FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 30, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2011-1172-M A.C. No. 26-02512-255877 A3V
v.	Docket No. WEST 2012-1171-M A.C. No. 26-02512-292804 A3V
SMALL MINE DEVELOPMENT, LLC, Respondent	Mine: Leeville

DECISION AND ORDER

Appearances: Alena E. Amundson, Esq. (Trial Counsel) and Courtney Przybylski, Esq. (Briefing Counsel), U.S. Department of Labor, Denver, Colorado, for Petitioner

Charles W. Newcom, Esq., Sherman & Howard, LLC, Denver, Colorado, for Respondent

Before: Judge McCarthy

I. Statement of the Case

These proceedings are before me based upon two Petitions for Assessment of Civil Penalties filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(d). Three citations issued by the Secretary of Labor ("the Secretary") against Small Mine Development, LLC ("SMD"), remain at issue.[1]

[1] The above-captioned dockets involve a total of six citations. Docket No. WEST 2012-1171-M contains five citations. Docket No. WEST 2011-1172-M contains a single citation. The parties have filed a joint motion to approve partial settlement for three of the five citations at issue in Docket No. WEST 2012-1171-M. Jt. Ex. 1. The parties propose a reduction in total civil penalty, from $12,421 to $8,317 for the three citations. The settlement terms include deleting the significant and substantial designation, and reducing the likelihood of injury or illness from "reasonably likely" to "unlikely" for Citation No. 8692424. The settlement terms also include reducing the injury or illness which could reasonably be expected to occur, from "fatal" to "lost workdays or restricted duty" for Citation No. 8692428. Respondent has agreed to accept Citation No. 8692426 as written with the corresponding proposed penalty. Having considered the representations and documentation submitted in this matter, I conclude that the proffered settlement is appropriate under the criteria set forth under section 110(i) of the Act. Accordingly, the motion to approve partial settlement is granted.

On May 1, 2012, Citation Nos. 8691999 and 8692000 (Docket No. WEST 2012-1171-M) were issued as part of the same inspection. Citation No. 8691999 alleges that a miner was adjusting the forks on a forklift in a dangerous manner in violation of section 57.14105 and/or in violation of sections 57.14211(c) or 57.14206(b) of the Secretary's mandatory safety standards for underground metal and nonmetal mines. 30 C.F.R. §§ 57.14105, 57.14211(c), 57.14206(b).[2] As a general matter, these standards address the hazards associated with unsecured raised components. Citation No. 8692000 alleges that the same miner had not been properly task trained regarding the operation and adjustment of the forklift in violation of section 48.7 of the Secretary's standards for training underground miners. 30 C.F.R. § 48.7.

Citation No. 8602339 (Docket No. WEST 2011-1172-M) was issued during an earlier inspection on April 20, 2011. It alleges that a concrete remix truck was being operated with a spider-webbed crack in the windshield in violation of section 57.14103(a), which requires that windows on self-propelled mobile equipment be maintained to provide visibility for safe operation. 30 C.F.R. § 57.14103(a).

A hearing was held on April 18-19, 2013 in Sparks, Nevada.[3] The record was left open for the filing of a joint motion to approve partial settlement in Docket No. WEST 2012-1171-M and the filing of the parties' joint stipulations. Tr. 15, 17.[4] Both filings were received on May 17, 2013. *See* Jt. Exs. 1 and 2, respectively. The parties then filed post-hearing briefs on June 17, 2013.

Based on the entire record, including the parties' post-hearing filings and briefs and my observation of the demeanor of the witnesses, I find the following:

II. Stipulated Facts

The parties have stipulated to the following facts:

1. At all times relevant to these proceedings, Respondent was engaged in underground metal mining operations at the Leeville mine (Mine ID 26-02512) in Eureka County, NV.

2. Respondent's mining operations affect interstate commerce.

[2] The Secretary's Motion to Plead in the Alternative was granted during a March 5, 2013 conference call. Tr. 10.

[3] During the hearing, Petitioner's Exhibits 1-12, 15, 17, and 18, and Respondent's Exhibits 1-19 and 23-27, were received into evidence. Tr. 20.

[4] As noted, I have reviewed the parties' joint settlement motion and I approve the parties' partial settlement agreement set forth in Jt. Ex. 1 as consistent with the criteria set forth in section 110(i) of the Act and in furtherance of the public interest.

3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ *et seq.* (the "Mine Act").

4. Respondent is an "operator" as defined in § 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Leeville mine where the Citations being contested in these proceedings were issued.

5. The Administrative Law Judge has jurisdiction over these proceedings, pursuant to § 105 of the Act.

6. The individuals whose signatures appear in Block 22 of the Citations at issue in these proceedings are all authorized representatives of the United States Secretary of Labor at the time of the inspection at issue.

7. It is agreed that the Citations at issue in the above-referenced dockets were issued in a timely manner, and while the correctness of the violations alleged in those citations is in dispute, no claim is made that any improper procedures were followed in the issuance of those Citations.

8. The Citations at issue in these proceedings may be admitted into evidence for the purpose of establishing their issuance, but not for the truthfulness or relevancy of any statements asserted therein.

9. The proposed penalties will not affect Respondent's ability to remain in business.

10. The certified copies of the MSHA Assessed Violations History reflect the history of the citation issuance at the mine for fifteen months prior to the date of the Citations and may be admitted into evidence without objection by Respondent.

11. The operator demonstrated good faith in abating the violations.

12. This pleading has been reviewed by Charles Newcom [counsel for Respondent] and he has authorized Alena Amundson [counsel for the Secretary] to apply his electronic signature to the pleading and to file it.

Jt. Ex. 2.

III. Factual Background

A. May 1, 2012 Inspection

Leeville Mine is an underground metal mine owned by Newmont Mining Corporation. Respondent, SMD, is a contractor for Newmont and performs all aspects of mining, including drilling, blasting, loading, and haulage. Tr. 45-46.

On May 1, 2012, MSHA Inspector Patrick Barney[5] performed a spot inspection of the Leeville Mine. Barney was accompanied by personnel from Newmont, but personnel from Respondent. Tr. 49-50.

1. Citation No. 8691999

The core facts surrounding the issuance of Citation No. 8691999 are largely undisputed. R. Br. at 2. At approximately 9:45 a.m., the inspection party arrived at the 4450 station. P. Ex. 7. Barney observed SMD employee Antonio Gaytan in the process of adjusting the forks on the No. 32 Skytrak Forklift to accommodate a smaller load. Gaytan was standing between the inner fork and the mine rib. The forks were approximately 2½ feet from the floor, and the engine was running. The front right tire had been turned in toward the rib. The back right tire had been chocked. The parking break was set. The forklift as a whole was immobile. The boom controlling the raising and lowering of the forks, however, was not physically blocked against movement.[6] At that time, neither Gaytan nor his supervisor, Chad Borresch, knew whether the forklift had mechanical locks on the hydraulic cylinder ("check valves") to prevent the boom from lowering inadvertently. *See* Sec'y Br. at 8-10; R. Br. at 3.[7]

Concerned that the boom could lower unexpectedly in the event of hydraulic failure and cause injury, Barney determined that Gaytan was adjusting equipment, which was not protected against hazardous motion in violation of section 57.14105. Accordingly, he issued Citation No. 8691999 alleging a violation of 30 C.F.R. § 57.14105. Tr. 76-77, 83; P. Ex. 1. Citation No. 8691999 alleges the following:

> At the 4450 station there was a miner adjusting the forks on forklift c/n FL32 while standing between the equipment and the rib. The equipment was running and there was no operator in the cab. This citation is issued in conjunction with the 107a imminent danger order #8691998.

[5] Barney has been an inspector with MSHA's Elko, Nevada field office since February 2011. Tr. 41, 44.

[6] The forks are raised and lowered via the boom, which functions on hydraulics. The boom is connected to the forks via a backstop, a horizontal bar between the forks, which also prevents loads from shifting when the forks are raised at an angle. Tr. 68. In order to prevent raised forks from lowering unexpectedly, the backstop can be rested on a block between the forks. Tr. 64.

[7] The boom is extended by pumping oil into a hydraulic cylinder, which increases pressure in the system. The boom is collapsed by sucking oil out of the cylinder, which relieves pressure in the system. Check valves prevent inadvertent movement in hydraulic systems by preventing oil from leaking out of the cylinder. Tr. 288, 306. Because check valves are usually located inline on the hydraulic cylinder, they are generally difficult to detect during inspections. Tr. 164, 289-90.

P. Ex. 1.[8] Barney determined that the cited condition was a significant and substantial contribution to a safety hazard that was reasonably likely to result in lost workdays or restricted duty to one person as a result of moderate negligence. The Secretary proposed a penalty of $3,493.

As noted, the Secretary appropriately alleged before trial that the cited condition violates one of three standards (30 C.F.R. § 57.14105, 30 C.F.R. § 14211(c), or 30 C.F.R. § 14206(b)), pled in the alternative:

> 30 C.F.R. § 57.14105, cited by the inspector, states:
>
> Repairs or maintenance on machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion.
>
> 30 C.F.R. § 14211(c), alternatively pled by the Secretary, states:
>
> A raised component must be secured to prevent accidental lowering when persons are working on or around mobile equipment and are exposed to the hazard of accidental lowering of the component.
>
> 30 C.F.R. § 14206(b), also alternatively pled by the Secretary, states:
>
> When mobile equipment is unattended or not in use, dippers, buckets and scraper blades shall be lowered to the ground. Other movable parts, such as booms, shall be mechanically secured or positioned to prevent movement which would create a hazard to persons.

SMD safety superintendent Jon Nyberg testified that after the citation was issued, a company mechanic confirmed that the forklift had operational check valves. Tr. 334. Assistant superintendent Kimball Rowley testified that check valves are built into all Skytrak model forklifts, including the cited forklift. Tr. 284-87. The parties stipulated that check valves are referenced in the maintenance manual for the Skytrak forklift, but they are not mentioned in the

[8] Upon first observing Gaytan standing between the forks and the rib, Barney issued an imminent danger order pursuant to section 107(a) of the Act. Respondent has not contested that Order. Tr. 51. Commission precedent makes clear, however, that the failure to contest an imminent danger order does not provide a basis for establishing the validity or S&S nature of a related citation because an operator may decide not to contest an imminent danger order for any number of reasons. *See, e.g., Wyoming Fuel Co.*, 16 FMSHRC 1618, 1625-26 (Aug. 1994) (finding no legal authority for the judge's conclusion that an uncontested imminent danger order has a preclusive effect with regard to an S&S designation for a related citation); *id*. at 1632 (Commissioners Doyle and Holen, concurring in part and dissenting in part) (noting that issues must be previously litigated to have preclusive effect).

operator's manual applicable to the equipment. Tr. 235. No explanation for the omission in the operator's manual is present on the record.

Inspector Barney conceded that he would not have issued the citation if he had been able to confirm that the forklift had functioning check valves. He contends, however, that the boom must be considered unsecured against hazardous motion because neither Gaytan nor Borresch knew whether check valves were present. The check valves were not tested for functionality at the time the citation was issued. Tr. 71-72, 166, 174-75.

2. Citation No. 8692000

After observing the conditions described above, Barney spoke with Gaytan. Gaytan told Barney that he was adjusting the forks according to how he had been trained. Tr. 99. Barney interpreted this to mean that Gaytan had been trained to adjust the forks without first shutting down the forklift, while standing between the rib and the forks, and while the forks were raised 2½ feet. Tr. 99-100. Concluding that Gaytan had been trained to adjust the forks in an unsafe manner in violation of section 48.7, Barney issued Citation No. 8692000.

Citation No. 8692000 states in relevant part:

> On the 4450 shaft station there was a miner operating the forklift c/n FL32 that was not task trained adequately as to the operation and adjustment of that equipment. The miner was working between the rib and the running piece of equipment with no operator in the cab. . . .

P. Ex. 4. Barney determined that the cited condition or practice was a significant and substantial contribution to a safety hazard that was reasonably likely to result in a fatal injury to one person as a result of moderate negligence. The Secretary alleges a violation of 48.7(a)(1), which states that miners assigned to new tasks as mobile equipment operators shall not perform those new work tasks until the prescribed training has been completed, and such training "shall include . . . the safe operating procedures related to the assigned tasks." The Secretary has proposed a penalty of $11,597 for the alleged training violation.

With regard to training, the record establishes that Gaytan began his employment at Leeville Mine on April 24, 2012. He received hazard training on April 25 and then received five days of training on the No. 32 Skytrak Forklift from his supervisor, Chad Borresch. Such training covered operation of the forklift, the preoperational checklist, and two days of supervised operation of the forklift. Tr. 199-203, 212-14, 242-43. Gaytan's certificate of training was signed on April 30, 2012, the day before Citation No. 8692000 was issued. P. Ex. 6.

Gaytan and Borresch testified that the training covered two methods for adjusting the forks. The first method was to raise the forks a few feet in the air and slide them by foot. The second method was to raise the forks to a higher level, tilt the carriage until the forks were hanging free, and then slide them by hand. Tr. 201, 216, 265. Although Gaytan was trained to rib and chock the forklift, he was not trained to shut off the machine before adjusting the forks. Tr.

216-17, 278. Borresch also testified that Gaytan had been trained to push the forks from the outside to avoid pinch hazards, and travel around and refrain from stepping over the forks to avoid tripping hazards. Tr. 270, 275-76.

Gaytan testified that he used the following procedure to adjust the forks at issue on May 1, 2012. He raised the forks 2½ feet, turned the wheel into the rib, set the parking brake, alighted from the driver's cab, chocked the rear driver's side wheel (away from the rib), slid the fork further from the rib and into position with his foot, walked over the forks, and pushed the fork nearer the rib into place while leaning against the rib. Tr. 193-95, 207-09. At no point was Gaytan standing under the forks. Tr. 194. Barney arrived as Gaytan was stepping back across the forks to check the adjustment from the cab. Tr. 195.

The majority of Barney's testimony regarding the alleged training violation focuses on the differences between Gaytan's method for adjusting the forks, and the procedures outlined in the Skytrak Forklift operator's manual, which Gaytan concedes was not referenced during his training. Tr. 220. The method for adjusting forks outlined in the manual includes elevating the forks to five feet, tilting the forks forward until they are hanging free, and pushing or pulling to slide the forks closer together or farther apart. Tr. 100-02; P. Ex. 17 at 5-13. The manual also states that shutdown procedures should be followed before exiting the cab, which include lowering the forks to the ground and removing the ignition key. P. Ex. 17 at 1-12, 4-3.

Barney attempts to resolve the apparently contradictory requirements that the forks be raised five feet and lowered to the ground by stating that if the forks were resting on a block, they would be raised and at their lowest point. Tr. 64, 67. Barney concedes, however, that subject to the constraints of the Secretary's regulations, an operator may exercise discretionary judgment when dealing with inconsistent provisions in an operator's manual. Tr. 144. In this case, however, Gaytan left the cab with the engine running and the forks were only 2½ feet above the ground. Tr. 102-05.

The Secretary also argues that Gaytan's training was inadequate because he was not trained to perform a pre-shift examination on the check valves. Sec'y Br. at 21. Gaytan admitted that check valves were not covered in his training. Tr. 236. In addition, I note that SMD assistant superintendent Rowley admitted that testing the check valves should be part of standard pre-operational procedure. Tr. 295. Rowley also testified, however, that a forklift operator would know if the check valves were not functional or operational even without testing them because the boom would "bleed off" or start to lower on its own. Tr. 313.

B. April 20, 2011 Inspection

On April 20, 2011, Barney was assisting with a regular inspection at the Leeville Mine. Tr. 49-50. While in the main haulageway, a remix truck pulled out and came close to hitting the inspection party.[9] Barney observed a spider-webbed crack in the truck's windshield. Tr. 117-18;

[9] The remix truck was carrying shotcrete (concrete conveyed through a hose at high velocity), which was delivered from the surface through a slickline (tubing for a pumping system). The remix truck had just pulled out into the main haulageway from the slickline dump point, when

P. Ex. 9; P. Ex. 11. Barney did not enter the cab of the truck to assess visibility from the driver's vantage point. Nevertheless, he testified that the spider-webbed crack extended across the driver's head area, when viewed from directly in front of the truck. Accordingly, Barney determined that the crack must have interfered with visibility. Tr. 119-20. Barney also expressed concern that the crack would create a glare in headlights. Tr. 123.

Barney spoke with the driver, who stated that the windshield had been cracked for about four days, and had been noted in the truck's pre-operational checklist for eight corresponding shifts. Tr. 117-18. The driver also told Barney that the crack had been reported to his shop supervisor, Bill Hanks, who instructed the driver to operate the truck while new glass was being ordered. Tr. 117-18. Barney then spoke with Hanks, who confirmed that he knew about the cracked glass and told the driver to operate the truck in that condition until the windshield could be replaced. Tr. 120.[10] When asked whether he was given any mitigating circumstances for why the truck was left in service, Barney admitted that Hanks told him in the shop that Hanks thought it was okay to run in that condition. Tr. 134.

Barney issued Citation No. 8602339 to Hanks after concluding that the remix truck had been operated with a cracked windshield, that the condition was extant for four days, and that shop supervisor Hanks knew of the condition, but directed that the truck be driven anyway. Tr. 117; P. Ex. 9. Citation No. 8602339 states:

> The MTI Remix Truck c/n T56 was being operated with a cracked and spider webbed driver side windshield. The condition had existed and been reported for 4 days (8) shifts. A spider webbed windshield causes reduced visibility during operation. The Shop Supervisor knew of the condition and ordered new glass. This truck operates in the vicinity of other equipment and foot traffic.

P. Ex. 9. The Citation alleges that this condition violates section 57.14103(a), which states that windows on operator stations of self-propelled mobile equipment "shall be maintained to provide visibility for safe operation." Inspector Barney designated the violation to be S&S because it contributed to a collision hazard that was reasonably likely to result in a fatal injury, with one person affected as a result of high negligence. The Secretary proposed a penalty of $29,529.

IV. Legal Analysis

A. Citation No. 8691999

1. 30 C.F.R. §57.14105

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inspector Barney observed it. Tr. 124-25. The main haulageway had a number of dump and draw points, and a large amount of foot and equipment traffic. Tr. 124-25, 119.

[10] Barney testified that he was not shown a purchase order for the new windshield. His testimony did not address whether he asked to see a purchase order. Tr. 120.

Under 30 C.F.R. §57.14105, the initial question presented is whether Gaytan's adjustment of the forks on the No. 32 Skytrak Forklift in order to pick up a smaller load constitutes "[r]epair or maintenance on machinery or equipment." If so, the power must be off and the forklift must be blocked against hazardous motion, unless forklift "motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are [still] effectively protected from hazardous motion." *See* 30 C.F.R. §57.14105.

No evidence has been presented that the forks or boom were broken. In fact, Barney conceded that no repair on machinery or equipment was being performed. Tr. 81-82. Rather, Barney recalled Gaytan telling him that he was adjusting the forks in order to carry a smaller load (as opposed to adjusting the forks to accommodate or fix a problem with the equipment). Tr. 86. Nor does the Secretary allege that adjusting the forks constituted "repair." Sec'y Br. at 11.

Furthermore, no maintenance on machinery or equipment was being performed. I agree with Respondent that the act of adjusting forks on the forklift was not maintenance or a task such as an oil change, changing tires, or replacing a light, which is performed to keep the forklift in good working order or to correct a deteriorating or malfunctioning condition. *See* R. Br. at 5-6. Maintenance is defined as "the labor of keeping something (as buildings or equipment) in a state of repair or efficiency: care, upkeep . . ." *Walker Stone Co.*, 19 FMSHRC 48, 51 (Jan. 1997), *aff'd* 156 F.3d 1076 (10th Cir. 1998) (finding that dislodging a rock to restore a crusher's functionality was properly encompassed under "repair or maintenance"). The Commission has distinguished between activity "designed to prevent [equipment] from lapsing from its existing condition or to keep the [equipment] in good repair," i.e., maintenance and activity designed to "increase its usefulness." *S. Ohio Coal Co.*, 14 FMSHRC 978, 982-83 (June 1992) (moving a conveyor belt was not maintenance since the move was meant to improve rather than preserve functionality), *cited in Walker Stone*, 19 FMSHRC at 52.

The Secretary asserts that Gaytan's activity should be considered "maintenance" because adjusting the forks to allow the forklift to carry loads of varying sizes keeps the equipment functioning in a state of efficiency. Sec'y Br. at 11. Contrary to the Secretary, I find that adjusting the forks is not an activity designed to maintain the forklift in a state of repair or efficiency. Rather, it is labor designed to improve or modify functionality by increasing the variety of loads that the equipment can accommodate.

Inspector Barney himself testified that adjusting the forks does not constitute maintenance or repair because it does not require a qualified mechanic. Tr. 82. Instead, Barney seems to have divorced the two sentences in section 57.14105, and issued the citation solely on the basis that Gaytan was adjusting the forks while the equipment was running and while he was allegedly not protected against hazardous motion. Tr. 83. The Secretary argues that Barney's opinion as to the definition of maintenance is not dispositive. Sec'y Br. at n. 6. Rather, the Secretary argues that maintenance was being performed. Therefore, the second sentence of the standard can be applied because an adjustment to the forks was being made, the forklift was running at the time of the adjustment, and such adjustment did not require the forklift to be running. *See* Sec'y Br. at 10-11 (citing Tr. 78, 80, and 83).

Under the plain language of the standard the second sentence is triggered only if repairs or maintenance are being performed within the meaning of the first sentence of the standard. The second sentence operates as an exception to the first sentence, with a proviso. As discussed above, I find that Gaytan was not performing repair or maintenance. Therefore, I conclude that section 57.14105 does not apply.

2. 30 C.F.R. § 57.14211(c)

Under 30 C.F.R. § 57.14211(c), the determinative question is whether the raised boom was "secured to prevent accidental lowering." A boom can be secured by either placing a block under the backstop to physically prevent the component from lowering, or placing a mechanical lock (such as a check valve) on the boom's hydraulic cylinder. Sec'y Br. at 13; Tr. 64. The Secretary has recognized that check valves adequately protect against the uncontrolled descent of a raised component in the event of hydraulic failure.[11] Inspector Barney conceded that he would not have issued a citation if he had been able to confirm the presence of functioning check valves. Tr. 166, 174.

Since the forks were not physically blocked, I must determine whether the boom was secured by functioning check valves. I find that it was.

With regard to the presence of check valves, I credit the testimony of SMD assistant superintendent Rowley that all Skytrak model forklifts have built-in check valves. Tr. 284-87.[12] I also emphasize the parties' stipulation that check valves are referenced in the maintenance manual for Skytrak Forklifts. Tr. 235. There is no reason to believe that the manufacturer omitted check valves from this particular forklift. With regard to whether the check valves were functioning, I credit the testimony of safety superintendent Nyberg that prior to the close-out conference, a mechanic tested the check valves on the No. 32 forklift and found them to be operational. Tr. 334; R. Ex. 28 at 2 (Nyberg's prepared statement read at the closeout conference).[13]

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[11] 30 C.F.R. § 57.14211(d) states that "under this section, a raised component of mobile equipment is considered to be blocked or mechanically secured if provided with a functional load-locking device . . . ." MSHA's Program Policy Manual reiterates that check valves will prevent uncontrolled descent in the event of a failure of the system holding up a raised component. P. Ex. 15.

[12] Rowley testified that he had operated a number of Skytrak forklifts, including the No. 32, and all of them had check valves. Tr. 284-87. Rowley further testified that check valves can be hard to spot, though they are visible on the Skytrak model if you know what you are looking for, namely, two screw caps on a box on the back side of the boom hydraulic cylinder. Tr. 289-90. Although Inspector Barney testified that when he looked over the forklift while waiting for the supervisor he did not see any "obvious ball valves or check valves," he concurred that check valves are difficult to spot and that he could not be sure from his cursory review whether or not this forklift had check valves. Tr. 162, 164, 166.

[13] This finding of functionality is bolstered somewhat by Rowley's testimony that malfunctioning check valves would be obvious because the hydraulic system would begin to lose pressure and

The Secretary emphasizes that neither Gaytan nor supervisor Borresch knew whether the forklift had check valves at the time the citation was written. Therefore, the Secretary argues that inspector Barney was unable to test whether the forklift had functioning check valves before issuing the citation. Sec'y Br. at 9-10. Similarly, the Secretary suggests that because Gaytan did not know whether check valves were present, they were not being "used" and therefore they were not protecting him against hazardous motion. Sec'y Br. at 13-14.

I agree that it is unwise for a forklift operator to be unaware of a safety measure built into the forklift, but this argument has more weight in the context of the alleged training violation. Section 57.14211(c) only requires actual protection against hazardous motion. Because I have found that functional check valves were present, the requirement that raised components be secured against hazardous movement under section 57.14211(c) was met, regardless of the forklift operator's knowledge of the presence of the check valves.

Barney's failure to test the functionality of the check valves when issuing the citation does not negate a finding that they were functional at that time. Citations may be vacated or modified when subsequent information proves the inspector's concerns unfounded. As for the argument that the check valves must be "used" to protect against hazardous motion, because check valves operate independently and do not need to be switched on or off, the check valves could be functioning without the forklift operator's knowledge. Tr. 306. Thus, operator knowledge that the check valves were functioning is not necessary for compliance with the standard.

3. 30 C.F.R. § 57.14206(b)

30 C.F.R. § 57.14206(b) requires that "when mobile equipment is unattended . . . booms [] shall be mechanically secured or positioned to prevent movement which would create a hazard to persons."

As a preliminary matter, I find, contrary to Respondent, that the forklift was unattended. In the mining context, equipment or areas are defined as "attended" in the "presence of an individual or continuous monitoring *to prevent unauthorized entry or access*." 30 C.F.R. § 57.2 (emphasis added). More generally, "unattended" means "lacking a *guard, escort, caretaker,* or other watcher." *Webster's Third International Dictionary 2482* (1986) (emphasis added).

Respondent contends that because the forklift was always in Gaytan's line of sight, it was being monitored, and therefore attended. R. Br. at 6-8. I disagree. Being attended requires more than visibility, it requires control. The monitoring miner must be able to prevent unauthorized access. In this regard, a Commission judge has found that a truck was unattended despite the

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the boom would begin to lower on its own ("bleed-off"). Tr. 292, 313. Rowley further testified that even if the operator did not know what was causing the problem, he would be able to tell that there was a problem with the hydraulics, and would likely stop operation. Tr. 313. Neither Barney nor Gaytan testified about any bleed-off of the boom on the day the citation was issued.

mechanic working underneath it, because the mechanic was not in a position to prevent the truck from moving. *Nevada Cement*, 18 FMSHRC 1653, 1655 (Sept. 12, 1996) (ALJ).

Here, Gaytan conceded that while adjusting the forks, his direct route to the operator's cab was at least six feet, and he would have had to travel even farther because his direct route was blocked by the ribbed front wheel. Tr. 210-11. Because Gaytan was not in a position to timely reach the controls, I find that the running forklift was unattended.

Nevertheless, as discussed above in the context of section 57.14211(c), the boom was mechanically secured via functioning check valves.[14] The Secretary again contends that the boom was not secured because Gaytan and his supervisor did not know whether check valves were present or functional. Sec'y Br. at 15. For the reasons discussed above, this argument is rejected. As with section 57.14211(c), section 57.14206(b) only requires actual protection against hazardous motion, rather than knowledge of protective measures. Because functioning check valves were present, the requirement in section 57.14206(b) that the boom be secured when equipment is unattended has been met.

Because I find that adjusting forks does not constitute repair or maintenance, and the No. 32 Skytrak Forklift had functioning check valves which secured the raised boom, I find that the Secretary has not established a violation of any of the three standards alleged in the alternative. Accordingly, Citation No. 8691999 is vacated.

B. Citation No. 8692000

For the reasons set for the below, I find that the Secretary established a violation of section 48.7(a)(1) as a result of moderate negligence. I also find that the violation was S&S. However, I find that any injury that would occur would likely result in lost workdays or restricted duty, not a fatality.

1. The Training Violation

The Secretary argues that Gaytan's training was inadequate in two ways: 1) the procedures outlined in the operator's manual for the Skytrak Forklift were not followed with regard to shutting down the forklift and adjusting the forks; and 2) the training did not cover securing the boom. Sec'y Br. at 21. I find that the failure to follow the operator's manual did not render Gaytan's training inadequate, per se. On the other hand, the omission of training regarding the check valves and their role in securing of the boom did constitute a failure to fully train Gaytan regarding the safe operating procedures related to the forklift.

[14] As noted above, section 57.14211(d) of the Secretary's regulations and MSHA's Program Policy Manual both state that raised components are considered mechanically secured if a functioning check valve is present. Although the regulation and guidance explicitly apply to section 57.14211(c), because sections 57.14211(c) and 57.14206(b) address essentially the same hazard (the danger posed by uncontrolled movement of raised components such as booms), I conclude that the check valves provide the same safe harbor under section 57.14206(b) because they sufficiently secure the boom to prevent movement which would create a hazard to persons.

The Skytrak Forklift operator's manual states that operators should not exit the forklift until the proper shutdown procedure has been performed. P. Ex. 17 at 1-12. This procedure involves seven steps. It is uncontested that Gaytan applied the parking brake, shifted the transmission to neutral, and exited the cab safely (steps 1, 2, and 7). Moreover, the Secretary has not established that Gaytan failed to idle the engine before exiting, and/or failed to exit safely (steps 4 and 6). Therefore, the only steps that Gaytan did not follow were shutting off the ignition, and lowering the forks to the ground (steps 3 and 5). *See* P. Ex. 17 at 3-4; Tr. 102-05.

The operator's manual also outlines a procedure for adjusting the forks. As noted, that procedure involves elevating the forks to approximately five feet, tilting the carriage forward until the fork heel is hanging free, standing to the side, and pushing or pulling the forks to slide them in or out. P. Ex. 17 at 5-13. Gaytan has conceded that the manual was not discussed or used as a reference during his training. Tr. 220.

The failure to follow procedures set forth in an operator's manual is not determinative as to sufficiency of training. *See, e.g., Foothills Materials*, 35 FMSHRC 495 (Feb. 2013) (ALJ) (noting that the failure to follow an operator's manual is insufficient evidence that the elements of safe operating procedure were overlooked during training). This is particularly true in this case where, as discussed below, the procedure that Gaytan was trained to employ was effective at protecting the miner against hazardous motion, and the manual is internally inconsistent with regard to the proper height at which the forks should be set while being adjusted. *See* P. Ex. 17 at 3-4, 5-13.

The Secretary alleges that Gaytan's training was inadequate in large part because the engine was not shut off before he exited the operator's cab, and because he placed himself in a dangerous position between the rib and a fork. Sec'y Br. at 20-21; Tr. 99-100. Gaytan admitted that he was not trained to shut down the engine before adjusting the forks, if the wheel was chocked and the brakes were set. Tr. 216-17. But the Secretary has conceded that immobilizing the vehicle alleviated any danger of being pinched between the fork and the rib. Sec'y Br. at 9, n. 4. And Gaytan was trained to set the parking brake and chock the wheel. Tr. 216-17. Accordingly, I find that the failure to additionally shut off the engine does not, in and of itself, constitute a failure to train in safe operating procedures.[15]

The Secretary also suggests that Gaytan's training was inadequate because he was trained to raise the forks 2½ feet above the ground to adjust them. Sec'y Br. at 20. But the Secretary failed to clarify whether the proper height was on the ground, in accordance with the manual's shutdown procedure, or raised five feet, in accordance with the manual's adjustment procedure. It is difficult to fault the operator for not complying with the manual when the Secretary is uncertain how to do so. I also note that raising the forks to 2½ feet was not the only method for adjustment covered in Gaytan's training. Alternatively, he was trained to raise the forks to five

[15] Additionally, given the inconsistency between the manual's procedures for shutting down the forklift, which state that the forks should be lowered to the ground, and its procedures for adjusting the forks, which state that they should be raised to five feet, it is unclear whether the shutdown procedure is even meant to apply when adjusting the forks.

feet and tilt the carriage, the same method suggested in the operator's manual. Tr. 201, 265; P. Ex. 17 at 5-13.

Inspector Barney conceded that an operator may exercise discretionary judgment when dealing with inconsistent provisions in a manual, subject to the constraints of the Secretary's safety regulations. Tr. 144. Here, the manual provisions are inconsistent, and the Secretary has failed to show that the alternate training methods chosen by the operator, to wit, immobilizing the forklift without fully shutting down, and allowing the forklift operator to adjust the forks at a height of 2½ feet as well as at five feet, is any less safe than the methods provided in the operator's manual. An operator's primary concern should be addressing all elements of safe operating procedure during training, rather than blindly following contradictory provisions in a manual.

I agree with the Secretary, however, that Gaytan should have been trained to conduct a pre-operational check of the check valves. Sec'y Br. at 21. Assistant superintendent Rowley conceded that testing check valves should be part of a forklift operator's standard pre-operational procedure. Tr. 295. The safety standards at issue clearly indicate that safe operating procedure requires raised booms to be secured against hazardous movement. Although Respondent unwittingly complied with the cited standards through functional operation of the check valves, safe operating procedure requires an operator to take steps to ensure that the check valves were present and functioning. Reliance on luck is not a safe operating procedure.[16]

Gaytan admitted that check valves were not covered during his training. Tr. 221, 236. Accordingly, I find that SMD violated section 48.7(a)(1) by failing to train Gaytan regarding the presence and proper functioning and testing of the check valves in the Skytrak Forklift.[17]

2. **The Violation Was Significant and Substantial (S&S)**

As a general proposition, a violation is properly found to be S&S if there is a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 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 in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal Co., Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995) (approving

[16] Alternatively, if the forklift did not have check valves or built-in mechanical locks, Gaytan's training should have included methods for physically blocking a raised boom against hazardous motion.

[17] Respondent asserts that check valve training was not required because check valves were not mentioned in the manual. R. Br. at 19. I disagree. The omission of certain training in a manual does not mean that miners need not be trained in that element, particularly if necessary to ensure safe operation of certain machinery or equipment.

Mathies criteria). An S&S determination must be based on the particular facts surrounding the violation, and must be made in the context of continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

Section 104(g)(1) of the Act states that "a miner who has not received the requisite safety training . . . [shall be declared] a hazard to himself and others, and . . . be immediately withdrawn from the coal or other mine." 30 U.S.C. § 824(g)(1). Relying on section 104(g)(1), the Secretary contends that such failure to adequately task train Gaytan constitutes an S&S violation. Sec'y Br. at 22-23.

Initially, I note that Gaytan received significant training as to the safe operation of the No. 32 Skytrak Forklift. On April 26, 2012, Borresch showed Gaytan how to operate the boom, parking brake, and lights; how to adjust the forks; and how to go through the pre-operational checklist, including checking the oil, parking brake, transmission, coolant, fuel, and frame. On April 27, 2012, Borresch and Gaytan did a walkthrough of the pre-operational checklist, and began hands-on training. Gaytan then operated the forklift for two days under Borresch's supervision, prior to executing his certificate of training on April 30, 2012. Tr. 199-203, 212-14, 242-43. I have found that Gaytan's task training omitted a *single element*, testing the check valves during the pre-operational procedure.[18]

In the circumstances of this case, however, I find that Respondent's failure to train Gaytan with respect to operation of the check valves does constitute an S&S violation. Cf. *Jim Walter Res.*, 28 FMSHRC 579, 596-97 (Aug. 2006) (finding that inadequate training did not constitute an S&S violation where the operator regularly instructed its miners in firefighting techniques, but failed to provide on-site simulated fire drills). The failure to train Gaytan with respect to operation of the check valves contributed to a hazard which was reasonably likely to result in an injury. As Rowley testified, if the check valves were to malfunction, "the boom would drop by itself . . . [and] the forks would curl forward." Tr. 313. Barney testified that a crushing injury would result if the forks were to drop unexpectedly while the forklift operator's feet were underneath. Tr. 77. Although Gaytan claims that he did not stand with his feet under the forks on this particular instance (Tr. 194), given continued mining operations, a forklift operator likely will spend time standing around or under the forks and boom of the forklift he is operating. In fact, Gaylan testified that he walked back across the forks on this occasion, contrary

[18] The Secretary contends that the gravity of the violation is compounded by additional elements which were omitted from Gaytan's training, namely, the failure to turn off the engine, and the failure to leave sufficient space between the forks and the rib. Sec'y Br. at 22. The failure to turn off the engine is immaterial here because no repair or maintenance work was being performed under section § 57.14105. Therefore, that standard, which requires that the engine be turned off and the machinery or equipment be blocked against hazardous motion, is inapplicable. Furthermore, Gaytan's training included alternate ways to immobilize the equipment (ribbing and chocking), which Barney conceded was sufficient to immobilize the forklift and allay his concern that Gaytan could have been pinned between the rib and the equipment. Tr. 77. Therefore, I conclude that injury was not reasonably likely to result from failing to turn off the engine or leave space between the forks and the rib.

to his training. Tr. 195, 209, 275.[19] Accordingly, I conclude that the failure to train Gaytan to perform a pre-operational check of the check valves contributes to the hazard of unexpected lowering of the boom in the event that a check valve malfunctions during continuous mining operations, which is reasonably likely to result in a serious injury to a limb that is caught underneath the falling boom. Therefore, the S&S designation for Citation No. 8692000 is affirmed.

Although I find the inadequate task training violation to be S&S, I reduce the injury that could reasonably be expected to occur from fatal to lost workdays or restricted duty. The Secretary conceded in Citation No. 8691999 that the greatest injury which could reasonably be expected to occur as a result of the boom unexpectedly dropping onto the forklift operator's feet would be lost workdays or restricted duty. Sec'y Br. at 8-9; P. Ex. 1. The hazard here is the same. Accordingly, based on the particular facts surrounding this violation, the S&S designation is affirmed, but the injury which reasonably could be expected to occur is reduced from fatal to lost workdays or restricted duty.

1. Negligence

Moderate negligence is attributable to an operator who "knew or should have known of the violative condition . . . but there are mitigating circumstances." 30 C.F.R. § 100.3(d). Here, Inspector Barney noted that Gaytan's task training had been performed for several days prior to the inspection, but was incomplete, rather than non-existent, indicating some due diligence on the part of Respondent and agent Borresch. Tr. 115. I find that the Secretary properly considered the training that Gaytan did receive as a mitigating factor. Sec'y Br. at 23. Accordingly, I affirm the moderate negligence designation.

Respondent asserts that it could not be expected to know that training with regard to check valves was required, because it was not mentioned in the operator's manual. R. Br. at 19. As noted, however, this is countered by the testimony from Assistant Superintendent Rowley's testimony that check valves should be examined as part of the typical pre-operational procedure. Tr. 295.

4. Civil Penalty

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

[19] Thus, the procedure to adjust the forks that Gaytan actually *employed* included an unsafe element that contradicted Gaytan's training. Gaytan stepped over the forks while adjusting them. Tr. 209. Supervisor Borresch credibly testified that Gaytan was *trained* not to step over the forks, as that presented a tripping hazard. Tr. 275. Because stepping over the forks was not part of Gaytan's training, however, there was no inadequate task training violation that contributed to the associated tripping hazard or otherwise compounded the gravity associated with Citation No. 8692000.

> The principles governing the Commission's authority to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:
>
> > [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect of the operator's ability to continue in business, [5] the gravity of the violations, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

22 FMSHRC at 600 (citing 30 U.S.C. § 820(i)). In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co*., 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Act. *Id*. at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission has noted that the de novo assessment of civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co*., 19 FMSHRC 1495, 1503 (Sept. 1997).

Although judges have the authority to assess penalties *de novo*, the penalty calculation tables provided in 30 C.F.R. § 100.3 provide a useful guide. The parties have stipulated to the operator's history of previous violations, that the proposed penalties will not affect Respondent's ability to remain in business, and that Respondent has demonstrated good faith in abating the violations. Jt. Ex. 1, stipulations 9-11.[20] Accordingly, based on the criteria set forth in section 110(i) of the Act, and the gravity and negligence findings discussed above, I assess a civil penalty of $3,143 for the inadequate task training violation found in Citation No. 8692000.

C. Citation No. 8602339

[20] MSHA's originally proposed penalty of $11,597 did not include a 10% reduction for good-faith abatement pursuant to MSHA's penalty proposal criteria. *See* 30 C.F.R. § 100.3(f). The parties, however, have stipulated that Citation No. 8692000 was abated in good faith. Accordingly, I apply a 10% reduction to the penalty assessment.

1. The Violation – The Spider-Webbed and Cracked Windshield Impaired Visibility

For the reasons discussed below, I find the violation, but reduce Respondent's negligence from high to moderate, and assess a penalty of $8,893.

At the outset, I note that Respondent does not dispute that there was a spider-webbed crack in the windshield of the remix truck. R. Br. at 20. Rather, Respondent disputes the inspector's determination that the crack interfered with visibility and safe operation of the vehicle.

I credit inspector Barney's testimony that when he first saw the remix truck he was directly in front of it and could see that the crack in the windshield "went right across where [the driver's] head was," and "was right in his line of vision." Tr. 120. A photograph taken at the time of the Citation supports Barney's contention that the spider-webbed crack in the windshield was near the driver's head. P. Ex. 11.[21] I also credit inspector Barney's testimony that the glare from headlights would likely glint off the crack in the windshield, temporarily blinding the driver. Tr. 123; Sec'y Br. at 25-26; *see also Lafarge Midwest, Inc.*, 32 FMSHRC 1832, 1841 (Dec. 8, 2010) (ALJ) (crediting the inspector's testimony that glare from the sun glinting off a cracked windshield would cause the driver to be unable to see). Just as the glare from the sun combined with the cracked windshield was found to interfere with visibility in *Lafarge Midwest*, I find that the glare from headlights in this underground mine combined with the cracked and spider-webbed windshield interfered with the driver's visibility. Accordingly, I concur with the inspector's determination that the windshield was not being maintained to provide visibility for safe operation. Tr. 119.

Respondent's primary argument is that because Barney did not sit in the driver's seat, he could not determine the driver's angle of vision or determine whether visibility would be impaired by the cracked windshield. R. Br. at 22. Barney admitted that he did not sit in the driver's seat. Tr. 120. But that admission does not invalidate his determination that the location of the spider-webbed crack impaired visibility. As a practical matter, an obstructed sightline is usually obstructed from both ends. In any event, I find it reasonable for Barney to conclude that the crack was "right in [the driver's] line of vision" because Barney stood directly in front of the truck where he "could see that [the crack] went right across where his head was." Tr. 120. Accordingly, I find that inspector Barney's testimony concerning the location of the spider-webbed crack in the windshield and the photograph he took to document it (P. Ex. 11), are sufficient to establish the likelihood of impaired visibility that diminishes safe operation of the remix truck.

Respondent argues that a Commission judge in another case found that the Secretary failed to prove impaired visibility where the inspector did not sit in the driver's seat of a truck with a cracked windshield. R. Br. at 20-22 (citing *Walker Stone Co.*, 17 FMSHRC 1389, 1394

[21] Although Barney's photograph (P. Ex. 11) does not show the entire windshield, I find the proximity of the crack to the center of the driver's-side windshield wiper provides a useful frame of reference that supports Barney's testimony. *See* R. Exs. 24 and 25.

(Aug. 1995) (ALJ)). Although the judge in *Walker Stone* vacated the citation, that case is distinguishable because it essentially turned on credible testimony from the driver of the truck that his vision was not impaired when he drove the truck with the cracked windshield. Specifically, the judge stated:

> Based on the evidence in this record, *most particularly the photographs of the truck (GX-6 and GX-7), which quite clearly depict the damage*, I conclude that it is insufficient to establish that the windshield cracks noted by the inspector impaired the operator's visibility to any significant extent. In this regard, I also find *Mr. Moenning's testimony that his vision was not impaired* when he drove the truck to be credible. *I also note* that Inspector Ramage admitted that he never got into the truck and looked through the windshield himself to determine whether the cracks would affect the operator's visibility. Accordingly, the citation fails of proof and will be vacated herein.

17 FMSHRC at 1393-94 (emphasis added). In other words, the inspector's failure to sit in the driver's seat was supplemental evidence supporting a conclusion which was primarily based on photographic evidence and direct testimony from the driver.

In *Lafarge Midwest*, another Commission judge similarly weighed the evidence and came to the opposite conclusion, finding that the cracked windshield impaired visibility:

> In the case at hand, the inspector did not sit in the driver's seat of this particular gator but he did look through the windshield and Ballard, who drove the gator daily, testified that the condition of the windshield obscured his vision . . . .

32 FMSHRC at 1839. In *Lafarge Midwest*, primary emphasis was placed on the testimony of the inspector and the driver, which was sufficient to establish impaired visibility, despite the inspector's failure to view the condition from inside the operator's cab.

In this case, there is no direct testimony from the driver. Accordingly, the weight of the evidence hinges on the testimony of the inspector, which I credit, and the photograph of the windshield, which I find supports the inspector's impaired-visibility determination. As in *Lafarge Midwest*, the inspector's failure to view the condition from the driver's seat alone is insufficient to rebut the Secretary's evidence.[22]

[22] As indicated in the above-cited cases, a direct and credible statement from the driver that his visibility was unaffected may have been enough to change the outcome in Respondent's favor. The Secretary contends that because the driver and former shop foreman Hanks were not called to testify on this issue, the undersigned should infer that if they had been, their testimony would have been adverse to Respondent, and that I should draw an adverse inference from Respondent's failure to call such witnesses. Sec'y Br. at 26 (citing the missing witness rule discussed in *Eagle Energy, Inc.*, 23 FMSHRC 1107, 1119-1122 (Oct. 2001)). I decline to draw an adverse inference here, particularly since Hanks is no longer employed by Respondent, and the driver could have been deposed or subpoenaed by either party. Rather, as noted, I find that

Respondent also challenges the Secretary's characterization of the width of the crack. Respondent argues that the photograph does not show the entire windshield, and that inspector Barney's notes do not provide any measurements.[23] R. Br. at 22; Tr. 140-43. I am not persuaded by these arguments. In determining visibility, the width of a crack is not determinative. A small crack directly in a driver's line of sight can be more disruptive than a wide crack along the top or bottom of a windshield. Although the photograph does not conclusively establish how far the crack in the windshield extended, it supports the inspector's testimony that the spider-webbed crack *began* in a location that would impair driver visibility. P. Ex. 11.

In sum, in the circumstances of this case, I am not persuaded by Respondent's arguments that the Secretary failed to meet his burden of proof because Barney failed to observe the spider-webbed and cracked windshield from inside the operator's cab, or because Barney failed to establish the extent of the crack in his photograph and notes. R. Br. at 22. While it is true that the Secretary bears the burden of proving each and every element of an alleged violation, *Jim Walter Res.*, 9 FMSHRC 903, 907 (May 1987), the Secretary meets that burden by a preponderance of the evidence, i.e., by showing that the existence of a fact is more probable than its nonexistence. *Rag Cumberland Res.*, 22 FMSHRC 1066, 1070 (Sept. 2000). Here, the Secretary established that driver visibility was impaired by a preponderance of the credible evidence based on Barney's testimony concerning the location of the crack as corroborated by the photographic evidence establishing that the crack was in the driver's line of vision. Tr. 120; P. Ex. 11 cross referenced in R. Exs. 24-25. Respondent's counter arguments regarding Barney's failure to sit inside the operator's cab and alleged failure to take adequate photographs and notes are insufficient to rebut that evidence.

2. The Violation was Significant and Substantial (S&S)

Logic dictates that impaired visibility puts others at risk of being struck by the remix truck, and that if a miner pedestrian were struck, a fatality would reasonably be expected to occur. Furthermore, the remix truck was a heavy piece of machinery and it was driven in an area with numerous draw and dump points and heavy traffic, both pedestrian and vehicular. Tr. 119, 124-25. Accordingly, I find that the cracked windshield violation significantly contributed to a discrete safety hazard (collision) that was reasonably likely to result in injury, particularly given the high traffic in the area. I further find that such injury would reasonably be expected to be fatal if a pedestrian was involved. *See Lafarge Midwest, supra*, 32 FMSHRC at 1841 (finding an S&S violation where mobile equipment with a cracked windshield was operated in a high traffic area). Accordingly, I affirm the Secretary's determination that the cited condition was an S&S violation that was reasonably likely to result in a fatality.

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inspector Barney's testimony and the photograph he took to document the crack (P. Ex. 11), are sufficiently credible to establish impaired visibility.

[23] Specifically, the Secretary alleges that the crack extended ¾ of the width of the windshield or approximately 18 inches (Sec'y Br. at 24), while Respondent counters that the crack may have been as narrow as ¼ of the width of the windshield or 6 inches (R. Br. at 21).

3. Negligence

A violative condition is attributable to high negligence where the operator "knew or should have known of the violative condition . . . and there are no mitigating circumstances." 30 C.F.R. § 100.3(d). Respondent clearly knew of the violative condition. The cracked windshield had been noted on the pre-shift examination book for eight shifts and the driver had reported the condition to his shop supervisor. Tr. 117-18.

When asked whether he was given any mitigating circumstances for why the truck was allowed to operate, inspector Barney admitted that shop supervisor Hanks told him in the shop that Hanks thought it was okay to run in that condition. Tr. 134. Inspector Barney continued, "I guess you could say that was mitigation. Maybe he did not realize it was a hazard, maybe he did not realize the severity of the hazard." *Id*. Hanks also ordered a replacement windshield. Tr. 120. In these circumstances, I am hard-pressed to conclude that Respondent did not offer credible evidence of some mitigating circumstances.

The Secretary argues that Hanks' statement through the hearsay admission of Barney that he thought that it was okay for the truck to be driven until the replacement window arrived, should not be considered a mitigating circumstance and should only remove the cited condition from the realm of an unwarrantable failure. Sec'y Br. at 27; *cf.*, *Lafarge Midwest, supra*, 32 FMSHRC at 1843 (finding an unwarrantable failure where the driver and other miners "constantly made complaints that went unheeded" for at least six months). I do not agree. Barney candidly admitted that Hanks told him that "he thought it was okay to run in that condition." Tr. 134. Furthermore, the record reveals a legitimate dispute as to whether the crack would impair visibility. In these circumstances, the Secretary's position gives insufficient credit for Barney's own admission of evidence of mitigation. Moreover, it results in a significantly increased penalty where credible evidence of mitigation exists. Hanks should have taken the truck out of service until the windshield was replaced, rather than playing the odds. But Barney's own hearsay testimony supports Respondent's case for mitigation. Accordingly, I reduce Respondent's negligence from high to moderate.

4. Civil Penalty

As noted above, the penalty calculation tables provided in 30 C.F.R. § 100.3 provides a useful guide. Given the parties' stipulations regarding Respondent's ability to remain in business and its good faith in abating the violation, and based on my moderate negligence finding above, I reduce the proposed penalty of $29,529 and assess a civil penalty of $8,893 for the cracked windshield violation in Citation No. 8602339.

V. ORDER

WHEREFORE, the parties' motion to approve partial settlement in Docket No. WEST 2012-1171-M is **GRANTED**. Consistent with the parties' settlement terms, it is **ORDERED** that Citation No. 8692424 be **MODIFIED** to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation. It is further **ORDERED** that Citation No. 8692428 be **MODIFIED** to reduce the injury or illness that could reasonably be expected to occur from "fatal" to "lost workdays or restricted duty."

Consistent with this Decision, it is **ORDERED** that Citation No. 8691999 in Docket No. WEST 2012-1171-M is **VACATED**. It is further **ORDERED** that Citation No. 8692000 in Docket No. WEST 2012-1171-M is **MODIFIED** to reduce the expected injury or illness from "fatal" to "lost workdays or restricted duty." It is further **ORDERED** that Citation No. 8602339 in Docket No. WEST 2011-1172-M is **MODIFIED** to reduce the level of negligence from high to moderate.

Accordingly, Respondent, Small Mine Development, LLC, is **ORDERED** to pay, within thirty days of the date of this decision, a total civil penalty of $20,353 in satisfaction of the six Citations at issue in the above-captioned dockets.[24]

Thomas P. McCarthy
Administrative Law Judge

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/tmw

[24] 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.