FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 26, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. TAFT PRODUCTION COMPANY, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2012-1484-M A.C. No. 04-02964-299562 Mine: Taft Production Company & Mines

DECISION

Appearances: Pamela F. Mucklow, U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, on behalf of the Secretary of Labor

Larry R. Evans, Oil Dri Corporation of America, Ochlocknee, Georgia, on behalf of Taft Production Company

Before: Judge James G. Gilbert

This case is before me upon a Petition for Assessment of a Civil Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The petition alleges that Taft Production Company ("Taft") is liable for four violations of the Secretary's safety and health standards for surface metal and nonmetal mines, and proposes the imposition of penalties in the total amount of $3,321.00. A hearing was held in Los Angeles, California and both parties filed post hearing briefs.[1]

I. Stipulations of Fact

1. Taft is engaged in surface metal/nonmetal mining at the Taft Production Company Mine in Kern County, California.

2. Taft's mining operations affect interstate commerce.

[1] Prior to the hearing, Respondent filed a *Motion for Summary Decision* and the Secretary filed a response in opposition. I declined to rule on the pending motions at that time, and took the motions under advisement. The summary decision briefs are referred to in this opinion as Resp. Br. and Sec'y Br. Tr. 308. Each party was permitted to file a supplemental post-trial brief with additional arguments (referred to in this opinion as R. Resp. Br. and Sec'y Resp. Br.).

3. Taft is an operator as defined in section 3(d) of the Act.

4. Operations at the Taft Production Company mine are subject to the jurisdiction of the Mine Act.

5. The Administrative Law Judge has jurisdiction in this matter pursuant to section 105 of the Act.

6. The individual whose signature appears in block 22 of the citations at issue in this proceeding was acting in his official capacity as authorized representative of the Secretary of Labor when the citations were issued.

7. True copies of the citations at issue in this proceeding were served on Taft as required by the Act.

8. The total proposed penalties for the citations in this proceeding will not affect Taft's ability to continue in business.

9. The Secretary stipulates that Taft exercised good faith in terminating the citations in a timely manner.

Transcript (Tr.) 6-7.

II. Discussion

Taft Production Company Mine is located in Kern County, California and is a producer of cat litter. Tr. 16; Stipulation (Stip.) No. 1. MSHA Inspector David Cheney conducted a regular inspection of the mine from July 30, 2012, through August 2, 2012.[2] Tr. 16-17. He was accompanied by Nick Kingston, the process manager at Taft, during the inspection.[3] Tr. 34. Cheney wrote four citations over the course of his inspection.

1. <u>Citation No. 8689617</u>

Citation No. 8689617 was issued by Cheney on July 31, 2012, at 4:40 a.m., pursuant to section 104(a) of the Act. Government's Exhibit No. 1 (Ex. G-1). It alleges a violation of 30 C.F.R. § 56.20003(a) which states that, "[a]t all mining operations – (a) Workplaces,

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[2] David Cheney has been an MSHA inspector for 11 years. Tr. 13. Prior to joining MSHA, Cheney was a miner at Riverside Cement, an open pit mine, for 23 years. Tr. 14.

[3] Nick Kingston has been employed by Taft for 7 years. Tr. 193. He has held positions such as laborer, line leader, and order processor during that time and is currently the team leader of processing. Tr. 193.

passageways, storerooms, and service rooms shall be kept clean and orderly." The violation was described in the "Condition or Practice" section as follows:

> At the top of the 102 silo was a spillage of material in front of the cat walked [sic]. This spillage consists of ½ inch rocks. This spillage was approximately 3 inches deep. Miners were exposed to a slip, trip, fall hazard. Miners are in this area once a month.
>
> Standard 56.20003(a) was cited 3 times in two years at mine 04-02964 (3 to the operator, 0 to a contractor).

Ex. G-1.

Cheney determined that the violation was unlikely to result in a lost workdays or restricted duty injury, that one person was affected, and that the level of negligence was moderate. A civil penalty in the amount of $176.00 was assessed for the violation.

A. Relevant Testimony

(1) Inspector David Cheney

Cheney testified that there was spillage on top of the 102 silo in front of the walkway. Tr. 19; Ex. G-2. A picture of the area taken by Cheney depicts soft powder with small granules on a flat surface, the roof of the silo, which leads up to a grated walkway.[4] Tr. 20, 30, 136. He estimated that the powder was spread across an area of 10 feet by 10 feet and approximately 2 to 3 inches deep. Tr. 20, 28, 29, 138. A photograph taken after termination of the citation depicts a smooth, clean silo surface devoid of powder and granules. Ex. G-3.

Cheney considered the conditions to be a violation of the cited standard because miners walked through the area, making it a work area or passageway, and it was not clean and orderly. Tr. 33. He was unsure whether there was a dust collector at the top of the silo or other material such as screws, but what he did see indicated that miners would need to access the area for maintenance purposes. Tr. 33-34.

Cheney determined that the violation was unlikely to result in an injury to one miner because a miner would only visit the area rarely to do maintenance. Tr. 40, 48; Ex. G-1. He stated that Kingston estimated that maintenance was done once a month. Tr. 41. He also asserted that the cited standard was intended to prevent slip, trip, and fall hazards that could lead

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[4] While the pictures introduced during the hearing depict dates on which the citations were not issued, Cheney testified that the batteries went dead on his camera and when the batteries were replaced, he did not modify the date. Tr. 22-23. He asserted that the photographs were actually taken on the dates that the citations were issued. Tr. 23-24. I find Cheney's explanation to be credible.

to lost workdays or restricted duty injuries, such as a twisted ankle, bumps, bruises, or cuts.[5] Tr. 36, 38, 45-46. These are injuries that have reportedly occurred from slip, trip, and fall hazards in other mines and happen “all the time.” Tr. 46-47.

Cheney marked the level of negligence as moderate because the operator either should have known or did know of the violative conditions but there were mitigating circumstances. Ex. G-1; Tr. 48. The Secretary argued that while Kingston stated that he was not in and has not held a management position, he was nonetheless an agent of Taft. Tr. 193, 269-70.

(2) Nick Kingston

Kingston maintained that the spillage on top of the 102 silo was between a ½ inch and 2 inches thick. Tr. 194. He was not very familiar with all the uses of the silo, but stated that it was part of section 1 of the plant and that the spillage usually happens from an overload of elevator 101. Tr. 228, 250. The elevator is loaded with product at the base, where it is transported upward, and automatically fed down the pipes that lead to the silo. Tr. 252.

Access to the top of the 102 silo is gained by climbing up the 101 silo and walking across a catwalk. Tr. 248; Ex. G-4, 5. Kingston explained three reasons why a miner would access the top of the 102 silo. He testified that the one miner who is on-shift would not go to the top, except to take measurements of the silo tank once a month. Tr. 194-95, 229. Kingston also stated that maintenance may access the top of the silo to grease if section 1 was running, noting that this could happen as often as once a month or as little as every 6 months. Tr. 195-96, 242. The last reason is to change the gates. Tr. 252-53. Gates are changed when Taft wants to bypass the silo and divert the product to a different pipe that leads directly to a conveyor. Tr. 253. In order to change the gates, a miner must climb the stairs located at the top of the 102 silo that lead to the top of the elevator. Tr. 247-48.

Because the top of the 102 silo is seldom accessed, Kingston asserted that he was not aware of the spill until traveling there with Cheney and that the spill had not been reported by any miner. Tr. 194, 227.

B. Respondent’s Legal Arguments

Respondent argues that it did not violate the above standard because the area where the 102 silo was located should not be considered a mining operation, the area was not a passageway or a walkway, there was no fair notice of the meaning of clean and orderly, and the citations were duplicative.[6]

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[5] Cheney stated that he slipped on the material after stepping onto it. Tr. 139.

[6] Respondent makes the same argument for the three citations discussed below as well. The issues of jurisdiction (Taft being a mining operation), fair notice, and duplication will be applicable to each citation in this proceeding. The issue of whether the area where the spill occurred was a workplace and/or passageway will be addressed in each individual citation discussion.

(1) Jurisdiction

Respondent argues that the cited areas were located in a milling operation, not a mining operation as the safety standard requires. Resp. Br. at 11-12. It also asserts that there is a marked difference between a mine operation and a mining operation. *Id.* at 12. However, Respondent stipulated that it is engaged in surface metal/nonmetal mining at the Taft Production Company Mine, that its "mining operations" affect interstate commerce, and that its operations are subject to the jurisdiction of the Mine Act. Stips. 1, 2, 4; Tr. 6. In addition, section 3(h)(1) of the Act states that a coal or other mine means ". . . structures, facilities, equipment, machines, tools, or other property… or used in, or to be used in, the milling of such minerals…." 30 U.S.C. § 3(h)(1).

Respondent stipulated to the fact that it is a mining operation engaged in surface metal/nonmetal mining. Its operations also fall under the purview of the Act as defined in section 3(h)(1). Accordingly, Respondent's argument that the Secretary lacked jurisdiction to issue the citation is rejected.

(2) Definition of Workplace and Passageway

Respondent argues that the cited areas were not workplaces or passageways. Resp. Br. at 3-5. When defining terms, the Commission has first looked at the language of the definition. *National Cement Co.*, 27 FMSHRC 721, 726 (Nov. 2005). Workplace and passageway are not defined in the Act or in the definitions relating to section 56. In this case, the Commission then looks to the commonly understood definition of the term. *Id.* at 726; *Jim Walter Res., Inc.*, 28 FMSHRC 983, 987 (Dec. 2006); *Drillex, Inc.*, 16 FMSHRC 2391, 2395 (Dec. 1994) (stating that "[i]n general, absent express definitions, statutory terms should be defined according to their commonly understood definitions."). However, the ordinary meaning of the words used in a statute cannot be applied to produce absurd results. *Jim Walter Res., Inc.*, 28 FMSHRC at 987; *National Cement*, 27 FMSHRC at 728.

Merriam Webster's Online Dictionary defines workplace as "a place where work is done" and defines passageway as "a way that allows passage." *Merriam Webster's Online Dictionary*, http://www.merriam-webster.com/dictionary/ (last accessed Jan. 26, 2014). Passage is defined as "way of exit or entrance: a road, path, channel, or course by which something passes." *Id.* These definitions do not produce absurd results if applied in the context of section 56.20003(a).

In particular to Citation No. 8689617, Respondent argues that the top of the 102 silo is not a workplace or passageway because the clay was behind a pipe and underneath a stairway. Resp. Br. at 3. However, Government Exhibits 2 and 3 clearly show that the spillage was not directly behind a pipe, but spread out and up against the catwalk. Miners would access the 102 silo to take measurements of the tank and to grease if the section was running. Tr. 194-96, 229, 242.

In addition, in order to change the gates, a miner has to walk across the top of the 102 silo to reach the ladder that leads to the top of the elevator where they are located. Tr. 247-48; Ex. G-4. Not only was work done on the top of the 102 silo, but miners were required to walk across

it as a means to reach the top of the elevator. Accordingly, I find that the 102 silo was both a workplace and a passageway.[7]

(3) Fair Notice

Respondent argues that MSHA failed to provide fair notice of its interpretation of the standard's requirements, particularly "clean and orderly." Resp. Br. at 2. It has stated that the Secretary's interpretation is essentially that "[e]very spot in the entire mine must always be spotless or you could be cited for each spot" and that it is "absurdly broad."

"[D]ue process considerations preclude the adoption of an agency's interpretation which 'fails to give fair warning of the conduct it prohibits or requires.'" *LaFarge North America*, 35 FMSHRC _, slip op. at 4, No. CENT 2010-4-M (Dec. 11, 2013); *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986). "The Commission's test for notice under the Mine Act is 'whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.'" *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1682 (Dec. 2010). A number of factors are relevant to this determination, including "the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question." *Id.*

The text of the regulation is clear: workplaces and passageways shall be kept clean and orderly. Respondent conceded that the language of the standard is not ambiguous. Resp. Br. at 1. The regulation is in place to prevent hazards, such as slipping, tripping, and falling that could lead to lost workdays or restricted duty injuries as Cheney stated above. There is no basis for Respondent's assertion that the Secretary's interpretation is that the areas must be spotless. A reasonably prudent person familiar with the mining industry would recognize that the accumulation of powder from several inches to up to 24 inches where miners work or walk by is prohibited under the standard. Ex. G-6, 11, 16. I find that Respondent had notice of the standard's requirements.

(4) Duplication

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[7] This determination is consistent with several other ALJ findings. *U.S. Silica Co.*, 32 FMSHRC 1699, 1706-08 (Nov. 2010) (ALJ) (affirming violations of section 56.20003 where there were accumulations on top of a bin that miners would access once a month to perform maintenance. There was an access ladder leading to the top of the bin, a catwalk leading to other bins, and footprints.); *USS, a Division of USX Corp.*, 13 FMSHRC 145, 153 (Jan. 1991) (ALJ) (affirming a violation of section 56.20003 and stating that "the standard applies to all workplaces and passageways, even though no work was being performed at the time of the cited violations, and even though the passageways were not designated or regularly used as such."); *Brubaker-Mann, Inc.*, 8 FMSHRC 1482, 1483 (Sept. 1986) (ALJ) (affirming a violation of section 56.20003 where there was a build-up of powdery fines that created a slip, trip, and fall hazard on a walkway that would only be accessed by a miner to perform maintenance.).

Respondent asserts that three of the four citations should be vacated because there should only be one citation for housekeeping per mine. R. Resp. Br. at 3. It cites MSHA's *Program Policy Manual* that states "where there are multiple violations of the same standard which are observed in the course of an inspection and which are all related to the same piece of equipment or to the same area of the mine, such multiple violations should be treated as one violation and one citation should be issued." I MSHA, U.S. Dep't of Labor, *Program Policy Manual* 21 (2003).

"The Commission has held that citations are not duplicative so long as the standards involved impose separate and distinct duties upon an operator. *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-05 (June 1997); *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (Mar. 1993)." *Cumberland Coal Res., LP*, 28 FMSHRC 545, 553 (Aug. 2006) *aff'd* 515 F.3d 247 (3d Cir. 2008). Additionally, in *Western Fuels*, the Commission focused on whether MSHA cited the operator on the basis of more than one specific act or omission. 19 FMSHRC at 1004 n.12.

In this case, the operator was cited for housekeeping violations because it failed to clean up accumulations of powder in four distinct areas of the mine that constituted a workplace and/or passageway: the top of the 102 silo; the base of elevator 101; underneath auger 6; and, the top of the fines tank. These four separate failures imposed four distinct duties on the operator to clean up the powder in each of these four locations. I find that the citations issued were not duplicative.

C. Findings and Conclusions

Taft failed to keep the top of the 102 silo, a workplace and passageway, clean and orderly by allowing material to accumulate up to 2 to 3 inches across a 10 foot by 10 foot area. I credit Cheney's testimony regarding the slipperiness of the powder and the slip, trip, and fall hazard that it created. This hazard could have reasonably caused twisted ankles, bruises, and cuts, resulting in lost workdays or restricted duty. In addition, I agree with Cheney's determination that one miner would be unlikely to suffer an injury because one miner is usually on-shift in the area and would access the top of the 102 silo once a month. Accordingly, I find that Taft violated section 56.20003(a).

As to the level of negligence, the Secretary attempted to establish at hearing that Kingston was an agent of Taft and his negligence was imputable to Respondent. Tr. 268. Pursuant to section 3(e) under the Act, an agent is defined as "any person charged with responsibility for the operation of all or part of a coal or other mine or the supervision of the miners in a coal or other mine." 30 U.S.C. § 802(e). The Commission has developed a multi-factor test to determine if a miner is also an agent which includes looking at the definition of agent under the Act, common law principles of agency, and distinctions between supervisors and employees under the National Labor Relations Act. *Martin Marietta Aggregates*, 22 FMSHRC 633, 637, 638 (May 2000). The Commission focuses on the miner's job functions, not title when making its determination. *Id*. at 637.

Kingston was an hourly employee who supervised mill 1, mill 2, and had four people on his team. Tr. 265, 282. He provided his team members with tasks to complete and he was their immediate supervisor. Tr. 266-67. If one of Kingston's team members was leaving for the day, the member would notify Kingston. Tr. 268. However, Kingston was not involved in the process of hiring or selecting his team, he took issues with team members to his boss, and he had never disciplined one of his members. Tr. 266-68.

These facts closely resemble a case previously decided by the Commission, affirming the judge's determination that the miner was not an agent where his job functions did not include hiring and firing employees, being given instructions for disciplining employees, and responsibility for an employee's performance and duties. *REB Enterprises*, 20 FMSHRC 203, 211-212 (May 1998). No evidence was presented that Kingston was responsible for the safety of his team or for ensuring compliance with mandatory safety standards.[8] While Kingston did have the authority to task members of his team with assignments and supervises part of the plant, the aspects that are not part of his job weigh more heavily toward a rank and file miner. Therefore, I find that Kingston was not an agent of Taft.

Moderate negligence is appropriate when "[t]he operator knew or should have known of the condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3. Low negligence requires considerable mitigating circumstances. *Id.* Taft should have known about the unsafe conditions. I find the fact that the top of the 102 silo was accessed as little as once a month to be a mitigating factor. Therefore, I find that Cheney properly determined the level of negligence to be moderate.

2. <u>Citation No. 8689619</u>

Citation No. 8689619 was issued by Cheney on July 31, 2012, at 5:00 a.m., pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 56.20003(a). The violation was described in the "Condition or Practice" section as follows:

> Over at the bottom of the elevator 101 at Mill 2 was a spillage of material. This spillage was approximately 6 inches deep. This was located at the west side of the plant. Miners are in the area only as needed.
>
> Standard 56.20003(a) was cited 4 times in two years at mine 04-02964 (4 to the operator, 0 to a contractor).

Ex. G-6.

Cheney determined that the violation was unlikely to result in a lost workdays or restricted duty injury, that one person was affected, and that the level of negligence was moderate. A civil penalty in the amount of $176.00 was assessed for the violation.

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[8] He did check workplace exam records, but somewhat infrequently, and there was no direct testimony that he was in charge of safety and compliance measures. Tr. 283.

A. Relevant Testimony

(1) Inspector David Cheney

Cheney testified that there was spillage of material at the bottom of elevator 101. Tr. 52. A photograph depicts the spillage, which looks like powder piled up along a white structure representing the outside of the elevator. Ex. G-7; Tr. 54-55. The material was up to 6 inches deep in an area approximately 12 feet by 12 feet. Tr. 55, 60, 64. In the immediate vicinity of the material were a conveyor belt, an elevator, and a ladder. Tr. 65. Cheney asserted that the area was a workplace because a miner would have had to at least do maintenance on the elevator and conveyor belt. Tr. 65.

Cheney determined that the likelihood of injury was unlikely because he was told by Kingston that miners only go to the area once a month to grease bearings on the conveyor belt. Tr. 70, 74, 78; Ex. G-23. He posited that the same hazards as the previous citation, slip, trip, and fall, were present and that the same injuries could have occurred, resulting in lost workdays or restricted duty. Tr. 78.

Cheney marked the level of negligence as moderate because the cited standard had been cited four times in the previous two years and Respondent should have known about the spillage through conducting a workplace examination. Tr. 79, 81; Ex. G-6. He also stated that when Kingston was asked why the spill was not cleaned up, Kingston remarked that "he was shorthanded and that it just happened." Tr. 66-67, 82.

(2) Nick Kingston

Kingston maintained that the spillage came from the elevator overloading, and that when the top of the 102 silo was cleaned off, the material fell in front of elevator 101, resulting in the citation. Tr. 200, 202, 273. He explained that to clean up the top of the 102 silo, the material was pushed off the side with a broom and barricades were set up at the ground level. Tr. 197. Kingston asserted that it was not possible to bring cleaning equipment to the top of the silo, so it is pushed off the side and picked up at the ground level with a scraper. Tr. 261. However, Kingston agreed that the amount of material at the base of elevator 101 looked like more material than what was pictured at the top of the 102 silo. Tr. 264; Ex. G-2, 7.

Kingston testified that the material consisted of a "fine-grade powder and a little bit of our course product." Tr. 204. He did not think that injury would have resulted from walking through the spillage because it was not deep or on an incline. Tr. 204-05. However, he did agree that a miner could trip if he did not know the area or if there was a ledge of powder. Tr. 206.

Kingston stated that he walked through the area once a month to check safety equipment such as fire extinguishers. Tr. 206, 275. A miner would not be in the area to operate the conveyor belt because that was done from a block house located 50 to 60 feet from the 102 silo. Tr. 202-04. He posited that the tail pulley and conveyor belt would need to be checked but was unsure how often. Tr. 278. Kingston also mentioned that a miner would do maintenance on the

bag house once every 3 months and would need to use the ladder at the base of the elevator. Tr. 276.

B. Findings and Conclusions

I credit Kingston's testimony that he walked through the area where the spillage was located once a month to check safety equipment, that at least one miner would perform maintenance on the conveyor belt, and that at least one miner would use the ladder on the side of the elevator to perform maintenance on the bag house once every three months. Based on the above definitions, the area where the spillage was located was used both as a workplace and passageway. Taft failed to keep the area around elevator 101 clean by allowing a build-up of powder to occur that was up to 6 inches deep over an area of 12 feet by 12 feet.[9] I find that Respondent violated section 56.20003(a).

As stated in the prior citation, the slipperiness of the powder created a slip, trip, and fall hazard. Even though the surface was flat, this hazard could have reasonably caused twisted ankles, bruises, and cuts, resulting in lost workdays or restricted duty. Although Kingston maintained that a miner would not be injured due to his familiarity with the area, the Act does not distinguish between a miner who knows the area and one that does not. In addition, I agree with Cheney's determination that injury is unlikely because one miner would check safety equipment in the area or grease bearings on the conveyor just once a month.

One miner only being in the area of the spillage once a month would be considered a mitigating factor supporting Cheney's determination of moderate negligence. However, Kingston's comment to Cheney about how the spill "just happened" and that "he was shorthanded," indicates to me that Kingston was aware of the spill and no clean-up was provided. Even if the accumulation included powder that was swept off the 102 silo, Kingston agreed that there was more powder present on the floor than what would have been swept off.

Taft should have known about the existing conditions. I do not consider being short-staffed a mitigating circumstance. However, since the area is seldom accessed, the spill that occurred prior to the sweeping of the 102 silo would likely not have been seen. Therefore, I find that the level of negligence was properly marked as moderate.

3. Citation No. 8689620

Citation No. 8689620 was issued by Cheney on August 1, 2012, at 5:25 a.m., pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 56.20003(a). The violation was described in the "Condition or Practice" section as follows:

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[9] While there were discrepancies in the time when clean-up was done on the 102 silo and the time that the citation for elevator 101 was issued, Kingston acknowledged that the amount of build-up on the floor was more than what would have been swept off of the silo. In addition, there was no mention by either party of barricades in the area of the elevator that Kingston stated were put up when cleaning off the silo. This leads me to believe that the silo was not cleaned off until after this citation was issued.

> Over at Auger #6 they had a spillage of material. This spillage of material was approximately 24 inches deep. There were footprints all thought [sic] the spillage. Miners were exposed to twisted ankles or a slip, trip, fall hazard. This was located on the south side of the plant. Miners are in this area to do maintenance.
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> Standard 56.20003(a) was cited 5 times in two years at mine 04-02964 (5 to the operator, 0 to a contractor).

Ex. G-11.

Cheney determined that the violation was reasonably likely to result in lost workdays or restricted duty, that it was significant and substantial (S&S), that one person was affected, and that the level of negligence was moderate. A civil penalty in the amount of $687.00 was assessed for the violation.

A. Relevant Testimony

(1) Inspector David Cheney

Cheney testified that there was spillage located at auger 6. Tr. 85. A photograph depicts the auger and powder spread out over the floor, some in a pile on the right side. Ex. G-12, 12-A, 13, 14; Tr. 87, 89.[10] It does not capture the entire spill. Tr. 89. Cheney measured the powder at a depth of 3 to 6 inches, with some of the piles reaching 24 inches deep. Tr. 97, 157, 158. Miners were conducting maintenance work in the area on a pipe that had a hole. Tr. 103-04. In addition to fixing the pipe, Cheney posited that other types of maintenance would be done in the area because he viewed screws, ports, an electrical box, a chute, and stairs. Ex. G-15A; Tr. 105, 108-10.

(2) Nick Kingston

Kingston testified that the powder, fines from the mill, came from the relief valves of the auger 6. Tr. 209, 211. The valves were opened to relieve pressure when a blockage occurred, usually two to three times a week. Tr. 209-10, 293. In order to reach the valves, a miner would have to walk under the auger 6. Tr. 210. Kingston estimated that the ports and omnilift were opened between July 29 and July 31. Tr. 288, 293. He also stated that workplace exams were conducted in the area where the spillage was located when it was running because trucks were loaded near there. Tr. 290.

Respondent argues that the citation should be vacated because maintenance was being done over the cited area. R. Resp. Br. at 4. This is not a valid defense. Pursuant to section 110(a) of the Act, "[t]he operator of a coal or other mine in which a violation occurs of a

[10] Kingston clarified that in Exhibit 15A, the A marked by Cheney was not the auger but an omnilift, which is a conveyor. Tr. 287. The long horizontal pipe marked P is the auger. Tr. 288.

mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary. . . ." 30 U.S.C. § 820(a). "This provision has been held to impose liability for violation of a standard against an operator without regard to fault." *Ames Construction, Inc.*, 33 FMSHRC 1607, 1611 (July 2011); *see also Allied Products Co. v. FMSHRC*, 666 F.2d 890, 893-94 (5th Cir. 1982); *Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1071 (4th Cir. 1982).

The area underneath the auger 6 was a workplace and Taft failed to keep the area clean and orderly by allowing piles of powder to accumulate up to 24 inches over a large area. Both witnesses stated that maintenance was being conducted in the immediate area of the spill. There were other objects in the area that would have required maintenance, and a miner had to travel underneath the auger in order to reach the relief valves. In addition, I credit Kingston's testimony that workplace exams were conducted in the area of the spill and that trucks were loaded there. Accordingly, I find that Taft violated section 56.20003(a).

B. Findings and Conclusions

(1) Significant & Substantial

The Commission has reviewed and reaffirmed the familiar *Mathies* framework for determining whether a violation is S&S in *Cumberland Coal Resources*, 33 FMSHRC 2357 (Oct. 2011):

> The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies*, 6 FMSHRC 1, the Commission further explained:
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> > 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.
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> *Id*. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 6 FMSHRC 1824, 1836 (Aug. 1984).
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> The Commission recently discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, 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, we clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause 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); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

Cumberland Coal Res., 33 FMSHRC at 2363-65.

The fact of the violation has been established. Cheney maintained that the spillage in the auger 6 area contributed to a discrete hazard, a miner slipping, tripping and falling. Tr. 113. The violation being S&S turns on whether the hazard was reasonably likely to result in an injury causing event and whether it was reasonably likely that an injury would be of a reasonably serious nature.

Cheney determined that injury was reasonably likely because there were miners in and around the area for the previous 2 days conducting maintenance activities and the area "had footprints all through it." Tr. 97, 103-04, 114, 117. Specifically, he was told by one of the maintenance workers that they were preparing to go upstairs to fix a pipe that had a hole. Tr. 104. While caution tape was present in the area because of a crane being used to perform maintenance work the night before, the tape only spanned one side, and more tape was added once the citation was issued. Tr. 100, 155. Like the above citations, Cheney believed that the spillage created a slip, trip, and fall hazard that could have caused a twisted ankle, resulting in lost workdays or restricted duty. Tr. 113.

Kingston did not think that walking through the area would have been hazardous to a miner. Tr. 211. He maintained that caution tape was hung by maintenance when fixing a blockage in the auger, which usually took place above the floor area where the spillage was located. Tr. 213. He stated that the tape's function was to block anyone from entering the area because miners were on ladders and sparks were flying from repairing the pipe. Tr. 214, 285.

The powder came from the relief valves of the auger, which Kingston testified were opened between July 29, 2012, and July 31, 2012. This means that the powder accumulations had been present for at least one shift, possibly more. There were also footprints throughout the spillage area, most likely those of the maintenance crew fixing the pipe. This indicates that the caution tape originally placed on one side of the area was insufficient to prevent miners from traveling through it. In addition, Cheney testified that he slipped on similar looking powder located on top of the 102 silo. Tr. 139. I find that the spillage contributed to a discrete safety

hazard, a miner slipping, tripping, and falling, which could have resulted in twisted ankles, cuts, and bruises.

Based on these facts, I find that it was reasonably likely that one miner would suffer reasonably serious injuries that would result in lost workdays or restricted duty, and that Cheney properly determined the violation to be S&S.

(2) Negligence

Cheney marked the level of negligence as moderate because he was told by Kingston that that the spill had just happened. Tr. 114-15. Cheney did not believe him and asserted that the spill had been present for "almost more than a shift." Tr. 114-15. In addition, caution tape was present in the area because of a crane doing maintenance work the night before, not as the result of the spillage. Tr. 100. The tape, however, only spanned one side, and more tape was added once the citation was issued. Tr. 155.

Kingston would read the workplace exam records every 2 to 3 days but looked at the records for each day in between. Tr. 283. Section 5 on the exam record covered auger 6 which was located in mill 1. Tr. 285; Ex. G-26. On July 31, 2012, section 5 had housekeeping checked off as unsatisfactory and the comment reads "[a]ll taped off."[11] Ex. G-26; Tr. 285. Kingston stated that the maintenance men would have cleaned up after finishing the repair on the pipe. Tr. 290.

Since the valves were opened between July 29, 2012, and July 31, 2012, the powder had been present for at least one shift. The spill was addressed in the workplace exam record on July 31, 2012, and the caution tape, although insufficient, would have at least alerted miners to the presence of the powder. I find that Cheney properly determined the level of negligence to be moderate.

4. <u>Citation No. 8689621</u>

Citation No. 8689621 was issued by Cheney on August 1, 2012, at 5:50 a.m., pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 56.20003(a). The violation was described in the "Condition or Practice" section as follows:

> At the top of the fines tank was approximately six inches of fines over the toe boards. There were maintenance welders working in this area to fixed [sic] a leak the day before. Footprints were all throughout this area. Miners were exposed to a slip, trip, fall hazard. This tank is approximately 60 foot [sic] off the ground.
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> Standard 56.20003(a) was cited 6 times in two years at mine 04-02964 (6 to the operator, 0 to a contractor).

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[11] Roy Long signed off on this exam but it was not mentioned in the record if he was an agent of Taft. Tr. 282.

Ex. G-16.

Cheney determined that the violation was reasonably likely to result in lost workdays or restricted duty, that it was S&S, that one person was affected, and that the level of negligence was high. A civil penalty in the amount of $2,282.00 was assessed for the violation.

A. Relevant Testimony

(1) Inspector David Cheney

Cheney testified that there was a large spill, consisting of powder looking material, on the top of the fines tank. Tr. 118; Ex. G-17. The powder was over the toe boards, which was along the outer edge, and at the back side of the tank. Tr. 120. The depth of powder was approximately 6 inches deep, lower in the middle, and extended over an area of approximately 12 feet by 12 feet or 14 feet by 14 feet. Tr. 120, 125. There were also footprints in the powder. Tr. 118, 120.

Cheney asserted that the area was a workplace because two maintenance men were changing a pipe in the area at the time the citation was issued. Tr. 126, 127. There was also a dust collector in the area which Cheney maintained would require bag changes on a regular basis because the bags get clogged. Tr. 128, 129; Ex. G-18.

(2) Nick Kingston

Kingston confirmed that at the time that the citation was issued, there was a leak at the top of the fines tank and maintenance was in the process of fixing it. Tr. 215-16. He stated that maintenance had been working to replace the pipe since at least July 31. Tr. 298. Kingston maintained that generally, only maintenance would need to access the top of the fines tank to conduct inspections of the dust collector. Tr. 215. He was “pretty sure” the inspection was done once every 3 months. Tr. 215.

Respondent argues that the citation should be vacated because welding work justifiably delayed clean-up. R. Resp. Br. at 5. As stated above, the Act imposes strict liability for violation of a standard without regard to fault. *Ames Construction, Inc.*, 33 FMSHRC at 1611. That welding work delayed clean-up is not a valid defense.

Maintenance men were working on top of the fines tank to replace the leaking pipe at the time that the citation was issued and maintenance on the dust collector would have to be performed about once every 3 months. Work was clearly being conducted in the area, making it a workplace. Taft failed to keep the top of the fines tank clean and orderly by allowing powder to accumulate in a large area at depths of up to 6 inches. I find that Respondent violated section 56.20003(a).

Findings and Conclusions

(1) Significant & Substantial

Cheney maintained that the spillage contributed to a discrete hazard, a miner slipping, tripping, falling, or hitting his head on a pipe. Tr. 130. The violation being S&S turns on whether the hazard was reasonably likely to result in an injury causing event and whether it was reasonably likely that an injury would be of a reasonably serious nature.

Cheney determined that injury to one person was reasonably likely because miners were working in the area, walking through the powder, and no one had reported the spill. Tr. 129, 130. He posited that the spill created a slip, trip, and fall hazard that could have resulted in a twisted ankle or a miner hitting his head on one of the several pipes in the area, causing lost workdays or restricted duty.[12] Tr. 130; Ex. G-17.

At least two maintenance men had been working to replace the leaking pipe since July 31, 2012. They had been walking through the powder, which was up to 6 inches deep in some areas, and the spill had gone unreported at the time that the citation was issued. These conditions contributed to a discrete safety hazard, a miner slipping, tripping, falling, or hitting his head on a pipe. These hazards could have resulted in injuries such as a twisted ankle, cuts, bruises, or head trauma, resulting in lost workdays or restricted duty.

Based on these facts, I find that the violation was reasonably likely to result in an injury of a reasonably serious nature to one miner, and that Cheney properly determined that the violation was S&S.

(2) Negligence

Cheney marked the level of negligence as high because he believed that Respondent knew about the spill and took no action to clean it up. Tr. 130. He based this belief on the fact that Chris Atkins, the maintenance supervisor, told him that the pipe was being replaced over the last few days. Tr. 131, 224. Cheney stated that when he asked Atkins why the spill had not been cleaned up, Atkins had no response. Tr. 131. Cheney did not review the workplace exam records that covered the top of the fines tank. Tr. 131-32.

A finding of high negligence is appropriate when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3.

Atkins, a supervisor and agent of Taft, had knowledge that the maintenance men were replacing a pipe and chose to remain silent when asked by Cheney why the spill was not cleaned. While this may imply that Atkins was aware of the spill, there was no direct testimony as to whether Atkins had actually visited the top of the fines tank, and Cheney failed to check the workplace exam records to confirm his belief. Nevertheless, since work was being conducted in the area, Respondent, at the very least, should have known about the violative condition. The fact that the top of the fines tank was usually accessed infrequently is not a mitigating factor

[12] Cheney also posited that a miner could have suffered a fatal injury if he slipped and fell through the railing. Tr. 129. No additional support to this theory was discussed and the occurrence appears highly unlikely.

since men were performing maintenance in the area at the time of the inspection and workplace exams were being conducted. Because neither the Secretary nor Respondent provided any additional information that would constitute a mitigating circumstance, I find that the level of negligence was properly marked as high.

III. Civil Penalty Criteria

Section 110(i) of the Act grants the Commission the authority to assess all civil penalties provided in the Act.

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

1. History of Previous Violations

Taft's history of violations is reflected in a report from MSHA's database, referred to as an R-17. Ex. G-21. The report reflects that 22 violations became final between April 2011 and July 2012. I accept the figures in the report as accurate, but there is no way to determine whether the numbers are high, moderate, or low. *See Cantera Green,* 22 FMSHRC 616, 623-24 (May 2000). The Secretary's form reflecting the originally assessed penalty amounts for the litigated violations (Secretary's Exhibit A)[13], does however, give some qualitative information by assigning points for the number of violations. 30 C.F.R. § 100.3(c). For total violation history, points used in the penalty calculation are assigned on the basis of the number of violations per inspection day, ranging from 0 points for 0 to 0.3 violations per day to 25 points for in excess of 2.1 violations per day. The assessment form for the litigated violations in this case reflects an assessment of 19 points for overall violation history. I find that Taft's history of violations is fairly high.

2. Size of the Operator

The parties did not stipulate to the size of the operator, however, the forms reflecting calculations of the proposed penalties require a determination of the size of the mine operator. The size is calculated "by using both the size of the mine cited and the size of the mine's controlling entity." 30 C.F.R. § 100.3(b). The size of the mine and the size of the mine's controlling entity was assigned 6 points out of a possible 15 and 10 points respectively. As the operator did not contest this determination, I find the operator to be medium in size.

3. Ability to Continue in Business

[13] The Secretary's Exhibit A was filed with the penalty petition.

The parties stipulated that payment of the proposed penalties in this case will not affect Taft's ability to continue in business, and I so find. Stip. 8.

4. Good Faith Abatement

The Secretary stipulated that Taft exercised good faith in terminating the citations in a timely manner, and I so find. Stip. 9.

Given the foregoing, I find the civil penalties assessed by the Secretary are appropriate.

IV. Civil Penalty Assessments

Citation No. 8689617 is **AFFIRMED** as issued.

Citation No. 8689619 is **AFFIRMED** as issued.

Citation No. 8689620 is **AFFIRMED** as issued.

Citation No. 8689621 is **AFFIRMED** as issued.

ORDER

It is **ORDERED** that the operator pay a total penalty of $3,321.00 within 30 days of the date of this decision.[14]

/s/ James G. Gilbert
James G. Gilbert
Administrative Law Judge

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[14] 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.