THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue NW, Suite 520N
Washington, D.C. 20004

OCT 07 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2015-1-M AC No. 14-01578-361486 Docket No. CENT 2015-157-M AC No. 14-01578-369439
v.	Docket No. CENT 2015-220-M AC No. 14-01578-371826
APAC-KANSAS, INC., Respondent	Mine: Bonner Springs Quarry

DECISION

Appearances: Daniel McIntyre, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

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

Before: Judge Bulluck

These cases are before me upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") on behalf of the Mine Safety and Health Administration ("MSHA") against APAC-Kansas, Incorporated, ("APAC"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815(d). The Secretary seeks a total penalty of $9,666.00 for 32 alleged violations of his mandatory safety standards.[1]

A hearing was held in Liberty, Missouri. The following issues are before me: (1) whether APAC violated the cited standards; (2) whether the violations were significant and substantial, where alleged; (3) whether the violations were attributable to the level of negligence alleged; and (4) the appropriate penalty. The parties' Post-hearing Briefs are of record.

[1] The parties reached a settlement on 27 of the 32 contested citations/orders. The total civil penalty proposed for the remaining four citations and order adjudicated in this proceeding is $3,070.00.

For the reasons set forth below, I **AFFIRM** four citations and one order, as issued, and assess penalties against Respondent.

I. FACTUAL BACKGROUND

APAC owns and operates the Bonner Springs quarry, a surface limestone mine in Wyandotte County, Kansas. The mine is staffed by approximately nine miners, working one shift per day. Tr. 190, 219. Bryan Lane, operations manager, and Keith Stoker, plant superintendent, were working at the mine during the 2014 inspection at issue. Tr. 162, 197.

APAC's mining process involves drilling and blasting its limestone highwall to form benches. Tr. 28-29. Crushed limestone accumulated at the base of the 42-foot highwall is removed and stockpiled by a front-end loader, then loaded onto haul trucks to be processed into saleable product. Tr. 27-30, 46-47. Between the mine floor and the top of the highwall, a safety or catch bench, approximately 21 feet above ground, prevents material in the upper highwall from falling onto the work area at the toe. Tr. 29-30.

On July 21, 2014, local media reported that an accident had occurred on an APAC mine site. Tr. 162. APAC investigated, and concluded that the accident had actually occurred on an adjacent property outside its control. Tr. 162. APAC management then called MSHA's Topeka field office to explain the inaccurate media report. Tr. 163. Later that night, MSHA supervisory Inspector Sidney Garay called APAC's division president, David Guillaume, to inquire about the incident. Tr. 163.

The following day, MSHA inspectors Garay, Christopher Ewing, and Dustin Crelly began an E01 regular inspection of the Bonner Springs mine that lasted for several weeks, and resulted in numerous citations.[2] Tr. 24-25, 98, 164. Among other violations, Garay cited APAC for failing to maintain two areas of the highwall (Exs. P-2, P-3); failing to guard moving parts on mobile equipment (Ex. P-5); failing to provide site-specific hazard training (Ex. P-4); and failing to conduct adequate workplace examinations (Ex. P-6).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8760649

Inspector Garay issued 104(a) Citation No. 8760649 on July 22, 2014, alleging a "significant and substantial" violation of section 56.3131 that was "reasonably likely" to result in

[2] APAC characterizes the inspection as retaliatory and a clear abuse of discretion. Tr. 164, 201; Resp't Br. at 2-3, 14. Even if the inaccurate media report sparked the inspection, no citations were issued related to the incident, and there is no record evidence, whatsoever, supporting this contention.

an injury that could reasonably be expected to be "fatal," and was caused by APAC's "moderate" negligence.[3] The "Condition or Practice" is described as follows:

> Operator failed to maintain loose and unconsolidated material on the working face located in the pit at the Argentine ledge high wall. Several rocks measuring approximately 8 inches to 24 inches in diameter, which are located approximately 42 feet from the ground level. The operator of the 992G CO#950 is working in the area on a regular basis. This condition exposes miners to a catastrophic collapse of the high wall, exposing miners to a fall of materials, blunt force, and fatal injuries hazard.

Ex. P-2. The citation was terminated on August 5 after APAC installed a berm at the toe of the highwall approximately 20 to 25 feet from the working face.

1. Fact of Violation

In order to establish a violation of one of his mandatory safety standards, the Secretary must prove that the violation occurred "by a preponderance of the credible evidence." *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

The Secretary contends that APAC's miners were working directly under loose, unconsolidated material, and that the operator employed no safety measures between the bench and the pit floor where they were working. Sec'y Br. at 6-8. APAC argues that the highwall was not in danger of a catastrophic collapse, and that the front-end loader operator was at least 50 feet away from the highwall - - a distance beyond which a falling rock would have traveled. Resp't Br. at 17-19.

Supervisory Inspector Sidney Garay came to MSHA in 2002, having worked in the mining industry for 21 years, with experience in evaluating highwall safety in a surface mine, and familiarity with MSHA training requirements. Tr. 17-20. He testified that section 56.3131 requires the operator to maintain loose and unconsolidated material in the working face of the highwall, between the bench and the floor, by scaling loose rock, or installing a berm at the mine floor to prevent access to the area where rock may fall. Tr. 57-59. He stated that the highwall displayed significant cracking, that a horseshoe-shaped feature in the bench evidenced a previous rock fall above the work area, that loose material that could fall at any time was located above and below the bench, that 8- to 24-inch diameter loose and unconsolidated material had accumulated on the bench, and that one section of the bench above the work area had been

---

[3] 30 C.F.R. § 56.3131 provides that "[i]n places where persons work or travel in performing their assigned tasks, loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard to persons shall be corrected."

blasted away. Tr. 32, 46, 57, 64, 66-67, 138-39; Ex. P-2 at 8, 10-11. He testified that no safety features protecting miners from a fall-of-material hazard were employed between the bench and the pit floor. Tr. 43; Ex. P-2 at 7. Garay also stated that while driving toward the highwall, he observed a front-end loader operating perpendicular and parallel to the highwall from an estimated distance of 12 to 24 feet, loading stone from the muck pile onto haul trucks. Tr. 25, 32-33, 142-45; Ex. P-2 at 8. He opined that the front-end loader operator was exposed to a fall-of-material hazard and potentially fatal injuries because the cab of the loader offered little protection from falling rocks, which generally fall in masses, and that the muck pile, itself, could not constitute a berm. Tr. 65-66, 147; Ex. P-2 at 7.

Plant supervisor Keith Stoker had 29 years of mining experience, and had been working at APAC for four years. Tr. 197-98. Testifying for APAC, he stated that he accompanied Garay and Ewing into the pit, and that the geology of the highwall is loose and unconsolidated, leading to "pieces and parts" that "move and shift," but that a catastrophic collapse of the entire highwall is highly unlikely. Tr. 203-04, 215. Stoker identified a photograph as depicting a muck pile at the foot of the highwall comprised of shot material, and he marked the exhibit to indicate the fall pattern of the rock that Ewing had identified to him as loose and unconsolidated during the inspection. Ex. R-12; Tr. 203-04, 223. Stoker also stated that a front-end loader working the muck pile would leave tracks in the direction in which it is traveling, and that it operates perpendicular to the highwall. Tr. 224. According to Stoker, when the front-end loader's bucket is touching the highwall, the operator's seat is elevated 13.5 feet above ground and its centerline is exactly 28 feet from the highwall. Tr. 207. In his opinion, therefore, the front-end loader operator was not exposed to any fall-of-material hazard because of the "size of the machine, the height of the bench, and loading techniques being perpendicular." Tr. 206.

It is uncontested that the highwall was comprised of loose and unconsolidated material 8 to 24 inches in diameter, above, below, and accumulated on the bench, that one section of the bench above the work area had been blasted away, and that a front-end loader was loading haul trucks with material from the muck pile at its toe when the inspection team arrived at the site. Since a portion of the bench had been blasted away, it no longer provided a layer of protection for the front-end loader operator. Based on the photograph showing tracks both perpendicular and parallel to the working face (Ex. P-2 at 8), corroborating Garay's observation, I find that the front-end loader was operating in both directions, and because APAC failed to challenge Garay's estimation, 12 to 24 feet from the highwall. Furthermore, APAC's reliance on *Lakeview Rock Products, Inc.*, 32 FMSHRC 305 (Mar. 2010) (ALJ), is misplaced. In that case, there was insufficient evidence that rocks in the highwall were loose and, even if they were, it was highly unlikely that they would have traveled 80 feet to where the front-end loader was operating. *Id.* at 308-09. Here, the loader was operating significantly closer to the unscaled highwall than in the circumstances under which *Lakeview* was decided. As a result, I find that the front-end loader operator was exposed to a fall-of-material hazard, especially because the bench above the working face had been compromised, no berm had been constructed, and the front-end loader's cab only provided limited protection. Accordingly, the Secretary has established a violation of section 56.3131.

2. Significant and Substantial

In *Mathies Coal Company*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is "significant and substantial" ("S&S") under *Nat'l Gypsum*, 3 FMSHRC 822 (Apr. 1981): 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); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'd* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The Commission has recently explained that the second *Mathies* criterion requires the judge to determine "whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC ___, slip op. at 6, No. WEVA 2011-283 (Aug. 29, 2016). When evaluating the third *Mathies* criterion, the judge is to assume that the hazard identified in step two has been realized, and then consider whether the hazard would be reasonably likely to result in injury in the context of "continued normal mining operations." *Id.* at 13 (citing *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 161-62 (4th Cir. 2016); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal*, 52 F.3d 133 at 135; *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Resolution of whether a violation is S&S must be based "on the particular facts surrounding that violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987). The Secretary need not prove a reasonable likelihood that the violation, itself, will cause injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010).

The fact of violation has been established and, respecting the second *Mathies* criterion, the hazard against which section 56.3131 is directed is a fall-of-material. A rock fall was reasonably likely given the unconsolidated composition of the highwall, evidence of a previous rock fall, loose 8- to 24-inch diameter material above, below, and accumulated on the bench, the compromised section of the bench above the work area, and the operation of the loader as close as 12 to 24 feet from the highwall. The third *Mathies* criterion has been met, in that falling rock striking the loader's cab with only limited protection to the operator, was reasonably likely to result in an injury; and there is a reasonable likelihood that the operator would suffer serious musculoskeletal to fatal injuries, satisfying the fourth *Mathies* criterion. Therefore, I find that the violation was S&S.

3. Negligence

The Secretary argues that APAC's negligence was moderate, and that the conditions were obvious and subject to regular workplace examinations. Sec'y Br. at 13. In consideration of the obviousness and extensiveness of this violation, and APAC's failure to remediate its removal of the bench above the work area by employing safety measures such as scaling loose material or

sloping the highwall to the angle of repose, I find that APAC was moderately negligent in violating section 56.3131.

B. Citation No. 8760656

Inspector Garay issued 104(a) Citation No. 8760656 on July 22, 2014, alleging a "significant and substantial" violation of section 56.3130 that was "reasonably likely" to result in an injury that could reasonably be expected to be "fatal," and was caused by APAC's "moderate" negligence.[4] The "Condition or Practice" is described as follows:

> Mining methods were not being used to maintain the wall, bank, and slope stability above the Argentine mine area. The north side high wall, at the 2nd bench area, has loose and unconsolidated material that is not sloped to angle of repose or stripped back for at least 10-feet. The exposed area is approximately 40 to 60 feet in length and approximately 15 to 20 feet high from the Argentine bench level. Miners were working below the high wall exposing them to a catastrophic failure, collapse of the high wall, engulfment, blunt force, fatal injury hazard.

Ex. P-3. The citation was terminated on July 23 when the highwall above the bench was scaled.

1. Fact of Violation

The Secretary contends that APAC did not employ any mining methods to maintain the wall, bank, and slope stability of the highwall above the bench where it had been mining. Sec'y Br. at 8-9. On the other hand, APAC argues that the highwall was not in danger of a catastrophic collapse, that no miner was working on the bench level and, again, relying upon *Lakeview*, 32 FMSHRC at 305, that its front-end loader operator was too far from the highwall to be exposed to any fall-of-material hazard. Resp't Br. at 18-20.

Inspector Christopher Ewing joined MSHA in February of 2013 with 18 years of mining experience, and he was a trainee under Garay's supervision at the time of the inspection. Tr. 24, 225-28. Ewing was shown a photograph which he described as depicting the working area on the bench as it existed on the day of the inspection. Ex. P-3 at 4; Tr. 232. He testified that under loose, unconsolidated rock on the highwall edge, he observed tire tracks and windrows on the bench which, he concluded, were caused by a small front-end loader sweeping the bench in preparation for a round of drilling and blasting.[5] Tr. 229, 232-35; Ex. P-2 at 4. Ewing stated that

---

[4] 30 C.F.R. § 56.3130 provides that "[m]ining methods shall be used that maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks. When benching is necessary, the width and height shall be based on the type of equipment used for cleaning of benches or for scaling of walls, banks, and slopes."

[5] A windrow is "[a] ridge of soil pushed up by a grader or bulldozer." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 628 (2d ed. 1997) ("*DMMRT*").

the bench had not been barricaded to prevent access, that he saw a drill on the bench that was poised to drill the shot "as soon as they got somebody to it," that he did not see a front-end loader or miner on the bench, and that he took a photograph of the drill (not in evidence). Tr. 229-31, 242-43; Ex. R-14. Inspector Garay testified similarly, that there was a drill on the bench, but he believed that a miner was there also, although he testified that he did not take a photograph or make note of either. Tr. 154, 157; Ex. P-3 at 3. Garay and Ewing both testified that loose and unconsolidated material was at risk of falling onto the bench. Tr. 64, 154-56, 233; Ex. P-3 at 4.

Stoker testified that the front-end-loader operator was the only miner in the pit at the time of the inspection, that no one was working on the bench, and that no one was exposed to any fall-of-material hazard. Tr. 210, 212-13. As has already been noted, Stoker opined that a catastrophic collapse of the highwall is highly unlikely, although some rock fragments might shift. Tr. 215.

It is uncontested that the bench had not been barricaded against entry, that a drill was positioned on it, that there was no front-end loader on it at the time of the inspection, and that loose, unconsolidated material was at risk of falling onto it. The credible evidence also establishes that no miner was on the bench at the time of the inspection. Nevertheless, I find that the bench was a work area based on the uncontroverted evidence of track marks and windrows indicating that a front-end loader had been operating there and that, based on the presence of the drill and APAC's mining methods, drilling and blasting were soon to follow. Again, *Lakeview* is not persuasive because, in this case, the bench work area was directly under loose, unconsolidated rock. Therefore, I find that APAC failed to maintain the stability of the highwall above the working area on the bench by scaling the unconsolidated material, and that the Secretary has established a violation of section 56.3130.

2. Significant and Substantial

Relying on *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986) (determining that the focus of the S&S reasonable likelihood of injury criterion is the "pendency of the violative condition prior to the citation" and "continued normal mining operations"), the Secretary contends that it is immaterial to the S&S analysis whether a miner was, in fact, present on the bench at the time of the inspection. Sec'y Br. at 12. APAC argues, on the contrary, that since no miners were working on the bench, the violation posed no hazard. Resp't Br. at 19-20.

The fact of violation has been established and, having found that no miner was on the bench, the focus is on the mining activities that preceded and were to follow on the heels of the inspection. Respecting the second *Mathies* criterion, the hazard against which section 56.3130 is directed is a fall-of-material. A rock fall from above the bench was reasonably likely to occur because the upper highwall above the working face had not been scaled of loose, unconsolidated material, and the area had been prepared for impending drilling and blasting. The third *Mathies* criterion has been met, in that falling rock striking an unprotected miner was reasonably likely to result in an injury; and there is a reasonable likelihood that the miner would suffer serious

musculoskeletal to fatal injuries, satisfying the fourth *Mathies* criterion. Therefore, I find that the violation was S&S.

3. Negligence

Garay opined that APAC's negligence was moderate because although the unstable highwall was obvious, he found no indication that APAC willfully exposed miners to the hazard. Tr. 60, 67. I find that APAC should have barricaded the affected bench area against entry or scaled down the loose, unconsolidated rock. Accordingly, I conclude that APAC was moderately negligence in violating the standard.

C. Citation No. 8760651

Inspector Garay issued 104(a) Citation No. 8760651 on July 22, 2014, alleging a "significant and substantial" violation of section 56.14107(a) that was "reasonably likely" to result in an injury that could reasonably be expected to be "permanently disabling," and was caused by APAC's "moderate" negligence.[6] The "Condition or Practice" is described as follows:

> The Caterpillar Haul Truck, Model 777, CO#26.660090, the fan belt and pulley assemblies in the engine compartment directly below the operator cab were not guarded to protect persons from contacting fan blades and pulley assemblies and similar moving parts. This condition exposes persons to permanently disabling, entanglement, crushing injury hazards, in that the equipment operators access the area to perform regular maintenance. The exposed area is approximately 10 inches to 20 inches wide and approximately 4 feet from the ground level.

Ex. P-5. The citation was terminated on July 23 when APAC installed a guard.

1. Fact of Violation

The Secretary argues that a haul truck did not have any guard installed in the engine compartment that would protect miners from inadvertently contacting the fan belt and pulleys located in a 30-inch wide work space that was regularly accessed in order to perform maintenance, examinations, and troubleshooting, that the engine is running while the mechanic is troubleshooting, and that a miner could slip, trip, or fall into the unguarded area. Sec'y Br. at 18-20. APAC argues that the engine compartment was equipped with a factory-installed guard that was in place at the time of the inspection, that the fan belt and pulley assemblies could not be inadvertently contacted, and that the moving parts were too far away from any working miner to pose a hazard. Resp't Br. at 9-11.

---

[6] 30 C.F.R. § 56.14107(a) provides that "[m]oving 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."

Both parties cite *Thompson Bros. Coal Co., Inc.*, 6 FMSHRC 2094 (Sept. 1984), for the test set forth by the Commission in analyzing whether moving parts require guarding. Sec'y Br. at 19; Resp't Br. at 9. In *Thompson*, the Commission recognized that the guarding standard "imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." 6 FMSHRC at 2097. Therefore, all relevant exposure and injury variables must be considered, including "accessibility of the machine parts, work areas, ingress and egress, work duties, and . . . the vagaries of human conduct." *Id.*

Garay testified that the fan belt and pulley assemblies, recessed an estimated 10 to 20 inches inside the haul truck's engine compartment, elevated four feet off the ground, and accessible to miners through a 30-inch gap between the front tire and the truck's body, were not guarded to protect miners against inadvertent contact. Tr. 81-82, 84, 137; Ex. P-5 at 5-7. Referring to his field notes, he stated that while the truck is positioned on uneven ground, miners access the work space daily to lubricate grease points or "Zerks," that mechanics access it to perform visual examinations with the engine running to troubleshoot the fan belt and pulleys, and that the exposed parts move when the engine is running, creating an entanglement hazard. Tr. 86-87, 97, 130, 136; Ex. P-5 at 4-8. He opined that miners could slip, trip, and fall into the unguarded area and that, instinctively, they put their hands out to brace their fall, risking inadvertent contact and entanglement that could result in loss of a limb. Tr. 96, 134, 137. He testified that Caterpillar manufactures a factory-installed guard for the fan belt and pulleys, and that similar haul trucks at the mine were equipped with factory-installed guards. Tr. 90-92. On cross-examination, he was unable to identify whether a photograph of the cited truck depicted a factory-installed guard. Ex. P-5 at 5; Tr. 133-34. Garay also explained that Caterpillar does not install belt and pulley guards on haul trucks intended for use in construction applications, unlike those intended for use in the mining industry; therefore, trucks purchased secondhand by mines may lack appropriate guards. Tr. 90-91.

Bryan Lane, operations manager for APAC since 2010, testifying for APAC, stated that he accompanied Garay during the inspection of the haul truck. Tr. 162, 175. Shown a photograph of the space between the truck body and tire, he opined that it was impossible for miners to inadvertently contact the fan belt and pulleys approximately seven feet off the ground, two to three feet inside the engine compartment, and behind what he identified as a factory-installed pulley guard. Ex. R-1; Tr. 169-71. He acknowledged that equipment operators would perform pre-shift examinations, but denied that a miner would contact moving machine parts. Tr. 172. He testified that the truck was equipped with grease Zerks requiring daily lubrication, which could result in a miner standing in the space between the front tire and body, that the engine would not "normally" be running, and that the miner would be facing away from the engine compartment. Tr. 173-74. He also contended that when maintenance is performed, the truck is shut down. Tr. 172.

The record supports a finding that equipment operators and mechanics routinely access the 30-inch work space between the truck's front tire and body to perform pre-shift examinations, lubrications, and troubleshooting while the engine is running. I also find, based upon the photograph depicting a six-foot tall miner standing in the work space with the engine

compartment opening adjacent to his head (Ex. R-1), that the compartment was somewhat less than six feet above ground and, based on the lack of any concrete measurement and conflicting testimony, that the moving parts were recessed 20 to 36 inches within the compartment. I fully credit Garay's testimony that the cited haul truck's belt and pulleys were not guarded based on a reasonable inference that the truck was acquired by APAC secondhand, and his observation that similar trucks on-site were equipped with factory-installed guards, a contention unchallenged by APAC. APAC's reliance on *Hollow Contracting*, 18 FMSHRC 2044 (Nov. 1996) (ALJ), is misplaced. In that case, the judge vacated a citation alleging a violation of section 56.14107(a) after finding that the unguarded belt was not within seven feet of any walking or working surfaces. *Id.* at 2056. In this case, however, considering all relevant factors, especially the "vagaries of human conduct," I find that it is reasonably possible for a miner of average height, working within the limited work space while the engine is running, to inadvertently contact the moving machine parts, which are entirely reachable although recessed at least 20 inches, through extension of the arms precipitated by a misstep, loss of balance, momentary distraction, or startlement. This finding takes into account the myriad possible human responses to all manner of external stimuli, as well as the protective purpose of the Act. Accordingly, the Secretary has established a violation of section 56.14107(a).

2. Significant and Substantial

The fact of violation has been established and, respecting the second *Mathies* criterion, the hazard against which section 56.14107(a) is directed is contact with moving machine parts. Inadvertent contact with the belt and pulleys was reasonably likely to occur considering that miners frequently performed examinations, lubrications, and troubleshooting on uneven ground, and accessed the space between the truck's tire and the body with the engine running, putting them within the 20- to 36-inch reachable range of the engine's moving parts. The third *Mathies* criterion has been met, in that contact with the moving belt and pulleys was reasonably likely to result in an injury; and there is a reasonable likelihood that the miner would suffer serious disfigurement or loss of a limb, satisfying the fourth *Mathies* criterion. Therefore, I find that the violation was S&S.

3. Negligence

The Secretary argues that APAC's negligence was moderate because the unguarded area was frequently entered and obvious, that APAC had similar equipment on-site that was appropriately guarded, and that Caterpillar manufactures a guard for the haul truck. Sec'y Br. at 21. I find, based on the miners' daily access to the tight work space between the truck's tire and body with the engine running, that the hazard of contacting moving parts within the engine compartment was obvious. Furthermore, based on APAC's use at the mine of similar Caterpillar trucks outfitted with factory-installed guards, I find that APAC knew or should have known that it was required to guard the belt and pulleys so that its miners could perform their tasks safely. Accordingly, I conclude that that APAC was moderately negligent in violating the standard.

D. Order No. 8760689

Inspector Garay issued 104(g)(1) Order No. 8760689 on August 5, 2014, alleging a violation of section 46.11(a) that was "unlikely" to cause an injury that could reasonably be expected to be "permanently disabling," and was caused by APAC's "high" negligence.[7] The "Condition or Practice" is described as follows:

> Twelve Clarkson Construction Company, Over the Road Truck Drivers, Contractor ID# KTL, entering the mine site have not received the required site-specific hazard awareness training, exposing them to mine hazards. The Mine Operator was aware of the training requirements. The mine operator must withdraw the Twelve Clarkson Construction Over the Road Truck Drivers from the mine until they have received the required training. The Federal Mine Safety and Health Act of 1977 states that an untrained miner is a hazard to himself and to others.

Ex. P-4. The citation was terminated when APAC provided MSHA with a photograph of a sign outlining site-specific mining hazards. Tr. 73; Ex. R-6.

1. Fact of Violation

The Secretary points out that the site-specific hazard training requirement may be satisfied by posting warning signs.[8] Sec'y Br. at 15. He makes several contentions in support of establishing the violation: that no signage with the requisite warnings was posted at the tarping area at the time of the inspection; that if it were, the operator would have discussed it with the inspector; that if it were, the operator would not have needed a training video; and that it is irrelevant whether other signs were posted elsewhere on-site because they do not satisfy the standard. Sec'y Br. at 15-17.

APAC argues that from 2010 through the time of the inspection, it had a sign in place at the tarping area that satisfied the site-specific hazard training requirement, and that the Secretary's contention that the sign was installed *after* the inspection to abate the violation is

---

[7] 30 C.F.R. § 46.11(a) provides that mine operators "must provide site-specific hazard awareness training before any person specified under this section is exposed to mine hazards."

30 C.F.R. § 46.11(b) requires mine operators to "provide site-specific hazard awareness training, as appropriate, to any person who is not a miner as defined by § 46.2 of this part but is present at a mine site, including: . . . (4) customers, including over-the-road truck drivers."

[8] 30 C.F.R. § 46.11(e) provides that mine operators "may provide site-specific hazard awareness training through the use of written hazard warnings, oral instruction, signs and posted warnings, walkaround training, or other appropriate means that alert persons to site-specific hazards at the mine."

"mistaken or untruthful." Tr. 125; Resp't Br. at 4-5. The operator also contends that the Secretary has not established that the 12 truck drivers lacked site-specific hazard training because the inspector failed to inquire whether the truckers had received any training other than formal training. Resp't Br. at 11-13. In support of this contention, APAC relies on *Apex Quarry*, 36 FMSHRC 211 (Jan. 2014) (ALJ). Resp't Br. at 11-13. In *Apex Quarry*, the judge vacated an order alleging a violation of section 46.11(a) because the inspector only asked the contractors whether they had received site-specific hazard training and, therefore, they may not have understood the "special meaning of the term 'training'" in the context of the cited standard. 36 FMSHRC at 230-31.

Garay testified that section 46.11(a) requires APAC to administer site-specific hazard training to its customers and that, alternatively, it may post adequate warning signs. Tr. 70. Garay also stated that at the beginning of the inspection, APAC's safety manager, Chris Switchman, told him that APAC satisfies the site-specific hazard training requirement by showing anyone who comes to the mine a training video in the scale house or office, and then issuing a card documenting that the training was received. Tr. 68, 71. Ewing testified similarly, but did not name the APAC management employees with whom he spoke. Tr. 236-37. According to Garay, 12 Clarkson employees in the tarping area of the mine told him that they had not received site-specific hazard training, had not viewed the training video, and had not been issued training cards. Tr. 67-69; Ex. R-5. Garay and Ewing both maintained that they looked for signs in the tarping area, but found none satisfying the training requirement, that the sign posted to terminate the citation was not present on the day of the inspection, and that no APAC representative ever raised the idea that a warning sign was posted. Tr. 80-81, 113, 236-38; Exs. R-6, R-15. Garay opined that untrained customers would be unlikely to suffer permanently disabling injuries as a result of being exposed to heavy equipment operation, blasting, or other hazards, because they only travel to limited areas of the mine. Tr. 69.

Lane testified that APAC does not show the training video to customers. Tr. 182-83. He stated that customer truck drivers are trained using signage posted throughout the facility, including the sign used to terminate the citation which, according to him, was in place in the tarping area at the time of the inspection, and had been since 2010. Tr. 180-81; Exs. R-6, R-7, R-8, R-9, R-10, R-11.

The record makes clear that the training video of which the inspectors were advised was not shown to the over-the-road truck drivers, and the parties agree that APAC would have satisfied the site-specific hazard training requirement if appropriate warning signage were posted at the tarping area. See Tr. 78-79; Sec'y Br. at 16. Both inspectors testified that the tarping-area sign was not there, and that they specifically looked for such a sign. APAC's attempt on cross-examination to have Garay identify a zoomed-in object in a photograph as a tarping-area sign was an exercise in futility because the image was so indistinct as to appear ethereal. Interestingly, in its brief, APAC abandoned any argument that the photograph depicted the requisite signage. In consideration of the inspectors' credible testimony, and the fact that no one, including APAC's safety director, showed the inspectors any sign, I find that no warning signage was posted at the tarping area on the day of the inspection. Testimony and exhibits regarding signage elsewhere on-site miss the mark because they do not address the hazards identified in the

tarping area. Furthermore, APAC's reliance on *Apex Quarry* is not persuasive because here, Garay not only questioned the 12 customers and APAC's safety director about the training, but he and Ewing specifically looked for an appropriate warning sign in the tarping area. Accordingly, I find that the Secretary has established a violation of section 46.11(a).

2. Gravity and Negligence

The record establishes that because the untrained customers only accessed limited areas of the mine, they were unlikely to suffer permanently disabling injuries resulting from exposure to heavy equipment operation. The Secretary argues that APAC's negligence was high, however, because it was aware that it needed to provide training, as evidenced by its production of the training video. Sec'y Br. at 18. I find that APAC knew or should have known of the site-specific hazard training requirement and, in failing to train its customers by video or posting appropriate signage at the tarping area, that it was exposing its customers to avoidable hazards. Furthermore, I do not find that signage elsewhere around the mine mitigates APAC's negligence because there is no evidence that they pertain to the hazards specific to the tarping area. Accordingly, I find that APAC was highly negligent in violating the standard.

E. Citation No. 8760690

Inspector Garay issued 104(a) Citation No. 8760690 on August 5, 2014, alleging a "significant and substantial" violation of section 56.18002(a) that was "reasonably likely" to result in an injury that could reasonably be expected to be "permanently disabling," and was caused by APAC's "high" negligence.[9] The "Condition or Practice" is described as follows:

> The mine operators competent persons did not conduct thorough examinations of workplaces at least once each shift for conditions which may adversely affect safety or health, in that the daily workplace examinations reviewed, did not document any of the conditions cited, which adversely affect safety and health of the miners, and attributed to multiple citations and orders issued during the E01 regular inspection.

Ex. P-6.

1. Fact of Violation

The Secretary argues that the obviousness of the cited hazards and the condition of the mine demonstrated that APAC was not conducting adequate workplace examinations. Sec'y Br. at 23. The Secretary also contends that the examination records do not document all working

[9] 30 C.F.R. § 56.18002(a) provides that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions."

areas of the mine, and that testimony that rank-and-file miners also perform examinations should be given no weight because there is no documentation of their competence, or any record of such examinations. Sec'y Br. at 25-28.

APAC contends that a competent person performed adequate examinations of all working areas prior to each shift, and that the number of citations and orders issued is not determinative of the adequacy of those examinations, especially since the inspection was retaliatory, the alleged violations were not obvious, and APAC disagrees with nearly all of them. Resp't Br. at 13-16.

According to Garay, the cited violations were obvious to any competently trained miner and, therefore, should have been discovered and recorded through adequate workplace examinations. Tr. 98-102. He testified that he reviewed Stoker's daily log or diary containing records of APAC's workplace examinations, and concluded that Stoker oversaw operations at the Bonner Springs and Shawnee quarries and that, regarding Bonner Springs, his records failed to identify working areas or hazards, or when they were corrected. Tr. 102-03. Garay opined that a plant superintendent and supervisor are competent persons to conduct workplace examinations within the meaning of section 56.18002(a). Tr. 158.

Lane testified that APAC foreman David Platt and superintendent Stoker, or a competent person designated by them, record a diary of activities that they perform throughout the day, including work areas that they have examined and whether the examination has been completed. Tr. 174, 189, 191; Exs. R-2 (Stoker), R-3 (Platt). Lane testified that Stoker's diary pertains to the Bonner Springs and Shawnee quarries, while Platt's diary covers only Bonner Springs. Tr. 188. Presented with entries in Stoker's and Platt's daily logs for July 8, 2014, Lane was unable to identify any workplace that either miner had examined. Tr. 190-91; Exs. R-2 at 1, R-3 at 1. He offered that another competent person, who he could not identify, may have performed the examination on that day, but that he was unaware of any examination records other than Platt's and Stoker's diaries. Tr. 191-92, 195.

Stoker testified that his log entries demonstrate that he examines and records any area of the mine that he visits, and that properly trained miners examine their work areas and provide him with completed examination record sheets at the end of each shift. Tr. 215-17, 219-21; Ex. R-2. He also stated that he did not conduct an examination of the mine on July 8, 2014. Tr. 221; Ex. R-2.

Stoker's and Platt's diaries rarely address Bonner Springs' working areas or conditions and, when they do, only in cursory fashion. Neither diary records any hazard identified during MSHA's inspection, nor does either record a workplace examination of any area of Bonner Springs on July 8, 2014. It is noteworthy that Stoker's and Platt's diaries begin to state, in routine fashion, that they examined the Bonner Springs plant, pit, and shop only *after* MSHA had begun its inspection. Stoker's testimony, that other competent miners conduct examinations of all working areas and fill out record sheets, is undermined by Lane's testimony that he is unaware of any documentation other than Stoker's and Platt's diaries, by APAC's failure to provide copies of such examination records to Garay during the inspection, and APAC's failure

to move for their admission into the record at the hearing. Accordingly, I find that APAC failed to perform and record adequate examinations of the Bonner Springs workplaces during every shift, and that the Secretary has established a violation of section 56.18002(a).

2. Significant and Substantial

The fact of violation has been established and, respecting the second *Mathies* criterion, the hazard against which section 56.18002(a) is directed is timely detection and correction of workplace hazards. Obvious hazardous conditions were reasonably likely to go undetected and promptly corrected by management based on APAC's failure to conduct adequate workplace examinations on a regular basis, and when they did, the examinations were incomplete and inaccurately recorded. The third and fourth *Mathies* criteria have been met, in that failure to timely identify and remedy unstable material above the working face of the highwall was reasonably likely to result in serious, if not fatal, injuries; likewise, entanglement with unguarded moving machine parts was reasonably likely to result in serious disfigurement or loss of a limb. Therefore, I find that the violation was S&S.

3. Negligence

The Secretary argues that APAC's negligence was high because it was aware that it was required to perform workplace examinations, many hazards were obvious, and its inspection records were incomplete and disorganized. Sec'y Br. at 29-30. APAC contends that the alleged hazards were not obvious, and that it disagrees with nearly all of the citations and orders. Resp't Br. at 14. In consideration of my findings that the highwall and guarding violations were obvious and serious, I find that APAC's failure to conduct adequate workplace examinations of the mine and timely correct identified hazards was the result of high negligence.

III. PENALTIES

While the Secretary has proposed civil penalties totaling $3,070.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, and based upon a review of MSHA's online records, I find that APAC is a small operator, with an overall history of violations that is a mitigating factor in assessing appropriate penalties (in the 15 months preceding the inspection, the operator had been cited for violating one standard, unrelated to any at issue in this proceeding). I also find that APAC demonstrated good faith in achieving rapid compliance after notice of the violations. Furthermore, APAC represents that the proposed penalties will not affect its ability to remain in business. Resp't Br. at 21.

The remaining criteria involve consideration of the gravity of the violations, and APAC's negligence in committing them. These factors have been discussed fully, respecting each violation. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

A. Citation No. 8760649

It has been established that this S&S violation of section 56.3131 was reasonably likely to cause an injury that could reasonably be expected to be fatal, that it was caused by APAC's moderate negligence, and that it was timely abated. Based on these factors, and considering the operator's violation history as a mitigating factor, I find that a penalty of $450.00 is appropriate.

B. Citation No. 8760656

It has been established that this S&S violation of section 56.3130 was reasonably likely to cause an injury that could reasonably be expected to be fatal, that it was caused by APAC's moderate negligence, and that it was timely abated. Based on these factors, and considering the operator's violation history as a mitigating factor, I find that a penalty of $450.00 is appropriate.

C. Citation No. 8760651

It has been established that this S&S violation of section 56.14107(a) was reasonably likely to cause an injury that could reasonably be expected to result in permanently disabling injuries, that it was caused by APAC's moderate negligence, and that it was timely abated. Based on these factors, and considering the operator's violation history as a mitigating factor, I find that a penalty of $250.00 is appropriate.

D. Order No. 8760689

It has been established that this violation of section 46.11(a) was unlikely to cause an injury that could reasonably be expected to result in permanently disabling injuries, that it was caused by APAC's high negligence, and that it was timely abated. Based on these factors, and considering the operator's violation history as a mitigating factor, I find that a penalty of $700.00 is appropriate.

E. Citation No. 8760690

It has been established that this S&S violation of section 56.18002(a) was reasonably likely to cause an injury that could reasonably be expected to result in permanently disabling injuries, that it was caused by APAC's high negligence, and that it was timely abated. Based on these factors, and considering the operator's violation history as a mitigating factor, I find that a penalty of $800.00 is appropriate.

IV. APPROVAL OF SETTLEMENT

The parties have filed a Motion to Approve Partial Settlement respecting 27 of the 32 citations/orders involved in these dockets. A reduction in penalty from $6,596.00 to $4,617.00 is

proposed. The citations/orders, initial assessments, and proposed settlement amounts are as follows:

Docket No.	Citation/Order No.	Initial Assessment	Proposed Settlement
CENT 2015-1-M	8760652	$263.00	$263.00
	8760657	$585.00	$969.00
	8760658	$100.00	$100.00
	8760659	$263.00	$0.00
	8760660	$263.00	$0.00
	8760663	$263.00	$263.00
	8760688	$100.00	$100.00
	8760664	$100.00	$100.00
	8760665	$263.00	$263.00
	8760667	$100.00	$0.00
	8760669	$585.00	$0.00
	8760671	$100.00	$100.00
	8760672	$100.00	$100.00
	8760681	$100.00	$100.00
	8760682	$263.00	$0.00
	8760673	$100.00	$100.00
	8760674	$100.00	$100.00
	8760675	$263.00	$263.00
	8760676	$263.00	$0.00
	8760677	$263.00	$263.00
	8760678	$263.00	$263.00
	8760679	$263.00	$0.00
	8760680	$263.00	$0.00
	8760687	$100.00	$100.00
	SUBTOTAL:	**$5,326.00**	**$3,447.00**
CENT 2015-157-M	8760650	$585.00	$585.00
	8760661	$585.00	$585.00
	8760662	$100.00	$0.00
	SUBTOTAL:	**$1,270.00**	**$1,170.00**
	TOTAL:	**$6,596.00**	**$4,617.00**

I have considered the representations and documentation submitted in these matters under section 110(k) of the Act, and I conclude that the proffered settlement is appropriate under section 110(i) of the Act.

ORDER

WHEREFORE, it is **ORDERED** that Citation Nos. 8760659, 8760660, 8760662, 8760667, 8760669, 8760676, 8760679, 8760680, and 8760682 are **VACATED**.

It is further **ORDERED** that Citation Nos. 8760649, 8760650, 8760651, 8760652, 8760656, 8760672, 8760673, 8760674, 8760677, 8760681, 8760690, and Order No. 8760689 are **AFFIRMED**, as issued.

It is further **ORDERED** that the Secretary **MODIFY** Citation Nos. 8760663, 8760671, and 8760687 to reduce the degree of negligence to "low;" Citation Nos. 8760663, 8760665, 8760675, and 8760678 to reduce the level of gravity to "unlikely," and remove the "significant and substantial" designation; Citation No. 8760658 to allege a violation of 30 C.F.R. § 56.14107(a) in the alternative, and Citation No. 8760665 to allege a violation of 30 C.F.R. § 56.14112(a)(1) in the alternative; and Citation Nos. 8760657, 8760658, 8760664, 8760665, 8760675, 8760678, and 8760688 to incorporate the proposed language in the "Condition or Practice;" and that these citations are **AFFIRMED**, as modified.

It is further **ORDERED** that APAC-Kansas, Incorporated, **PAY** a civil penalty of $7,267.00 within thirty (30) days of the date of this Decision.[10] **ACCORDINGLY**, these cases are **DISMISSED**.

Jacqueline R. Bulluck

Jacqueline R. Bulluck
Administrative Law Judge

Distribution:

Daniel McIntyre, Esq., U.S. Department of Labor, Office of the Solicitor, 1244 Speer Boulevard, Suite 216, Denver, CO 80204

Kevin Keating, Oldcastle Law Group, 900 Ashwood Parkway, Suite 600, Atlanta, GA 30338-4780

/tcp

[10] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket number and A.C. number.