FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 18, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. MEYER AGGREGATE LLC, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2015-654 A.C. No. 32-00964-391773 Docket No. CENT 2015-655 A.C. No. 32-00964-391773 Docket No. CENT 2016-73 A.C. No. 32-00964-394388 Docket No. CENT 2016-74 A.C. No. 32-00964-394388 Docket No. CENT 2016-243 A.C. No. 32-00964-403208 Mine: Plant 2

DECISION AND ORDER

Appearances: John A. Lauer, Office of the Solicitor, Denver, Colorado, for Petitioner;

Chad Meyer, *pro se*, Dickinson, North Dakota, for Respondent.

Before: Judge Miller

These cases are before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act"). These dockets involve five citations issued pursuant to Section 104(a) of the Mine Act, one citation and one order issued pursuant to Section 104(d), and one order issued pursuant to Section 104(g). The proposed penalties total $4,642.00. The parties presented testimony and evidence regarding these citations at a hearing held in Bismarck, North Dakota, on August 31, 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.

Meyer Aggregate's ("Meyer") Plant 2 is a small portable surface sand and gravel mine in Golden Valley County, North Dakota, that normally employs three people. Tr. 15:12-14. The parties have stipulated that Meyer 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. At Plant 2, Meyer's miners use a dozer to dig up and loosen sand and gravel and transport it to a feeder via a front-

end loader. Tr. 21. From the feeder, the miners move the material into a screener and crusher, which separates and stacks the product to be sold and unloaded. *Id.*

Seven of the citations addressed below were issued by inspector Alan Roberts in August 2015 at the Plant 2. Inspector Roberts worked as a MSHA inspector for 13 years and is now a training specialist. Tr. 18:15-23. Prior to working for MSHA, Roberts worked at Hutchison Salt Mine in Kansas, where he was an underground superintendent and was in charge of up to 100 employees. Tr. 20:11-13. The eighth citation was issued in January 2016 by inspector Robert Lindeman at the Reich Pit. He has been an MSHA inspector for 15 years and has inspected Meyer's portable operations in the past. Tr. 108-110.

I. PRINCIPLES OF LAW

The Secretary has the burden to prove each citation and its elements. The Secretary has designated a number of the violations as Significant and Substantial and two of the violations were designated as an unwarrantable failure to comply with a mandatory standard.

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 the "hazard" should be defined in terms of the prospective danger the cited safety standard is intended to prevent. *Id.* at 6. The likelihood of the occurrence of the hazard 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 Commission has emphasized that the Secretary's 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." *Brody*, 37 FMSHRC 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. Unwarrantable Failure

The unwarrantable failure terminology is taken from Section 104(d) of the Act, 30 U.S.C. § 814(d). The Commission has explained that unwarrantable failure is "aggravated conduct constituting more than ordinary negligence. [It] is characterized by conduct described as 'reckless disregard,' 'intentional misconduct,' 'indifference,' or a 'serious lack of reasonable care.'" *Consol. Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) (citations omitted) (quoting *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987); *Rochester & Pittsburgh Coal Co.*, 13

FMSHRC 189, 194 (Feb. 1991)). In determining whether a violation is an unwarrantable failure, the Commission has instructed its judges to consider all of the relevant facts and circumstances in the case and determine whether there are any aggravating or mitigating factors. *Id.* Aggravating factors to be considered include:

> the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation.

IO Coal Co., 31 FMSHRC 1346, 1352 (Dec. 2009); *see also Consol.*, 22 FMSHRC at 353.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8933001 (CENT 2016-74)

On August 12, 2015, Roberts and inspector trainee Danny Cooper visited the Plant 2 Mine near the Kurdna Pit. Tr. 13. Roberts and Cooper examined the product stockpile upon their arrival. Tr. 13, 25:15-17. Meyer had sold the stockpile to Dunn County, North Dakota, and county employees were loading and transporting gravel at the time of the inspection. *See* Tr. 21. The stockpile was approximately 40 feet tall and the inspectors noticed visible cracks, fissures, sheer walls, and undercuts near the vertical face. Ex. G-18, G-19. The material was wet and was drying out and trickling down, and Roberts testified that he could hear the product shifting and moving on the stockpile. Tr. 30-31. He observed an estimated 100-ton portion of the stockpile fall and land approximately 20 feet out from the stockpile and 10 feet from the inspection party. Tr. 35:1-17.

Two county trucks were loading gravel from the stockpile and another truck was parked nearby. Tr. 27-30. The miner removing the material and the truck drivers were Dunn County employees. Tr. 45: 11. Roberts testified that he also observed miners on foot within 50 feet of the stockpile. Tr. 31: 12-18. The loader operator was undercutting the pile and creating an overhang as he removed material. Tr. 28. Furthermore, the tracks on the ground indicated that the loader and the trucks were operating in a dangerous location under the stockpile. Tr. 29:20-30:3. Roberts was concerned that the stockpile could fall and cause fatal crushing injuries, especially during the inspection and walkaround of the truck parked nearby. Tr. 28: 4-10. He cited the mine for a violation of 30 C.F.R. § 56.3130, which requires in part, that:

> Mining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks.

The Secretary alleges that the violation was S&S and the result of Meyer Aggregate's high negligence and unwarrantable failure to comply with the standard. Ex. G-18. The proposed penalty is $2,000.00.

30 C.F.R. § 56.3130 requires mines to maintain the bank and slope stability of stockpiles in areas where miners work and travel. The Commission has determined that the mine operator has a responsibility to maintain an area of unstable ground and remove hazardous conditions before work or travel takes place. *Connolly-Pacific Co.*, 36 FMSHRC 1549, 1553 (June 2014). The standard is a "clear" and "performance-oriented standard" intended to require mining methods that maintain ground stability. *U.S. Silica Co.*, 37 FMSHRC 1736, 1742 (Aug. 2015) (ALJ) (citing *Connolly-Pacific Co.*, 36 FMSHRC 1549, 1553 (June 2014), *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 374 (Mar. 1993)).

It is undisputed that the stockpile was unstable and that individuals were working on it during the inspection. Inspector Roberts's photographs show that the stockpile was sheer at a steep angle and had visible cracks. Ex. G-19. He testified to seeing large amounts of material shift and fall from the pile. Foreman Roger Friedt admitted to Inspector Roberts that he knew that the stockpile was unstable, but Meyer did not barricade the area or take any other steps to reduce or abate the danger prior to allowing county employees to work on the stockpile. Tr. 41.

Meyer argues that it was not responsible for maintaining the stockpile because Dunn County purchased the pile from the mine and only Dunn County employees were working on the stockpile. Tr. 41:20-24. I find that the stockpile was nonetheless a part of Meyer's operation, and that Meyer was liable for maintaining it. Meyer excavated the gravel and placed it in the stockpile and the stockpile was located on the mine site. Tr. 21:17-20, 43:5-11. Both Meyer and Dunn County had a responsibility to proactively maintain its safety and stability under the standard and therefore both entities were properly cited for the violation. Tr. 212; Ex. G-18. I find that the Secretary has demonstrated a violation of 30 C.F.R. § 56.3130.

Inspector Roberts designated the violation S&S. I have determined that Meyer violated the mandatory safety standard, satisfying the first element of the *Mathies* test. The violation also contributed to a discrete safety hazard. Section 56.3130 is designed to prevent persons and equipment from being engulfed by material that sloughs from poorly maintained walls, banks, and slopes. 30 C.F.R. § 56.3130. Meyer's failure to properly maintain the stockpile clearly resulted in the stockpile's cracks and sheer faces that could slough off of the pile and engulf and injure nearby employees. Roberts personally witnessed a 100-ton portion of the stockpile fall and land 10 feet from the inspection party. A miner, whether on foot or in the cab of a piece of equipment, could not escape from the falling material and could be suffocated and killed. Roberts testified that another such fall was reasonably likely and could be fatal. Tr. 36. He based his testimony on three fatalgrams in which similar material falls killed miners, one of which Roberts investigated himself. *See* Tr. 36:23-37:7; Ex. G-21. While Roberts did not know the exact height of the stockpiles in the fatalgrams, he testified that they were not as tall as the Meyer stockpile. Tr. 38. I credit Inspector Roberts's experience and testimony and find the violation to bean S&S violation.

Roberts designated the violation as high negligence. Foreman Friedt acknowledged that the stockpile was dangerous and yet took no action to mitigate or abate the violation until the citation was issued. Tr. 41:20-24. I find that high negligence is appropriate.

I find further that Roberts correctly designated the violation as an unwarrantable failure. The violation existed for at least one shift. Tr. 42:21-24. The Commission has found that the existence of a hazard for a "matter of seconds" may weigh against an unwarrantable failure finding, but that its existence for minutes may support such a finding. *U.S. Silica Co.*, 37 FMSHRC 1736, 1746 (Aug. 2015) (ALJ) (citing *Midwest Material Co.*, 19 FMSHRC 30 (Jan. 1997)). While one shift is not an exceptionally long period of time, the condition of the stockpile exposed miners to the hazard for many hours.

The size and hazardous condition of the stockpile was extensive, obvious, and posed a high degree of danger. The photographs of the stockpile clearly show steep faces and undercuts, and the pile was estimated to be nearly 40 feet high. *See* Tr. 27:19-20; Ex. G-19. The entire east and south side of the stockpile posed a danger to miners. Tr. 43. Meyer admitted to Roberts that it was aware of the danger posed by the stockpile but did not believe it was their responsibility to maintain it. Moreover, Roberts observed an estimated 100 tons of material slough off of the stockpile during the inspection. That amount is more than enough to kill or seriously injure the miners in the vicinity of the stockpile. Meyer was not placed on notice for this or a similar condition and had not been cited for a similar violation. However, Meyer did nothing to abate the condition until after the citation was written, despite the fact that it recognized the danger that the stockpile posed. I therefore find, given the facts and circumstances presented, that the duration, extent, obviousness and high degree of danger of the stockpile constitute an unwarrantable failure. I assess the proposed penalty of $2,000.00.

B. Citation No. 8933002 (CENT 2015-654)

Inspector Roberts next observed that the rear door of a storage van was open and did not have a chain handrail to protect miners when they entered the van to retrieve supplies. Ex. G-1. The opening was 42 inches above the ground. *Id.* Miners normally used a small stairway at the front of the storage van to store and retrieve tools and supplies on a daily basis and only used the rear doors for loading oil barrels. Tr. 56, 60. Roberts noted, however, that one of the two rear doors of the storage van was open and that no loading was taking place. Tr. 60. The supervisor went inside the storage van and closed the door during the inspection and explained that it was not normally left open. Tr. 56:3-6. Roberts testified that other similar vans had handrails, and thus the supervisor knew that this van should have one as well. Tr. 56. He issued Citation No. 8933002 for a violation of section 56.11002, which requires that "Crossovers, elevated walkways, elevated ramps ...shall be provided with handrails, and maintained in good condition." Roberts alleges that the violation was the result of moderate negligence and not S&S. The proposed penalty is $100.00.

I find that this part of the van was an elevated walkway and required a handrail or barrier across the rear opening. The photographs clearly show that the rear door was open, the walkway was elevated, and that tools and oil were stored in the back of the storage van next to the doors. *See* Ex. G-2. Miners would have to walk across the storage van from the stairway to access the stored equipment and could fall through the open door. Meyer argues that its miners normally entered the van through the side and only opened the rear doors to load larger equipment into the storage van. The doors were closed immediately after loading was complete. *See* Tr. 60:3-4, 133-36; Ex. G-2. However, I credit Roberts's testimony that the rear door was open and no

loading was in progress during the inspection. Thus, the storage van required a handrail or other stabilizing device to prevent miners from falling to the ground as they walked around the rear of the storage van.

I find that the violation was the result of low negligence because Meyer had placed chain handrails in similar vans but believed it was not necessary here. I credit the testimony that miners usually used the stairway on the front side of the storage van and only opened the rear doors to load large equipment and therefore find that Meyer was only slightly negligent. I assess a penalty of $100.00.

C. Citation No. 8933003 (CENT 2015-654)

Inspector Roberts issued Citation No. 8933003 for an alleged violation 30 C.F.R. § 56.14112(b). A hinged guard door on the crusher was left slightly ajar. *See* Ex. G-4, G-5. Behind the guard are moving parts. Tr. 62:23-63:6. Roberts believed that the guard door had a latch at one time, but that it was missing, and that signs of rust indicate that it had been missing for some time. Tr. 63:24-64:5. Meyer asserts that it secured the guard door with a wire and that the door had probably been opened the day before to remove debris and had not been secured the next morning. Tr. 138:3-5, 155:12-16. The opening was approximately five feet from the ground and 10 square inches in size. Tr. 63:9-13. Section 56.14112(b) 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." The Secretary alleges that the violation was non-S&S and the result of moderate negligence. The proposed penalty is $100.00.

The photographs provided by the Secretary indisputably show that the guard door was open and unsecured. Ex. G-5. The opening was large enough to expose miners to an entanglement hazard. Roberts testified that the machine was in operation on the morning of the inspection, though it was not running when Roberts inspected the guard. Tr. 63:16-20. I credit his testimony and find that the guard door was open while the machine was capable of being operated.

I also find that the open door did not fit into the narrow exception of the standard. Section 56.14112(b) contains a narrow exception for when machinery is operated for testing or adjustments that cannot be performed without removing the guard. *See Hi Valley Crushing Inc.*, 21 FMSHRC 1158, 1160 (Oct. 1999) (ALJ). Miner Arnold Friedt testified that they opened the door to clean out material that had fallen inside the crusher and caused problems with the V-belts. Tr. 137:13-22. The crusher had become clogged the night before and the miners decided not to unclog it until morning. Tr. 153:22-154:6. However, Foreman Roger Friedt testified that he was unsure why the guard door was unsecured, as the miners usually used a different door below the guard to clean out the machine. Tr. 153:13-16. I therefore find that the Secretary has proven the violation as alleged.

Inspector Roberts designated the violation as moderate negligence because workplace exams had been performed on the crusher and screener but that the hazard itself was not easily observable. Tr. 64-65. I agree that the negligence was moderate and assess a penalty of $100.00.

D. Citation No. 8933004 (CENT 2015-655)

Inspector Roberts observed a significant buildup of spilled gravel on two ends of the elevated walkway beside the Cedarapids crusher/screener. Tr. 67:11-14. A supervisor accessed the walkway daily to check the screens. Tr. 70:12-17; 75:24-764. The walkway is a slippery, uneven surface and Roberts believed that a miner could slip, trip, or fall on the gravel and sustain a leg injury, or possibly fall off of the 10-foot high walkway and be killed. Tr. 74:21-24.

Foreman Friedt told Roberts that he was aware that the spill had occurred but did not clean it up immediately. Tr. 73:2-7. Roberts understood Friedt to say that the spillage had been there for a week, but Friedt meant that the crusher had been clogging for the past week. Tr. 73:2-7, 176:1623. Friedt testified that the spillage had actually occurred the night before, and that he intended to clean the spill once the crusher was in working condition and before starting production the next morning. Tr. 166:18-21, 167:12-15. He is trained to keep the walkway clean and recalled that he had been in trouble in the past for failing to do so, and that he did not intend to allow that to happen again. Tr. 167:17-19. Further, Friedt testified that he usually climbed up to one of the other two sides of the walkway, which were clean at the time the citation was issued. Tr. 167:6-11, 178-79. He indicated that he could check the screens from the clean areas without walking over the spillage. Tr. 178-79. Roberts did not take photos of the two clean sides of the walkway, but admitted that they were clean and orderly at hearing. *Id.*

Roberts issued Citation No. 8933004 for a violation of 30 C.F.R. § 56.20003(a), which requires that "At all mining operations[,] [w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." Inspector Roberts designated the violation as S&S and the result of high negligence, and an unwarrantable failure to comply with the standard. *Id.*

Section 56.20003(a) requires a showing that (1) the cited area is a "workplace" and a "passageway," and (2) the area is not being kept clean and orderly. 30 C.F.R. § 56.20003(a); *See Tim M. Ball, Employed by Mountain Materials, Inc.*, 38 FMSHRC 1799, 1808 (July 2016) (ALJ). It is clear that the walkway qualifies as a "workplace" and as a "passageway" and was not kept clean and orderly. Miners accessed the walkway at least once a shift to check the bolts and the screen. Tr. 178:18-25, 176:6-7. Photographs presented by the Secretary show large amounts of spilled rock on the elevated walkway in two areas, one at each end of the crusher. Ex. G-13. Walking on or crawling over the material put the miner in a position to lose his balance and fall over the handrail. Thus, I find that the Secretary has proven a violation.

In considering Inspector Roberts's S&S designation, I have already determined that Meyer violated the mandatory safety standard by failing to keep the walkway clean and orderly. The violation also constitutes a discrete safety hazard. Keeping the elevated walkway clear of obstructions aims to prevent miners from having to walk or crawl over uneven spillage, where they may lose their balance and fall. Over the course of continuous mining operations, standing, crawling, or walking on the walkway was reasonably likely to result in an injury. The walkway was nearly 10 feet above the ground and a falling injury could be serious or even fatal. Accordingly, I find that the violation was S&S.

Based upon his conversation with Foreman Friedt, Inspector Roberts designated the violation as the result of high negligence. Friedt knew about the spill and had been instructed to

keep the walkway clear in the past. The spill was obvious and covered two ends of the walkway. Friedt elected not to shovel the walkways until the next morning even though he had been trained to keep them clear. Thus, I find that a high negligence designation is appropriate.

However, I find that the violation did not constitute an unwarrantable failure. Inspector Roberts designated the violation as an unwarrantable failure because the hazard was obvious and extensive, covering two areas of the walkway. Tr. 76:6-8, 77:17-19. The violation had not been present for more than one night. Inspector Roberts mistakenly understood Foreman Friedt to say that the spillage had been there for a week when Friedt meant that the crusher had been clogging for the past week. Friedt credibly testified that the spill occurred the previous evening and he intended to clean it up the following morning before resuming operations. He also admitted that he had every intention to keep the walkway clean prior to anyone walking in the area. I have no reason to doubt that Foreman Friedt was honest about the spill, and credit his testimony accordingly.

Additionally, the violative condition was not as extensive as Inspector Roberts alleged. While spillage was obvious on two ends of the walkway, both parties acknowledged that other areas of the walkway were kept clean and orderly. I credit Foreman Friedt's testimony that the side of the walkway, where there was a ladder to access the walkway was used to check the screens and did not contain spillage. Further, Friedt could see the screens from that side, and he did not climb or walk over the material. Tr. 167:6-11.

Meyer was not placed on notice that greater efforts were necessary and received no citations of this nature in the past. Again, I credit Foreman Friedt's testimony that he normally abates the spillage after it occurs, and that on this one occasion waited until the next morning to clear it off before operating the crusher. The violation was obvious but did not pose a high degree of danger because two sides of the walkway were indisputably clear of spillage and allowed Friedt to check the screens without walking over the spill. In weighing the unwarrantable failure factors in this circumstance, the unwarrantable failure designation is vacated. I therefore assess a reduced penalty of $1,200.00.

E. Citation No. 8933005 (CENT 2016-73)

Roberts observed that the windshield wiper on a Case SR200 skid loader did not function. Ex. G-15. The loader operates in areas of foot traffic and in dusty and wet weather. Tr. 80:2-9. Roberts believed that the broken wiper exposed miners in the area to the hazard of being struck by the loader. Tr. 82:3-4. Meyer admits that the wiper did not work at the time of the inspection, but argues that it worked earlier that morning when Foreman Friedt tested the loader. Tr. 169. Meyer changed a blown fuse to abate the citation. *Id.*

Roberts cited the mine for a violation of section 56.14100(b), which provides that "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." He designated the violation non-S&S and the result of moderate negligence. Ex. G-15. The proposed penalty is $100.00.

To establish a violation of § 56.14100(b), the Secretary must prove that there was a defect in the equipment, that the defect affected safety, and that it was not corrected in a timely

manner. *See* 30 C.F.R. § 56.14100(b). Here, Meyer does not dispute that the windshield wiper failed to activate when the inspector asked the operator to start it. The defect also clearly affects the safety of the skid loader. The skid loader is used on a daily basis all over the plant, mostly to clean up material spills. Tr. 79:9-17. Lack of a functioning wiper would impede the operator's visibility and create a hazard to the loader operator and other miners working in the area. Tr. 80:10-15.

The main issue regarding the violation here is whether the mine failed to correct the defect "in a timely manner." The Commission addressed the timeliness requirement of § 56.14100(b) in *Lopke Quarries, Inc.*, 23 FMSHRC 705 (July 2001), which involved a lockout device. The Commission determined that "[w]hether the operator failed to correct the defect in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of its existence." *Id.* at 715. Here, Foreman Friedt admitted that the wiper failed to work during the inspection, but testified that it did work earlier that morning when he checked the skid loader prior to using it. The inspection sheet produced by the operator confirmed that the wiper was working during the pre-shift inspection, and the photograph shows wiper marks on the skid loader's windshield. *See* Ex. G-16. Friedt testified that he had to replace a fuse in order to repair the wiper, indicating that the fuse may have blown after the morning pre-check. I find that Meyer had no reason to know that the wiper was defective and therefore could not have corrected the defect in a timely manner. The citation is therefore vacated.

F. Citation No. 8933006 (CENT 2015-654)

Inspector Roberts examined a Cat D8L Dozer and noted that the vehicle was missing handholds on both sides. Tr. 84:12-15; Ex. G-7. He observed the dozer in use during the inspection, and testified that miners used the dozer throughout the day, sometimes in wet and muddy conditions. Tr. 85:5-19, 86:2-4. Miners stood on the tire and grabbed under the metal areas of the dozer to reach the cab. Tr. 99:14-17. Roberts asserted that miners could slip and fall and sustain broken bones when attempting to climb into the Dozer by standing on one of its tires. Tr. 87:9-88:1.

Roberts cited a violation of section 56.11001, which requires that "Safe means of access shall be provided and maintained to all working places." A "working place" is defined as "any place in or about a mine where work is being performed." 30 C.F.R. § 56.2. He designated the violation as S&S and the result of moderate negligence. Ex. G-7. The Secretary proposed a penalty of $100.00.

Inspector Roberts testified that he issued this citation because the dozer had no handrails or grips for miners to hold while climbing up onto the dozer. Tr. 84:12-15. The dozer cab is clearly a "working place" because Inspector Roberts observed the dozer in operation and testified that it is used often and in all weather conditions. No safe access was provided to the cab. The photographs indicate that each side of the dozer had a handrail when it was manufactured but that both were missing at the time of the inspection. Tr. 84:12-15; Ex. G-8. Climbing into the cab by standing on the dozer's tire is not a safe means of access. A miner entering or exiting the dozer could slip and fall without the handrails, especially in wet or inclement weather, and could be seriously injured or killed. Meyer argues that the dozer did not

have handrails when it was purchased. Even so, the argument does not absolve them of liability because they were required to provide, not merely maintain, safe access to the cab. Since there are no handholds or rails for miners to grab in order to pull themselves up and enter the cab, I hold that Meyer violated the standard.

I further find that the violation is S&S and the result of Meyer's moderate negligence. I have determined that Meyer violated the mandatory safety standard. Section 56.11001 is designed to prevent miners from being injured as they enter a working place. The lack of handrails to hold onto and pull oneself up, indicates that the access was not safe. Failure to provide a safe means to access the dozer cab is reasonably likely to result in a miner slipping and hitting the side of the equipment or falling to the ground. Miners have to face the dozer to get in and out of it and could fall approximately three feet backwards onto the ground, which could be made of rock or other hard material. Further, the dozer is accessed frequently and in all types of weather, and it is likely that such an injury would amount to broken bones or head and back injuries. Therefore, the violation is significant and substantial. Moderate negligence is appropriate because it is clear that the dozer lacked handrails for quite some time. I assess a penalty of $100.00 as proposed.

G. Citation No. 8933007 (CENT 2015-654)

Inspector Roberts observed county employees using a loader to load a truck out of the mine's product stockpile in conjunction with Citation No. 8933001, discussed above. The loader operator was undercutting the stockpile in a dangerous manner and was not properly trained to identify unsafe practices. Tr. 49:11-17. The county employees were working in an area where material may slough off of the stockpile. Tr. 48:7-21. None of the county employees had received site-specific hazard awareness training. *Id.* Roberts issued Citation No. 8933007 for an alleged violation of 30 C.F.R. § 46.11(b), which states:

> You must 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...

The Secretary alleges that the violation was S&S and the result of moderate negligence. Ex. G-10. The proposed penalty is $142.00.

Meyer argues that the county owns the stockpile and therefore Meyer has no authority over county employees. Tr. 157-158. Meyer asserts that the county employees only worked near the stockpile and did not travel into the pit. Tr. 158:11-12. Foreman Friedt testified that the equipment near the stockpile was the property of the county, and that the county drivers and loaders have more experience than many of the miners. *See* Tr. 161:20-162:2, 195:2-6. He explained that they were trained by the county and knew what they were doing when loading the stockpile. Tr. 161:20-162:7.

While Meyer no longer owned the stockpile or the equipment nearby, Meyer is nonetheless responsible for the safety of any non-employee who enters their mine site. The county employees were not directly employed by Meyer, but the stockpile where the men were working was located on the mine site. Section 46.2 defines "mine site" as "an area of the mine

where mining operations occur" and the extraction, crushing and screening of the gravel constituted mining operations. *See* 30 C.F.R. § 46.2(f) and (h). Meyer excavated the gravel from the pit and used the stockpile to store the product for sale and transport. Tr. 21:17-20. The stockpile was located on the mine site and near the pit. Tr. 43:5-11. Thus, Meyer was responsible for ensuring the safety and proper training of non-employees that entered the Mine site and therefore, the failure to provide hazard recognition training violated the standard.

The violation is properly designated as S&S and the result of moderate negligence. I have found a violation of a mandatory safety standard. The standard is designed to give persons who are non-employees and not familiar with the mine, a brief overview of the various hazards that may be present on the mine site. Not being trained is a hazard in itself and could result in a serious accident because the county employees would be unable to recognize the dangers posed by the stockpile or the areas and equipment around the stockpile. An untrained person, unfamiliar with the surroundings, is likely to be involved in an accident. Such an accident would be reasonably likely to result in permanently disabling or in fatal injuries. Friedt testified that he was not aware that he should have trained the miners, even though they were working on the mine site near the stockpile. Though Foreman Friedt thought that the county employees were experienced, he still should have required the employees to undergo site-specific training for unloading material from the stockpile and while working around the mine's equipment or travelling through its areas. Thus, I uphold the S&S and moderate negligence violations and assess a penalty of $142.00.

H. Citation No. 8932505 (CENT 2016-243)

On January 13, 2016, Inspector Lindeman visited the Plant 2 Mine near the Reich Pit. Tr. 13. During the inspection, Meyer was preparing to re-locate the Plant. Tr. 110: 10-15. Lindeman observed that the road entering the mine between the pit and the stockpile was not bermed. Tr. 111:3-5. Lindeman testified that the unbermed area was approximately 150 feet long and 22 feet wide with a drop-off of six feet. Tr. 111, 114. The road was the main road to reach the mine equipment. Tr. 120:14-17, 129:11-16. Lindeman was concerned that a person entering the mine coming around the stockpile could drive off the road and into the pit. Tr. 115:8-16. He cited the mine for a violation of 30 C.F.R. § 56.9300(a), which requires that "Berms or guardrails shall be provided and maintained 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." Lindeman designated the violation not S&S and the result of moderate negligence. Ex. G-22. The Secretary proposed a penalty of $100.00.

The plain language of section 56.9300(a) requires the judge to decide (1) whether 'a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment,' and if so, (2) whether any berms or guardrails exist." *See Lakeview Rock Products, Inc.*, 33 FMSHRC 2985, 2988 (Dec. 2011). Neither the testimony nor the photographic evidence leaves any doubt that no berm existed on the roadway in question. In addition, the witnesses explained that there was a drop-off sufficient to cause a vehicle to overturn or endanger persons in equipment. The photograph shows that the unbermed section was about 150 feet long with a drop-off of six feet. Were a vehicle to drive too close to the unbermed area, the grade of the

drop-off was steep enough to cause a vehicle to roll or endanger the miner operating the vehicle. *See* Tr. 115:8-16.

Meyer argues that the steep grade could not cause a vehicle to overturn because nobody was present at the mine while the work was being completed. Arnold Friedt operates equipment and has worked at the mine for three years. Tr. 123:10-21, 124: 10-12. Friedt was in a dozer doing reclamation work at the end of the pit and knocking down the berm when the inspection began. Tr. 125:12-17. He testified that he was filling in the area below the berm so that there would be no drop-off and was in the process of sloping the area. Tr. 126:13-18. The plan was to finish sloping the area and reset the Plant on the other side before anyone else arrived in the area. Tr. 128:20-23.

However, Mr. Friedt admitted during cross-examination that other miners were due to return to the mine site shortly and that the road would not have been sloped down by the time of their arrival. Tr. 129:17-130: 13. Further, the road at issue was the entrance to the mine site and was elevated. Anyone coming in and out of the mine site used the road. The toilet and fueler were both located off of the road and the miners would have gone back and forth along the road to use these facilities. Tr. 113:3-19. Tire tracks are visible in the photograph and indicate that the road was used frequently and recently. Ex. G-23. While the employees were aware of the missing berm and parked in a safe zone, Meyer did not put up any signs or barricades to prevent anyone unfamiliar with the mine site from entering the property while work was ongoing. Tr. 113:14-17. I find that a violation has been shown.

I also find Lindeman's moderate negligence and non-S&S designations to be appropriate. While no berm was in place and the drop-off could cause a vehicle to overturn or cause danger to equipment, the miner was working on the area and did not expect anyone other than employees to travel the area. The mine was not expecting the fuel man or the toilet cleaner at that time and thus the exposure was limited. I therefore uphold the citation as written and assess the proposed $100.00 penalty.

III. PENALTY

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. It shows no violations in the 15 month period. 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 each citation. Based upon my consideration of the penalty criteria, I find the following penalties to be appropriate.

Citation No.	**Originally Proposed Assessment**	**Settlement Amount**	**Modification**
Docket No. CENT 2016-73			
8933005	$100.00	--	Vacate.
Docket No. CENT 2016-74			
8933001	$2,000.00	$2,000.00	None.
Docket No. CENT 2015-654			
8933002	$100.00	$100.00	Modify to low negligence.
8933003	$100.00	$100.00	None.
8933006	$100.00	$100.00	None.
8933007	$142.00	$142.00	None.
Docket No. CENT 2015-655			
8933004	$2,000.00	$1,200.00	Remove Unwarrantable Failure Designation.
Docket No. CENT 2016-243			
8932505	$100.00	$100.00	None.

GRAND TOTAL	**$4,642.00**	**$3,742.00**	

IV. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $3,742.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

Distribution: (U.S. First Class Certified Mail)

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