FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 23, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. KENT 2010-784-M A.C. No. 15-18478-211341
v.	
APEX QUARRY, LLC, Respondent	Mine: Apex Quarry

DECISION AND ORDER

Appearances: Latasha T. Thomas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner

Todd Harris, pro se, White Plains, Kentucky for Respondent

Before: Judge McCarthy

I. Statement of the Case

This case is before me upon a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Petition charges Respondent, Apex Quarry, LLC (Apex) with thirteen violations of mandatory safety standards and seeks a total civil penalty of $23,979 for those violations.

Prior to hearing, the parties participated in a series of conference calls to discuss the status of settlement negotiations and narrow the issues for hearing. Respondent, through its *pro se* owner, Todd Harris, claimed that Apex Quarry was unable to pay the proposed penalties given the company's current financial situation.

A hearing was held in Nashville, Tennessee. The parties introduced rather limited testimony and documentary evidence, particularly given the number of citations at issue.[1] The

[1] Joint Exhibit 1, which reflected stipulated facts, and well as P. Exs. 1-14 (copies of citations, supporting documentation or photographs, and a certified violation history report) and R. Ex. 1 (a 2010 safety award), were received into evidence. (Tr. 10-15).

Secretary's sole witness was inspector Hollis.[2] Hollis gave a brief description of each citation and the bases for his gravity and negligence determinations supporting the proposed penalties. Harris, content with answers provided by Hollis after cross-examination, declined to provide narrative testimony concerning the citations at issue. Tr. 165. Instead, Harris' testimony was limited to Respondent's claimed inability to pay and additional testimony in response to cross-examination and questions from the bench. Tr. 167-80. Both parties waived post-hearing briefs. Tr. 165-66.

After carefully considering the testimony of inspector Hollis and pro se owner Harris, I find that the Secretary has demonstrated a clear violation of MSHA standards as alleged in Citation Nos. 6596269, 6596270, 6596275, 6596271, 6596273, and 6596276. These citations are affirmed as written. The Secretary, however, did not meet his burden of proof regarding Citation/Order Nos. 6596268, 6596269, 6596278, and 6596279. Accordingly, these citations and orders are vacated. Finally, Citation Nos. 6596272, 6596274, and 6596277 are modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation.

Based on the entire record and my observation of the demeanor of the witnesses,[3] I make the following:

II. Stipulations

At hearing, the parties agreed to the following stipulations:

1. Apex Quarry, LLC is the operator of the Apex Quarry; Mine ID No. 15-18478. The Apex Quarry is located in Christian County, Kentucky.

2. The Apex Quarry is a "mine" as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802(h).

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[2] Inspector Hollis has nearly thirty year of mining experience and has been with MSHA since April 1999. Tr. 29. Hollis' experience is exclusively with surface and underground metal/non-metal mines including "sand and gravel operations, dredges, limestone quarries, underground zinc mines, [and] underground lead mines." Tr. 31. Although clearly an experienced inspector, Hollis' interpretation of certain facts was fraught with unsubstantiated conclusions and logical fallacies. Accordingly, I give appropriate weight to this fact in assessing the probative value of Hollis' testimony and the Secretary's burden of proof.

[3] In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, and consistency or lack thereof within the testimony of witnesses and between the testimony of witnesses.

3. At all times relevant to these proceedings, products of the Apex Quarry entered commerce, or the operations or products of thereof affected commerce, within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.

4. Employees at the Apex Quarry worked approximately 20,000 hours in the two years preceding the violations at issue.

5. Copies of the violations at issue in this proceeding were served on Apex by an authorized representative of the Secretary.

6. Apex Quarry, LLC timely contested the violations.

7. [Withdrawn].[4]

8. In an effort to narrow the issues in this proceeding, Apex Quarry, LLC stipulates to the following facts related to the violations below:

   A. Citation No. 6596269 - N/A

   B. Citation No. 6596268 - Apex stipulates that there was not a breaker, or a dummy breaker, in the breaker box located in the foreman's office. However, Apex contends that the condition would not cause a fatal injury.

   C. Order No. 6596269 - N/A

   D. Citation No. 6596270 - Apex stipulates that the parking brake on the WABCO #4 35-ton haul truck was not maintained in functional condition. The parking brake would not hold the truck on the maximum grade that the truck travels. However, Apex contends that the condition would not cause a fatal injury.

   E. Citation No. 6596271 - Apex stipulates that the lights on the Kawasaki 770Z front loader were not maintained in functional condition. However, Apex contends that the condition would not cause a fatal injury.

[4] The original stipulation read: "Apex Quarry, LLC claims that the proposed civil money penalties will affect its ability to remain in business. Apex Quarry, LLC requests an opportunity to present proof regarding its financial condition." At hearing, the parties withdrew the stipulation because Apex had gone out of business after the stipulations were drafted. Tr. 10-11.

F. Citation No. 6596272 - Apex stipulates that the tail pulley on the return conveyor was not guarded. However, Apex contends that the condition was not reasonably likely to cause an injury.

G. Citation No. 6596273 - Apex stipulates that the lights on the #3 haul truck were not maintained in functional condition. However, Apex contends that the condition would not cause a fatal injury.

H. Citation No. 6596274 - Apex stipulates that the door glass on the WABCO #3 haul truck was broken. However, Apex contends that the condition was not reasonably likely to cause an injury.

I. Citation No. 6596275 - Apex stimulates that the parking brake on the #3 haul truck was not maintained in functional condition. The parking brake would not hold the truck on the maximum grade that the truck travels. However, Apex contends that the condition would not cause a fatal injury.

J. Citation No. 6596276 - Apex stipulates that there was not a plate covering an opening on the side of the portable impact safe start box. However, Apex contends that this condition would not cause an injury.

K. Citation No. 6596277 - Apex stipulates that adequate pre-operational checks of mobile equipment were not being conducted at the time the citation was issued. However, Apex contends that the violation was not reasonably likely to cause an injury. Apex further contends that the violation would not cause a fatal injury.

L. Order No. 6596278 - N/A

M. Citation No. 6596279 - Apex stipulates that the guardrails on the scales were not “mid-axle height” of the largest piece of equipment that uses the scales. However, Apex contends that the condition was not reasonably likely to cause an injury. Apex further contends that the scales are not a “roadway” as contemplated by 30 C.F.R. § 56.9300(b).

9. Apex Quarry, LLC is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and the presiding Administrative Law Judge has the authority to hear this case and issue a decision regarding this case.

10. Apex timely abated all citations at issue.

Jt. Ex. 1; *see also* Tr. 11 re stipulation 10.

III. Findings of Fact and Legal Analysis

Respondent is a limited liability company that operated a small limestone quarry in White Plains, Kentucky. In December of 2009, when the contested citations were issued, the mine was owned and operated by Todd Harris. Tr. 168. Harris had just taken control of Apex following a buyout of his partner, Leslie Strong. Harris alleges that Strong defrauded Apex and third parties, placing the company in a "negative cash flow situation." Tr. 168. Under Harris' management, Apex's financial troubles were exacerbated when Respondent incurred a series of MSHA citations and proposed penalties. *Id.*

In 2011, Harris represented Apex in an unrelated civil penalty case before the undersigned. In those proceedings, Respondent contested a penalty of $19,632 on the grounds that the size of the penalty would prevent him from remaining in business. *Apex Quarries, LLC*, 33 FMSHRC 3158-59 (Dec. 20, 2011) (ALJ McCarthy). Because Respondent did not provide audited financial statements as requested by the bench, I found that Respondent had failed to meet its burden of proof on that issue. *Id.* at 3162-63. After review of that record, I ordered Respondent to pay a reduced total penalty of $9,971 in 60 equal installments of $163.13.[5]

Unable to manage outstanding tax liabilities to the Kentucky Department of Revenue, however, Apex ceased operations in September 2011. Tr. 171. In March of 2012, Respondent sold all its mining equipment, real estate, and permits to Apex Materials, Inc., an independent limited liability company. Tr. 171, 172. Respondent, however, did not dissolve Apex Quarry, LLC on the advice of Respondent's accountant. *Id.*

A. Citation No. 6596269

[5] According to MSHA's Mine Data Retrieval System, Respondent is delinquent on all citations issued after November 2007 for which a penalty has been assessed. *See* Mine Safety & Health Admin., Data Retrieval System ("MSHA DRS"), http://www.msha.gov/drs/drshome.htm (Apex Quarry, LLC ("1518478")).

Citation No. 6596269 alleges a non-S&S[6] violation of 30 C.F.R. § 46.3(a) and states that, "[a] review of the training plan revealed that the new miner training section of the plan did not have the required hours, to total the 24 hours needed. The plan showed 12 hours total in the time required." P. Ex. 1.

The violation is alleged to affect one person and to be a result of moderate negligence. *Id.* Hollis found that the operator's negligence was mitigated by the fact that the violation was an oversight in an otherwise valid plan. Tr. 36. The citation further alleges that no injury was likely to result from the bookkeeping error. P. Ex. 1.; *see also* Tr. 35. The Secretary proposed a penalty of $100.

30 C.F.R. § 46.3(a) provides that an operator "must develop and implement a written plan, approved by [MSHA] under either paragraph (b) or (c) of this section, that contains effective programs for training new miners and newly hired experienced miners, training miners for new tasks, annual refresher training, and site-specific hazard awareness training." To receive MSHA approval, a training plan can be submitted the "Regional Manager, Educational Field Services Division, or designee, for the region in which the mine is located." 30 C.F.R. § 46.3(c). Alternatively, a plan is assumed to be approved if it contains, at minimum, the following information:

> 1) The name of the production-operator or independent contractor, mine name(s), and MSHA mine identification number(s) or independent contractor identification number(s); 2) The name and position of the person designated [to be] responsible for the health and safety training at the mine. This person may be the production-operator or independent contractor; 3) A general description of the teaching methods and the course materials that are to be used in the training program, including the subject areas to be covered and the approximate time or range of time to be spent on each subject area; 4) A list of the persons and/or organizations who will provide the training, and the subject areas in which each person and/or organization is competent to instruct; and 5) The evaluation procedures used to determine the effectiveness of training.

30 C.F.R. § 46.3(b)

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[6] The Mine Act defines an S&S violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is S&S "if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

Respondent does not deny the paperwork violation, but claims that the inspector did not take into account additional mitigating circumstances. Tr. 38. Respondent highlights Hollis' testimony on cross-examination that during his inspection, he did not discover any miner who lacked the requisite training. Tr. 141.

It is clear from the record that the bookkeeping omission constitutes a violation of section 46.3(a). Pursuant to 30 C.F.R. § 46.5, new miners must be provided twenty-four hours of mandatory training. Respondent's training plan did not account for half of the required training in contravention of this regulatory requirement. Even assuming that additional mitigating factors exist, as Respondent contends, the Secretary has proposed the minimum penalty for this paperwork violation. Accordingly, the Citation and $100 penalty are affirmed.

B. Citation No. 6596268

Citation No. 6596268 alleges a non-S&S violation of 30 C.F.R. § 56.12032. The cited standard provides that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs." 30 C.F.R. § 56.12032. The Citation specifically alleges that "[t]he breaker box located in the foreman's office is absent a breaker/ or dummy breaker in the box. The breaker or dummy breaker is helpful in isolating energized components from mines [sic] who may open the box." P. Ex. 2. The Citation further alleges that an injury would be unlikely to result from this condition, but if an injury occurred, the injury could reasonably be expected to be fatal assuming the miner was wet or standing in water. *Id.; see also* Tr. 42. Finally, the Citation alleges moderate negligence, with one person affected. P. Ex. 2. The Secretary has proposed a penalty of $425.

The circuit breaker box in question appears similar to the type commonly found in residential buildings. *See* P. Ex. 2B. The breaker box grants easy access to the breaker switches, while preventing access to the electrical components. Two vertical rows of metal knockouts provide potential slots for additional breakers to be installed. *Id.* The offending hole in the breaker box at issue was partially filled by a breaker, leaving only a small gap. *Id.*

Hollis testified that the door to the breaker box was closed and located indoors, in an "out-of-the-way place," and therefore a miner would not come into contact with energized components "without putting some effort into it." Tr. 40. Hollis explained that the purpose of the cover plate was to prevent inadvertent contact with electric components and to protect the electrical equipment from "becom[ing] compromised . . . by moisture . . . animals . . . birds, [or] wasps . . . making nests" in the electrical housing. Tr. 103-04.

After carefully examining the evidence before me, I conclude that the Secretary has not met his burden to establish a violation of section 56.12032. The standard only requires that a cover plate be installed which, according to Hollis, should be capable of preventing inadvertent contact and environmental hazards. Although Hollis believed that the presence of a dummy breaker would be "helpful," the cited standard makes no mention of a dummy breaker and the

standard does not require both a protective door and dummy breaker.[7]

[7] I note that the Secretary has previously maintained that a door can serve as a cover plate under section 56.12032. *Lakeview Rock Products, Inc.*, 18 FMSHRC 1504, 1506-07 (Aug. 1996) (ALJ) (finding a violation of the standard where the door to an electrical junction box was left ajar); *Essroc Cement Corp.*, 33 FMSHRC 459, 465-66 (Feb. 2011) (ALJ) (same).

Given the small size of the gap and the fact that Respondent kept the breaker box closed when not in use, I find that the breaker box door effectively guards against the risks outlined by Hollis and thus serves as a cover plate for the purposes of section 56.12032. Accordingly, this Citation and its associated penalty are vacated.

C. Order No. 6596269

Order No. 6596269 alleges a violation of 30 C.F.R. § 46.7(a) and states:

> Mr. Joey Peterson, haul truck driver, had not received adequate task training to operate the truck. When Mr. Peterson was asked to demonstrate the emergency steering function of the truck, he was unable to. When Mr. Peterson was asked how long he had been operating the truck he stated "this was his first day on that truck[.]" The mine operator was aware of the Part 46 training requirements. The Federal Mine Safety and Health Act of 1977 states that an untrained miner is a hazard to himself and to others.

P. Ex. 3. The cited standard provides that, before a miner performs a new task, the operator "must provide any miner who is reassigned to a new task in which he or she has no previous work experience with training in the health and safety aspects of the task to be assigned, including the safe work procedures of such task, information about the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of the mine's HazCom program." 30 C.F.R. § 46.7(a).

The Order is alleged to be significant and substantial, to wit, reasonably likely to result in an injury that would reasonably be expected to be fatal, and the result of high negligence, with one person affected. P. Ex. 3. The Secretary has proposed a penalty of $7,774.

During the inspection, Hollis flagged down a haulage truck and proceeded to question the driver about the truck's safety features. Tr. 46. The truck driver, Joey Peterson, answered all of Hollis' questions correctly, but was unable to engage the emergency steering function when asked to do so. *Id.;* Tr. 143. On this fact alone, Hollis determined that Peterson had not received adequate task training.

Hollis placed little importance on the fact that this was the first day that Peterson had been assigned to the haulage truck, and because the Order issued at 11:55 a.m., Peterson had driven the truck for only several hours. Tr. 47; P. Ex. 3. More importantly, Hollis appears to have completely disregarded the fact that Respondent had a record of providing the appropriate training to Peterson, but Hollis did not record this fact in his inspection notes or in the Order's narrative. Hollis testified, "I checked the records. But, again, when you ask a man to demonstrate something and he can't demonstrate it, the records is the records and the demonstration is the demonstration." Tr. 142.

Peterson's failure to demonstrate a single safety feature on a vehicle that he had only been operating for several hours, does not, in itself, prove that Respondent failed to provide training required under section 46.7(a). Had Peterson been unfamiliar with multiple safety features or had other miners also failed to demonstrate knowledge of the emergency steering function, perhaps an inference could be drawn that Respondent's training regime was incomplete or inefficient. Alternatively, Hollis could have attempted to determine the content of Respondent's new task training for this particular vehicle. Instead, Hollis' inquiry ended prematurely and the Secretary has been left to make a case on an incomplete set of facts that falls far short of meeting his burden of proof.

Accordingly, I find that the Secretary has failed to meet his burden of proof to establish a violation of 30 C.F.R. § 46.7(a). This Citation and its associated penalty are vacated.

D. Citation No. 6596270

Citation No. 6596270 alleges a violation of 30 C.F.R. § 56.14101(a)(2) and states:

> The parking break [sic] provided on the WABCO #3 35 ton haul truck was not maintained in a functional condition. The parking brake would not hold the truck either empty or loaded on the steepest grade it is required to traverse in the mine.

P. Ex. 4. The cited standard provides that "[i]f equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels." 30 C.F.R. § 56.14101(a)(2).

The non-S&S Citation alleges that an injury was unlikely to occur from this condition, but if an injury did occur, it could reasonably be expected to be fatal, with one person affected as a result of moderate negligence. P. Ex. 4. *Id.* The Secretary proposed a penalty of $425.

Hollis testified that when the truck was parked on the steepest road at the mine and the parking break was engaged, the vehicle rolled back approximately five or six feet. Tr. 55-56. Hollis expected that any injury to a miner hit by the large haulage truck would likely be fatal. Tr. 58-59. Respondent has stipulated to the violation, but argues that MSHA regulations require redundant breaking mechanisms. Tr. 143.

Given the parties' stipulation that the truck's parking brake was not operational, I find a violation of the cited standard. The inspector took into account the redundant braking mechanisms on the truck when determining that the violation would be unlikely to result in an injury. Tr. 53. This appears contrary to analogous Commission precedent in the S&S context,[8]

[8] C*f. Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133 (7th Cir. 1995); *see also Amax Coal*, 18 FMSHRC 1355, 1359

but under other extant Commission precedent, I lack authority to modify the non-S&S designation and make it S&S.[9] Although Respondent appears to contend that additional braking mechanisms also mitigate negligence, the presence of additional safeguards already required under the Act or MSHA regulations do not mitigate Respondent's duty to comply with a mandatory health or safety standard requiring operational parking brakes.

Additionally, Respondent contends that the violation is not likely to result in a fatal injury. Jt. Ex. 1. In explaining the "fatal" designation, Hollis testified that parking brake failures have resulted in fatalities in the past and that he was aware of instances where miners have died while working under unspecified vehicles. Tr. 58-59. Hollis' testimony on this point, however, was vague and generic. The inspector did not provide an example in which a miner at Apex would face a reasonable likelihood of injury, considering the type of vehicle cited, its use at this particular mine, and the location where it was normally parked or serviced. Instead, he proposed a scenario, unsupported by any factual basis, where a miner would be "climbing around . . . [and] crawling under [the vehicle], trying to work on it" while parked on an incline. Tr. 59.

Despite the paucity of specific evidence on this issue, I find that the hazard was reasonably likely to contribute to a serious and possibly fatal injury. The size of the Wabco #3 truck, capable of carrying 35 tons, substantially increases the likelihood that the failure of the parking brake to hold on the mine's steepest incline contributed to a run-away truck hazard that would reasonably result in a fatal crushing injury. In addition, I take administrative notice of the fact that MSHA has designated § 56.14101(a) in its "Rules to Live By" program as one of the most commonly cited standards in fatal accident investigations at metal/non-metal mines. MSHA, FATALITY PREVENTION - RULES TO LIVE BY, available at www.msha.gov/focuson/RulestoLiveBy/RulestoLiveByI.asp (last accessed Jan. 23, 2014). Accordingly, Citation No. 6596270 is affirmed, as written, and Respondent is assessed a penalty of $425.

E. Citation No. 6596275

Citation No. 6596275 alleges a violation of 30 C.F.R. § 56.14101(a)(2) and states that "[t]he parking break [sic] on the WABCO #3 haul truck would not hold the truck on the steepest grade it [is] required to traverse in the mine. The truck was tested loaded and empty and the parking brake would not hold in either case." P. Ex 9.

For the reasons set forth in the previous citation, Citation No. 6596275 is affirmed and a penalty of $425 is assessed against Respondent.

(Aug. 1996); *Amax Coal*, 19 FMSHRC 846, 850 (May 1997); *Big Ridge,* 35 FMSHRC 1525 (June 2013); *Cumberland Coal*, 33 FMSHRC 2357, 2369-70 (Oct. 2011), *aff'd Cumberland Coal Res. v. FMSHRC*, 717 F.3d 1020 (D.C. Cir. 2013).

[9] *Mechanicsville Concrete, Inc. t/a Materials Delivery*, 18 FMSHRC 877, 880 (June 1996).

F. Citation No. 6596271

Citation No. 6596271 alleges a violation of 30 C.F.R. § 56.14100(b) and states:

> The lights on the Kawasaki 770 Z front-end loader are not working. The loader is used to feed the plant hopper and the lights would be helpful in the event of rail or dusty conditions.

P. Ex. 5. The cited standard provides that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." 30 C.F.R. § 56.14100(b). The non-S&S Citation alleges that an injury was unlikely to occur from this condition, but if an injury did occur, it could reasonably be expected to be fatal, with one person affected as a result of moderate negligence. P. Ex. 5. The Secretary has proposed a penalty of $425.

Inspector Hollis testified that the lights on the front-end loader provided two important safety functions: 1) to aid the operator's vision in inclement weather, low light, or dusty conditions, and 2) to warn miners and other traffic of the vehicle's approach. Tr. 62-63. Hollis determined that an injury was unlikely because the mine operates during daytime hours, but added that the mine would likely continue normal operations in rainy weather or dusty conditions. Tr. 64-66.

Respondent stipulated that the headlights were not operational at the time of the inspection, but maintains that the violation would not contribute to a hazard that would result in a fatal injury. Jt. Ex. 1. Hollis justified the "fatal" designation because he was concerned that "someone could have been run over and killed." Tr. 66. Hollis testified that there were miners on foot and miners operating other vehicles in the area where the loader was operating. Tr. 64.

Similar to the analysis in the parking brake citations above, I find that if an exposed miner, particularly a miner traveling on foot, was hit by a large vehicle like the front-end loader, the resulting injury would likely be fatal. Furthermore, Section 56.14100(b) has been recognized in MSHA's Rules to Live By III as a major contributor to fatalities at metal/non-metal mines. MSHA, RULES TO LIVE BY III - PREVENTING COMMON MINING DEATHS, *available at* www.msha.gov/focuson/RulestoLiveByIII/MNMStandards.asp (last accessed January 23, 2014). Accordingly, Citation No. 6596271 is affirmed, as written, and Respondent is assessed a penalty of $425.

G. Citation No. 6596273

Citation No. 6596273 alleges a violation of 30 C.F.R. § 56.14100(b) and states that "[t]he lights on the WABCO #3 haul truck are not working. The lights would be helpful in the event of

rain or dusty conditions." P. Ex. 7. The non-S&S Citation alleges that an injury was unlikely to occur from this condition, but if an injury did occur, it could reasonably be expected to be fatal, with one person affected as a result of moderate negligence. *Id.* The Secretary has proposed a penalty of $425.

For the reasons set forth in the previous citation, Citation No. 6596273 is affirmed and a penalty of $425 is assessed against Respondent.

H. Citation No. 6596272

Citation No. 6596272 alleges a violation of 30 C.F.R. § 56.14107(a) and states:

> The tail pulley guard on the return conveyor has been damaged and has exposed the moving machine parts (fluted tail pulley) to passing miners. There are footprints in the mud where miners have passed by the exposed parts. If the condition is continued [sic] to exist it is reasonably likely that a miner could contact the moving parts. If a miner accidentally contacted the parts, he/she could receive severe possibly permanently disabling injuries.

P. Ex. 6. The cited standard provides 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 S&S Citation alleges that the cited condition was reasonably likely to contribute to a hazard that would result in an injury and that such injury would reasonably be expected to be permanently disabling, with one person affected as a result of moderate negligence. P. Ex. 6. The Secretary has proposed a penalty of $946.

Respondent does not contest the fact that the tail pulley guard was damaged, but maintains that the violation was not reasonably likely to result in injury. Jt. Ex. 1. Respondent points out that the tail pulley guard was in place, but that one corner of the guard had been damaged or bent back, thereby exposing the flutes on the tail pulley. Tr. 144-45; *see also* P. Ex. 6B. Respondent also asserts that the area was not accessed often, thereby reducing the likelihood that a miner would come into contact with the unguarded tail pulley. *Id.*

When asked why the citation was designated reasonably likely to result in an injury, Hollis replied:

> Well, there was exposure or evidence that someone had been in the area by the footprints in the mud. The location of the pulley, the person could easily get within a seven-foot criteria on 14107(a) as far as guarding moving machine parts. So if the condition would

> have been allow[ed] to continue, it's reasonably likely someone at one time could have contacted those machine parts and got into them.

Tr. 82.

Hollis further testified that a ground man may patrol the area to ensure that the machinery is operational and to perform routine maintenance or clean up. Tr. 83. Hollis also testified, however, that this particular tail pulley was self cleaning and "doesn't get a material buildup on it like a smooth tail pulley does," and conceded that the footprints could have been left by a miner greasing the bearing during a pre-shift examination. Tr. 78-79; 145.

Under the Mine Act, an S&S violation is one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is S&S "if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

To establish an S&S violation under *National Gypsum*, the Secretary must prove the four elements of the Commission's subsequent *Mathies* test: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *See Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *accord Buck Creek Coal, supra*, 52 F.3d at 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria). An evaluation of the reasonable likelihood of injury is made assuming continued normal mining operations. *U.S. Steel Mining Co.* (*U.S. Steel III*), 7 FMSHRC 1125, 1130 (Aug. 1985) (*quoting U.S. Steel Mining Co.* (*U.S. Steel I*), 6 FMSHRC 1573, 1574 (July 1984).

The tail pulley was mostly guarded, as shown in the inspector's photograph. *See* P. Ex. 6B. The gap in the damaged guard appears relatively small and positioned in such a way that a miner would be unlikely to come in contact with the fluted tail pulley without reaching into the gap. I find it unlikely that a ground man would come in contact with the unguarded section while patrolling the area. Rather, only a miner working in very close proximity to the tail pulley while the machinery was operational would likely be exposed to the hazard. The Secretary has offered no evidence to establish that a miner would ever be subject to these conditions while the machinery was running.

Therefore, I find that the Secretary has failed to meet his burden of proof to show that, assuming continued mining operations, the violative condition contributes to a hazard that was

reasonably likely to result in a serious injury. Accordingly, the Citation is modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation. Applying the criteria set forth in section 110(i) of the Act, I assess a penalty of $190 to reflect the lower level of gravity.

I. Citation No. 6596274

Citation No. 6596274 alleges a violation of 30 C.F.R. § 56.14103(b) and states:

> The door glass (right side sitting in the seat) of the WABCO #3 haul truck is broken with sharp raised edges. The truck operator sits with-in 3 feet of the sharp edges. If the condition is allowed to exist it is reasonably likely that the operator would contact the sharp raised edges, receiving injuries requiring time to heal. The truck is used to haul material from pit to plant.

P. Ex. 8. The cited standard provides that "[i]f damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed. Damaged windows shall be replaced if absence of a window would expose the equipment operator to hazardous environmental conditions which would affect the ability of the equipment operator to safely operate the equipment." 30 C.F.R. § 56.14103(b).[10]

The S&S Citation alleges that it was reasonably likely that an injury would result from the cited condition and that such injury would reasonably be expected to result in lost workdays or restricted duty, with one person affected. P. Ex. 8. Hollis determined that the alleged violation was the result of low negligence after he was informed that Respondent had ordered a replacement window. Tr. 99, 178. The Secretary has proposed a penalty of $285.

Respondent stipulated to the fact that the window glass was broken, but argues that the hazard was not reasonably likely to cause injury. Hollis testified that the broken window was approximately three feet to the right of the driver's seat. Tr. 92. While fractured, the window remained mostly intact, with the exception of a portion of the top right quadrant. P. Ex. 8B. When asked how an operator would come in contact with the broken glass, Hollis testified, that "getting in the truck, the person could possibly come in contact with the glass." Tr. 92. Upon questioning from the undersigned, Hollis conceded that an operator would enter the cab from the left side, not the right side where the window was broken.Tr. 92, 94.

[10] The Secretary does not claim that the broken window impaired the operator's visibility or exposed the operator to adverse environmental conditions.

Next, Hollis testified that the operator of the truck might come in contact with the glass when being jostled around the cab while operating the truck on the mine's bumpy roadways. Tr. 95. Hollis, however, conceded that if wearing a seatbelt, as required, the operator would be less likely to extend his arm to the window three feet away in an effort to regain balance. Tr. 147. Hollis also testified that the operator might place a water jug or lunch bucket on the right side of the cab or that a buddy seat might be installed on the right side to accommodate an additional passenger. Tr. 97. Hollis, however, could not remember if such conditions existed in the cited vehicle. *Id.*

Harris and Hollis gave conflicting testimony as to the composition of the broken window. Section 56.14103(a) requires that all windows of self-propelled mobile equipment should be made of "safety glass or material with equivalent safety characteristics."[11] Harris testified that the window was made of plastic plexiglass. Tr. 178. Hollis, however, claimed that it was not plexiglass, but what he called "door glass" or "windshield glass." Tr. 146. Inspector Hollis's characterization of the glass did not draw any distinction between tempered glass or laminate glass, which may react differently when shattered and pose a different level of risk of cuts or lacerations. Both parties do agree, however, that the broken window did have some sharp edges. Tr. 100, 178.

I find that the Secretary established that the safety glass posed a hazard to the operator of the vehicle under the cited standard and therefore the Secretary established a violation of section 56.14103(b). Based on the existing record, the risk of such hazard, however, appears to be remote. The most likely scenario set forth by Hollis was that the mine's bumpy roads would jostle the operator, causing him to reach out and cut his arm on the broken window.[12] Tr. 95. For a vehicle operator wearing a seat belt to touch the broken glass, the driver's arm would have to extend three feet and come in contact with the top right quadrant of the window. Such a location does not appear a likely candidate for an operator to grasp in an attempt to regain balance. *See R S & W Coal Co. Inc.*, 30 FMSHRC 100, 101-02 (Jan. 2008) (ALJ) (violation was not S&S when the vehicle operator was unlikely to come in contact with the broken section of the driver-side window). Furthermore, I credit Harris that the window was made of plastic plexiglass over Hollis' vague characterization of the glass. Since I find that the window was plastic, the chance of lacerations was substantially decreased. *See Johnson Paving Co., Inc.*, 31 FMSHRC 1246,

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[11] Safety glass is defined as either tempered glass "that when struck breaks into relatively harmless granules rather than large jagged pieces" or laminated glass. *Webster's Third New Int'l Dictionary (Unabridged)* 1998 (1993). Laminate glass is a "plate consisting of two or more sheets of glass with plastic sheeting bonded between to resist shattering." *Id.* at 1267.

[12] The other scenarios set forth by Hollis appear to be mere conjecture with little or no foundation based on the actual condition or use of the truck in question. Tr. 92 (contact with glass when entering vehicle), or Tr. 97 (contact with glass when reaching for a water jug or a passenger riding in a buddy seat).

1258-59 (Oct. 2009) (ALJ) (citation vacated where judge found that "[s]afety glass typically cracks rather than shatters. It is common knowledge that such cracks do not necessarily produce edges capable of cutting a person's hand.").

Accordingly, Citation No. 6596274 is modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation. Applying the criteria in Section 110(i), a civil penalty of $100 is assessed for this violation.

J. Citation No. 6596276

Citation No. 6596276 alleges a violation of 30 C.F.R. § 56.12032 and states:

> There is not a knock-out plug/cover plate in place on the side of the portable impact safe start box located in the motor control center. The plug/plate is helpful in maintaining the inner integrity of the box and provides a level of protection.

P. Ex. 10. The cited standard provides that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs." 30 C.F.R. § 56.12032. The non-S&S citation alleges that an injury would be unlikely to occur from this condition, but if an injury did occur, such injury would reasonably be expected to cause lost workdays or restricted duty, with one person affected as a result of moderate negligence. P. Ex. 10. The Secretary has proposed a penalty of $127.

Respondent has stipulated to the violation, but argues that the hazard would not result in injury. Jt. Ex. 1. Unlike Citation No. 6596269 discussed above, the motor control start box did not have a door or cover that would protect against inadvertent contact or environmental hazards. Exposed electrical components clearly pose a risk of injury, even if such risk is unlikely, as the Secretary maintains. Accordingly, the Citation is affirmed, as written, and I assess a penalty of $127.

K. Citation No. 6596277

Citation No. 6596277 alleges a violation of 30 C.F.R. § 56.14100(a) and states:

> Adequate pre-operational checks of mobil [sic] equipment are not being conducted at the mine. This is evident by the amount of citations issued on equipment conditions. A through [sic] pre-operational check helps identify conditions that could be hazardous to equipment operators and notifies the mine operator of the conditions.

P. Ex. 11. The cited standard provides that "[s]elf-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift." 30 C.F.R. § 56.14100(a). The S&S Citation alleges that it is reasonably likely that an injury would result from the cited practice and that the injury would reasonably be expected to be fatal, with one person affected as a result of moderate negligence. P. Ex. 11. The Secretary has proposed a penalty of $2,106.

Pre-operational safety examinations should be performed each shift before a piece of equipment is put into operation. Tr. 113. Hollis testified that Harris told him that pre-operational examinations were performed on all vehicles in accordance with the standard. Tr. 111. In addition, the operators of the equipment produced examination checklists documenting that the examinations were performed and that "everything was okay." Tr. 116-17. Hollis testified that the checklists were "good forms" and included a detailed list of safety features that should be examined. Tr. 117-18.

While section 56.14100(a) does not specifically include an adequacy requirement, Hollis testified that he believes the standard was violated because the mobile equipment operators did not document the violative conditions above regarding inoperative parking brakes and headlights. Tr. 112. Hollis testified that equipment operators must do more than pay lip service to checking the oil and fluids. Rather, they must establish that they have checked all safety-related features, such as brakes and steering, prior to engaging a vehicle. *Id.*

I note that here were five citations issued for defects in mobile equipment: two citations for inoperative headlights, two citations for inoperative parking brakes, and one citation for a broken window. Citation No. 6596274 was documented by mine management and a replacement window had been ordered at the time the citation was issued. Tr. 178. Accordingly, that Citation does not demonstrate that the pre-operational examination was inadequate. Similarly, the Citations for the faulty parking brakes are not very persuasive because the vehicle must be put into operation and driven to the mine's steepest gradient before the violative condition can be tested or observed. 30 C.F.R. § 56.14101(a)(2) requires that parking brakes be capable of holding the equipment with the "typical load on the maximum grade it travels." To observe this condition, the vehicle must be loaded then driven to the part of the road with the steepest grade. Notably, inspector Hollis did not discover the faulty parking brakes by visual inspection, but by asking the vehicle's operator to attempt to engage the parking brake on the steepest grade at the mine. Tr. 56. There was no testimony adduced at hearing about whether the condition would be apparent to an operator *before* the equipment was put into operation.[13]

[13] I note that the standard requires pre-operational examinations to be performed by the vehicle operator, not a certified mechanic. As such, the complexity of the examination is controlled by what a competent vehicle operator can reasonably be expected to perform prior to operation of the vehicle.

On the other hand, I find that it unlikely that the headlights on two different vehicles became inoperable after pre-operational examinations were concluded. Rather, it appears that the equipment operators were not checking the functionality of the headlights during the pre-operational examination. Had a full examination been performed, the problems should have been obvious to a competent, well-trained miner. *Cf. Sunbelt Rentals, Inc.*, 35 FMSHRC 3208 (Sep. 2013) (ALJ McCarthy), *petition for rev. granted*, Unpublished Order dated Jan. 13, 2014 (summary dismissal granted where facts established that a properly recorded pre-shift examination by a competent examiner failed to note a *latent hazard)*. Although section 56.14100(a) does not require that examinations be "adequate," where the violative condition is patently obvious or especially egregious, the failure to note such condition during the examination is tantamount to the failure to conduct a pre-operational examination. *See Cemex, Inc.*, 32 FMSHRC 1897, 1903-04 (Dec. 2010) (ALJ) (discussing pre-shift workplace examinations under § 56.18002(a)). Accordingly, I find such a violation here with respect to the headlights on two separate trucks.

The two citations for inoperable headlights alone, however, do not warrant the S&S designation. As noted above, the deficiencies with the pre-operational examinations were not as extensive as inspector Hollis had determined when issuing the Citation because Hollis improperly considered the parking brake and broken window violations. Tr. 108.

Furthermore, I find that the gravity for this Citation should not exceed that of the headlight violations, Citation Nos. 6596273 and 6596271, which were not alleged to be S&S. While the decisions of other judges are not binding on the undersigned, I note that inspector Hollis's classification of the violations for inoperable headlights as non-S&S was in keeping with a long line of ALJ decisions finding the same. *See Freeman Rock, Inc*., 28 FMSHRC 354, 358 (May 2006) (ALJ Melick) (inoperable headlights violation was of low gravity); *Nelson Bros. Quarries*, 24, FMSHRC 980, 989 (Nov. 2002) (inoperable headlights did not pose a hazard under § 56.14100(b) when vehicle operated only during daylight hours) (ALJ Feldman); *Florida Rock Indus.*, 34 FMSHRC 745, 762-63 (Mar. 2012) (ALJ Zielinski) (citation for broken headlights was not S&S when operation of vehicle in darkness or reduced visibility was rare); *Walker Stone Co.*, 20 FMSHRC 1225, 1226 (Oct. 1998) (ALJ Manning) (violation for inoperable headlights "was not very serious" when vehicle only used in daylight hours); *Bob Bak Constr*., 19 FMSHRC 582, 605 (Mar. 1997) (ALJ Fauver) (judge credited inspector testimony that if the vehicle was only operating during daylight hours, the violation of § 56.14100(b) was not S&S); *Walker Stone Co.*, 20 FMSHRC 1218, 1222 (Oct. 1998) (ALJ Manning**)** (lack of headlights not S&S when vehicle operated during daylight hours). It is undisputed that the mine only operated during daylight hours and that mines such as Apex Quarry typically cannot operate in heavy rain. Tr 64-65. As the failure to check headlights during pre-operational examinations of mobile equipment contributes to the same hazard as the citations for inoperable headlights, I modify the citation to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation.

With regard to negligence, I find that Apex was performing and documenting pre-operational examinations and its pre-operational checklist exceeded industry standards. As

inspector Hollis noted, Respondent provided equipment operators with a comprehensive pre-operational checklist that required operators to check safety features. According to Hollis, Apex's checklist appears to have exceeded normal industry standards and thus mitigated Respondent's negligence. In these circumstances, I affirm the inspector's finding of moderate negligence.

As such, Citation No. 6596277 is modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely;" to delete the significant and substantial designation. Based on the reduction in gravity, I find that a reduced penalty of $425 is appropriate under section 110(i) of the Act.

L. Order No. 6596278

Order No. 6596278 alleges a violation of 30 C.F.R. § 46.11(a) and states:

> Three contract miners working at the mine have not received the required site-specific hazard training. The mine operator was aware of the training requirements. The mine operator must withdraw the contract miners until they have received the required training. The Federal Mine Safety and Health Act of 1977 states that an untrained miner is a hazard to himself and to others.

P. Ex. 12. The section 104(g)(1) Order is alleged to be significant and substantial because the training violation is reasonably likely to result in an injury that would be fatal, with three people affected as a result of high negligence. P. Ex. 12. The Secretary has proposed a penalty of $9,882.

The cited standard provides that the operator "must provide site-specific hazard awareness training before any person specified under this section is exposed to mine hazards . . . . The training must address site-specific health and safety risks, such as unique geologic or environmental conditions, warning and evacuation signals, evacuation and emergency procedures, or other special safety procedures; and recognition and avoidance of electrical and powered-haulage hazards, and hazards resulting from traffic patterns and control or in restricted areas. 30 C.F.R. § 46.11(a), (d). Unlike other training requirements, MSHA regulations are much more lenient in determining what constitutes training under this section. Operators need only alert miners of site-specific hazards by means of "written hazard warnings, oral instruction, signs and posted warnings, walkaround training, or other appropriate means." 30 C.F.R. § 46.11(e). Further, such training is "not required for any person who is accompanied at all times by an experienced miner who is familiar with hazards specific to the mine site." 30 C.F.R. § 46.11(f).

The record reveals that during the inspection, Hollis approached three contractors working near the plant in an area where vehicles were parked when not in use. Tr. 121. Hollis identified one of the contractors, Mark Bowles, as the supervisor or owner of the contracting

company. Tr. 122-23. Hollis then asked each contractor if they had received site-specific hazard training "for contractors." They replied that they had not. *Id.*; Tr. 150. When Hollis requested that the mine superintendent produce records showing that the contractors had been given site-specific hazard training, he was unable to locate such records. *Id.* 122.[14] While the Order was premised on Hollis' belief that the contractors had no familiarity with Apex Quarry, the inspector did not ask the contractors about their experience working at Apex Quarry. Tr. 123-24, 151.

Hollis maintains that even though the contractors may have been experienced, failure to provide site-specific hazard training to the contractors put them at risk of fatal injuries. Tr. 123-24. Hollis testified that the contractors should have received training regarding the hazards associated with "their exposure to the blasting activities, the traffic pattern activities, and other hazards associated with mine property." Tr. 125. On the other hand, Harris argues that the contractors did not need to receive site-specific hazard training because they were accompanied by an experienced miner with knowledge of the hazards specific to the area of the mine where the contractors were working. Harris argues that, in addition to his role as a contractor, Bowles was Respondent's employee and had experience working at the mine site. Tr. 150. Harris also testified that in addition to his job with Respondent, Bowles rents mining equipment to Respondent. *Id.*; Tr. 160-61.

Pursuant to subsection 46.11(f), an operator does not need to provide site-specific hazard training when miners are accompanied by an experienced miner familiar with the hazards specific to the mine site. It is undisputed that the contractors were under the supervision of Bowles, an experienced miner. Tr. 123. Harris maintains that Bowles worked both in his capacity as a rank-and-file miner and as a contractor renting equipment to Respondent. Tr. 150, 160-61. Although Respondent has not provided additional evidence concerning Bowles' relationship with Respondent, the Secretary has presented no evidence in support of Hollis' allegation that Bowles was unfamiliar with the mine site and its hazards. In fact, during the inspection, Hollis did not even inquire as to the contractors' experience or familiarity with Apex Quarry and the site-specific hazards to which they were exposed. Tr. 151.

Even assuming, *arguendo*, that Bowles was not an experienced employee of Apex Quarry, the Secretary has not established that there were site-specific hazards that the contractors might be exposed to, but of which they were unaware. Section 46.11(a) only requires that site-specific hazard training address hazards to which the contractors may be exposed. Hollis testified that there were at least two potential hazards at Apex Quarry that the contractors should

[14] It is not clear from the record if Respondent was required to maintain site-specific hazard training records for two of the contractors. Section 46.9 specifically exempts operators from having to maintain such records for maintenance or service workers, who do not work at a mine site for frequent or extended periods. *See* 30 C.F.R. § 46.2(g)(2). Two of the contractors were preforming maintenance on mobile equipment at the time that the Order was issued. Tr. 127. There was no testimony regarding the amount of time the contractors spent at the mine. Tr. 151.

have been made aware of: blasting activities and traffic pattern activities.

There is insufficient evidence to support Hollis' contention that the contractors were exposed to blasting hazards. The contractors were working at a ready line near the plant, which by Hollis' own estimation was between 150 and 200 yards from the pit. Tr. 57, 121. Hollis could not recall if the mine was blasting while the contractors were on mine property. Tr. 125. Further, the Secretary has not proffered any evidence that the contractors would be required to enter the pit where the operator was engaged in blasting activities. Given the contractors' considerable distance from the pit and limited work area, I cannot assume without any supporting evidence, that the contractors were in an active blast area and thus required to have site-specific hazard training to make them aware of the potential hazards associated with blasting.

As to the Hollis' claim that the contractors were subject to hazards from their exposure to traffic pattern activities, I find that the severely limited scope of Hollis' investigation failed to support his conclusion that the contractors were not made aware of such hazards. Hollis' allegations are based primarily on the response of the contractors when asked by Hollis if they had received site-specific training for contractors. While the contractors replied that they had not received such training, it is unclear if the contractors understood the special meaning of the term "training" in the context of section 46.11. While most training in the MSHA context consists of highly standardized formal instruction, section 46.11 has a significantly more expansive definition of what constitutes "training" than what one normally would assume.[15]

As noted, under the regulation, operators can provide training through the use of written hazard warnings, oral instruction, signs and posted warnings, walkaround training, or other appropriate means to alert persons to site-specific hazards. 30 C.F.R. § 46.11(e). Thus, a violation of the standard does not rest simply on whether a miner received formal instruction, but rather whether the operator took appropriate steps to alert miners of site-specific hazards. The inspector, however, did not inquire as to the contractor's familiarity with the mine site or whether they were made aware of any hazard particular to this mine. Because the inspector did not examine other means of "training" that MSHA has deemed appropriate, Hollis's inquiry did not go far enough to establish a violation of the standard.

Thus, after consideration of all the circumstances in the existing record, I find that the Secretary has failed to establish a violation of 30 C.F.R. § 46.11(a). Accordingly, Order No. 6596278 and its associated civil penalty are vacated.

M. Citation No. 6596279

Citation No. 6596279 alleges a violation of 30 C.F.R. § 56.9300(b) and states:

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[15] Even inspector Hollis was hesitant to classify informal discussion with miners and mine management as "training." Tr. 199.

> The rails of the truck scales are not at least mid-axle height of the largest piece of equipment that uses them .. [sic] The existing rails are approximately 4-5 inches from the deck floor. The mid-axle height of the equipment is about 17-19 inches. There is a 3-3 ½ foot vertical drop on one side of the scales. If a truck over turned on this drop is it [sic] reasonably likely that the operator could receive injuries requiring time to heal. The scales are used everyday to weigh trucks.

P. Ex. 13. The cited standard provides that "[b]erms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway." 30 C.F.R. § 56.9300(b). The cited condition is alleged to be a significant and substantial violation of the standard because it contributed to a tip-over hazard that was reasonably likely to result in a lost-workdays or restricted-duty injury, with one person affected as the result of moderate negligence. P. Ex. 13. The Secretary has proposed a penalty of $634.

Respondent concedes that the truck scale did not have guards or berms of mid-axle height, but contends that the hazard was not reasonable likely to result in injury. Jt. Ex. 1. Further, Respondent argues that the truck scale does not constitute a "roadway" for the purposes of section 56.9300(b). *Id.*

The facts concerning Citation No. 6596279 closely mirror those in *Knife River Corp.*, 34 FMSHRC 1109 (May 2012) (ALJ McCarthy). At issue in *Knife River* was a truck scale equipped with a 10-inch rub rail and a 41-inch drop-off that was cited under section 56.9300(b). *Id.* at 1111. I found, as a matter of fact and law, that the Secretary failed to establish that the Paetsch pit truck scale at issue in that case was a roadway or part of the mine's roadways. *Id.* at 1122.[16] My rationale was based on the fact that the scale was "a piece of equipment designated and used for a specific purpose. It was not designed to serve as a roadway and does not share roadway features, such as banks, that are envisioned in section 56.9300. Not all traffic must travel the scale to reach a particular destination and the scale is not integral to the adjacent roadway's function." *Id.*

[16] Additionally, I found in *Knife River* that the Secretary's broad definition of a roadway encompassing truck scales was unreasonable, inconsistent with the regulatory language and history, and unworthy of deference. *Knife River Corp., supra*, 34 FMSHRC at 1127-31. In this case, the Secretary has declined to brief the issue or set forth his rationale for interpreting section 56.9300(b) to include truck scales. In the interest of brevity, my legal findings in *Knife River* regarding the scope and plain meaning of the standard are incorporated by reference.

In this case, Hollis' description of the truck scale's function and use is more akin to the limited-use equipment described in *Knife River* than to the bridges, ramps, and benches that the Commission has found to be extensions of a mine's roadway system in the context of a similar regulation concerning elevated roadways at coal mines. *See El Paso Rock Quarries*, 3 FMSHRC 35, 36 (Jan. 1981) (bench is an elevated roadway); *Burgess Mining & Constr. Corp.*, 3 FMSHRC 296 (Feb. 1981) (bridge is an elevated roadway); *Capitol Aggregates, Inc.*, 4 FMSHRC 846 (May 1982) (ramp is an elevated roadway); *see also* 30 C.F.R. § 77.1605. Hollis testified that a "truck would not have to cross over the scales to leave the property. There was a road right beside the scales . . . and if [the truck] didn't need weigh[ing] or wasn't weighed, [the truck driver] could go around the scales." Tr. 131. Further, there was only one vehicle on the scale at a time and the vehicle would be traveling "very, very slow," less than two to three miles an hour. Tr. 134, 136, 152.

Upon examination of the use and function of the truck scale at issue, I find as a matter of fact that the truck scale at Apex Quarry is not a roadway or part of the mine's roadways under section 56.9300. Furthermore, I incorporate by reference the legal analysis set forth in *Knife River* establishing that a truck scale is not a "roadway" under the clear and unambiguous meaning of the standard. Accordingly, Citation No. 6596279 and the associated proposed penalty are vacated.

VI. Penalty Assessment

Section 110(i) of the Mine Act sets forth the following criteria to be considered in determining an appropriate civil penalty:

> The operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification and violation.

Apex is a small quarry, employing no more than eight employees at any given time. Tr. 170. The parties have stipulated that Respondent timely abated the violations in good-faith. Tr. 11. The negligence and gravity factors have been addressed above with respect to each violation.

Both Respondent and the Secretary agree that Apex is no longer in the mining business. Tr. 10. Harris provided undisputed testimony that Apex has sold its assets and is no longer operational. Tr. 169. Harris further testified that he does not intend to reopen mining operations and is currently working as a contract mechanic. Tr. 172. Respondent, however, has not dissolved its corporate entity based on advice from its accountant. Tr. 171.

The Secretary contends that the section 110(i) criteria regarding the effect of a penalty on an operator's ability to continue in business is inapplicable to an operator who is already out of business. *Spurlock Mining Co.*, 16 FMSHRC 697 (Apr. 21, 1994). In *Spurlock*, the Commission

declined to reduce a penalty where a mine ceased operations, but intended to reopen once sufficient financing was secured. *Id.* 700. The Commission, however, specifically declined to pass on whether it would be appropriate to reduce the penalty if a mine was permanently out of business. *Id.*

Respondent has offered no evidence demonstrating that Apex is permanently out of business. The company remains registered with the State of Kentucky as a corporate entity and Respondent has not been able to account for all of the $750,000 obtained through the sale of Apex's assets. Tr. 171-74. While a portion of this money is due to creditors, any remaining funds could be used by Apex to reenter the mining industry. As Respondent has not provided any audited financial documentation showing what Apex is owed and what it owes it creditors, I cannot determine if Apex is unable to pay the penalties assessed.

Furthermore, although Apex Quarry, LLC may have sold its assets, the mine continues production under new ownership as Apex Materials, LLC. Tr. 172. In an apparent attempt to avoid paying MSHA penalties, Harris testified that he was advised to keep the Apex Quarry alive as a corporate entity to avoid personal liability for outstanding MSHA penalties. Tr. 171. The sale of a mine, however, does not absolve the owners from paying outstanding MSHA penalties, particularly in the successor or alter ego context. *See generally Performance Coal Co.*, 34 FMSHRC 587 (Mar. 2012) (ALJ) (approving settlement of outstanding proposed penalties to be paid by successor-in-interest); *Ember Contracting Corp.*, 33 FMSHRC 2742, 2758 (Nov. 2011) (ALJ) ("The Mine Act's concession to operators having difficulties in continuing their businesses does not reward those engaged in shell games.").

For the reasons set forth above, I decline to reduce the assessed penalties on account of Respondent's financial position. Accordingly, a total penalty of $2,642 is assessed against Respondent.

VII. Order

WHEREFORE, it is **ORDERED** that Citation/Order Nos. 6596279, 6596268, 6596278 and 6596269 be **VACATED**. Citation Nos. 6596274, 6596277, and 6596272 are **MODIFIED** to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation. It is **ORDERED** that Respondent pay a total penalty of $2,642 within thirty days of this decision.[17]

/s/ Thomas P. McCarthy
Thomas P. McCarthy

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

Administrative Law Judge

Distribution:

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/tjr