FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. TILCON NEW YORK INC, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. YORK 2016-66 A.C. No. 30-00075-402400 Docket No. YORK 2016-72-M A.C. No. 30-00075-404552 Mine: Haverstraw Quarry & Mill

DECISION AND ORDER

Appearances: Margaret Temple and Suzanne Demitrio Campbell, U.S. Department of Labor, Office of the Solicitor, New York, New York, for Petitioner;

Kevin R. Keating, Oldcastle Law Group, Atlanta, Georgia, for Respondent.

Before: Judge Miller

These cases are before me upon petitions for assessment of civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act"). These dockets involve sixteen citations issued pursuant to Section 104(a) of the Act with originally proposed penalties totaling $3,758.00. Prior to hearing, the parties agreed to settle six of the citations from Docket No. YORK 2016-66 and one from Docket No. YORK 2016-72. The Secretary vacated a second citation from YORK 2016-72 just prior to hearing, and the parties settled a third citation from that docket during the hearing. The settlement is addressed below. The parties presented testimony and evidence regarding the remaining seven citations at a hearing held in Poughkeepsie, New York, on July 27, 2016. Based upon the parties' stipulations, my review of the entire record, my observation of the demeanors of the witnesses, and consideration of the parties' legal arguments, I make the following findings and order.

The Haverstraw Quarry and Mill is a surface granite mine in Rockland County, New York, operated by Tilcon New York, Inc. The parties have stipulated that Tilcon is an "operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d), and is subject to the jurisdiction of the Commission. Ex. P-1. Tilcon New York operates four quarries as well as several other plants, and has approximately 275 to 300 employees. The Haverstraw Quarry is one of the company's larger quarries. A history of assessed violations at the mine was admitted as Exhibit P-17.

On December 28, 2015, Inspector Brian Righi traveled to the Haverstraw Quarry to conduct a general inspection. Righi also returned to the mine the following day and on January 5 and 6. Righi has been a mine inspector for four years and estimated that he has conducted 141 inspections. He has attended the required MSHA training. Prior to becoming an inspector, he worked 15 years in the mining industry, including work on crushers, conveyors, and various safety and health matters.

I. APPLICABLE PRINCIPLES OF LAW

The citations issued by Righi have been designated with various levels of negligence and several have been designated as significant and substantial violations. The Secretary has the burden of proof and the mine operator has the burden to prove any defenses it may raise, including the issue of fair notice.

A. Establishing a Violation

To prevail on a penalty petition, the Secretary bears the burden of proving an alleged violation by a preponderance of evidence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd* 272 F.3d 590 (D.C. Cir. 2001); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). The Secretary may establish a violation by inference in certain situations, but only if the inference is "inherently reasonable" and there is "a rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152-53 (Nov. 1989).

B. Significant and Substantial

A "significant and substantial" ("S&S") violation is described in Section 104(d)(1) of the Mine Act as a violation "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)(l). A violation is properly designated S&S "if based upon the particular facts surrounding that 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 *Mathies Coal Co.*, the Commission established the standard for determining whether a violation is S&S:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum,* the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC 1, 3-4 (Jan. 1984).

The second element of the *Mathies* test addresses the likelihood of the occurrence of the hazard the cited standard is designed to prevent. *Newtown Energy, Inc.*, 38 FMSHRC __, No. WEVA 2011-283, slip op. at 5 n.8 (Aug. 29, 2016). The Commission has explained that "hazard" refers to the prospective danger the cited safety standard is intended to prevent. *Id.* at 6. In *Newtown*, for instance, for a violation of a standard requiring that equipment be locked out and tagged out while electrical work is being performed, the Commission considered the hazard of a miner working on energized equipment. *Id.* The likelihood of the hazard occurring must be evaluated with respect to "the particular facts surrounding the violation." *Id.*; *see also McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991-92 (Aug. 2014); *Mathies*, 6 FMSHRC at 4. At the third step, the judge must assess whether the hazard, if it occurred, would be reasonably likely to result in injury. *Newtown*, slip op. at 5. The existence of the hazard is assumed at this step. *Id.*; *Knox Creek Coal Corp. v. Sec'y of Labor,* 811 F.3d 148, 161-62 (4th Cir. 2016). As with the likelihood of occurrence of the hazard, the likelihood of injury should be evaluated with respect to specific conditions in the mine. *Newtown,* slip op. at 7. Finally, the Commission has held that the S&S determination should be made assuming "continued normal mining operations." *McCoy*, 36 FMSHRC at 1990-91.

C. Negligence

The Secretary's regulations categorize negligence into five categories, from "no negligence" to "reckless disregard." 30 C.F.R. § 100.3, Table X. The Commission has emphasized, however, that these regulations apply to the Secretary's proposal of penalties only, and are not binding on the Commission. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015). The Commission instead directs its judges to "evaluate negligence from the starting point of a traditional negligence analysis . . . . Under such an analysis, an operator is negligent if it fails to meet the requisite standard of care—a standard of care that is high under the Mine Act." *Id.* at 1702. In evaluating an operator's negligence, the judge should consider "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Jim Walter Res.*, 36 FMSHRC 1972, 1975 (Aug. 2014).

While the Secretary's regulations focus on the presence or absence of mitigating circumstances in determining the level of negligence, 30 C.F.R. § 100.3, the Commission has indicated that Commission judges are not limited to this analysis and "may find 'high negligence' in spite of mitigating circumstances or may find 'moderate' negligence without identifying mitigating circumstances." *Brody*, 37 FMSHRC at 1702-03. High negligence is characterized by "an aggravated lack of care that is more than ordinary negligence." *Id.* at 1703.

D. Fair Notice

Where the language of a regulatory provision is clear, the provision must be enforced as written unless the regulator clearly intended a different meaning, or unless interpreting the language as it is written would lead to absurd results. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Island Creek Coal Co.*, 20 FMSHRC 14, 18 (Jan. 1998). If, however, the standard is "silent or ambiguous with respect to the specific point at issue," the court must defer to the agency's interpretation of its own regulation "as long as it is reasonable." *Small Mine*

Devel., 37 FMSHRC 1892, 1894 (Sept. 2015) (quoting *Tenet HealthSystems Healthcorp. v. Thompson*, 254 F.3d 238, 248 (D.C. Cir. 2001)); *see also Auer v. Robins*, 519 U.S. 452, 461 (1997) (holding that an agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation").

When an agency's interpretation is the basis for imposition of a civil penalty, "a separate inquiry may arise concerning whether the respondent has received 'fair notice' of the interpretation it was fined for violating. '[D]ue process ... prevents ... deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.'" *Island Creek*, 20 FMSRHC at 24 (quoting *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir 1986)). In evaluating whether a standard provides fair notice to an operator, the Commission applies the "reasonably prudent person" test: application of a standard to a set of facts is consistent with fair notice if "a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990).

In applying the reasonably prudent person standard, the Commission has taken into account a wide variety of factors, including the text of the regulation, its placement in the overall regulatory scheme, explicit definitions in the regulations or the Act, the regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community of its interpretation. *See Hecla Ltd.*, 30 FMSHRC __, No. WEST 2012-760-M (Aug. 30, 2016); *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1682 (Dec. 2010); *Island Creek*, 20 FMSHRC at 24-25; *Morton Int'l, Inc.*, 18 FMSHRC 533, 539 (Apr. 1996); *Ideal Cement Co.*, 12 FMSHRC at 2416. Also relevant is the testimony of the inspector and the operator's employees as to whether they believed the cited condition to be a violation. *Island Creek*, 20 FMSHRC at 24-25. Finally, the Commission has looked to evidence of accepted safety practices in the industry. *See BHP Minerals Int'l Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996); *Ideal Cement*, 12 FMSHRC at 2416.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The seven citations discussed below remain in dispute and I make the following findings with regard to each.

A. Citation No. 8923674

In the course of his inspection, Inspector Righi observed an elevated highwall roadway leading to an active drilling area. The roadway had a drop-off of approximately 50 feet. It was unbermed for about 200 feet on one side, but orange barrels had been placed at the entrance to the roadway. The barrels were labeled with a warning that the area was unbermed, but the warning was in relatively small type and could not be seen without getting close to the barrels. *See* Exs. R-H, P-2. Although Eric Kechejian, Tilcon's safety director, stated that the barrel cones were heavy, it was possible to move them. Kechejian explained that the mine had been using the barrels in place of berms for many years and that past inspectors had approved.

Righi testified that the roadway became an active drilling area farther down the road. The portion near the barrels was used by drilling, blasting, and maintenance vehicles, but was not heavily traveled. Righi understood that blasting and drilling at the mine were performed by a contractor and were done regularly but not every day. The mine's plant manager, George Lindbloom, testified that the area was being actively mined at the time of the inspection and that berms had been removed where drilling and blasting were going to take place. Righi did not agree that the cited portion of the road was an active mining area.

Righi was concerned that the barrel cones could be easily moved and did not effectively impede entry. He cited the mine for a violation of 30 C.F.R. § 56.9300(d). The Secretary requires that berms or guardrails be provided "on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." 30 C.F.R. § 56.9300(a). However, if the roadway is "infrequently traveled and used only by service or maintenance vehicles," the mine may instead comply with the standard by providing all of the following alternative safety measures: 1) locked gates at the entrance points of the roadway; 2) signs warning that the roadway is unbermed; 3) delineators along the perimeter of the roadway to indicate the edges and attitude of the roadway; 4) a maximum speed limit posted on the roadway; 5) road surface traction that is not impaired by weather conditions, or corrective measures to improve traction in the event of bad weather conditions. 30 C.F.R. § 56.9300(d). The inspector cited the mine under this alternative subsection.

Tilcon disputes that the roadway was "infrequently travelled," arguing that it was an active mining area. However, Tilcon acknowledges in its post-hearing brief that the area was a "roadway." Resp. Br. at 8. It is clear from the testimony that the area had a drop-off of 50 feet. Thus, regardless of whether the exceptions in § 56.9300(d) were applicable, the area was subject to § 56.9300(a), the general provision requiring berms. Tilcon does not claim to have installed berms. Nor does it claim to have installed locked gates and delineators along the perimeter of the roadway to satisfy the exception in § 56.9300(d). Accordingly, I find that a violation occurred.

Tilcon argues that it was not provided with fair notice of the inspector's interpretation, but I reject this argument. I do not credit the safety director's testimony that the exact configuration had been observed by other inspectors without a citation issued. While inspectors may have been in the area on previous inspections, there is no credible evidence to show that the exact conditions existed and were not cited. Additionally, a reasonable miner would recognize that the barrels that were in place would not keep a miner from driving along the cited area that was not bermed.

The Secretary alleges that the violation was the result of low negligence, that it was unlikely to result in injury, that if injury did occur it would be fatal, and that the violation was not S&S. I agree that the negligence was low, since there was some genuine disagreement about the nature of the road. The testimony and the record support a finding that the violation was much more serious than the inspector indicated and should have been marked as significant and substantial. There is no question that persons travelled near the entrance to this road. They would not have been kept out or warned by the cones with the warning in small lettering. The drillers and blasters who used the area could easily over-travel on the road and drop down a 50-

foot drop-off. For that reason, I find that injury was reasonably likely to occur and the gravity was greater than the citation indicates. I assess a penalty of $1,000.00.

B. Citation No. 8923675

Righi observed loose material extending the length of the 140 bench highwall. There was loose gravel as well as a large boulder at one point on the wall. He did not observe falling material, but observed a residual pile along the base of the wall. Righi also testified that the mine's blasting method involved drilling past what would become the next bench, and that the top edge of the wall was therefore likely fractured. He did not believe the mine had scaled recently, and a miner told him the company did not like to scale.

Lindbloom testified that the material on the highwall was compacted rather than loose and unconsolidated. The highwall is inspected daily, and Lindbloom explained that the miners who work in the area are familiar with the geology, know how to identify unsafe conditions, and are empowered to address them. The wall was scaled to terminate the citation, and miners told Lindbloom they believed the wall was less safe after it was scaled because the rock had been loosened. Lindbloom stated that the boulder was a remnant of an earlier road, was set back about a foot, was angled away from the edge, and was not in danger of falling over the highwall.

Righi observed three miners working in the area around the highwall, hauling material from a muck pile with a loader and haul trucks. The boulder was directly above them. Righi stated that loading out the muck pile involved driving along the base of the highwall. Lindbloom disagreed, saying that the loader operator would actually be at least 30 feet from the bottom of the highwall. He stated that the muck pile was at the base of the highwall and extended six to ten feet, and the loader operator would be loading out of the pile with the scoop end of the loader facing the wall. He stated that the muck pile is against the wall and is intended to keep miners from getting too close to the wall. However, Righi observed a tire track close to the wall. There were no warnings or barricades to keep workers from walking next to the face.

Righi issued Citation No. 8923675 for a violation of 30 C.F.R. § 56.3200, which requires that "Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area." The Commission has explained that the plain language of § 56.3200, when read in conjunction with §§ 56.3130 and 56.3131, requires operators to "maintain highwall stability and correct hazardous conditions before work or travel takes place." *Connolly-Pacific Co.*, 36 FMSHRC 1549, 1553 (June 2014). The preamble to § 56.3200 states that it is a "performance-oriented" standard with "broad application" that applies "wherever such a hazard is present." 51 Fed. Reg. 36,192 (Oct. 8, 1986). In applying broadly worded standards, the Commission uses the reasonably prudent person standard, asking "whether a reasonably prudent person would have ascertained the specific prohibition of the standard and concluded that a hazard existed." *U.S. Steel Mining Co., LLC*, 27 FMSHRC 435, 439 (May 2005).

I credit the testimony and reasoning of Righi and find that the rocks and loose material at the top of the highwall presented a hazard to those working below. An experienced MSHA inspector's opinion that a hazard exists is entitled to substantial weight. *Buck Creek Coal Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Harland Cumberland Coal Co.*, 20 FMSHRC 1275,

1278-79 (Dec. 1998). Tilcon offered little evidence of the general condition of the highwall and its methods for controlling it, and I find no reason to doubt the inspector's descriptions. Righi explained that he observed loose material and both large and small rocks. Any freezing of the ground, blasting in the area, or removal of material could easily cause the rocks to fall. A reasonably prudent person would have understood that scaling and berms were necessary. I also credit the inspector's finding that miners were working at the base of the highwall and were exposed to a fall hazard. Even a small rock falling from that height could crash through the windshield of a piece of equipment and injure a miner.

I find further that the violation was significant and substantial. Applying the *Mathies* criteria, there was a violation of a mandatory standard which created the hazard of rock and loose material falling from a height above and hitting someone working below. The hazard was likely to occur because the mine's drilling methods had destabilized the highwall, making a fall likely, and three miners were working at the base. Falling rock or loose material that hit a truck or loader would be likely to crush the top or crash through the windshield, causing death or serious injury. In view of the evidence that the miners had not scaled recently or installed berms, I also accept the designation of moderate negligence. I assess a penalty of $807.00 as proposed.

C. Citation No. 8923680

Inspector Righi issued a number of guarding violations during the inspection. Citation No. 8923680 relates to an area guard for a large cone crusher. The guard is a fence and gate enclosing the crusher, and is intended to protect miners from contact with the V-belts and drive pulleys that operate the cone crusher. Additional guards for the belts and pulleys are not provided inside the fence, so a miner entering through the gate could come in contact with the moving parts. Righi observed that the gate was secured with a nut and bolt and labeled with a "Do Not Enter" sign. However, the nut and bolt were loose and came apart when he touched the gate. Righi believed that the nut and bolt did not adequately secure the area and that a padlock should have been used instead. He explained that the gate was easily defeated and someone could easily enter the area and access the moving parts. However, he did not believe that the condition was likely to cause injury due to the presence of the gate and the "Do Not Enter" sign.

Lindbloom testified that the mine has a policy prohibiting miners from entering areas to work on moving components unless they have been locked out and tagged out. He stated that miners would not enter the area to inspect it, because they conduct inspections from outside the fenced area. He also stated that the mine had been using the guard in this form for 11 or 12 years. Kechejian said that the mine has not been cited for using the nut and bolt in the past.

Righi cited the mine for a violation of § 56.14112(b), which provides that "Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard." 30 C.F.R. § 56.14112(b). He designated the citation as resulting from low negligence and being unlikely to cause injury, noting that the mine had made attempts to secure the area and that miners were unlikely to enter it.

Tilcon argues that the guarding standards are intended to address inadvertent contact with machine parts, but that in this case, a miner would only contact the parts if he intentionally entered the gated area. However, Righi testified that when he touched the gate, the nut and bolt came apart. The photographs also show that the gate was located at the bottom of a short stairway, so someone could fall into the gate. *See* Exs. P-5, R-B. Righi stated that the moving machine parts were right inside the gate, where someone could contact them.

I find that the gate as observed by Righi was not secure, and therefore a violation has been shown. Tilcon argues that it did not have fair notice of the requirement because past inspectors had permitted the gate in this condition. However, I find that the Secretary's interpretation of the regulation was clear in this instance. A gate that opens when touched is clearly not "securely in place" as required by the plain language of the standard. "[W]hen the meaning of a standard is clear based on its plain language, it follows that the standard provided the operator with adequate notice of its requirements." *Austin Powder Co.*, 29 FMSHRC 909, 919 (Nov. 2007) (internal quotations omitted) (quoting *LaFarge Constr. Materials*, 20 FMSHRC 1140, 1144 (Oct. 1998)). An inconsistent enforcement pattern by the Secretary does not change that result. *Id.* at 920.

While I believe this violation was more serious than the inspector indicated, I defer to his assessment that the violation was unlikely to cause injury and was the result of low negligence. Therefore, I assess a $100.00 penalty as proposed by the Secretary.

D. Citation No. 8923683

Citation No. 8923683 also alleges a violation of § 56.14112(b). A guard was provided around the drive pulley for the motor on the Diester scalping screen, which is used to size and sort rock. Righi observed that the guard, a piece of expanded metal, had been pushed up in one location, exposing the belt and pulley. Photographs introduced by the Secretary show the small gap in the guard. Ex. P-6. The exposed area was small, but large enough for someone to fit a hand through. It was located on the top and side of the motor and so not easily accessible. The area would be accessed via a metal walkway to the side of the motor. While Lindbloom pointed out that the general area was roped off with a sign saying "Danger Falling Rocks," the area could be accessed for clean-up, maintenance, or to inspect nearby fire extinguishers.

The witnesses differed on the potential for a person to contact the moving parts. Lindbloom stated that it would be impossible for someone to contact the pulley because the gap in the guard was narrow, it was four to five feet off the ground, and the walkway was two to three feet away from the machine. Righi agreed that he came within two feet of the spot. But he believed it would be possible for someone to trip on a stone on the walkway and put his hand into the gap to catch himself. I credit the testimony of the inspector on this point. The mine also argues that its lock-out/tag-out policy would prevent any person from contacting moving machine parts. Resp. Br. at 5. However, the purpose of guarding standards is to prevent inadvertent contact. *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). Such contact is not fully addressed by a lock-out/tag-out policy.

The photographs show a small unguarded area on the scalping screen. While the spot is not easily accessed, it can be done. Given the falling material around the screen and the need to

access the equipment periodically, the unguarded area presented a hazard. Lindbloom and Kechejian stated that the guard had been in the position observed by Righi for seven or eight years and had never been cited. However, the inspector's photographs show that the guard was at an angle and appears to be out of place. I find therefore that the guard was not "securely in place," and that a violation existed. I reject the fair notice defense raised by the mine based on past inspections that were not substantiated. Since the gap was on top of the motor where it was unlikely to be reached, I agree with the inspector that the violation was unlikely to cause injury. The inspector designated the citation as resulting from moderate negligence because it was open and obvious, and I agree. I assess a $100.00 penalty as proposed by the Secretary.

E. Citation No. 8923686

Citation No. 8923686 involves a head pulley guard on a V-belt, a conveyor used to move stone. Righi observed that a section was missing on the lower part of guard, and no guard was provided on the back side of the pulley drive. Exhibit P-9 includes photographs showing the gaps where there are missing guards. Righi believed that the guards were not adequate to protect miners from coming into contact with moving parts. He believed miners would be in the area to grease and maintain the equipment.

Tilcon's witnesses showed that the pulley was difficult to access: a miner would have to walk across 500 feet of catwalk, pass through a chain, go down a ladder and up another ladder, and go through a waist-high gate secured with a nut and bolt. Lindbloom and Kechejian testified that greasing on the machinery was done remotely and inspections were done from below, so the only reason a miner would be in the area would be for maintenance on the belt, in which case the equipment would be locked out. Righi argued that miners would also need to enter the area for monthly fire extinguisher checks and periodic housekeeping.

Righi cited the mine for a violation of 30 C.F.R. § 56.14107(a), which requires that "Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." Because only a small portion of the pulley was not guarded, Righi determined that the violation was not S&S.

The inspector's testimony and photos indicate that there were moving machine parts that were not completely guarded. However, the Commission has held that for a guarding standard to be applicable there must be a "reasonable possibility of contact and injury." *Thompson Bros.*, 6 FMSHRC at 2097. In assessing whether there is a reasonable possibility of contact, judges are instructed to consider "all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and ... the vagaries of human conduct." *Id.* Here, I credit the statements of Tilcon's witnesses that most maintenance of the belt was done remotely and that it was extremely difficult to access the area. Anyone going into that remote area would de-energize the equipment prior to moving near the small unguarded spot. Accordingly, I find there was no reasonable possibility of a person contacting moving machine parts, and additional guarding was not required. Therefore, this citation is vacated.

F. Citation No. 8923690

Citation No. 8923690 alleges another violation of § 56.14107(a) for inadequate guarding. Righi observed that a section next to the electrical motor on the no.6 crusher was not guarded, exposing the V-belts and pulley. The unguarded section was approximately 2.5 by 12 inches. The area was about four or five feet above the walking area, leading the inspector to believe that someone could slip and fall and contact the moving parts. Lindbloom stated that a second angled guard by the motor would prevent anyone from touching the unguarded spot, and that a person could not contact the motor without intentionally reaching through the guard. The mine produced photographs showing the second angled guard. Ex. R-G. However, Righi stated that the second guard did not prevent him from walking right up to the problem area, and that the photograph was misleading. Lindbloom stated that the crusher stands alone and can only be accessed via a separated platform. He stated that the only time a miner would be in the area while the machine was running would be to view the moving parts or to hose off the platform. For other maintenance, the machine would be locked out.

I credit the inspector's observation and findings and find that there is a violation. Because the unguarded area was small, it may have escaped miners' attention. I therefore find that negligence was low. The violation was unlikely to cause injury due to the size and location of the gap. I assess a $100.00 penalty as proposed by the Secretary.

G. Citation No. 8923694

Citation No. 8923694 concerns a bent step near the left rear engine compartment of a loader. The parties agree that the machine operator had other means of accessing the cab, and the step was not intended for that use. However, Righi believed that a fueler and oiler would use the step daily when servicing the machine. A person using the step could slip and fall since it was not a flat surface. Lindbloom testified that the maintenance crew typically does not use the step anyway because it is too high. Instead, they back the fuel truck directly up to the machine or use a ladder they carry with them. The condition had been reported in a pre-shift examination several months earlier, but the maintenance department determined that the step was safe and did not repair it.

Righi issued Citation No. 8923694 for a violation of 30 C.F.R. § 56.11001, which requires that "Safe means of access shall be provided and maintained to all working places." He designated the citation as S&S and resulting from high negligence.

I find that the engine of the loader was a "working place," for purposes of fueling, oiling, and general maintenance. The step was a means of accessing the engine, and the standard thus required that it be maintained in a safe condition. Exhibit P-14 clearly shows that the step is bent. I agree with Righi that this created a hazard. In the event that a miner was not looking and stepped up onto the slanted step, he would be likely to fall backwards and be injured. I therefore find that a violation has been shown. I find that a reasonable person familiar with the mining industry would have understood that the bent step was not properly "maintained" as required by the standard, and so reject Tilcon's fair notice argument. Resp. Br. at 10-11; *see Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990).

Applying the *Mathies* S&S criteria to this citation, I find that the Secretary has proven a violation of a mandatory standard. The hazard created by the violation is that someone using the step could fall backward onto the ground. I find that this hazard was likely to occur. While Tilcon claims that the maintenance crew used a ladder rather than the step, someone could easily forget and use the step. It had not been removed or flagged in any way. Such a person could easily fall when they stepped on the slanted surface, expecting a flat one. If the hazard occurred, a person falling backward onto the ground from a height of three feet would likely be injured. An injury of broken bones or back or neck injury would be likely, which are reasonably serious in nature. Therefore, I find the violation is S&S.

Given that the condition had been reported to the mine operator but it chose not to repair the step, the negligence is high. I assess the penalty of $1,203.00 as proposed by the Secretary.

III. PENALTIES

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that in assessing civil monetary penalties, the judge must consider six statutory penalty criteria: the operator's history of violations, its size, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations has been admitted into evidence and shows nothing unusual in the history, particularly as it relates to the guards.[1] It shows eight violations in the 15-month period prior to the inspection, including one guarding violation and several equipment violations. The parties agree that the citations were abated in good faith and the mine has raised no defense of ability to pay. The negligence and the gravity have been discussed above with respect to each citation.

IV. PARTIAL SETTLEMENT

The Secretary has filed several motions to approve partial settlement, in which he represents that the parties have agreed to settle nine of the sixteen citations in these dockets.

[1] The history of violations submitted by the parties omitted a portion of the fifteen month period. Ex. P-17. The court takes judicial notice of the mine's history of violations as indicated on the MSHA website.

The Secretary has set forth the factual basis for the proposed modifications. The Respondent has agreed to the proposed changes. The originally assessed amount for the eight settled citations was $1,248.00 and the proposed settlement amount is $1,148.00. The proposed settlement includes:

Citation No.	Originally Proposed Assessment	Settlement Amount	Modification
Docket No. YORK 2016-66			
8923678	$100.00	$100.00	None.
8923681	$243.00	$243.00	Remove S&S designation.
8923684	$100.00	$100.00	Modify negligence from moderate to low.
8923685	$100.00	$100.00	Modify negligence from moderate to low.
8923688	$100.00	$100.00	None.
8923689	$243.00	$243.00	None.
TOTAL	**$886.00**	**$886.00**	
Docket No. YORK 2016-72-M			
8923691	$162.00	$162.00	None.
8923692	$100.00	$100.00	Modify negligence from high to low.
8923693	$100.00	---	Vacate.
TOTAL	**$362.00**	**$262.00**	

I accept the representations and modifications of the Secretary as set forth in the motions to approve settlement. I have considered the representations and documentation submitted, find that the modifications are reasonable, and conclude that the proposed settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The citations listed above as settled are approved. The following chart sets forth the penalty amounts for each of the seven citations that are subject to this decision.

Citation No.	Originally Proposed Assessment	Decision Amount	Modification
Docket No. YORK 2016-66			
8923674	$100.00	$1,000.00	Modify likelihood of injury from unlikely to reasonably likely.
8923675	$807.00	$807.00	None
8923680	$100.00	$100.00	None.
8923683	$100.00	$100.00	None.
8923686	$100.00	---	Vacate.
TOTAL	**$1,207.00**	**$2,007.00**	

Docket No. YORK 2016-72-M			
8923690	$100.00	$100.00	Modify negligence from moderate to low.
8923694	$1,203.00	$1,203.00	
TOTAL	**$1,303.00**	**$1,303.00**	

GRAND TOTAL	**$3,758.00**	**$4,458.00**	

V. ORDER

The Secretary's motions to approve partial settlement are **GRANTED**. The Respondent is ordered to pay an additional $3,310.00 total penalty as detailed in the findings above for the seven contested citations. Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $4,458.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

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