FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 19, 2014

	CIVIL PENALTY PROCEEDINGS
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner,	Docket No. LAKE 2011-818-M A.C. No. 21-00831-255564 Docket No. LAKE 2011-834-M A.C. No. 21-00831-258448
v.	Docket No. LAKE 2012-499-M A.C. No. 21-00831-283699 Docket No. LAKE 2012-536-M A.C. No. 21-00831-283699 Docket No. LAKE 2012-728-M A.C. No. 21-00831-292533
NORTHSHORE MINING COMPANY Respondent.	Mine: Northshore Mining Company

DECISION AND ORDER

Appearances: Timothy Turner, Esq., U.S Department of Labor, Office of the Solicitor, Denver, CO for the Secretary

Arthur Wolfson, Esq., Jackson Kelly, PLLC, Pittsburgh, PA for Respondent

Before: Judge Lewis

STATEMENT OF THE CASE

These cases are before the undersigned Administrative Law Judge on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor against Respondent, Northshore Mining Company ("Respondent" or "Northshore"), pursuant to Section 104 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(d). A hearing was held in Duluth, Minnesota on August 27, 2013. The parties subsequently submitted post-hearing briefs.

PROCEDURAL HISTORY

Between April 2011 and May 2012, MSHA Inspectors William H. Soderlind, Steven E. Swenson, and Robert A. Marincel conducted several inspections of Northshore Mining Company and issued numerous citations. Northshore Mining Company contested many of these citations, 69 of which were placed in five civil penalty dockets (LAKE 2011-818, LAKE 2011-834, LAKE 2012-499, LAKE 2012-536, and LAKE 2012-728). The total assessed penalty for those civil penalty proceedings was $146,290.00. On May 9, 2013 a hearing was set in this matter. As the date for the hearing approached, the parties settled 65 of the 69 citations (including all of the subject citation issued by Inspectors Swenson and Marincel). The parties filed a Motion to Approve Partial Settlement, which was granted on February 11, 2014. The remaining citations were Citation No. 6564267 (LAKE 2011-834), Citation No. 6564223 (LAKE 2011-818), Citation No. 6564235 (LAKE 2011-818), and Citation No. 6564248 (LAKE 2011-818). The total assessed penalty for the remaining citations was $20,327.00. On August 28, 2013 a hearing was held on these remaining citations.

STIPULATIONS

The parties have entered into several stipulations, admitted as Parties' Joint Exhibit 1.[1] Those stipulations include the following:

1. Northshore Mining Company is engaged in mining operations in the United States, and its mining operations affect interstate commerce

2. Northshore Mining Company is the above-referenced mine. Northshore Mining Company is an "operator" as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act), 30 U.S.C. 803(d).

3. Northshore Mining Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et. seq.*

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations and orders were properly served by a duly authorized representative of the Secretary upon an agent of Northshore Mining Company on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance.

6. The exhibits to be offered by Northshore Mining Company and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

[1] Hereinafter the Joint Exhibits will be referred to as "JX" followed by the number. Similarly, the Secretary's Exhibits will be referred as "GX" and Respondent's Exhibits will be referred to as "RX."

7. The assessed penalties, if affirmed, will not impair Northshore Mining Company's ability to remain in business.

8. MSHA Inspector William Soderlind was acting in his official capacity and as an authorized representative of the Secretary of Labor when aforesaid citations and order were issued.

Joint Exhibit 1 (*see also* Transcript at 6).[2]

Citation No. 6564267

I. ISSUES

With respect to Citation No. 6564267, the issues to be determined are whether Respondent's alleged actions on May 3, 2011 were a violation of §56.14112(a)(1) and, if so, whether that violation was significant and substantial ("S&S"), whether it was reasonably likely to result in lost workday/restrict duty injury to one miner, whether it was the result of moderate negligence, and the appropriate penalty for the violation.

II. SUMMARY OF TESTIMONY

On May 3, 2011 Inspector William Soderlind issued Citation No. 6564267 for a guard violation (GX-2).[3] (Tr. 18). Soderlind issued Citation No. 6564267 because he observed a violation of 56.14112(a)(1) in the pellet plant which he believed could endanger the safety of miners. (Tr. 20). That standard states that guards must be constructed and maintained to withstand the vibration, shock, and wear to which they are subjected during normal mining operations. (Tr. 20).

Soderlind was at Respondent's plant during May and April of 2011 for a regular, full inspection.[4] (Tr. 17). Respondent's employee Brian Hill accompanied Soderlind during the

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[2] Hereinafter the transcript will be cited as "Tr." Followed by the page number.

[3] At hearing, Soderlind was present and testified for the Secretary. (Tr. 13). At the time of the hearing, he had worked for MSHA's Duluth, Minnesota office as a metal/nonmetal mine safety and health inspector for four years. (Tr. 13). In that capacity he inspected 50-80 mines a year to ensure safety. (Tr. 13). Soderlind had been trained to become an inspector at the Mine Safety and Health Academy in West Virginia. (Tr. 14). He also received journeyman refresher training every two years. (Tr. 14, 82). Before working for MSHA, Soderlind worked construction for seven years. (Tr. 14-15, 83). Before that he was in the Marine Corps for over six years. (Tr. 15). His Marine Corps experience included work as crash, fire, and rescue personnel. (Tr. 15, 83). He also attended a structural firefighting academy in Orange County, California. (Tr. 15). Soderlind was certified as an EMT and a firefighter. (Tr. 15). Soderlind also had an English degree. (Tr. 15). He had never worked in a taconite plant. (Tr. 83).

[4] Respondent was owned by Cleveland Cliffs and the plant was located in Silver Bay, Minnesota. (Tr. 16). Respondent engaged in iron ore mining and creation of taconite pellets. (Tr. 16).

inspection.[5] (Tr. 103). During the inspection Soderlind took handwritten contemporaneous notes, which he reviewed during the hearing (GX-3). (Tr. 19, 83). He also had general field notes (RX-17). (Tr. 83-84). When Soderlind observed a condition he would enter it into his general field notes and then turn to the back pages of his note book to write his citation notes. (Tr. 84).

The specific violative condition cited was a guard on the 124 conveyor that had come apart in places leaving jagged metal stuck out where it could cut a miner. (Tr. 20, 28, 103-104). This conveyor was in the pelletizer and elevated eight feet off the ground. (Tr. 104, 113). The hanging guard was four or five inches from another portion of the guard, which itself was six inches from the tail pulley. (Tr. 23-24). Originally, the guard had been temporarily welded, or "tacked," in place. (Tr. 22). Another guard had fallen completely off the 124 conveyor and was hanging partway into the walkway. (Tr. 20, 22). The cited condition exposed the pulley.[6] (Tr. 22).

The guards could have come apart from the vibration of equipment, contact from spilled material, corrosion, improper construction, or other reasons. (Tr. 21). When the conveyor is running there is some vibration and shaking. (Tr. 112). It would be hard to say how much the pulley would vibrate when in operation. (Tr. 23). The area had wet processes, which could have caused the guard to corrode and separate. (Tr. 26). Water and oxygen cause guards to wear, so Respondent had to continually upgrade their guards. (Tr. 26).

During the inspection, the conveyor was running and the tail pulley was spinning. (Tr. 22-23, 112). A piece of the guard was hanging while the belt was running. (Tr. 112). If the hanging guard were to contact the tail pulley it could shoot out into the walkway or under the conveyor. (Tr. 24). The guard could get shot out after getting pulled into the pulley or it could just fall. (Tr. 85). The walkway was right next to the pulley. (Tr. 24, 85, 104). The walkway was about 30 inches wide and went all the way around the tail pulley. (Tr. 104). It would be traveled a couple of times per shift, mostly by operators. (Tr. 104).

There are roughly 400 miners at Respondent's plant. (Tr. 114). At the time of the hearing, Soderlind had inspected the plant a total of four times. (Tr. 15-16). His most recent inspection lasted 9-weeks and occurred two weeks before the hearing. (Tr. 16). The plant was inspected twice a year for between 9 and 14 weeks each time. (Tr. 16).

[5] At hearing, Brian Hill was present and testified for Respondent. (Tr. 102). Both at the time of the hearing and May of 2011, Hill was on the day crew for pelletizer operations. (Tr. 102). At the time of the hearing he took care of precips, dust collectors, and other environmental pollution controls. (Tr. 102). When the instant citations were issued he was training and taking care of equipment (the furnace, the ball and drums, etc.). (Tr. 102). He had worked for Respondent for five and a half years and started in the mining industry in 1995. (Tr. 102-103). He spent 13 years as a belt contractor, but worked at the Plant as he did so. (Tr. 103).

[6] The tail pulley was about two feet in diameter and three feet wide. (Tr. 23). There was a shaft through the pulley to the pillow block (which had a grease coming out of it). (Tr. 23).

Further, there was a pile of taconite pellets by the tail pulley. (Tr. 24-25). The walkway was grated so pellets should have fallen through. (Tr. 86, 113). However, sometimes the grates clog and accumulations occur. (Tr. 86-87). Soderlind had seen places in the plant where pellets had to be climbed over. (Tr. 33). He had issued citations for miners climbing past a tail pulley where pellets had spilled. (Tr. 33). Soderlind testified that pellets were removed by shoveling them out or onto the conveyor. (Tr. 25, 85). If a shovel contacted the pulley it could strike the miner, pull the miner in the pulley, or knock a miner down. (Tr. 25). Hill testified that pellets were removed with an air lance, not a shovel. (Tr. 113). The pellets that day were on a structured beam, not the floor. (Tr. 113-114). Soderlind had seen miners shoveling pellet next to an energized pulley, but not in this instance. (Tr. 25). Respondent sold the pellets, so they would try to get them out quickly. (Tr. 87, 96-97). It could be an arduous process to shut down the belt, lock it out, and tag it out. (Tr. 97). The belts are crucial to production and shutting down the belt could shut down a whole section of the mine. (Tr. 97). As a result, Soderlind testified that if the guards are in place, they just shoveled the product back on. (Tr. 86, 97-98).

Finally, Soderlind testified there was sharp metal sticking into the walkway. (Tr. 26). There was also an opening in the guard itself. (Tr. 28). The metal in these areas was sharp enough to break the skin if someone fell or rubbed against it. (Tr. 26, 28). Soderlind conceded that there were no tripping hazards in the area and there were handrails. (Tr. 86). A miner might contact the guard while cleaning, traveling, or greasing the pulley, possibly while carrying tools. (Tr. 27). Hill testified that the edge on the guarding did not protrude into the walkway. (Tr. 106). There would be no reason to contact the guarding edges. (Tr. 106). Soderlind testified that some miners wore latex gloves, but they did not provide protection. (Tr. 26-27). Hill testified that most of the miners, including operators, wore strong leather gloves. (Tr. 107, 114, 117). The guard would not easily puncture those gloves. (Tr. 107). They would only go through the leather if someone fell on the edges and there was no tripping hazard. (Tr. 107). Hill did not recall any lost-time injuries from hand cuts at the plant. (Tr. 108). Latex gloves were only used when hosing the swamp or in the lab. (Tr. 114). Respondent's employees were also trained to keep their hands and limbs away from moving equipment. (Tr. 106-107). However, the area could be hot and miners sometimes had exposed arms. (Tr. 118).

The citation was marked "reasonably likely" because the guard was damaged in several places and miners travelled in the area to apply grease, to examine belts, or to walk through. (Tr. 30, 87). The examinations were required under 56.18002, which applies to working areas. (Tr. 87-88). If the condition was not abated, it would get worse and a miner could contact the sharp edge, receiving a laceration. (Tr. 27, 30). It was possible, but less likely, that a miner could contact the shaft of the tail pulley. (Tr. 27, 30, 105). Hill stated the area was only traveled a couple of times a day, the walkway was adequate, and structure blocked everything except an 8-inch opening 20 inches off the walkway. (Tr. 105-106). Further, the tail pulley was recessed four or six inches behind the guarding. (Tr. 106).

The citation was also marked "lost workdays or restricted duty," because someone could cut their hand or leg during a fall or get a puncture wound requiring a tetanus shot or medical attention. (Tr. 30-31). A miner contacting the rotating shaft could suffer permanently disabling injury. (Tr. 31). The citation was marked as affecting one person because it was unlikely that more than one person would injure themselves on the same guard at the same time. (Tr. 31).

The citation was marked S&S because there was reasonable likelihood of an injury that was at least lost workday/restricted duty. (Tr. 31). The specific hazard was the loose guard with jagged edges in the walkway. (Tr. 32). The deteriorating guard and the high traffic created the likelihood of injury. (Tr. 32). The guard had corroded, which was evidence that the condition had existed for months. (Tr. 32). Under normal mining conditions there was a strong likelihood that a miner would be injured. (Tr. 32-33). This is especially true in light of the pellets in the walkway. (Tr. 33).

The citation was marked as "moderate" negligence. (Tr. 33). Moderate negligence exists where there are some mitigating factors. (Tr. 33). Soderlind considered violation history, the location, visibility, and obviousness. (Tr. 34). Soderlind did not believe Respondent knew of this condition, but should have. (Tr. 34). Respondent's miners are a "self-directed" workforce meaning the individual miners are supposed to tell management about any issues they come across. (Tr. 34). Low negligence would be in a remote area. (Tr. 34).

Respondent terminated the citation by replacing the guard with a one that was better constructed. (Tr. 34-35). The new guard had a large metal frame around it. (Tr. 28-29).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact are based on the record as a whole and the Administrative Law Judge's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the Administrative Law Judge has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the Administrative Law Judge has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the Administrative Law Judge's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel,* 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That 30 C.F.R. §56.14112(a)(1) Was Violated.

On May 3, 2011, Inspector Soderlind issued a 104(a) Citation, No. 6564267, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> Pellet Plant – The tail pulley guard for the 124 conveyor was corroded and falling apart in several areas. Sharp jagged metal edges where the expanded metal had separated were found on all sides of the guard. This condition exposes miners to laceration type injuries due to unexpected contact with the jagged metal.

(GX-2).

The cited standard, 30 C.F.R. §56.14112(a)(1) ("Construction and Maintenance of

Guards”), provides the following:

> (a) Guards shall be constructed and maintained to—
>> (1) Withstand the vibration, shock, and wear to which they will be subjected during normal operation; and

30 C.F.R. §56.14112.

Inspector Soderlind credibly testified that the cited guard was coming apart. (Tr. 20, 28, 103-104). Specifically, corrosion and vibration had caused the guard to break down. (Tr. 21). When cited, the guard had ragged edges and was no longer properly blocking the tail pulley. (Tr. 20, 22, 28, 103-104).

In its brief, Respondent did not argue against the validity of Citation No. 6564267. The Administrative Law Judge finds that Respondent conceded that it violated the standard. In light of this fact, and the evidence presented, the Administrative Law Judge finds that this citation was valid.

2. Considering The Record *In Toto* And Applying Applicable Case Law, The Violation Was Reasonably Likely to Result in a Lost Workday/Restricted Duty Injury And Significant And Substantial In Nature

Inspector Soderlind marked the gravity of the cited danger in Citation No. 6564267 as “Reasonably Likely” to result in “Lost Workday/Restricted Duty” injury to one person. (GX-2). These determinations are supported by a preponderance of the evidence.

The Mine Act requires that “gravity of the violation” be considered in assessing a penalty. 30 U.S.C. §820. The Secretary has promulgated a three-factor inquiry to determine the gravity of a citation for purposes of determining the penalty. Those factors are:

> [T]he likelihood of the occurrence of the event against which a standard is directed; the severity of the illness or injury if the event has occurred or was to occur; and the number of persons potentially affected if the event has occurred or were to occur.

30 C.F.R. §100.3(e).

The event against which the instant standard, 30 C.F.R. §56.14112(a)(1), is directed is contact by a miner with moving conveyor pieces or with damaged pieces of the guard. The particular guard here was designed to prevent contact with the tail pulley of the 124 conveyor. (GX-2). Inspector Soderlind credibly testified that given the state of the cited guard, contact with the conveyor, or the broken guard itself, was reasonably likely. Specifically, Soderlind testified that the cited area was next to a walkway where miners worked and traveled on a regular basis. (Tr. 104, 30, 81). In fact, the broken guard was sticking out into the walkway and miners shoveling pellets onto the belt could have contacted the belt with a shovel. (Tr. 20, 25, 28, 85-86, 97-98, 103-104). Given this exposure, the Administrative Law Judge finds that

contact with the broken guard or moving pieces of the conveyor was reasonably likely to occur.

Soderlind also credibly testified that if a miner were to contact the conveyor or the broken guard, lost workday/restricted duty injuries would occur to one miner. Specifically, he testified that under continued normal mining conditions a miner could place his hand on the guard and receive a laceration. (Tr. 26-28). Further, miners often walked through the area in their shirtsleeves. (Tr. 118). As a result, miners could walk past the cited area and brush their arms against the damaged guard, resulting in lacerations. In addition to the risk from touching the guard, Soderlind credibly testified that as time passed and the guard's condition became worse, the guard could be pulled into the pulley and then shoot out into the walkway, injuring a miner. (Tr. 85). Finally, miners could be injured by their shovels when cleaning pellets. (Tr. 25). All of these conditions would only affect one miner. (Tr. 31). A preponderance of the evidence supports the Inspector's findings.

Respondent offered several arguments asserting that an accident was unlikely. However, as Respondent discussed those arguments in relation to the S&S designation, they will be discussed *infra*.

Well-settled Commission precedent sets forth the standard used to determine if a violation is S&S. A violation is S&S "if, based upon 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., National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). The Commission later clarified this standard, explaining:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor 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).

With respect to the first element, the underlying violation of a mandatory safety standard, it has already been established that Respondent violated 30 C.F.R. §56.14112(a)(1).

With respect to the second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – Inspector Soderlind credibly testified that the violation, a damaged guard, contributed to the safety hazard of a miner grasping or brushing the broken guard or coming into contact with the energized conveyor pulley.

The Secretary also argued that contribution to a discrete safety hazard should be considered in light of the frequency with which the cited area is accessed, the position of the now exposed part in relation to the miner, and the general condition of the walkway next to the moving part exposed by the faulty guard. (*Secretary's Post-Hearing Brief* at 11, *citing Carder,*

Inc., 27 FMSHRC 839, 844 (Nov. 2005)(ALJ Manning); *Bachman Sand & Gravel*, 34 FMSHRC 226, 231 (Jan. 2012)(ALJ Miller); and *Baker Rock Crushing Co.*, 2010 WL 3616493, *8 (Aug. 2010) (ALJ Barbour)). Inspector Soderlind credibly testified that the area experienced heavy foot traffic and was accessed regularly for examinations. (Tr. 30, 87). He also testified, and the photographs confirmed, that the exposed tail pulley was directly next to the walkway. (Tr. 22-24, 85, 104, 112)(GX-4, p.1). Finally, the inspector testified that there were slippery pellets in the walkway creating an additional tripping hazard. (Tr. 24-25, 33, 86-87, 113).

Respondent produced several arguments for the proposition that this condition did not contribute to a safety hazard, none of which are compelling.

First, Respondent argued under normal mining conditions, no one would contact the jagged edges of the guard. (*Respondent's Post-Hearing Brief* at 5-6). It argued that the edges did not protrude into the walkway, that edges were inside the waterline between the guarding and the walkways, and that there was no reason for a miner to reach toward these jagged edges. (*Id.* at 6). The Administrative Law Judge credits the Inspector's testimony that the jagged guard was exposed in the walkway and that miners could touch or brush the jagged edges. (Tr. 20, 22, 26). The photographs, specifically GX-4, p. 2, support this testimony. While it was possible that some of the jagged edges were behind the waterline, the Administrative Law Judge finds that under normal mining conditions miners would eventually contact these jagged edges.

Respondent also argued that miners were trained to stay away from moving parts. (*Respondent's Post-Hearing Brief* at 6). There is no reason to doubt Respondent's assertion that the miners received this training. However, even if it is true, that does not change the significant and substantial nature of this violation. If training were sufficient, properly maintained guards would not be required under 30 C.F.R. §56.14112(a)(1). The standard exists because MSHA determined that, even in light of the extensive training miners are given, miners could be injured by exposed moving parts. Whether through inadvertence or accident, even trained miners could contact the moving pieces if no guard were in place. As a result, the hazard still existed despite the training.

Finally, Respondent argued that there was no tripping hazard in the cited area. (*Respondent's Post-Hearing Brief* at 6 *citing Baker Rock Crushing Co.*, 32 FMSHRC at 976 and *Carder, Inc.*, 27 FMSHRC at 844). As discussed *supra*, there were pellets in the walkway in this area. (Tr. 24, 25, 86-87, 113). These marble-like pellets constituted a tripping hazard. However, even if there were no pellets in this area, this would still be S&S. The only requirement of the second prong of *Mathies* is that the violation *contribute* to a discrete safety hazard. While a tripping hazard may create a greater likelihood of the hazard being realized, the fact that the guard was deficient had already made an accident more likely. Therefore, the second prong of *Mathies* is met.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. The preponderance of the evidence establishes that the hazard contributed to in this matter would be reasonably likely to result in injury.

The Commission clarified the third element of the *Mathies* test in *Musser Engineering,*

Inc., and PBS Coal Inc., 32 FMSHRC 1257, 1280-81 (Oct. 2010) ("PBS") (affirming an S&S violation for using an inaccurate mine map). The Commission held that the "test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., [in that case] the danger of breakthrough and resulting inundation, will cause injury." *Id*. at 1281. Importantly, it clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Id*. The Commission concluded that the Secretary had presented sufficient evidence that miners who broke through into a flooded adjacent mine would face numerous dangers of injury. *Id*. The Commission also emphasized the well-established precedent that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id*. (*citing Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996).

If the hazard contributed here were realized, specifically if a miner contacted the guard or moving parts, an injury would be reasonably likely. If the miner contacted the jagged edge of the guard, he would experience lacerations and perhaps infection. (Tr. 27, 30-31). If the guard were pulled into the tail pulley and shot out, a miner would experience puncture wounds or lacerations. Finally, if the miner's shovel were to contact the belt, it would result in striking injuries.

Respondent made several arguments attempting to show that there is no likelihood of injury from the cited condition. None of those arguments are compelling.

First, Respondent argued that miners would not receive lacerations from contacting the jagged guarding because they wore leather gloves. (*Respondent's Post-Hearing Brief* at 7). The Administrative Law Judge credits the testimony of Inspector Soderlind that miners often wore latex gloves, which would not provide protection from lacerations. (Tr. 26-27). Further, Respondent's witness, Hill, testified that even wearing leather gloves, a miner could be injured if he fell onto the guarding, because the leather gloves could be punctured . Given the pellets littering the floor, a fall was a real possibility. Also, regardless of leather gloves, other parts of miners' bodies, including their arms, were exposed without any protection. (Tr. 118).

Next, Respondent argued that there was no possible injury caused by the gap in the guarding exposing the tail pulley. (*Respondent's Post-Hearing Briefs* at 7-8). Specifically, Respondent argued that the pellets shown in the photographs were shown on the pillow block inside of the guard and that in order to shovel the belt, the conveyor would have be de-energized. (*Id*.). The Administrative Law Judge credits the testimony of the Inspector that pellets accumulated in the cited area and that miners loaded the pellets onto energized conveyors. (Tr. 24-25, 85). Even if the pellets photographed were on the pillow block rather than the walkway, under normal mining conditions pellets would eventually accumulate on the walkway and need to be shoveled.

Finally, Respondent argued that Soderlind's testimony regarding injury dealt solely with what "could" happen if the miner contacted the moving parts of the pulley. (*Respondent's Post-Hearing Brief* at 9). Specifically, when asked what would happen if the guard contacted the pulley, Soderlind said that the belt could shoot into the walkway, it could go under the conveyor, or anything could happen. (Tr. 24). It argues that something that merely could happen is not

sufficient to support an S&S designation. (*Respondent's Post Hearing Brief at 9 citing Wolf Run Mining*, 32 FMSHRC 1669, 1677 (Dec. 2010), *Texasgulf* 10 FMSHRC 498, 500-1 (April 1998); and *Zeigler* Coal, 15 FMSHRC 949, 952-54 (Jun. 1993)). Respondent is correct that the Commission has consistently held that dangers that simply "could" happen are insufficient to support an S&S designation. While the Administrative Law Judge believes that it is somewhat likely that this guard would eventually contact the pulley and then shoot into the walkway, the evidence does not support a finding that such an event is reasonably likely. However, the S&S designation is not based solely on the danger posed by the guard shooting into the walkway. The Administrative Law Judge finds that an injury was reasonably likely to result from a miner falling on or grasping the broken guard or contacting the moving parts of the pulley. As a result, the cited condition meets the third prong of the *Mathies* test.

Under *Mathies,* the fourth and final element that the Secretary must establish is that there was a "reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co*., 6 FMSHRC at 3-4; *U.S. Steel*, 6 FMSHRC at 1574. The Administrative Law Judge finds that that the kinds of injuries expected here, lost workday/restricted duty injuries from lacerations or striking, are reasonable serious in nature. *See e.g. Carmeuse Lime & Stone, Inc.*, 29 FMSHRC 284, 295-296 (Mar. 2007)(ALJ Hodgdon) and *Lexicon, Inc.*, 24 FMSHRC 1014, 1022-23 (Nov. 2002)(ALJ Hodgdon).

Respondent argued that any lacerations that results from a miner contacting broken guarding would be minor. (*Respondent's Post-Hearing Brief* at 8). It noted there was no history of lost workday/restricted duty injury from cuts to the hand at the plant. (*Id.*). The Administrative Law Judge credits the testimony of the Inspector that the lacerations to be expected from a fall onto the guard would be of a reasonably serious nature. (Tr. 30-31). The fact that Hill was not aware of lost workday or restricted duty injuries at the plant does not change this determination. The issue is whether the danger here presented a possibility for serious injury, not whether there was a history of these accidents. Respondent's good fortune in avoiding injuries in the past does not affect the S&S nature of this citation.

As a result of these factors, the Administrative Law Judge finds that the Secretary proved the violation was S&S by a preponderance of the evidence.

3. Respondent's Conduct Displayed "Low" Rather than "Moderate" Negligence.

In the citation at issue, Inspector Soderlind found that the operator's conduct was moderately negligent in character. (GX-2).

Standard 30 C.F.R. §100.3(d) provides the following:

> (d) Negligence. Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence. The negligence criterion

assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.

In 30 C.F.R. §103(d), Table X, the category of high negligence is described thusly: "The operator knew or should have known of the violative condition or practice and there are no mitigating circumstances." Conversely, moderate negligence is shown when "[t]he operator knew or should have known of the violative condition or practice, but there are some mitigating circumstances." Low negligence is reserved for situations where there are "considerable" mitigating circumstances.

With respect to the instant citation, Respondent did not have actual knowledge of the cited condition. Even Inspector Soderlind admitted as much. (Tr. 34). Therefore, the question is whether Respondent should have known the condition existed. A preponderance of the evidence shows that it should have.

Inspector Soderlind credibly testified that that the cited condition was open and obvious. (Tr. 34). Further, he stated that routine checks of the area would have discovered this condition for correction. (Tr. 33-34). Finally, Respondent would have been aware that this guard was in a wet, vibrating location and that these conditions could cause corrosion. (Tr. 26). Therefore, Respondent should have known the condition existed.

Respondent argued that it should not have known the cited condition existed because the cited area was not a "working area" within the meaning of the Act and no examination of that area was necessary. (*Respondent's Post-Hearing Brief* at 9). For the purposes of the Act, "working place" means any place in or about a mine where work is being performed.[7] 30 CFR § 56.2. However, the Act also requires that "safe means of access shall be provided and maintained to all working places." 30 C.F.R. § 56.11001. It is uncontested that a walkway went directly past the tail pulley. (Tr. 24, 85, 104). Even if Respondent is correct that the tail pulley was not a working area (a dubious claim), the fact remains that walkways between working places must also be examined and maintained. Therefore, Respondent should have known about the condition of the cited guard as it was directly next to a walkway.

While Respondent should have known about the condition of the cited guard, there are mitigating circumstances. Inspector Soderlind conceded that those mitigating circumstances existed. Specifically, he testified that Respondent did not have actual knowledge of the cited condition and Respondent's employees were a self-directed workforce. (Tr. 34). The Secretary felt that these mitigating circumstances dictated a finding of "moderate" negligence. (GX-2). However, in addition to those cited by the inspector, the Administrative Law Judge finds another mitigating factor. While this was a working area of the mine and examinations were required, the area was still relatively remote. Miners were not working in this area constantly and when they were in the area they were passing through. As a result, these mitigating circumstances are better characterized as "considerable" and a finding of "Low" negligence is appropriate.

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[7] "Places" and "Areas" are terms that are apparently used interchangeably.

4. Penalty

Under the assessment regulations described in 30 CFR §100, the Secretary proposed a penalty of $3,143.00 for Citation No. 6564267. A recent Commission decision, *Sec. v. Performance Coal Co.*, (Docket No. WEVA 2008-1825 (8/2/2013) reaffirmed that neither the ALJ nor the Commission is bound by the Secretary' proposed penalties. (*see also* 30 U.S.C. §820(i) and 29 C.F.R. §2700.30(b)). However, the Commission in *Performance Coal*, also held that, although there is no presumption of validity given to the Secretary's proposed assessments, substantial deviation from the Secretary's proposed assessments must be adequately explained using §110(i) criteria. (*Id*. at p. 2). (*see also Cantina Green*, 22 FMSHRC 616, 620-621 (May 2000)). The ALJ finds that a substantial deviation from the Secretary's proposed assessment is warranted herein and will evaluate the factors contained in 30 U.S.C. §820(i) to explain that deviation. Those factors are as follows:

(1) The Operator's history of previous violations – Inspector Soderlind credibly testified that Respondent had a history of these violations. (Tr. 34). Respondent's violation history supports this testimony. (GX-1).

(2) The appropriateness of the penalty compared to the size of the Operator's business – Northshore Mining Company has 770,129 yearly mine hours and Respondent has 2,179,873 yearly controller hours. According to MSHA's penalty assessment guidelines this gives United Plant 10 "mine size points" out of a possible 15 and Respondent seven "controller size points" out of a possible 10. *see* 30 CFR § 100.3(b). Thus, Respondent is a large operator with an above-average sized plant.

(3) Whether the Operator was negligent – As previously shown, Respondent's negligence is better characterized as "Low" rather than "Moderate" negligence

(4) The effect on the Operator's ability to remain in business – The parties have stipulated that the Orders at issue here would not affect Respondent's ability to remain in business. (JX-1)

(5) The gravity of the violation – As previously shown, the gravity of the cited danger was reasonably likely to result in lost workday and restricted duty injuries to one miner. Further the condition was S&S.

(6) The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – The evidence shows the condition was abated rapidly and in good faith.

In light of the Administrative Law Judge's decision to modify the negligence from "Moderate" to "Low" a reduction in the assessed penalty is appropriate. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $2,000.00 with respect to this violation.

Citation No. 6564223

I. ISSUE

With respect to Citation No. 6564223, the issues to be determined are whether Respondent's alleged actions on April 6, 2011 were a violation of §56.20003(a) and, if so, whether that violation was significant and substantial ("S&S"), whether it was reasonably likely to result in lost workday/restrict duty injury to one miner, whether it was the result of moderate negligence, and the appropriate penalty for the violation.

II. SUMMARY OF TESTIMONY

On April 6, 2011 Inspector Soderlind issued Citation No. 6564223 (GX-6) for a violation of 56.20003(a) which requires working areas of the mine, travel ways, passageways, store rooms, and service rooms be kept clean and orderly.[8] (Tr. 35-38). Specifically, the base of the #10 Silo was open, allowing miners to come into contact with old equipment and unsafe conditions for foot travel. (Tr. 37, 108, 122). Pellets were stored in the top of the silo and various tools and parts were stored on the shelves in the bottom of the silo. (Tr. 38, 43, 108, 114, 122, 144). There were also loose pellets on the ground. (Tr. 41). Pellets are slippery when spread out, less slippery (but still capable of causing falls) when piled up. (Tr. 41). There was no lighting in the silo. (Tr. 42). It would sometimes be lit by the sun, but three-quarters of the day would be dark. (Tr. 42). Tim Aijala conceded that the inside of the silo was a mess.[9] (Tr. 124). There were pallets laying around and dried mud on the floor. (Tr. 124).

If an area was sealed off, MSHA would not issue citations. (Tr. 49). MSHA requires operators to barricade an area if it wishes to keep miners out, but there is no specific standard for how to make the barrier. (Tr. 38-39). A barricade is supposed to physically prevent people from entering. (Tr. 98). Here, Respondent had two one-inch diameter metal bars four feet apart that were welded to the garage door for the silo to block access. (Tr. 39, 44, 109, 124). The top rail was about four feet high and the lower rail was about two feet high. (Tr. 50-51). The bars across the silo entrance were installed a year and a half to two years before the citation. (Tr. 123-124, 144). There was no sign saying that miners should not enter. (Tr. 44, 149). Aijala testified that miners would be less likely to enter an area with a sign, but believed the barrier would prevent entry. (Tr. 149). Soderlind testified that while the barrier was there, it was clear that it was not preventing miners from going inside. (Tr. 43-44, 98).

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[8] Hill accompanied Soderlind on this inspection. (Tr. 108).

[9] At hearing, Tim Aijala was present and testified for Respondent. (Tr. 119). He had worked for Respondent for 15 and a half years. (Tr. 120). He worked for a year as safety inspector and spent 13 years loading boats and running heavy equipment. (Tr. 120). At the time of the hearing he was employed by Respondent to operate the railroad. (Tr. 119). At the time of the instant citations he was the safety inspector. (Tr. 120). As a safety inspector, he inspected the plant every day looking for safety hazards and writing work orders. (Tr. 120). He also accompanied MSHA inspectors. (Tr. 120). Before working for Respondent, Aijala spent eight years working at an underground copper mine in Michigan. (Tr. 120). Aijala did not accompany the inspector here, but went afterwards and looked at it before the abatement. (Tr. 121-122, 139-140).

Soderlind knew the barrier was not working because he looked into the silo from the entrance and saw footprints on the ground.[10] (Tr. 40-42, 98). Respondent intended to close the area and not have anyone in the silo. (Tr. 98, 109). However, the barricade did not indicate that people should not enter because there was no sign. (Tr. 98-99, 114). Hill and Aijala did not believe anyone entered the silo after it was closed and knew it was barred. (Tr. 109-110, 124). Everyone, including contractors, receive site specific training, MSHA training, and new miner training. (Tr. 116-117). However, Hill did not know if they were told not to enter the silo; that was not his job. (Tr. 116). Not going through the barricade was common sense. (Tr. 117, 124). Before the citation, Aijala believed that the two bars were enough to barricade the silo. (Tr. 148). At the hearing, he believed it was not. (Tr. 148).

To get inside, miners would have to crawl through the barrier. (Tr. 45). While climbing in or out they would be carrying something, as there was no other reason go there. (Tr. 45). There was a hose in the walkway and pallets with various items on them. (Tr. 43). Soderlind believed a miner would enter this silo, bent over, to get old idlers, come-alongs, belts, and hoses.[11] (Tr. 42-43, 51). However, Hill and Tim Aijala testified that nothing in the silo would be needed in the course of normal operations. (Tr. 110, 123, 149). Aijala knew the equipment was not in use because he had worked there 13 years and knew a new storage area was built. (Tr. 123). Respondent no longer had the equipment to use the idlers in Silo #10. (Tr. 123).

Hill testified that that the footprints were not on the equipment in the silo, but only on the ground. (Tr. 111). The ground was flat and smooth. (Tr. 111). Aijala testified that from the doorway he could not see footprints on equipment. (Tr. 125, 145-146). However, he reviewed the photograph marked GX-8, p. 1 and saw dried footprints on either a roll of rubber line techs or a small roll of old belt. (Tr. 146). He could not tell if there were more than one set of footprints in the photograph. (Tr. 146). The photograph marked GX-8, p. 2 showed many sets of footprints on the floor, but Aijala thought they were all old. (Tr. 147).

Soderlind believed the footprints had been left recently; around a week. (Tr. 40). He knew this because the door never closed and was exposed to the weather, including rain, snow, and wind. (Tr. 40-41). These conditions would cover the footprints. (Tr. 41). All the witnesses agreed this area was exposed to the elements. (Tr. 40-41, 115, 147-148). Soderlind believed miners entered this area a couple of times a month, but it was hard to say for sure. (Tr. 43).

Hill conceded there were footprints in the area. (Tr. 117). However, he believed the footprints were dried and not fresh. (Tr. 110). New prints would be in mud and then old tracks would dry up. (Tr. 110, 115). He believed footprints probably occurred in the fall when it was raining and then froze in winter. (Tr. 115-116). Hill also testified that the silo was close to the water and the weather could change often. (Tr. 116). Aijala observed some footprints hardened

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[10] Soderlind did not go inside the silo. (Tr. 88).

[11] Soderlind believed he ask someone why miners would enter the silo. (Tr. 88). Such a conversation would be in his field notes. (Tr. 88). However, Soderlind was unable to find a record of such a conversation in either his field notes (RX-7) or citation notes (GX-7). (Tr. 89).

on the floor level. (Tr. 124-125). Aijala did not believe that the footprints were very recent. (Tr. 145). However, he could not say for certain if the footprints were from when the silo was a storage room. (Tr. 144). It was possible that they had occurred after the area was closed. (Tr. 144-145). In this area, mud usually occurred from water seeping from the water system. (Tr. 145). That system was shut down in November and kept off until spring. (Tr. 145). The footprints were at least from the previous fall, though he could not say for sure. (Tr. 145). If miners entered the previous fall, someone would have entered after the barrier was built. (Tr. 148-149).

The cited silo was along a roadway. (Tr. 90). Soderlind could not see the footprints while driving. (Tr. 90). If he had not seen footprints he would not have issued the citation. (Tr. 48). Respondent had a policy against miners going through barred areas. (Tr. 49). Bars were common at the mine and, if Soderlind had not seen the footprints, he would have assumed that, like other areas, no one entered. (Tr. 49). If miners had not entered, this would have been an acceptable barricade. (Tr. 50).

There was a pile of pellets (Respondent's product) in front of the silo. (Tr. 90-91). The silo was near the boat load-out area where the pellets were placed on ships for delivery. (Tr. 91). The piles of pellets would come and go. (Tr. 91). Hill testified that there was not a lot of traffic in this area because when boats we reloading, no one was permitted underneath the conveyors to the ship. (Tr. 108-109). Only five or six guys worked in that area. (Tr. 114).

The instant citation was marked "reasonably likely" because when miners access an area with clutter on the floor (pallets, hoses, boards) and no lighting it was reasonably likely that someone would trip and be injured. (Tr. 46-47).

The citation was marked "lost workdays or restricted duty," because a miner could sprain or strain a joint when falling in this area. (Tr. 47). The citation was also marked as affecting one person because it was likely only one person would be in that area at a time. (Tr. 47).

The citation was marked S&S. (Tr. 47). The specific hazard was the clutter in the walking and working space in the silo. (Tr. 47). The clutter in the silo and the fact that miners entered this area to get tools and parts created a tripping hazard. (Tr. 47-48). An injury from such a trip would be likely if the condition was not corrected. (Tr. 48).

The citation was marked as "moderate" negligence because there was an attempt to barricade the area. (Tr. 48). However, the condition was open and obvious and Respondent a history of housekeeping violations. (Tr. 48).

Aijala spoke with Inspector Soderlind about the citation.[12] (Tr. 125). He explained to the inspector that Respondent had put up the bars to keep people out, that the mud was hardened, and that it was hard to determine when someone was in the area. (Tr. 126).

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[12] Aijala took inspection notes that day. (Tr. 121, 140-141). He would take a notepad every day and compiles notes and then collect them in a bigger notebook. (Tr. 121-122). The next day, when the citations are issued with numbers, he transfers his notes from his notebook to a new set

Respondent terminated this citation by putting up caution tape between the bars and ribbon that showed the nature of the hazard. (Tr. 45-46, 50, 90, 125). They took expanded metal and welded it between the existing bars to prevent people from climbing into the silo. (Tr. 46, 125). The new barrier was sufficient and the silo and its contents could not be accessed. (Tr. 46, 90, 149-150). A sign was added. (Tr. 99, 125).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That §56.20003(a) Was Violated.

On April 6, 2011, Inspector Soderlind issued a 104(a) Citation, Citation No. 6564223 to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> Yards & Docks – Silo #10 had boot tracks through the fines on the ground indicating that this silo had been accessed. This silo had pallets, idlers, and various other debris and parts cluttered throughout the area. There is no walkway maintained and the silo is supposed to be barricaded by two bars across the door opening. These bars are easily defeated and the area can be accessed without much effort. There was no sign posted prohibiting entry, and no other warning tape or other hazard type of warning present. This condition exposes miners to trip and fall hazards resulting in injury

(GX-6).

Standard 30 C.F.R. §56.20003(a) ("Housekeeping") provides the following:

> (a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly;

30 C.F.R. §56.20003(a).

Inspector Soderlind credibly testified that the cited silo contained a large amount of debris and used equipment. (Tr. 37, 41, 108, 122). Respondent's witnesses conceded that the area was dirty and not maintained. Therefore, the only issue is whether the cited silo was a "storeroom" within the meaning of the standard or if this was a barricaded area where maintenance was not required.

A preponderance of the evidence supports a finding that this was a storeroom. Inspector Soderlind credibly testified that this silo was used to store old equipment and pallets. (Tr. 41). While he conceded that Respondent intended to close this area, he also credibly testified that miners entered this area either to retrieve equipment or to drop off old equipment. (Tr. 45, 98, 109). The fact that miners were entering the area was evidenced by the fact that foot prints were

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of notes. (Tr. 141-142). If a citation was issued when he is not present, he will talk with the person who was with the inspector and, if possible, look at the condition himself. (Tr. 141).

visible on the floor and equipment of the silo. (Tr. 40-42, 98). Respondent's witnesses conceded these points. (Tr. 111, 117, 146-147). Therefore, the Administrative Law Judge finds that the cited area was an active storeroom and that it was not being maintained in a clean and orderly fashion.

Respondent offered several arguments to show that the instant citation was not validly issued. However, these arguments are not persuasive.

First, Respondent noted that the degree of cleanliness in the given area of a mine is dictated by the amount of use that area receives. (*Respondent's Post-Hearing Brief* at 15 *citing Beco Construction Co.*, 23 FMSHRC 1182, 1194-95 (Oct. 2011)(ALJ Manning)). It argued that the cited area was closed and that no one needed to enter the silo. (*Id*.). Therefore, it argued that despite the debris on the floor, the floor was sufficiently maintained. (*Id*.). Further, it argued that the area was not in as great a disarray as Inspector Soderlind cited, as the floor was smooth, flat, and easily visible. (*Id*.). In short, Respondent argued that the condition of the silo was sufficient given its limited use.

There was some evidence supporting Respondent's contention that the cited silo was no longer in use. Specifically, it was uncontested that Respondent intended to close the cited silo. (Tr. 98, 109). Further, it was uncontested that if the area was closed, a citation would not have been appropriate. (Tr. 49). However, a preponderance of the evidence showed that the silo was in use. Specifically, it is uncontested that footprints were found inside the silo. (Tr. 40-42, 98, 111, 117, 146-147). This indicates that while Respondent may have intended to close the area, the silo was still in use. Respondent presented evidence that these footprints were old, perhaps from before the bars were placed on the silo. (Tr. 147). However, the Administrative Law Judge credits the Inspector's testimony that the footprints had been created relatively recently. (Tr. 40-43). Even Respondent's witnesses testified that the footprints, while old, occurred after Respondent intended to close the silo. (Tr. 145, 148-149). Finally, as discussed *supra*, the evidence supports a finding that the cited area was extremely disordered. Therefore, given the continued use of the silo and the level of debris found therein, the cleanliness of the cited area was insufficient

Respondent also argued that most of those footprints inside of the silo were mostly on the floor, not the equipment or tools. (*Respondent's Post-Hearing Brief* at 15). A preponderance of the evidence indicates that there were footprints on equipment and pallets as well as on the floor. (Tr. 40-42, 98, 111, 117, 146-147). Respondent's witness Hill testified that he could see footprints on the belts on the floor. (Tr. 117). Even if Respondent was correct and miners largely walked on the floor, equipment and pallets still constituted a tripping hazard within in the silo. As a result, the location of the footprints in the mine support the issuance of this citation.

Finally, Respondent argued that the issue of whether the barricade was adequate is completely irrelevant. (*Respondent's Post-Hearing Brief* at 16-17). It argued that under Section 56.20011 and the MSHA Program Policy manual, that the barricade need only prevent unintentional access to an area. (*Id*.). According to the Respondent, even if the barricade was inadequate, that does not necessarily create a violation of the cited standard here. (*Id*.).

Respondent is correct, as far as that goes. Respondent was not cited for an improper barrier and whether the barrier was adequate does not directly bear on the issue of Respondent's violation of 56.20003(a). The issue in this case is whether the silo was a storeroom and, if it was, whether the silo was maintained. As discussed *supra*, a preponderance of the evidence shows that the silo was actively used and inadequately cleaned. The state of the barrier is only relevant in that if the barricade was more solidly constructed, miners could not have used the silo. Having found that miners used the storeroom, the exact state of the barrier is entirely irrelevant.

2. Considering The Record *In Toto* And Applying Applicable Case Law, The Violation Was Unlikely to Result in a Lost Workday/Restricted Duty Injury And Was Not Significant And Substantial In Nature

Inspector Sichmeller marked the gravity of the cited danger in Citation No. 6564223 "Reasonably Likely" to result in "Lost Workday/Restricted Duty" injury to one person. (GX-6). These determinations are supported by a preponderance of the evidence.

The event against which the instant standard, 30 C.F.R. §56.2003(a) is directed is injury caused by poorly maintained working areas. Here the cited area was poorly maintained. (Tr. 37, 108, 122). Even Respondent's witnesses testified that there were pallets, tools, and equipment strewn throughout the poorly lit silo. (Tr. 37, 42, 108, 122, 142). However, the preponderance of the evidence shows that exposure to the cited condition was not frequent enough to justify a finding that the injury was "reasonably likely." Respondent's witnesses credibly testified that the cited area was located on a lightly used access road. (Tr. 108-109). Further, the evidence indicated that while some miners had clearly crossed through the barrier into the silo, many of the miners at the plant knew that two parallel bars indicated that the area was barred. (Tr. 49). This further limited exposure to the cited condition. Therefore, the Administrative Law Judge finds that there was some exposure to the cited condition, but that an injury was unlikely to occur.

If a miner were exposed to this danger, a preponderance of the evidence shows he would sprain or strain a joint when falling in this area. (Tr. 47). Only one person would be affected by the cited condition. (Tr. 47).

Having found that the exposure was limited and that an injury was unlikely, the Administrative Law Judge finds that the cited condition was not S&S. *see Florida Rock Industries, Inc.*, 34 FMSHRC 745, 751-753 (Mar. 2012)(ALJ Zielinski) (holding that if exposure is low and injury unlikely, a violation of 56.20003(a) is not S&S).

In light of the foregoing, the Administrative Law Judge finds that the cited condition was unlikely to result in lost workday/restricted duty to one miner and that the violation was not S&S.

3. Respondent's Conduct Displayed Moderate Negligence

In the citation at issue, Inspector Soderlind found that the operator's conduct was

moderately negligent in character. A preponderance of the evidence shows that Respondent knew or should have known that the cited condition existed. The Administrative Law Judge credits the testimony of Soderlind that the condition was open and obvious. (Tr. 48). The footprints, which showed the miners were entering the silo, were clearly visible from outside. (Tr. 48) Therefore, Respondent should have known that the condition existed. Further, Respondent had a history of housekeeping violations, putting Respondent on notice that maintenance was an area of concern. (Tr. 48, GX-1). Therefore, Respondent was negligent.

Respondent argued that it did not know and should not have known about the cited condition. (*Respondent's Post-Hearing Brief* at 21-22). Specifically, Respondent argued that the footprints were not visible from the roadway. (*Respondent's Post-Hearing Brief* at 22). More broadly, it argued that it had no knowledge that people were entering the barricade. (*Id*.). While the administrative Law Judge credits Respondent's evidence that it did not have actual knowledge of the cited condition, it should have known. The Administrative Law Judge credited the testimony of Inspector Soderlind that the footprints were visible. (Tr. 48). Further, Respondent should have ensured that the barricade was honored and checked to make sure that miners were not using the area. Even a brief glance into the silo would have revealed the footprints and alerted Respondent to the cited condition. Respondent cannot simply overlook an area and then use this oversight to claim that it is not negligent. *See Freeport McMoran Morenci, Inc.*, 2013 WL 1187700, *8 (Jan. 2013)(ALJ Miller)(holding that a condition is not "hidden" simply because it is ignored.). While Respondent did not have actual knowledge of the conditions at the silo, it should have known about the instant violation.

While Respondent was negligent, there were mitigating circumstances. Specifically, Respondent exercised diligence in barricading the area and creating a policy against entering barred places. (Tr. 39, 44, 49-51, 109, 123-124). In light of these mitigating circumstances, a finding of "Moderate" negligence was appropriate.

4. <u>Penalty</u>

As with the previous citation, the Administrative Law Judge finds that a substantial deviation from the Secretary's proposed assessment of $2,473.00 is warranted herein. Once again, the factors contained in 30 U.S.C. §820(i) will be used to explain that deviation. Those factors are as follows:

(1) The Operator's history of previous violations – Inspector Soderlind credibly testified that Respondent had a history of these violations. (Tr. 48). Respondent's violation history supports this testimony. (GX-1).

(2) The appropriateness of the penalty compared to the size of the Operator's business – As discussed with respect to the earlier citation, Respondent was a large operator with an above-average sized plant.

(3) Whether the Operator was negligent – As previously shown, Respondent's negligence is best characterized as "Moderate."

(4) The effect on the Operator's ability to remain in business – The parties have stipulated that the Orders at issue here would not affect Respondent's ability to remain in business. (JX-1)

(5) The gravity of the violation – As previously shown, the gravity of the cited danger was unlikely likely to result in lost workday and restricted duty injuries to one miner. Further the condition was not S&S.

(6) The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – The evidence shows the condition was abated rapidly and in good faith.

In light of the Administrative Law Judge's decision to modify the gravity of the cited danger from "Reasonably Likely" and "S&S" to "Unlikely" and "Non-S&S" a reduction in the assessed penalty is appropriate. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $1,000.00 with respect to this violation.

Citation No. 6564235

I. ISSUE

With respect to Citation No. 6564235, the issues to be determined are whether Respondent's alleged actions on April 11, 2011 were a violation of §56.12032 and, if so, whether that violation was significant and substantial ("S&S"), whether it was reasonably likely to result in fatal injury to one miner, whether it was the result of moderate negligence, and the appropriate penalty for the violation.

II. SUMMARY OF TESTIMONY

On April 11, 2011 Soderlind issued Citation No. 6564235 (GX-9) for a violation of §56.12032 which requires cover plates to remain securely in place on electrical junction boxes and equipment unless under repair.[13] (Tr. 51-54). The citation issued at the head end of the 67 conveyor outside of the plant. (Tr. 126). Here, the cover plate for an electrical junction box was hanging, exposing the inner-conductors and electrical terminals.[14] (Tr. 54, 56-57). These were clearly visible and the inch-and-a-half terminals were bare. (Tr. 57, 133). Soderlind could not inspect the inner conductors, but they were covered in dust. (Tr. 58). Aijala saw that the condition was dusty, but this did not mean the plate had been off for a long time, without a tight seal equipment gets dusty quickly. (Tr. 153). He believed that the wires were protected with a rubber coating. (Tr. 133). Fewer than half of the 18 terminals were live. (Tr. 133).

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[13] Aiajala accompanied Soderlind. (Tr. 126).

[14] The junction box was about four and a half to five feet off the ground. (Tr. 57). There was a handrail under the box, 44-inches off the ground. (Tr. 57). The box was between a foot-and-a-half and two feet above the handrail. (Tr. 57).

The face plate could have fallen off from vibrations. (Tr. 62, 135). There were brackets to keep the cover plate in place. (Tr. 61). MSHA did not require that all the screws attaching the cover plate to the brackets be tightened, just that the plate be secure. (Tr. 62).

Soderlind testified that a cover plate dangling would be quite apparent. (Tr. 63). The cited area was in continuous use. (Tr. 63). In the cited area, material dropped down into trucks from chutes. (Tr. 63). There was also a conveyor that entered from the yard. (Tr. 63). Sometimes miners would add material from the yard onto the conveyor. (Tr. 63, 126). The material was then sent to the silos and kept there until the ships come. (Tr. 63). Soderlind conceded that the condition was behind a set of stairs. (Tr. 94). He could not recall if he could see the condition from the ground level, but he saw it as he was walking up the stairs to the area. (Tr. 94-95). Aijala testified that this area was very infrequently traveled. (Tr. 126). He stated no one was aware of the condition. (Tr. 135). If someone had been aware, they would have called an electrician to put the box back on. (Tr. 135).

Miners would be in the cited area to clean with the hose and to examine. (Tr. 55, 60). Hoses were used to clean out two chutes that feed two belts. (Tr. 55-56, 127). When miners were hosing, they stood near the chutes. (Tr. 155). These hoses were high pressure, powerful enough to knock a miner down. (Tr. 61). Only one miner would be using the hose at a time. (Tr. 61). The chutes were cleaned four times a year when a crushed pellet product called sinter was shipped. (Tr. 127-128, 152-153, 156). Sinter does not flow like pellets and can clog the chutes. (Tr. 128, 152). Cleaning out the chute occurs outside in the elements, so there could be rain or snow. (Tr. 153-154). Shipping occurred between late March and the middle of January. (Tr. 156). However, there was still snow and ice during the shipping season. (Tr. 156). No one would be in the area and no cleaning would occur during the non-shipping season. (Tr. 153). At the time of the citation, no sinter boars had been to the plant in 2011. (Tr. 152, 156).

There was also a hose lying in the walkway near the junction box. (Tr. 59, 126). A miner could trip over the hose if he was walking in the area and did not see it. (Tr. 59, 64). A miner entering area to reach the electrical box and might be carrying a shovel or tools. (Tr. 59). Soderlind testified the hose added to the hazard of the open box, making injury more likely. (Tr. 59-60). Aijala testified that contact with these terminals was unlikely because someone would have to fall against the wires. (Tr. 134). A fall was unlikely because there was no tripping hazard. (Tr. 124). Contact with these terminals was unlikely because someone would have to fall against the wires. (Tr. 134). He stated the hose did not present a tripping hazard because it was coiled in a ball, the lighting was good (it was daylight), and there was room to walk around. (Tr. 132). At nighttime this area was well-lit with overhead sodium vapor lights. (Tr. 132). The floor in this location was grated. (Tr. 156).

There were controls mounted on the cover plate. (Tr. 55, 57). These controlled the ram and the limit switch.[15] (Tr. 54). In order to use the controls a miner would put the plate back on

[15] Soderlind was not sure was the ram and limit switch were. (Tr. 55). The cited area was a truck dump area and he believed the switch was related to clearing the chute, but was not sure. (Tr. 55). Aijala testified that the controls were used to move the cylinder back and forth between the belts. (Tr. 128-129). If maintenance was working on one of the belts it would use the control

the box. (Tr. 91). However, Soderlind believed it was possible to use the box while the face was hanging off. (Tr. 92, 100). Soderlind did not believe they would do so, it would make more sense to put the face back on. (Tr. 92). He conceded that tripping over the hose was the most likely hazard. (Tr. 92).

The citation was issued out in the yard and dock, the outside area of the mine. (Tr. 55, 58, 62). This increased the hazard because the box was exposed to the elements. (Tr. 58). Over time the jackets from the wires would wear out. (Tr. 58).

The box was energized. (Tr. 58). Soderlind testified that an electrician verified that this box was 110 volts, which is sufficient to kill a person. (Tr. 57, 60). In order to kill, 110 volts would just need a path through the body; the miner would need to touch the box and, with the other hand, some metal to complete the circuit. (Tr. 60). There were metal handrails, stairs, and other structure in the area. (Tr. 60). In Aijala's experience, 110 volts was not enough to prove fatal. (Tr. 134-135, 151). Someone would just be shocked and then pull away. (Tr. 135). However, he conceded he was aware that 110 volts could kill someone. (Tr. 151). That voltage was the most common voltage and it was the most common cause of electrical death. (Tr. 151).

Aijala testified that the cited control box was not in use for any reason, though it had been used before. (Tr. 128-129, 150). A new control box had been built behind the stairway near the cited location. (Tr. 129-130). As a result, there would be no reason to enter this area because the new box was installed. (Tr. 132-133). Accessing the new box would not require walking past the one cited. (Tr. 131). Upon coming up the stairway in the area, the cited box was on the left, the new box was on the right. (Tr. 131-132). Aijala conceded the old box was not being repaired and not being tested. (Tr. 150). The cover plate was not off for maintenance. (Tr. 54, 150). Aijala further conceded that the old box was still energized. (Tr. 151). Aijala told the inspector about the new box. (Tr. 135-136). However, while the box was no longer in use, people still entered the area to hose out the sinter. (Tr. 151-152). People doing this task would not be focused on the box. (Tr. 152).

The citation was marked "reasonably likely" because there was a hose in the walkway and the junction box was exposed to the elements and water from the hose. (Tr. 64). Water sprayed into the terminals may have increased the corrosion or tripped something. (Tr. 65).

The citation was marked "fatal" because this condition could lead to fatal electrocution, burns, or shocks. (Tr. 65). A shock of 110 volts could cause a person to lose control of his muscles and the ability to release something from his grip. (Tr. 65-66). Soderlind had read of these types of injuries, he has never seen one himself. (Tr. 66). The citation was marked as affecting one person because it was likely only one miner would be in the area. (Tr. 66).

The citation was marked S&S. (Tr. 66). The specific hazard was the electrical risk of the open cover plate. (Tr. 66). The hazard would be likely to occur because miners were in the area, the area was exposed to the elements, and there was dust in the box. (Tr. 66-67). The citation

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box to direct the reclaimed pellets onto the other belt so one belt would continue to run while they worked. (Tr. 129).

was issued in April, so there could have been ice or snow. (Tr. 67). Under continuing mining operations, an injury was reasonably likely. (Tr. 67).

The citation was marked as "moderate" negligence because the condition was in an open and obvious area of the mine, the area experienced a lot of foot and vehicle traffic, and it could be seen from outside. (Tr. 67-68). The office was nearby and all employees traveled through the area to get to the silos, the boats, or the yard. (Tr. 68). Further, the dust in the box and on the conductors inside indicated the condition had existed for some time. (Tr. 68).

To terminate the condition, Respondent screwed the four corners of the plate into the existing metal framing. (Tr. 62, 68).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That §56.12032 Was Violated.

On April 11, 2011, Inspector Soderlind issued a 104(a) Citation, Citation No. 6564235 to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> Yards & Docks – The cover plate for the ram and limit switch, with control switches mounted on the face, was dangling by live 110 volt inner conductors. This was located at the shuttle level below the head of the 67 conveyor. A 1 ½ inch water hose was also in the walkway, creating an additional tripping hazard (See Citation #6564236). This condition exposes miners to electrical hazards resulting in serious injury.

(GX-9).

Standard 30 C.F.R. §56.12032 ("Inspection and Cover Plates") provides the following:

> Inspection 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.

In the instant case, it is uncontested that there was a cover plate loose from a junction box at the head of the 67 conveyor. (Tr. 51, 54, 56). There was no evidence that the box was being tested or repaired. (Tr. 150).

In its' brief, Respondent did not argue against the validity of Citation No. 6564235. The Administrative Law Judge finds that Respondent conceded that it violated the standard. In light of this fact, and the evidence presented, the Administrative Law Judge finds that this citation was valid.

2. Considering The Record *In Toto* And Applying Applicable Case Law, The Violation Was Significant And Substantial In Nature And Reasonably Likely to Result in a Fatal Injury

Inspector Soderlind marked the gravity of the cited danger in Citation No. 6564235 "Reasonably Likely" to result in "Fatal" injury to one person. (GX-9). These determinations are supported by a preponderance of the evidence.

The event against which the instant standard, 30 C.F.R. §56.12032, is directed is electrocution by contact with live electrical equipment. In the instant case, the cited condition, the hanging cover plate, exposed miners to bare terminals and conductors. (Tr. 55, 60). The terminals were live. (Tr. 58). Inspector Soderlind credibly testified that, miners worked in this area and were exposed to the electrical hazard. Further, a hose located in the area creating a tripping hazard which increased the chances of contact with the junction box. (Tr. 59, 64, 126). As a result, the Administrative Law Judge finds that contact with the electrical equipment was reasonably likely. Soderlind also credibly testified that if a miner were to contact this electrical equipment, the 110 volt charge was sufficient to cause fatal injuries to one miner. (Tr. 57, 60).

Respondent provided several arguments asserting that an accident was unlikely and that a 110 volt shock would be unlikely. As Respondent addressed those arguments as they related to the S&S designation, they will be discussed *infra*.

Citation No. 6564235 was marked by Inspector Soderlind as S&S. (GX-9). It has already been established that the first element of the *Mathies* S&S analysis, the underlying violation of a mandatory safety standard, has been established with respect to this citation. As discussed *supra*, Respondent violated 30 C.F.R. 30 C.F.R. §56.12032.

The second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation, is also met. The preponderance of the evidence shows there cited condition, a hanging cover for a junction box, contributed to the hazard of contacting live electrical terminals. Specifically, the uncontested evidence showed that the cover of the junction box was off and that the terminals within were live. (Tr. 54, 56-58, 151). The fact that the wires were exposed increased the likelihood that a miner would be electrocuted.

Respondent produced several arguments for the proposition that this condition posed no hazards. None of these arguments are persuasive. First, Respondent argued that there was no reasonable hazard because miners rarely entered the cited area, limiting expsoure. (*Respondent's Post-Hearing Brief* at 27-28 *citing Essroc Cement Corp.*, 33 FMSHRC 459, 467-68 (Feb. 2011)(ALJ Manning); *Buffalo Crushed Stone*, 16 FMSHRC 2154, 2158 (Oct. 1994)(ALJ Weisberger); *Danaco Exploration International*, 13 FMSHRC 1962, 1966 (Dec. 1991)(ALJ Morris); and *Higman Sand & Gravel, Inc.*, 27 FMSHRC 641, 643-44 (Sep. 2005)(ALJ Manning)). Respondent argued extensively that the instant citation is similar to the condition in *Higman Sand & Gravel, Inc*. In that case, the ALJ found that the cited condition was located in an area where, under normal mining conditions, no miners would ever enter. 27 FMSHRC at 643-644. Respondent argued that this was analogous to the instant situation wherein miners only entered the cited area four times a year. (*Id.*).

While it is true that miners were not always exposed to the cited violation, under continued normal mining conditions, exposure was certain. Unlike in *Higman Sand & Gravel, Inc.*, if the condition had not been abated, miners eventually would have been ordered into this area to clean out the chutes. This would have occurred at least four times a year. (Tr. 127-128, 152-153, 156). Therefore, there would have been exposure. When working on the chutes, miners would have been working in wet conditions and exposed to the elements in the direct vicinity of the cited box. (Tr. 153-154, 156). There would also have been tripping hazards in the area. (Tr. 54, 64). Therefore, unlike in *Higman Sand & Gravel, Inc.*, miners would actually be exposed to the junction box.

Respondent also argued that that the cited box was old and no longer in use, thereby eliminating exposure to the cited condition. (*Respondent's Post-Hearing Brief* at 27-28). Respondent noted that Soderlind was not aware that there was a new box when he cited the exposed junction box. (*Id*.). However, the fact that there was a new junction box probably increased, rather than decreased, the chances that a miner would contact the bare terminals. Miners working in this area would know that there was a new junction box. Further, given the decrepit condition of the cited box, miners would reasonably conclude that the box was no longer in use and, as a result, no longer energized. Miners might touch the box or simply behave less cautiously around it believing that Respondent would not energize unnecessary electrical equipment, increasing the chances for exposure. In effect, an "old" energized junction box might have a greater chance of dangerous conduct than a "new" energized junction box.

Respondent also argued that miners working in this area would be using the hose, so it would not present a tripping hazard. (*Respondent's Post-Hearing Brief* at 30). Further, the hose was sprayed away from the cited box. (*Id*.). The Administrative Law Judge finds that a preponderance of the evidence supports a finding that the cited condition poses an S&S hazard even without a tripping hazard. There was an open junction box with live electrical terminals in an area where miners were working. (Tr. 51, 54, 56-59, 64,126, 151). The possibility that there was a tripping hazard merely adds to that existing danger. Further, even if miners would be using the hose and spraying away from the junction box, under normal mining conditions there would still be situations where the hose would be placed on the ground or when water was on the ground, creating tripping hazards. Respondent's argument in no way limits the hazard.

In light of the foregoing, the Administrative Law Judge finds that the second prong of *Mathies* is met.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – is also met. In the event that a miner were to contact the electrical terminal, he would be electrocuted by 110 volts of electrical current. (Tr. 57, 60). There is no question that this would cause an injury.

The fourth element - a reasonable likelihood that the injury in question will be of a reasonably serious nature – is also met. There is no question that electrocution could cause serious injury or even death. (Tr. 57, 60, 151). The voltage in the cited junction box, 110 volts, has caused more fatal electrocutions than any other voltage. (Tr. 151). As a result, the fourth prong of *Mathies* is met.

The Administrative Law Judge finds that the cited condition was reasonably likely to result in a fatal injury to one miner. Further, the cited condition was S&S.

3. <u>Respondent's Conduct Displayed Moderate Negligence</u>

In the citation at issue, Inspector Soderlind found that the operator's conduct was moderately negligent in character. A preponderance of the evidence supports this determination. Respondent knew or should have known of the cited condition. The condition was open and obvious and was located near the office, the roadway and the truck load out area. (Tr. 63, 67-68). Further, Respondent knew that vibrations could cause junction boxes to become uncovered. (Tr. 135). Further, because it had ordered the junction box to be replaced, Respondent had to be aware that it had an energized junction box that was no longer being examined or maintained. As a result, Respondent was negligent.

Respondent offered several argument to show that it did not know and should not have known about the cited condition. First, Respondent argued that this was not a high traffic area and the condition was not readily visible. (*Respondent's Post-Hearing Brief* at 31). As noted *supra*, while miners may not have been at the cited junction box at all times, it was in a general area where miners and management would be traveling and working. Further, Respondent knew that it had an abandoned, but energized, junction box that was no longer being maintained and examined. As a result, it should have known that the box could pose a hazard and was negligent.

Respondent also argued that this condition was likely caused by vibrations, meaning that no one would notice it as it occurred. (*Respondent's Post-Hearing Brief* at 31). Respondent was clearly aware that vibrations could cause the cover plate to fall off. (Tr. 135). Therefore, it should have been aware that the cited condition was possible and acted affirmatively to prevent or correct it. Therefore, Respondent was negligent.

While Respondent was negligent, there were mitigating circumstances. Specifically, miners were not working in this area at all times. (Tr. 127-128, 152-153, 156). As a result, a finding of moderate negligence was appropriate.

4. <u>Penalty</u>

In light of the fact that the Administrative Law Judge has affirmed the Secretary's citation as issued, it is appropriate to affirm the assessed penalty as issued. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $11,306.00 with respect to this violation.

<u>Citation No. 6564248</u>

I. ISSUE

With respect to Citation No. 6564248, the issues to be determined are whether Respondent's alleged actions on April 18, 2011 were a violation of §56.20003(b) and, if so, whether that violation was significant and substantial ("S&S"), whether it was reasonably likely

to result in lost workday/restricted duty injury to one miner, whether it was the result of moderate negligence, and the appropriate penalty for the violation.

II. SUMMARY OF TESTIMONY

On April 18, 2011 Soderlind issued Citation No. 6564248 (GX-12) for a violation of 56.20003(b) which requires every work area and passageway be kept clean, orderly, and dry. (Tr. 68-70). Here, the area behind the tail end of the 45 conveyor was wet, slippery, and had a buildup of taconite fines on the floor. (Tr. 70, 95, 138). He did not measure how deep it was. (Tr. 75). There was also a pellet spill nearby. (Tr. 70, 72). Loose pellets are like marbles. (Tr. 73). Some pellets were in the wet fines but others were in a different area. (Tr. 95). The condition could occurred during a shift. (Tr. 75).

Soderlind knew this area was wet, muddy and slippery because he tested it with his foot. (Tr. 71, 75). He did not walk through the material. (Tr. 96). There was a lot of moisture and steam in the mine. (Tr. 74). Water could also spill in this area. (Tr. 74-75). The cited area was low in the mine and so water would settle there. (Tr. 75). Aijala believed that the fines were dry and had good traction because he drug his feet across them. (Tr. 137-138). He also did not walk through the fines. (Tr. 154).

Soderlind observed footprints in the muddy conditions on the floor, but he could not tell if there was more than one set. (Tr. 72, 80). Aijala believed that the footprints in the material showed good traction because they were well-defined, rather than showing a slip. (Tr. 137-138). There was no evidence anyone had slipped. (Tr. 138).

According to Soderlind, miners accessed this area on foot often, through a set of double doors, to access the plant. (Tr. 72-74). Miners would either go through the doors, climb the stairs, or take the walkway around the conveyor. (Tr. 74). When traveling through this area, miners might be carrying tools or equipment. (Tr. 76). The cited conditions were about ten feet from the stairs. (Tr. 73). Aijala testified that the tail end of 45 conveyor was remote. (Tr. 136). He stated miners did not normally travel in this area during the normal routine. (Tr. 136-137).

At the plant, miners act as representatives for Respondent and identify, report, and correct hazards. (Tr. 80). Workers were to “clean through” meaning that if miners have to travel through an area with a hazard they have to stop and clean up. (Tr. 76). This was not a written policy. (Tr. 154). If a miner did not have time to clean, the area was barricaded off with danger tape and the condition recorded. (Tr. 76). The length of time between taping off and cleaning the condition would depend on the worker’s schedule. (Tr. 154-155). In the cited area, there was no barricade or danger tape. (Tr. 76, 154).

Soderlind testified that Respondent did not have a cleaning crew, but other similar mines hired a cleaning crew or a person to clean conditions constantly. (Tr. 81-82). Aijala testified that Respondent’s day crew cleaned the floors and there were workers on the shift who cleaned. (Tr. 138-139). He believed, under normal mining conditions, this area would be cleaned. (Tr. 139). Soderlind testified that it would take no more than ten minutes to clean the cited condition with a hose. (Tr. 75, 77-78). He had seen similar areas cleaned. (Tr. 75).

The citation was marked "reasonably likely" because there were footprints going through the condition and this was a high traffic area. (Tr. 78). Soderlind believed that someone would eventually slip on the fines or pellets and injure himself. (Tr. 78).

The citation was marked "lost workday/restricted duty" because this condition could lead to sprained or strained ankles, knees, elbows, wrists, or similar conditions. (Tr. 78). This citation was marked as affecting one person. (Tr. 79).

The citation was marked S&S. (Tr. 79). The specific hazard was slip and fall on the pellets or fines. (Tr. 79). Miners slipping on pellets was common. (Tr. 79). The hazard would be likely to occur because miners traveled this area often. (Tr. 79). Under continuing mining operations, an injury was reasonably likely. (Tr. 79-80).

The citation was marked as "moderate" negligence because Respondent had a history of housekeeping violations and because miners traveled through this area often. (Tr. 80). Soderlind had cited Respondent for similar violations and also seen others. (Tr. 81). The cited condition was not "high" negligence because he did not believe that management knowingly told miners to walk through the cited condition. (Tr. 81). However, it was not "low" negligence because it was open, obvious, and should have been addressed. (Tr. 81).

This citation was terminated when Respondent cleaned the cited condition. (Tr. 82). The area was sprayed down, cleared of all the slippery fine material, and the pellets were removed with a hose. (Tr. 77). Pellets could also have been cleaned with a shovel. (Tr. 77).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. <u>The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That §56.20003(b) Was Violated.</u>

On April 18, 2011, Inspector Soderlind issued a 104(a) Citation, Citation No. 6564248 to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> Pellet Plant – The walkway around the tail end of the 45 conveyor was covered in wet, slippery fines material and pellets. The affected area was approximately 20 ft. long by 6 ft. wide with foot tracks coming and going through the entire length of the affected area. This condition exposes miners to slip/fall hazards resulting in injury.

(GX-12).

Standard 30 C.F.R. §56.20003(b) ("Housekeeping") provides the following:

> (b) The floor of every workplace shall be maintained in a clean and, so far as possible, dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places shall be provided where practicable; and

30 C.F.R. §56.20003.

In the instant case, it is uncontested that the walkway near the tail end of the 45 conveyor had an accumulations of fines. (Tr. 70, 72, 95, 138). The cited condition was 20 feet long by 6 feet wide. (Tr. 71-73).

In its' brief, Respondent did not argue against the validity of Citation No. 6564248. The Administrative Law Judge finds that Respondent conceded that it violated the standard. In light of this fact, and the evidence presented, the Administrative Law Judge finds that this citation was valid.

2. Considering The Record *In Toto* And Applying Applicable Case Law, The Violation Was Significant And Substantial In Nature And Reasonably Likely to Result in a Lost Workday/Restricted Duty Injury

Inspector Soderlind marked the gravity of the cited danger in Citation No. 6564248 "Reasonably Likely" to result in "Lost Workday/Restricted Duty" injury to one person. (GX-12). These determinations are supported by a preponderance of the evidence.

The event against which the instant standard, 30 C.F.R. §56.20003(b), is directed is injury caused by poorly maintained working areas. With respect to the instant citation, the condition, an improperly maintained walkway, exposed miners to the possibility of injury. Inspector Soderlind credibly testified that the walkway was covered in an accumulation of mud and pellets, creating a slip and fall hazard. (Tr. 70, 72, 95, 138). He knew the area was slippery because he tested it with his foot. (Tr. 71, 75). He also testified that this was a high traffic area. (Tr. 72-74, 79). In fact, he observed footprints through the cited condition, showing that miners were exposed to the condition. (Tr. 72, 80). Therefore, the Administrative Law Judge finds that it was reasonably likely that a miner would suffer a lost workday/restricted duty injury from a slip and fall.

Respondent provided several arguments asserting that an accident was unlikely. As Respondent addressed those arguments as they related to the S&S designation, they will be discussed *infra*.

Citation No. 6564248 was also marked as S&S. (GX-12). It has already been established that the first element of the *Mathies* S&S analysis, the underlying violation of a mandatory safety standard, has been established with respect to this citation. As discussed *supra*, Respondent violated 30 C.F.R. 30 C.F.R. §56.20003(b).

With respect to the second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation, the preponderance of the evidence shows that the violation created a tripping hazard. Inspector Soderlind credibly testified that that the cited walkway contributed to the hazard of slipping and falling. (Tr. 73, 79). The walkway was covered in accumulations of slippery mud and taconite pellets. (Tr. 70, 72, 95, 138). Soderlind knew the condition was slippery because he tested it with his boot. (Tr. 71, 75).

These conditions support a finding that the violation contributed to a discrete safety hazard. *See e.g. Imerys Pigments*, LLC, 28 FMSHRC 180, 182-184 (Mar. 2006)(ALJ Melick).

Respondent produced several arguments for the proposition that this condition posed no hazards. These arguments were not persuasive. First, Respondent argued that the cited condition was located in a remote area with little foot traffic. (*Respondent's Post-Hearing Brief* at 36). Respondent noted that where there was limited exposure, a finding of S&S was inappropriate. (*Id*. at 35 *citing Placerville Industries, Inc.*, 27 FMSHRC 115, 119-21 (2005)(ALJ Manning)). As noted *supra*, Inspector Soderlind credibly testified that miners traveled through this area regularly. (Tr. 72-74, 79). He testified at length about the various directions miners could travel from the walkway. (Tr. 72-74). Further, the fact that footprints were found in the accumulations shows that miners were accessing this area. (Tr. 72, 80). Therefore, the Administrative Law Judge finds that there was sufficient traffic in this area to find S&S.

Respondent also argued that the foot prints in the cited area were minimal and did not show that there was a "regular" hazard. (*Respondent's Post-Hearing Brief* at 36 *citing Patriot Mining*, 31 FMSHRC at1470). While there may not, at that time, been a large number of footprints, that does not show that this hazard was not S&S. Under normal mining conditions, and without abatement, more miners would have been traveling through this area. (Tr. 79, 80). The fact that only a small number of miners, at the time of the citation, had traveled through the area attests to Respondent's good luck in being cited early, rather a limited amount of exposure.

Finally, Respondent testified that the cited condition was coarse and dry rather than slippery. *(Respondent's Post-Hearing Brief* at 36-37). Aijala testified that he tested the material with his feet and found that it was dry and had good traction. (*Id*.). Further, the "firm" footprints showed that the material was not slick. (*Id*.). The Administrative Law Judge credits the testimony of Inspector Soderlind that the material was wet and slippery. (Tr. 71, 73, 75, 79). The photograph evidence supports a finding that the walkway was slick. (GX-14, p. 1). Further, even if the material was largely dry, it would still make the walkway slippery and increases the likelihood of an injury. As a result, the Administrative Law Judge finds that the sector prong of *Mathies* is met.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – is also met. In the event that a miner were to slip and fall on the walkway, injuries including sprains, strains, and broken bones would be expected. (Tr. 78).

Respondent argued that there was no evidence that an injury could result beyond the Inspector's experience. While it is possible that no slip and falls had ever caused injury at Respondent's plant, the Administrative Law Judge credits the inspector's testimony that such a fall could result in sprains, strains, and broken bones. (Tr. 78).The inspector's testimony regarding his experience constitutes evidence regarding the likelihood of an injury. *Buck Creek Coal, Inc. v. Federal Mine Safety and Health Admin.*, 52 F.3d 133, 135-136 (7th Cir. 1995)(holding that "no further evidence" beyond the Inspector's testimony is necessary to find that a violation was reasonably likely to result in injury and was S&S); *see also Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-1279 (Dec. 1998). There is no requirement that

the Inspector prove that an injury occurred in this particular case or testify directly regarding an identical situation. As a result, the Administrative Law Judge finds that the third element of *Mathies* is met.

The fourth element - a reasonable likelihood that the injury in question will be of a reasonably serious nature – As noted *supra*, an injury caused by slip and fall would be of a reasonably serious nature.

Respondent argued that a slip and fall type injury would not constitute an injury of a reasonably serious nature. *(Respondent's Post-Hearing Brief* at 37). Respondent cites *Placerville Industries, Inc.*, for the proposition that a slip and fall would not result in a reasonably serious injury. 27 FMSHRC at 121. However, slip and fall injuries are not, as a matter of law, always minor. There are several ALJ cases that find hazards that pose slip-and-fall risks to be S&S. *See e.g. Oak Grove Resources, LLC*, 35 FMSHRC 3039, 3052 (Sept. 2013) (ALJ Zielinski*); Oil-Dri Production Company*, 32 FMSHRC 1761 (Nov. 2010) (ALJ Manning); and *Mach Mining, LLC*, 32 FMSHRC 213 (Feb. 2010) (ALJ Weisberger). The determination of whether a violation is S&S, including whether it would result in a reasonably serious injury is based on the particular circumstances of that violation. *Texasgulf Inc.*, 10 FMSHRC at 501. Therefore, whether the slip and fall injuries expected here would result in a reasonably serious injury must be determined based on the specific circumstances surrounding this violation. The Administrative Law Judge finds the cited condition was extremely wet and slippery and also located in an area where there were staircases and a large amount of equipment. (Tr. 71-75, 79). As a result, a reasonably serious injury was reasonably likely.

The Administrative Law Judge finds that the cited condition was reasonably likely to result in a lost workday/restricted duty injury to one miner. Further, the cited condition was S&S.

3. Respondent's Conduct Displayed Moderate Negligence

In the citation at issue, Inspector Soderlind found that the operator's conduct was moderately negligent in character. A preponderance of the evidence supports this designation. Inspector Soderlind credibly testified that the cited condition was open and obvious. (Tr. 80). Further, Respondent had a history of housekeeping violations, placing them on notice that this type of issue would arise. (Tr. 80, GX-1). While it is likely that Respondent did not have actual knowledge of the cited condition, it should have known. Therefore, it was negligent.

Respondent argued that consideration of the history of housekeeping violations was inappropriate. (*Respondent's Post-Hearing Brief* at 39). Specifically, it noted that the only issue with respect to negligence is whether Respondent knew or should have known of the cited condition and that prior actions do not matter for this inquiry. (*Id.*). Respondent misunderstands the way in which past violations are used in determining negligence. Respondent is not being punished again for past violations, instead past violations are used to show Respondent had notice. *Black Beauty Coal Co. v. Federal Mine Safety and Health Review Com'n*, 703 F.3d 553, 561-562 (D.C.Cir. 2012)(holding that past violations provide awareness to a mine operator and are relevant for both unwarrantable failure and negligence determinations). Showing that

Respondent had been cited for housekeeping issues in the past shows that Respondent knew these conditions could and would arise but failed to take proper precautions. As a result, the Administrative Law Judge considers the credible evidence submitted on that point to be relevant to determining Respondent's negligence

Respondent also argued that it should not have known about the condition because the cited area was remote and rarely traveled. (*Respondent's Post-Hearing Brief* at 38). As discussed with respect to gravity *supra*, the Administrative Law Judge credits the testimony of the inspector that miners traveled with some regularity in this area. (Tr. 72-74, 79). Further, the footprints in the material attested to the fact that miners were required to walk in this area. (Tr. 72, 80). A preponderance of the evidence shows that miners worked in this area. As a result, the failure to maintain it constituted negligence.

While Respondent was negligent, there were mitigating circumstances. Specifically, Inspector Soderlind noted that the mine used a "clean through" program that allowed miners to inspect the mine. (Tr. 81-82). Therefore, management may not have been aware of the cited condition. Further, as Respondent argued, a cleaning crew at the mine was tasked with cleaning these areas. (*Respondent's Post-Hearing Brief* at 38). Eventually, this crew may have cleaned the cited condition even if Respondent had not been cited. As a result, a finding of moderate negligence was appropriate.

4. Penalty

In light of the fact that the Administrative Law Judge has affirmed the Secretary's citation as issued, it is appropriate to affirm the assessed penalty as issued. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $3,405.00 with respect to this violation.

ORDER

It is hereby **ORDERED** that Citation Nos. 6564267, 6564223, 6564235, and 6564248 are **AFFIRMED** as modified herein.

Respondent is **ORDERED** to pay civil penalties in the total amount of $17,711.00 within 30 days of the date of this decision.[16]

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

[16] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

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