FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. LAKE 2011-1029-M
Petitioner,	:	A.C. No. 11-02963-263549
	:	Mine: Northern Illinois Service Co.
v.	:	Portable Mine #1 (Blackrock Quarry)
	:	Docket No. LAKE 2012-0161-M
	:	A.C. No. 11-03104-272174
NORTHERN ILLINOIS SERVICE COMPANY,	:	Mine: Northern Illinois Service Co.
Respondent.	:	Portable Mine #2 (Bedrock Quarry)

DECISION

Appearances: Sean J. Allen, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, CO, for Petitioner;

Peter DeBruyne, Esq., Peter DeBruyne, P.C., Rockford, IL, for Respondent.

Before: L. Zane Gill, U.S. Administrative Law Judge

These cases arise from a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Northern Illinois Service Company's ("NISC") portable rock crushing plants near Rockford, IL, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or "Act"). They comprise 11 alleged violations distributed between the two captioned dockets. The Secretary proposed a total penalty of $6,756.00. The parties presented testimony and documentary evidence at a hearing held in Rockford, IL, starting on January 8, 2013.

Procedural History

Prior to the hearing, docket LAKE 2011-1029, consisting of Citation Nos. 6555758, 555759, 6555760, 6555761, 6555762, 6555763, 6555764,[1] and 6555766, was consolidated with LAKE 2012-0161, consisting of Citation Nos. 8662246, 8662247, and 8662248. The ten remaining citations were litigated at the hearing.

Stipulations

The parties entered the following stipulations into the record at the hearing:

1. Jurisdiction exists because NISC was an operator of a mine as defined in Section 3(b) of the Mine Act, 30 U.S.C. § 803(b), and the products of the subject mine entered the stream of commerce or the operations or products thereof affected commerce within the meaning and scope of section 4 of the Act, 30 U.S.C. § 803. This issue is not in dispute.

2. This case involves two crushed and broken limestone mines known as Northern Illinois Service Portable Mine No. 1 and No. 2, which is owned and operated by Northern Illinois Service Company.

3. The mines, MSHA ID Nos. 11-02963 and 11-03104, are subject to the jurisdiction of the federal Mine Safety and Health Act of 1977.

4. NISC is an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 803(d), at the limestone mine at which the Citations at issue in this proceeding were issued.

5. The Administrative Law Judge has jurisdiction over these proceedings, pursuant to Section 105 of the Act.

6. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of NISC on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuances, but not for the truthfulness or relevancy of any statements asserted therein.

7. NISC's operations affect interstate commerce.

8. The exhibits offered by Respondent and the Secretary are stipulated to be authentic, but no stipulation is made as to their relevance or the truth of the

[1] Citation No. 6555765 was issued with the other citations in this docket but was vacated on April 20, 2012. (Resp. Post-Hearing Brief, pg. 1)

matters asserted therein. Additionally, both parties maintain the right to object to exhibits not produced in discovery.

The Citations

- **Citation No. 6555758** (Exhibit GX-1; Docket LAKE 2011-1029) was issued on June 22, 2011, and alleges a 104(a) violation of 30 CFR § 56.12004, which requires that electrical conductors exposed to mechanical damage be protected. This citation is characterized as unlikely to cause injury, potentially affecting a single miner, and arising from moderate negligence. The Secretary proposed a penalty of $108.00.

- **Citation No. 6555759** (Exhibit GX-3; Docket LAKE 2011-1029) was issued on June 22, 2011, and alleges a violation of 30 CFR § 57.14107(a), which requires that moving machine parts be guarded to protect persons from contacting moving parts that can cause injury. This citation is characterized as unlikely to cause injury, potentially affecting a single miner, and arising from moderate negligence. The Secretary proposed a penalty of $807.00.

- **Citation No. 6555760** (Exhibit GX-5; Docket LAKE 2011-1029) was issued on June 22, 2011, and alleges a violation of 30 CFR § 47.44(b), which requires that operators mark temporary, portable containers not emptied at the end of each shift with the common name of the contents. This citation is characterized as unlikely to result in injury, lost workdays, or restricted duty, as potentially affecting a single miner, and arising from moderate negligence. The Secretary proposed a penalty of $108.00.

- **Citation No. 6555761** (Exhibit GX-7; Docket LAKE 2011-1029) was issued on June 22, 2011, and alleges a violation of 30 CFR § 56.14100(b), which requires that defects on any equipment, machinery, or tools that affect safety be corrected in a timely manner to prevent the creation of a hazard to persons. This citation is characterized as reasonably likely to be fatal, potentially affecting a single miner, S&S, arising from moderate negligence. The Secretary proposed a penalty of $1,795.00.

- **Citation No. 6555762** (Exhibit GX-9; Docket LAKE 2011-1029) was issued on June 22, 2011, and alleges a violation of 30 CFR § 56.14132(a), which requires that manually operated horns or other audible warning devices on self-propelled mobile equipment be maintained in functional condition. This citation is characterized as unlikely to be fatal, potentially affecting a single miner, and arising from high negligence. The Secretary proposed a penalty of $1,203.00.

- **Citation No. 6555763** (Exhibit GX-10: Docket LAKE 2011-1029) was issued on June 22, 2011, and alleges a violation of 30 CFR § 56.14130(i), which requires that seat belts be maintained in functional condition and replaced when necessary to assure proper performance. This citation is characterized as being reasonably likely to be fatal, S&S,

and arising from moderate negligence. The Secretary proposed a penalty of $1,795.00.

- **Citation No. 6555764** (Exhibit GX-13: Docket LAKE 2011-1029) was issued on June 22, 2011, and alleges a violation of 30 CFR § 56.9300(a), which requires that berms or guardrails be provided and maintained on the banks of roadways which drop off enough to cause a vehicle to overturn or endanger persons in equipment. This citation is characterized as being reasonably likely to result in lost workdays or restricted duty, affecting a single person, S&S, and arising from moderate negligence. The Secretary proposed a penalty of $540.00.

- **Citation No. 6555766** (Exhibit GX-15: Docket LAKE 2011-1029) was issued on June 23, 2011, and alleges a violation of 30 CFR § 46.9(b)(5), which requires that training records be kept and include MSHA Form 5000-23, containing a statement by the person designated in the MSHA-approved training plan and certifying that the miner in question has received periodic training as required by the training plan. This citation is characterized as a paperwork violation arising from low negligence. The Secretary proposed a penalty of $100.00.

- **Citation No. 8662246** (Exhibit GX-20: Docket LAKE 2011-0161) was issued on September 27, 2011, and alleges a violation of 30 CFR §56.12006, which requires that electrical distribution boxes have a disconnecting device for each branch circuit which is appropriately labeled so that it can be visually checked to see if a device is open and the circuit is de-energized. This citation is characterized as unlikely to result in lost workdays or restricted duty, potentially affecting a single person, and arising from moderate negligence. The Secretary proposed a penalty of $100.00.

- **Citation No. 8662247** (Exhibit GX-22: Docket LAKE 2011-0161) was issued on September 27, 2011, and alleges a violation of 30 CFR §56.4201(a)(1), which requires that fire extinguishers be visually inspected at least once a month to determine that they are fully charged and operable. This citation is characterized as unlikely to result in lost workdays or restricted duty, potentially affecting a single person, and arising from moderate negligence. The Secretary proposed a penalty of $100.00.

- **Citation No. 8662248** (Exhibit GX-24: Docket LAKE 2011-0161) was issued on September 28, 2011, and alleges a violation of 30 CFR §56.12028, which requires that electrical grounding system be tested periodically and records be kept for inspection. This citation is characterized as unlikely to result in and injury but the injury could be fatal, potentially affecting a single person, and arising from moderate negligence. The Secretary proposed a penalty of $100.00.

Background Facts

The citations from LAKE 2011-1029 were issued by MSHA inspector Thomas Heft on June 22 and 23, 2011.[2] Those from LAKE 2012-0161 were issued on September 27 and 28, 2011. NISC mines and produces aggregate products from two locations near Rockford, IL. The two mine properties are identified in the record as Portable Mine No. 1 and Portable Mine No. 2. The mines had been idle for some time prior to June 22, 2011, and NISC personnel had just begun the process of examining for items needing attention prior to resuming mining when Heft appeared at the site to conduct his inspection on June 22, 2011.

Analysis

Common Legal Standards

Negligence

Section 110(i) of the Mine Act requires that in assessing penalties the Commission must consider, among other criteria, whether the operator was negligent. 30 U.S.C. § 820(i). Each mandatory standard carries an accompanying duty of care to avoid violations of the standard. An operator's failure to satisfy the appropriate duty can lead to a finding of negligence. In this type of case, we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64. *See also, Nacco Mining Co.*, 3 FMSHRC at 848, 850-51(Apr.1981) (construing the analogous penalty provision in 1969 Coal Act where a foreman committed a violation), *cited in A. H. Smith Stone Company,* 5 FMSHRC 13 (Jan.1983).

Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required [...] to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* "MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices." *Id.* Reckless negligence is present when "[t]he operator displayed conduct which exhibits the absence of the slightest degree of care." *Id.* High negligence is when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* Moderate negligence is when "[t]he operator knew or should

[2] LAKE 2011-1029 comprises the following citations: Citation Nos. 6555758, 6555759, 6555760, 6555761, 6555762, 6555763, and 6555764 were issued on June 22, 2011; Citation No. 6555766 was issued on June 23, 2011. LAKE 2012-0161 comprises three citations. Nos. 8662246 and 8662247 were issued on September 27, 2011, andCitation No. 8662248 was issued on September 28, 2011.

have known of the violative condition or practice, but there are mitigating circumstances." *Id.* Low negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* No negligence is found when "[t]he operator exercised diligence and could not have known of the violative condition or practice." *Id.*

Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U .S.C. § 820(i), is most often viewed in terms of the seriousness of the violation. *Sellersburg Stone Co.,* 5 FMSHRC 287, 294-95 (March 1983), *aff'd,* 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.,* 9 FMSHRC 673, 681 (Apr. 1987). The seriousness of a violation can be evaluated by comparing the violated standard and the operator's conduct with respect to that standard in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.,* 12 FMSHRC 134, 140 (Jan. 1990) (ALJ). The Commission has recognized that the determination of the likelihood of injury should be made assuming continued normal mining operations without abatement of the violation. *Consolidation Coal Co.,* 8 FMSHRC 890, 899 (June 1986).

However, the gravity of a violation and its significant and substantial ("S&S") nature are not the same. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.,* 18 FMSHRC 1541, 1550 (Sept. 1996). The gravity analysis can include the likelihood of an injury, but should focus more on the potential severity of an injury, and the number of miners potentially injured. The analysis should not equate gravity, which is an element that must be assessed in every citation or order, with "significant and substantial," which is only relevant in the context of enhanced enforcement under Section 104(d). *See Quinland Coals Inc.,* 9 FMSHRC 1614, 1622 n. l (Sept. 1987).

Significant and Substantial

It is clear in the Mine Act that because negligence and gravity, which are delineated in 30 C.F.R. § 100.3 and related tables, apply to all citations and orders, the enhanced enforcement provisions set out in Section 104(d) contemplate something distinct and more, when talking about S&S and unwarrantable failure. The Secretary must prove negligence and gravity for all citations and orders. In order to invoke the enhanced enforcement provisions in Section 104(d), he must also prove that the circumstances of the violation satisfy both the S&S and unwarrantable failure standards. If the Secretary fails to prove both, there can be no enhanced enforcement. Thus, the Secretary has to prove four distinct elements when the enhancement scheme in Section 104(d) is alleged: (1) negligence; (2) gravity; (3) "significant and substantial;" and (4) "unwarrantable failure."

Significant and Substantial

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Federal Mine Safety and Health Review Commission ("Commission") explained:

> 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.

Id. at 3-4.

In *U.S. Steel Mining Co.,* 7 FMSHRC 1125 (Aug. 1985), the Commission held:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." [. . .] We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial."

Id. at 1129 (emphasis in original) (citations omitted).

The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *See Texasgulf, Inc.,* 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.,* 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC,* 195 F.3d 42 (D.C. Cir. 1999)

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 the "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties 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 said penalty. 29 C.F.R. § 2700.28.

Under Section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith in abatement of the violative condition. 30 U.S.C § 820(i). Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co.*, 736 F.2d at 1151-52 ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties ... we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."); *See American Coal Co.*, 35 FMSHRC 1774, 1819 (July 2013)(ALJ Zielinski).

The Commission has repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g.,* 293 *Sellersburg Stone Co.*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000) (citations omitted). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622.

Discussion

Citation No. 655758

Inspector Heft issued Citation No. 6555758 under 30 C.F.R. § 56.12004 alleging that the operator failed to protect an electrical conductor exposed to mechanical damage. (Tr.1 at 53, Ex. GX-1) Heft testified that he found an orange 110 volt power cable along the scale conveyor. (Tr.1 at 54, 60) The outer jacket of the cable was torn exposing the inner insulated conductors. (Tr.1 at 54) The exposed area of the power cable was approximately one half inch long, and the power cable was thirty inches above the ground. (Ex. GX-1; Ex. GX-2) Heft concluded that the breach in the cable's outer jacket exposed the inner electrical conductors to possible mechanical damage such as "equipment, material, weather, and UV radiation." (Tr.1 at 54; Ex. GX-1) Heft surmised that water could get inside the power cable through the jacket tear, dirt could corrode the cable, rocks could fall from the scale conveyor and strike the cord, clean up equipment such as the skid-steer could contact the cable, or the vibration of the scale conveyor could further damage the cable. (Tr.1 at 56; Tr.2 at 42-43)

Heft concluded that the breach in the cable jacket was a safety hazard because there was only a thin layer of insulating material left on the inner conductors (Tr.1 at 57) which, with further deterioration, could cause pinholes or bare sections to develop in the inner conductors. *Id.* This could expose any miner coming in contact with the cable to electrical shock. (Tr.1 at 57, 61) Also, an exposed inner conductor could energize the conveyor scale's metal frame and possibly shock any miner coming in contact with it. *Id.* Heft testified that a jolt from the 110 volt cable could cause electrical shock, burns, or electrocution, which in turn could result in lost work days or restricted duty. *Id*

Brian Russell testified on behalf of NISC that there was always at least one person loading trucks with the sales loader at Mine No. 1 and Mine No. 2 from April to December each year. (Tr.2 at 131) Russell testified that Mine #1 only crushed product about 15 days per year (Tr.2 at 50, 55-57), but that limestone had been mined and crushed during the period from a year before Heft's inspection to a year after. (Tr.2 at 130-131) Russell confirmed that the crusher, generator, three screens, and four or five conveyor belts were in operation when Heft did his inspection. (Tr.2 at 86) Russell stated that he had visually inspected the power cable in question here, but had not turned it over to see all angles. (Tr.2 at 75-77) Russell looked for cuts, abrasions, and kinks in the cable to make sure the outer jacket wasn't cracked (Tr.2 at 76), but admitted that the compromised portion of the jacket was facing down when Heft found it. (Tr.2 at 88-89)

The Violation

NISC argued that the fact that Mine No.1 was just being resurrected from its winter break should affect my assessment of whether the defect in the 110 volt cable in question here constituted a violation of 30 C.F.R. § 56.12004. (Resp. Brief at 8; Tr.1 at 16) Its argument raises a point of equity not pertinent to the strict liability nature of the Mine Act and its implementing regulations. *See, Allied Products Inc.,* 666 F.2d 890, 892-93 (5th Cir.1982). It may well be that time did not allow NISC to thoroughly examine all of its equipment and grounds prior to resuming operations the day before Heft's inspection, or that had they only had another day or two before Heft's inspection, they would have been able to work their way from the most important safety concerns to those a bit lower on their list. But NISC had notified MSHA that they had resumed operations (Tr.1 at 146-147; 208), and Mine No.1 was in partial production on the day of the inspection. (Tr.2 at 332) These factors might weigh against a finding of higher negligence, but they have no bearing on the existence of a violation.

There is no dispute that Inspector Heft found a defect in the 110 volt cable or that the defect exposed the inner, current-carrying cables to ambient conditions. Assuming normal and continuing mining operations, even factoring in the twenty-five or less production days during a normal work year, it is reasonably likely the breach in the outer insulation would cause the insulation on the inner conductors to fail due to the effects of weathering and/or friction. This is a violation of the standard's requirement that "[e]lectrical conductors exposed to mechanical damage [. . .] be protected." 30 C.F.R. § 56.12004.

Negligence

The Secretary argued for a finding of moderate negligence. Moderate negligence requires that the operator knew or should have known of a violating condition, but there are mitigating circumstances, albeit less weighty than what is contemplated in conjunction with a finding of low negligence. Low negligence is defined as the situation in which the operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.

Russell testified that he walked along the conveyors and visually checked all power cables, but he did not handle them. (Tr.2 at 75-77) NISC knew (through its management) that it had to check all power cables in the mine for damage. *Id.* Despite this, Inspector Heft found the break in the outer cable insulation that Russell had missed. I credit Russell's testimony that he had checked the cable in question. This is evidence of mitigation. I also consider the fact that NISC had not gotten to every inspection item on its first day of resumed operation, and they gave priority to more pressing inspection issues as further evidence of mitigation. (Tr.2 at 86) I conclude that low negligence is the appropriate category.

Gravity

NISC does not contest Heft's gravity assessment specifically. It does argue that the citation should be vacated because there was no evidence of compromise to the insulation on the inner conductors, and the break in the outer insulating jacket does not make out a violation, or in the alternative, if it could, exposure to the elements does not constitute exposure to "mechanical damage" as specified in 30 CFR § 56.12004. NISC also alleges that over the evening between the first and second days of hearing, Heft came up with an alternate theory of how the "scabbing" he found on the cable jacket amounted to mechanical damage. I see nothing untoward in Heft's additional explanation about his enforcement theory, however, I do see evidence that supports the Secretary's gravity allegation. Heft noted on Exhibit GX-1 that the inner insulation was intact and that the cable was not adjacent to a travel way, but testified that in time the cable could continue to wear from the elements, exposure to moving equipment and falling rocks, and mechanical vibration to the point where current could short to the frame of the scale conveyor. (Tr.2 at 142-43) This is consistent with his allegations in Exhibit GX-1 that it was unlikely that an injury would occur, but that if it did happen, it could result in lost workdays or restricted duty to a single miner. I conclude that the gravity was as alleged by Heft in Exhibit GX-1.[3]

Penalty

The Secretary assessed the penalty for this citation as $108.00. I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected by prior violations, the negligence points, the likelihood points, and the good faith point reductions. Because I have found low negligence instead of moderate negligence, the point calculation in 30 CFR § 100.3 results in a penalty of $101.00. I assess a penalty of that amount.

[3]Heft did not designate this violation as S&S or an unwarrantable failure to comply with the requirements of the standard.

Citation No. 6555759

Inspector Heft issued Citation No. 6555759 under 30 C.F.R. § 56.14107(a) when he found an unguarded opening on both sides of the Roadstone stacker conveyor's tail pulley, measuring approximately four inches by six inches and situated about 16 inches above the ground. (Tr.1 at 67-69; Ex. GX-3; Ex. GX-4) The Roadstone stacker was in operation, and the tail pulley was in motion. (Tr.1 at 67-68; Ex. GX-3) A person could walk right up to the opening in the guard. (Tr.1 at 69) The opening was large enough for a person's hand to fit through it. (Tr.2 at 92-93) Heft concluded that if a person tripped and fell and a hand were to pass through the opening, it could come in contact with the moving tail pulley, which could pull the hand and arm into the stacker and cause dismemberment. (Tr.1 at 70:6-7) Heft stated that the condition was not open or obvious, but NISC should have known of it because of its duty to affirmatively look for safety and health hazards. (Tr.1 at 71) The guard on the Roadstone stacker was original equipment. (Tr.2 at 92)

The Violation

There was a guard in place on the stacker which did not cover the entire opening to the tail pulley area. The unguarded openings were large enough for a person's hand to pass through. 30 C.F.R. § 56.14107(a) applies to moving parts that may be contacted, "including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Thompson Bros. Coal,* 6 FMSRHC 2094, 2097 (Sept. 1984); (*Thompson* was incorporated by reference for 30 C.F.R. § 56.14107 in *Mainline Rock and Ballast, Inc.,* 693 F.3d 1181, 1186 (10th Cir. 2012)) Heft testified that he was able to walk up to the openings and could have put his hand through them. (Tr.1 at 69-71) Foreman Russell also stated that when he greased the machine, he put his hand through the opening after first turning the stacker off. (Tr.2 at 92-93) A look at the photo of one of the openings in Exhibit GX-4 confirms this.

I find that however unlikely it was that a person would actually get a hand through the unguarded opening, there was still a discernable hazard that exactly such a mishap could occur. NISC should have anticipated this eventuality and taken steps to guard the entire opening. The failure of the existing guard to prevent a miner's hand from coming in contact with the moving tail pulley violates the standard.

The fact that previous inspections had not cited this defect is of no avail to NISC, nor does it require that MSHA give specific prior notice, as argued in NISC's post-hearing brief, before enforcing 30 C.F.R. § 56.14107, as it did here for the first time on this mine property. The test for prior notice of intent to enforce is whether a reasonable person familiar with the mining industry, the protective purpose of the Mine Act and its implementing regulations, and how MSHA disseminates its interpretation of its regulations should have discerned the need to guard the machine part in question here. *See Alan Lee Goodf d/b/a Good Construction,* 23 FMSHRC 995, 1005 (Sept. 2001), *MSHA v. Holcomb & Co.,* 33 FMSHRC 1435, (June 2011) (ALJ Manning), and *Higman Sand & Gravel Inc.,* 24 FMSHRC 87 (Jan. 2002) (ALJ Manning). As

pointed out in the Secretary's Post-Hearing Reply Brief, NISC was cited for violations of this same standard seven times in the two year period preceding Inspector Heft's citation here. NISC was or had reason to be aware of MSHA's enforcement intent with regard to this standard. As Judge Manning explained in his decision in *MSHA v. Holcomb & Co.*, "[t]he regulatory history of section 56.14107(a) makes clear that the Secretary provided notice to the mining community that [he] interprets the safety standard very broadly to protect persons from coming into contact with moving machine parts and that the standard covers inadvertent, careless, or accidental contact." (Internal citation omitted.) 33 FMSHRC at 1439.

Negligence

The citation alleges moderate negligence which requires that the operator knew of should have known of the violating condition, but there are mitigating circumstances. 30 CFR § 100.3(d), Table X. In addition, operators must be charged with knowledge of the Mine Act and have a duty to comply with those provisions. *Emery Mining Corp.*, 744F.2d 1411, 1416 (10th Cir. 1984) (citations omitted); *Central Sand and Gravel Co.*, 22 FMSHRC 779 at n. 4 (June 2000)(ALJ Barbour) ("It is the duty of each operator to have a thorough, working knowledge of the code's contents and applications.")

NISC should have known it was accountable for ensuring that all moving machine parts were guarded. It knew that this tail pulley could be contacted because Foreman Russell had put his hand into the gap in the guard on previous occasions to grease the Roadstone stacker. (Tr.2 at 92-93) However, the fact that the likelihood of a miner accidentally getting a hand or other appurtenant part into the gap in the guard was very remote mitigates against a finding of anything more than moderate negligence. Similarly, any adjustments to change the positioning of the tail pulley were done from a location a foot and a half from the opening. (Tr.2, at 95). I conclude that NISC's negligence was moderate.

Gravity

NISC does not specifically contest Heft's characterization of the gravity of this violation, viz., unlikely to cause injury and potentially affecting a single miner. It does challenge in general the fairness of MSHA issuing citations for conditions that might have arisen over the winter production break and that NISC had not yet gotten around to fixing on its first day of resumed operations. (Resp. Post-Hearing Brief, pgs. 6-7) This violation, however, involves the lack of guarding on a piece of equipment, a condition which did not arise during the winter break. NISC points out in defense of this citation that the guarding on the Roadstone stacker came from its manufacturer in the condition Inspector Heft found. (Tr.2 at 92) NISC also argues that the only time anyone ever inserts a hand into the unguarded gap is to perform periodic lubrication maintenance, which is only done when the entire stacker conveyor is shut down. (Tr.2 at 93) It is not necessary to use the unguarded gap to adjust the tail pulley. (Tr.1 at 242) I am also aware that Inspector Heft noted in his narrative on the citation form that "[t]he condition is not along a regular travel way," and that given the fact that the stacker came equipped as cited,

"[t]he operator did not recognize the hazard." (Ex. GX-3) The evidence of the gravity of this violation is consistent with Heft's finding, and I concur.

Penalty

The Secretary recommends a penalty for this citation of $807.00. I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected by prior violations, the negligence points, the likelihood points, and the good faith point reductions. I assess a penalty of $807.00, as the Secretary has recommended.

Citation No. 6555760

Violaton

On June 22, 2011, Inspector Heft issued Citation No. 6555760 for failure to mark a portable container with the common name of its contents. (Tr.1 at 73-78) Heft found an unlabeled, partially full, portable container in the back of a NISC service truck. (Tr.1 at 75) The photo in Ex. GX-6 confirms that the container was not labeled. Heft concluded that because the container was in the bed of service truck on the mine premises, it was available for use. (Tr.2 at 43 and 75) Foreman Russell told Heft he had been driving the service truck for two days. (Tr.1 at 77; Ex. GX-18, pg. 7) Heft concluded that the container was being used to transfer hydraulic oil, not as a permanent container. (Tr.1 at 77-79) Foreman Russell told Heft that the container had been in the service truck since Russell had taken the truck from another site, and that he did not know the container was partially full or unlabeled. (Tr.1 at 79; Ex. GX-5, pgs. 3-4) Heft concluded that the unlabeled container was a safety hazard because a miner could contact a hazardous substance (the hydraulic oil) in the container and would not know what precautions to take. (Ex. GX-5, pg. 3) Heft also believed the container was a safety hazard because it contained hydraulic oil, a petroleum product which could cause skin and eye irritation and result in lost work day injuries. (Tr.1 at 79; Ex. GX-5, pg. 3)

Foreman Russell testified that he had taken the truck to Mine No. 1 for the first time the day before Heft's inspection. (Tr.2 at 80) The truck was owned by NISC. (Tr.2 at 134) The truck was used at this mine site only long enough to start the machinery after the winter pause. (Tr.2 at 137) Russell did not put the container in the truck; a mechanic did. (Tr.2 at 96; 136-137) The container was in the truck at the beginning of Russell's shift on June 22, 2011. (Tr.2 at 136-137) Neither Russell nor the other miner on site used the container before the inspection. (Tr.2 at 96) Russell testified that the hydraulic oil was used on equipment at Mine No. 1. (Tr.2 at 96-97; 134-135)

NISC argues three points against this citation: (1) the cited standard only applies if the contents of the portable container are actually used (Resp. Post-Hearing Brief at 14); (2) the

Secretary failed to prove that the hydraulic oil in the container was hazardous (*Id.* at 15); and (3) the truck was primarily used at non-mine locations and was only used by Russell in this case to travel to Mine No. 1 at the beginning of this shift and was parked on mine premises the rest of the time. *Id.*

None of the Respondent's arguments is convincing. First, even assuming *arguendo* that NISC's syntactic logic truly meant that in order for the standard to apply, the portable container must actually be used by a miner, its language would also require that for the labeling requirement not to apply, the miner using the container must not only know the identity of the contents and its related protective measures, he must also leave the container empty at the end of the shift. The purpose of a temporary container is to contain something for a time. Whether the material in the container is used at all is only a secondary consideration. The gravamen of the standard is that it is permissible to use a portable container for temporary storage, and it need not be labeled if it is left empty at the end of the shift, regardless of whether the contents are used during the shift. The "use" that is central to this standard is the use of the portable container to contain a potentially hazardous material, not whether a miner actually uses the material. This container was not left empty at the end of the previous shift. Therefore, one of the necessary elements needed for NISC's logic to apply was unsatisfied. The container was not emptied at the end of the prior shift – it was found containing hydraulic oil during the inspection shift – which means that one condition necessary for it not to be labeled did not exist. (Tr.1 at 252) It contained hydraulic oil during the shift and on mine premises; it was being used by Russell for its intended purpose, i.e., to temporarily contain something. Russell testified that he knew that the container was in the service truck he had driven for a day or two and that he knew it contained hydraulic oil. (Tr.2 at 96-98) The elements of the standard, written in the negative as it is, that would excuse the obligation to label the temporary container were not present. What remains is the use of an unlabeled temporary container to hold an arguably hazardous material while on mine premises. It is irrelevant whether the contents were used.

Second, Heft testified that hydraulic oil is hazardous. (Tr.1 at 79; 253) In its cross examination of Heft, NISC referred to a document entitled 1999/45/E.C. (Resp. Post-Hearing Brief at 15), which from its context seems to support the notion that hydraulic oil is not hazardous to humans. Heft did not acknowledge the authority of this document, nor was it entered into evidence. As a result, the court may not recognize it for the purpose NISC intended. The only evidence in the record on the issue of whether hydraulic oil is hazardous is Heft's testimony that it is, in his opinion. I find that for purposes of determining whether 30 CFR § 47.44(b) was violated in this case, hydraulic oil is hazardous.

Third, the service truck was on mine premises with the unmarked container in its bed when Heft did his inspection and wrote this citation. (Ex. GX-5) I credit the fact that Russell used the service truck to come to Mine No. 1 from another location and parked it on the mine premises once he got there. (Tr.2 at 81-82) I also credit the fact that the service truck was used at non-mine locations some of the time and had been used at such a non-regulated location during the winter pause. (Tr.2 at 79-80) It is also undisputed that the service truck sat parked close to

the mine shop when Russell was not using it to drive around the mine site. (Tr.2 at 81-82) None of this changes the fact that at the time of Heft's inspection, the service truck was on the Mine No.1 premises, which were subject to MSHA regulation and inspection, and it had the unmarked container in its bed. These facts are relevant to the negligence and gravity findings, but they do not obviate the violation of 30 CFR § 47.44(b). I find that a portable, temporary storage container was found unmarked in the bed of the service truck while it was on mine premises and conclude that this makes out a violation of the standard.

Negligence

Inspector Heft appropriately categorized this violation at the level of moderate negligence. Russell had driven the service truck on more than one shift and had brought it onto mine property each time with the unmarked container in the bed. NISC knew or should have known of the violating condition. As above, the brief time the mine had been back in operation after the winter break mitigates against a higher level of negligence. I concur in Heft's negligence assessment and find that the violation was the result of moderate negligence.

Gravity

Inspector Heft concluded that this violation was "unlikely" to cause injury, and that the potential injury would result in lost workdays or restricted duty and involve a single miner. (Ex. GX-5) Heft testified that the potential injury would be skin or eye irritation. (Tr.1 at 79) Hydraulic oil would most likely not cause a more serious injury if a miner got it on his skin. I concur with Heft's gravity assessment.

Penalty

The Secretary recommends a $108.00 penalty for this citation. I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected by prior violations, the negligence points, the likelihood points, and the good faith point reductions. I assess the recommended penalty of $108.00.

Citation No. 6555761

Inspector Heft issued Citation No. 6555761 on June 22, 2011, for an alleged failure to correct a defective acetylene torch gauge in a timely manner. (Tr.1 at 81) Heft found an acetylene torch on the same service truck discussed above. (Tr.1 at 84-85) He observed that the pressure gauge on the acetylene tank read 15 psi (pounds per square inch). (Tr.1 at 85) He released the pressure to the gauge by a process he called "bleeding off," and expected to see the gauge reading to go from 15 psi to zero. (Tr.1 at 86) It did not; it stayed at 15 psi, which Heft interpreted as evidence that the gauge was not functioning properly. (Tr.1 at 85-87) Heft was

aware that if pressure in the tank exceeded 15 psi, acetylene could ignite spontaneously without an ignition source. Without a functioning pressure gauge, which would show an excess pressure reading in a red zone on its dial, there is no way a miner would know to take extra precautions to avoid an explosion. (Tr.1 at 89-93) The acetylene torch was not being used at the time of the inspection, but Foreman Russell told Heft that the torch had been used earlier in the day. (Tr.1 at 88-89, Ex. GX-7)

Heft classified this situation as S&S. He believed that it was reasonably likely to result in an injury because: (1) the torch was available for use; (2) it was not tagged out of service; and (3) it had already been used once that day in the defective condition. (Tr.1 at 91-92) Heft also concluded that it was reasonably likely to lead to a fatal injury because there was no way to effectively tell if the pressure because too high, which could cause an explosion. *Id.*

According to the testimony of Foreman Russell, the torch was normally used to cut metal at the NISC recycling plant located off the mine site. (Tr.2 at 98-99) However, Russell also stated that a mechanic working for NISC had used the torch at the Mine No. 1 site earlier in the day. (Tr.2 at 133-134)

NISC argues that the service truck was only used to transport Russell to the Mine No. 1 site, which somehow means that NISC was not obligated to do a pre-shift examination to determine if it or any of the equipment in its bed needed attention. NISC goes on to posit that since it did not consider the service truck subject to the pre-shift examination requirement, it was not obligated to, nor did it otherwise determine that there was a problem with the gauge on the acetylene torch and tank. As a result, there could be no violation of the standard because the standard requires that defects in "self-propelled mobile equipment to be used during a shift" be "corrected in a timely manner," and NISC could not have detected the faulty gauge since they did not consider it, or anything in or on the service truck, something they should inspect pre-shift. They ask how they could have corrected a defect in the acetylene gauge that they did not know about as a result of their interpretation that they did not have to look for any problems with the service truck.

A more perfectly circular argument is hard to find. NISC's argument is facile; it appears neat and comprehensive only by ignoring the clear mandate created by the standard to pre-shift all self-propelled equipment to be used on the mine site, including this service truck and its contents.

NISC compounds things by pointing out a former decision of mine[4] in which I interpreted two standards in *pari materia* [5] such that the one that required a defective piece of equipment to

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[4] *MSHA v. Wake Stone Corp.*, 33 FMSHRC 1205, 2011 WL 2745783. (Currently on appeal to the Commission.)

[5] The general principle of in pari materia, a rule of statutory interpretation, says that laws of the same matter and on the same subject must be construed with reference to each other. The

be tagged out of service not defeat the other which gave the operator the right (and obligation) to discover the defect in a pre-shift examination. In that case, the inspector found a violation before the operator conducted its pre-shift and before the equipment was placed in service. In contrast, NISC argues here that it had no obligation to pre-shift the service truck and thus had no opportunity to discover the defect in the acetylene torch gauge, while at the same time arguing that it was preempted from correcting problem by its own decision not to pre-shift the truck. There, the equipment had not yet been pre-shifted or put in service when the inspection happened. Here, there simply was no pre-shift done or intended, the truck had already been put in service on the mine site, and the faulty acetylene torch had been used on the mine site.

The Violation

NISC put the service truck and the acetylene torch equipment in its bed into service without conducting a pre-shift examination. Heft discovered a defect in the acetylene torch gauge. NISC does not contest the fact that the gauge was defective. The service truck was a piece of self-propelled equipment used on a mine site that had to be pre-shifted and wasn't. As a result, NISC did not know, although it should have, about the defective acetylene gauge, and it did nothing to correct the defect before Heft discovered it during his inspection. This is a violation of 30 CFR § 56.14100(b), which requires that defects on any equipment, machinery, or tools that affect safety be corrected in a timely manner to prevent the creation of a hazard to persons.

There can be no doubt that this violation occurred on a mine site and, as such, arose under the Mine Act.[6] Although NISC argues that the fact that the service truck was used most

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intent behind applying this principle is to promote uniformity and predictability in the law.

[6] Section 4 of the Mine Act provides in part that "[e]ach coal or other mine [. . .] shall be subject to the provisions of this Act." 30 U.S.C. § 803. "Coal or other mine" is defined in section 3(h)(1) of the Act as:

> (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface of underground, used in, or to be used in, or resulting from , the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of

commonly at a facility that was outside MSHA regulation should make a difference in Heft's enforcement decisions, there is no dispute that the defective acetylene torch gauge was located in the service truck bed on the Mine No. 1 site when Heft discovered the defect, and when it was used earlier that day to cut metal.[7] There is no *de minimus* rule that allows this court to exclude from its review the fact that the violating event happened and was discovered on a mine site subject to the jurisdiction of the Mine Act, no matter how little time the service truck was used at the Mine No. 1 site.

Negligence

Heft rated this violation at the level of moderate negligence. This requires that NISC knew or should have known that the acetylene gauge was defective, and that there were mitigating circumstances. NISC should have and could have known about the defective gauge if it had conducted a competent pre-shift examination of the service truck and the items, including the acetylene torch, in its bed. When the miner used the acetylene torch to cut metal earlier in the shift, NISC had a second opportunity to know of the defect in the acetylene torch. (Tr.1 at 88-89; Tr.2 at 133-134; Ex. No. 7, 3) Heft explained that the proper procedure for maintaining an acetylene torch is to bleed off the hose after each use and check that the gauge shows zero pressure. (Tr.1 at 92-93) Had the miner bled off the hose on the torch, he could have discovered the defect and timely done something to remedy it before Heft found it. (Tr. 1 at 257) Heft did not explain in testimony what he considered to be mitigating circumstances. I do not consider anything that happened on June 22, 2011, as mitigation. Heft's assessment of moderate negligence is appropriate.

Gravity

Heft classified this violation as reasonably likely to involve a single miner in a potentially fatal accident. He explained that since acetylene can become volatile and prone to explode without an ignition source at pressures above 15 psi, the faulty pressure gauge prevented a miner from visually determining if there was excess pressure in the system, thus increasing the likelihood of an explosion. (Tr.1 at 91-92) This is a reasonable conclusion; it is not contested by NISC. I concur that as it was found and assuming it would have continued to be used during normal continuing mining activities, the faulty pressure gauge was reasonably likely to result in a fatality. *U.S. Steel Mining Company. Inc.*, 6 FMSHRC 1573, 1574 (1984).

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miners employed at one physical establishment.

30 U.S.C. § 802(h)(1).

[7] NISC does not contend that the location of the violation was excluded from Mine Act jurisdiction. It does mention that the location where the service truck was most often used and stored was not subject to MSHA jurisdiction. However, since the site where the violation occurred and was discovered is clearly under MSHA jurisdiction, this fact means nothing.

Significant & Substantial

The Secretary seeks a ruling that this violation is significant and substantial ("S&S"). If an inspector finds, "based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature," then the violation must be classified as significant and substantial ("S&S"). *National Gypsum Co.*, 3 FMSHRC 822, 825 (1981). To establish that a violation of a mandatory safety standard is S&S, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard, i.e., a measure of danger to safety contributed to by the violation; (3) a reasonable likelihood that the hazard will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC at 3-4.

I have found that NISC's failure to find and remedy the faulty acetylene pressure gauge is a violation of 30 CFR § 56.14100(b). The measure of danger to safety contributed to by the violation was discussed as part of the gravity analysis above, as was the reasonable likelihood that the defective pressure gauge could lead to an explosion from volatile, over-pressured acetylene and result in a fatality. This violation is properly characterized as S&S.

Penalty

The Secretary recommends a $1,795.00 penalty for this citation. I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected by prior violations, the negligence points, the likelihood points, and the good faith point reductions. I have also confirmed that this violation should be subject to enhanced S&S consequences. I assess the recommended penalty of $1,795.00.

Citation No. 6555762

Violation

Inspector Heft discovered that the horn on the service truck did not work and issued Citation No. 6555762 under 30 C.F.R. § 56.14132(a).[8] (Tr.1 at 96; Ex. GX-9) Heft instructed Russell to test the manual horn on the service truck. (Tr.1 at 84-85) The horn did not work. (Tr.1 at 98) Heft testified that a manual horn is a basic safety device to warn inattentive people not to step in front of the truck. (Tr.1 at 98-99) Heft testified that if a person were hit by a Ford F-700 truck, he could suffer a fatal crushing injury. (Tr.1 at 99; Ex. GX-9) Heft considered the

[8] 30 C.F.R. § 56.14132 (a) Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.

likelihood of such an injury unlikely because of the limited foot traffic at the mine site. (Tr.11 at 99-100)

Russell did not check the horn at the beginning of the shift. (Tr.1 at 100; Ex. GX-9; Tr.2 at 137-138) The truck had been on the mine site for two days. *Id.* Heft testified that Russell should have tested the horn as part of the mandatory pre-shift examination of the service truck. Russell had operated the truck for over six hours before Heft issued the citation. (Tr.1 at 101) If a meaningful pre-shift examination had been done, Heft expected that the faulty horn would be noticed and the truck taken out of service until the horn was fixed. (Tr.1 at 102) Heft also testified that he did not find anything about the faulty horn situation that he considered mitigating circumstances. (Tr.1 at 102)

Russell testified that there was no other equipment operating on the mine site when he drove the service truck onto the site. (Tr.2 at 100) The truck was only driven on the mine site when NISC needed to crush limestone. (Tr.2 at 100-104) Russell did not consider the horn to be a real problem because the other mobile equipment on the site was louder than the horn, and everyone on the site wore earplugs. (Tr.2 at 100-103) On further questioning, Russell conceded that the loudness of the equipment was not an excuse for not having a functioning horn on the service truck. (Tr.2 at 137-138)

NISC argues that, for the same reasons cited in relation to the preceding violation, this citation should simply be dismissed. It suggests that because this service truck was used more at sites not subject to Mine Act regulation, Heft should have regarded it as a personal private vehicle rather than a piece of mobile mine equipment. It is not contested that Russell used it to travel to and come onto the mine site to perform his assigned work tasks for NISC. Heft correctly considered the service truck as a piece of self-propelled mobile equipment, irrespective of the possibility that it saw more used on non-regulated sites.

The Commission laid out a clear rule governing this issue in *Wake Stone Corp.*, 36 FMSHRC 825, 828, April 18, 2014, "[S]tandards requiring maintenance in functional condition are enforceable when the cited equipment is not in actual use, unless it has been removed from service." Citing *Ideal Basic Indus.*, 3 FMSHRC 843, 844-45 (Apr. 1981). (Use of a piece of equipment containing a defective component that could be used and which, if used, could affect safety, constitutes a violation.) *Id.* at 844; *See also Alan Lee Good*, 23 FMSHRC at 997 (reinforcing the rule that equipment not tagged out of operation and parked for repairs must be maintained in functional condition, "whether or not the equipment is to be used during the shift."); *Mountain Parkway*, 12 FMSHRC at 963 (relying on *Ideal Basic* and interpreting the term "used" broadly to include equipment that was parked in the mine in turn-key condition and not removed from service).

I find that the service truck was a piece of self-propelled equipment available for use on the mine site and that its manual horn did not work. This was a violation of 30 C.F.R. § 56.14132(a).

Negligence

The citation alleges high negligence for this violation. High negligence is present for MSHA's enforcement purposes when an operator knew or should have known of the violating condition and there are no mitigating circumstances. 30 C.F.R. § 100.3(d), Table X. The court should consider the following factors in finding a high degree of negligence: (1) was management aware of the condition; (2) was the mine on notice regarding the condition; and (3) was the operator complacent in complying with the standard? *See, e.g., Robert L Weaver*, 21 FMSHRC 370, 373 (Mar. 1999)(ALJ Bulluck); *Sangravl Co.*, 33 FMSHRC __, 2011 WL 2286880 at * 4 (May 2011) (ALJ Barbour) ; *Lebanon Quarry & Mill,* 33 FMSHRC 751, 760 (Mar. 2011)(ALJ Miller).

Russell should have, but did not, conduct a pre-shift examination of the service truck. Had he done so competently, he would have checked the horn (as Heft did) and discovered that it obviously did not work. NISC did not argue that it lacked the notice required to give it knowledge of the faulty horn. NISC is expected, as a mining company, to know the law, including the requirement to do a competent pre-shift examination of mobile mine equipment such as this service truck. *See Emery Mining Corp.* 744 F.2d at 1416. NISC cannot claim that it lacked knowledge of the faulty horn because it failed to conduct a pre-shift exam. *See, Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 363 (D.C. Cir. 1997) (stating that "knowing" in the context of section 110(c) includes "deliberate ignorance" and "reckless disregard"). NISC's failure to conduct a pre-shift exam is proof of its complacence about its duty to comply with the standard. Although Russell had used the truck on mine property for two days (Tr.1 at 100), Russell did not even undertake an exam that could have revealed the faulty horn. I find that NISC should have known – and would have known – of the faulty horn had it not ignored the duty to look for defects in the service truck before using it on the mine site. I conclude that Heft's assignment of high negligence was proper.

Gravity

This citation is characterized as unlikely to result in an injury, but if it did, the injury might reasonably be fatal, and potentially affecting a single miner. Due to the fact that the violation occurred in the first days of operation after a winter pause and there was only one other miner on the property at the time (Tr.2 at 100-103), I concur that the lack of a working horn on the service truck was unlikely to result in an injury. I also agree that a truck of this size could cause a fatal accident were it to hit a miner. (Tr.1 at 99)

Penalty

The Secretary recommends a $1,203.00 penalty for this citation. I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons

affected by prior violations, the negligence points, the likelihood points, and the good faith point reductions. I assess the recommended penalty of $1,203.00.

Citation No. 6555763

Violation

Inspector Heft found a torn and frayed seatbelt on a Caterpillar 992G front end loader (Tr.1 at 105; Ex. GX-10) for which he issued Citation No. 6555763 under 30 C.F.R. § 56.14130(i). The standard requires that seat belts be maintained in functional condition and replaced when necessary to assure proper performance. The loader was on the mine site and was in use at the time the citation was issued. (Tr.1 at 107) The photos in Ex. GX-11 show the seat belt tear and fraying. Heft measured the tear to be approximately three-eighths of an inch into the belt. (Tr.1 at 106-107; Ex. GX-11) The frayed portion on the side of the belt was approximately two-and-one-half inches long. *Id.* The belt was a lap belt meant to restrain a person from leaving the seat. (Tr.1 at 108) In Heft's opinion, the seat belt was not functional because of the tear, the thinning from wear, and the frayed edges. *Id.* Heft testified that as he saw it, the seat belt was not in its original manufactured condition (Tr.1 at 108-109), and in the event of a roll-over accident, this degree of wear might be enough to cause the belt to fail to restrain the driver. (Tr.1 at 109) If the belt broke, the operator could be thrown from the loader or bounced around in the cab and fatally injured. *Id.*

Heft felt that the defects in the seat belt made an injury accident reasonably likely. (Ex. GX-10) During continued mining operations, the tear would get worse as shown by the visible tear that had developed in the area where the belt was frayed. (Tr.1 at 109-110) Heft factored in the fact that the loader frequently operated on a ramp near the scale house which was long and fairly steep (Tr.1 at 110:16-17) and that there were other ramps in the quarry the loader used during normal mining operations. (Tr.1 at 110) Heft testified about an MSHA Program Policy Manual source that states that failure to maintain seatbelts is a serious safety hazard and should be cited as significant and substantial under most circumstances. (Tr.1 at 113; Ex. GX-12) Heft testified that the loader operator knew that the belt was torn and frayed, but did not recognize the hazard and did not inform management. (Tr.1 at 120) The tears and fraying were obvious because they were on the main part of the belt which lies on the operator's lap. *Id.*

Russell testified that the seatbelt was still functional because when he drove the same loader on terrain that caused him to bounce around in his seat, he could feel the belt restraining his motion. (Tr.2 at 107:8-11) Russell agreed with Heft that there were 35 to 40 degree slopes at the Mine No. 1 site. (Tr.2 at 107)

NISC argues that Heft should not have determined that the seat belt was non-functional based on the fact that it was not in new condition. It maintains that the Secretary only proved that the belt was somewhat worn, not that it was non-functional. I agree.

The only evidence in the record bearing on the belt's functionality, other than Heft's opinion, is Russell's testimony about the belt holding him in place in the operator's seat as he drove the loader over rough roadways on the quarry site. It is possible that in the event of a rollover accident the belt might fail, but there is no evidence in the record to make that possibility anything more than speculation. The photos in Ex. GX-11 confirm that the belt was frayed and certainly not in factory-new condition, but there is nothing beyond Heft's unsupported conclusion to prove that the belt wear was serious enough to make the possibility of it breaking in a rollover more than conjecture. See, *Ammon Enterprises,* 2008 WL 4190445 at *13 (July 2008)(ALJ Zielinski). (Four inch wide seat belt frayed at edges with a three-quarter inch tear was deemed "functional" by MSHA inspector. Gravity assessment was based on prediction that the belt would fail during a rollover accident. No strength testing done on the belt. Inspector's determinations based solely on his visual examination. Secretary failed to carry burden of proof.)

I conclude that the Secretary failed to prove that this seat belt was non-functional and vacate Citation No. 6555763.

Citation No. 6555764

Violation

Inspector Heft issued Citation No. 6555764 when he discovered that a portion of a berm was missing on the roadway on the west side of the NISC maintenance shop. He noted that there was a drop-off next to the roadway deep enough to cause a vehicle to overturn or endanger persons in equipment that might go over the drop-off. (Tr.1 at 122-123; Ex. GX-13) The photos in Ex. GX-14 show the before and after condition of the edge of the roadway and confirm that a portion of berm was missing. The roadway was approximately twenty feet wide and was used by mobile equipment to access the shop area. (Tr.1 at 125-127) Heft testified that the berm was insufficient along a 36 foot section where the drop-off was approximately five feet. (Tr.1 at 127-128: Ex. GX-13; Ex GX-18) Heft measured the slope of the unbermed area and determined it to be forty percent. (Tr.1 at 129)

Heft characterized the missing berm section as S&S due to the lack of anything along the section of roadway to keep a vehicle on the roadway. (Tr.1 at 131) He concluded it was reasonably likely that a vehicle could go over the edge of the roadway because he observed vehicle tracks within two feet of the edge. (Tr.1 at 126-127; 131; Ex. GX-13) The five foot drop-off and forty percent slope were enough in Heft's assessment to pose a danger to anyone who drove a vehicle over the edge of the roadway. (Tr.1 at 129-130) Heft envisioned a person going over the edge being thrown and banged around inside the vehicle cab (Tr.1 at 130) and suffering cuts, bruises, strains, sprains, and broken bones in the process. (Tr.1 at 130)

There was agreement between Heft and Russell that there had been a berm in this location which had washed away. (Tr.1 at 132; Tr.2 at 111-112; Ex. GX-14) Heft felt that the operator

should have known that a berm was required in that area. (Tr.1 at 132), which Russell confirmed when he testified that a berm was needed on this portion of the roadway. (Tr.2 at 139)

Russell testified that he had not yet inspected this portion of the roadway. He had been busy getting the plant started. (Tr.2 at 77; 111) Russell stated that this roadway was not the main roadway in the mine area. (Tr.2 at 62) The roadway was not used by customers of Mine No. 1 and was rarely used by miners. *Id.* Russell explained that because the corner between the maintenance shop and the edge of the roadway was so narrow – about 20 feet – anyone driving on that section would take care to go very slowly – no more than 5 miles per hour. (Tr.2 at 116-117) Nonetheless, the roadway had a speed limit of 10 miles per hour and was open to the public. (Tr.2 at 114) Russell testified that the 9980 sales loader used this roadway (Tr.2 at 115-116) and that it is the largest piece of equipment that traveled the roadway – more than 12 feet wide. (Tr.2 at 139) Russell agreed that if a person drove off the edge of the roadway, he would be thrown around, but would probably not be injured. (Tr.2 at 140)

As with the other citations in this decision, Russell claimed to have intended to get to the missing berm in due course, but had just not gotten that far down his start-up to-do list yet when Heft arrived for the inspection. (Tr.2 at 77; 111) Russell also claimed, based on his experience with ordinary farm equipment, that he had driven equipment down equivalent grades and had not overturned or been thrown around in the cab. (Tr.2 at 112-114)

In defense of this citation, NISC argued that Heft agreed that it would be best when restarting production after an idle period to attend first to those areas of the plant that posed the greatest potential danger to miners, but he had gone against this concept by citing NISC for doing exactly that. (Resp's Post-Hearing Brief at 21) NISC argues further that its prioritization of tasks at the start-up was not negligent and that it should be relieved of any responsibility for the missing berm section because, although Heft testified that according to his understanding of his duty as an authorized representative of the Secretary of Labor if he saw a violating condition, he was obligated to write a citation irrespective of negligence or excuses, it is unfair to NISC to hold it to a strict liability standard.

The standard requires berms or guardrails at any portion of a roadway where there is a drop-off of sufficient grade or depth to cause a vehicle to overturn or endanger persons in the vehicle. There is no dispute that there was no berm in the area Heft referred to in the citation documentation and in his testimony. There is also no dispute that the cited area was a roadway used by vehicles on the mine site needing to go to the maintenance shop. (Tr.1 at 127-129) Heft and Russell agree that a person could be thrown around in the cab if the vehicle went over the edge of the roadway at that point. It stands to reason that cuts, bruises, strains, sprains, and broken bones are within the ambit of reasonably likely injuries arising from this violation. Russell acknowledged that the missing berm section needed to be fixed, which confirms the court's view that a reasonably prudent miner would have seen the need to fix the berm and done so post haste. NISC's argument that it just did not have time to get to this item yet does not avail it anything in this strict liability regulatory environment. *See, e.g. Asarco v. FMSHRC*, 868 F.2d

1195 (10 th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. I conclude that NISC violated 30 CFR § 56.9300(a).

Negligence

Heft rated this violation at the level of moderate negligence. This requires that NISC knew or should have known that the berm was missing on this section of roadway and that there were mitigating circumstances. NISC should have and could have known about the missing berm section. On the first day of resumed activities at the mine site, Russell did not inspect the roadway section in question here, though he intended to get to it as soon as possible. (Tr.2 at 77; 111) NISC does not argue that it should not have known about the missing berm. It argues that its intention was to find and fix all hazards on the mite site, but had not gotten to this one yet. In mitigation, I credit the fact that NISC seems to have been working diligently to find and fix hazards. I concur with Heft's assessment of moderate negligence.

Gravity

This citation is characterized as reasonably likely to result in an injury involving lost workdays or restricted duty, and potentially affecting a single miner. Given the fact that the roadway in question was quite narrow – approximately 20 feet, was used occasionally by vehicles needing to access the maintenance shop, showed evidence of vehicles tracking close to the drop-off, had a drop-off of approximately five feet with a 40 percent grade, I concur that there was a reasonable likelihood of an injury and that the injury could result in lost workdays or restricted duty. It is well within the realm of feasible that an operator strapped into a vehicle such as the sales loader would sustain such injuries in the event he drove over the unbermed edge and got thrown around in the cab, even without the vehicle tipping over in the process.

Significant & Substantial

Heft designated this violation as S&S. Applying the four elements of the accepted S&S analysis discussed above, I conclude that this violation was S&S, as charged. There was an underlying violation of a mandatory safety standard, there was a discrete element of safety hazard, e.g., vehicle roll-over or serious jostling in the cab, rolling over or running off the edge could reasonably result in an injury to the driver, and the injury could involve serious bodily harm, or worse. The *Mathies* S&S elements are satisfied. *Mathies Coal Co.*, 6 FMSHRC at 3-4.

Penalty

The Secretary recommends a $540.00 penalty for this citation. I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons

affected by prior violations, the negligence points, the likelihood points, and the good faith point reductions. I assess the recommended penalty of $540.00.

Citation No. 6555766

The Violation

Heft wrote Citation No. 6555766 under 30 C.F.R. § 46.9(b)(5), which requires that training records be kept and include MSHA Form 5000-23, containing a statement by the person designated in the MSHA-approved training plan and certifying that the miner in question has received periodic training, as required by the training plan. Heft asked to see NISC's training records but did not find a Form 5000-23 annual training certificate with the appropriate signature. (Tr.1 at 134-137; Ex. GX-15) Brian Russell was the person responsible for training under the Part 46 Training Plan (Tr.1 at136) but Heft found that the Form 5000-23 had been signed by Will Hoff, NISC's field superintendent. (Tr.1 at 136-137; Tr.2 at 167-169) Hoff was not listed as the designated signatory under the Part 46 Training Plan. *Id.* Hoff testified that he signed the forms for all NISC miners because NISC was in the process of naming a new quarry superintendent and someone with company authority had to certify that the training had taken place. Hoff did the training for all other types of work as NISC. (Tr.2 at 168-169) Hoff signed the forms at the conclusion of the training course. (Tr.2 at 169)

This is a technical violation of the standard. The training had taken place, and all covered employees got the training. The violation consists of a clerical inconsistency and failure to hue to the letter of the standard. Again, because of the strict liability nature of Mine Act enforcement, Heft was within the bounds of his enforcement authority when he wrote the citation.

Negligence

In 2011, when the training took place, former quarry superintendent Dahm had removed the Training Plan from NISC's premises when he was discharged and a replacement superintendent had not yet been named. (Resp. Post-Hearing Brief at 24) Hoff stepped into Dahm's shoes to sign the training certificates. I agree with NISC's argument that the purpose behind the requirement of having a supervisor sign the training certificates was satisfied. After the quarry reopened for the next production season, Russell was promoted to quarry foreman. Administrator Dagnon prepared a new Training Plan which designated Russell as the training officer. When Heft did his inspection, Russell's name was not yet on the new training plan. Under these circumstances, I conclude that NISC was not negligent.

Gravity

This violation is considered a paperwork violation and does not involve an assessment of gravity.

Penalty

I assess a penalty of $20.00.

Citation No. 8662246

Violation

When he inspected Portable Mine No. 2 on September 27, 2011, Heft found four 110 volt circuit breakers in a circuit breaker panel on the east side of the scale office that were not labeled to show which circuit each disconnecting device controlled. (Tr.1 at 153-157) He cited NISC under 30 CFR §56.12006, which requires that electrical distribution boxes have a disconnecting device for each branch circuit which is appropriately labeled so that it can be visually checked to see if a device is open and the circuit is de-energized. (Ex. GX-20) Heft found the unmarked circuit breakers in a distribution box approximately 100 feet from the scale house. (TR.1 at 154-156) Each circuit breaker was connected to one of four power cables. (Tr.1 at 156) The power cables were used to send current to engine block heaters in the winter. *Id.* Heft was unable to visually determine which circuit breaker controlled which power cable because they were not labeled. (Tr.1 at 156-157) The breaker box was energized at the time of the inspection. (Tr.2 at 26) The power cables had not been used in four years, according to Russell. (Tr.2 at 120)

NISC argued that this citation should be vacated because no active mining was taking place at Portable Mine No. 2. (Resp's Post-Hearing Brief at 26) However, Heft's inspection field notes show that "man hours" had been reported in a quarterly report submitted to MSHA and relating to Mine No. 2. (Tr.2 at 174-175) No limestone was being crushed at Mine No. 2 when Heft did his inspection. (Tr.2 at 125) However, Russell testified that limestone had been crushed and blasted, and the crushing machine had been used at Mine No. 2 before and after Heft's inspection. (Tr.2 at 143-144) Mine No. 2 was also open to customers to come on site to purchase limestone that had been previously crushed. (Tr.2 at 146; 174-175)

I credit Heft's testimony summarized above and conclude that the lack of labeling on the four circuit breakers and associated power cables was a violation of 30 CFR §56.12006.

Negligence

Heft assigned moderate negligence to this violation, which requires that the operator knew or should have known about the violating condition and there were mitigating circumstances. 30 C.F.R. §100.3(d), Table X. NISC does not argue that it did not know about the lack of labeling on these circuit breakers and cables, but it does argue that the four year period of disuse and its intent not to use the power cables in the future should mitigate against the existence of a violation and be factored into the assessment of both negligence and gravity. (Tr.2 at 27) Heft testified that the standard's requirement of suitable marking is a matter of common knowledge in the industry. (Tr.1 at 160-161) Heft also took into account the fact that the breaker

box was located close to the scale house office where management went on a daily basis in his assessment of negligence. (Tr.1 at 154-155) I feel it is appropriate to consider the disuse and lack of future plans to use the power cables as evidence of mitigation. The Secretary's decision to rate the negligence at the moderate level is appropriate.

Gravity

This citation is characterized as unlikely to result in lost workdays or restricted duty and potentially affecting a single person. Heft testified he did not rate the gravity any higher than "unlikely" because there was a master breaker switch located next to the unmarked breaker box which could de-energize all four unmarked circuits. (Tr.1 at 159-160) I concur that the level of gravity assigned to this violation should be "unlikely" and would potentially affect a single miner.

Penalty

The Secretary recommends a $100.00 penalty for this citation. I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected by prior violations, the negligence points, the likelihood points, and the good faith point reductions. I assess the recommended penalty of $100.00.

Citation No. 8662247

Violation

Inspector Heft issued Citation No. 8662247 on September 27, 2011, because NISC could not provide evidence of monthly inspections for two fire extinguishers located in the scale office. (Tr.1 at 162-165; Ex. GX-22) An annual inspection was done on the two fire extinguishers in June, 2011, but there was no record that the required monthly visual inspection had been done in the interim between the annual inspection and the date of Heft's inspection. *Id.* Heft concluded that no monthly visual inspection had been done because of the missing documentation. (Tr.1 at 165-166) Any written evidence of the monthly inspection would have sufficed, including a note on the inspection tag on the extinguisher itself or any other written record. (Tr.1 at 165-166; Ex. GX-23) The purpose of a monthly visual inspection is to ensure that the extinguisher is charged and operable. (Tr.1 at 163)

NISC argued that Mine No. 2 was closed on September 27, 2011, when Heft issued this citation. (Tr.1 at 162) The mine did not reopen until November 2, 2011. (Tr.2 at 147) Heft testified that if he had inspected Mine No. 2 during the winter shut-down, he would have factored into his thinking that no one from NISC had been on the premises to conduct a monthly visual inspection. (Tr.2 at 28-30) Heft stated that if there were no one on site to check the fire

extinguishers, he would not issue a citation for the months when no one was there. (Tr.2 at 31) NISC argued that because no harm resulted from its failure to do the monthly visual inspection, the citation should be vacated.

Heft did not issue a separate citation for every month without a visual inspection record. He issued only one citation for the lack of records of the monthly visual inspections since the annual check. The citation responds to the conditions discovered by Heft on the date of his inspection. No additional liability is attributed to the fact that there were no records for several months. This makes Heft's failure to inquire whether anyone was present at the mine after the annual inspection in June, 2011 meaningless for purposes of assessing strict liability. Although the extinguishers were fully operable at the time of Heft's inspection, there is still a violation of the standard, which clearly requires monthly record keeping.

Negligence

Heft justified the moderate negligence designation because the extinguishers were in the main office where it would have been very easy to do the visual check and note it. (Tr.1 at 168) Heft felt that the blue card on the back of the extinguisher put NISC on notice that monthly visual checks had to be done and recorded. *Id.* The blue card is laid out in columns for the date of inspection and the initials of the person doing the inspection. (Ex. GX-23, pg. 3) Heft spoke to Russell about this citation and learned that Russell was aware that a monthly visual inspection was required, but he did not know that such an inspection had not been done since June, 2011. (Tr.1 at 170-173; Ex. GX-22) Other mine employees apparently did not know that a monthly inspection was required. (Tr.1 at 168; Tr.2 at 154-155)

I conclude that Heft appropriately considered all evidence relating to this violation in arriving at his determination of moderate negligence. As of the date of his inspection, when NISC personnel were on site and able to make a record of a visual fire extinguisher check, not only was no record made, but Russell was aware that such records were required. I credit Heft's testimony as to what he would have done hypothetically if he had made his inspection during the winter shut-down period as evidence of mitigation. Here there is the necessary combination of knowledge on the part of NISC and appropriate consideration of mitigating circumstances.

Gravity

Heft characterized this violation as unlikely to result in an injury because when he inspected the extinguishers, it appeared to him that they were mechanically sound and in good condition and that the annual inspection had been done just three months before. (Tr.1 at 169) NISC reminds the court that this was a no-harm-no-foul situation. I find that Heft appropriately accounted for the NISC argument in making his "unlikely" gravity assessment.

Penalty

The Secretary recommends a $100.00 penalty for this citation. I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected by prior violations, the negligence points, the likelihood points, and the good faith point reductions. I assess the recommended penalty of $100.00.

Citation No. 8662248

Violation

30 CFR §56.12028 requires that electrical grounding systems be tested periodically and records of the testing be kept for inspection on request. Inspector Heft requested records for four pieces of equipment during his inspection on September 28, 2011, at Mine No. 2: (1) the grounding system of the 40 kilowatt generator ("genset"); (2) the 30 horsepower Flyght submersible pump in the pit; (3) the 110 volt outlets in the scale trailer; and (4) the four 110 volt power cables at the breaker panel east of the scale office. (Tr.1 at 176-181; Ex. GX-24) All four pieces of equipment were in operation at the time the citation was issued. (Tr.1 at 180-181) NISC did not provide the requested records. (Tr.1 at 179) Heft testified that such records are required to assure that continuity and resistance testing is done and can be verified. Since it is not possible to visually determine if an electrical circuit is intact and free of circuit faults, these records play an important role in assuring the safety of electrical equipment. (Tr.1 at 178-182) Heft explained that if the resistance in a piece of equipment is too high, the overload protection may not work, and if a person were to contact equipment without functioning ground protection, he could be electrocuted. (Tr.2 at 178-182)

Russell told Heft that he believed a test had been done on the genset and pump, but there was no record because it was done by a person who was no longer an employee of the company. (Tr.1 at 183-185; Ex. GX-24) Russell stated that he had observed NISC's former foreman, John Dahm, conduct continuity and resistance testing for the genset and submersible pump during the prior production year. (Tr.2 at 126-127) Russell did not see Dahm do the testing on the 110 volt outlets in the scale house or the power cords at the distribution box. (Tr.2 at 127-128) Russell confirmed that he did not give Heft any records proving that continuity and resistance testing had been done on any of the equipment. (Tr.2 at 142)

NISC argued that Dahm had done the continuity and resistance testing (Tr.2 at 38-40), and that he had taken the testing records with him when his employment at NISC ended. (Tr.2 at 64; 142) NISC points out that Russell told Heft that he was aware that Dahm had done the testing on the pump and genset (Tr.2 at 39-40) and believed that Dahm had done a continuity and resistance test on anything that had a motor at Mine No. 2. (Tr.2 at 127) It also contended that Heft's citation and related documentation did not mention the keeping and production of testing records. (Resp. Post-Hearing Brief at 29)

The thrust of NISC's defense is that the Secretary failed to prove that the testing had not been done. This misses the point. The standard requires that records be kept as proof of testing. Russell's parole evidence about what he saw Dahm do and what Dahm must have done in keeping with his reputation as a conscientious foreman (Tr.2 at 127-128) does not satisfy the requirements of the standard. The record is clear. NISC did not produce the required testing records on request.

The standard is unambiguous. It requires that "[continuity and resistance of grounding system shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent test shall be made available on a request by the Secretary or his duly authorized representative." 30 CFR §56.12028 NISC violated the standard by failing to produce the requested records, which implies that no such testing had been done for the four pieces of equipment identified above. (Tr.1 at 176-181; Ex. GX-24) *See Knaak Sand,* 24 FMSHRC 964, 966 (Nov. 2002)(ALJ Feldman).

Negligence

Heft testified that the operator should have known to do continuity and resistance testing before placing the equipment into operation. (Tr.2 at 182) Russell's testimony that he observed Dahm perform the tests on some of the equipment during the prior production year and his belief that Dahm had tested everything on the motor with an electric motor is confirmation that NISC knew it was obligated to perform the testing. The testimony that Dahm had taken the testing records when he left NISC shows that NISC was aware of the obligation to keep the records. Again, in this strict liability setting, NISC's excuse for not being able to produce the records does not obviate its duty to comply with the standard. The excuse is, however, an element of mitigation which supports Heft's designating this violation as involving moderate negligence. I concur.

Gravity

Heft issued this citation as unlikely to result in injury because the equipment looked to be in good condition. (Tr. 2 at 182-183) NISC does not offer any argument against this element. I agree that this violation was unlikely to result in a miner injury.

Penalty

The Secretary recommends a $100.00 penalty for this citation. I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected by prior violations, the negligence points, the likelihood points, and the good faith point reductions. I assess the recommended penalty of $100.00.

ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C.§820(I), I assess the penalties summarized in the following table for the citations discussed above. NISC is **ORDERED** to pay the Secretary of Labor the sum of $4,874.00 within 30 days of the date of this decision. It is also **ORDERED** that Citation No. 6555763 be **VACATED**.

Citation No. 6555758	$101.00
Citation No. 6555759	$807.00
Citation No. 6555760	$108.00
Citation No. 6555761	$1,795.00
Citation No. 6555762	$1,203.00
Citation No. 6555763	Vacated
Citation No. 6555764	$540.00
Citation No. 6555766	$20.00
Citation No. 8662246	$100.00
Citation No. 8662247	$100.00
Citation No. 8662248	$100.00
	Total: $4,874.00

L. Zane Gill
Administrative Law Judge

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