

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
721 19th St., Suite 443
Denver, CO 80202-2500
Office: (303) 844-5266/Fax: (303) 844-5268

November 19, 2014

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2014-117
Petitioner,	:	A.C. No. 50-01783-336602
	:	
v.	:	
	:	
DELTA CONCRETE PRODUCTS, INC.,	:	Mine ID: 50-01783
Respondent.	:	Mine: Willow Lake Portal

DECISION

Appearances: Sean J. Allen, Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 216, Denver, CO 80202 for Petitioner

Robert B. Groseclose, Cook, Schuhmann & Groseclose, 714 Fourth Ave., Suite 200, Fairbanks, AK 99707-0810 for Respondent

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Delta Concrete Products, Inc. at its Delta Junction mine, 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"). The case includes nine contested violations with a total proposed penalty of **\$4,721.00**. The parties presented testimony and documentary evidence at a hearing held in Fairbanks, Alaska on August 12 and 13, 2014. For the reasons that follow, eight of the nine contested citations and orders are **AFFIRMED** with two reductions in the negligence level and one citation is **VACATED**. Respondent will be ordered to pay **\$3,807.00** in penalties.

II. BACKGROUND

Delta Concrete Products, Inc., (Respondent) crushes and screens gravel at their mile 267.5 Delta Junction surface pit mine (the "mine") in Delta Junction, Alaska. The mine is subject to regular inspections by the Mine Safety and Health Administration

("MSHA") pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). The parties stipulated as follows:

- A. Respondent was, at all relevant times, the operator at the Delta Concrete Products Pit, Mine ID: 50-01783.
- B. The mine listed above is a mine, as defined in the Mine Act.
- C. Respondent is engaged in mining operations in the United States and its mining operations affect interstate commerce.
- D. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-965.
- E. The Federal Mine Safety and Health Review Commission has jurisdiction of this matter under the Mine Act.
- F. The citations at issue in this matter were issued on the date indicated.
- G. The inspector whose signature appears in block 22 of the citations at issue was acting in his official capacity as an authorized representative of the United States Secretary of Labor.
- H. The Secretary's proposed penalties for each citation are listed on Exhibit A of the penalty assessment filed in this matter and those amounts incorporated are incorporated by reference herein.
- I. The exhibits to be offered by the parties are stipulated to be authentic but no stipulation is made as to their relevance or as to the truth of the matters asserted therein.

Secy's Prehearing Report.

At hearing, the Secretary presented testimony from MSHA Inspector Garrett Frey. Inspector Frey has worked as an inspector for MSHA for two years. Tr. 30. He has conducted regular MSHA E01 inspections of approximately one hundred sand and gravel operations and spends ninety five percent of his work time doing so. Tr. 30-34. Inspector Frey received classroom and field training at the MSHA Mine Academy in West Virginia. *Id.* He has also participated in informal weekly training at staff meetings and journeyman training which covered basic electricity and three-phase electricity systems. *Id.* Frey earned a Bachelor's degree in engineering which included courses on basic electricity and three phase electricity. Tr. 31.

Respondent presented testimony from its President and General Manager, Matthew Walker and electrician Christopher Morley. Mr. Walker has co-owned Delta Concrete Products since 2002, previously worked for a general contractor and prior to that, for approximately 18 years, worked for a logging company performing various functions from running the shop, working on equipment as a field mechanic, operating equipment and cutting down trees. Tr. 298-299. Mr. Morley has owned Morley Electric in Delta, since 2004. Tr. 389. He has been a journeyman electrician since 1998 and an electrical administrator administrating electrical installations ensuring they meet code and job requirements since 2004. Tr. 390. Morley is licensed as a journeyman electrician and electrical administrator with the Alaska Division of Occupational Licensing and a member of the International Brotherhood of Electrical Workers 1547. *Id.*

I have organized my findings by individual docket and detailed my final ruling for each citation within its respective subsection. The Secretary designated the majority of these contested citations as “Significant & Substantial” (S & S) violations. At hearing, Respondent contested the factual representations of the testifying MSHA inspector, the underlying legal basis of the citations as well as the Secretary’s gravity and negligence designations.

As such, I have prepared a Statement of Law outlining the Commission’s instructions regarding: 1) Burden of Proof; 2) Significant and Substantial violations; 3) Negligence and 4) Penalty Assessments. I have followed these guidelines for each of the nine contested violations.

The hearing for these nine citations lasted two days and produced a 517 page transcript with numerous exhibits. The parties also submitted post-hearing briefs articulating their respective positions on the evidence presented at hearing. I have reviewed all of this evidence at length. In the interest of brevity, I have not included a general overview summary of the testimony presented, but rather have cited to the testimony, exhibits, and arguments I found critical to my ultimate ruling within my analysis.

III. STATEMENT OF LAW

A. Burden of Proof

The Commission has long held, “In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation.” *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (August 1992). The Commission has described the Secretary’s burden as:

The burden of showing something by a “preponderance of the evidence,” the most common standard in the civil law, simply requires the trier of fact “to believe that the existence of a fact is more probable than its nonexistence.”

RAG Cumberland Res. Corp., 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

The Secretary may establish a violation by inference in certain situations. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2153. Any such inference, however, must be inherently reasonable, and there must be a rational connection between the evidentiary facts and the ultimate fact inferred. *Mid-Continent Resources*, 6 FMSHRC 1132, 1138. (May 1984).

If the Secretary has established facts supporting the citation, the burden shifts to the Respondent to rebut the Secretary's prima facie case. *Construction Materials*, 23 FMSHRC 321, 327 (March 2001) (ALJ Feldman).

B. Significant and Substantial

A violation is Significant & Substantial (S&S), "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In order to uphold a citation as S&S, the Commission has held that 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. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984).

An S&S designation must be based upon the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The Secretary does not necessarily have to "prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (holding that failure to maintain emergency equipment was S&S despite low likelihood of emergency occurring); *See also Musser Engineering, Inc. and PBS Coals* 32 FMSHRC 1257, 1280-81 (Oct 2010) (PBS).

However, the Commission has recently reiterated that "it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial." *Black Beauty Coal*, 34 FMSHRC 1733, 1740 (August 2012) (upholding Judge's S&S determination that a ¼ mile wide gap in a protective berm created a safety hazard of trucks driving over a steep embankment) (*quoting U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836)(Aug 1984).

C. Negligence

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 be on the alert for conditions and practices in the mine that affect the safety and health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* Low negligence exists when "[t]he operator knew or

should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* High negligence exists when [t]he operator knew or should have known of the violation, condition or practice and there are no mitigating circumstances. *Id.* See also *Brody Mining, LLC*, 2011 WL 2745785 (2011) (ALJ). Finally, the operator is guilty of reckless disregard where it “displayed conduct which exhibits the absence of the slightest degree of care.” *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.*

D. Penalty Assessment

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (March 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider six statutory penalty criteria:

(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 of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. 820 (I).

Although I assess monetary penalties de novo, the Secretary has submitted proposed penalty amounts for each citation contested at hearing. Following 30 CFR §100.3, the Secretary submitted regularly assessed penalty amounts based upon point values corresponding to the six statutory criteria for all citations.

For all penalty assessments, the Secretary bears the burden of establishing the proposed penalty is appropriate based upon the statutory criteria of Section 110(i) of the Act. *In re: Contest of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 239, 241 (ALJ Broderick) (January 1992) (Order).

In this matter, there appears to be no dispute that Respondent is a small family owned business. Tr. 301. Respondent has not argued or presented any evidence indicating that any of the proposed penalties would affect its ability to continue business operations. I have discussed the violation history, negligence, gravity, and abatement efforts pertaining to each alleged violation within my findings for each citation.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW ELECTRICAL VIOLATIONS

Five of the nine citations adjudicated in this case, 8693966, 8693967, 8693968, 8693970 and 8693978 involve electrical violations. For clarity these citations will be addressed together. It is undisputed that the number of people affected by each violation is one.

Respondent crushes, screens, washes and conveys gravel at their Delta Junction mine facility. The crushing operation is referred to as the “dry side” and the screening/washing and conveying process occurs on the “wet side”. Resp. Prehearing Brief. It is undisputed that at the time of the inspection the dry side was “red tagged” and had been out of service since 2012. *Id.* All of the electrical citations in this case were issued for the wet side. At issue is whether the wet side was operational at the time the citations were issued.

A. MSHA’s Authority to Inspect the Wet Plant Portion of Delta Junction Mine

Respondent argued that the wet side of the mine should not have been subject to the issuance of citations because it was locked and tagged out and therefore, removed from service. Respondent’s president and co-owner, Matthew Walker testified it was his understanding that if a piece of mining equipment was locked and tagged out it could be subject to inspection but not cited. Tr. 366-367. However, Inspector Garrett Frey testified that he appropriately inspected the wet plant portion of the mine according to MSHA’s Metal and Nonmetal General Inspection Handbook procedures. Tr. 283-297. The Metal and Nonmetal General Inspection Handbook states,

[a]t times, inspectors attempt to conduct regular inspections of mines or mills and find, on arrival, that it is not operating or not operating at full capacity and some equipment or machinery is not in operation. In these cases, regardless of whether the mill or mine is operating or only operating with limited capacity, inspectors shall conduct a regular inspection...of the non-producing or non-active section of the mine or mill to assure that potential hazards or risks to miners do not exist.

Tr. 284-286, Sec’y Ex. P-17, Page 35.

Inspector Frey testified that Respondent was continuing to produce material based upon the mine producing material two weeks prior to the inspection. Tr. 286. The inspector observed that Respondent could continue to produce material from the wet side of the mine because the wet plant distribution box was locked out and tagged out only for the purpose of a screen change. Tr. 36-38; 286-287. Frey confirmed that the mine had not produced material for two weeks prior to the inspection based on his conversation with Walker and later verified by production reports. Tr. 36-38. However, the inspector believed that the wet plant could easily be placed back into service. Tr. 36-38. During the hearing, Inspector Frey testified to observing many electrical and non-electrical violations on the wet side of the mine that he believed would continue to exist during continued mining operations. Tr. 286-287.

The operator, Matt Walker testified that the wet side of the mine was “removed from service” because the intention of the lock and tag was to permanently disable that part of the mine. Tr. 370-371. However, MSHA’s Citation and Order Writing Handbook for Coal Miners and Metal and Nonmetal Mines states,

[t]he term ‘removed from service’ does not mean that the mine operator stopped using and parked a piece of equipment (e.g., front-end loader, truck) or a mining unit (e.g., portable crusher, screening unit) when it could or can be restarted and easily placed back into service in the same condition which caused issuance of the original citation(s) or order(s). Rather, “removed from service” refers to the action(s) taken by the mine operator or contractor to permanently incapacitate or render inoperable the equipment and eliminate the violation.

Inspector Frey testified that the wet plant was not removed from service because it was locked and tagged out only for the purpose of a screen change as noted on the distribution box tag. Tr. 36-38. He further testified that the wet side was not permanently incapacitated or rendered inoperable because the wet plant could easily be placed back into service in the same condition after the screens were changed for production purposes. Tr. 288-290; Sec’y Ex. P-2, Photo 4. The inspector explained that the wet plant could be returned to service by unlocking the distribution box and energizing the wet plant. *Id.*

Similarly, Respondent argues that at a minimum the cited electrical violations would have been corrected during off season maintenance. Resp. Post Hearing Brief, p. 8. However, this argument presupposes that the wet side of the plant was indeed shut down for the season and was removed from service. A fact contrary to the evidence relied upon by the inspector noted above that the wet side was locked and tagged out only for a screen change; thus, indicating intent or ability to reactivate the wet side as needed for further operation. Nor was there evidence presented by Respondent that, had no citations been issued, a competent individual would have conducted an inspection and tagged the electrical issues for repair given Respondent’s admission that had the citations not been issued the electrical issues would have continued on during normal mining operations. Tr. 487.

I find that it was appropriate and necessary for Inspector Frey to inspect the wet plant for safety hazards because (1) MSHA’s Inspection handbook allows inspectors to conduct inspections at mines that are not operating at full capacity, and (2) the wet side of the Delta Junction mine was not permanently incapacitated because the lock and tag on the distribution box was marked only for a screen change and material had been run on the wet side of the mine two weeks prior to the inspection based on production reports.

B. Citation No. 8693966

Inspector Frey issued Citation No. 8693966 on August 19, 2013 for an alleged violation of 30 CRF 56.12013. Tr. 39; Sec’y Ex. P-2. The inspector alleged within the citation that:

A mechanically strong, insulated and sealed splice was not used in connecting a P-136-29-MSHA 6AWG SOOW power cable coming from the wet plant

distribution box in the operator's tower. The wet plant has operated using this 480 volt three phase electrical connection of only wire nuts and minimal electrical tape approximately 16 inches off the ground immediately in front of the wet plant distribution box. A miner coming into contact with energized 3 phase electrical circuits could experience severe shocks, burns, or other fatal electrical injuries and complications.

Sec'y Ex. 2.

Inspector Frey determined that the violation was reasonably likely to cause an injury, the resulting injury would be fatal, the violation was S&S, affected one person, and was the result of Respondent's high negligence. Sec'y Ex. P-2. The Secretary proposed a penalty of \$807.00.

1. Findings

Inspector Frey issued Citation No. 8693966, because he determined that a splice connected to a wet plant distribution box was in violation of 30 CFR § 56. 12013 which mandates that:

Permanent splices and repairs made in power cables, including the ground conductor where provided, shall be:

- (a) Mechanically strong with electrical conductivity as near as possible to that of the original;
- (b) Insulated to a degree at least equal to that of the original, and sealed to exclude moisture; and
- (c) Provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket.

Frey testified that Respondent used wire nuts with electrical tape wrapped around them to connect a 480-volt power cable coming from the wet plant distribution box in the operator's tower. Tr. 44. The inspector's notes designate that the splice was 16 inches off the floor below the wet side distribution box and was located in the travel way of the operator's tower. Sec'y Ex. P-2. Frey stated that the splice violated the standard because wire nuts are not mechanically strong with electrical conductivity as near as possible to that of the original. Tr. 43-46. The inspector also testified that the electrical tape used to wrap around the wire nuts was not bonded in a way to prevent moisture from infiltrating the splice. Tr. 46. He stated that he observed the black, green, red, and yellow inner conductors on the splice which demonstrated that the conductors were not sealed from moisture or adequately bonded to the outer jacket. Tr. 45-47. He also noted that the filler material sticking out of the cables exposed the splice to moisture that could potentially wick down the length of the cable and create a potential shock hazard to miners. *Id.*

Christopher Morley, Respondent's electrical witness, testified that the splice was mechanically strong because the power cords were secure and would not come apart when pulled. Tr. 419-421. Morley believed that the wire nuts wrapped in electrical tape were sealed to exclude moisture. *Id.* However, he acknowledged the splice was not protected from damage as near as possible to the original because it was missing the outer jacket. Tr. 421. The inspector provided very detailed, specific and compelling testimony regarding the likelihood of moisture wicking down the cables given the location of the splice in the Conex structure close to an open door with evidence of rusting and water tracks on the structure walls. Tr. 44-49. Accordingly, I defer to his reasonable determination and credit his testimony over that of Respondent's electrical witness.

As such, I find that Respondent violated 30 CRF 56.12013 by failing to connect a 480-volt power cable with use of a splice that was mechanically strong and insulated and bonded to a degree that would exclude moisture. Accordingly, Citation No. 8693966 is **AFFIRMED**. However, for reasons explained below the negligence level will be modified from high to moderate.

a. Prior Non-Enforcement of Standards at Delta Junction Mine

Matthew Walker, the operator of Delta Concrete, testified that previous MSHA inspectors had instructed him that there were better ways to splice, but the way Respondent chose to connect power cables was adequate. Tr. 349. Walker testified that previous MSHA inspector's did not inform him to make any changes to the existing electrical splices that were cited by Inspector Frey. Tr. 350. He argued that because they had not previously been cited for any electrical splice connections, the Secretary should be estopped from enforcement of citations dealing with hazardous electrical splices. Tr. 351.

Although such evidence may be weighed when determining the appropriate penalty, the Commission has generally rejected the prior non-enforcement defense to enforcement of a future citation. In *Secretary v. King Knob Coal Company, Inc.*, 3 FMSHRC 1417 (1981), the Commission generally rejected the doctrine of equitable estoppel. However, it also viewed the erroneous action of the Secretary (mistaken interpretation of the law leading to prior non-enforcement) as a factor which can be considered in mitigation of penalty. The Supreme Court has held that equitable estoppel generally does not apply against the federal government. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 383-386 (1947); *Utah Power and Light Co. v. United States*, 243 U.S. 389, 408-411 (1917). The Court has not expressly overruled these opinions, although in recent years lower federal courts have undermined the *Merrill/Utah Power* doctrine by permitting estoppel against the government in some circumstances. *See United States v. Georgia-Pacific Co.*, 521 F.2d 92, 95-103 (9th Circ. 1970). Absent the Supreme Court's expressed approval of that decisional trend, we think that fidelity to precedent requires us to deal conservatively with this area of the law. This restrained approach is buttressed by the consideration that approving an estoppel defense would be inconsistent with the liability without fault structure of the 1977 Mine Act. *See El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 38-39 (1981). Such a defense is really a claim that although a violation occurred, the operator was not to blame for it. Furthermore, under the 1977 Mine Act, an equitable consideration, such as the

confusion engendered by conflicting MSHA pronouncements, can be appropriately weighed in determining the appropriate penalty.

Accordingly, the doctrine of equitable estoppel will not be applied to the enforcement actions of the Secretary here. However, the Respondent's evidence in this connection will be considered in mitigation of penalty. Citing *Sec'y of Labor, Mine Safety & Health Admin. (MSHA), Petitioner*, 15 FMSHRC 2549 (Dec. 17, 1993).

2. Gravity

Inspector Frey designated Citation No. 8693966 as an S&S violation. The first element of the *Mathies* test requires a violation of a mandatory safety standard, and I have already found that the failure to connect a 480-volt power cable with use of a mechanically strong and insulated splice was a violation of 30 CFR § 56.12013. The second *Mathies* element is a contribution to a discrete safety hazard. By failing to remedy the deficient splice that potentially existed since fall of 2011, Respondent exposed miners to possible severe shocks or burns. Tr. 57, 484.

The third *Mathies* element requires showing a reasonable likelihood that the hazard contributed to will result in an injury. The inspector noted that no documentation of workplace exams identified the defective splice. Tr. 57. Walker testified that the splice probably existed from the fall of 2011 to August of 2013. Tr. 484. Inspector Frey believed that the hazard existed when the wet plant was last run and would likely continue to exist during mining operations because multiple deficient splices were noted over the course of the initial inspection of Delta Concrete. Tr. 57. Further, Walker acknowledged that had Inspector Frey not cited the condition it would have continued to exist into the indefinite future. Tr. 487.

The Inspector contends that a fatal electrocution injury was reasonably likely to occur through one of several different ways. Tr. 49. The inspector testified that a miner could contact the splice by (1) reaching down to open the door to the tower, (2) brushing against the splice while turning on or off the distribution box, (3) grabbing items from the storage hooks next to the splice, or (4) slipping and falling into the splice because the electrical tower did not exclude moisture. Tr. 49-51. Because the splice was located in the travel way of the operator's tower, the potential for an electrocution to a miner was more likely. Tr. 49. I credit the inspector's testimony that the deficient splice was obvious and could be seen immediately when entering the operator's tower. Tr. 63. Inspector Frey testified that the wet plant distribution box was located next to a door where you could see daylight which likely exposed the splice to weather conditions. Tr. 49. Also, Inspector Frey testified no current continuity and resistance test had been performed since March of 2012, which increased the risk of electrical potential taking the path of least resistance. Tr. 56.

Respondent argues that the violation was not reasonably likely to lead to a significant injury because according to electrician Morley, the splice was sufficiently protected against electrical shock Tr. 457. Morley testified that the wire nuts coupled with the electrical tape provided protection from moisture. Tr. 405. The operator, Walker, also testified that he has never had a problem with moisture in the operator's tower and thus there was no increased risk of weather exposure to the splice. Tr. 346. After considering both parties testimony, I find that

the state of the splice without adequate protection from the elements and adjacent to a travel way without a protective outer jacket created a reasonable likelihood of contributing to a potentially fatal electrical shock. The lack of a continuity and resistance test and the splice's exposure to weather conditions increased the risk of a serious injury or death to a miner working in the travel way of the operator's tower. Tr. 56, 49.

The fourth *Mathies* element requires showing a reasonable likelihood that the hazard contributed to will result in an injury. Inspector Frey testified that under the right circumstances a miner coming into contact with the splice would potentially be fatal because the power cord was energized up to 480 volts. Tr. 59. The inspector also testified to five separate fatalgrams, each showing that a 480-volt shock can be fatal. Tr. 60. The inspector stated that the fatalgrams demonstrate that 480-volt electrical systems are dangerous and need to be installed and maintained in order to prevent exposure to fatal amounts of electricity. Tr. 61. Although Respondent argued that the splice was secure and safe to grab while energized, I find that the testimony of the inspector substantiates that the splice was a danger to miners working in the travel way of the operator's tower. Inspector Frey testified that the splice was in close proximity to the door of the operator's tower. Tr. 49. Frey noted that there was evidence of water infiltration in the operator's tower and that moisture increases the risk a miner operating the wet plant distribution box will be shocked. Tr. 51. The inspector also testified that there had not been a continuity and resistance test done that year which increased the undetected risk electricity would take the path of least resistance. Tr. 56. Therefore, after considering the above testimony, I find a reasonable likelihood that an electrical shock coming from the 480-volt splice would cause serious injury or death to a miner.

As the evidence produced at hearing supports all four elements of the *Mathies* formula, I find that the Secretary has established that Citation No. 8693966 was an S&S violation.

3. Negligence

Inspector Frey credibly and without equivocation in a straight forward, compelling manner testified and noted in his citations that throughout the mine there were similar deficient splices. Tr. 57. The inspector believed that the splices were made this way intentionally and that it was common practice at Delta Concrete to splice using wire nuts and electric tape. Tr. 57. Accordingly, he assigned a high negligence level to the violation at issue.

I find that Respondent was aware or should have been aware of the violation, but there are some mitigating circumstances that must be considered. I credit the inspector's testimony that there was no documentation identifying any electrical hazards and that he believed the hazards would continue to exist during continued mining operations. Tr. 57. He also noted that the deficient splice was obvious upon entering the travel way of the control tower. Tr. 64. Operator Walker acknowledged that the deficient splice would have continued to exist at the mine had Respondent not been cited. Tr. 487.

When determining who was responsible for creating the splices there appeared to be a fundamental miscommunication or misunderstanding between Inspector Frey and Operator Walker. I credit Walker's testimony that his son, Ryan Walker was likely the foreman at the

time the splice was made and was, in fact, the person that made the splice. Tr. 335. The inspector testified that based on his conversations with Walker, the foreman was not competent to perform electrical maintenance at the mine. Tr. 64. Frey testified that he considered this statement when determining the severity of the negligence. Tr. 65. Walker denied telling Frey that the foreman *at the time the splice was made* was not competent to perform electrical maintenance. Tr. 483. He went on to explain that his son, Ryan started doing electrical work at the mine in 2002 and that he worked with a local electrician, Ted Hamilton at the mine until he had the requisite experience to do the electrical work himself. Tr. 336. When his son finished working at the mine in approximately 2011 he went on to work with an electrical contractor at Fort Greely for a couple of years. Tr. 339. Although there is no testimony to suggest whether the electrician, Hamilton knew or had training in MSHA electrical regulations, I credit Walker's testimony that he reasonably believed his son, Ryan, was a competent person to perform the electrical work. I find that the operator reasonably and in good faith believed a competent person was performing the electrical maintenance, and credit his testimony based on his personal observations of Ryan's work with electrician Hamilton.

For all these reasons, I find that Citation No. 8693966 was the result of moderate rather than high negligence on the part of Delta Concrete, as they should have been aware of the violation, but I credit the operator's testimony that he maintained a good faith belief he designated a competent person to perform electrical maintenance at the Delta Junction mine.

4. Penalty Assessment

The Secretary has proposed a regularly assessed penalty of \$807.00 for this citation. Respondent's past history of previous violations revealed that the mine has a total of seven past violations and no repeated violations of 56. 12013. P-1. Walker testified that Respondent is a small mom and pop operation. They had 15 current employees at the time the citation was issued. Tr. 301. Respondent has not argued or presented any evidence indicating that the proposed penalty would affect its ability to continue business operations. I found a moderate level of negligence because the operator maintained a good faith belief in his son, who had previously performed the electrical maintenance, to be a competent person to conduct repairs. Respondent was negligent because the deficient splice was open and obvious, intentionally made, undocumented, and by Walker's own admission would have continued to exist at the mine had the inspector not issued a citation. Tr. 57, 64, 487. I also found the potential for an electrocution to a miner was more likely and thus S & S because the defective splice was located in the travel way of the operator's tower subject to the risk of exposure to the elements as well as the fact that the splice had existed since at least late 2011. Tr. 49. Although the citation was terminated based upon a seasonal closure and shutdown of the mine, Respondent's electrical witness, Christopher Morley testified to repairing most of the electrical hazards cited by Inspector Frey. Tr. 389-396.

After considering all six penalty criteria as well as the Respondent's reliance on MSHA pronouncements from prior inspections, I am modifying the Secretary's proposed penalty of \$807.00 and assess Respondent a civil monetary penalty of \$400.00 for Citation No. 8693966.

C. Citation No. 8693967

Inspector Frey issued Citation No. 8693967 on August 19, 2013 for an alleged violation of 30 CRF 56.12008. Tr. 83. He alleged within the citation that:

An energized 120-volt electrical cord passing through a cutout in the metal back wall of the operator's station tower is not bushed allowing wear and damage to the outer jacket, insulation, and eventually inner conductors. A miner in contact with the metal tower could become a path to ground in the event of a fault leading to shock and burn type injuries.

Sec'y Ex. 4.

Frey determined that the violation was reasonably likely to cause an injury, the resulting injury would be lost workdays or restricted duty, the violation was S&S, affected one person, and was the result of Respondent's moderate negligence. Sec'y Ex. 4. The Secretary has proposed a penalty of \$100.00.

1. Findings

Inspector Frey issued Citation No. 8693967, because he determined that a 120-volt electrical cord passing through a cutout in the operator's tower was not bushed. This was in violation of 30 CFR § 56.12008 which mandates that:

Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

The inspector testified that he observed a blue 120-volt electrical cord without a bushing passing through a cutout of the metal back wall of the operator's tower. Tr. 85. Frey stated that the cutout allowed for wear and damage to the cord's insulation and outer jacket. Tr. 85. He also testified that there were multiple cords coming out of the operator's tower and that the blue power cord hung straight down. Tr. 86. I credit the inspector's testimony where he testified that the power cord had some weight on it and that the weather conditions had the ability to degrade the power cord rapidly. Tr. 86. Also, Frey noted that the cited power cord was still energized at the time the citation was issued. Tr. 88.

Inspector Frey explained the standard was violated because the power cord entered a cutout of the operator's tower that was not protected. Tr. 88. The inspector credibly testified that the cutout was not protected because it had burrs and sharp edges on the side that would eventually cut through the power cords insulators and contact the inner conductors. Tr. 88. Morley, Respondent's electrical witness acknowledged that the power cord should have been bushed. Tr. 422. As such, I find that Respondent violated 30 CRF 56.12008 by failing to install a bushing for a blue 120-volt electrical cord where it passed through a cutout in the operator's tower. Citation No. 8693967 is **AFFIRMED**.

2. Gravity

Inspector Frey designated Citation No. 8693967 as an S&S violation. The first element of the *Mathies* test requires a violation of a mandatory safety standard, and I have already found that the failure to install a bushing for the blue 120-volt electrical cord entering a cutout in the operator's tower was a violation of 30 CFR § 56. 12008. The second *Mathies* element is a contribution to a discrete safety hazard. By failing to provide a bushing for the cutout in the operator's tower, Respondent exposed miners to potential shock and burn injuries. Tr. 95.

The third *Mathies* element requires showing a reasonable likelihood that the hazard contributed to will result in an injury. The inspector testified that the blue 120-volt power cord was damaged where it was going in and out of the metal cutout. Tr. 94. Frey testified that at the time the citation was issued, there was no exposure to the insulation and inner conductor but with continued use the power cord would be damaged. Tr. 94. With continued use, the power cord would continue to degrade and eventually the conductors would make contact with the metal frame of the operator's tower. Tr. 90. If the inner conductor made contact with the metal frame while energized, the power cord would either trip the breaker or potentially bleed electric potential to the area without drawing enough current to trip the breaker. *Id.* Also, the inspector stated that the weather exposure of the cutout increased the risk a miner would be exposed to electrical shock. Tr. 91.

Respondent argued that the violation was not reasonably likely to lead to a significant injury because there was a breaker system connected with the power cord which would allow the cord to short. Tr. 408-419. Morley, Respondent's electrical witness, testified that because the operator's tower is grounded, the power cord would trip the breaker if there were a cut in the jacket. Tr. 409. After considering both parties' testimony, I defer to and credit the inspector's testimony that there is always the potential that the power source will not break and that weather exposure increases the risk of shock to miners working in the operator's tower. Tr. 408-411. As such, I find that the lack of a bushing to protect the power cord entering the cutout made it reasonably likely that a significant injury would occur.

The fourth *Mathies* element requires a reasonable likelihood that a resulting injury will be reasonably serious. Inspector Frey testified that it is unlikely that a shock from a 120-volt power cord would be fatal, but there was the potential for miners to be shocked or burned. Tr. 94. Frey believed that a potential injury from touching the power cord while it was energized would likely lead to lost workdays or restricted duty depending on severity. Tr. 95. He also noted that the cutout allowed the power cord to be exposed to weather, so there was the potential for moisture to wick up the cord. Tr. 92. Wicking allows electricity to carry up a cord while it is wet, which could cause a serious shock or burn injury. Tr. 92. Therefore, considering the above evidence, there is a reasonable likelihood that an electrical shock coming from 120-volt power cord could cause serious injury to a miner.

As the evidence produced at hearing supports all four elements of the *Mathies* formula, I find that the Secretary has established that Citation No. 8693967 was an S&S violation.

3. Negligence

Inspector Frey testified that it was likely that the operator or miner had observed the hazard based on similar cords having bushings to protect them. Tr. 96. Frey also acknowledged that at one point the power cord could have had a bushing and worked its way out. Tr. 97. I credit the inspector's testimony that the 120-volt power cord was not terribly easy to see because the cutout was located in the back of the operator's tower which is elevated from the ground. Tr. 97. He also acknowledged that the violation was not an obvious hazard and not terribly easy to see. *Id.*

Frey noted that the ability for the 120-volt power cord to move affected the way he designated negligence. Tr. 97. He testified that the cord had probably been there for a while because it exhibited some damage. Tr. 91. The inspector believed that because the power cord could freely move and was exposed to weather conditions, the cord would likely degrade down to the insulation and inner conductors. Tr. 97. Also, the inspector testified that because this power cord was plugged into the wall there was the potential for water to infiltrate the area and potentially wick up the cord. Tr. 98. I credit Frey's testimony that the risk of an electrical shock was increased because the operator's tower is frequently visited by miners. Tr. 49.

For all these reasons, I find that Citation No. 8693967 was the result of moderate negligence on the part of Respondent, as they should have been aware of the violation, but I credit the inspector's testimony in that the hazard was not obvious. Tr. 98. Therefore, the negligence designation for Order No. 8693967 is upheld as moderate.

4. Penalty Assessment

The Secretary has proposed a regularly assessed penalty of \$100.00. Respondent's past history of previous violations revealed that the mine has a total of seven past violations and no repeated violations of 56.12008. P-1. After considering all six penalty criteria analyzed earlier in this decision, I uphold the Secretary's proposed penalty and assess Respondent a civil monetary penalty of \$100.00 for Citation No. 8693967.

D. Citation No. 8693968

Inspector Frey issued Citation No. 8693968 on August 19, 2013 for an alleged violation of 30 CRF 56.12004. Tr. 107. The inspector alleged within the citation that:

The 480-volt 3 phase power cable energizing the sand stacker belt drive motor has multiple areas exposed to mechanical damage that have not been protected. The power cable may have been smashed and is deformed near the tail, has a slice that removed approximately 1/2" of the outer jacket exposing the cable to water damage/hazards, and a 1" gash where inner wires are visible and exposed. Inner conductors may be damaged. The damage is at eye level along a travelway. A miner traveling adjacent the sand stacker performing maintenance or production duties and contacting a damaged conductor could suffer shock, burn, and other fatal electrical type injuries and complications.

Sec'y Ex. 5.

Frey determined that the violation was reasonably likely to cause an injury, the resulting injury would be fatal, the violation was S&S, affected one person, and was the result of Delta Concrete's high negligence. Sec'y Ex. 5. The Secretary has proposed a penalty of \$807.00.

1. Findings

Inspector Frey issued Citation No. 8693968, because he determined that a 480-volt 3 phase power cable had multiple exposed areas of unprotected damage. This was a violation of 30 CFR § 56. 12004 which mandates that:

Electrical conductors shall be of a sufficient size and current-carrying capacity to ensure that a rise in temperature resulting from normal operations will not damage the insulating materials. Electrical conductors exposed to mechanical damage shall be protected.

Frey testified that he observed multiple areas of mechanical damage on a 480-volt power cable that energized a sand stacker belt drive. Tr. 109. The power cord was feeding the drive motor on the sand stacker and Frey observed multiple areas where the cord was cut, gashed, and smashed. Tr. 109-113, Sec'y Ex. P-5, Photos 1-5. In one location the inspector observed a half-inch gash where the inner wires were visible and exposed. Tr. 109. The inspector believed that with continued mining operation the damaged areas would wear down to the inner conductors and expose miners to electrical shock. Tr. 111. Both Mr. Walker and Mr. Morley acknowledged that the cited cable was damaged in the locations cited by Inspector Frey. Tr. 423-426. 487-489.

According to the testimony of the inspector, the standard was violated because the power cord was not protected against mechanical damage in multiple places. Tr. 110. I credit the inspector's testimony where he stated he observed multiple areas of a 480-volt 3 phase power cable that was cut, gashed, and smashed. Tr. 110. As such, I find that Delta Concrete violated 30 CFR 56.12004 by failing to repair a 480-volt 3 phase power cable which had multiple areas that were exposed to mechanical damage. Citation No. 8693968 is **AFFIRMED**.

2. Gravity

Inspector Frey designated Citation No. 8693968 as an S&S violation. The first element of the *Mathies* test requires a violation of a mandatory safety standard, and I have already found that the failure to repair a 480-volt 3 phase power cable that was exposed to mechanical damage was a violation of 30 CFR § 56. 12004. The second *Mathies* element is a contribution to a discrete safety hazard. By failing to repair multiple areas of a power cable, Respondent exposed miners to potentially fatal shock and burn injuries. Tr. 111.

The third *Mathies* element requires showing a reasonable likelihood that the hazard contributed to will result in an injury. Inspector Frey testified that he observed multiple areas where a 480-volt power cord had cuts, gashes, and smash marks. Tr. 109. In one area of the power cord, he observed a one-inch gash where the inner wires were visible and exposed. Tr. 109. The inspector also testified that areas where gash marks were observed also contained moisture, dirt, and sections where the entire outer jacket was missing. Tr. 110-111. Frey noted

that he observed a part of the power cord that was mashed and deformed. Tr. 109. He also believed that the damage to the 480-volt power cord occurred over multiple instances and not just one. Tr. 110-111. The inspector testified that the damage to the power cord likely occurred over the course of time and if the hazards were recognized they were not fixed or documented. Tr. 112. He believed that the dirt and moisture trapped in the gashed areas of the power cord would, over time, degrade the insulation and further expose the inner conductors. Tr. 113. The exposure to moisture and dirt increased the likelihood a miner would be exposed to an electrical injury. Tr. 114. Also, Frey noted that the power cable travels along the side of the sand stacker at eye level and was immediately adjacent to a travelway. Tr. 117. He concluded that a miner performing maintenance, repair, or workplace exams could potentially be exposed to the different hazards of mechanical damage. Tr. 117.

Respondent argued that the violation was not reasonably likely to lead to a significant injury because the wet side of the Delta Junction mine was locked and tagged out and no energy could get to the cable. Tr. 361. Walker, the operator of the mine, testified that no bare wires were exposed on the 480-volt 3 phase power cable. Tr. 362. He testified that the gashed parts of the power cord did not show bare wire, but actually a fiber-type filler that was between the outer jacket and the conductors. Tr. 363. Thus, the operator believed that the damage to the outer jacket of the 480-volt power cable would not cause a miner to be electrocuted. Tr. 364. Respondent also argued that maintenance, like greasing, occurs only when the wet side is non-operational and therefore the exposure to an energized power cord is decreased. Tr. 125. After considering both parties testimony, I find that the cuts, gashes, and smash marks in the 480-volt 3 phase power cord made it reasonably likely that a significant injury would occur to a miner. I defer to and credit the inspector's straight forward and detailed testimony that an injury was reasonably likely to occur because the power cord was next to a travelway where maintenance is performed by miners. Tr. 106, 122-123.

The fourth *Mathies* element requires a reasonable likelihood that a resulting injury will be reasonably serious. Respondent argued that a miner exposed to the damaged part of the power cord would not be fatal because the primary insulation was still present and that part of the wet plant was locked and tagged out. Tr. 361. The inspector testified that the multiple hazards in the 480-volt power cord made it reasonably likely a miner traveling in the area could be fatally electrocuted if they were to brush up against the exposed hazards. Tr. 113-114,117. Inspector Frey stated that the fatalgrams referenced in Citation No. 8693966 also would apply for this citation as well because a miner coming into contact with a 480-volt power cord would cause serious injury or death. Tr. 121

As the evidence produced at hearing supports all four elements of the *Mathies* formula, I find that the Secretary has established that Citation No. 8693968 was an S&S violation.

3. Negligence

Inspector Frey testified that the multiple hazards he observed on a 480-volt power cable were obvious when he walked along the travelway. Tr. 122-123. The inspector believed that the operator should have known about the multiple hazards because it was an area where adequate workplace examinations should have been taking place and a frequent area where miners travel.

Tr. 122-125. Frey also noted that the mine had no documentation that recognized the electrical hazards and there was no evidence of repair to the 480-volt power cord. Tr. 122.

According to the inspector, an adequate workplace examination did not occur based on the number of hazards identified on the 480-volt power cable. Tr. 123. I credit the inspector's testimony that he believed the electrical damage existed since the last workplace examination of the travelway. Tr. 123. Inspector Frey also stated that Respondent had been operational two weeks prior to the issuance of the citation and in his view there were no mitigating circumstances. Tr. 114-115, 123.

Finally, the inspector factored into account that the operator told him that the foreman performing workplace exams or electrical maintenance was not competent. Tr. 122. Walker testified to the contrary, and avowed that he never told the inspector the foreman was not competent and clarified that the foreman in question was actually his son Ryan Walker who was the last one that had performed electrical work at the mine prior to the inspection. Tr. 335. It is important to note Ryan Walker left Respondent's employment at the mine in late 2011 or early 2012, no less than a year prior to the inspection at issue. While I found Operator Walker's reliance on his son's competence in performing electrical work a mitigating factor in Citation 8693966 above no such mitigating factor exists here because the damage to the 480-volt power cable was open and obvious to anyone that would be travelling along the pathway. Respondent should have noticed the damage and taken immediate action to have the cable repaired. The fact that they failed to do so leads me to conclude that the inspector's high negligence level designation is appropriate.

For all these reasons, I find that Citation No. 8693968 was the result of high negligence. Although the inspector relied partially on his conversation with the operator about the foreman's competency when determining negligence, I find that this testimony is a non-factor for the high negligence designation. I credit the inspector's testimony that the hazard was obvious because it was in a travelway where miners frequently pass. And, adequate workplace inspections would have allowed the electrical hazards to be observed, noted, and repaired. Therefore, the negligence designation for Citation No. 8693968 is upheld at high.

4. Penalty Assessment

The Secretary has proposed a regularly assessed penalty of \$807.00. Respondent's past history of previous violations revealed that the mine has a total of seven past violations and no repeated violations of 56. 12004. Sec'y Ex. P-1. I upheld the high negligence designation for this citation because the inspector testified that he observed multiple electrical hazards along a 480-volt power cable that was immediately adjacent to a travel way where miners travel and perform maintenance. Tr. 122-125. Although the operator, in good faith, believed a competent person was performing the electrical maintenance, the multiple electrical hazards on the 480-volt power cable demonstrates that adequate workplace inspections were not conducted. Even though the citation was terminated based upon a seasonal closure and shutdown of the mine, Christopher Morley testified to repairing most of the electrical hazards cited by Inspector Frey in this docket. Tr. 389-396.

After considering all six penalty criteria analyzed earlier in this decision, I uphold the Secretary's proposed penalty and assess Respondent a civil monetary penalty of \$807.00 for Citation No. 8693968.

E. Citation No. 8693970

Inspector Frey issued Citation No. 8693970 on August 19, 2013 for an alleged violation of 30 CRF 56. 12013. Tr. 155. The inspector alleged within the citation that:

A mechanically strong, insulated and sealed splice was not used in connecting the 480-volt 3 phase well pump to cable that powers it. Additionally the ground wire was not connected and hanging in the open. A miner coming into contact with energized 3 phase electrical circuits could experience severe shocks, burns, or other fatal electrical injuries and complications.

Standard 56. 12013 was cited 1 time in two years at mine 5001783 (1 to the operator, 0 to a contractor).

Sec'y Ex. 8.

Frey determined that the violation was reasonably likely to cause an injury, the resulting injury would be fatal, the violation was S&S, affected one person, and was the result of Respondent's high negligence. Sec'y Ex. 8. The Secretary has proposed a penalty of \$807.00.

1. Findings

Inspector Frey issued Citation No. 8693970, because he determined that a splice connected to a 480-volt 3 phase well pump was in violation of 30 CFR § 56. 12013 which mandates that:

Permanent splices and repairs made in power cables, including the ground conductor where provided, shall be:

- (a) Mechanically strong with electrical conductivity as near as possible to that of the original;
- (b) Insulated to a degree at least equal to that of the original, and sealed to exclude moisture; and
- (c) Provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket.

Frey testified that Respondent used a splice to connect a 480-volt 3 phase well pump to a power cord. Tr. 156. The inspector stated that the splice connected the two cords with the use of wire nuts and electric tape. Tr. 156-157. Frey testified that the green grounding wire was not connected to anything and should have been connected to a grounding system. Tr. 157. The

inspector testified that the black, green, red, and yellow inner conductors wrapped around the well pump were exposed to mechanical damage. Tr. 158. The inner conductors were not protected by housing and there was no outer jacket sheath. Tr. 157. The inspector stated that the splice violated the standard because wire nuts are not mechanically strong with electrical conductivity as near as possible to that of the original. Tr. 156, 158. Also, the inspector testified that the splice was not bonded in a way to prevent moisture from infiltrating the inner conductors. Tr. 160.

Frey believed that moisture could infiltrate the splice because it was not encased in an outer jacket, outdoor rated housing, or other conduit. Tr. 159-160. I defer to and credit the inspector's testimony that the grounding wire was not properly grounded and that the splice was exposed to mechanical damage. Respondent attempted to address this violation through testimony from electrical witness Morley. However, I found his testimony confusing and focused primarily on the grounding issue stating that the pump was grounded at other points while acknowledging that the green grounding wire was not connected. Tr. 397. Furthermore, Morley acknowledged there was no outer jacket to which the splice could be bonded. Tr. 427. As such, I find that Respondent violated 30 CRF 56.12013 by failing to connect a 480-volt power cable that was mechanically strong and insulated to a degree that would exclude moisture. Citation No. 8693970 is **AFFIRMED**. However, for reasons explained below the negligence level will be modified from high to moderate.

2. Gravity

Inspector Frey designated Citation No. 8693970 as an S&S violation. The first element of the *Mathies* test requires a violation of a mandatory safety standard, and I have already found that the failure to connect a 480-volt 3 phase well pump to a power cable with use of a mechanically strong and insulated splice was a violation of 30 CFR § 56. 12013. The second *Mathies* element is a contribution to a discrete safety hazard. By failing to remedy the deficient splice that potentially existed since the fall of 2011, Respondent exposed miners to possible severe shocks, burns, or other fatal electrical injuries. Tr. 57, 353.

The third *Mathies* element requires showing a reasonable likelihood that the hazard contributed to will result in an injury. Inspector Frey testified that the wire nuts and electric tape used to splice the well pump were not mechanically strong and not bonded or sealed to exclude moisture. Tr. 156. Also, the inspector stated that the splice was not insulated equal to its original condition and was not bonded to the cable outer jacket to prevent moisture. Tr. 156-157. Frey testified that water can easily infiltrate the splice through the wire nuts where there are exposed conductors. Tr. 160. Furthermore, Frey noted that the green grounding wire was not attached, and that a continuity and resistance test had not been performed during the year the citation was issued. Tr. 157. The inspector believed that the lack of a grounded wire with no continuity and resistance test made it more likely that if a miner touched the splice they would be the least resistance to ground where electrocution could be fatal. Tr. 156-160. Additionally, the inspector testified that the splice was an obvious hazard that was in plain sight when he approached the water pump. Tr. 158. Frey stated that the splice was adjacent to a travelway and surge tunnel used by miners. Tr. 162-163. Thus, miners were regularly exposed to the deficient splice. *Id.* Inspector Frey believed that the hazard existed when the wet plant was last run and would likely

continue to exist during mining operations because multiple deficient splices were noted over the course of the initial inspection of the mine. Tr. 57. The operator acknowledged that the splice had existed in its cited condition since Ryan Walker installed the splice more than a year before the citation was issued. Tr. 483-484. Finally, Inspector Frey testified that no work place examinations noted the inadequate splices throughout the mine. Tr. 168.

Respondent argues that the violation was not reasonably likely to lead to a significant injury because according to Morley, the splice was sufficiently protected against electrical shock Tr. 457. He testified that the wire nuts coupled with the electrical tape provided a moisture resistant connection. Tr. 405. Also, Morley stated that although the green wire was not grounded, there was a ground bar on the water pipe. Tr. 397. He believed that the generator that powers the 480-volt 3 phase well pump would trip if the splice's inner conductors were exposed to moisture. Tr. 400. Morley also acknowledged that the splice was not protected from damage as near as possible to the original and that he would have enclosed the splice in a raceway or enclosure. Tr. 426-427. I defer to and credit the inspector's straight forward, detailed testimony that it was reasonably likely a significant injury would occur because the deficient splice was an electrical hazard and was in a location frequently traveled by miners.

The fourth *Mathies* element requires a reasonable likelihood that a resulting injury will be reasonably serious. Inspector Frey testified that under the right circumstances a miner coming into contact with the splice would be potentially fatal because the power cord was 480 volts. Tr. 59. The inspector also testified to five separate fatalgrams, each showing that a 480-volt shock can be fatal. Tr. 60. The inspector stated that the fatalgrams indicate that 480-volt electrical systems are dangerous and need to be installed and maintained in order to prevent exposure to fatal amounts of electricity. Tr. 61. Morley, Respondent's electrical witness acknowledged that contact with a 480-volt power cord could be fatal. Tr. 421. Therefore, considering the above evidence there is a reasonable likelihood that an electrical shock coming from the splice would cause serious injury or death to a miner.

As the evidence produced at hearing supports all four elements of the *Mathies* formula, I find that the Secretary has established that Citation No. 8693970 was an S&S violation.

3. Negligence

Inspector Frey testified that the splice connecting a 480-volt 3 phase well pump to a power cord was immediately obvious when walking past the well pump. Tr. 167-168. Frey credibly testified and noted that there were multiple deficient splices throughout the mine that were similar to the cited splice. Tr. 57. He believed that the splices were made this way intentionally and that it was common practice at the Delta Junction mine to splice using wire nuts and electric tape. Tr. 57. I find that Respondent was aware or should have been aware of the violation based on the number of deficient splices noted by inspector Frey. Tr. 57. I credit the inspector's testimony when he testified that there was no documentation identifying any electrical hazards and that he believed the hazard would continue to exist during continued mining operations. Tr. 164-168. When Walker, the operator, was asked whether the deficient splices would have continued to exist at the mine had the operator not been cited, he acknowledged that they would have continued to exist. Tr. 487.

As I noted above in reference to Citation 8693966 I credit the operator's testimony that his son, Ryan Walker, was likely the foreman at the time when the splices were made. Tr. 335. The inspector believed that based on his conversations with the operator, the foreman was not competent to perform electrical maintenance at the mine. Tr. 64. The analysis for this citation mirrors that of Citation 893966. As such, I find that the operator reasonably and in good faith believed a competent person was performing the electrical maintenance, and credit his testimony based on his personal observations of Ryan's work with electrician Hamilton. Walker's reasonable belief is a mitigating factor.

For all these reasons, I find that Citation No. 8693970 was the result of moderate negligence on the part of Respondent, as they should have been aware of the violation, but I credited the operator's testimony that he made a good faith effort to assign a competent person to perform electrical maintenance at the mine which constitutes a mitigating circumstance.

4. Penalty Assessment

The Secretary has proposed a regularly assessed penalty of \$807.00. Respondent's past history of previous violations revealed that the mine has a total of seven past violations and no repeated violations of 56. 12004. P-1. Walker, the operator testified that Respondent was a small mom and pop operation with 15 current employees at the time the citation was issued. Tr. 301. Respondent has not argued or presented any evidence indicating that the proposed penalty would affect its ability to continue business operations.

Although the inspector designated the citation as high negligence, I found that the mine was moderately negligent because the operator, in good faith, believed a competent person was performing the electrical maintenance. Respondent was negligent because the inspector testified that the deficient splice located on the water pump was obvious, not documented, and would have likely continued to exist at the mine based on the number of electrical hazards cited as well as Walker's admission that the violation would have continued to exist had the inspector not issued a citation. Tr. 57, 64, 164-168, 487. Much like the other electrical citations, there was a reasonable likelihood that a resulting injury would be reasonably serious because a miner coming into contact with the splice could have easily been killed because the power cord was 480 volts. Tr. 59. Although the citation was terminated based upon a seasonal closure and shutdown of the mine, Christopher Morley testified to repairing most of the electrical hazards cited by Inspector Frey. Tr. 389-396.

After considering all six penalty criteria as analyzed earlier in this decision as well as Respondent's reliance on MSHA's pronouncements from prior inspections, I am modifying the Secretary's proposed penalty of \$807.00 and assess Respondent a civil monetary penalty of \$400.00 for Citation No. 8693970.

F. Citation No. 8693978

Inspector Frey issued Citation No. 8693978 on August 23, 2013 for an alleged violation of 30 CRF 56.12028. Tr. 255. The inspector alleged within the citation that:

Records of ground continuity testing for Delta Concrete were unable to be reviewed upon request and could not be verified. Grounding systems are in place and have been tested in the past. The last inspector noted that ground testing had been performed in March of 2012. Ground system testing would have identified that the well pump ground wire was not connected as noted during this inspection. A miner that became a path to ground for a three phase 480-volt electrical system as is used at this mine could suffer shocks, burns, and other fatal electrical injuries and complications.

Sec'y Ex. P-12.

Frey determined that the violation was reasonably likely to cause an injury, the resulting injury would be fatal, the violation was S&S, affected one person, and was the result of Respondent's high negligence. Sec'y Ex. 12. The Secretary has proposed a penalty of \$807.00.

1. Findings

Inspector Frey issued Citation No. 8693978, because he determined that Respondent had not performed a ground continuity test annually and the operator was unable to provide test records upon request in violation of 30 CFR § 56.12028 which mandates that:

Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative.

Frey testified that he issued Citation No. 8693978 because Respondent failed to produce a record of a ground continuity test upon request. Tr. 256. The inspector testified that he was able to determine that the last ground continuity test was done in March of 2012 by referencing a previous inspector's notes. The citation was issued on August 23, 2013, which indicates that a ground continuity test had not been performed annually. Tr. 271. Frey stated that he did not personally observe any records of testing. Tr. 260. Additionally, the electrical hazards found at Delta Concrete provided further evidence that a ground continuity test had not been performed annually. The inspector believed this to be the case because the well pump ground wire was not attached to anything and a ground continuity test would have recognized this hazard. Tr. 260. Frey also stated that the other electrical hazards cited at Delta Concrete gave him reason to believe that a ground continuity test had not been performed at all within the last year. Tr. 264.

I credit the inspector's testimony that Respondent failed to produce a record of a ground continuity test upon request. Also, I credit Frey's testimony that a continuity and resistance test was last conducted March of 2012, which is more than one year before the citation was issued on August 23, 2013. As such, I find that Respondent violated 30 CFR 56.12028 because Respondent failed to produce any records indicating a continuity and resistance test had been performed and that a test had not taken place annually since March of 2012. Citation No. 8693978 is **AFFIRMED**.

2. Gravity

Inspector Frey designated Citation No. 8693978 as an S&S violation. The first element of the *Mathies* test requires a violation of a mandatory safety standard, and I have already found that the failure to provide prior records of a continuity and resistance test and not performing a test annually since March of 2012 was in violation of 30 CFR § 56.12028. The second *Mathies* element is a contribution to a discrete safety hazard. By failing to conduct a continuity and resistance test it is reasonably likely that a miner coming into contact with the energized wire or exposed moisture will become the lowest resistance to ground and be electrocuted. Tr. 59-61.

The third *Mathies* element requires showing a reasonable likelihood that the hazard contributed to will result in an injury. Inspector Frey testified that he had no reason to believe that a ground continuity and resistance test had been performed based on the electrical hazards found at Delta Concrete. Tr. 261. Frey stated that he was particularly concerned about the non-grounded well pump splice that would not provide a low-resistance path to ground. Tr. 262. Had a continuity and resistance test been performed it would have detected the electrical hazards present at Delta Concrete. Tr. 263. Also, he stated that most of the hazards cited were open and obvious. Tr. 264-265. Frey testified that it is likely the operator would have continued to operate the wet plant without a continuity and resistance test being performed and the various electrical hazards would continue to exist. Tr. 267.

The fourth *Mathies* element requires a reasonable likelihood that a resulting injury will be reasonably serious. Inspector Frey testified that under the right circumstances a miner coming into contact with a defective splice or power cord would be potentially fatal because most of the defective hazards had electrical capacity up to 480 volts. Tr. 59. The inspector also testified to five separate fatalgrams, each showing that a 480-volt shock can be fatal. Tr. 60. The operator, Walker, testified that he believed the lack of a continuity and resistance test would not be fatal because the mine was not in production. Tr. 461. I have already addressed Respondent's argument regarding Respondent's operational defense earlier in this decision. Accordingly, I credit the inspector's testimony that it is reasonably likely that contact with 480 volts would be fatal. Tr. 265, P-3.

As the evidence produced at hearing supports all four elements of the *Mathies* formula, I find that the Secretary has established that Citation No. 8693978 was an S&S violation.

3. Negligence

The inspector testified that the operator conducted continuity resistance tests in the past and knew the tests had to be completed annually. Tr. 266. Frey also testified that the operator did not meet the standard in providing records of past or present continuity and resistance tests. Tr. 266. The inspector stated that the numerous hazards present during the inspection gave him reason to believe that a test had not been performed within the last year. Tr. 266. Walker, the operator, also acknowledged that he did not conduct a continuity and resistance test because he was waiting a couple months so he could have more time to conduct the subsequent annual test at a later date. Tr. 459-461.

For all these reasons, I find that Citation No. 8693978 was the result of high negligence on the part of Delta Concrete, as they should have been aware of the violation because the operator knew a continuity and resistance test had to be performed annually and that documentation of previous tests must be available at MSHA's request. I credit the inspector's testimony that no continuity and resistance test had been performed since March 2012 and that no documentation of previous tests was provided to Inspector Frey. Tr. 260-267. Therefore, the negligence designation for Citation No. 8693978 is upheld as high.

4. Penalty Assessment

The Secretary has proposed a regularly assessed penalty of \$807.00. Respondent's past history of previous violations revealed that the mine has a total of seven past violations and no repeated violations of 56. 12028. Sec'y Ex. P-1. After considering all six penalty criteria as explained more fully earlier in this decision, I uphold the Secretary's proposed penalty and assess Respondent a civil monetary penalty of \$807.00 for Citation No. 8693978.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW OTHER VIOLATIONS

A. Citation No. 8693969

Inspector Frey issued Citation No. 8693969 on August 19, 2013 for an alleged violation of 30 CFR 56.11027. Tr. 134. The inspector alleged within the citation that:

The handrail on the washplant operator's station has not been maintained. The corner post on the right side of the ladder landing has popped welds and flaps. This corner serves both as a fixed point for the swing gate atop the landing and as the hand hold extending above the working platform when climbing the ladder for access. The working platform is 6 feet from the washplant deck and a fall to the ground would be 20 feet. This area is subject to weather and operational conditions that can make it wet and slippery. A miner falling from this height while accessing or atop the working platform could suffer fatal injuries and complications.

Sec'y Ex. 6.

Frey determined that the violation was reasonably likely to cause an injury, the resulting injury would be fatal, the violation was S&S, affected one person, and was the result of Respondent's moderate negligence. Sec'y Ex. 5. The Secretary has proposed a specially assessed penalty of \$243.00.

1. Findings

Inspector Frey issued Citation No. 8693969, because he determined that the southwest handrail on the washplant operator's station had not been maintained in good condition and was in violation of 30 CFR § 56.11027 which mandates that:

Scaffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition. Floor boards shall be laid properly and the scaffolds and working platforms shall not be overloaded. Working platforms shall be provided with toeboards when necessary.

Frey testified that the cited handrail was located on the southwest side of the washplant operator's station. Tr. 136, 149. He observed a broken bottom corner post weld that caused the handrail to freely move. Tr. 136. The loose handrail was next to the access ladder, so the handrail would be a point of contact for a miner climbing up the ladder to the operator's station. Tr. 137. The operator's station was six feet down from the wash plant deck and 20 feet from the ground. Tr. 136. Also, the inspector testified that the weld appeared to have popped due to continued vibration. Tr. 136. Walker, the operator, acknowledged that the handrail had a broken bottom corner weld. Tr. 497-498.

According to the testimony of the inspector, the standard was violated because the handrail was not maintained in good condition. Tr. 137. I credit the inspector's testimony where he testified that the broken right corner weld allowed the vertical bar to move up and down and was no longer connected to anything. Tr. 137. He also observed marks on the metal where it was rubbing at the bottom of the railing. Tr. 136. Frey stated that the vertical end piece was hanging below the angle iron where it used to be welded. Tr. 137. As such, I find that Respondent violated 30 CRF 56.11027 by failing to maintain a working platform in good condition. Citation No. 8693969 is **AFFIRMED**.

2. Gravity

Inspector Frey designated Citation No. 8693969 as an S&S violation. The first element of the *Mathies* test requires a violation of a mandatory safety standard, and I have already found that the failure to maintain a working platform was a violation of 30 CFR § 56.11027. The second *Mathies* element is a contribution to a discrete safety hazard. By failing to repair the handrail on the wash plant operator's station, Respondent exposed miners to a potential fall hazard. Tr. 138.

The third *Mathies* element requires showing a reasonable likelihood that the hazard contributed to will result in an injury. Both parties testified that the wash plant operator's station is a working platform for miners to operate the wet side screen deck. Tr. 140, 498. The inspector noted that the markings from the vertical bar hitting the angle iron indicated that the wet side screen deck had been operational without the hazard being corrected. Tr. 141. According to the inspector, this indicated that the plant was running at some point after it was broken. Tr. 141. The inspector believed because the handrail was able to freely move, a miner could not safely use it for support while climbing up the ladder or as point of contact without the potential of falling. Tr. 137-138, 143. Walker, the operator testified that a miner must go up onto the operator's tower to operate the wet plant. Tr. 498. The inspector believed the broken handrail would continue to exist during continued mining operations because the defective handrail should have been noted in a workplace examination but was never documented. Tr. 141. Frey also testified that the washplant operator's station was exposed to weather conditions which increased the likelihood of a miner falling. Tr. 154.

The fourth *Mathies* element requires a reasonable likelihood that a resulting injury will be reasonably serious. Inspector Frey testified that if a miner were to fall from the top of the wash plant operator's station, the fall would either be six feet down to the washplant deck or 20 feet down to the ground. Tr. 136. The inspector believed that either fall would be potentially fatal. Tr. 153-154. Respondent argued that it would be very unlikely that a miner could fall past the wash plant deck to the ground and that a fall to the wash plant deck would not be fatal. Tr. 466. The inspector testified that if a miner were climbing the ladder it would be more likely that a miner would miss the wash plant deck and fall to the ground. Tr. 138, 153-154. Inspector Frey also testified about two fatalgrams, which showed that miners can be fatally injured from falls of nine feet and sixteen feet. Tr. 144-145. I defer to and credit Frey's straight forward and detailed testimony that there is a reasonable likelihood a resulting injury would be reasonably serious if a miner were to fall from the wash plant operator's station to the ground or wash plant deck.

As the evidence produced at hearing supports all four elements of the *Mathies* formula, I find that the Secretary has established that Citation No. 8693969 was an S&S violation.

3. Negligence

Frey believed that the defective handrail was readily apparent because a miner doing a workplace inspection or climbing up to the wash plant operator's station should have noticed the hazard. Tr. 147. The inspector testified that the marks where the vertical bar was rubbing against the platform indicated that the wet side screen deck had been operational without the hazard being corrected. Tr. 141. Also, inspector Frey noted that the broken handrail was not noted in a workplace examination and no safeguards were put in place to indicate it had been identified. Tr. 143,147. Accordingly, he acknowledged that the weld could have broken when the plant was last in operation and considered this a mitigating factor thus assessing the negligence level as moderate. Sec'y Ex. P-6, p. 1.

Respondent argued that a drop down bar connects the southwest railing once a miner reaches the top of the operator's station and manually swings it down. Tr. 152. Inspector Frey testified that because the southwestern bottom corner weld was broken, the drop down bar would not function as intended and would not help a miner climbing up the ladder. Tr. 152. Additionally, the inspector testified that the swing gate for the working platform did not work properly and made the cited condition more obvious. Tr. 143. Again, I find Frey's testimony straight forward, detailed, articulate and persuasive meriting credit and deference over that of Respondent's arguments.

For all these reasons, I find that Order No. 8693969 was the result of moderate negligence on the part of Respondent, as they should have been aware of the violation because the handrail was not maintained and the operator's station is frequently used by miners to operate the wet side screen deck. Tr. 143. Therefore, the negligence designation for Order No. 8693969 is upheld at a moderate level.

4. Penalty Assessment

The Secretary has proposed a regularly assessed penalty of \$243.00. Respondent's history of previous violations revealed that the mine has a total of seven past violations and no repeated violations of 56. 11027. P-1. Walker, the operator, testified that Respondent is a small mom and pop operation with 15 current employees at the time the citation was issued. Tr. 301. Respondent has not argued or presented any evidence indicating that the proposed penalty would affect its ability to continue business operations. I upheld the moderate negligence designation for this citation because the defective handrail was able to freely move and a miner could not safely use it for support while climbing up the ladder without the potential of falling. Tr. 137-138, 143. The defective handrail created a reasonable likelihood of injury because a miner must go up the ladder onto the operator's tower to operate the wet plant. Tr. 498. According to the record, the citation was terminated based upon a seasonal closure and shutdown of the mine.

After considering all six penalty criteria and relying on my penalty analysis earlier in this decision, I uphold the Secretary's proposed penalty and assess Respondent a civil monetary penalty of \$243.00 for Citation No. 8693969.

B. Citation No. 8693974

Inspector Frey issued Citation No. 8693974 on August 19, 2013 for an alleged violation of 30 CRF 56.9303. Tr. 180. The inspector alleged within the citation that:

The grizzly ramp wall adjacent to the plant feed conveyors is unstable and has multiple concrete blocks in the process of toppling as ramp material thrusts them outward. Miners travel below the wall to maintain and grease the conveyors and as an access to the Surge tunnel. If the wall were to fail, a miner in the adjacent travelway could be fatally crushed.

Sec'y Ex. 9.

Inspector Frey determined that the violation was reasonably likely to cause an injury, the resulting injury would be fatal, the violation was S&S, affected one person, and was the result of Respondent's moderate negligence. Sec'y Ex. P-9. The Secretary has proposed a penalty of \$243.00.

1. Findings

Inspector Frey issued Citation No. 8693974, because he determined that a grizzly ramp wall adjacent to the plant feed conveyors was unstable where he observed multiple concrete blocks that were in the process of toppling. He found this condition to be a violation of 30 CFR § 56.9303 which mandates that:

Ramps and dumping facilities shall be designed and constructed of materials capable of supporting the loads to which they will be subjected. The ramps and

dumping facilities shall provide width, clearance, and headroom to safely accommodate the mobile equipment using the facilities.

The Respondent constructed a ramp to a grizzly storage bin where large vehicles dump gravel into a grizzly that funnels the gravel onto a feed conveyor located in a surge tunnel under the ramp. Tr. 183. Frey testified that the grizzly ramp wall was not capable of supporting the weight of the materials above the ramp. Tr. 182. The inspector observed that material was sloughing into the roadway past a stack of ecology blocks which were in the process of toppling and being thrust forward by the material that was falling down the grizzly ramp. *Id.*, Sec'y Ex. P-9. Also, Frey stated that the retaining wall under the ramp was cracked and leaning outward. Tr. 185. The inspector also noted that at the top of the grizzly ramp there was a k-rail highway style divider that was sloughing down the side of the ramp. Tr. 180-185. Frey testified that the ecology blocks and k-rail created a hazard to miners because the material falling down the ramp could cause them to topple down into the walkway. Tr. 182. Respondent denied that the blocks were in the process of toppling and asserted that the blocks were purposefully installed in a toppled fashion to hold the bank down from erosion. Tr. 439, 441-442, Sec'y Ex. P-9.

According to the inspector, the standard was violated because the grizzly ramp wall was unstable and multiple concrete blocks were in the process of toppling as ramp material thrust them outward. Tr. 182-189. I defer to and credit the inspector's testimony that the grizzly ramp was not capable of supporting the loads to which it was subject because the falling material was thrusting hazards outward. The inspector believed that eventually the material would thrust the multiple hazards outward and into the travelway. Tr. 186. The photos taken by the inspector show the toppled ecology blocks with k-rails that appear to have been displaced due to sloughing of ground material. Sec'y Ex. 9. I concur with his belief based on his direct observation and photos of the condition. As such, I find that Respondent violated 30 CRF 56.9303 by failing to stabilize a grizzly ramp wall that was not able to support the load to which it was subjected. Citation No. 8693974 is **AFFIRMED**.

2. Gravity

Inspector Frey designated Citation No. 8693974 as an S&S violation. I have already found that the failure to stabilize a grizzly ramp wall was in violation of 30 CFR § 56.9303 thus meeting element one of the *Mathies* test. The second *Mathies* element is a contribution to a discrete safety hazard. By failing to stabilize the grizzly ramp wall, Respondent exposed miners to crushing injuries from ecology blocks toppling or material sloughing off the ramp. Tr. 182, 191.

The third *Mathies* element requires showing a reasonable likelihood that the hazard contributed to will result in an injury. Inspector Frey testified that miners were exposed to the ecology blocks and sloughing material because they have to access the travel way to perform maintenance, repair, inspection, cleanouts, and to access the surge tunnel. Tr. 193. The inspector testified that eventually, with continued mining operations, the ecology blocks would topple into the travel way, the k-rails would slough into the travel way, and gravel would slough into the travel way. Tr. 191. Also, Frey stated that there could be a landslide of debris if the retaining wall or ecology blocks failed to hold back the material on the grizzly ramp. Tr. 191.

The inspector also testified that the vibration from mobile equipment around the ramp would cause material to move down the ramp quicker and would eventually cause the grizzly ramp to fail. Tr. 191-192. Frey also observed that the grizzly ramp hazard was obvious when he walked up the travel way. Tr. 190. He noted that the ramp hazard would likely continue to exist into the future because the ramp failure was not recognized in any workplace examinations. Tr. 190-193. According to the inspector, the operator was unaware of the state of the grizzly ramp wall. Tr. 190.

Respondent argued that the violation was not reasonably likely to lead to a significant injury because the ecology blocks, k-rails, or gravel material would not slough off in a way that would lead to a significant injury. Tr. 439-446. The operator testified that the ecology blocks were locked in place because of a v-notch at the bottom of every block. Tr. 442. Walker avowed that neither the ecology blocks nor k-rails had moved at all since they were installed to hold back material on the grizzly ramp. Tr. 443. He also testified that even though the retaining wall under the ramp was cracked, it was reinforced with rebar. Tr. 444. I defer to and credit the inspector's straight forward and compelling testimony that it was reasonably likely the ecology blocks, k-rails, or gravel material sloughing off the ramp would lead to a significant injury because his observations are clearly supported by the photos he took. Tr. 194, Sec'y Ex., P-9.

The fourth *Mathies* element requires a reasonable likelihood that a resulting injury will be reasonably serious. The inspector testified that he was concerned that a miner could be crushed or struck by an ecology block or k-rail falling down the slope of the ramp. Tr. 194. I share his concern and find it is reasonably likely the ecology blocks, k-rails, or gravel material sloughing off the ramp would lead to fatal crushing injuries. Tr. 193-194.

As the evidence produced at hearing supports all four elements of the *Mathies* formula, I find that the Secretary has established that Citation No. 8693974 was an S&S violation.

3. Negligence

Inspector Frey testified that he was worried about continued mining operations because the grizzly ramp had probably degraded over time and the hazards were not recognized by the operator. Tr. 193. The inspector believed the hazards on the grizzly ramp had not been recognized because the area was not cordoned off to prevent access and there was no workplace examination identifying the hazards. Tr. 193. Frey also testified that the toppling ecology blocks, sloughing k-rails, and cracked retaining wall were obvious signs that the ramp was failing. Tr. 195. However, he also acknowledged that the deterioration progressed slowly thus "kind of working itself into the background" on not being noticed. Tr. 195.

For all these reasons, I find that Citation No. 8693974 was the result of moderate negligence on the part of Delta Concrete, as they should have been aware of the violation because the toppled ecology blocks and sloughing material were obvious and next to a travel way where sufficient workplace examinations should have been taking place. Tr. 143. I find the slow progression of the deterioration to be a mitigating factor leading one to believe immediate attention was not necessary. Therefore, the negligence designation for Citation No. 8693974 is upheld at moderate.

4. Penalty Assessment

The Secretary has proposed a regularly assessed penalty of \$243.00. Respondent's past history of previous violations revealed that the mine has a total of seven past violations and no repeated violations of 56.9303. Sec'y Ex. P-1. Walker, the operator testified that Respondent is a small mom and pop operation with 15 current employees at the time the citation was issued. Tr. 301. Respondent has not argued or presented any evidence indicating that the proposed penalty would affect its ability to continue business operations. I upheld the moderate negligence designation for this citation because the toppling ecology blocks, sloughing k-rails, and cracked retaining wall were obvious signs that the grizzly ramp was failing. Tr. 195. I found that it was reasonably likely the ecology blocks, k-rails, or gravel material sloughing off the ramp could lead to a significant injury to a miner. Tr. 194. According to the record, the citation was terminated based upon a seasonal closure and shutdown of the mine.

After considering all six penalty criteria and noting the penalty analysis earlier in this decision, I uphold the Secretary's proposed penalty and assess Respondent a civil monetary penalty of \$243.00 for Citation No. 8693974.

C. Citation No. 8693975

Inspector Frey issued Citation No. 8693975 on August 23, 2013 for an alleged violation of 30 CRF 56.18002a. Tr. 180. The inspector alleged within the citation that:

A competent person has not been performing workplace exams at least once per shift at Delta Concrete based upon the number of discrete safety hazards found during inspection and the length of time necessary for them to accumulate. A miner performing their duties could be fatally injured if exposed to a hazard that should have been found and corrected in an examination of working places.

Sec'y Ex. 10.

Frey determined that the violation was reasonably likely to cause an injury, the resulting injury would be fatal, the violation was S&S, affected one person, and was the result of Respondent's high negligence. Sec'y Ex. 10. The Secretary has proposed a penalty of \$807.00.

1. Findings

Inspector Frey issued Citation No. 8693975, because he determined that a competent person had not been performing workplace exams at least once per shift at Delta Concrete. This was in violation of 30 CFR § 56.18002a which mandates that:

A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.

A competent person according to 56.2 is “a person having abilities and experience that fully qualify him to perform the duty to which he is assigned.” 30 C.F.R. § 56.2. MSHA’s Program Policy Manual states a competent person is “any person who, in the judgment of the operator, is fully qualified to perform the assigned task. MSHA does not require that a competent person be a mine foreman, mine superintendent, or other person associated with mine management.” Sec’y Ex., P-19.

Inspector Frey testified that there was evidence that mining related activities had occurred on days where there was no record of examination. Tr. 214. After inspecting Delta Concrete, inspector Frey stated that the number of hazards identified led him to question the competency of the person performing those inspections. Tr. 214. The operator acknowledged that at the time they were cited, Respondent was not conducting competent person inspections every shift as required by 56.18002a. Tr. 474. The inspector stated that there were missing records of examinations for when work would have been performed based upon looking at production reports. Tr. 217. Inspector Frey noted that most of the hazards cited at the mine were open and obvious hazards that should have identified by sufficient workplace examinations. Tr. 214.

The inspector noted no less than four citations where he believed the operator should have discovered the hazards during a previous workplace examination. Tr. 216. For Citation Nos. 8693966 and 8693970, the operator should have discovered the inadequate splices during workplace examinations because the splices were open and obvious and a competent miner would have spotted the hazard. Tr. 216-219. For Citation No. 8693968, the operator should have observed the damaged 480-volt cable adjacent to a travel way during a workplace examination because the damage had existed for a significant period of time based on the amount of damage to the cable. Tr. 217-218. Lastly, for Citation No. 8693969, the operator should have observed the defective handrail during a workplace examination because a reasonable miner would have noticed it while climbing up to the operator’s station. Tr. 219.

I credit the inspector’s testimony that the hazards were extensive and had most likely existed for a significant period of time demonstrating that inadequate work place examinations had taken place while the plant was operational. Tr. 215. Respondent argued that there was a communications failure between Inspector Frey and Operator Walker regarding who was responsible for workplace examinations. Walker avowed that as owner operator he was the competent person who was responsible for the exams while Frey believed Crusher Operator Jimmy Hanlon was responsible. Tr. 334-335, 127, 129-130, 217. Respondent further asserted he believed workplace exams were required for operation days only and not maintenance days. Tr., 473-474. Regardless of the alleged communication issues I find sufficient evidence to conclude that there was a lapse in required workplace exams due to the absence of exam records and the fact that the electrical violations had existed for an extended period while the plant was operational prior to the inspection. As such, I find that Respondent violated 30 CRF 56.18002a because a competent person had not been performing workplace examinations at least once per shift at Delta Concrete. Citation No. 8693975 is **AFFIRMED**.

2. Gravity

Inspector Frey designated Citation No. 8693975 as an S&S violation. I have already found that Respondent failed to have a competent person perform workplace examinations at least once per shift in violation of 30 CFR § 56.18002a. The second *Mathies* element is a contribution to a discrete safety hazard. There were a number of discrete safety hazards that existed at Delta Concrete which included inadequate splices, damaged power cords, and a broken handrail that were not discovered during workplace examinations. Tr. 226-228, P-10.

The third *Mathies* element requires showing a reasonable likelihood that the hazard contributed to was likely to result in an injury. For the electrical citations, the inspector testified that many of the electrical hazards were located in travel ways where miners perform maintenance, repair, inspection, and cleanouts. The inspector also testified that other discrete safety hazards like the defective handrail or grizzly ramp were also in locations where miners frequently work and these hazards were obvious and had existed for a significant period of time while Respondent was operational. Based on the testimony of the inspector, I find a reasonable likelihood that the failure to conduct workplace examinations reasonably contributed to the likelihood a significant injury would occur.

The fourth *Mathies* element requires a reasonable likelihood that a resulting injury will be reasonably serious. Inspector Frey testified that under the right circumstances a miner coming into contact with a defective splice or power cord would be potentially fatal because most of the defective hazards had electrical capacity up to 480 volts. Tr. 59. The inspector also testified to five separate fatalgrams, each showing that a 480-volt shock can be fatal. Tr. 60. Frey stated that the non-electrical hazards posed a significant risk of injury to miners which included crushing injuries from the grizzly ramp and fall hazards from the defective handrail. I credit the inspector's testimony that many of the hazards cited on August 19, 2013 could lead to fatal injuries and that six out of nine citations were designated as potentially fatal. The failure to identify and address these hazards via workplace examinations significantly contributed to the reasonable likelihood of a serious injury or fatality occurring.

As the evidence produced at hearing supports all four elements of the *Mathies* formula, I find the Secretary has established that Citation No. 8693975 was an S&S violation.

3. Negligence

Inspector Frey testified that the negligence designation was high because the operator should have been aware that work place examinations were not being conducted as required by a competent person. Tr. 228. Frey testified that the Walker stated during their conversation that equipment operator Jimmy Hanlon did not have sufficient training and was not competent to perform some workplace examinations. Tr. 229. Walker testified that his conversation with the inspector was contrary to inspector Frey's testimony, but did acknowledge that Hanlon was not competent to perform workplace examinations for electrical hazards. Tr. 378. Based on both parties' testimony, I credit the inspector's testimony that the number of electrical hazards demonstrates that a competent miner whether it be Hanlon or Walker himself, was not performing adequate workplace examinations. Tr. 233.

Frey also reviewed the workplace examination reports from Delta Concrete and determined that work was performed on days when examinations were not recorded. Tr. 230. Frey stated that when he inspected Respondent, he was not provided with examination records for every day he could substantiate work taking place. Tr. 230. The inspector stated that there were some records of examinations on some days, but there were gaps between days when work was performed. Tr. 215. The mine operator acknowledged that the miners doing workplace examinations did not do examinations on maintenance days if the wet plant was not going to produce gravel, even if the miners worked in the cited areas. Tr. 472-474. He also testified that at the time of the citation, there were competent miners doing the workplace inspections, but it was not on a daily basis. Tr. 473. Based on the testimony from both parties it is easy to conclude there was a fundamental misunderstanding between Frey and Walker about who was responsible for the workplace examinations. Walker ultimately admitted he was the responsible competent person after his son left employment from the mine in 2011 and acknowledged that workplace exams had only been conducted on a shift by shift basis while the plant was operational and not when maintenance only was being performed. However, it is clear from the evidence that at a minimum the electrical violations had existed since 2011, no less than a year and a half to two years prior to the 2013 inspection. A competent workplace exam while the plant was operational during this time should have identified the electrical issues. Therefore, I find the high negligence designation to be appropriate and uphold it.

4. Penalty Assessment

The Secretary has proposed a regularly assessed penalty of \$807.00. Respondent's past history of previous violations revealed that the mine has a total of seven past violations and no repeated violations of 56.18002a. Sec'y Ex. P-1. Walker, the operator testified that Respondent is a small mom and pop operation with 15 current employees at the time the citation was issued. Tr. 301. Respondent has not argued or presented any evidence indicating that any of the proposed penalties would affect its ability to continue business operations. I upheld the high negligence designation for this citation because of the many open and obvious hazards present at Delta Concrete that should have been identified by sufficient workplace examinations. I also found that significant injury was reasonably likely because many of the electrical hazards were located in travel ways where miners perform maintenance, repair, inspection, and cleanouts.

After considering all six penalty criteria and noting my penalty analysis earlier in this decision, I uphold the Secretary's proposed penalty and assess Respondent a civil monetary penalty of \$807.00 for Citation No. 8693975.

D. Citation No. 8693977

Inspector Frey issued Citation No. 8693977 on August 23, 2013 for an alleged violation of 30 CRF 56.9300a. Tr. 241. The inspector alleged within the citation that:

The scale does not have rub rails or any other mid axle height barrier with approximately a 4 foot drop off on either side. Trucks drive across the scales as needed depending upon business. Driving off the scale could cause a truck to turn on its side leading to cuts, bruises, strains, sprains, or broken bones for the driver.

Standard 56.9300a was cited 1 time in two years at mine 5001783 (1 to the operator, 0 to a contractor).

Sec'y Ex. 11.

Inspector Frey determined that the violation was unlikely to cause an injury, the resulting injury would be lost workdays or restricted duty, the violation was not S&S, affected one person, and was the result of Respondent's low negligence. Sec'y Ex. 11. The Secretary has proposed a penalty of \$100.00.

1. Findings

Inspector Frey issued Citation No. 8693977, because he determined that the operator's scale for weighing vehicles was in violation of 30 CFR § 56.9300a which mandates 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.

Frey testified he observed an operator's scale for weighing vehicles at the Delta Junction mine that did not have rub rails, berms, or guardrails and there was a four foot drop off on either side of the scale. Tr. 243-245. The Commission requires a three-part test for finding violations of 30 C.F.R. § 56.9300: (1) whether the scales are part of a roadway; (2) whether each scale has a drop-off of sufficient grade or depth to cause a vehicle to overturn or endanger persons; and (3) whether the scales are equipped with berms or guardrails that are at least mid-axle height of the largest self-propelled mobile equipment that travels the roadway. *Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985 (Dec. 2011).

Since issuance of *Lakeview* the case that has most fully considered the question of whether an elevated scale is part of a roadway has been *Knife River Corp.*, 34 FMSHRC 1109 (May 10, 2012). In *Knife River*, Judge Thomas McCarthy applied the Commission's three-part test and provided a thorough analysis in determining that an elevated truck scale with 10-inch rub rails was not part of the roadway. The judge found unpersuasive the argument that the scale is part of a continuous road and therefore, by definition, part of the roadway. 34 FMSHRC at 1121. He noted that because the Commission required in *Lakeview* an initial determination of whether the scale was part of the roadway, the judge must examine the "design, location, and use of the truck scale", in making his determination. *Id.* The judge agreed with the Secretary's position that the plain language of Section 56.9300 would apply to an area where vehicles must travel, but found that the Secretary in his case failed to establish that the scale constituted such an area where vehicles must travel. *Id.* at 1122. He noted that the scale at Knife River was not located on the main haulage road where all the vehicles entering or exiting the mine were required to travel, but rather was removed on a single-lane access road. *Id.* The only trucks that drove on the scale were those being weighed. *Id.* The judge specifically found that:

Drivers do not use the scale as one typically uses a road, bridge, bench, or ramp (i.e., as a means of traveling from one point to another)... Rather, the scale is

used as a piece of equipment for the sole purpose of weighing vehicles, which slowly move across the scale with intermittent stops before proceeding back on course. The fact that trucks enter one end of the scale and exit on another is completely secondary to the scale's function and use. *Id.*

I find that advancing a functionalist approach, rather than a formal approach that examines the scale superficially, Judge McCarthy allowed the first element of the Commission's test to have meaning. *Citing Lakeview Rock Products, Inc.*, 35 FMSHRC 473, 487, 2013 WL 1385621, at *13-14.

In this case Respondent argued that the operator's scale was not a roadway that vehicles used as an entrance or exit to the mine site. Tr. 437. Respondent's Google image of the Delta Junction mine shows the location of the main roadway used by miners and contractors in red. Tr. 317-319, Resp. Ex. A, Photo 7. Walker, the operator, testified that the main roadway in red ran from left to right, and that the lines depicted traffic flow from the two exit and entrance points. *Id.* Also, Walker testified the location of the scale access point and exit were next to the office and indicated that a miner would not use this access as an entrance to or exit from the mine site. Tr. 318, 437. Walker also testified that the specific purpose of the scale was for weighing vehicles and was not a roadway that miners would regularly use. Tr. 437. Frey testified that he considered the scale to be a part of the roadway because vehicles and trucks would have to drive across the scale twice in order to be properly weighed. Tr. 243-244. First, a truck driver with an empty trailer would have to drive over the scale and then weigh the trailer end. Tr. 243. Second, the truck driver would then drive over it again, after being loaded, to get a heavy weight to determine the saleable amount of product. Tr. 243. Because of the vehicle traffic that the scale road took on, the inspector believed that it was part of a roadway. Tr. 243-244.

After considering both parties' arguments, I find that the design, location, and use of the scale at the Delta Junction mine establishes that it is not part of the mine's roadway. I credit Walker's testimony that the scale road was next to the office and that it was not used as an entrance or exit roadway to or from the mine. Like *Knife River*, the scale was not located on the main travel way road that ran left to right, but rather the scale area was removed onto a single-lane access by the main office. Resp. Ex. A, Photo 7. I credit Walker's testimony that the sole purpose of the scale area was to weigh vehicles and not as a roadway miners used as an entrance and exit. The design and placement of the scale at the mine, based on the Google image of the Delta Junction mine site, clearly demonstrates that a miner wishing to weigh a vehicle would have to pull off the main roadway onto the scale road to be weighed. Resp. Ex. A, Photo 7. Therefore, I find that the Secretary has failed to prove a violation of 30 CRF 56.9300a because the scale access area was not part of a roadway. Accordingly, Citation No. 8693977 is **VACATED**.

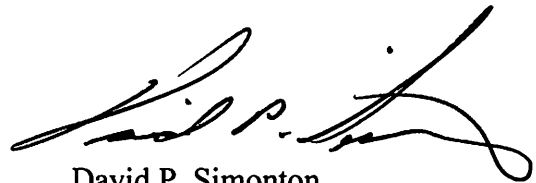
VI. PENALTY ASSESSMENT SUMMARY

The following chart summarizes my findings and the assessed penalties in this docket:

Citations			
Citation No.	Proposed Amount	Judgment Amount	Modification
8693966	\$807.00	\$400.00	Negligence level reduced from high to moderate
8693967	\$100.00	\$100.00	
8693968	\$807.00	\$807.00	
8693970	\$807.00	\$400.00	Negligence level reduced from high to moderate
8693978	\$807.00	\$807.00	
8693969	\$243.00	\$243.00	
8693974	\$243.00	\$243.00	
8693975	\$807.00	\$807.00	
8693977	\$100.00	\$0.00	Vacated
Total	\$4721.00	\$3807.00	

VII. ORDER

Based upon the findings above, Citation Nos. 8693966 and 8693970 are **AFFIRMED** with modified negligence levels. Citation Nos. 8693967, 8693968, 8693978, 8693969, 8693974, and 8693975 are **AFFIRMED** as written. Citation No. 8693977 is **VACATED**. Based on the criteria in section 110(I) of the Mine Act, 30 U.S.C. § 820(I), I assess eight penalties contested at hearing above for a total judgment penalty of \$3807.00. Delta Concrete Inc. is hereby **ORDERED** to pay the Secretary of Labor the total sum of **\$3,807.00** within 30 days of this order.¹



David P. Simonton
Administrative Law Judge

¹ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

Distribution: (First Class U.S. Mail)

Sean J. Allen, Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 216,
Denver, CO 80202 for Petitioner

Robert Groseclose, Cook, Schuhmann & Groseclose, Inc., 714 Fourth Avenue, Suite 200,
Fairbanks, AK 99701 for Respondent