FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEVA 2013-1149 A.C. No. 46-06750-326262
v.	
EAGLE CREEK MINING, LLC, Respondent	Mine: Eagle Creek No. 5 Mine

DECISION AND ORDER

Appearances: Paige Bernick, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner

Mark A. Heath, Esq., Spilman Thomas & Battle, PLLC, Charleston, West Virginia, for Respondent

Before: Judge McCarthy

I. INTRODUCTION

"[I]n this world, with great power there must also come -- great responsibility." *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2415 (2015) (quoting S. Lee and S. Ditko, Amazing Fantasy No. 15: "Spider-Man," p. 13 (1962)). MSHA inspectors are entrusted with great power to ensure a safe working environment for miners in an inherently dangerous industry. An MSHA inspector's testimony is given great weight by the Commission, but abuse of position can undermine confidence in the inspection process.

The credible testimony in the instant case indicates that MSHA inspector Curtiss (Bud) Vance III overtly displayed animus toward foreman Jay Curry for prior discipline that Vance received pursuant to Curry's recommendation when both worked at the Old Hickory Mine years earlier. Further, inspector Vance prevaricated and cursorily checked the abatement measures for some allegations in the citations at issue in this matter. This irresponsible conduct by an MSHA inspector does a large disservice by undermining public faith in the agency's critical inspection process.

II. STATEMENT OF THE CASE

This case is before me upon a Petition for the Assessment of Civil Penalty filed by the Secretary of Labor (Secretary) under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. §814(d). The parties filed a Joint Motion to Approve Settlement of eight of the thirteen citations in Docket No. WEVA 2013-1149. Specifically, the parties agreed to settle Citation Nos. 7162341, 7162347, 7162348, 7162349, 7162350, 7162353, 7162354, and 7162356. I issued a Decision Approving Partial Settlement on September 29, 2014. Five citations, Citation Nos. 7162340, 7162343, 7162344, 7162346, and 7162351, were litigated and remain at issue.

Four of the five remaining citations involve various alleged violations concerning two Caterpillar 777D and two Caterpillar 777F rock haulage trucks cited during Vance's inspection of Eagle Creek Mine #5, a surface bituminous coal mine in Logan County, West Virginia, on April 30, 2013. The fifth citation involves a water truck cited on May 2, 2013. The Respondent argues that Citations Nos. 7162346 and 7162351 involving the Caterpillar 777F trucks should be vacated. Further, Respondent disputes the significant and substantial (S&S) designations for all five citations, and the fatality designation as the injury or illness that could reasonably be expected to occur for four of the citations. Respondent also disputes the appropriateness of the civil penalties proposed by the Secretary. R. Br. 1. Respondent argues that inspector Vance's alleged bias against foreman Curry greatly affected the paper that was written, its classification, and the Secretary's case. R. Br. 1.

A hearing was held in Charleston, West Virginia. The parties introduced testimony and documentary evidence,[1] and witnesses were sequestered.[2] The parties filed post-hearing briefs.

On July 21, 2014, the Secretary filed a Motion to Reopen the Record to admit certified data for April and May 2013 from the National Climatic Data Center for Logan, West Virginia. ALJ Ex. 1. Thereafter, Respondent filed an Opposition, or in the alternative, a Motion to Permit Rebuttal Evidence and to Take Judicial Recognition of Related Evidence. ALJ Ex. 2. The undersigned grants both motions and receives all proffered evidence from each party.

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[1] There are two volumes of transcripts. Volume I contains pages 1 to 352, and volume II contains pages 1 to 199. Citations to transcript volume I are indicated by "Tr." followed by the page cite. Citations to transcript volume II are indicated by "Tr. II," followed by the page cite. Jt. Exs. 1-6 were received into the record. Petitioner Exhibits (P. Exs.) 1-13 and Respondent's Exhibits (R. Exs.) 1-4 were received into evidence. The Secretary's post-hearing motion to reopen the record, and memorandum of law in support, with attached exhibit A, is received as ALJ Ex. 1. Respondent's opposition and alternative motion to permit rebuttal evidence and take judicial notice of related evidence is received as ALJ Ex. 2.

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

On the entire record, and after considering the post-hearing briefs and motions, I make and rely on the following findings of fact and conclusions of law:

III. CONTROLLING PRINCIPLES OF LAW

A. Establishing a Violation

To prevail on a penalty petition, the Secretary bears the burden of proving by a preponderance of the credible evidence that a violation of the Mine Act occurred. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001). A mine operator is held strictly liable for violations that occur at its mine. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). The operator may avoid liability by showing that it was not properly on notice of the violative nature of its conduct. *LaFarge North America*, 35 FMSHRC 3497, 3500-01 (Dec. 2013). Even in the absence of actual notice, the Secretary may properly charge the operator with a violation when a reasonably prudent person familiar with the protective purposes of the cited standard and the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would have recognized a hazard warranting corrective action within the purview of the applicable regulation. *Id.*; *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

B. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard violated and the operator's conduct with respect to that standard in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See, e.g.*, *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ).

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that an assessment of the likelihood of injury is to be made assuming continued normal mining operations, without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

C. Significant and Substantial (S&S)

The Mine Act describes an S&S violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1).[3]

[3] See also *Id.* § 814(e), the Mine Act's pattern-of-violations provision, which is the only other provision that mentions S&S, and which defines the term the same way as § 814(d)(1).

In a seminal early decision interpreting this statutory provision, the Commission held that a violation is S&S "if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In so holding, the Commission rejected the Secretary's argument that all violations are S&S except technical violations or violations that pose only a remote or speculative risk of injury or illness. *Id.* The Commission found that the Secretary's interpretation would result in almost all violations being categorized as S&S, which would be inconsistent with the statutory language and the role the S&S provision is intended to play in the Mine Act's graduated enforcement scheme. *Id.* at 825, 828. The Commission also found that the Secretary's interpretation would leave little room for inspectors to exercise their independent judgment. *Id.* at 825-26.[4] In addition, the Commission found that the Secretary's interpretation would render the Act's S&S language almost superfluous, and would render the Act's pattern-of-violation provisions wholly punitive by making it almost impossible for a mine to be relieved of withdrawal order liability once placed on notice of a pattern of violations. *Id.* at 826-27. Although the Commission did not develop a test to determine whether violations are S&S, it enunciated several guiding principles. Specifically, it stated that the term "hazard" denotes "a measure of danger to safety or health" and that a violation is S&S if it "could be a major cause" of such a danger. *Id.* at 827.

In its subsequent *Mathies* decision, the Commission set forth a four-prong test for determining whether a violation is S&S under *National Gypsum*. *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984). To establish an S&S violation, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Id.* at 3-4. The Secretary, mine operators, and the federal appellate courts have accepted the *Mathies* test as authoritative. *See Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 160 (4th Cir. 2016) (noting federal appellate courts' uniform adoption of *Mathies* test and parties' recognition of authority of test); *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016) (applying *Mathies* criteria); *Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria).

Ensuing case law has solidly established several general principles regarding the proper application of the *Mathies* test. The Commission has held that the S&S determination should be made assuming "continued normal mining operations." *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1990-91 (Aug. 2014) (citing *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130

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[4] The Commission has consistently reiterated that the inspector's judgment is an important element of the S&S determination. However, the concept has generally been raised in the context of deferring to the inspector's opinion that a violation was S&S, rather than in the context of examining whether the inspector exercised independent judgment in forming this opinion as opposed to merely following the "mechanical approach" advanced by the Secretary and rejected by the Commission in *National Gypsum*, 3 FMSHRC at 825. *See, e.g., Wolf Run Mining Co.*, 36 FMSHRC 1951, 1959 (Aug. 2014); *Maple Creek Mining, Inc.*, 27 FMSHRC 555, 563 n.6 (Aug. 2005); *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

(Aug. 1985)). The assumption of continued normal mining operations considers "the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued," without any assumptions as to abatement. *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff'd sub nom. Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989); *see also Knox Creek*, 811 F.3d at 165-66 (upholding Commission's rejection of "snapshot" approach to evaluating S&S for accumulations violation); *Mach Mining*, 809 F.3d at 1267-68 (citing with approval *McCoy Elkhorn*'s discussion of operative timeframe for S&S). The Commission has repeatedly stated that the S&S determination must be based on the particular facts surrounding the violation. *See, e.g.*, *Wolf Run Mining Co.*, 36 FMSHRC 1951, 1957-59 (Aug. 2014) (remanding S&S finding for further consideration of relevant circumstances); *Black Beauty*, 34 FMSHRC at 1740; *Peabody Coal Co.*, 17 FMSHRC 508, 511-12 (Apr. 1995); *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988).

A line of cases beginning with the Seventh Circuit's decision in *Buck Creek*, *supra*, has established that an operator cannot rely on redundant safety measures to mitigate the likelihood of injury for S&S purposes. *See, e.g.*, *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015).[5] Finally, Commission precedent indicates that the likelihood of injury is the key consideration in determining whether a violation is S&S. *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996) (comparing S&S inquiry, which focuses on "the reasonable likelihood of serious injury," with gravity inquiry, which focuses on "the effect of the hazard if it occurs").

The evolving case law, however, has presented conflicting guidance as to how some of these principles should be applied. In particular, there is some confusion about how to evaluate the facts surrounding the violation and the likelihood of injury under the second and third prongs of the *Mathies* analysis. The Fourth Circuit's recent decision in *Knox Creek*, *supra*, and the Seventh Circuit's decision in *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014), have cast doubt on whether the traditional application of the literal language of the second and third prongs of the *Mathies* test is still valid.

Traditional Application of *Mathies* Test

Under the traditional approach, Commission Administrative Law Judges (ALJs) have conducted the fact-intensive component of the analysis and evaluated the reasonable likelihood of injury at the third prong. In one of its earliest decisions applying the *Mathies* test, the Commission explained that "the reference to 'hazard' in the second element [of the test] is simply a recognition that the violation must be more than a mere technical violation – i.e., that the violation present a measure of danger." *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836

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[5] It is not completely clear whether redundant safety measures are precluded from consideration such that it is error to take them into account, which could make it difficult for judges at the trial level to discharge their duty of considering all the particular facts surrounding the violation, or whether arguments that rely on redundant safety measures are simply disfavored as a defense to S&S. Compare *Brody Mining*, 37 FMSHRC at 1691 (stating that evidence regarding redundant safety measures has been "consistently rejected as irrelevant") with *Black Beauty Coal Co.*, 36 FMSHRC 1121, 1125 n.5 (May 2014) (stating only that such measures "do not prevent a finding of S&S") and *Buck Creek*, 52 F.3d at 136 ("The fact that Buck Creek has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners.").

(Aug. 1984). "There is no requirement of 'reasonable likelihood'" encompassed in this element. *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1280 (Sept. 2010). Rather, longstanding Commission precedent indicates that the likelihood of harm should be accounted for in the third *Mathies* element, which "requires that the Secretary establish a *reasonable likelihood* that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel*, 6 FMSHRC at 1836 (quoted by the Commission on numerous occasions over the next two decades, including in *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Bellefonte Lime Co.*, 20 FMSHRC 1250, 1254-55 (Nov. 1998); *Zeigler Coal Co.*, 15 FMSHRC 949, 953 (June 1993); and *Texasgulf*, 10 FMSHRC at 500). As the Commission explained in another early decision, "The third element embraces a showing of a reasonable likelihood that the hazard will occur, because, of course, there can be no injury if it does not." *Consolidation Coal Co.*, 6 FMSHRC 189, 193 (Feb. 1984).

Following this guidance, ALJs have traditionally applied *Mathies* by identifying the potential hazard at the second prong, and then at the third prong, assessing whether there is a reasonable likelihood that the hazard will result in injury under the particular facts of the case at hand, with the caveat that normal mining operations are assumed to continue without abatement of the violation. The crux of this traditional *Mathies* analysis is the third and fourth prongs of the test, which effectuate *National Gypsum*'s definition of S&S (reasonable likelihood of a reasonably serious injury) and are often combined into a single showing (reasonable likelihood that a particular serious injury will occur under the facts of the case). Consistent with this approach, MSHA inspectors determine whether a violation meets the criteria for S&S by the likelihood of injury and the expected severity of injury, which correspond to the third and fourth *Mathies* elements.[6]

Over the years, it appears that the Commission, with court approval, has developed special rules for applying the *Mathies* test in two situations. First, for violations that contribute to the hazard of an ignition, fire, or explosion, the Commission has held that the third *Mathies* element is satisfied only when a "confluence of factors" is present that could have triggered an ignition, fire, or explosion, under continued normal mining operations. *Zeigler Coal Co.*, 15 FMSHRC at 953; *Texasgulf*, 10 FMSHRC at 501; *see, e.g.*, *Paramont Coal Co. Va., LLC*, 37 FMSHRC 981, 984 (May 2015). Second, for violations of emergency safety standards, the Commission assumes the emergency when making the S&S evaluation. *See, e.g.*, *Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1027-28 (D.C. Cir. 2013); *Mill Branch Coal Corp.*, 37 FMSHRC 1383, 1394 (July 2015).

Effect of Recent Fourth & Seventh Circuit Decisions

The Fourth Circuit's recent *Knox Creek* decision issued in January 2016 appears to shift the focus of the S&S analysis from the third to the second *Mathies* prong and to restrict consideration of the facts bearing on the reasonable likelihood of injury under the third prong.

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[6] The Secretary's citation/order form contains boxes for inspectors to check the likelihood of injury and the expected severity of injury immediately above the line where they designate the violation S&S or non-S&S. Inspectors are trained not to designate a violation as S&S, unless item 10.A on the form is marked "reasonably likely," "highly likely," or "occurred," and item 10.B is marked "lost workdays or restricted duty," "permanently disabling," or "fatal." *See* MSHA, PROGRAM POLICY MANUAL, Vol. I, § 104 (2003).

The Fourth Circuit interpreted the second *Mathies* prong to entail an inquiry into the likelihood of harm, stating:

> In our view, the second prong of the test ... primarily accounts for the Commission's concern with the *likelihood* that a given violation may cause harm. This follows because, for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm.

Knox Creek, 811 F.3d at 162. Significantly, the Fourth Circuit further held that the occurrence of the hazard must be assumed under the third prong of the *Mathies* test. *Id.* at 161-65. Evidence of the likelihood that the hazard will occur is not considered at this prong, according to the Fourth Circuit. Rather, the inquiry is whether the hazard, assuming it occurred, would result in serious injury. *Id.* at 162. The particular hazard confronted by the Fourth Circuit was the escape of ignited gas into the mine atmosphere through impermissible enclosures. *Id.* at 164. The parties had stipulated that the mine was a "gassy" mine that liberated more than 500,000 cubic feet of methane or other explosive gases per day. *Id.* at 164. Consequently, the ALJ had found that methane was reasonably likely to accumulate to explosive concentrations. *Id.* The ALJ had also found that a resulting explosion was reasonably likely to cause serious injuries, but he had ultimately declined to find that the violation was S&S because the Secretary had failed to prove the likelihood of an ignition. *Id.* at 154, 164-65. Without discussing the likelihood of ignition, the Fourth Circuit deemed the ALJ's other findings sufficient to satisfy the third *Mathies* prong. *Id.*

Previously, in *Peabody Midwest Mining*, the Seventh Circuit had similarly suggested that the S&S analysis assumes the occurrence of the hazard. The violation at issue in that case was the mine operator's failure to erect berms on an elevated roadway. The Seventh Circuit defined the hazard as the risk that a vehicle would veer off the roadway and go over the edge. *Peabody Midwest*, 762 F.3d at 616. The operator had argued that a vehicle was not reasonably likely to veer off the road. *Id.* However, the Seventh Circuit stated that the question "is not whether it is likely that the hazard (a vehicle plummeting over the edge) would have occurred" but "whether, if the hazard occurred (regardless of likelihood), it was reasonably likely that a reasonably serious injury would result." *Id.*

Peabody Midwest does not discuss the proper role of deference in the S&S context, but the Fourth Circuit reached its holding in *Knox Creek* by deferring to the Secretary's interpretation that the third *Mathies* element requires proof that the hazard, not the violation itself, is likely to cause injury. 811 F.3d at 161. The Fourth Circuit further asserted that this interpretation is consistent with a number of prior cases, including the Seventh Circuit's decisions in *Peabody Midwest* and in *Buck Creek*, *supra*, 52 F.3d at 135 (assuming occurrence of fire at third *Mathies* prong when ALJ had engaged in "confluence of factors" analysis at second prong); the Fifth Circuit's decision in *Austin Power*, *supra*, 861 F.2d at 103-04 (declining to require evidence that the hazard was likely to occur); and the Commission's decision in *Musser Engineering*, *supra*, 32 FMSHRC at 1280-81 (stating that third *Mathies* prong requires showing that the hazard, not the violation itself, will cause injury). 811 F.3d at 161-62.[7] The Fourth

[7] It is debatable to what extent *Austin Power* and *Buck Creek* truly stand for the proposition the Fourth Circuit seems to be embracing, which is that the actual likelihood of injury is irrelevant

Circuit rejected the operator's argument that under *Zeigler Coal Company*, *supra*, the Secretary must show that an ignition is reasonably likely under the third *Mathies* prong. 811 F.3d at 164. The Court found this position to be "flatly contradicted" by *Musser Engineering* and by decisions of other federal appellate courts. *Id.*

The Fourth Circuit emphasized, however, that the *Mathies* approach that it has adopted "still allows plenty of room for a fact-intensive S & S analysis, both under prong two, where the Secretary must establish that the violation contributes to a discrete safety hazard, and within prongs three and four, where evidence is still necessary to establish that the hazard is reasonably likely to result in a serious injury." *Id.* Realistically, however, it will likely require very little fact-specific analysis to conclude that any given non-technical violation contributes to a discrete safety hazard, because the Secretary generally does not promulgate a mandatory health and safety regulation (except technical regulations), unless the Secretary has already found that violating the standard would contribute to a hazard. Under the third *Mathies* prong, judges must consider all of the facts surrounding the violation, but must assume continued normal mining operations without abatement of the violation, and may not rely on redundant safety measures to mitigate the likelihood of injury. Now, under *Knox Creek* and *Peabody Midwest Mining*, judges must also assume that the hazard will actually occur. At some point, so many circumstances are either assumed or precluded from consideration that judges will find themselves evaluating the likelihood of injury in the abstract. If this is the case, the Commission will have turned its back on the principles set forth in *National Gypsum* because the *Mathies* test will have become a longhand expression for "non-technical violations." S&S will apply to almost all violations and therefore will no longer serve as a statutory tool by which the Secretary can single out the violations that he believes the Commission should consider significant and substantial when assessing a penalty.

As noted above, the Fourth Circuit reached its result in *Knox Creek* by deferring to the Secretary's interpretation of the Mine Act, and the Seventh Circuit reached a similar result. It is not surprising that the Circuit Courts have departed somewhat from the traditional *Mathies* analysis because the Secretary's attorneys, and not the Commission's, are the ones who argue for enforcement of the Commission's decisions in the Circuit Courts of Appeals. That is strange. It should be obvious that since the Secretary is one of the litigating parties before the Commission

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except to the extent necessary to establish a "discrete" hazard at the second *Mathies* prong. In *Austin Power*, the Fifth Circuit upheld an S&S finding for a fall protection violation, reasoning that "[a] danger of falling is a necessary element of this violation, so by the very nature of a violation there was a discrete safety hazard." 861 F.2d at 103. However, the hazard had actually occurred and had resulted in a fatality, which may have influenced the Court's failure to require additional evidence of likelihood at the third *Mathies* prong. 861 F.2d at 100. In *Buck Creek*, the Seventh Circuit did not expressly discuss the proper application of the *Mathies* test, but simply rejected the mine operator's argument that the ALJ had not put enough emphasis on the third and fourth *Mathies* factors when evaluating S&S for an accumulations violation. 52 F.3d at 135. The ALJ had made a finding at the second *Mathies* prong (rather than the third) that there existed a confluence of factors, including fuel sources and ignition sources, that could trigger a fire. *Id.* By contrast, in *Knox Creek*, the Fourth Circuit did not require a "confluence of factors" analysis or a showing that an ignition source existed at any prong of the *Mathies* test.

at the trial level, the Commission's and the Secretary's views on interpretation of the Act may differ. *See e.g., The American Coal Co.,* 36 FMSHRC 1311 (May 2014)(ALJ), *petition for interlocutory review granted,* Unpublished Order dated July 11, 2014. In my view, the Commission's interpretations of Mine Act provisions that turn on adjudication and not enforcement should be accorded at least some form of "*Skidmore*" deference based on the power to persuade, as evidenced by the fact that courts and litigants have uniformly followed the Commission-derived *Mathies* test.[8] It is within the Commission's authority to specify how the second and third factors of the *Mathies* test should be applied – particularly, whether the hazard must now be assumed at the third factor, and if so, what steps of the test account for the facts surrounding the violation – and whether the *Mathies* test is still intended to effectuate *National Gypsum*'s interpretation of the S&S provisions of the Mine Act or whether the Commission now interprets S&S differently.

Because I am bound by the *Mathies* test, I will evaluate S&S under this test after taking into consideration the more recent approach set forth in *Knox Creek* and *Peabody Midwest Mining.*

D. Negligence

Negligence is not defined in the Mine Act. The Commission has found "[e]ach mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted). In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984). *See also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975, 1976-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated).

The Mine Act imposes a high standard of care on foremen and supervisors. *Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997) (holding that "a foreman ... is held to a high standard of care"); s*ee also Capitol Cement Corp.,* 21 FMSHRC 883, 892-93 (Aug. 1999) ("Managers and supervisors in high positions must set an example for all supervisory and nonsupervisory miners working under their direction," *quoting Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987)); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995) (heightened standard of care required of section foreman and mine superintendent).

Although MSHA's regulations regarding negligence are not binding on the Commission, *see Wade Sand & Gravel Co.*, 37 FMSHRC 1874, 1878 n.5 (Sept. 2015), MSHA defines negligence by regulation in the civil penalty context as follows:

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[8] *But see Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1027 (D.C. Cir. 2013) (expressly declining to address validity of *Mathies* test).

> 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 . . . .

30 C.F.R. § 100.3(d).

MSHA regulations further provide that mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, and that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions. 30 C.F.R. § 100.3(d). According to MSHA, the level of negligence is properly designated as high 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, Table X. The level of negligence is properly designated as moderate when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* The level of negligence is properly designated as low when there are considerable mitigating circumstances surrounding the violation. *Id.*

Recently, the Commission held that Commission judges are not required to apply the level-of-negligence definitions in Part 100 and *may* evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015); *accord Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016). Moreover, because Commission judges are not bound by the definitions in Part 100 when considering an operator's negligence, they are not limited to a specific evaluation of potential mitigating circumstances, and may find "high negligence," in spite of mitigating circumstances, or moderate negligence, without identifying mitigating circumstances. *Brody*, 37 FMSHRC at 1701; *Mach Mining*, 809 F.3d at 1263-64. In this regard, the gravamen of high negligence is "an aggravated lack of care that is more than ordinary negligence." *Brody*, 37 FMSHRC at 1701 (citing *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)). Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances and may consider the totality of the circumstances holistically. Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Id.*

E. Penalty Assessment

The Act requires that the Commission consider the following statutory criteria when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness

of the penalty to the size of the business; (3) the operator's negligence; (4) the operator's ability to stay in business; (5) the gravity of the violation; and (6) any good-faith compliance after notice of the violation. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. § 820(i). The Commission is not required to give equal weight to each of the criteria, but must provide an explanation for any substantial divergence from the proposed penalty based on such criteria. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

As I discussed in my final *Big Ridge* decision, in an effort to avoid the appearance of arbitrariness, I look to the Secretary's penalty regulations and assessment formula as a reference point that provides useful guidance when assessing a civil penalty. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 2014) (ALJ); *see also Wade Sand & Gravel*, *supra*, at 1880 n.1 (Chairman Jordan and Commissioner Nakamura, concurring). *See also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (holding that an agency's interpretation of its own regulation should be given controlling weight unless it is plainly erroneous or inconsistent with the regulation). This formula is not binding, but operates as a lodestar, since factors involved in a violation, such as the level of negligence, may fall on a continuum rather than fit neatly into one of five gradations.[9] Unique aggravating or mitigating circumstances will be taken into account and may call for higher or lower penalties that diverge from this paradigm. I will also account for the fact that, although the violations at issue in this case were written under broad, general safety standards, each citation contains a myriad of specific allegations with respect to which the Respondent's history of repeat violations is unavailable. This means that the Secretary's proposed penalty assessment for each citation is based on a violation history that may disadvantage the Respondent by capturing prior dissimilar violations that were written under the same broad standard, but did not involve the same allegations. *See* 30 C.F.R. § 100.3(c) (indicating that the Secretary's violation history formula considers, along with the total number of prior violations, "the number of repeat violations of the same citable provision of a standard"). My independent penalty assessment analysis applies to each of the citations at issue in this case.

IV. STIPULATED FACTS

At hearing, the parties agreed to the following stipulations:

1. Eagle Creek Mining, LLC is subject to the Federal Mine Safety and Health Act of 1977 and to the jurisdiction of the Federal Mine Safety and Health Review Commission.

2. The presiding Administrative Law Judge has the authority to hear this case and issue a decision.

3. Eagle Creek Mining, LLC has an effect upon commerce within the meaning of Section 4 of the Federal Mine Safety and Health Act of 1977.

4. Eagle Creek Mining, LLC operates the Eagle Creek No. 5 Mine, Mine Identification Number 4606750.

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[9] See, for example, my discussion of the negligence penalty criterion for Citation Number 7162340, *infra*.

5. The Eagle Creek No. 5 Mine produced 312,391 tons of coal in 2013, and had 54,626 hours worked in 2013.

6. The proposed penalties will not affect Eagle Creek Mining LLC's ability to remain in business.

7. Respondent, Eagle Creek Mining LLC, abated the citations involved herein in a timely manner and in good faith.

8. P. Exs.1-10 and P. Exs. 12-13 are authentic and admissible.

9. R. Exs. 1-3 are admissible and R. Ex. 3 is admissible and authentic.

Jt. Ex. 1.

V. FURTHER FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

A. Inspector Vance's Animosity Toward or Bias Against Foreman Curry

1. Background at the Old Hickory Mine

When Inspector Curtiss (Bud) Vance III[10] initially took the stand, he confined his testimony to the events of April 30 and May 2, 2013, the days on which he wrote the four citations at issue in this case. However, the Respondent subsequently presented evidence revealing that Vance and foreman Jay Curry[11] have a tangled history. Curry credibly testified that Vance and Curry worked together at the unionized Old Hickory Mine in Sharples, West Virginia about 1996 or 1997. Tr. II, 55-57. There was some animosity between groups of miners at Old Hickory after a merger resulted in changed job responsibilities under the seniority provisions of the collective-bargaining contract. Tr. II, 57-59. Curry was a shift superintendent. Tr. II, 57.

Vance was one of four miners suspected of willful damage to equipment by Old Hickory foreman Art Hale, who reported to Curry. Tr. II, 60. Curry investigated the sabotage incident and Curry and Hale recommended that Vance and the other miners be suspended with intent to discharge. Tr. II, 60, 63-64. Curry credibly testified that Vance knew of Curry's recommendation because Curry told Vance that they would have to suspend him pursuant to

[10] Curtiss Vance is a surface coal mine inspector at MSHA's Logan, West Virginia field office in District 12. Tr. 21-22. Vance worked for Old Hickory Coal from 1994 until he was laid off in 1999. Tr. 23. Vance then worked at various Massey Energy mines from 1999-2006. Tr. 23-24. Vance operated rock trucks during his mining career, but never performed mechanical repairs on them. Tr. 160-61. After serving as a surface mine inspector for West Virginia for one year, Vance joined MSHA in 2007 as an inspector/accident investigator. Tr. 25-26.

[11] Jay Curry is the foreman at the Eagle Creek No. 5 Mine. Tr. II, 51. He has over 40 years of mining industry experience, with 30 years of experience as a foreman. Tr. II, 50-51.

company policy. Tr. II, 61, 64. Vance was formally suspended without pay and lost work for about a month. Tr. II, 61.

Vance and the other miners filed a grievance under the National Bituminous Coal Wage Agreement and the grievance proceeded to arbitration. Tr. II, 62. The arbitrator reinstated Vance and two of the other miners with backpay, and expunged the discipline from their personnel files. Tr. II, 60-62. One miner's discharge was upheld. Tr. II, 60-61.

The Secretary attempted to impeach Curry on cross examination because the alleged events occurred almost 20 years ago and Respondent proffered no notes or other documents to confirm what actually happened. Tr. II, 113-14. However, Curry testified that company records were expunged after the arbitration, and Curry specifically recalled, on questioning from the undersigned, that he was present at the arbitration at which foreman Hale was called as a witness, but Curry was not. *Id.*

During cross examination, Vance denied that he was ever recommended for discipline, took any grievance to arbitration, or lost any work while working at Old Hickory. Tr. 161.

2. Inspector Vance's April 30, 2013 Statements to Curry and Curry's Follow Up with MSHA District 12

On April 30, 2013, inspector Vance arrived at Eagle Creek Mine No. 5 to conduct a regular EO1 inspection. Tr. 30. Vance met with foreman Curry to tour work areas and to obtain an equipment list. Tr. II, 54. Vance then informed Curry that he was going to start checking equipment. *Id.* Curry credibly testified that he asked Vance, "do you need me to go with you?" Vance replied, "No, I don't really want you near me" during the inspection. Tr. II, 54, 65. "We'll just do it the normal way." Tr. II, 54.

According to Curry, the normal way meant that Respondent's chief mechanic, Tony Lusk, would accompany Vance. *Id.* Curry radioed Lusk and told him to proceed to the area where Vance was going to start inspecting equipment. *Id.* In these circumstances, I find no violation of Respondent's section 103(f) walkaround rights, particularly since Respondent does not pursue the issue.

After his conversation with foreman Curry, Inspector Vance inspected four rock trucks and shut all four of them down due to alleged safety-related defects. Vance initially denied and then could not recall whether he told Curry that he did not want Curry anywhere near him during the inspection. *Compare* Tr. 163 *with* 203.

Shortly after the April 30, 2013 inspection, Curry signed an undated letter that was sent by Respondent's corporate safety director to MSHA District 12 manager, Timothy Watkins. Tr. II, 65-69; R. Ex. 1. In this letter, Curry mentioned Vance's statement that Vance did not want Curry near him during the inspection and complained that Vance had unfairly documented the severity of citations during the April 30, 2013 inspection and other inspections because Vance had been discharged from Old Hickory while under Curry's supervision. R. Ex. 1. In his letter, Curry concluded, "I have been a foreman on Eagle Creek #5 for Eagle Creek Mining, LLC for five years with a very good citation and incident rate. I feel that my reputation and integrity as a foreman has been targeted by this particular inspector unfairly. I have had no issues with prior

inspections or inspectors and wish for a fair inspection by a MSHA inspector other than Mr. Vance." R. Ex. 1.

The Secretary attempts to impeach Curry's credibility by emphasizing that Curry's letter (R. Ex. 1) informed Watkins that Curry was Vance's "direct supervisor" at Old Hickory, while Curry testified that he was not his direct supervisor. Tr. II, 113. Curry credibly explained, however, that he wrote "direct supervisor" in the letter to Watkins because Curry was charged with investigating the sabotage charge against Vance. Tr. II, 113. I find the discrepancy immaterial as to whether Vance told Curry on April 30, 2013 that Vance did not want to be near Curry during the inspection. I credit Curry's specific recollection over Vance's denial, particularly since other witnesses for Respondent credibly testified about Vance's animus toward Curry, as explained below.

3. Other Miners' Corroborating Testimony Regarding Vance's Animus Toward or Bias Against Curry

Several witnesses from Respondent's camp provided testimony that lends credence to Respondent's argument that Vance held a personal vendetta against Curry for the Old Hickory incident. According to these Eagle Creek miners, various statements were made by Vance, which demonstrated his disdain for Curry.[12] The Secretary had the opportunity to cross examine Respondent's witnesses regarding these statements, but elected not to do so. Nor did the Secretary elicit any rebuttal concerning these statements after Vance was recalled to the stand. Tr. II, 179-182.

Ballard Smith[13] operated rock truck 4058, a 777F model, during Vance's inspection on April 30, 2013. Tr. II, 6-9. Smith had met Vance several years earlier when Vance dated Smith's niece. Tr. II, 33. Smith credibly testified that the first time Vance ever inspected his truck at the Eagle Creek No. 5 Mine was about two years prior to the April 30, 2013 inspection. On that occasion, Vance asked Smith what he thought about Curry. Tr. II, 33. Smith said, "He's all right." *Id.* Vance then allegedly told Smith, "Well, I used to work for him, and I can't stand him." *Id.* On questioning from the undersigned, Smith recalled that the conversation took place at the Eagle Creek Mine while Vance was "stooped down on my walk rail on the side of my cab in my truck." Tr. II, 46-47. Smith did not recall any other conversation in which Vance indicated any type of dislike for Curry. *Id.* When asked by the undersigned whether Vance indicated why he did not like Curry, Smith candidly testified that, "[H]e didn't go into detail. He just said that he used to work for him and he could not stand him." Tr. II, 47.

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[12] I have carefully considered the alleged out-of-court statements made by Vance to Respondent's miners as they relate to Vance's bias against Curry. Material and relevant hearsay evidence is admissible in Commission proceedings. *Ideal Cement Co.*, 13 FMSHRC 1346, 1350 n.1 (Sept. 1991) (citing *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1135 (May 1984)). In fact, the Commission's procedural rules expressly state that "[r]elevant evidence, including hearsay evidence" is admissible. 29 C.F.R. § 2700.63(a).

[13] Smith has 25 years of mining experience, and seven years at Eagle Creek. Tr. II, 7. Smith has driven rock trucks for almost 20 years. Tr. II, 7.

Steven Newsome[14] operated rock truck 4013, a 777D model, during Vance's inspection on April 30, 2013. Tr. 314-15. The dozer that Newsome normally operated was not operating that day. Tr. 348. As more fully explained below, Vance "downed" truck 4013 during his April 30 inspection after citing Respondent for excessive ball stud and steering linkage slack, leaking steering hoses, an excessive audible air leak during brake application, a broken bracket that mounted the driver-side mirror, and a broken handrail behind the driver-side door. P. Ex. 3. Newsome testified that Vance took "just a couple of minutes" to check for slack in the ball studs. Newsome did not know the exact time, but knew that Vance "wasn't under there long." Tr. 318-19. Newsome testified that when Vance signaled for Newsome to move the steering wheel, Vance "went under the truck a minute or two and then back out." *Id.* Newsome testified that Vance checked the ball studs one time. Tr. 321-22. Newsome further testified that he would have seen a dial indicator if Vance had been carrying one. Tr. 322.

Newsome testified that after downing Newsome's truck that day, Vance laughed and said "I love it." Tr. 320. Although Newsome candidly could not testify that the remark pertained to Curry because Vance "didn't specify," in the absence of rebuttal from Vance, I infer that the remark indicated the pleasure that Vance derived from shutting down another one of foreman Curry's trucks on April 30, 2013. *Id.*

Newsome also recalled a few prior occasions on the job and one occasion at a Subway shop in Logan, West Virginia during which Vance indicated to Newsome that Vance did not like Curry. Tr. 328, 348-50. For example, Newsome recalled a prior inspection when Vance was in the cab of Newsome's dozer and asked Newsome what he thought about Curry and then told Newsome that Vance did not like him. Tr. 349-350. Newsome also recalled being with a buddy and running into Vance at a Subway in Logan, West Virginia. *Id.* During the conversation, Vance indicated that he would make it rough on Curry because Vance did not like him and that Vance could make Curry fix whatever Vance wanted Curry to fix, such as air conditioners. Tr. 350. As noted below, Vance wrote an S&S citation in an effort to make Curry fix an air conditioner on the first haulage truck inspected on April 30, 2013.

Finally, Respondent's chief mechanic Tony Lusk testified that on April 30, 2013, when Lusk was working on the trucks that Vance had downed, Vance asked Lusk, "You think I got him smothered yet? If not, I'll be back with a few more." Tr. II, 164-165. Lusk conceded that Vance did not mention Curry by name, but Lusk assumed that Vance was referring to Curry. Tr. II, 165. As explained below, Vance did come back on May 2, 2013 to cite a water truck for additional violations. Based on the totality of this record, I infer that Vance was talking about smothering Curry with paper.

A few weeks after the April 30, 2013 inspection, Lusk signed an undated letter that was sent by Respondent's corporate safety director to MSHA District 12 manager, Timothy Watkins. Tr. II, 167; R. Ex. 2. In this letter, Lusk wrote:

> On 4/30/2013 at approximately 8-9:00am Bud approached me after he had downed 4013, 4058, and 4045. At that time he told me what

[14] Newsome has over 14 years of experience in mining and holds a West Virginia surface and underground certification. Tr. 314. He has driven rock trucks and dozers for over eight years. Tr. 314.

needed to be fixed on those three trucks, he said that he would be back with another list in a minute. We went to check the 992G and he walked over to me laughing and said "Do you think I have him smothered out yet? If not I can get a few more." He told me that I had twenty-four hours to fix the equipment and I explained to him that I would not be able to get all the parts in that amount of time. I made the repairs to 4058 and 4045 and explained to him how to examine the emergency steering on the trucks because they were working fine when I checked them. I ordered the rest of the parts for the trucks and he told me that if I didn't have 4013 fixed by the end of the day that he would write a "D-order" on it. A few days later, he came back to check the equipment and he came to me and asked me if we had made the repairs, I said yes and he left without checking. He has done this on previously [sic] inspections as well.

/s/ Tony Lusk

R. Ex. 2.

4. Vance's Incredible Denials on Cross Examination

On cross examination, in addition to denying the Old Hickory suspension, which was eventually expunged, and denying that he told Curry that he did not want to be near him during the inspection, Vance further denied that he ever told any miners at the Eagle Creek Mine that he did not like Curry. Tr. 162. Vance also denied that he ever asked an Eagle Creek miner about his impression of Curry. *Id.* Further, Vance said he did not recall talking to chief mechanic Lusk during the April 30, 2013 inspection, unless it was documented in Vance's inspection notes. Tr. 163-64. Vance did concede that Lusk was in the same work area as Vance, making repairs to conditions that Vance cited. Tr. 164-65. Vance did not recall telling Lusk words to the effect, "Do you think I've got him [Curry] smothered out yet? … If not, I can go get a few more." Tr. 164. Vance also did not recall or document that Lusk allegedly told Vance that Vance was not correctly testing the secondary steering on the 777F model haul trucks. Tr. 164-65.

5. Conclusions

After considering all the evidence before me, I credit the evidence presented by the Respondent regarding Vance's history at the Old Hickory mine and his animosity toward or bias against foreman Curry. I credit Curry's specific recollection of the disciplinary incident at the Old Hickory mine over Vance's general denials that he was ever disciplined or lost any work at Old Hickory. I find it difficult to believe that Curry would spin such an elaborate tale in an effort to avoid liability for the instant citations. I further credit Curry's testimony that Vance told him "I don't really want you near me" during the April 30, 2013 inspection. Tr. II, 54, 65. Overall, Curry's testimony struck me as forthright and unembellished. Tr. II, 114. He was persuasively conveying facts as he recalled them. His recall was detailed and specific, in contrast to Vance's general, unconvincing denials. Tr. 163, 203.

I also credit the testimony of Smith, Newsome, and Lusk over Vance's blanket, self-serving denial of and failure to recall anything that would cast doubt on his good faith, including his denial that he told any miners at the Eagle Creek Mine that he did not like Curry, his denial that he asked any Eagle Creek miners about their impressions of Curry, and his denial that he mentioned "smothering" Curry during the inspection. The testimony from Smith, Newsome, and Lusk corroborates foreman Curry's belief, first expressed in his letter to the MSHA District 12 manager, that he was being targeted by inspector Vance.

Based largely on the above findings, I conclude that Vance did not exercise good faith in dealing with Curry. I find that Vance was biased against and out to get Curry because of his discipline years earlier at the Old Hickory Mine. In my view, this is a fundamental infringement of fair and impartial due process of law. It is against the foregoing backdrop of Vance's animus toward Curry that I assess the validity of the four citations that Vance wrote on April 30, 2013, and the additional citation that Vance wrote on the water truck when he returned to the Eagle Creek No. 5 Mine on May 2, 2013.

B. The April 30, 2013 Inspection of Rock Trucks and Inspector Vance's Typical Inspection Procedures

Upon arriving for his April 30, 2013 EO1 inspection at the Eagle Creek No. 5 Mine, Vance had a brief conference with Curry about the inspection, checked the on-shift examination book to find no violations recorded, and arranged to inspect mobile equipment (haul trucks) at the pump house pit area after performing an imminent danger run. Tr. 30, 32-33, 35. Four rock trucks were then driven to the flat and level pit area for inspection. Tr. 35. Two of the large haulage trucks were Caterpillar 777D models and two were Caterpillar 777F models. Tr. 173. Vance proceeded to check the brakes, steering, secondary steering, gauges, and other various parts of the trucks for safety hazards or defects. Tr. 39-41; P. Exs. 1, 3, 5, and 7.

Vance testified about his typical vehicle inspection process. Initially, Vance discusses the inspection process with the driver in the operator's cab and checks to see if pre-operational inspections have been performed and recorded for each vehicle. Tr. 37, 40-41. Vance inspects the seats, seat belts, gauges, warning alarms, and brakes, while in the operator's cab. Tr. 41. Vance utilizes a "pull-through" brake test in which the driver releases the parking brake so that Vance can check whether the service brake and secondary brakes will hold and not pull through at certain revolutions per minute (rpms). Tr. 41-42.

After exiting the cab, Vance checks the lights, signals, horns, and wipers via hand-signal communication with the operator. Tr. 43. Vance walks around the vehicle to check tires, rims, and fuel tanks and to check for any hydraulic oil or fuel leaks. Tr. 43. At the back of the vehicle, Vance checks the backup lights, brake lights, turn signals and stabilizing bar. Tr. 44.

Vance also directs the driver through several steering movements to check the steering linkage system under the truck and determine if any leak or excessive movement is present. Tr. 45, 47. As the operator turns the steering wheel left or right, Vance crouches under the truck to check the steering components and look for any slack or horizontal movement in the ball stud of the steering jack. Tr. 46-47. In response to questioning from the undersigned, Vance testified that he never has to get down on a knee or lie on the ground to check for slack in the steering linkage ball joints. Tr. 46.

Vance testified that if any slack or movement is observed, Vance measures the slack using a dial indicator, before citing the play in the ball joint. Tr. 46-47, 183. Vance testified that he sets up his dial indicator on the steering linkage under the vehicle and then directs the driver to steer back and forth while Vance measures the slack between the ball stud and steering jack. Tr. 186.

At hearing, Respondent proffered into evidence portions of Caterpillar's maintenance manuals for the 777F and 777D models. See R. Exs. 3 and 4, respectively. The record was left open for the Secretary to proffer additional pages from the 777D manual (R. Ex. 4), and the Secretary did so after the hearing with pages that covered inspection of brakes and inspection of steering linkage assemblies. P. Ex. 11; see Tr. 171.

The Operation and Maintenance Manual for the 777D models provides that the steering linkage inspection should take place on a level surface, with the parking brake engaged. The magnetic base of the dial indicator should be placed on the steering rod link to check for horizontal wear on the ball studs. The dial indicator should then be placed on the side of the steering arm and set to zero. The front wheels should be turned left and right. The amount of horizontal play should be recorded by placing the dial indicator on the side of the center arm, repeating the wheel movement, and then recording the measurement on the dial indicator. The indicator is then reset to zero. *See* P. Ex. 11, p. 194.

When asked how long it takes to set up a dial indicator to measure ball stud slack on a steering jack assembly, foreman Curry testified as follows:

> By the time you got it out of the case and put it on the mount and set it up, it would probably take you -- if you was real good with it and the truck was real clean, it would probably take you 15, 20 minutes to get everything together and get set and have the proper work done.
>
> If you have to clean mud and material off so the magnet will stick, you know, it could take longer.
>
> Q. And typically, when you're under a rock truck on a surface mine is everything clean to be able to –
>
> A. No. Because -- the old saying on a surface mine, if it's not raining and muddy, we water the roads to make it muddy.
>
> Q. All right. Have you ever seen Mr. Vance use a dial indicator on your job?
>
> A. No sir.

Q. Has any of your –Mr. Lusk or anybody else ever reported seeing him use a dial indicator?

A. No.

Tr. II, 82-83.

At hearing, Curry was shown his own dial indicator as a demonstrative exhibit, and he briefly described the components and how calibrated measurements were taken. Tr. II, 82-90. Curry explained that dial indicators are mounted by a magnet and must be attached to a clean stationary area that is free of dirt and mud to record the measurement. Tr. II, 82, 86-87. Curry further testified that the dial indicator must be calibrated regularly, and the measurement should be taken two to three times to ensure that it is accurate. Tr. II, 85, 91.[15]

Inspector Vance testified that although there is no regulatory standard regarding play in ball joints, MSHA generally adheres to the manufacturer's recommendations. Tr. 192. Caterpillar's Operation and Maintenance Manual for the 777D model provides that "[t]he maximum amount of horizontal wear is 1.02 mm (.040 inch [40,000ths]). If any of the measurements exceed this limit, replace the worn ball studs and the outer bearing races." R. Ex. 4, p. 194, para. or step 9.

As part of his standard vehicle inspection, Vance also checks the secondary steering. Tr. 47-48. Secondary steering is an emergency or backup steering mechanism designed to allow a driver some limited steering to control and stop the vehicle if the engine loses power or the vehicle runs out of fuel. Tr. 63-64, 197. Vance testified that during the secondary steering test, the driver remains in the cab to operate the steering. Tr. 48, 53. Vance then checks the secondary steering by hitting the "kill switch" on the front bumper to simulate a power loss, with the steering set in the automatic position, and then he listens for the electric motor to come on automatically. Tr. 49, 53. Vance further testified that the driver can check the secondary steering himself by shutting the vehicle off and pushing the steering from automatic to manual and then manually checking the steering. Tr. 53.

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[15] Curry testified that a typical dial indicator has a 2¼ inch gauge. Tr. II, 84. Measurements circle the gauge in 10,000ths-of-an-inch increments or smaller increments of 1,000ths. *Id.* The gauge measures up to 1 inch (in thousandths). Tr. II, 84-85. These indicators are incredibly precise and must be calibrated regularly. Tr. II, 85. To use the indicator, a measuring stem on the indicator is placed onto a piece of equipment. Tr. II, 86. When a ball stud or tie rod is moved, a needle on the dial indicator will move to measure the slack. *Id.* The needle moves because the indicator has a magnetic bracket or brace that is placed on metal equipment for measurement. Tr. II, 88. The position of the indicator can be adjusted by vertical and horizontal rods. Tr. II, 88-89. To measure the play in a ball stud, the indicator is mounted to a rod and once the ball stud hits a component on the indicator, the needle on the gauge moves accordingly. Tr. II, 89.

The Caterpillar Operation and Maintenance Manual for the 777F model lists the following steps for testing the secondary steering:

> 1. Stop the machine on a level surface. Place the transmission control in the PARK position and stop the engine.
>
> 2. Push the top half of brake release and secondary steering switch and hold the switch in order to manually activate the brake release and secondary steering pump. The switch is located on the overhead switch panel.
>
> 3. Turn the steering wheel completely to the right. Then turn the steering wheel completely to the left.
>
> 4. Release the switch in order to return the switch to the AUTO position.

R. Ex. 3, at 2-3.

The Caterpillar Operation and Maintenance Manual for the 777D lists the following steps for testing the secondary steering:

> 1. After you stop the engine, push the top half of the brake release and secondary steering switch in order to select the MANUAL position.
>
> 2. Turn the steering wheel completely to the right. Then, turn the steering wheel completely to the left.
>
> 3. Return the switch to the AUTO position.

R. Ex. 4, p. 193.

Thus, as Vance acknowledged on cross examination, testing the secondary steering for 777D model is different from testing the secondary steering for the 777F model. Tr. 173. To test the steering for the 777D, the manual indicates that the operator must "stop the engine, push the top half of the brake release and secondary steering switch in order to select the manual position." R. Ex. 4; Tr. 179-180. By contrast, when testing secondary steering in the 777F model, the switch has to be held in while the test is performed. Tr. 180; Tr. II, 11. Once the button is depressed, a light comes on to indicate that the secondary steering is on. Tr. II, 13. Vance acknowledged that the 777D secondary steering test would not work on a 777F model because the operator must manually hold the switch in on the 777F model for the secondary steering to engage. Tr. 180-81, 250-51.

1. Citation No. 7162343 – Caterpillar 777D, Truck No. 4016

The first truck that Vance inspected on April 30, 2013 was a Caterpillar 777D (No. 4016) used to haul overburden from the pit area to the dumpsite during the mining process. Tr. 38-40, 55. The truck weighed approximately 100 tons. Tr. 39. The cab was about ten to twelve feet off the ground. *Id.* Chief mechanic Lusk was present when Vance began the inspection of the 777Ds. Tr. II, 136-38, 177-78.

Upon checking inside the cab, Vance discovered that the air conditioning was not working. Tr. 55. When engaged, the system would not blow cold air. *Id.* Lusk testified that he told Vance even before he inspected the truck, that the air conditioning was down and the parts were on order, but would not arrive until morning. Tr. II, 153.

After the cab inspection, Vance inspected outside of the vehicle. Tr. 42. Vance testified that he observed excessive slack in the inside ball stud on the left-side steering jack when the driver steered from left to right. Tr. 55-56. Vance testified that he used a dial indicator that measured horizontal movement of 70,000ths of an inch between the ball stud and steering jack. Tr. 57-59. Vance's inspection notes indicate side-to-side movement or slack between the ball stud and the steering jack, which measured 70,000ths of an inch with a dial indicator. P. Ex. 2, p. 3. Vance relied on the manufacturer's aforementioned out-of-service criteria of 40,000ths of an inch to determine that the truck should be taken out of service and repaired. Tr. 53, 59, 62; P. Ex. 2, p. 3.

Vance also testified that the nut, which holds the ball stud in place, was moving. Tr. 60. Upon questioning from the undersigned, Vance testified that he did not determine whether the nut was physically loose because it was too big to check. Tr. 60-61. Vance acknowledged that the cotter pin was still in place. Tr. 61. Vance's notes include a diagram of the steering jack and nut. P. Ex. 2, p. 3. Vance concluded that a ball stud, with play of more than 40,000ths of an inch, was reasonably likely to compromise steering, particularly since the slack exceeded Caterpillar's out-of-service criteria. Tr. 62; P. Ex. 2, p.3.

Lusk testified that he was present right beside Vance when Vance began his examination for slack in the ball studs and that Vance did not use a dial indicator. Tr. II, 179. In fact, Lusk testified that Vance did not use a dial indicator when inspecting any of the haul trucks that day. *Id.*

On rebuttal, the Secretary recalled Vance, who brought his own dial indicator to the witness stand. Tr. II, 181. In response to leading questions, Vance testified that this was the dial indicator that he used on April 30 and May 2, 2013. Tr. II, 182. I note that aside from this questioning, however, there is no indication that Vance ever used a dial indicator on May 2, 2013, as he did not, in fact, write any violations that would have required the use of a dial indicator on that day, but only cited a water truck for non-functioning brakes and a broken water bed bracket mount. See P. Ex. 9. Contrary to Curry's testimony that it generally takes 15-20 minutes to set up the dial indicator, Vance testified that it would only take him about 5 minutes or less to set up the dial indicator. Tr. II, 183.

On extensive cross-examination following rebuttal, Vance testified that he has never calibrated his dial indicator. Tr. II, 184. Vance testified that "you calibrate it each time by going back to zero." *Id.* Vance testified that he leaves the dial indicator assembled in its padded pelican case in his truck, and retrieves it each time he is going to write a violation for slack in a ball joint. *Id.* Specifically, Vance testified that "[w]hen I'm going to write a violation, I use this for my notes. To get my measurement. Only when I'm going to write a violation." *Id.* Although Vance took numerous pictures during his inspection, he did not take any pictures of the measurement(s) that he claims to have observed with his dial indicator. Tr. II, 185.

Vance then testified that when he sets up the dial indicator, he tells the operator that he is going to set it up. "Stay still. Don't move the steering wheel." Tr. II, 186. Then, in response to questioning from the undersigned as to whether Vance tells the operator whether he is going to use a dial indicator, Vance testified, "No. I just signal for him not to move. I go get it out of the pickup, and then go back under the truck." Tr. II, 186.

On further cross examination, Vance acknowledged that the operator should see him walking to his truck and carrying back the dial indicator, "if he's watching." Tr. II, 187. Vance testified that after he retrieves the dial indicator, he tells the operator what side he is going to check. Tr. II, 187. Vance testified that he usually takes just one measurement, unless he has a problem with the dial indicator. Tr. II, 188.

When asked whether he needed a clean spot to set up the dial indicator, Vance testified that it depends on whether the truck is kept clean or not. Tr. II, 191. Vance was then asked, "Well in a mine that's a surface mine, running over dirt and mud, don't you generally have mud you got to clean and get it ready before you can attach that magnet?" Tr. II, 191. Vance testified, "Not normally, no. It's according to how often the mine operator steam cleans his equipment." *Id.* When shown P. Ex. 4, p. 1, a picture of the left-side steering jack cited for excessive slack on the 777D Caterpillar Truck No. 4013 written up in Citation No. 7162344 (P. Ex. 3), discussed below, Vance was asked what he used to clean mud and dirt from the area to mount the dial indicator. Tr. II, 193-95. Vance testified, "I usually just wipe it off with my hand. If I need to, my shirt," or a "rag in my pocket." *Id.*

Vance testified that he next checked the secondary steering on Truck No. 4016. Tr. 62. Vance testified that he shut off the kill switch and did not hear the electric motor for the secondary steering turn on. Tr. 62-63. Vance testified, "I shut it off and the driver never could get it to function." When asked whether he gave the driver an opportunity to try to have it turn on, Vance testified, "Yes. And he [the driver] seemed to have good working knowledge of it, so I assumed that he was trained and knew how to operate it." Tr. 63. Vance's notes indicate that the secondary steering was not functioning, so if the truck lost power, the driver would have no other steering during daily, off-road, haulage of overburden. P. Ex. 2, p. 3.

Based on this inspection, Vance issued Citation No. 7162343 and served Curry. P. Ex. 1. The Citation alleged a significant and substantial (S&S) violation of 30 C.F.R. § 77.404(a), which requires that "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." The Condition or Practice narrative alleges:

> 1. Excessive slack existed on the inside ball stud located on the left side steering jack. Excessive slack existed when the truck was steered in either direction. Also, slack existed where the nut was located on the ball stud.
>
> 2. The secondary steering was not functioning when tested.
>
> 3. The AC was not functioning when tested.
>
> This Truck is being operated in the Pump House Pit area. It is reasonably likely if these conditions continue to exist an accident will occur. . . .

P. Ex. 1.

The citation was designated as significant and substantial because the alleged violative conditions contributed to a hazard that was reasonably likely to result in a fatal injury, with 1 person affected, as a result of Respondent's moderate negligence. P. Ex. 1. The proposed penalty was $12,248. Vance testified and documented that the following measures were taken to abate the conditions cited: (1) a new ball stud was installed; (2) a new solenoid was installed; (3) and a new compressor was installed and the AC charged up. Tr. 75-76; P. Ex. 1.

Lusk performed the repairs on the truck. When asked by the undersigned whether the secondary steering was functioning on Truck No. 4016, Lusk testified, "I would say that it was. Oh yes." Tr. II, 153. When asked by Respondent, what was wrong here, Lusk testified, "we had a wire broke." *Id.* Lusk was then asked, "[W]ere you able to find out what the condition of the secondary steering was at the start of the shift, when the pre-operational examinations would have been done?" *Id.* Lusk testified, "Yeah. They're not allowed to move it. If the secondary steering doesn't come on, they're not allowed to pull out. But you get a lot of dirt and mud under them and it pulls wires. And, you know, it's hard to keep up with them." Tr. II, 154.

Contrary to abatement measures listed in Vance's citation, Lusk testified that no solenoid was installed on the secondary steering. Rather, Lusk testified the he simply repaired the wiring. Tr. II, 154. Lusk confirmed that a ball stud and a compressor were installed. *Id.*. Although Lusk replaced the ball stud on Truck 4016 in order to abate the citation, Lusk did not confirm Vance's allegations of excessive slack on the inside ball stud located on the left side steering jack.

With regard to his S&S designation, Vance testified that if the ball stud is moving, the steering jack can pop off causing the driver to lose control and the truck to wreck. Tr. 61-62. Vance essentially supported his reasonably likely and fatal designations with regard to the excessive slack by testifying that the truck regularly hauled 50 to 100 loads of overburden a day on steep grades and elevated roadways and dumpsites. Tr. 72. Therefore, if the steering jack popped off the ball stud, a driver could be killed if he lost control of the vehicle or the truck collided with another truck that operated in close proximity in the pit area. Tr. 61-62, 67-68.[16]

On cross examination, Vance conceded that the steering jack would have to pop off the ball stud for the driver to lose control of the truck and be injured. Tr. 205. Vance further

[16] Vance testified that while working at Massey Energy sometime between 1999 and 2006, he witnessed two incidents where a truck driver ran into a spoil bank. Tr. 66-67, 195. Vance was operating a dozer during both incidents. Vance testified that when he went to check on the driver, he noticed that the steering jack had popped off the ball stud. In both instances, the driver was not injured. Tr. 66-67. On cross examination, Vance conceded that he played no role in the investigation of the accidents and did not have any personal knowledge about what caused the steering jacks to pop off the ball studs. Tr. 195-96. I find that Vance's vague and general anecdotal testimony is not particularly probative as to whether the alleged excessive slack on the steering assembly of Truck No. 4016 contributed to a hazard that was reasonably likely to result in a fatal injury.

testified that the 70,000ths of alleged slack satisfied the out-of-service criteria, but Vance could not confirm that it would cause the steering jack to pop off the ball stud. *Id.*

With regard to the secondary steering, Vance testified that in an emergency, with loss of power, a functioning secondary steering mechanism would permit limited control of the truck to avoid an accident until it could be stopped safely. Tr. 68. Vance's notes indicate that if the steering fails and the truck wrecks, the driver would receive fatal injuries. P. Ex. 2, p. 3.

With regard to the broken air conditioner, Vance testified that the cab of the trucks become extremely hot and it is hard to just roll down the window like in a pickup because the driver does not wear a respirator and would be exposed to dust. Tr. 69. Vance recalled an incident in which a driver purportedly blacked out because heat in the cab triggered the driver's high blood pressure. Tr. 69-70. I give little weight to this non-specific, general testimony.[17]

Vance designated Respondent's negligence as moderate. He determined that the amount of slack in the ball stud developed from excessive wear over a period of time greater than one shift, that the slack was obvious, that no defects were noted on the pre-operational examination, and that Respondent presented no evidence that it was performing two-man "buddy" checks. Tr. 74; P. Ex. 2, p.3.[18]

Newsome, the driver of truck 4013 (discussed below), testified that he could not check steering joints by himself and "sometimes once a week, once every two weeks, we buddy up. One gets in the truck and you check the ball studs and all that. Alone, you can't check them." Tr. 316. Newsome testified that on April 30, Vance did not ask Newsome how he conducted his pre-operational examinations or whether Respondent ever used buddy checks. *Id.*

Smith, the driver of truck 4058, testified on cross examination that buddy checks were performed more or less weekly. Smith testified that the greaser/fueler, who was a "decent mechanic," would pull the drivers over about once a week to check for movement in the ball studs. Tr. II, 38.

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[17] Curry recalled that the air temperature that morning was below freezing at 25°F. Tr. II, 73-74. He testified that the outside temperature that time of year is damp, with a little freeze during the morning that will thaw out during the day. *Id.* The Secretary argues in his motion to reopen the record that the certified weather data for Logan, West Virginia shows that on April 30, 2013, the maximum temperature was 71°F with a minimum temperature of 53°F, and a trace of rain. ALJ Ex. 1 at 6, citing Ex. A, p. 4. Contrary to the Secretary, I do not find this source "especially reliable and probative" since the elevation of the Eagle Creek Mine is over 1,000 feet higher than Logan, West Virginia, where the data was collected. ALJ Ex. 2, Affidavit of Richard R. Stacey Jr.; see also n. 19, below. I find that the Secretary's certified weather data does not materially contradict Curry's recollection and testimony. Curry generally struck me as a truthful and forthright witness.

[18] It is undisputed that two men are needed to inspect the ball joints in the steering linkage assembly. One miner must be in the cab to manipulate the steering, while another must be under the vehicle checking for movement or play in the ball joints. Tr. 316; Tr. II, 38, 100.

Foreman Curry testified that Caterpillar recommends checking for slack in the ball studs every 1000 hours, which equates to about every 100 mining days for Respondent's rock trucks, which operate about 10 hours per day. Tr. II, 100. Curry further testified that Respondent checked the ball studs every week or week and one-half. Tr. II, 100-01. Curry testified that the 777D models that Vance cited for excessive slack had been parked for about three months and there were intentions of removing them from the job, but higher management apparently decided to put them back in service about a week prior to Vance's April 30 inspection. Tr. 101-02.

a. Legal Analysis Concerning Citation 7162343

i. The Alleged 77.404(a) Violation

Section 77.404(a) imposes two duties upon an operator: (1) to maintain machinery and mobile equipment in safe operating condition, and (2) to remove unsafe equipment from service. Derogation of *either* duty violates the standard. *Peabody Coal Co.*, 1 FMSHRC 1494, 1495 (Oct. 1979).

777D Caterpillar Truck No. 4016 cited by inspector Vance was mobile equipment. Such mobile equipment was in service when cited. The primary issue is whether the truck was maintained in safe operating condition. Equipment is in unsafe operating condition under section 77.404(a) when a reasonably prudent person familiar with the factual circumstances surrounding the alleged hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation. *Ambrosia Coal & Constr. Company*, 18 FMSHRC 1552, 1557 (Sept. 1996) (citing *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982) (applying identical standard in underground coal mines)).

Applying this test, I find that the Secretary has failed to establish by a preponderance of credible evidence that Respondent violated Section 77.404(a) by failing to maintain the steering linkage assembly and secondary steering on the haul truck in safe operating condition. I find a non-S&S violation with regard to Respondent's failure to maintain the air conditioner in safe operating condition.

The Allegation of Slack in the Ball Joint

I credit Lusk that Vance did not use a dial indicator to take any measurements of slack in ball joint movement on April 30, 2013. Vance testified that the slack was obvious, which undercuts the need for measurements. Vance never showed Lusk his measurements. Although Vance took many pictures of cited conditions during his inspection, Vance never took a picture of the measurements. In addition, I find it difficult to believe that Vance never had to get down on a knee or on the ground to check for slack in the steering linkage ball joints, particularly when setting up a dial indicator. Tr. 46. Further, the excessive slack allegations concerning the first two rock trucks inspected in the instant citation and Citation 7162344 were verbatim and Vance's purported dial indicator measurements were exactly the same, 70,000ths of an inch. The identical wording and measurements cast further doubt on Vance's claim that he independently measured and evaluated each ball joint.

Most importantly, I observed Vance as a witness and do not believe his testimony or his notes indicating that he observed excessive slack that was obvious and used a dial indicator to

measure it. Vance struck me as an unreliable witness, who was out to get Curry and was not beyond creating false documentation of dial indicator measurements in an effort to do so. For example, Vance wrote that a new solenoid had been installed as an abatement measure to correct the secondary steering problem cited on this truck. P. Ex. 1, p. 2. Lusk credibly testified that no solenoid was installed. Rather, Lusk just repaired a broken wire. Tr. II, 153-54. I credit Lusk, as explained below. Vance did not rebut Lusk's testimony, even though Citation No. 7162343 indicates that a new solenoid was installed for abatement purposes. P. Ex. 1. Vance had poor recollection of events and abatement measures without reading from or consulting his notes and the citations. Tr. 32, 261. Moreover, Lusk's testimony is supported by R. Ex. 2, in which Lusk wrote MSHA District 12 Manager Watkins that when Vance returned to check on abatement efforts, Vance asked Lusk if he had made the repairs and then left without checking.

Similarly, regarding Citation No. 7162346, discussed below, I have credited Lusk's testimony that contrary to abatement measures listed on the citation by Vance, no sensor was installed for the brake oil temperature gauge, no sensor was installed for the brake action warning light, and no sensor was installed for the fuel gauge. Rather, I have found below that Vance prevaricated certain abatement measures listed on the citation and cursorily checked abatement measures consistent with Lusk's letter to District Manager Watkins. *See* R. Ex. 2. In addition, regarding Citation 7162351, discussed below, I have credited Smith's testimony, as corroborated by Lusk and Curry, concerning Vance's apparently fabricated abatement measures.

I also emphasize that Curry credibly testified that he has never seen Vance use a dial indicator, and no one from Respondent, including Lusk, has ever reported seeing Vance use a dial indicator. Tr. II, 82-83. Newsome essentially corroborated Curry and Lusk when testifying that that he would have seen a dial indicator if Vance had used one. Further, Newsome confirmed that Vance was only under his truck about a minute or two when he was checking the ball studs. Based on Curry's credited testimony, this was not enough time to set up the dial indicator and take a proper measurement after cleaning off mud and debris from the trucks.

Accordingly, despite his notes, I find that Vance's measurements were unreliable and the Secretary failed to prove by credible, probative evidence that any ball joint movement met Caterpillar's out-of-service criteria. Further, although Vance's citation indicated that slack existed where the nut was located on the ball stud (P. Ex. 1), Vance did not check to see if the nut was loose, and the ball stud still had the cotter pin in place. Tr. 60-61. In these circumstances, I find that the Secretary failed to prove that excessive slack existed on the inside ball stud located on the left side steering jack such that movement in the steering linkage ball joints was sufficient to establish that the truck was not maintained in safe operating condition. *Cf. Extra Energy*, 36 FMSHRC 2733, 2744 (Oct. 2014) (ALJ) (crediting inspector's testimony which established that tape-measured inch of vertical play in the ball joint constitutes a hazard making continued operation of the haul truck unsafe and requiring its removal from service pursuant to Commercial Vehicle Safety Alliance, North American Standard Out-of-Service Criteria, particularly given credited testimony that the nut at the bottom of the ball joint was loose and ready to fall off, had sheared the cotter pin keeper, and was removed with bare hands).

The Allegation that the Secondary Steering Was Defective

With regard to testing the secondary steering on the 777D Caterpillar Truck No. 4016, the Secretary failed to establish that Vance applied the proper test. As noted, the Caterpillar

Operation and Maintenance Manual for the 777D indicates that the operator must stop the engine and push the top half of the brake release and secondary steering switch to select the manual position. Then the steering wheel should be turned completely to the right and then left. Then the switch should be returned to the automatic position. R. Ex. 4, p. 193; Tr. 179-180. Vance did not have the operator do this. Rather, Vance shut off the kill switch from outside the vehicle and did not hear the electric motor turn on for the secondary steering. Tr. 62-63. Vance testified, "I shut it off and the driver never could get it to function." *Id.* When asked whether he gave the driver an opportunity to try to have it turn on, Vance testified, "Yes. And he [the driver] seemed to have good working knowledge of it, so I assumed that he was trained and knew how to operate it." Tr. 63. Vance did not cite the Respondent for a training violation regarding operation of the secondary steering. Since Vance did not testify that he applied a proper secondary steering test, I find that the Secretary has failed to establish that the secondary steering was not functioning. Further, I have discredited Vance's allegation that a solenoid was installed to abate the secondary steering allegation. Although Lusk credibly testified that he repaired a broken wire, the Secretary failed to establish that repair of such wire equated to Respondent's failure to maintain the truck is safe operating condition. I dismiss the secondary steering allegation.

The Allegation that the Air Conditioning Was Defective

Finally, with regard to the air conditioner, I find that the system would not blow cold air. Tr. 55. In fact, Lusk told Vance even before Vance inspected the truck, that the air conditioner was down and the parts were on order, but would not arrive until morning. Tr. II, 153. Vance did not rebut this testimony. I find that the failure to maintain the air conditioning system rendered the cab of the truck unsafe during extremely hot weather because the driver could overheat or pass out. In fact, Vance recalled an incident in which a driver blacked out because heat in the cab triggered the driver's high blood pressure. Tr. 69-70. Although Vance testified that a driver who rolled down the window would be exposed to dust because he would not be wearing a respirator, Vance did not write the citation as a health violation. Tr. 69; P. Ex. 1.

ii. S&S, Gravity, and Negligence

I find that the safety violation was non-S&S under the second prong of the *Mathies* test. The second prong requires the showing of a "discrete safety hazard -- that is, a measure of danger to safety – contributed to by the violation." *Mathies*, 6 FMSHRC at 3. As the Fourth Circuit recently recognized, this prong "primarily accounts for the Commission's concern with the likelihood that a given violation may cause harm. This follows because, for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm." *See Knox Creek*, 811 F.3d at 160. In this regard, I find it unlikely that the non-functioning air conditioner would result in harm, much less a fatal accident, under continued normal mining operations because the Secretary's evidence (ALJ Ex. 1) and Respondent's rebuttal evidence (ALJ Ex. 2, p. 4 and Aff. of Richard R. Stacey Jr.) suggest that mine temperatures in late April 2013 were generally mild at the mine's higher elevation. Moreover, although an S&S determination is made at the time the citation is issued without any assumptions as to abatement (*Knox Creek,* 811 F.3d at 165), Lusk's credited testimony establishes that the air-conditioning parts (compressor) had already been ordered for the summer season *prior* to issuance of the citation. Tr. II, 153. In these circumstances, the Secretary failed to demonstrate that the violation was at least somewhat likely to result in harm.

As discussed above, the Commission has traditionally framed the second *Mathies* element slightly differently than the Fourth Circuit's interpretation, in that the Commission has not traditionally required a showing at this step that the violation was "at least somewhat likely to result in harm." *See U.S. Steel Mining Co.*, 6 FMSHRC at 1836 (indicating that the requisite showing is simply "that the violation must be more than a mere technical violation – i.e., that the violation present a measure of danger"). However, even if I reframe the inquiry to correspond to the *U.S. Steel* formulation rather than the wording of *Knox Creek*, the Secretary's evidence still fails to establish that the air conditioning violation satisfies the second *Mathies* prong. This was essentially a technical violation under the unique circumstances of this case. Due to the mild temperatures at the mine, the violation did not present any measure of danger to miners' safety. Nor has the Secretary established that the violation would have endangered anyone's safety with continued normal mining operations, because even before the citation was issued, the operator had already taken the steps necessary to timely prevent any danger from developing (namely, ordering the parts needed to repair the unit before the summer weather arrived). No hazard existed. Accordingly, I need not reach *Mathies*' often-combined third and fourth prongs, which require evidence that the hazard contributed to by the violation is reasonably likely to result in a serious, injury-producing event. *See Knox Creek*, 811 F.3d at 162-63.

I find that the gravity of this violation was not serious because there is no evidence that the lack of a functioning air conditioner was at all dangerous under the circumstances.

The fact that Lusk's credited and unrebutted testimony establishes that Respondent had already ordered a new compressor and apprised inspector Vance about the order prior to issuance of the citation, supports a reduction in negligence from moderate to low.

iii. Penalty

Applying the penalty assessment criteria set forth in section 110(i) of the Mine Act, I find that Respondent, Eagle Creek Mining, LLC, operates the Eagle Creek No. 5 Mine, which produced 312,391 tons of coal in 2013, and had 54,626 hours worked in 2013. Jt. Ex. 1. The parties stipulated that the originally proposed penalty will not affect Respondent's ability to remain in business. *Id.* MSHA recognized Respondent's good-faith compliance in abating the citation. I have modified MSHA's gravity and S&S determinations from reasonably likely and S&S to unlikely and non-S&S. I have modified MSHA's negligence determination from moderate to low. As discussed above in the legal principles subsection of this opinion, I have also considered that the history of repeat violations relied upon by the Secretary may have been overbroad. After consideration of the penalty assessment criteria set forth in section 110(i) of the Act, I assess a $200 civil penalty against the Respondent.

2. Citation No. 7162344 – Caterpillar 777D, Truck No. 4013

Vance next inspected Caterpillar 777D, Truck No. 4013. Tr. 77. Newsome drove this truck on April 30, 2013. Tr. 314-15. Vance checked the pre-operational examination record for the truck. Tr. 99. Vance then apparently began in the cab by checking the brakes, seats, seat belts, gauges, steering and mirrors. Tr. 77-78.

When testifying about the citation's allegations, Vance read from the citation (P. Ex. 3); "5. Where the mirror mounts to the driver's side door is broke," "And No. 6, the handrail located

behind the driver's side door is broke." Tr. 78; see P. Ex. 3. Vance testified that the mirror was there, "but where it mounts to the door was broke, causing the mirror to vibrate real bad under operation." Tr. 79. In response to questioning from the undersigned, Vance testified that he did not operate the truck, but after counsel answered affirmatively for him, Vance testified that he learned through a conversation with a miner informant "[t]hat the mirror was shaking. Can I read my notes? It's in my notes." Tr. 79-80.

When pressed by the undersigned to divulge the substance of what he learned from the informant, Vance testified as follows:

> Through my experience as a truck driver, if the mirror bracket is broke, it shakes. Extremely. And it's hard to visually see as you back up. And like I said, you're really high up in this cab, and the depth – I mean, you depend solely on these mirrors when backing up.

Tr. 80. Vance was then essentially led by counsel to testify that he learned from the informant that the mirror was shaking during operation.

> Q. Did you learn through these conversations that – that the mirrors were shaking?
>
> A. Yes.
>
> Q. During operation?
>
> A. Yes.
>
> Judge McCarthy: Did you learn whether the shaking of the mirrors had any effect on the driver's ability to see?
>
> The Witness: Yes.
>
> Judge McCarthy: What did you learn?
>
> The Witness: That he was having difficulty seeing backing up with the shaking mirror.

Tr. 80-81. Vance's notes state, "Driver said it was hard to see out mirror from vibrating because it was broke at door & mount." P. Ex. 2, p.34.

The abatement measure as set forth on the citation for the cited mirror states, "5. A new door has been installed and the mirror bracket installed in place to the door securely." P. Ex. 3, p. 5.

Contrary to Vance's notes, Newsome, the driver, testified that he did not have any problems seeing out of his mirror, and he would not have been driving if he could not use the mirror. Tr. 327. I credit Newsome over the hearsay testimony from Vance, even as corroborated by Vance's notes. In fact, Vance essentially recanted his testimony and testified that the operator just told him that there was a problem with the mirror. Tr. 267-68.

Vance also testified that the handrail behind the driver's side door was broken. Tr. 78, 81. Vance testified that the handrail is used to maintain three-point contact when the driver is walking on the two-foot wide "cat walk" area to enter and exit the cab, and clean mirrors and windows. Tr. 81, 83.

On cross examination, Vance was shown P. Ex. 8 and he indicated where there was a break in the bottom of the handrail. P. Ex. 8; Tr. 252-53. The upper and lower parts of the handrail, however, were intact, and Vance conceded that the handrail would prevent one from falling through "as long as it don't break." P. Ex. 8; Tr. 253. Vance also conceded that the steel handrail would have to break at the top and bottom for one to fall through the handrail. Tr. 253. Vance testified that the cited handrail itself would not establish an S&S violation. Tr. 253-54.

Upon checking the parking brake, Vance testified that he heard an "excessive audible air leak" in a hose when the brakes were applied while Vance was still on the ground. Tr. 95-98. Vance testified that he told the operator to release the parking brake because the wheels were scotched, leave the truck off, and pull the brake, either the hand spike (retarder), or the foot brake (service brake) so that Vance could listen for air leaks while on the ground. *Id.* Vance testified that he told the operator to release the park brake and hold the retarder and Vance heard an excessive audible air leak from the general area underneath the truck, towards the center "where you get up under to check the tire rods and ball studs." Tr. 95. Vance heard an air leak from a hose when the brakes were applied. Tr. 96-97. Vance did not measure the decibels of the air leak or use any other device to measure the alleged air leak. Tr. 96.

Vance testified that after hearing the air leak from a hose while on the ground, Vance climbed back up into the cab, asked the driver to start the truck to build the air pressure back up, and then asked the driver to apply the brakes again. Tr. 97. Vance testified that when this happened, Vance observed the air pressure gauge start dropping, but Vance did not take any measurement as to how far it dropped or what the difference was in pounds per square inch (psi). Tr. 96-99. Vance was confident that that there was a brake leak because "it would only leak once he applied the brakes." Tr. 96.

On cross-examination, Vance acknowledged that when you apply the brakes, the air gauge drops. Tr. 222. He testified that if the air pressure leaks off, the service brake and the park brake set up, if functioning properly. Tr. 222-23. Vance did not cite any brake problems on the truck. Tr. 224. When asked by Respondent's counsel how the air leak was reasonably likely to cause a serious injury, Vance testified that "... if the truck is traveling with a load and a line blows and the brakes set up, you could lose control of the truck by the wheel locking up if the roads were wet." Tr. 224.

As noted, Vance could not determine precisely where the air leak was other than from some alleged hose somewhere underneath the center of the truck where one checks the tire rods and ball studs. Tr. 95-97, 222. Vance did not visually observe any leaking line or hose and could present no evidence that the truck was reasonably likely to blow a line. Tr. 225.

As Vance continued to inspect outside and underneath the vehicle, Vance noticed that there was oil leaking from both steering hoses onto the metal fittings where the hoses enter the right and left steering jacks. Tr. 83-84, 86. At trial, the Secretary entered pictures of the oil leaks into evidence and Vance identified the conditions that he observed. Tr. 84-90; P. Ex. 2, pp.

5-6; P. Ex. 4, pp. 1-2. Vance testified that the steering hoses supply oil to the steering cylinders in the steering jack so that the truck can be steered. Tr. 94. Vance further testified that the leaking hoses could cause a catastrophic failure because when the steering hose blows, you can lose oil pressure to the steering jacks, which would cause loss of steering control during operation of the vehicle. *Id.*

Lusk admitted that the steering hoses were leaking, but he testified that the leak(s) did not affect operation of the steering. Tr. II, 155. As explained below, I discount this testimony from Lusk.

Vance further observed that the center pin, which goes through the center arm in the steering linkage, had excessive slack where the pin mounts inside the center arm. Tr. 90-92. Vance testified that the center arm is where all the steerage linkage comes together. Tr. 91. The center pin pivots or moves as the center arm rotates. Tr. 93. The Secretary entered a picture of the outside bottom end of the pin into evidence. P. Ex. 4, p. 3.

When asked by the Secretary whether he noticed any other slack on the steering jack, Vance essentially read from the citation and testified that it was the same situation as the first truck he cited that day meaning that "[e]xcessive slack existed on the inside ball stud located on the left side steering jack" and "[a]lso slack existed where the nut was located on the ball stud." Tr. 93; *compare* P. Ex. 3 *with* P. Ex. 1. Vance testified that he again used a dial indicator to take a measurement. Tr. 93. According to Vance's testimony and his notes, this ball stud was also 70,000ths of an inch out of adjustment. Tr. 94; P. Ex. 2, p. 4. For the same reasons discussed in connection with the previous citation, for which the pertinent facts were the same, I do not credit this evidence and find it unreliable.

At 9:58 a.m., Vance issued Citation No. 7162344 to Curry for an alleged violation of 30 C.F.R. § 77.404(a) because Truck No. 4013 was not being maintained in safe operating condition. Specifically, the Citation alleged that:

> 1. Excessive slack existed on the inside ball stud located on the left side steering jack. Excessive slack existed when the truck was steered in either direction. Also slack existed where the nut was located on the ball stud.
>
> 2. The steering hoses were leaking to the right and left side steering jacks.
>
> 3. Excessive slack existed in the center arm pin located on the steering linkage.
>
> 4. Excessive audible air leak existed.
>
> 5. Where the mirror mounts to the drivers [sic] side door is broke.
>
> 6. The handrail located behind the drivers [sic] side door is broke.

P. Ex. 3.

Citation No. 7162344 was designated as a significant and substantial violation that contributed to a hazard that was reasonably likely to result in a fatal injury, with 1 person affected, as a result of Respondent's moderate negligence. *Id.* The Citation indicated that the truck was operated in the Pump House Pit Area and "[i]t was reasonably likely that if these conditions continued to exist an accident will occur." The truck was removed from service immediately. *Id.* The proposed penalty was $12,248.

Vance's initial testimony regarding the significant and substantial designation was general and vague.

> Q. Okay. Why did you mark this reasonably likely?
>
> A. Based on the conditions of the truck and the conditions in which the truck operates under on a regular basis. Daily basis.
>
> Q. What injury of illness did you mark?
>
> A. Fatal.
>
> Q. Why?
>
> A. It is the injury most likely to occur in an incident based on the conditions in which his truck operates on a regular basis. Daily.

Tr. 100-01.

Upon questioning from the undersigned about the nature of the hazard(s), Vance testified that the excessive slack on the inside ball stud would cause the steering jack to pop off the ball stud while the truck was in operation causing the driver to lose control of the truck. Tr. 102. He testified that "[i]f the steering hose blows, it loses pressure to the steering, unable to steer, causing the driver to lose control of the truck and wrecking." *Id.* Vance further testified that

> "[E]xcessive audible air leak on the pressure to the brake system, brake failure, causing the . . . driver to lose control and wreck. The handrail, this is where he enters and exits the cab. It's a very narrow area. The driver without the proper handrail and handling, could fall off the truck causing fatal injuries from his elevated height of approximately 10 to 12 foot."

Tr. 102-03. Vance testified that he designated Respondent's negligence as moderate because the leak on the steering hoses, the audible air leak, and the condition of the handrail and mirror were all obvious, the excessive slack in the ball stud occurred over time, and Respondent could not provide any records showing that the ball studs were checked by two people. Tr. 104.

As noted, Newsome operated Truck No. 4013 during the April 30, 2013 inspection. Tr. 315. Newsome testified that he found no problems during a pre-operational inspection of Truck No. 4013 on the morning of April 30. *Id.* Newsome testified that buddy checks are done on the

ball studs about once a week or once every two weeks, and Vance never asked Newsome about buddy checks or how he performed his pre-operational checks. Tr. 316.

Newsome testified that Vance began his inspection on the ground first and not in the cab. Tr. 317. As noted previously, Newsome testified that Vance was only under the truck for a couple of minutes when he checked the ball studs and that Newsome did not see Vance with a dial indicator. Tr. 316--19. Although he could not see under the truck, Newsome testified that if Vance had been carrying a dial indicator, Newsome would have seen it. Tr. 322.

Newsome testified that after Vance came out from under the truck, Vance hit the kill switch on the bumper of the truck and then climbed up into the cab. Tr. 317. Newsome testified that Vance asked Newsome to turn the key on and when he did so "there was a small leak. Nothing to affect anything. It was like a hose or something leaking. And he heard that, and he said, "You're down.'" Tr. 320; *see also* Tr. 322 ("[H]e heard the small air leak and said, 'You're down.'"). Newsome testified, "Then he [Vance] laughed and said he loved it." Tr. 320. Newsome testified that, "[t]hen he -- well, he checked, I think the mirror and something -- not the mirror, but the casing or something was broke on the door." Tr. 320, 322 ("[T]he door casing was busted or something. I mean it wasn't nothing pertaining to safety, but he -- he mentioned something about it.").

Newsome was shown P. Ex. 4, p. 4, a picture of the cited handrail on the outside of his cab on Truck No. 4013. Tr. 323. Newsome testified that when the door to the cab was opened, the handrail area was not accessible because of the way the door swung open. Tr. 323-24. When asked whether there was any problem with the stability of the handrail, Newsome testified, "No. It's used for nothing really." Tr. 324. Newsome further testified that there was no window or anything that one needed to clean, which would require use of the handrail. Tr. 324-26. In essence, Newsome testified that the cited handrail was not used because it was located behind a door hinge, and was not needed to clean the window in the door. *Id.*

As noted, Newsome testified that he never saw Vance with a dial indicator during the inspection. Tr. 317. Furthermore, Newsome testified that Vance was only under the truck for a minute or two when Newsome was manipulating the steering wheel to the left and right to check the steering linkage system, and that Vance only checked under the truck once after directing Newsome to turn the steering wheel. Tr. 316, 322. I credit Newsome's testimony, particularly because he was forthcoming with regards to conditions that did exist and candidly admitted when he was unfamiliar with a particular system or did not have the requisite knowledge to answer a question. Tr. 333, 336, 343, 346.

a. Legal Analysis Concerning Citation 7162344

i. The Alleged 77.404(a) Violation

Under Section 77.404(a), 777D Caterpillar Truck No. 4013 cited by inspector Vance on April 30, 2013 was mobile equipment that must be maintained in safe operating condition and removed from service, if unsafe. *Peabody Coal*, *supra*, 1 FMSHRC at 1495. It is undisputed that such mobile equipment was in service when cited. The primary issue is whether the truck was maintained in safe operating condition. Applying the reasonably prudent operator test set forth above, I find that the Secretary has established that Respondent violated Section 77.404(a)

by failing to maintain the steering hoses in safe operating condition and that the violation was significant and substantial. I find a non-S&S violation with regard to Respondent's failure to maintain the truck in safe operating condition free from a small air leak, since the Secretary failed to establish through Vance's testimony that the air leak contributed to a discrete brake-failure hazard which was likely to result in an injury during continued mining operations. I dismiss the remaining allegations in the citation.

The Allegation of Slack in Steering Linkage Components

For the reasons previously set forth with regard to Citation 7162343, I discredit Vance's testimony that he used a dial indicator on Truck 4013 and found 70,000ths of excessive slack (i.e., the same amount of slack attributed to Truck 4016 in Citation 7162343) on the inside ball stud located on the left side steering jack, and slack where the nut was located on the ball stud. Rather, I have credited Respondent's witnesses, particularly Lusk and Newsome, that Vance did not use a dial indicator to take any measurements of slack in ball joint movement on any truck inspected on April 30, 2013. Further, Citation 7162344, like its predecessor Citation 7162343, indicated that slack existed where the nut was located on the ball stud, but Vance did not testify about any such slack on Truck No. 4013.

With regard to the allegation that excessive slack existed in the center arm pin located on the steering linkage, Vance identified a picture of the bottom of the center pin (P. Ex. 4, p. 3) and testified that he observed excessive slack in the center arm pin where the pin mounts inside the center arm. Tr. 91. Vance confirmed that the pin is inside the center arm and the picture just shows the outside of the pin. Tr. 91-92. Vance did not testify what amount of slack was excessive slack in the center arm pin and he did not take any measurements.

I find Vance's testimony and notes about excessive slack in steering linkage components to be unreliable and motivated by his bias against Curry. I find that the Secretary failed to prove by credible, probative evidence that any ball joint movement or excessive slack in the center arm pin met Caterpillar's out-of-service criteria such that truck 4013 was not maintained in safe operating condition.

The Allegation of a Broken Mirror

With regard to the allegation that the mount for the mirror on the driver-side door was broken, I find that the Secretary failed to establish that the cited mirror interfered with visibility and safe operation of the vehicle. *See, e.g.*, *Walker Stone Co.*, 17 FMSHRC 1389, 1394 (Aug. 1995) (ALJ). I rely on the credible testimony of Newsome that he did not have any problems seeing out of his mirror (Tr. 327), the fact that the Secretary failed to establish that Vance sat in the driver's seat of the truck to check for vision impairment, the fact that P. Ex. 8 shows the cited mirror and an additional mirror above it to be intact, and the fact that Vance demonstrated clear bias against Curry. Accordingly, this allegation in the citation fails of proof and will be dismissed.

The Allegation of a Broken Handrail

With regard to the allegation that the handrail located behind the drive-side door was broken, I find that the broken bottom portion of the handrail did not render the truck in unsafe operating condition under the cited standard. On cross examination, Vance was shown P. Ex. 8

and pointed out where there was a break in the bottom portion of the handrail. P. Ex. 8; Tr. 252-53. The photograph and Vance's testimony establish that the upper and middle portions of the handrail were intact and Vance conceded that the handrail would have to break through steel at the top and bottom for one to fall through. P. Ex. 8; Tr. 253. Vance further opined that the cited handrail itself would not establish an S&S violation. Tr. 253-54. In addition, the Secretary failed to establish that the existing handrail was insufficient to grasp onto as a miner walked up or down the adjacent steps. In these circumstances, I find that the Secretary failed to establish that the Respondent failed to maintain the truck in safe operating condition because of the missing portion of the otherwise intact handrail. Accordingly, this allegation fails of proof and will be dismissed.

The Allegation of an Air Leak

With regard to the allegedly "excessive audible air leak" that Vance heard emanating from underneath the center of the cab when the operator released the parking brake and held the retarder, I find that there was an audible air leak when the brakes were applied. Tr. 98. Newsome confirmed that after Vance hit the kill switch, climbed up into the cab, and asked Newsome to turn the key, one could hear "a hose or something leaking." Tr. 320. Vance did not determine where the leak was coming from or measure the amount of air or air pressure that was leaking. I credit Newsome that the leak was small. Tr. 320.[19] I further credit Newsome that when Vance heard the small air leak, he said "You're down," laughed, and said he "loved it."

I find that a reasonably prudent operator should recognize that an air leak, although small, amounts to a failure to maintain the leaking component of the truck in safe operating condition in violation of section 77.404(a).

The Allegation that the Steering Hoses Were Leaking

With regard to the leaking steering hoses, I credit Vance's testimony, as corroborated by photographs (P. Ex. 2, pp. 5-6; P. Ex. 4, pp. 1-2), that there was oil leaking from both steering hoses onto the metal fittings where the hoses enter the right and left steering jacks. Tr. 83-84, 86; P. Ex. 2, pp. 5-6; P. Ex. 4, pp. 1-2. As noted, the steering hoses supply oil to the steering cylinders in the steering jack so the truck can be steered. I credit Vance's testimony that the leaking hoses could cause a catastrophic failure because when the steering hose blows, you can lose oil pressure to the steering jacks, which would cause loss of steering control during operation of the vehicle. Tr. 94. Lusk admitted that the steering hoses were leaking, but he testified that the leak(s) did not affect operation of the steering. Tr. II, 155.

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[19] Vance provided no frame of reference for his allegation that the leak was "excessive." He did not measure the decibels or use any other device to measure the air leak. Tr. 96. Although Vance observed the air pressure gauge start dropping after he climbed back up in the cab, he did not take any measurement as to how far it dropped or what the difference was in pounds per square inch (psi). Tr. 96-99. Further, Vance acknowledged on cross examination that applying the brakes can cause the air gauge to drop. Tr. 222. Given Vance's animus and bias toward Curry, as set forth herein, I find that his use of the term "excessive" to describe the air leak was overstated. Moreover, it was unnecessary, because an air leak constitutes a defect regardless of its magnitude.

Contrary to Lusk's cryptic attempt to downplay this safety issue, I find that a reasonably prudent operator should recognize that the failure to maintain the steering hoses free from oil leaks amounted to a failure to maintain the truck in safe operating condition in violation of the section 77.404(a).

ii. S&S, Gravity, and Negligence

Although the air leak constituted a violation of a mandatory safety standard, satisfying the first *Mathies* prong, I find that the Secretary has failed to meet his burden of proof under the second prong with regard to this particular condition. As noted, the second prong of the *Mathies* test requires showing a "discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation." *Mathies*, 6 FMSHRC at 3. The Fourth Circuit recently held that the second prong of the test contemplates a showing that the violation was at least somewhat likely to result in harm. *Knox Creek*, 811 F.3d at 162. Vance alleged that the air leak violation contributed to the hazard of the brakes failing due to loss of pressure in the brake system. However, the Secretary has failed to substantiate this speculative allegation. Vance conceded that if the air pressure leaks off, the service brake and park brake set up, if functioning properly. Tr. 222-23. Vance did not cite any brake problems on the truck. Tr. 224. Moreover, Vance could not determine precisely where the air leak was other than somewhere underneath the center of the truck where one checks the tire rods and ball studs. Tr. 95, 222. Thus, it is not clear whether the leak was coming from the brake system, as he suggested, or whether it actually originated in some other part of the vehicle. I further note that Vance did not visually observe any leaking line or measure the pressure that was allegedly leaking off and could present no evidence that the truck was at all likely to blow a brake line. Tr. 225. Rather, Vance's testimony focused on a speculative loss-of-control hazard at *Mathies* prong three assuming that a line blew and the wheels locked up on a wet road. When asked by Respondent's counsel how the air leak was reasonably likely to cause a serious injury, Vance merely testified that "... if the truck is traveling with a load and a line blows and the brakes set up, you could lose control of the truck by the wheels locking up if the roads were wet." Tr. 224. Vance's testimony lacked any explanation as to how the air leak contributed to this hazard. In these factual circumstances, I find that the Secretary failed to establish that the air leak violation, as litigated, contributed to a discrete brake-failure hazard that was likely to result in harm.

Turning the leaking steering hoses, I have already found that this condition violated a mandatory safety standard, satisfying the first prong of the *Mathies* test. I further find that the other three elements of the *Mathies* test were satisfied and that the violation of the mandatory safety standard was significant and substantial.

With regard to the second *Mathies* element, the Secretary established that the leaking steering hoses contributed to a discrete safety hazard or measure of danger to safety and were "at least somewhat likely to result in harm," satisfying both the traditional formulation and the *Knox Creek* Court's formulation of *Mathies* prong two. The steering hoses supply oil to the steering cylinders in the steering jack so the truck can be steered. Tr. 94. Vance testified that the leaks in the hoses could cause the hoses to fail catastrophically, resulting in loss of pressure to the steering jacks and loss of steering control during operation of the vehicle. Tr. 94, 102. Lusk denied that the leaks affected the steering, but did not consider what would happen if the leaks were to continue unabated. Tr. 155. I find that the leaking fluid, if left unabated during the course of continued normal mining operations with normal use of the truck, would be reasonably

likely to cause the steering hoses to blow and pressure to be lost to the steering jacks, resulting in loss of steering control. The cited truck is a large haul truck driven over uneven, curved, and graded mine roads. It is used regularly and carries heavy loads. Under the circumstances, loss of steering control would be reasonably likely to result in injury to the driver due to the vehicle overturning or wrecking, injury to another driver during collision with another vehicle, or injury to another miner traveling on foot in the vicinity of haul truck operations. Accordingly, I find that the violation was more than "somewhat likely to result in harm" due to its contribution to a discrete safety hazard that was reasonably likely to occur and to cause injury during continued normal mining operations.

Regarding the third *Mathies* element, the Secretary demonstrated a reasonable likelihood that the hazard contributed to by the violation, i.e., loss of control of the large haul truck on mine roads, was reasonably likely to result in an injury during continued mining operations, for the reasons described above.

Concerning the fourth *Mathies* element, I find a reasonable likelihood that any such injury would be of a reasonably serious nature given the nature of the hazard, the size of the truck, and the impact from any collision. The loss-of-control hazard contributed to by the failure to maintain the large haul truck in safe operating condition was reasonably likely to result in a collision and concomitant serious or fatal injury to the truck driver, miners in a colliding vehicle, or miners struck on foot. The Caterpillar 777D is a very large haul truck capable of carrying loads weighing hundreds of thousands of pounds. A collision with another vehicle or miner likely would be serious or fatal. Accordingly, the Secretary has shown a reasonable likelihood that an injury resulting from the hazard contributed to by the violation was reasonably likely to be serious or fatal.

The gravity of this violation was serious, although not as serious as indicated by the inspector. I have dismissed four of the six defects that Inspector Vance allegedly observed (slack in the steering ball joint, slack in the center arm pin, and the alleged defects in the mirror and handrail), and I have found the Secretary's evidence to be lacking with regard to the hazard presented by the fifth defect (the air leak). However, the sixth defect (the leaks in the steering hoses) was serious in light of its contribution to a discrete risk of serious injury.

I further find that Respondent's level of negligence was properly designated as moderate. Respondent knew or should have known of the leaking steering hoses, although it is unclear how long the oil was leaking.

iii. Penalty

As noted, Respondent is a large operator. The parties stipulated that the originally proposed penalty of $12,248 will not affect Respondent's ability to remain in business. MSHA recognized Respondent's good-faith compliance in abating the citation. I have dismissed four specific allegations in the citation. I have modified the S&S determination concerning the air leak in the braking system from reasonably likely to unlikely and non-S&S. I have affirmed the allegation concerning the leaking steering hoses as S&S, as written. I have affirmed MSHA's moderate negligence determination. After consideration of the penalty assessment criteria discussed earlier and set forth in section 110(i) of the Act, I assess a $3,050 civil penalty against the Respondent.

3. Citation No. 7162346 – Caterpillar 777F, Truck No. 4045

Vance inspected a third truck on April 30 at 11 a.m. -- Caterpillar 777F, Truck No. 4045. Tr. 106. Vance testified that the 777F is the "same type of truck" as the 777D, with some upgrades, and that he followed the same inspection protocol. *Id.* Vance began in the cab and observed that the brake action warning light was on, and that the brake oil temperature gauge was not working properly. *Id.* Vance testified that the brake action light remained on, regardless of whether the brakes were engaged. Tr. 107. Vance testified that a driver would not know about a problem with the braking system if the warning light was continuously engaged. Tr. 114.

Vance explained that the brake oil temperature gauge is important because it allows the driver to monitor the temperature of the brakes, especially on a downhill slope or steep grade, and to determine when to switch gears or to change braking technique. Tr. 107. Vance testified that the brake action warning light comes on when the brake oil temperature gauge reaches a certain temperature and gives warning that the driver needs to change gears, lighten the load, or try different braking options. *Id.* Vance speculated that the light was stuck on and stayed on continuously, but Vance never tested his assumption during operation of the truck. *Id.*

Vance took a picture of the brake warning light. P. Ex. 6. Tr. 236-37. On cross examination, Vance testified that the truck would move when the warning light was on based on his experience. Tr. 237. On further cross, however, it became clear that Vance's experience was based on a warning light that was engaged during operation of a different truck, and the cited truck was parked and not operating. Tr. 237-38. Vance continued to maintain that the cited truck could be driven while the brake warning light was on. Tr. 238. Vance conceded that he had never driven a 777F, only a 777D or a lesser model. Tr. 238.

When asked by the undersigned how he knew that the truck could move with the light on, Vance replied, "[b]ecause the brake is not set up. Now with the park brake light on, the park brake is set up … But this light will come when you start getting some indication that there's a problem with the braking system." Tr. 238-39. Vance could not identify the illuminated light with the gear and exclamation point next to the illuminated brake warning light and above the illuminated parking brake. Tr. 239. Vance never checked the manual to see if the truck could be driven with the brake warning light on. Tr. 239.

Contrary to Vance, Lusk testified that a truck can be started, but cannot move with the brake action warning light on. Tr. II 158, 160. I credit Lusk over Vance since he has driven the 777F model and Vance has not.

Both Vance and Lusk testified that a warning buzzer will go off if there is a problem with the brakes. Tr. 244; Tr. II 159. In fact, on cross examination, Vance acknowledged that the buzzer was an audible three alarm that was working and would go off before there was problem with the brake system or any brake failure. Tr. 244. Vance then attempted to retract his admission, but Respondent's counsel would not let him do so.

> Q. So the brake light and the oil temperature light would not cause an injury, because if we're getting into a problem with the brake system, the buzzer is going to go off, correct?

A. The buzzer will go off.

Q. And that tells an operator he's got a problem with his brake system; right?

A. It could be another thing, too. I mean, it doesn't necessarily -- it could go off for the steering, it could go off for oil pressure loss. It works off all the alarms.

Q. It would tell him he has a problem with the system; right?

A. Yes.

Q. Okay. And that tells him to stop; right?

A. Yes.

Id.

When asked on cross examination how the allegedly defective brake oil temperature gauge was reasonably likely to cause a serious injury, Vance testified, "[b]ecause the driver does not have no warning that if he's overheating the brakes or not. Because the light is on and the temperature gauge is pegged out." Tr. 240. When pressed further about how ignorance of the brake oil temperature is reasonably likely to cause a serious injury, Vance testified, "[b]ecause the hotter the brakes get, you're pretty much, more or less, cook them. So the less brake friction you're going to have as far as stopping capability." *Id.* Vance further testified that the brake oil would have to heat up to a sufficient degree that the driver would lose the capability to stop the truck, and you will probably see smoke coming from the brake drum. Tr. 241.

Although the citation indicated that the fuel gauge was not working properly (P. Ex. 5), Vance did not testify how the fuel gauge was malfunctioning. Rather, Vance testified that it was "good practice to know if you've got fuel" and testified that once while driving a large rock truck out of a pit, the truck ran out of fuel and rolled back until the brakes set up. Tr. 108. On cross examination, counsel asked Vance *how* it was reasonably likely to have a serious injury from a fuel gauge not working. Vance replied, "[b]ecause the truck could run out of fuel while traveling uphill or downhill, and the truck is going to roll a certain distance until the brakes actually stop the truck." Tr. 233-34. Vance testified that the truck could be dumping in a valley field down a grade about a quarter mile to a mile from the pit. Tr. 235-36.

When counsel asked how far the truck had rolled during the incident that Vance described, Vance replied, "[p]robably 50 feet or better." Vance testified that he was driving on a steep grade under the heavy load of a much larger 793 model rock truck, capable of carrying 2.5 times the tonnage of the 777D or 777F models cited. Tr. 233-34.

At the time of the inspection, Curry credibly testified that the rock trucks were refueled at the end of every shift, and could run for two days, or 20 hours, on one tank of fuel. Tr. II, 102-03. At the time of hearing, Curry testified that Respondent was refueling midday. Tr. II, 103. Vance conceded on cross examination that for an injury to occur, Respondent would have to deviate from its practice of refueling at shift's end. Tr. 234.

With regard to the alleged slack in steering linkage components, Vance read from the citation and testified as follows: "The first item, 'Excessive slack existed on the inside ball stud located on the right side steering jack. Excessive slack existed when the truck is steered in either direction. Also, slack existed where the nut was located on the ball stud.'" Tr. 108. Vance testified that he observed the slack and measured 80,000ths of slack with a dial indicator. Tr. 108-09.

> Q. Can you tell us about that?
>
> A. Measurement with a dial indicator, 80,000ths.
>
> Q. You use the same --
>
> A. Horizontal movement, yes. Steering jack and the ball stud.
>
> Q. Were they making the same movement as the stuff you observed before?
>
> A. Yes.
>
> Judge McCarthy: Did you measure both the right side of the steering jack and where the nut was located?
>
> The Witness: Just the top part where the -- where the -- top of the ball stud and the steering jack itself. Not the nut.
>
> Judge McCarthy: Is that true for all the measurements?
>
> The Witness: Yes. It's the same as -- just this one had a little bit more slack.
>
> By Ms. Bernick:
>
> Q. Did anybody else take any measurements of this?
>
> A. Not at the time when I was there.

Id. Vance's notes for the citation indicate "Pic's taken, no pics taken by company." P. Ex. 2, p. 15. As noted, however, no pictures of dial indicator measurements were proffered by the Secretary.

Vance testified that the slack in the ball joint, combined with the braking issues could cause a driver to lose control of the truck and wreck. Tr. 110. Vance testified generally that he had investigated numerous truck accidents that were caused by brake system defects. Tr. 111. Vance testified that in each instance, brake defects caused the driver to lose control and wreck the truck. Tr. 111. According to Vance, none of these incidents resulted in a fatality, but did result in permanent disability. Tr. 111-12. Vance did not present any accident or investigation reports, nor provide specific information about any of the accident investigations in which he was involved. Tr. 112-13.

Following his inspection, Vance issued Citation No. 7162346 for an alleged violation of 30 C.F.R. § 77.404(a). The citation alleged that:

> 1. Excessive slack existed on the inside ball stud located on the right side steering jack. Excessive slack existed when the truck is steered in either direction. Also slack existed where the nut was located on the ball stud.
>
> 2. The brake oil temperature gauge was not working properly.
>
> 3. The brake action warning light was on.
>
> 4. The fuel gauge was not working properly.

P. Ex. 5. The citation was designated as S&S and reasonably likely to result in a fatal injury, with one person affected, as a result of Respondent's moderate negligence. The proposed penalty was $12,248. The citation described abatement steps as follows:

1. A new ball stud has been installed.
2. A new sensor has been installed.
3. A new sensor has been installed.
4. A new sensor has been installed.

P. Ex. 5.

These abatement steps were largely disputed by Lusk, who repaired the truck. Tr. II, 161. Although Lusk testified that an inside ball stud on the right side steering jack was replaced, no sensor was installed for the brake oil temperature gauge. Rather, Lusk repaired some wiring. Tr. II, 160-61. Lusk testified that nothing was wrong with the brake action warning light and no sensor was installed. Tr. II, 162. Similarly, Lusk testified that no sensor was installed for the fuel gauge. *Id.* Rather, Lusk testified that the sensor was plugged back up because dirt had pulled it apart. *Id.* I credit Lusk regarding these abatement steps that he personally undertook. I find that Vance prevaricated certain abatement steps and cursorily checked abatement measures consistent with Lusk's letter to District Manager Watkins. *See* R. Ex. 2.

a. Legal Analysis Concerning Citation 7162346

i. The Alleged 77.404(a) Violation

Under section 77.404(a), the primary issue is whether the 777F Caterpillar Truck No. 4045, cited by inspector Vance on April 30, 2013, was maintained in safe operating condition and removed from service, if unsafe. *Peabody Coal,* 1 FMSHRC at 1495. It is undisputed that such mobile equipment was in service when cited. The primary issue is whether the truck was maintained in safe operating condition. Applying the reasonably prudent operator test set forth above, I find that the Secretary established that Respondent violated 30 C.F.R. §77.404(a) by failing to maintain the brake oil temperature gauge in safe operating condition, but failed to establish that the violation was significant and substantial. I find that the Respondent further

violated the standard by failing to maintain the fuel gauge in safe operating condition and that this violation was significant and substantial. I dismiss the remaining allegations in the citation.

The Allegation of Slack in the Ball Joint

For essentially the reasons previously set forth herein, except for Vance's slight modification of the amount of slack purportedly measured, I discredit Vance's testimony that he used a dial indicator on Truck 4045, and that he found 80,000ths of an inch of excessive slack on the inside ball stud located on the right side steering jack, excessive slack when the truck was steered in either direction, and slack where the nut was located on the ball stud. Rather, I have credited Respondent's witnesses, particularly Lusk and Newsome, that Vance did not use a dial indicator to take any measurements of slack in ball joint movement on any truck inspected on April 30, 2013. Further, Citation 7162346, like predecessor Citations 7162343 and 7162344, all indicated that slack existed where the nut was located on the ball stud, but as with Citation 7162344, Vance did not testify about the alleged slack where the nut was located on Truck 4045. As with the prior citations, I find Vance's testimony and notes about excessive slack or slack in steering linkage components to be totally unreliable and motivated by his bias against Curry. I find that the Secretary failed to prove by credible, probative evidence that excessive slack existed on the inside ball stud located on the right side steering jack or that slack existed where the nut was located on the ball stud. Accordingly, the Secretary failed to establish that any such slack met Caterpillar's out-of-service criteria such that truck 4045 was not maintained in safe operating condition.

The Allegation that the Brake Action Warning Light Was Defective

With regard to the allegation that the brake action warning light was on, I have credited Lusk's testimony that nothing was wrong with the brake action warning light and no sensor was installed to abate the violation. Tr. II, 162. Lusk testified that the light comes on when the truck starts, and it remains on, preventing the truck from moving, until pressure builds up for the brakes. Tr. II, 158-60. Vance indicated that the warning light is linked to the brake oil temperature gauge, which was not functioning properly. Considering this information, I reject Vance's allegation that the light was "stuck." Tr. 107. It is likely that the light had turned on because the truck had just been started, or else it had been automatically activated by the problem with the brake oil temperature gauge in order to alert the driver to the need to check the brake oil, which is exactly the way the light is supposed to work. Further, I have credited Lusk's testimony that the truck cannot be driven while the brake action warning light is on. I discredit Vance's testimony to the contrary and find that the Secretary failed to establish that the brake action warning light was not functioning properly while the truck was operating. Accordingly, this allegation in the citation fails of proof and will be dismissed.

The Allegation that the Brake Oil Temperature Gauge Was Defective

With regard to the allegation that the brake oil temperature gauge was not working properly, Lusk conceded that he repaired the wiring leading to the gauge. Tr. II, 161. Further, Vance testified that the brake oil temperature gauge allows the driver to monitor the temperature of the brakes, especially on a downhill slope or steep grade, and determine when to switch gears or change braking technique.

I find that the gauge was not working properly due to faulty wiring and thus Respondent violated 30 C.F.R. § 77.404(a) by failing to maintain the truck in safe operating condition.

The Allegation that the Fuel Gauge Was Defective

With regard to the allegation that the fuel gauge was not working properly, Vance did not explain how the fuel gauge was malfunctioning. I have credited Lusk's testimony that the operator did not need to install a new sensor to repair the fuel gauge, as the sole problem was that a component of the sensor had come unplugged. Tr. II, 162.

As previously stated, § 77.404(a) requires operators to maintain vehicles in safe condition and remove them from service if unsafe. Thus, the question before me is whether the unplugged fuel gauge rendered the truck unsafe. The fuel gauge serves to alert the driver when fuel is running low. A nonfunctional fuel gauge creates a risk that the driver will not realize the vehicle needs to be refueled, and as a result, the vehicle may run out of gas unexpectedly. As Judge Gill recently noted in a case involving a runaway truck, running out of gas causes a truck's engine to die, which can affect the operability of the steering and brakes, leading to a loss-of-control hazard on steep, winding mine roads. *Clintwood Elkhorn Coal Co.*, 37 FMSHRC _, Docket No. KENT 2011-42R et al., slip op. at 7 (Mar. 22, 2016). Similarly, Vance recalled a prior incident when he had been driving a truck that ran out of fuel and rolled along an incline until the brakes kicked in. Tr. 108. I conclude that the unplugged fuel gauge rendered the truck unsafe, and therefore the condition violated § 77.404(a).

ii. S&S, Gravity, and Negligence

As discussed above, I have found that the brake oil temperature gauge and the fuel gauge were defective, in violation of the mandatory safety standard at § 77.404(a). These findings satisfy the first *Mathies* element.

Turning to the second *Mathies* element, with regard to the brake oil temperature gauge, the Secretary established that the defective gauge created a hazard in that the driver could no longer determine whether the brakes were overheating, which could contribute to an accident if the brakes were to overheat. Tr. 240-41. However, I find that the second *Mathies* element is not satisfied because the hazard did not constitute a genuine measure of danger to safety under the particular circumstances surrounding this violation and because the evidence does not establish that the violation was at least somewhat likely to result in harm. When asked on cross examination how the brake oil temperature gauge that was not working properly was reasonably likely to cause a serious injury, Vance testified, "[b]ecause the driver does not have no warning that if he's overheating the brakes or not. Because the light is on and the temperature gauge is pegged out." Tr. 240. However, I have credited the operator's testimony that the vehicle could not be moved because the brake action warning light was on. Because the truck could not be moved, there was no measure of danger to safety. Even if it could be moved, there was no evidence of any problems with the brakes. Moreover, both Vance and Lusk testified that a warning buzzer will go off if a problem with the brakes were to arise. Tr. 244; Tr. II 159. In fact, on cross examination, Vance acknowledged that the audible three alarm buzzer was working and would go off before there was problem with the brake system or any brake failure. Tr. 244. In these circumstances, I find that the Secretary failed to establish a likelihood that the brake oil would heat up without warning to a sufficient degree that the driver would lose the

capability to stop the truck. Accordingly, I need not address the remaining *Mathies* elements, and I find that the defective brake oil temperature gauge was not a significant and substantial violation.

However, I uphold the S&S designation with regard to the defective fuel gauge. Curry credibly testified that at the time of the inspection, the rock trucks were refueled at the end of every shift and could run for two days, or twenty hours, on one tank of fuel. Tr. II, 102-03. Vance conceded on cross examination that for an injury to occur, Respondent would have to deviate from its practice of refueling at shift's end. Tr. 234. Nonetheless, I find that the Secretary has overcome the very low burden imposed by the second prong of the *Mathies* test by establishing that the defective fuel gauge presented a discrete hazard – that is, a measure of danger to safety – that was at least somewhat likely to result in harm. As discussed above, the defective fuel gauge created a loss-of-control hazard if the truck were to unexpectedly run out of gas. Given the vagaries of human conduct and assuming continued normal mining operations, it was at least somewhat likely that the truck would not be refueled despite the operator's refueling policy and would run out of gas, which would occur without warning due to the inoperable fuel gauge. *See Peabody Coal Co.*, 19 FMSHRC 1381, 1385 (Aug. 1997) (finding that operator's safety practices do not preclude S&S finding because such an approach would rely on miners' skill and attentiveness to prevent injury, which impermissibly "ignores the inherent vagaries of human behavior") (citing *U.S. Steel*, *supra*, 6 FMSHRC at 1838 n.4). Because the truck was regularly driven on steep, curving mine roads, any loss of control occasioned by the truck unexpectedly running out of gas would be reasonably expected to cause a vehicular accident such as a collision, a fall from a precipitous height, or a rollover accident. *See, e.g.*, *Clintwood Elkhorn*, *supra* (discussing accident wherein an out-of-control truck ran out of gas, accelerated down a mountain road, crashed through a berm, struck a utility pole at the base of the hill, and rolled over). Any such accident would be reasonably likely to result in harm to a driver, a passenger, or anyone in the path of the out-of-control vehicle. Accordingly, I find that the defective fuel gauge contributed to a discrete safety hazard that was at least somewhat likely to cause harm, satisfying the second *Mathies* element.

The third and fourth *Mathies* elements are also satisfied. Assuming the loss-of-control hazard were to occur, the hazard would be reasonably likely to cause an accident resulting in serious or fatal injuries to the driver, a passenger, or anyone in the truck's path, as this is a heavy rock truck that is operated in mountainous terrain.

Because the four *Mathies* elements are met, the operator's failure to maintain the fuel gauge in safe condition was S&S.

Having rejected two of the four allegations at issue in this citation and determined that one of the two remaining safety defects (the defective brake oil temperature gauge) did not present a genuine measure of danger to the safety of miners, I find that the gravity of this violation was not as serious as suggested by Inspector Vance.

I further find that Respondent's level of negligence was properly designated as moderate. Respondent knew or should have known that the brake oil temperature gauge needed rewiring and that the fuel gauge needed to be repaired, although it is unclear how long the conditions existed.

iii. Penalty

Respondent is a large operator. The parties stipulated that the originally proposed penalty of $12,248 will not affect Respondent's ability to remain in business. MSHA recognized Respondent's good-faith compliance in abating the citation. I have dismissed two specific allegations in the citation. I have modified the S&S determination concerning the brake oil temperature gauge from reasonably likely to unlikely and non-S&S, but have upheld the S&S determination concerning the fuel gauge. I have affirmed MSHA's moderate negligence determination. After consideration of the penalty assessment criteria discussed earlier and set forth in section 110(i) of the Act, I assess a $3,050 civil penalty against the Respondent.

4. Citation No. 7162351- Caterpillar 777F, Truck No. 4058

Vance inspected Caterpillar 777F Truck No. 4058 at about 1:20 p.m. on April 30, 2013. Tr. 115. Vance testified that the handrail on the offside was broken and needed repair, and the mirror bracket was bent and needed adjustment. Tr. 116.

Vance checked the secondary steering by standing at ground level, hitting the "kill switch," and listening for the electric motor to engage. Tr. 118. Vance testified that the driver of the truck (Ballard Smith) manually held the switch in once Vance climbed up in the cab. Tr. 181.[20] Vance did not indicate, however, whether the secondary steering worked at that point. As set forth below, Smith, Lusk and Curry all testified for Respondent that the secondary steering did work. I credit Respondent's witnesses, as explained below.

When asked whether the electric motor came on, Vance testified:

> A. No. And he did not -- wasn't able to do it from the cab neither by releasing the -- the brake in the -- the transmit -- or the steering in the manual position.
>
> Q. Well, can you tell us about what the safety conditions here are on the secondary steering?
>
> A. Power loss engine failure, the driver wouldn't have no secondary steering, no back up to get the truck stopped, under control, safely while in operation without secondary steering in the case of a power failure, as far as loss of engine, loss of fuel.

Tr. 119.

Vance issued Citation No. 7162351 for an alleged violation of 30 C.F.R. § 77.1606(c). The condition or practice narrative alleged:

1. Secondary steering was not functioning when tested.

[20] Ballard Smith was the driver of the truck on the day the citation was issued. Tr. II, 12-13.

2. The handrail located on the offside of the truck was broke.

3. The offside mirror bracket needed repaired (sic).

P. Ex. 7. The citation was designated as a significant and substantial violation because reasonably likely to result in a lost-workdays or restricted-duty injury, with 1 person affected, as a result of low negligence. P. Ex. 7. The proposed penalty was $1,530. The citation described abatement steps as follows:

1. The wiring has been repaired to the secondary steering.

2. The handrail has been welded back up in place.

3. The mirror bracket has been adjusted up properly.

P. Ex. 7.

Vance testified that he cited 30 C.F.R. § 77.1606(c) rather than 30 C.F.R. § 77.404(a) because he "didn't feel this truck was not being maintained. Just that these conditions existed that affected it. These safety defects. So that's why I went with this instead of the 404(a)." Tr. 121. Vance did not describe how the handrail was broken, but testified that if a driver or greaser used it they could lose contact with the vehicle and fall. Tr. 117. Vance testified that the bent offside mirror bracket that was out of adjustment is used each time the driver backs up, and he could "back into something. Back over a rock. Back into another piece of equipment." Tr. 116.

Vance testified that he designated the citation as reasonably likely to result in a lost-time injury because the truck was operated in reverse about 50 percent of the time and the bent offside mirror bracket "makes it difficult for the driver to see" during operation of the truck around other equipment and in close proximity to confined areas. Tr. 121. Basically, Vance opined that the citation was significant and substantial because the bent mirror bracket prevented a driver from seeing while backing up, which could cause a collision. Tr. 123. Vance further supported his reasonably likely designation because the secondary steering would not function if there was a power failure of the truck, which operated ten hours per day for five days per week. Tr. 122. Vance testified that he only relied on the secondary steering and bent offside mirror bracket for his S&S designation, and not on the defective handrail. Tr. 265-66.

Vance testified that "lost workdays or restricted duty" was the appropriate injury designation because the operator could back up and hit another object or piece of equipment. Further, Vance distinguished this injury designation from the fatal designation in prior citations because only secondary steering was cited, and not primary steering linkages or brakes. Tr. 122-23.

On cross examination, consistent with P. Ex. 8, a photograph of the cited mirror and handrail, Vance testified that there were two mirrors on the driver side and he circled the cited bottom mirror. Tr. 254-56; P. Ex. 8. Vance testified that the bottom mirror bracket was bent, but the top mirror bracket was not bent and the top mirror was fully functioning. Tr. 254. Vance did

not know whether another operator, who drove the truck, had requested that the bottom mirror bracket be bent. Tr. 244-45.

To abate the alleged violation, Vance testified that "[t]he mirror bracket has been adjusted up properly." Tr. 256. When asked how they adjusted it, Vance testified, "Probably loosened it up and adjusted the mirror. It's got – it's mounted from the top to the bottom and you can adjust either side to side or - -." *Id.* The following exchange then occurred with Respondent's counsel:

> Q. Okay. So what's the problem here? Is it the bracket or is it the way the mirror is lined up? What's your issue?
>
> A. Well, if the bracket is bent and you haven't adjusted it to make up the difference, you won't be able to see completely what you need to see when operating the truck.
>
> Q. What about the mirror above it?
>
> A. Well, as a truck driver, the bottom mirror is usually towards the bottom of the truck and the top mirrors are used for the upper section of the truck when you're loading on the offside of the truck to see your loader. When you stage up.
>
> Q. So you went and sat in the operator seat?
>
> A. No. This is from prior experience.
>
> Q. Okay. So you don't know on this truck how the operator had these two mirrors lined up for his use?
>
> A. No.
>
> Q. And you didn't take any pictures of it?
>
> A. Just the picture that you see.
>
> Q. Right. And that doesn't really tell us what either one of these mirrors are showing. We're seeing the back of the mirrors, aren't we?
>
> A. Yes.
>
> Q. It doesn't show us what the view of the operator sitting in the operator's cab would see?
>
> A. The depth of it would be hard with the picture.

Q. All right. And -- are you aware that they made no changes to this mirror after your citation?

A. They told me the mirror bracket had been adjusted, and the driver was okay with it.

Q. Who told you that?

A. Whoever I spoke to. Jay Curry.

Tr. 256-58.

In short, on cross examination, Vance admitted that the driver had another higher mounted mirror that was fully functional, that Vance did not sit in the operator's seat to check visibility from the higher mounted mirror, that the bent mirror bracket could have been adjusted for operator use, and that Vance did not know what the operator saw, rather Vance was "[j]ust going by experience." Tr. 254, 257, 267. Subsequently, the following colloquy occurred between the undersigned and Vance:

Judge McCarthy: Well, did you – did the operator tell you what he saw or didn't see on the day you wrote the citation?

The Witness: It's been took out of the notes.

Judge McCarthy: Well –

The Witness: What was exactly said, I don't remember. I mean, exactly what was said. Did he –

Judge McCarthy: Well, what do you remember the operator telling you?

The Witness: The day the citation was issued?

Judge McCarthy: Right. About the mirror.

The Witness: Evidently, there was a problem with the mirror. Without me sitting in the seat and him not telling me, I would not know.

Judge McCarthy: Okay. You have a problem, don't you? I mean, you have the steering. Okay? It's like a crack in the windshield. I have had cases where the inspector didn't get up – well, you can read them or you can find them. But – so we don't know what the operator told you. He just said there was a problem?

The Witness: Yes

Tr. 267-68.

Vance designated Respondent's negligence as low. The Secretary's counsel conceded that she was not seeking to modify that designation. Tr. 128.

As noted, Ballard Smith operated Truck No. 4058 during the inspection. Tr. II, 7-8. Smith testified that buddy checks were performed more or less on a weekly basis at Eagle Creek. Tr. II, 38. Smith acknowledged that there was a crack in the weld on the truck's handrail. Tr. II, 15. In addition, Lusk admitted that the handrail had broken from its weld at one point and Lusk repaired it to abate the citation. Lusk noted, however, that the handrail had several other points of contact with the truck. Tr. II, 144.

Smith did not remember any problem with the mirror bracket and did not have any trouble using the mirrors while driving the truck. Tr. II, 28. When asked on direct whether the mirrors angled to the appropriate areas to allow Smith to see behind him, Smith testified, "I didn't have any problem with it. I wouldn't pull out if I had a problem seeing." Tr. II, 29. Smith confirmed that he did a pre-operational check on the truck that morning and did not have any problems with the mirror that he could remember. *Id.* Smith did not recall having any conversation with Vance about the mirrors. *Id.* Smith did recall that the offside mirror bracket had been bent a little bit during shipping, but one could adjust the mirror. Tr. II, 29-30. When asked whether the mirror had been adjusted to be in the proper location, Smith testified, "I didn't have any problem with it." Tr. II, 30. Smith testified that he could adjust the bottom mirror from the steering wheel to see behind him on the offside when backing up to judge the distance of objects behind him. Smith could also adjust the mirror to look at the side of the truck or the wheel area. *Id.* Smith testified that Vance probably noticed that the bracket was bent a little bit, but Smith did not recall Vance questioning Smith about the mirror and it was not a problem. Tr. II, 31. The Secretary redacted any alleged conversation that Vance may have had with Smith about the mirror. *Id.*; P. Ex. 2, p. 30.

Smith further testified that Vance could not check the secondary steering on the 777F model from the ground by hitting the kill switch. Tr. II, 12. As noted, on questioning from the undersigned, Vance testified that Smith manually held the switch in once Vance climbed up in the cab. Tr. 181. Tr. II, 12-13. Vance did not indicate whether the secondary steering worked at that point. As explained below, I credit Smith, Lusk and Curry, who all testified that the secondary steering did work.

Smith testified that he had never been inspected in a 777F model, and that after Vance "downed" and left Smith's vehicle, Tony Wallace, the driver in the truck next to Smith, radioed Smith to inform him how to check the secondary steering. Tr. II, 13, 22-24. Smith testified that he turned the key without starting the engine, held the switch in, and the secondary steering light came on with a little hum. Tr. II, 13, 23. Smith further testified that there was nothing wrong with the emergency steering and that Smith showed Vance that the secondary steering worked after Vance had downed the truck and came back about an hour later to check on abatement

efforts. Tr. II, 13, 24-25. Smith did not know whether Vance had already written up the citation after Smith showed Vance that the secondary steering was working. Tr. II, 26. Smith assumed that Vance also did not know that when you hit the kill switch on the 777F model, the secondary or emergency steering would not engage. Tr. II, 27.

Smith further testified that two of the three abatement measures listed by Vance on the citation were inaccurate. Specifically, Smith testified that there was no repair to the wiring on the secondary steering because Smith was with the truck and nobody notified him that they were going under the vehicle to repair the wiring. Tr. II, 41-42. Smith also noted that nothing was done to the mirror bracket that day. Tr. II, 48.

I credit Smith's testimony concerning abatement measures and his testimony that he had no problem seeing out of the offside bottom mirror when driving the truck. I further credit Smith that the secondary steering was working and that Vance's test was executed incorrectly.

Smith's testimony was essentially corroborated by Lusk. Lusk testified that when Vance climbed up the ladder into Smith's cab, Vance told Smith that the emergency steering was not working. Tr. II, 140. Lusk then asked Smith in Vance's presence whether Smith had held in the button, and Smith said, "No, I thought you just had to push it." Tr. II, 140-41. Lusk then hollered over to foreman Curry that Vance was not testing the 777F model correctly, as Vance started to walk away to another truck. Tr. II, 142. As Vance passed Lusk, Vance told him to weld the handrail, which Lusk began doing. *Id.* Lusk conceded that the handrail had broken loose from the weld and needed to be re-welded. Tr. II, 144. Lusk testified that when Vance returned to check on the handrail, Lusk told him that there was nothing wrong with the emergency steering. Tr. II, 142, 144. Lusk testified that Vance said, "Okay. Fine. Let's test it," and the test was fine. Tr. II, 143. Lusk further corroborated Smith that nothing was done to adjust the mirrors that day. Tr. II, 142.

Finally, I note that Curry testified that Lusk informed Curry on April 30, 2013 that Vance was not testing the emergency steering on the 777F models properly. Tr. II, 69. Accordingly, Curry directed Lusk to walk Vance through the proper test for the secondary steering system on the 777F model. Tr. II, 70. Curry further testified that he was present in the area when Lusk and Vance rechecked the secondary steering and there was no problem with it. Tr. II, 72.

a. Legal Analysis Concerning Citation 7162351

i. The Alleged § 77.1606(c) Violation; S&S; Gravity; Negligence

Section 77.1606 pertains to loading and haulage equipment. The cited portion of the mandatory safety standard states: "Equipment defects affecting safety shall be corrected before the equipment is used." 30 C.F.R. § 77.1606(c).

I have credited Smith's testimony concerning Vance's apparently fabricated abatement measures and Smith's testimony that he had no problem seeing out of the offside bottom mirror when driving the truck. I further have credited testimony from Smith, Lusk, and Curry that the secondary steering was working and that Vance's emergency steering test was executed

incorrectly on the 777F model. Accordingly, I find that the Secretary failed to establish that the bent offside mirror bracket and the secondary steering system were equipment defects that affected safety and that needed to be corrected before the equipment was used under the cited standard.

Respondent's witnesses conceded that a weld on the handrail was missing and needed to be re-welded. Inspector Vance testified that he only relied on the secondary steering and bent offside mirror bracket allegations for his S&S designation, and not on the defective handrail. Tr. 265-266. Contrary to Respondent's efforts to vacate the handrail allegation completely (Tr. II, 145), I find that the missing weld was an equipment defect that affected safety if one tripped or fell since it was located in close proximity to the steps and could be latched onto as one was falling down, but consistent with the Secretary's litigating position, it was not S&S, and the gravity of the violation was not serious.

I affirm the low negligence determination since the reminder of the handrail was intact.

ii. Penalty

After consideration of the penalty assessment criteria discussed earlier and set forth in section 110(i) of the Act, my findings on gravity and negligence set forth above, and the fact that the violation was abated immediately in good faith, I assess a $310 civil penalty against the Respondent for the defective handrail.

5. Citation No. 7162340 – Water Truck No. 8147

On May 2, 2013, Vance returned to the Mine to terminate the citations issued on April 30 and to continue his E01 inspection. Tr. 200. At about 12:35 p.m., Vance inspected the White Sterling Water Truck, No. 8147. Tr. 135. The water truck is used to water down roads for dust control. Tr. 152.

Vance testified that the walk-around inspection protocol for the water truck was similar to a haul truck, but the out-of-service criteria was different because haul trucks are confined to off road, and water trucks can be operated on and off road. Tr. 136, 138. Vance used the Commercial Vehicle System Alliance's North American Standard Out-of-Service Criteria for inspecting the water truck. Tr. 136. This criteria is not written into any MSHA standard, it is only used as a guideline. Tr. 283.

Vance testified that to check the brakes, he crawled under the water truck and checked the amount of slack or overstroke to determine whether the brakes should be taken out of service. Tr. 143. Vance testified that when the brakes are engaged on the water truck, a pushrod extends from the brake canister near the slack adjustor and applies pressure to the S-Cam, and the brakes expand against the drum. Tr. 146-147. Depending on the size of the canister, the length of rod that extends from the canister is then measured in inches. Tr. 147. Vance testified that he measured the overstroke with a wooden, folding tape measure. Tr. 145.

Vance testified that the type-30 canisters used for the back brakes on the water truck had a 2-inch limitation under the North American Standard Out-of-Service Criteria. Tr. 146-47. Vance testified that he measured 2 and ¼ inches of overstroke for the left-side rear axle, which exceeded out-of-service criteria. Tr. 148. Curry testified, however, that a brake with a 2 and ¼ inch overstroke would still stop the water truck. Tr. II, 81. As explained below, I discount Curry's testimony.

Vance also testified that the brakes on the left and right side of the front-drive axle did not function when tested. Tr. 146. He testified that there was no movement in the pushrod when the brakes were engaged. *Id.* On cross examination, Vance could not determine why the brakes did not move on the left and right side of the front-drive axle (Tr. 283), but he testified earlier on direct examination that caps were missing from the brake canisters, which would allow dust to fill the canisters and prevent the brakes from moving. Tr. 150-51.

Vance also observed that the brake pads did not contact the brake drum as they were supposed to do when the brakes were fully applied on the right side of the rear-drive axle. Tr. 148. Vance testified that a filler gauge is used to check space between the pads and the drum, but Vance never testified specifically that he used a filler gauge. *Id.*

In addition, Vance observed that the water bed bracket that mounts the water bed to the frame on the right side of the truck was broken. Tr. 149.

At about 12:35 p.m., Vance served Curry with Citation No. 7162340 alleging that the water truck was not being maintained in safe operating condition in violation of 30 C.F.R. § 77.404(a) because of the following conditions:

> 1. The brakes located on left and right side of front drive axle were not functioning when tested.
>
> 2. The service brake chamber pushrod stroke for the left side chamber on the rear drive axle measured to be 2 ¼" inches (over stroked).
>
> 3. The brakes located on the right side of the rear drive axle [were] not working properly when tested. With the brakes fully applied the brake pads would not contact the brake drum.
>
> 4. The water bed bracket mount located on the right side of the truck was [broken] off from the water bed.
>
> These conditions expose the miner to hazards while operating the truck. This truck is being operated throughout mine property to water the roadways. It is reasonably likely if these conditions continue an accident will occur. Management removed the truck from service immediately.

P. Ex. 9.

The S&S citation was designated as reasonably likely to result in a fatal injury, with one person affected, as a result of Respondent's moderate negligence. *Id.* The proposed penalty was $10,437. The citation listed the following abatement steps to correct the conditions:

1. The air lines have been plumbed up properly and the brakes are now functioning properly when tested.

2. The brake was readjusted back up properly.

3. The air lines have been plumbed up properly and the brakes are now functioning properly when tested.

4. The bracket was welded back into place on the water bed.

Id.

Essentially, Vance supported his S&S designation by testifying that four of the six sets of brakes on the water truck were either out of alignment or not working, and since the brakes were not functioning properly, a driver could lose control of the water truck on the mine's steeply graded roadways and suffer a fatal injury after traveling through a berm or colliding with another oncoming truck. Tr. 151-156. Further, with regard to the broken water bed bracket mount, Vance testified that the water bed is mounted to the frame by brackets on each of the four corners of the bed. Tr. 149, 274. When asked on direct, what happens if you don't have brackets, Vance testified that ". . . the water bed on the truck could come off under normal operation, causing the truck to overturn, wreck, driver loses control of the truck." Tr. 149. Vance testified on cross examination that under continued normal mining operations, the water truck would be driven on steep grades and curvy roads and under heavy loads, which conditions would put stress on the remaining brackets, causing them to fail and the truck to become unbalanced and overturn. Tr. 274, 276. Vance opined that any injury from such accident was reasonably likely to be fatal because the water truck is driven in and out of the pit area and on steeper grades than the haul trucks. Tr. 155.

Vance determined the violation to be the result of moderate negligence because the Respondent could not provide any evidence that a two-man or buddy check had been conducted on the brakes, although the operator had performed a pre-operational examination on the vehicle. Tr. 156-57.

On cross examination, Vance did not have any independent recollection of where he inspected the water truck, although he testified, after consulting his notes, that he probably inspected the water truck in the pump house area. Tr. 268-69; P. Ex. 10. Vance then testified that he saw the water truck in operation in the pump house area on the main pump house haul road which extends from the pit to the dump. Tr. 270. Vance testified that the water truck was in operation and not parked because Vance would have reflected the fact that it was parked in his

notes. Tr. 269, 271. Vance's notes just indicate that the water truck was checked. P. Ex. 10, p. 3.

Curry testified that the water truck was idle on May 2, 2013 because it had just rained the night before, and the air temperature that morning was below freezing, making it too cold to water the roads and create ice. Tr. II, 73.[21] Curry testified that a brake adjustment was scheduled for the water truck that day because the operator had informed him on April 30 that the brakes needed adjustment. Tr. II, 75. Curry testified that he told the operator to park the truck in the maintenance area at the top hill on the No. 8 curve and that is where the truck was inspected when out of service. Tr. II, 75, 77. Lusk confirmed that the truck was in the maintenance yard and scheduled for brake adjustment when Vance inspected it on May 2, 2013. Tr. II, 163. Curry acknowledged, however, that the water truck was not locked and tagged out. Tr. II, 77.

I credit the mutually corroborative and specific testimony of Curry and Lusk that the water truck was idled in the maintenance yard and scheduled for brake adjustment when inspected by Vance on May 2. Vance's recollection of the location of the inspection was hazy and poor and I have found that Vance was not a forthright and reliable witness.

a. Legal Analysis Concerning Citation 7162340

i. The 77.404(a) Violation

Under section 77.404(a), the water truck cited by inspector Vance on May 2, 2103 was mobile equipment that must be maintained in safe operating condition and removed from service, if unsafe. *Peabody Coal,* 1 FMSHRC at 1495. Although I have found that the water truck was idle on May 2, 2013 and awaiting maintenance in a makeshift lot, I find that the truck was still in service because the vehicle was not locked and tagged out. The Commission has held that a vehicle that is not locked and tagged out is still considered in service. *Wake Stone Corporation,* 36 FMSHRC 825, 828 (Apr. 2014) (citing *Alan Lee Good*, 23 FMSHRC 995, 997 (Sept. 2001)

[21] As noted, after the hearing, the Secretary moved to reopen the record to submit certified weather data from April 30 and May 2, 2013 showing that the temperature ranges for Logan, West Virginia those days were well above freezing and there was no rain in Logan, West Virginia on May 1 or 2, 2013. ALJ Ex. 1, Ex. A. I have admitted the evidence, but accord it no weight as it relates to Curry's credibility or the water truck citation. Any discrepancies between Curry's testimony about the temperature and precipitation and the weather data submitted by the Secretary may be attributed to the elevation of the Eagle Creek Mine, which is over 1,000 feet higher than Logan, West Virginia where the data was collected. ALJ Ex. 2, p. 4 and Affidavit of Richard R. Stacey Jr. I also note that the certified weather data submitted by the Secretary shows that that was some rain in the Logan area on April 30, 2013, the day Curry testified that the truck was parked for a brake adjustment. Tr. II, 75. Moreover, as explained below, the water truck was not locked and tagged out, and was not being maintained in safe operating condition. Further, for the reasons explained below, I have found that the violation was significant and substantial.

(reinforcing the rule that equipment not tagged out of operation and parked for repairs must be maintained in functional condition "whether or not the equipment is to be used during the shift")). The Respondent concedes that the brakes needed to be adjusted, which is why the truck was idled, and Respondent did not challenge the allegation that a water bed bracket mount was broken. I find that both the defects in the brakes and the broken bracket violated 77.404(a).

ii. S&S, Gravity, and Negligence

I further find that the Secretary has proven an S&S violation of 77.404(a) because the water truck's brakes and a mount on the water bed bracket were not being maintained in safe operating condition and these conditions contributed to loss-of-control safety hazards that were reasonably likely to result in serious or fatal injury.

I credit Vance's testimony that four of the six sets of brakes on the water truck were either out of alignment or not working. He testified that the brakes were over stroked on the rear drive axle, and that the brake pads on the left and right side of the rear drive axle were not working properly. There was no conflicting testimony regarding these conditions. In fact, Lusk and Curry confirmed that the truck was in the maintenance yard and scheduled for brake adjustment when Vance inspected it on May 2, 2013. Although the water truck was idled, it was not properly locked and tagged out of service. Given the vagaries of human behavior and assuming normal mining operations were to continue, I find it reasonably likely that a driver would use the water truck with the defective brakes and lose control of the truck on the mine's steeply graded roadways, and suffer a fatal injury after traveling through a berm or colliding with another oncoming truck. Tr. 151-156.

The broken water bed bracket mount also contributed to a loss-of-control safety hazard that was reasonably likely to result in serious or fatal injury. The Respondent's witness contended that the hazard was mitigated by the presence of other brackets to hold the water tank in place. Tr. II, 79-81. But Vance persuasively testified on cross examination that under continued normal mining operations, the water truck would be driven on steep grades and curvy roads and under heavy loads, which conditions would put stress on the remaining brackets, causing them to fail and the truck to become unbalanced and overturn. Tr. 274, 276. I agree. Consistent with Vance's testimony, I find that any injury from such accident was reasonably likely to be fatal because the large water truck is driven in and out of the pit area and on steeper grades than the haul trucks, and if the water bed was not properly secured, the driver would lose control of the truck and collide into surrounding equipment, overturn, or run through a berm. Tr. 155. Accordingly, I find that the citation was properly designated S&S.

I further find that the gravity of this violation was serious because the two cited defects contributed to a discrete loss-of-control hazard that was reasonably likely to result in serious injury to miners.

With regard to negligence, I have credited the testimony of Curry and Lusk that the water truck was idled in the maintenance yard and scheduled for brake adjustment when inspected by Vance on May 2, 2013. The Respondent's efforts to address the brake problems might support a reduction to low negligence in other circumstances. However, the Respondent did not properly

lock and tag the truck out of service, meaning that miners were not prevented from using the vehicle prior to adjustment of the brakes, and the Respondent further failed to address the broken bracket mount at all. Under these circumstances, I find that although the Respondent's conduct falls somewhere along the continuum between low and moderate negligence, it is more properly described as closer to moderate negligence.

iii. Penalty

As noted, Respondent is a large operator. The parties stipulated that the originally proposed penalty of $10,437 will not affect Respondent's ability to remain in business. MSHA recognized Respondent's good-faith compliance in abating the citation. I find that Respondent is entitled to additional credit for good faith compliance because the water truck was already idled and slated for brake maintenance at the time the citation was written. I have affirmed the S&S determination concerning the water truck's defective brakes and the broken water bed bracket mount. Although I have affirmed the Secretary's moderate negligence designation, I have further found that the level of negligence is actually somewhere along the continuum between low and moderate, but closer to moderate. After consideration of the penalty assessment criteria discussed earlier and set forth in section 110(i) of the Act, I assess a $6,550 civil penalty against the Respondent for Citation No. 7162340.

VI. ORDER

It is **ORDERED** that Citation Nos. 7162343 and 7162351 be **MODIFIED** to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the "significant and substantial" designation.

It is **ORDERED** that Citation No. 7162343 be **MODIFIED** to reduce the level of negligence from "moderate" to "low."

It is **ORDERED** that the operator pay a civil penalty of $13,160 for the five citations litigated within 30 days of this decision.[22]

Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

[22] As noted herein, I assess a penalty of $200 for Citation No. 7162343, $3,050 for Citation No. 7162344, $3,050 for Citation No. 7162346, $310 for Citation 7162351, and $6,550 for Citation No. 7162340.

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