitz, I agree with

Respondent's assertion that the inspector issued the citation due to a miscommunication. The parking brake may have been defective, but the Secretary did not establish that it posed a hazard to miners. Inspector Urnovitz based this citation upon Burton's comments at the time of the inspection that the parking brake was "defective," but Burton and Lenz testified that the brake held the vehicle. The Secretary bears the burden of proof and the inspector did not test the parking brake. The Secretary did not meet his burden of proving a violation.

Citation No. 8565190 is hereby **VACATED**.

F. Citation No. 8565191

On August 11, 2010, Inspector Urnovitz issued Citation No. 8565191 under section 104(a) of the Mine Act, alleging a violation of section 56.14132(a) of the Secretary's safety standards. The citation states, in part:

> The horn on the Komatsu WA-450-3 loader (serial # 53324) was not maintained in a functional condition. The horn button was broken and the metal contact spring and the cover were kept in a storage cubby, so the horn could not be sounded. The loader operator could hold the parts in place to sound the horn, but could only do so when the loader was parked.

(Ex. G-19). Inspector Urnovitz determined that an injury was unlikely to occur but that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the operator's negligence was high and that two persons would be affected. Section 56.14132(a) of the Secretary's safety standards requires "manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition." 30 C.F.R. § 56.14132(a). The Secretary proposed a penalty of $392.00 for this citation.

1. Summary of Evidence

Inspector Urnovitz issued Citation No. 8565191 as a violation of section 56.14132(a) because the horn on a Komatsu Loader did not function. (Tr. 154). The inspector saw that the horn button was not attached to the vehicle; Burton admitted that the horn did not function and Burton also tested the horn to show the inspector that it did not function. (Tr. 155

The Inspector designated Citation No. 8565191 as the result of Respondent's high negligence because Burton was aware of the cited condition but continued to use the equipment. (Tr. 158). Inspector Urnovitz also testified that Burton told him that the condition had existed for about two weeks and the equipment was used intermittently during that time. (Tr. 158). Lenz testified that Respondent's miners were properly trained and should not have removed the horn. (Tr. 318).

2. Discussion and Analysis

Respondent stipulated to the violation, but disputes the high negligence designation. (Tr. 157). I find that Respondent's high negligence caused the cited condition in Citation No. 8565191. Although its employees may be properly trained, its management knew of a violation but did not abate it. The Secretary argues, and I agree, that because Burton, Respondent's manager, knew that the horn was broken for 2 weeks but did not fix it, that Respondent was highly negligent. The gravity was serious.

A penalty of $400.00 is appropriate for this violation.

G. Citation No. 8565192

On August 11, 2010, Inspector Urnovitz issued Citation No. 8565192 under section 104(a) of the Mine Act, alleging a violation of section 56.14100(c) of the Secretary's safety standards. The citation states, in part:

> The left front outrigger float on the P&H 15 ton crane (serial #808703) was defective due to damage. One bolt approximately 7/8 inch in diameter on the upper saddle that held the float to the outrigger boom was sheared off and the second bolt was bent. The 20 x 20 inch float was only held loosely on the outrigger pin due to this damage and could not resist lateral forces as effectively as intended by the manufacturer.

(Ex. G-20). Inspector Urnovitz determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. The Secretary proposed a penalty of $807.00 for this citation.

1. Summary of Evidence

Inspector Urnovitz issued Citation No. 8565192 as a violation of section 56.14100(c) because Respondent's P&H 15-ton crane had a defective outrigger float. (Tr. 141). Outrigger floats are used to stabilize the crane; the cited piece of equipment had a defective left, front float. (Tr. 164). One bolt that secured the float to the outrigger was missing and the other was bent. (Tr. 168). The inspector testified that accepted industry standards classify equipment damaged in the cited manner to be unsafe to use. (Tr. 170-171). If the remaining bolt were removed or destroyed, the float could fail, causing the crane to tip. (Tr. 171). If the crane tipped, its operator or miners on the ground were likely to receive permanently disabling or fatal injuries. (Tr. 172-73).

The inspector testified that the cited condition was reasonably likely to cause an injury. (Tr. 177). Respondent used the crane the day of the inspection for a period of about 45 minutes. (Tr. 177). The operator intended to use the crane again that day. (Tr. 178). The use of the crane required a miner to be stationed near the crane as a guide. (Tr. 179).

Inspector Urnovitz designated Citation No. 8565192 as the result of moderate negligence. Although Burton told the inspector that he knew of the cited condition, Burton also said that the owner of the crane assured Respondent that the condition was not a safety hazard. (Tr. 180).

Lenz acknowledged that "it looks like . . . the rule was broken," but argued that if the second bolt broke the outrigger would still prevent the crane from tilting or tipping. (Tr. 320). Lenz testified that not all cranes have pinpoints connecting floats. (Tr. 321). Burton testified that the float required repairs due to a broken bolt, but it still functioned properly. (Tr. 421).

2. Discussion and Analysis

I find that Citation No. 8565192 was a violation of section 56.14100(c). Respondent argues that the cited float was a vertical stabilizer and the inspector referred to it as a horizontal stabilizer and did not show that the condition presented a hazard. Respondent's arguments fail. Although vertical and horizontal stabilization are not the same function, the inspector's confusion of the two does not undermine the citation. Destabilized cranes can capsize and crush miners. The float and outrigger stabilize a crane while it lifts loads and the failure of one could lead to a crane capsizing and crushing a person while lifting a load that the outrigger is otherwise rated to lift. Simply viewing a crane in action leads to this logical conclusion, but I also credit the inspector's testimony that a damaged outrigger can cause an accident.

I find that Citation No. 8565192 was S&S because the cited condition was reasonably likely to lead to a serious injury. The violative damage to the float and outrigger created a crushing hazard for miners that could cause injuries that would be at least permanently disabling. The cited condition is reasonably likely to lead to an injury. One bolt that held the float in place completely failed, while the other was damaged, making the destruction of the connection between the outrigger and the float likely. Respondent used the crane while the damage to the float and outrigger existed and planned to use the crane again. Both the crane operator and the miner who worked closely to help the operator were likely to be hurt in such a situation. As stated above, it is the *contribution* of a violation to the cause and effect of a hazard that must be considered when evaluating whether a violation is S&S. The condition cited in Citation No. 8565192 was reasonably likely to contribute to a serious injury and was therefore S&S. The gravity was serious.

I find that Respondent's low negligence caused Citation No. 8565192 because it reasonably relied upon the representations of the crane owner that the crane was safe to operate. Citation No. 8565192 is hereby **MODIFIED** to a low negligence designation. A penalty of $600.00 is appropriate for this violation.

H. Citation No. 8565193

On August 11, 2010, Inspector Urnovitz issued Citation No. 8565193 under section 104(a) of the Mine Act, alleging a violation of section 56.19024(e) of the Secretary's safety standards. The citation states, in part:

> The 7x7 wire rope that was approximately 9/16 inch in diameter used on the P&H 15 ton crane (serial #808703) had damage that exceeded retirement criteria. At least 2 kinks (dog-legs) were observed, as were three spots with multiple broken strands (3-6) in each area that had unraveled approximately 2 to 3 inches from the wire rope.

(Ex. G-23). Inspector Urnovitz determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, and that one person would be affected. Section 56.19024(e) of the Secretary's safety standards requires that "[u]nless damage or deterioration is removed by cutoff, wire ropes shall be removed from service when any of the following conditions occurs . . . [d]istortion of the rope structure." 30 C.F.R. § 56.19024(e). The Secretary proposed a penalty of $6,624.00 for this citation.

1. Summary of Evidence

Inspector Urnovitz issued Citation No. 8565193 as a violation of section 56.19024(e) because three out of six wire ropes on the same crane cited in Citation No. 8565192 were damaged. (Tr. 187-88; Ex. G-24). The ropes had three broken strands and numerous areas with various rope defects including doglegging, kinking, and birdcaging. (Tr. 192; Ex. G-24,25). There were 19 total strands, each of which had seven individual wires. (Tr. 196). Distorted wire ropes cause weight to be distributed unevenly throughout the length of the rope, which can break a rope. (Tr. 199). Broken ropes lead to the hazards of miners being crushed by a dropped load, struck by the rebounding rope, or hit by flying debris. (Tr. 199-200). The inspector designated the likely injury as a result of the cited condition to be fatal. (Tr. 201).

The inspector testified that an injury was reasonably likely to result from the cited condition because the operator planned to use the crane in an area where workers were present. (Tr. 202). The inspector also believed that the crane wires were highly likely to snap because they were extensively compromised. (Tr. 203). Inspector Urnovitz testified that Burton knew of the damage to the wire ropes, but believed that they did not present a hazard. (Tr. 205). Burton was also the operator of the crane. (Tr. 205).

Lenz testified that he objected to the violation because the inspector inaccurately described the number of strands and braids in the rope. (Tr. 326). Burton also testified that there was not a wire rope with seven strands and seven wires that supported loads on the crane. (Tr. 422). He did not dispute the doglegging or birdcaging. (Tr. 326).

2. Discussion and Analysis

I find that Respondent violated section 56.19024(e). Respondent claims that Citation No. 8565193 is invalid because the citation addresses a 7x7 wire rope while the cited crane has a 9x21 wire rope. Despite his testimony that the cited rope did not exist, Lenz does not dispute the damage to the rope, stating that he "was aware of the conditions." (Tr. 326). The inspector further undermines this argument by testifying that he based the citation upon incorrect

information provided by Burton and at the time of the hearing he believed that the wire rope was not 7x7. Miscalculating the number of strands in a wire rope does not eliminate the fact that the rope contained "distortion of the rope structure" in violation of section 56.19024(e). Respondent's employee, moreover, was responsible for that miscalculation. The cited rope, based upon the inspector's testimony and photographs, clearly existed and violated section 56.19024(e), regardless of the number of strands it contained.[3]

I also find that Citation No. 8565193 is an S&S violation of section 56.19024(e). The wire rope had broken wires, kinks, and other distortions. (Ex. G-24). Each individual defect of the rope created the hazard of a miner being fatally crushed if a wire rope broke during crane operation, likely dropping large loads onto miners. It is reasonably likely that such a hazard could contribute to an injury considering each distortion and damage to the rope increased and multiplied the likelihood of an accident occurring, the crane was used close to a miner on the ground, and the crane was scheduled to be operated again. Respondent's management failed to identify the damage to the wire ropes and the float outrigger, which suggests that Respondent used the equipment carelessly, increasing the likelihood of an accident occurring. Citation No. 8565193 was reasonably likely to contribute to a fatal injury and was an S&S violation of section 56.19024(e). The gravity was serious.

I find that Citation No. 8565193 was the result of Respondent's moderate negligence. Although it was reasonable to believe that the damage to the outrigger float was not hazardous, the damage to the cited wire ropes was obvious. The rope was badly frayed and distorted. Both Lenz and Burton were aware of these conditions but did not correct them because they believed the conditions did not pose a hazard. Respondent should have known of and corrected the hazardous condition. The facts do not support a high negligence finding.

Citation No. 8565193 is hereby **MODIFIED** to a moderate negligence designation. A penalty of $1,000.00 is appropriate for this violation.

I. Citation No. 8565194

On August 11, 2010, Inspector Urnovitz issued Citation No. 8565194 under section 104(a) of the Mine Act, alleging a violation of section 56.12028 of the Secretary's safety standards. The citation states, in part:

> The documentation for the most recent continuity and resistance testing could not be provided by the operator when requested. The grounding systems had been checked as required, but the record had been misplaced or lost.

(Ex. G-26). Inspector Urnovitz determined that there was no likelihood that an injury would occur and that injury was likely to cause no lost workdays. Further, he determined that the

[3] Although subsections (a),(c),(g),and (h) of section 56.19024 require the calculation of the percentage of damaged strands in a wire rope to establish a violation of the standard, subsection (e) does not. 30 C.F.R. § 56.19024. Thus, the size of the rope is not crucial here.

operator's negligence was moderate. Section 56.12028 of the Secretary's safety standards requires "[c]ontinuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter." 30 C.F.R. § 56.12028. It also requires that a "record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative." *Id.* The Secretary proposed a penalty of $100.00 for this citation.

1. Summary of Evidence

Inspector Urnovitz issued Citation No. 8565194 as a violation of section 56.12028 because Respondent did not provide documentation for its most recent continuity and resistance testing of its grounding system. (Tr. 208). Operators must test grounding systems anytime a plant is moved or subjected to an event that may disrupt the system. (Tr. 211). The portable crusher was recently torn down and moved. (Tr. 211). Respondent produced documentation of its previous system tests, but could not locate documentation of its most recent tests. (Tr. 210, 212). Burton did inform the inspector that Respondent performed a test upon the grounding system approximately two weeks prior to the inspection. (Tr. 211). Inspector Urnovitz called Citation No. 8565194 a "paperwork violation" that had "no likelihood" of causing an injury because he credited Burton that Respondent performed the tests. (Tr. 213). The inspector designated the citation as the result of moderate negligence because Burton performed and recorded the test, but could not provide it to the inspector. (Tr. 214).

Lenz testified that he exported the records to an office to make copies without informing Burton. (Tr. 329). Respondent did not produce a copy of the records before or during the hearing and stated that they may no longer exist. (Tr. 330).

2. Discussion and Analysis

I find that Respondent violated section 56.12028 because Respondent failed to keep a record of its most recent grounding tests available to the inspector upon request. Respondent argues that the inspector never requested paperwork from the office. The inspector did request paperwork from the supervisor of the mine, who was responsible for creating and providing that paperwork. The supervisor informed the inspector that he could not produce the records and did not do so, which was a violation of the standard upon its face. The inspector must simply request the records, not make efforts to contact various members of the Mine's management to obtain them, especially after being told that the records were lost. Respondent, furthermore, could not produce the records at hearing. Citation No. 8565194 is a violation of section 56.12028.

I find that Citation No. 8565194 resulted from Respondent's low negligence. Respondent failed to produce the records due either to misplacing them or a miscommunication amongst Respondent's management as to where the records were stored. The violation posed no danger to miners and Respondent's older records were available to show that it normally kept such records. The violation was not serious.

Citation No. 8565194 is hereby **MODIFIED** to a low negligence designation. A penalty of $50.00 is appropriate for this violation.

J. Citation No. 8565195

On August 11, 2010, Inspector Urnovitz issued Citation No. 8565195 under section 104(a) of the Mine Act, alleging a violation of section 56.18002(b) of the Secretary's safety standards. The citation states, in part:

> The documentation for the work place exams conducted during the past 12 months could not be provided by the operator when requested. The exams had been done as required, but records were not consistently kept. The operator could not produce any records for this operating season, which began approximately 6 weeks ago.

(Ex. G-27). Inspector Urnovitz determined that there was no likelihood that an injury would occur and that injury was likely to cause no lost workdays. Further, he determined that the operator's negligence was high. Section 56.18002(b) of the Secretary's safety standards requires "[a] record that such examinations were conducted shall be kept by the operator for a period of one year, and shall be made available for review by the Secretary or his authorized representative." 30 C.F.R. § 56.18002(b). The Secretary proposed a penalty of $100.00 for this citation.

1. Summary of Evidence

Inspector Urnovitz issued Citation No. 8565195 as a violation of section 56.18002 because Respondent could not produce records of workplace exams that occurred after the most recent move. (Tr. 222). Respondent did have past exam records and the inspector believed that Burton did perform the exams. (Tr. 222). The inspector believed that there was no likelihood of injury as a result of this violation because it was a "recordkeeping" violation. (Tr. 223).

Inspector Urnovitz designation Citation No. 8565195 as the result of Respondent's high negligence because Burton clearly knew that records of workplace exams were required, but he told the inspector that he did not create the records. (Tr. 223, 228).

Lenz testified that the records of the workplace examinations were also removed from the Mine site to make copies. (Tr. 332). Respondent did not produce workplace examination documents at any time. (Tr. 333-34).

2. Discussion and Analysis

I find that Citation No. 8565195 is a violation of section 56.18002 because Respondent failed to produce records of its workplace examinations. The parties' arguments concerning Citation No. 8565195 mirror those made concerning Citation No. 8565194. Although the standards relate to different records, each requires that the operator make those records available to the inspector. Citation No. 8565195 is a violation of section 56.18002 for the same reasons that Citation No. 8565194 violated section 56.12028

I find that Respondent's high negligence caused Citation No. 8565195. Although Lenz testified that the workplace examination records were available at the time of the inspection, he could not prove the truth of this statement because he could not produce those records at the hearing. Burton, furthermore, was responsible for creating the records of the workplace examinations and knew that those records should be created and presented to inspectors upon demand; Burton, however, told the inspector that he had not created the records. Therefore, I find that Citation No. 8565195 resulted from Respondent's high negligence because the supervisor of the Mine, who was responsible for examination records, failed to produce or generate the records despite knowing that they were required.

A penalty of $125.00 is appropriate for this violation.

K. Citation No. 8565196

On August 11, 2010, Inspector Urnovitz issued Citation No. 8565196 under section 104(a) of the Mine Act, alleging a violation of section 56.4201(a)(2) of the Secretary's safety standards. The citation states, in part, "[a]ll of the four fire extinguishers at the site had not . . . received a maintenance check since 07/2007." (Ex. G-28). Inspector Urnovitz determined that an injury was unlikely to occur but that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the operator's negligence was moderate and that one person would be affected. Section 56.4201(a)(2) of the Secretary's safety standards requires that:

> Firefighting equipment shall be inspected according to the following schedules . . . [a]t least once every twelve months, maintenance checks shall be made of mechanical parts, the amount and condition of extinguishing agent and expellant, and the condition of the hose, nozzle, and vessel to determine that the fire extinguishers will operate effectively.

30 C.F.R. § 56.4201(a)(2). The Secretary proposed a penalty of $100.00 for this citation.

1. Summary of Evidence

Inspector Urnovitz issued Citation No. 8565196 as a violation of section 56.4201(a)(2) because Respondent had not performed a maintenance check upon four fire extinguishers at the Mine in the previous 12 months. (Tr. 229). The tags affixed to the extinguishers indicated that the last maintenance check that Respondent performed upon them occurred in July 2007. (Tr. 299). Most operators hire contractors, who always affix date tags, to inspect extinguishers. (Tr. 230). Burton indicated to the inspector that he was not aware that yearly maintenance checks are required for extinguishers. (Tr. 231). Respondent did include extinguishers in its monthly visual checks and previous workplace exams. (Tr. 231).

Failing to conduct maintenance checks upon extinguishers could cause those extinguishers to malfunction if their use was required, according to the inspector. (Tr. 232). Miners could enter confined areas to fight fires with the extinguisher. (Tr. 233). Failure or

malfunction of extinguishers in a confined space could lead to lost day workday or restricted duty injuries in the form of smoke inhalation or burns. (Tr. 232-33).

The inspector testified that the cited condition was unlikely to lead to an injury because the Mine had few confined areas. (Tr. 234). He designated the negligence as moderate because Respondent should have known to perform yearly maintenance checks upon extinguishers. (Tr. 234). An independent contractor working at the Mine had an extinguisher that satisfied section 56.4201(a)(2). (Tr. 237).

Lenz testified that Respondent sent 10 to 12 fire extinguishers to be inspected and that the cited extinguishers were temporary replacements that came from Lenz's personal shop. (Tr. 335). Lenz testified that Respondent sent its extinguishers to Fleet Parts and Service, which could not supply Respondent with a record documenting the service of the fire extinguishers due to the passage of time. (Tr. 337). Lenz could not find any record either. (Tr. 337). Lenz was "100% sure [Burton] was aware the fire extinguishers were getting charged." (Tr. 336).

2. Discussion and Analysis

I find that Respondent violated section 56.4201(a)(2) by failing to inspect four fire extinguishers. Even if Respondent had 10 to 12 extinguishers being serviced off the Mine site, the four that were there did not meet the standard. Although the presence of expired extinguishers may be safer than the complete absence of extinguishers, I agree with the Secretary's argument that welding was being done at various parts of the mine to restore guards and a miner attempting to use a fire extinguisher to fight a fire in an enclosed space could be harmed if the extinguisher malfunctioned. The extinguisher brought to the Mine by a contractor does not abate this condition, as Respondent argues, because the uninspected extinguishers still present a hazard. The difference between the hazards of the absence of extinguishers and presence of expired extinguishers accounts for the fact that this citation is non-S&S.

Respondent's argument that fire extinguishers are only used in case of emergency goes to the likelihood of an injury, not the fact of violation, because the violation of a safety standard does not require the showing of a hazard. *Allied Products Inc.,* 666 F.2d at 892-93. The occurrence of an emergency, furthermore, would be assumed when evaluating the S&S nature of a condition. *Cumberland Coal Resources, LP*, 717 F.3d 1020 (D.C. Cir. 2013).

I find that Citation No. 8565196 was the result of Respondent's moderate negligence. A penalty of $100.00 is appropriate for this violation.

L. Citation No. 8565197

On August 12, 2010, Inspector Urnovitz issued Citation No. 8565197 under section 104(a) of the Mine Act, alleging a violation of section 56.20008(a) of the Secretary's safety standards. The citation states, in part:

> There were no toilet facilities at the mine site, or readily accessible to the miners. The closest toilet was at a gas station that was over 1 mile away from the mine.

(Ex. G-29). Inspector Urnovitz determined that an injury was unlikely to occur but that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the operator's negligence was moderate and that three persons would be affected. Section 56.20008(a) of the Secretary's safety standards requires that "[t]oilet facilities shall be provided at locations that are compatible with the mine operations and that are readily accessible to mine personnel." 30 C.F.R. § 56.20008(a). The Secretary proposed a penalty of $138.00 for this citation.

1. Summary of Evidence

Inspector Urnovitz issued Citation No. 8565197 as a violation of section 56.20008(a) because there were no toilet facilities at the Mine. (Tr. 240). The inspector did not observe any toilets and Burton told the inspector that miners were using toilets that were one mile away. (Tr. 240-41). Three miners were at risk of contracting intestinal illness from unsanitary conditions, which was likely to result in lost workdays or restricted duty according to the inspector. (Tr. 241-42). The inspector testified that an injury was unlikely because the Mine had water available. (Tr. 243). There was no hot water available. (Tr. 243).

The inspector designated the citation as the result of Respondent's moderate negligence. Burton was aware that there were no toilets at the Mine, but he believed that being able to drive a mile fulfilled the requirement. (Tr. 243). The condition existed for an extended period of time; there had never been toilets or sanitary facilities at the Mine. (Tr. 243).

Lenz testified that Respondent provided restroom or toilet facilities in an adjacent lumber mill as well as at the scale shack where Respondent would supply customers with gravel. (Tr. 338-39). Burton testified that the lumber mill and scale shack had restrooms that were 200 and 400 yards away. (Tr. 424-25). Burton also testified that he told the inspector that they used the toilets at the gas stations. (Tr. 425).

2. Discussion and Analysis

I find that Respondent did not violate section 56.20008(a) because it did provide toilet facilities. I credit Lenz's testimony that miners used the toilet facilities located at the adjacent scale shack. These facilities were "compatible" with the mine site because the Mine used the scale shack when customers wanted to buy gravel. Lenz testified that the facilities were about 200 and 400 yards from the Mine. The Secretary argues that these toilets were not readily accessible because they were 200 yards away, but the scale shack was accessible to miners to fill customers' orders, which means it was also accessible for the use of toilets. Burton's testimony that employees drove to a gas station to use the bathroom does not change the existence of the available facilities. The Secretary failed to meet his burden of proof. Citation No. 8565197 is hereby **VACATED**.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty.[4] Respondent's history of previous violations is set forth in Exhibit G-30. During the period between 5/11/2009 and 8/10/2010, Respondent had a history of 22 paid violations at the Mine of which 13 were S&S violations. At all pertinent times, Respondent was an extremely small operator. Information at MSHA's Mine Data Retrieval System ("MDRS") shows that Respondent employed three miners during the third quarter of 2010 and no miners after that. The MDRS also shows that the total hours worked at the Mine in 2010 was 417. A major reason I reduced the penalties in this case is Respondent's very small size. The violations were abated in good faith. There was no proof that the penalties assessed in this decision will have an adverse effect on Respondent's ability to continue in business.[5] The gravity and negligence findings are set forth above.

IV. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

Citation No.	30 C.F.R. §	Penalty
8565186	56.4101	$100.00
8565187	56.12004	50.00
8565188	56.14107(a)	Vacated
8565189	56.9300(a)	108.00
8565190	56.14100(c)	Vacated
8565191	56.14132(a)	400.00

[4] Commission judges assess penalties *de novo*. *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). "In determining the amount of the penalty, neither the judge nor the Commission is bound by a penalty recommended by the Secretary." *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). "However, such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purposes of the Act." *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission in *Sellersburg* explained that "when . . . it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves the Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission." *Sellersburg Stone* at 293. Congress intended civil penalties to provide a "strong incentive for compliance with mandatory health and safety standards." *Nat'l Independent Coal Operators' Ass'n v. Kleppe*, 423 U.S. 388, 401 (1976). The penalties I have assessed in this decision provide a strong incentive for compliance taking into consideration the penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(c), and my findings and conclusions.

[5] The MDRS indicates that the Mine began operations July 19, 2007, and that the Mine was "abandoned" on or about August 10, 2011. This notation may reference the sale of the crusher.

8565192	56.14100(c)	600.00
8565193	56.19024(e)	1,000.00
8565194	56.12028	50.00
8565195	56.18002(b)	125.00
8565196	56.4201(a)(2)	100.00
8565197	56.20008(a)	Vacated
	TOTAL PENALTY	$2,533.00

For the reasons set forth above, the citations and orders are **AFFIRMED**, **MODIFIED**, or **VACATED** as set forth above. North Idaho Drilling, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $2,533.00 within 40 days of the date of this decision.[6]

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

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[6] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.