

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 7, 2014

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 2012-199
Petitioner,	:	A.C. No. 29-00097-271526
	:	
v.	:	
	:	
BHP NAVAJO COAL COMPANY,	:	Navajo Mine
Respondent.	:	

DECISION

Appearances: Bryan Kaufman, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Charles W. Newcom, Esq., Sherman & Howard LLC, Denver, Colorado, for Respondent.

Before: Judge Manning

These cases are 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 BHP Navajo Coal Company, 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 Durango, Colorado and submitted post-hearing briefs.

BHP Navajo operates a large surface coal mine in San Juan County, New Mexico. A total of seven section 104(a) citations were adjudicated at the hearing. Two section 104(a) citations were settled immediately before the hearing and therefore were not adjudicated. The Secretary proposed a total penalty of \$103,037.00 for the adjudicated citations.

**I. DISCUSSION WITH FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

A. Citation No. 8141178

On September 20, 2011, Inspector Danny Craig Cerise issued Citation No. 8141178 under section 104(a) of the Mine Act, alleging a violation of section 77.202 of the Secretary’s safety standards. (Ex. G-2). At hearing, the Secretary amended the citation to allege a violation of section 77.1607(i). The citation states that float coal dust enveloped two front end loaders that were loading coal from a stockpile into a train. The dust made it “difficult to see rail cars.” *Id.* Inspector Cerise determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he

determined that the violation was Significant and Substantial (“S&S”), the operator’s negligence was moderate, and that two persons would be affected. Section 77.1607(i) of the Secretary’s safety standards requires that during the operation of loading equipment “[d]ust control measures shall be taken where dust significantly reduces visibility of equipment operators.” 30 C.F.R. § 77.1607(i). The Secretary proposed a penalty of \$1,304.00 for this citation.

For the reasons set forth below, I vacate Citation No. 8141178.

Discussion and Analysis

I find that the Secretary did not fulfill his burden to show that Respondent violated section 77.1607(i). The Secretary must prove the existence of a violation by a preponderance of the evidence. *RAG Cumberland Resources Co.*, 22 FMSHRC 1066, 1070 (Sept. 2000). Based upon the inspector’s testimony and photographs, the dust reduced the visibility of the loader operators. (Tr. 19-22; Ex. R-A). The Secretary did not show, however, that the dust *significantly* reduced visibility of the equipment operators in question. The photos in Respondent’s Exhibit A and the Secretary’s Exhibit 2 do not conclusively show that the dust significantly reduced the visibility to the loader operators such that a safety hazard was created. Although the dust is thick in some places, those sections are generally below the cab of the loaders, which would not significantly reduce the operators’ visibility. The dust dissipated as soon as the loaders moved. Other than the two loaders, there were no obstructions or other equipment in the loading area. (Exs. G-2, R-A). The inspector, furthermore, did not have a view from inside the cab during operation and he observed the cited conditions from a distance. (Tr. 37; Ex. G-2). The operators of the vehicles told the inspector that their visibility was unaffected by the dust clouds. (Tr. 37). Respondent, moreover, watered the roadways in the cited area to combat dust. (Tr. 42, 60). The Secretary did not present sufficient evidence to show that the cited condition significantly obscured the visibility of the operators of the equipment in question. I hereby **VACATE** Citation No. 8141178.

B. Citation No. 8567301

On September 20, 2011, Inspector Jeff D. (Bill) Scott issued Citation No. 8567301 under section 104(a) of the Mine Act, alleging a violation of section 77.1103(b) of the Secretary’s safety standards. (Ex. G-5). The citation states that the operator “failed to install flexible connections to prevent adverse effects from the tank settling.” Tank movement possibly pushed the conduit clamps off and damaged a steel pipe and union, creating a constant drip of gasoline. The condition existed for more than a shift to weeks; large paint blister developed from the leaking gasoline and a large vapor ball existed. *Id.* Inspector Scott determined that an injury was highly likely to occur and that such an injury could reasonably be expected to result in a fatal injury. Further, he determined that the violation was S&S, the operator’s negligence was moderate, and that nine persons would be affected. Section 77.1103(b) of the Secretary’s safety standards mandates that “[o]utlet piping shall be provided with flexible connections or other special fittings to prevent adverse effects from tank settling.” 30 C.F.R. § 77.1103(b). The Secretary proposed a penalty of \$32,810.00 for this citation.

For the reasons set forth below, I modify Citation No. 8567301. I find that the cited conditions were reasonably, not highly likely, to cause a serious injury and I find that fewer than nine persons would be affected.

Discussion and Analysis

Inspector Scott issued Citation Nos. 8567301, 8567302, 8567303, and 8567304 at the North Plant of the mine. The North Plant was a large open area that contained maintenance facilities and a laboratory. (Ex. R-D). Along the south side of this plant there were bulk storage tanks containing diesel fuel and gasoline. These tanks were on a concrete pad that was a few feet below ground level and there was a concrete retaining wall around the tanks. (Ex. R-B). The roadway entrance to the North Plant was on the north side. A fueling station was located to the west of the storage tanks. There was a chain-link fence along the south side of the North Plant behind the fuel tanks but there was at least one opening in the fence that constituted a principal means of access because miners could use that opening to enter the area on foot from a parking lot. (Tr. 177; Ex. R-D). There was no roadway entering the North Plant from the south.

I find that the conditions cited in Citation No. 8567301 violated section 77.1103(b). The cited fuel tank lacked a flexible connection to prevent adverse effects caused by the tank settling. Although one end of the cited fuel line had a flexible connection, the end attached to the fuel tank did not. (Tr. 101-02). As a result, a conduit clamp was missing from one section of the fuel line and the fuel tank leaked gasoline. (Ex. G-5 at 4). I find that this damage was most likely caused by the lack of a flexible connection between the fuel tank and the fuel line. Respondent argues that the Secretary did not show that the cited tank settled and also asserts that the fuel line had numerous and sufficient flexible connections. I credit the inspector's testimony that the settling of the tank combined with the lack of the specific flexible connection between the fuel tank and line caused the broken conduit clamp and leak. (Tr. 111-12). Although the cited fuel line did have flexible connections, it lacked a flexible connection at the vital juncture where the tank and fuel line met. The fact that the leak occurred at that point suggests that the leak was caused by movement of the tank itself and not of the fuel lines. The lack of a flexible connection between the tank and fuel line caused the adverse effect of a fuel leak when the tank settled.

Citation No. 8567301 was S&S.¹ The missing flexible connection contributed to the gasoline leak at the union between the fuel tank and fuel line, which caused the hazard of fire or

¹ 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).

explosion. Fires and explosions can cause injuries including burns and smoke inhalation that could be fatal. I credit the inspector's testimony that potential ignition sources existed. (Tr. 134-36). These ignition sources included damaged electrical conductors, a static charge, and welding equipment. I recognize that these ignition sources were not always present, but it appears that the gasoline leak existed for a considerable length of time and there is no indication that it would have been corrected in the near future. Both the inspector and Leonard Palmer, who dealt with injuries and escorted inspectors for Respondent, smelled gasoline as they approached the fuel tanks and saw the gas actively leaking from the tank. (Tr. 90, 115, 285-87). They differed as to the strength of the odor. The inspector also averred that the gas leak could create a dangerous "vapor ball" that could be ignited. (Tr. 90-91). I find that, assuming continuing mining operations, the leaking gasoline would have contributed to the cause and effect of a significant hazard of a fire or explosion that would reasonably likely injure a miner.

Although the facts presented by the Secretary convince me that a serious injury was reasonably likely, I find that the Secretary did not fulfill his burden to prove that an injury was highly likely. The testimony of the inspector and other evidence presented by the Secretary fails to show the cited condition was highly likely to lead to an injury or even to quantify how likely the cited conditions were to contribute to an injury. Despite numerous and specific questions pertaining to the likelihood of an injury occurring, the inspector would only testify that injuries caused by the cited condition would be serious in nature and should have been obvious to miners. (Tr. 137-38). The inspector stated the conclusion that the cited condition was highly likely to contribute to an injury, but did not provide an explanation why it was highly likely to do so. (Tr. 139).

The inspector's testimony concerning possible ignition sources focuses on the contact of those sources with the vapor ball. I do not credit the inspector's testimony that the leaking gasoline could have created a vapor ball capable of being ignited from as far away as the laboratory to the east of the tanks or the employee parking lot to the south. The leak was simply a drip that occurred every few seconds. Palmer testified that the smell was not much stronger than what motorists would encounter at a gasoline service station. (Tr. 284). Most importantly, this bulk fuel storage facility was located outside, away from any buildings in an open area on the high plains where breezes are almost always present. Any vapors would quickly dissipate to a level that would be neither explosive nor flammable. My S&S finding is based upon the contribution of the violation to a fire or explosion if an ignition source came within a few feet of the leak. I find it was not highly likely that flammable vapor would come into contact with ignition sources that were not directly adjacent to the fuel tanks. (134-35). Citation No. 8567301 was S&S because it was reasonably likely to cause a serious injury with continued operations.

Respondent's moderate negligence caused the violation cited in Citation No. 8567301. Both the inspector and Palmer smelled the gasoline leaking from the fuel line from a distance and saw the leak once they approached it. (Tr. 285, 287, 115-17). Respondent should have known of the cited condition.

I modify Citation No. 8567301 from highly likely to reasonably likely to cause an injury. I also find that fewer than nine persons would be affected by the violation. The inspector's testimony concerning the number of persons affected was vague, unconvincing, and seemed to

include every miner who approached him out of curiosity. (Tr. 139-40). I find it more likely that only one or two miners would be in the area at the same time in the event of a fire. Firefighting personnel and first responders were less likely to be injured especially considering the open area around the fuels tanks. The gravity was serious. A penalty of \$10,000.00 is appropriate for Citation No. 8567301.

C. Citation No. 8567302

On September 21, 2011, Inspector Scott issued Citation No. 8567302 under section 104(a) of the Mine Act, alleging a violation of section 77.1103(c) of the Secretary's safety standards. (Ex. G-5). The citation did not specify how the standard was violated, but the inspector testified that the cited fuel lines lacked shutoff valves. (Ex. G-6; Tr. 104). Inspector Scott determined that an injury was highly 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 nine persons would be affected. Section 77.1103(c) of the Secretary's safety standards mandates that "[f]uel lines shall be equipped with valves to cut off fuel at the source and shall be located and maintained to minimize fire hazards." 30 C.F.R. § 77.1103(c). The Secretary proposed a penalty of \$32,810.00 for this citation.

For the reasons set forth below, I vacate Citation No. 8567302.

Discussion and Analysis

The condition cited in Citation No. 8567302 did not violate section 77.1103(c) and I therefore vacate Citation No. 8567302. The cited gasoline tank was equipped with valves that cut off the fuel at the source. Ned Begay, a safety specialist for Respondent, testified that an electric emergency cut off switch was 68 feet from the fuel tanks and could cut off the fuel from all three tanks. (Tr. 246-47; Ex. R-B at 11). The solenoid for the electric cut off switch was located a few inches from the tanks and would shut off the fuel at that location when the switch was activated. (Tr. 317, 330-31; Ex. G-6 at 3). George Kelly, a business process data coach for Respondent, corroborated Begay's testimony, but also testified that there was a manual shutoff valve on the discharge side of each of the tanks. (Tr. 314). The inspector also testified that manual shut off valves existed. (Tr. 187-88). Based upon the cited testimony, I reject the Secretary's argument that the fuel shut off valves would not cut off fuel at the source; the solenoid switch was only inches from the cited tank, which was the source of the fuel. The switch to operate that solenoid was 68 feet from the tank and could be accessed safely in the event of an emergency. I hereby **VACATE** Citation No. 8567302.

D. Citation No. 8567303

On September 20, 2011, Inspector Scott issued Citation No. 8567303 under section 104(a) of the Mine Act, alleging a violation of section 77.1103(a) of the Secretary's safety standards. (Ex. G-7). The citation states that the operator did not post required placards upon the south and east sides of fuel tanks. *Id.* Inspector Scott determined that an injury was highly 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 nine

persons would be affected. Section 77.1103(a) of the Secretary's safety standards mandates that "[f]lammable liquids shall be stored in accordance with standards of the National Fire Protection Association." 30 C.F.R. § 77.1103(a). The Secretary proposed a penalty of \$32,810.00 for this citation.

For the reasons set forth below, I modify Citation No. 8567303. I find that the cited condition was a violation of section 77.1103(a) and the result of Respondent's moderate negligence, but was unlikely to lead to a serious injury and would not affect nine people.

Discussion and Analysis

I find that Respondent violated section 77.1103(a). The National Fire Protection Association ("NFPA") requires that, at a minimum, warning placards must be posted at "[e]ach principal means of access to an exterior storage area" of flammable liquids. (Ex. G-16). Respondent did not have placards upon the south and east sides of the cited fuel tank. (Tr. 151).

I find, however, that Citation No. 8567303 was not S&S. The cited absence of warning placards was not reasonably likely to lead to a serious injury in the event of a fire. Violations involving safety during an emergency should be evaluated in the context of the contemplated emergency. *Cumberland Coal Resources LP*, 33 FMSHRC 2357 (Oct. 2011), 2366 *aff'd* 717 F.3d 1020 (D.C. Cir. 2013). The NFPA placards serve to provide information about flammable materials to firefighters and other responders in the event of a fire. The main entrance to the fueling area was on the north side of the plant and that entrance was the only entrance for vehicles. (Tr. 176). Placards were posted upon the fuel tanks in a position visible from the north. (Tr. 178; Ex. R-B). I credit Val Lynch's testimony that access from the main gate of the mine to fueling area was via the haul road to the north of the plant and that firefighters were unlikely to approach the fire from the south or east. (Tr. 351, 359, 362). Even if the wind blew from the south or east, the approach would be from the north and west. The tanks were clearly marked from those directions. In addition, firefighters would be unlikely to fight a fire with a fence to their backs. The missing placards were not reasonably likely to contribute to a serious injury because firefighters would see the placards upon the north and west sides of the tanks.

I find that Citation No. 8567303 was the result of Respondent's moderate negligence. The fuel tanks formerly had placards upon the south and east sides and Jay Arnold, an electrician at the mine, testified that he had requested that these placards be replaced. (Tr. 214). Respondent should have known of the cited condition. For the reasons discussed in reference to Citation No. 8567301, I find that fewer than nine persons would be affected by the cited condition. The gravity was low. A penalty of \$2,000.00 is appropriate for Citation No. 8567303.

E. Citation No. 8567304

On September 21, 2011, Inspector Scott issued Citation No. 8567304 under section 104(a) of the Mine Act, alleging a violation of section 77.1713(a) of the Secretary's safety standards. (Ex. G-8). The citation stated that the "[r]equired on Shift Examination Record Book reflects an inadequate examination and/or no examination of the fuel Tanks and Fuel Island." *Id.* Inspector Scott determined that an injury was unlikely to occur and that any 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 nine persons would be affected. Section 77.1713(a) of the Secretary's safety standards mandates that "[a]t least once during each working shift...each active working area and each active surface installation shall be examined by a certified person...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). The Secretary proposed a penalty of \$897.00 for this citation.

For the reasons set forth below, I modify Citation No. 8567304 to reflect that fewer than nine persons would be affected by the cited condition.

Discussion and Analysis

I find that Respondent violated section 77.1713(a). I credit the inspector's testimony that the examinations were not performed. None of Respondent's examination books show that the cited fuel tank was examined, no foreman could tell the inspector who was responsible for the examinations, and Respondent did not produce a witness with personal knowledge of the actual performance of the examinations.² (Tr. 158). Respondent argues that it examined the tanks, but did not record the examination in the books because no hazards were found and that Kelly's testimony proves this argument because it establishes the "usual procedure" of the examinations. (Respondent's Br. at 11; Tr. 311-12). I reject Respondent's argument because Kelly did not have actual knowledge that the examinations were performed. He could only testify that the examinations of the fuel tanks should have been performed based upon procedure. Kelly testified, furthermore, that if examinations of the fuel tanks were performed, procedures insured that the area would be listed in the books under "active surface installation/work area examined." (Tr. 332-33; Ex. G-14). The records show no such entry. The examination records and testimony by both Kelly and Inspector Scott show that Respondent performed no examinations in September. For the reasons discussed concerning Citation No. 8567301, I find that fewer than nine persons would be affected by the cited condition. This violation was particularly serious because on-shift examinations are crucial to the maintenance of a safe workplace. Respondent's negligence was high given the importance that should be placed upon pre-shift and on-shift examinations. An increased penalty of \$5,000.00 is appropriate for Citation No. 8567304 taking into consideration the serious nature of the violation and Respondent's negligence.

F. Citation No. 8466798

On September 20, 2011, Inspector Scott issued Citation No. 8466798 under section 104(a) of the Mine Act, alleging a violation of section 77.202 of the Secretary's safety standards. (Ex. G-3). The citation stated that the operator allowed dangerous amounts of coal dust and moisture residue to accumulate in the energized digger wheel control cabinet, creating a fire hazard. The door seals were cracked and damaged, coal dust was upon the walls, wires, contactors, and the floor of the box and evidence of water movement was present. *Id.* Inspector Scott determined that an injury was reasonably likely to occur and that such an injury could

² Much like the foremen interviewed by Inspector Scott, Palmer testified that the examinations occurred, but his testimony was inconclusive concerning who performed them. (Tr. 297-300).

reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. Section 77.202 mandates that "[c]oal dust in the air of, or in, or on the surfaces of, structures, enclosures, or other facilities shall not be allowed to exist or accumulate in dangerous amounts." 30 C.F.R. § 77.202. The Secretary proposed a penalty of \$1,203.00 for this citation.

For the reasons set forth below, I modify Citation No. 8466798; the cited condition was unlikely to cause a serious injury and was non-S&S.

Discussion and Analysis

I find that the conditions cited in Citation No. 8466798 violated section 77.202. Respondent argues that the Inspector did not prove that a dangerous amount of coal dust accumulated in the cited area. The Commission has held, with reference to electric control boxes cited under section 77.202, that "if a 'potential' ignition source is present in the vicinity of an accumulation, the accumulation is dangerous within the meaning of the standard." *Pittsburg & Midway Coal Mining Co.*, 8 FMSHRC 4, 6 (Jan. 1986). The inspector testified that the cited accumulations were exposed to the control contacts that could arc, leading to ignition or explosion, just as in *Pittsburg & Midway Coal*. (Tr. 378). Although the inspector's testimony and some of the photos show minimal amounts of accumulations, the inspector testified that the largest amount of accumulations occurred at the bottom of the control box. The picture depicting the top of the cited box also reveals a significant amount of coal accumulations that could easily fall into the box through the unsealed edge of the door. (Ex. G-5 at 5; Tr. 377). I find that Respondent allowed coal dust to exist or accumulate in dangerous amounts upon and within the cited box in violation of section 77.202.

I find that Citation No. 8466798 was not S&S. Respondent's violation of 77.202 contributed to the safety hazard of a fire or explosion, which could cause a variety of serious injuries, but was not reasonably likely to do so. The Secretary argues that moisture could cause a direct short or the contactors could go phase-to-phase, either of which would cause an explosion. Although the cited conditions were dangerous, they are not reasonably likely to cause a serious injury because the ignition sources were unlikely to ignite a fire. The contacts and components in the control box described by the inspector were undamaged. To ignite the coal fines the electrical components in the control box must first malfunction. The Secretary did not provide any evidence that a malfunction was at all likely. In addition, I find that it was not established that it was reasonably likely the moisture detected by the inspector would be sufficient to create an arc that would ignite the coal dust. The conditions cited in Citation No. 8466798 were not reasonably likely to contribute to an injury. Respondent's negligence was moderate.

A penalty of \$800.00 is appropriate for Citation No. 8466798.

G. Citation No. 8466799

On September 20, 2011, Inspector Scott issued Citation No. 8466799 under section 104(a) of the Mine Act, alleging a violation of section 77.400(a) of the Secretary's safety standards. (Ex. G-4). The citation stated that a guard on the No. 5162 belt had "broken loose

and was flopping around,” creating an opening that was 12 by 1.5 inches. *Id.* The guard contacted the moving parts. The condition existed for multiple shifts or days and created a cutting or smashing hazard. *Id.* Inspector Scott determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was S&S, the operator’s negligence was moderate, and that one person would be affected. Section 77.400(a) of the Secretary’s safety standards mandates that “exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.” 30 C.F.R. § 77.400(a). The Secretary proposed a penalty of \$1,203.00 for this citation.

For the reasons set forth below, I modify Citation No. 8466799 to be unlikely and non-S&S.

Discussion and Analysis

I find that the conditions cited in Citation No. 8466799 violated section 77.400(a). The Commission has held that a violation of section 77.400(a) requires a “reasonable possibility of contact and injury” that includes “contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness.” *Thompson Brothers Coal Company, Inc.*, 6 FMSHRC 2094, 2097 (Sept. 1984). To determine whether a reasonable possibility exists, the Commission stated that all “relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct” must be considered, emphasizing that “the vagaries of human conduct” cannot be ignored. *Id.* Respondent argues that its policy prohibited entry into the area of the cited guard while the piece of equipment operated and a yellow cable surrounded the area. (Tr. 434-35). Neither the policy nor the rope, however, provided a physical barrier that would surely stop a miner from entering the area due to human carelessness or the vagaries of human conduct. Respondent also argues that the unguarded area was too small for a miner to contact unless they did so advertently. I credit the inspector’s testimony that a miner could use the guard for stability when moving through the area from platform to platform. (Tr. 412-15). While grabbing the guard, a miner could inadvertently place his hand or fingers through the hole in the guarding.³ The condition cited in Citation No. 8466799 violated section 77.400(a).

I find that Citation No. 8466799 was not S&S; although it was possible for a miner to contact the pulley due to the cited guard, it was not reasonably likely. Respondent’s policy that miners could not approach the area of the cited guard while the machine operated was buttressed by the yellow cord, a clear indication to miners to avoid the area, which makes miners entering the area unlikely. The inspector also testified that miners would enter the area while the machine operated to examine the machine if they suspected an operational problem. (Tr. 430-31). This testimony was speculative and, even if it were correct, a miner searching for a problem would be wary of safety issues, making that miner less likely to contact an unguarded area. Miners were unlikely to enter the area of the cited condition and therefore not reasonably likely to sustain a serious injury. The inspector’s statement in the citation that the guard “was flopping around” is

³ The standard is not limited to inadvertent or accidental conduct. *See Mainline Rock and Ballast, Inc.*, 693 F.3d 1181, 1185 (10th Cir. 2012).

pure speculation because he admitted that the equipment was not operating at the time of his inspection. (Tr. 424).

Citation No. 8466799 was the result of Respondent's moderate negligence because Respondent should have known of the cited condition. I credit the inspector's testimony that condition existed for multiple shifts or even days. I find that a penalty of \$800.00 is appropriate for Citation No. 8466799.

II. SETTLED CITATIONS

The parties settled two of the citations in this case. (Tr. 8). Respondent agreed to withdraw its contest of Citation No. 8466796. The Secretary agreed to modify Citation No. 8467305 to delete the S&S determination because an injury was unlikely. The penalty is reduced to \$2,000.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have considered the Assessed Violation History Reports, which demonstrate that during the 15 months preceding the issuance of the citations in this case, Respondent was issued 121 citations and 52 of these citations were S&S. (Ex. G-15). At all pertinent times, Respondent was a large coal mine operator. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect upon the ability of BHP Navajo Coal Company to continue in business. The gravity and negligence findings are set forth above. In those instances in which I reduced the penalty from that proposed by the Secretary, I did so because, based upon the evidence presented at the hearing, I found that the likelihood of an injury was not as great as the Secretary believed and the number of people who would reasonably be affected by the violation was not as great as the Secretary assumed.

IV. ORDER

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

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
8466796	77.504	807.00
8141178	77.1607(i)	VACATED
8466798	77.202	800.00
8466799	77.400(a)	800.00
8467301	77.1103(b)	10,000.00
8467302	77.1103(c)	VACATED
8467303	77.1103(a)	2,000.00
8467304	77.1713(a)	5,000.00
8467305	77.1104	2,000.00
TOTAL PENALTY		\$21,407.00

For the reasons set forth above, I **VACATE** Citation Nos. 8141178 and 8567302 and **MODIFY** Citation Nos. 8567301, 8567303, 8567304, 8466798, and 8466799. BHP Navajo Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$21,407.00 within 30 days of the date of this decision.⁴

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

Distribution:

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⁴ 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.