

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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November 29, 2018

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION, (MSHA),  
Petitioner,

v.

MARTIN MARIETTA MATERIALS  
SOUTHWEST, INC.,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. CENT 2018-0179  
A.C. No. 41-01335-457187

Mine: Beckmann Quarry

**DECISION**

Appearances: Christopher D. Lopez-Loftis, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, for Petitioner;

Benjamin J. Ross, Esq., Jackson Kelly PLLC, Denver, Colorado, 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, pursuant to the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 801.<sup>1</sup> This case involves five Section 104(a) citations issued to Martin Marietta Materials Southwest, Inc. (“Martin Marietta” or “Respondent”), in December 2017.

A hearing was held on September 12, 2018, in San Antonio, Texas. MSHA Inspector David Tijerina testified for the Secretary. Two managers from the mine, Howard Evans and Richard Jackson, testified for Martin Marietta. At hearing, the Secretary requested that Citation No. 9356108 be vacated, and the request was granted. Regarding the remaining four citations, the Secretary argued that they should be upheld as written. Martin Marietta contested all four violations, along with the gravity and negligence designations for each. The parties submitted post-hearing briefs. Based upon the parties’ stipulations and my review of the witnesses’ testimony and of the entire record, I make the following findings.

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<sup>1</sup> In this decision, the transcript, the joint stipulations, the Secretary’s exhibits, and Respondent’s exhibits are abbreviated as “Tr.,” “Jt. Stips.,” “Sec’y Ex. #,” and “Resp. Ex. #,” respectively.

## II. STIPULATIONS OF FACT

At hearing, the parties agreed to the following stipulations of fact included in their prehearing statements:

1. Martin Marietta Materials Southwest, Inc. (hereinafter, “Respondent”) was at all times relevant to this proceeding engaged in mining activities at the Beckmann Quarry Mine.
2. Respondent’s mining operations affect interstate commerce.
3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq. (The “Mine Act” or “Act”).
4. Respondent is an “operator” as that word is defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Beckmann Quarry Mine (Federal Mine I.D. No., Mine ID 41-01335) where the contested citations in this proceeding was [sic] issued.
5. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the Act.
6. On or about December 12, 2017, through December 13, 2017, Mine Safety and Health Administration (“MSHA”) Inspector David Tijerina was acting as a duly authorized representative of the United States Secretary of Labor, assigned to MSHA, and was acting in his official capacity when conducting the inspection and issuing the citations from docket CENT 2018-0179, at issue in this proceeding.
7. The citations at issue in this proceeding was [sic] properly served upon Respondent as required by the Act and was [sic] properly contested by Respondent.
8. The citations at issue in this proceeding may be admitted into evidence by stipulation for the purpose of establishing their issuance. Materials published on MSHA’s website or otherwise published by MSHA may also be admitted into evidence by stipulation for the purpose of establishing their issuance and availability. The truthfulness or relevancy of any statements asserted therein is not stipulated to by the parties.
9. Respondent demonstrated good faith in abating the violations.
10. The penalties proposed by the Secretary in this case will not affect the ability of Respondent to continue in business.

*See Tr. 5; Jt. Stips.*

### III. LEGAL PRINCIPLES

#### A. Establishing a Violation

The Commission has long held that, “In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation.” *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyo. Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992). The Commission has described the Secretary’s burden as follows: “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 FMSRC at 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 Res.*, 6 FMSHRC 1132, 1138 (May 1984).

#### B. Significant and Substantial

A violation is significant and 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 Div., Nat’l 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).

The Commission has held that the second element of the *Mathies* test addresses the extent to which a violation contributes to a particular hazard. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016). Analysis under the second step should thus include the identification of the hazard created by the violation and a determination of the likelihood of the occurrence of the hazard that the cited standard is intended to prevent. *Id.* at 2038. At the third step, the Secretary must prove there was a reasonable likelihood that the hazard contributed to by the violation will cause an injury, not a reasonable likelihood that the violation, itself, will cause injury. *W. Ridge Res., Inc.*, 37 FMSHRC 1061, 1067 (May 2015) (ALJ), citing *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1280–81 (Oct. 2010). Evaluation of the four factors is made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

### **C. Negligence**

Under the Mine Act, operators are held to a high standard of care. *Am. Coal Co.*, 38 FMSHRC 2062, 2083 (Aug. 2016); *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). However, negligence is not defined in the Act and has been differently defined by the Secretary and the Commission. The Secretary evaluates negligence on the basis of mitigating circumstances: low negligence involves actual or constructive knowledge of the violative condition with considerable mitigating circumstances; moderate negligence involves actual or constructive knowledge of the violative condition with mitigating circumstances; high negligence involves actual or constructive knowledge of the violative condition with no mitigating circumstances; and reckless disregard involves conduct that exhibits the absence of the slightest degree of care. 30 C.F.R. § 100.3: Table X.

The Commission and its judges are not bound to apply the Part 100 regulations in their consideration of negligence. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2048 (Aug. 2016) (citing *Brody*, 37 FMSHRC at 1701–03). The Commission instead employs a traditional negligence analysis, assessing negligence based on whether an operator failed to meet the requisite standard of care. *Brody*, 37 FMSHRC at 1702. In doing so the Commission considers what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation would have taken under the same circumstances. *Id.* Commission judges are thus not limited to an evaluation of mitigating circumstances but may instead consider the totality of the circumstances holistically. *Id.*; see also *Mach Mining*, 809 F.3d 1259, 1264 (D.C. Cir. 2016).

### **D. Penalty**

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 Co.*, 5 FMSHRC 287, 291 (March 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the 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).

## **IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Martin Marietta operates the Beckmann Quarry, a surface limestone operation located in Bexar County, Texas. On December 12, 2017, MSHA Inspector David Tijerina visited the

quarry to perform a regular inspection.<sup>2</sup> He was accompanied by Ron Hager, the plant manager. Tr. 17. Four 104(a) citations issued during that inspection are at issue in this case.

#### **A. Citation No. 9356102**

Inspector Tijerina began the inspection at the primary crusher. The Beckmann Quarry is large with several pit areas, and the primary crusher is a large crusher with conveyor belts that feed the plants. Tr. 18. The crusher and its supports sit on a cement platform. Tr. 18. Tijerina examined the platform and observed that it was covered in mud. Tr. 18. He did not measure the mud, but believed it to be about two to four inches deep. Tr. 18, 22. The mud appeared slick to him, although he did not walk on it. Tr. 18-19. He observed footprints in the mud and believed that some of them indicated that the person walking had slipped. Tr. 18-20. The Secretary introduced a photograph of the footprints taken by Tijerina. Sec'y Ex. 2-1. Tijerina believed slip marks were apparent in the third footprint from the right in the photograph. Tr. 56. He determined that the mud had accumulated because the material in the crusher was wet and sticky due to recent rains. Tr. 21. Miners would typically have used a water pump and hose to spray down the area, but the pump was not working. Tr. 21. Tijerina believed that the mud presented a slip-and-fall hazard for miners working in the area. Tr. 20. He explained that if a person fell, he could strike the floor or one of the pillars and get a laceration, contusion, or broken bones. Tr. 24. The company terminated the citation by using a water truck to spray down the area. Tr. 26.

Howard Evans, the superintendent for the primary crusher area, was present during this portion of the inspection and testified at the hearing. He explained that typically employees only access the platform area to do cleanup. Tr. 61-61. They occasionally also enter the area to access the 96 belt if there is a problem with it. Tr. 61-62. He stated that the area is typically cleaned approximately every other day, and it had been cleaned the night before the inspection. Tr. 64. The platform is also occasionally used to access the 96 conveyor for repairs. Tr. 64. Evans stated that before directing anyone to work in the area, management would have inspected the area and ordered it to be cleaned. Tr. at 65. Evans believed there was less mud on the platform than the inspector described, only an inch or two of material instead of four. Tr. 66. He described the buildup as "minimal" and attributed it to dust from crushing that had gotten wet. Tr. 66. Evans did not believe the mud presented a slip-and-fall hazard. Tr. 67. He explained that employees wear steel-toed boots with slip-resistant soles that would prevent them from slipping if they walked in the mud. Tr. 67. No one was assigned to the crusher platform area on the morning of the inspection, and there were no problems with the 96 belt to cause anyone to enter the area that day or the previous day. Tr. 63, 102. Evans did not know who had made the footprints shown in the inspector's photographs. Tr. 70. He did not observe any slip marks on the day of the inspection. Tr. 102.

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<sup>2</sup> Inspector Tijerina has worked as an MSHA inspector for approximately seven and one half years. Tr. 13. He previously worked for 20 years in the mining industry, including as a safety manager and consultant. Tr. 14.

## 1. The Violation

Based on the conditions at the crusher platform, Inspector Tijerina issued Citation No. 9356102 for a violation of 30 C.F.R. § 56.20003(a). Sec’y Ex. 1-1. That standard requires that “At all mining operations[,] Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly.” 30 C.F.R. § 56.20003(a).

The term “workplace” is not defined in the Secretary’s regulations, but Commission ALJs have generally found that an area is a workplace if work is done in the area. *See, e.g., Oil Dri Prod. Co.*, 38 FMSHRC 990, 997-98 (May 2016) (ALJ); *Moltz Constr., Inc.*, 36 FMSHRC 1861, 1863 (July 2014) (ALJ); *Taft Prod. Co.*, 36 FMSHRC 522, 526 (Feb. 2014) (ALJ). Commission ALJs have interpreted “passageway” to include areas where miners walk in order to access other areas. *See, e.g., Ball, employed by Mountain Materials, Inc.*, 38 FMSHRC 1799, 1809 (July 2016) (ALJ); *Taft*, 36 FMSHRC at 526-27. Here, while no one was assigned to the area at the time, the crusher platform provided access to the 96 belt and miners entered the area regularly to clean. The footprints in the mud indicate that someone had been in the area recently to work or to pass through.<sup>3</sup> I find that the area was a “workplace” or “passageway.”

I also find that the area was not “kept clean and orderly.” In applying broad standards such as this one, the Commission asks whether “a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.” *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990). Inspector Tijerina testified that the area was covered in a thick layer of mud and appeared slippery. Tr. 18-19. Based on his observations of the footprints, he believed someone had already slipped in the mud. Tr. 18-20. I credit his testimony and find that the mud presented a slip-and-fall hazard. While Evans stated that the area had been cleaned the night before, even if this was true, I find that a reasonably prudent miner would have recognized the hazard and taken steps to address it. Accordingly, the Secretary has proven a violation.

## 2. Significant and Substantial

The Secretary argues that the violation was S&S and was reasonably likely to result in an injury causing lost workdays or restricted duty. The Secretary has proven a violation of a mandatory safety standard, satisfying the first element of the *Mathies* test for an S&S violation.

To prove the second *Mathies* element, the Secretary must demonstrate the reasonable likelihood of the occurrence of the hazard that § 56.20003(a) is designed to prevent. *Newtown Energy*, 38 FMSHRC at 2037. Section 56.20003(a) requires that all workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly. 30 C.F.R. § 56.20003(a). The purpose of § 56.20003(a) is to address the hazard of a miner slipping, falling, or tripping on loose materials in a work area. Martin Marietta argues that the hazard was unlikely to occur because the crusher pedestal was only accessed for cleaning, which occurred every other day, and

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<sup>3</sup> Evans implied at hearing that the footprints could have belonged to the inspector. Tr. 68. However, Tijerina testified that he did not walk on the cement. Tr. 19. I credit the inspector’s testimony and find that the prints most likely belonged to a miner.

occasionally for repairs of the 96 conveyor. Resp. Br. 3, 6; Tr. 64. The company contends that the area would have been cleaned before anyone performed work there. Resp. Br. 6. However, the footprints observed by the inspector indicate that someone entered the area while it was still muddy. Assuming continued normal mining operations, it is reasonable to expect that someone would have entered the area again without cleaning it first. The operator argues that steel-toed boots would prevent anyone from slipping in the mud and that there are no slip marks apparent in the inspector's photograph. Resp. Br. 5-6. I disagree and find that the photograph does indicate slippage. *See* Sec'y Ex. 2-1. I find that the slip-and-fall hazard was reasonably likely to occur.

The third *Mathies* element requires proof that the hazard, if it occurred, would be reasonably likely to result in injury. *Newtown*, 38 FMSHRC at 2038. Tijerina noted that there were hard surfaces in the area, including a concrete floor and pillars, which a person could strike if he fell. Tr. 24. I find that a fall in the area would be reasonably likely to lead to injury.

Finally, to establish the fourth *Mathies* element, the Secretary must show a reasonable likelihood that the injury resulting from the hazard would be of a reasonably serious nature. *Newtown*, 38 FMSHRC at 2038. Tijerina testified that a slip and fall could result in lacerations, stitches, contusions, or broken bones. Tr. 24. I credit his assessment and conclude that there was a reasonable likelihood that a reasonably serious injury could occur.

I affirm the Secretary's S&S designation for this violation, and for the same reasons I affirm the gravity designation of reasonably likely to result in lost work days or restricted duty.

### **3. Negligence**

The Secretary alleges that the violation involved moderate negligence on the part of the operator. The Secretary contends that the condition was in plain view and miners should have seen the mud and known to clean it up. Sec'y Br. 13. Instead, a miner walked through the mud without cleaning it up. The Secretary considered the broken pump to be a mitigating circumstance, because it made cleaning the area more difficult. Tr. 24. The Secretary believed that management was unaware of the condition. Tr. 24. Martin Marietta argues that it was not negligent because the area had been cleaned the night before the inspection, miners had not been assigned to work in the area, and company policy required that miners wear non-skid boots. Tr. 64; Resp. Br. 7.

I agree with the Secretary that the condition was obvious. While the area was not heavily used, the footprints indicate that someone had passed through the area in that condition. Sec'y Ex. 2-1. I credit Evans's testimony that the area had been cleaned the night before. Tr. 64. The broken pump also made cleanup more difficult. Tr. 21. Nevertheless, it was possible to clean the area another way, and miners should have done so before using the area as a passageway. I affirm the Secretary's moderate negligence designation.

#### **4. Penalty**

The Secretary proposed a penalty of \$2,919.00. Martin Marietta had been cited under the same standard seven times in the fifteen-month period prior to the inspection. Sec'y Ex. 11. The parties stipulated that the company demonstrated good faith in abating the violation. Jt. Stips. ¶ 9. I assess the proposed penalty of \$2,919.00.

#### **B. Citation No. 9356103**

Inspector Tijerina continued his inspection in the F section of the plant. The F section included a conveyor known as a pant leg conveyor because it has a belt that splits into two separate sections. Tr. 28, 97. A set of steps led up to the conveyor and catwalk, and Tijerina observed that the steps and lower portion of the catwalk were covered with material. Tr. 28. There was approximately four inches of material on the steps, and closer to a foot of material on the catwalk. Tr. 28. The steps had a chain and sign across them that said "do not enter while running." Tr. 72. The steps had also been taped off with danger tape and a tag dated to the day before the inspection. Tr. 29. Based on interviews with miners, Tijerina determined that the condition had been identified the previous day, during either the day or the night shift. Tr. 29. The Secretary's Exhibit 4-1 is a photograph of the steps showing material on the steps and danger tape blocking entry to the steps. Tijerina observed that the pant leg chute was in bad condition, and that rock was spilling out of holes in the chute. Tr. 30. He believed this was causing the accumulation of material. Miners informed him that even if they cleaned up the material, it would accumulate again within an hour because of the condition of the chute. Tr. 30. Management told Tijerina that the chute had been there for a long time and they had plans to replace it in the next year. Tr. 30. To terminate the citation, miners installed a plate over a portion of the chute to keep the material from falling out. Tr. 31. The plate kept the material from spilling out when it was tested. Tr. 32.

Evans, the supervisor for this section, was also present when this citation was issued. He testified that the spillage had been discovered the day before the inspection, and he had instructed employees to begin cleaning the area at that time. Tr. 72, 81, 84. He explained that workers had started at the top of the head section of the 104 conveyor and had been working their way down cleaning the catwalk. Tr. 80. The employees would pull out any larger rocks that were stuck in the catwalk and then wash the remaining material down to the bottom of the conveyor with a hose. Tr. 80, 81. Respondent's Exhibit H-6 is a photograph of the side-view of the conveyor, and Evans testified that it is an accurate representation of the conditions at the time of the inspection. Tr. 74. Evans noted that while there are accumulations visible on the steps and the lower third of the conveyor, there are none on the upper section. Tr. 83; Resp. Ex. H-6, H-7. Martin Marietta argues that this is consistent with Evans's testimony that the miners had begun cleaning prior to the inspection, moving from the top to the bottom of the conveyor. Resp. Br. 8; Tr. 83. Evans believed the spillage had been discovered during clean-up on the previous day shift, and cleaning had begun at that point. Tr. 84. He thought workers had also cleaned during the night shift, but had also run the plant, which would have created more spillage. Tr. 84. Evans explained that the miners typically clean for approximately one hour at the beginning and end of each shift and do as much as they can. Tr. 106. He understood the inspector's



position to be that cleaning should have been completed before the plant started running. Tr. 106.

Evans emphasized that there was red caution tape across the entrance to the catwalk as well as a sign and a tag, and thus no one would have entered the area. Tr. 71-73. The miners working on cleaning had entered from a different ladder, and they would not be allowed to enter the belt area while the belt was running. Tr. 81, 84, 107. Regarding the source of the spillage, Evans explained that the belt is equipped with metal and rubber skirting to keep material from spilling out. Tr. 96. Over time the skirting wears away and has to be readjusted. Tr. 96. In this location, the metal skirting was replaced and the rubber skirting was readjusted to stop the spillage. Tr. 96. Evans also explained that the conveyor has a liner that sometimes wears out and has to be patched. Tr. 97. However, he did not recall having to patch any holes in the liner to terminate this violation. Tr. 98.

The Secretary questions Evans's assertion that the catwalk was being cleaned at the time of the inspection. Evans testified that he instructed workers to clean the area as soon as the spillage was detected, which was during clean-up on the previous day shift. Tr. 84. However, the Secretary introduced the inspector's notes from the inspection, which state, "Management had not seen it according to superintendent." Sec'y Ex. 3-4. Evans denied telling the inspector that he had not seen the spillage, and instead testified that he told the inspector at the time that the area was being cleaned and no one was allowed to enter. Tr. 99. Tijerina made no mention of the mine's cleaning efforts in his testimony or his notes. Tr. 33; Sec'y Ex. 3-4. Instead, the notes reflect that there was nothing in the workplace examination reports reflecting the condition. Sec'y Ex. 3-4. Faced with inconsistent testimony, I credit the inspector on this issue because of the contemporaneous notes matching his account. It seems most likely that someone at the mine had noticed the condition and tagged the area, but the condition had not been noted in the examination log and clean-up had not yet begun. The miners' comments to the inspector that even if they cleaned the area, the accumulations would be back in an hour, suggest that cleaning the area was not a priority. Tr. 30. Martin Marietta argues that the photos showing less accumulated material on the top section of the conveyor indicate that the top section had already been cleaned. Resp. Br. 12; Resp. Exs. H-6, H-7. However, it is equally possible that the hole in the chute causing the accumulations was simply located near the bottom of the chute. The photos do not show that anyone was cleaning at the time of the inspection.

## **1. The Violation**

The Secretary alleges a violation of 30 C.F.R. § 56.18002(a), which provides:

(a) A competent person designated by the operator shall examine each working place at least once each shift before work begins or as miners begin work in that place, for conditions that may adversely affect safety or health.

(1) The operator shall promptly notify miners in any affected areas of any conditions found that may adversely affect safety or health and promptly initiate appropriate action to correct such conditions.

In order to prove a violation under a prompt-correction rationale, the Secretary must establish (1) the existence of a condition that may adversely affect safety or health and (2) that the operator failed to initiate either (a) prompt or (b) appropriate action to correct the condition. 30 C.F.R. § 56.18002(a).

The inspector testified that the accumulated material on the steps and catwalk could have caused a miner who tried to walk there to trip and fall. I credit this testimony and find that the cited condition adversely affected the safety of miners.

The Secretary alleges that the operator failed to promptly correct the condition in violation of the standard. While the “promptness” requirement is not elaborated in the standard, the Commission has interpreted an analogous standard requiring “timely” correction of a defect on equipment after inspection. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 715 (July 2001). The Commission found that “Whether the operator failed to correct the defect in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of its existence.” *Id.* This interpretation is consistent with the Commission’s application of the “reasonably prudent person” standard to broadly worded regulations. *See Ideal Cement Co.*, 12 FMSHRC at 2415-16.

Here, the accumulation of material on the steps and catwalk was extensive. Someone at the mine had recognized that the accumulations presented a hazard and had put up danger tape and a tag. Tr. 29. While Evans testified that miners had begun cleaning the accumulations, this was not corroborated by the inspector’s notes or the mine’s records, and thus I do not credit his statement. Tr. 84; Sec’y Ex. 3-4. The condition had been discovered the previous day, but action had not yet been taken to correct the hazard. Instead, several cycles of cleaning and running the plant had occurred without anyone addressing the condition. Tr. 29. I find that a reasonably prudent person would have taken steps to clean the area or to address the cause of the spillage in the time that had elapsed since it was discovered.<sup>4</sup> The Secretary has proven a violation.

## 2. Gravity

The Secretary alleges that the violation was unlikely to cause injury and that if injury did occur it would likely lead to lost workdays or restricted duty. The inspector credibly explained that if someone were to walk in the area, he could trip and fall on the extensive accumulated material. Tr. 32-33. He did not think this was likely, however, because the area had been taped off and tagged out. Tr. 32. Evans also testified that no one would enter the area while the plant was running. Tr. 107. Based on these facts, I affirm the Secretary’s gravity assessment.

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<sup>4</sup> Because I find that miners had not yet begun cleaning the cited area, it is unnecessary to address Martin Marietta’s arguments that the standard requires operators to “initiate” but not to complete corrective action to address a safety hazard and that it lacked adequate notice of the requirements of the standard. Resp. Br. 9-14.

### **3. Negligence**

The Secretary alleges that the violation involved moderate negligence on the part of the operator. The inspector noted that the area had been taped and tagged off to warn miners of the danger. Tr. 29. Mine management also had plans to replace the chute, which would address the cause of the spillage. Tr. 30. Martin Marietta argues that it was not negligent because it had already begun removing the accumulations, but I do not find this to be true. Resp. Br. 14. Based on the other mitigating factors, however, I modify the negligence designation to low.

### **4. Penalty**

The Secretary's proposed a penalty of \$151.00. Based on the reduction in negligence, I assess a penalty of \$100.00.

### **C. Citation No. 9356106**

The next violation at issue involved a catwalk between the mine's Crusher 2 and Crusher 3 in the secondary area of the plant. Tijerina observed that the catwalk was dented in the middle and had a three-inch drop. Tr. 34. The welds at the corner of the walkway had come off. Tr. 34. The Secretary's Exhibit 6 is a photograph showing the missing welds. Respondent's Exhibit L-9 is another photograph of the same area showing that the grating is bent. Respondent's Exhibit L-6 is an aerial photograph of the catwalk showing that it is bent in the middle. A miner told Tijerina that the catwalk had been in this condition for at least three and a half weeks. Tr. 35. Tijerina thought it had probably been longer based on the substantial amount of rust. Tr. 35. He believed that the uneven surface of the catwalk created a trip hazard. Tr. 35. He also believed that the grating on the catwalk would eventually fail, which could lead a person to fall 20 feet to the ground below. Tr. 35. Tijerina did not conduct any tests to evaluate the strength of the catwalk. Tr. 55. After the inspection, the company determined that it would be difficult to repair the catwalk and instead closed off access to it. Tr. 37, 140.

Richard Jackson, the supervisor of the secondary area at the mine, was present for this portion of the inspection. Tr. 128. He stated that some of the welds on the catwalk had curled up to the left and there was a separation where part of the catwalk had bowed up. Tr. 129. The portion that had bowed up was at the very edge of the catwalk on the toe board. Tr. 129; Resp. Ex. L-1. The bent grating was about halfway across the catwalk. Tr. 139. He disagreed with the inspector's opinion that the catwalk was not stable enough to support workers because while the grating was curled up in the corner, it was otherwise in good shape. Tr. 131. He did not believe that anyone would fall off of the catwalk because there were guardrails on both sides that were stable and in good shape. Tr. 131; Resp. Ex. L-8. He also did not believe that the catwalk would collapse. Tr. 145. He explained that the catwalk is used to travel between Crusher 2 and Crusher 3 so that miners can avoid descending to the ground and walking up another set of stairs. Tr. 132. Miners would not be in the area while the plant was running, but would use the catwalk when doing lubing or greasing in the area or when doing inspections. Tr. 131-32.

## 1. The Violation

Inspector Tijerina cited the mine for a violation of 30 C.F.R. § 56.11002. That standard provides that “Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.” 30 C.F.R. § 56.11002.

I find that the Secretary has proven a violation. The catwalk was an “elevated walkway” used to travel between two crushers at the mine. The walkway was not maintained in good condition. The welds at one corner of the catwalk had come off, and the grating was bent in several places. Sec’y Ex. 6; Resp. Ex. J, L-6, L-9. The bent grating created a tripping hazard for miners and should have been corrected.

## 2. Significant and Substantial

The Secretary argues that the violation was S&S and was reasonably likely to result in a fatal injury. The Secretary has proven a violation of a mandatory safety standard, satisfying the first element of the *Mathies* test for an S&S violation.

With regard to the second *Mathies* element, the inspector discussed two hazards addressed by the standard. The first was that the catwalk could fail or collapse. Tijerina believed that the grating was in such bad condition that it would eventually fail. Tr. 35. However, he did not conduct tests to evaluate the strength of the catwalk or provide details as to why he thought it would fail. Tr. 55. It is difficult to assess the strength of the walkway from photographs alone. In the absence of more detailed evidence regarding the conditions of the catwalk, I do not find that the Secretary has established that this hazard was likely to occur. The inspector also discussed the hazard of a miner tripping and falling on the catwalk. Tr. 35. A portion of the grating at the end of the catwalk was bent upward where the weld had come off. However, Jackson testified that the curled up portion was on the very edge of the catwalk, and this testimony is supported by the photographs introduced by Martin Marietta. Tr. 129; Resp. Ex. J. Jackson believed it was unlikely that anyone would step in that specific place and thus that it was unlikely that anyone would trip. Tr. 133-34. The Secretary did not provide any details regarding how the trip hazard would occur. I agree with the assessment of Jackson that the damaged grating was not in a location where it would be likely to cause a trip and fall accident.<sup>5</sup> The likelihood of injury is modified from reasonably likely to unlikely. The Secretary has failed to establish that the trip and fall hazard was likely to occur, and therefore, the S&S designation is vacated.

With respect to the injury designation, as noted above, the Secretary’s evidence fails to establish a reasonable likelihood of a fatality, either from a fall or from the collapse of the

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<sup>5</sup> Martin Marietta argues that a trip and fall hazard was unlikely to occur because there were handrails present on the walkway. Resp. Br. 17-18. The Commission has held that redundant safety measures are irrelevant to the S&S analysis. *Black Beauty Coal Co.*, 38 FMSHRC 1307, 1312-13 (June 2016). Thus, my finding that a hazard was unlikely to occur is not based on that rationale.

catwalk. In the event that a miner did trip on the uneven catwalk, however, the resulting injury could be expected to lead to lost workdays or restricted duty. Thus, the injury designation is modified from fatal to lost workdays/restricted duty.

### **3. Negligence**

The Secretary alleges that the violation involved moderate negligence on the part of the operator. Management claimed that they were unaware of the violation and the walkway was not used frequently. Tr. 44, 46, 132. However, Tijerina determined based on a discussion with a miner that the condition had been present for at least three and a half weeks, and I credit his finding. Tr. 35. Additionally, miners told the inspector they had reported the condition on workplace exams. Tr. 44. Tijerina did not see a record of the condition in the workplace exam record, but I do not find this to be a mitigating circumstance. Tr. 44. Although the walkway was not severely compromised, the defects were obvious. The bent portion of the walkway was visible from a distance. Resp. Ex. L-6. The defects had been present for some time and should have been addressed. I increase the negligence designation from moderate to high.

### **4. Penalty**

The Secretary proposed a penalty of \$2,487.00. Martin Marietta had not been cited under this standard in the fifteen months prior to the inspection, and the parties stipulated that the company demonstrated good faith in abating the violation. Sec'y Ex. 11; Jt. Stips. ¶ 9. Based on the changes in gravity and negligence, I assess a penalty of \$1,250.00.

### **D. Citation No. 9356109**

The final citation at issue occurred in the rail load out area where trucks and rail cars are loaded with material. Tr. 46, 48. The inspection party approached the three screen shaker, and Tijerina observed that the catwalk in front of the shaker was covered in material. Tr. 46. He observed that the chute on the shaker had a hole and was spilling material out onto the catwalk. Tr. 46. The shaker was running at the time. Tr. 47. A photograph of the area shows that the material reached the top of the toe board in one place, a height of four inches. Tr. 46, 48; Sec'y Ex. 10-1. The material was wet at that point in the operation, and Tijerina believed it would be relatively stable to stand on. Tr. 50. At one point during the inspection, a miner was about to enter the area, but the supervisor for that area, Eddie de la Garza, stopped him from doing so. Tr. 49. To terminate the citation, miners repaired the damaged chute, which stopped the material from spilling out. Tr. 49, 142.

Jackson, the secondary supervisor, testified about the general housekeeping practices at the mine. He explained that because of the nature of the work, there are many possibilities for spillage. Tr. 115. Miners do workplace examinations at the beginning of each shift and also walk around the site monitoring conditions throughout the shift. Tr. 116. The company attempts to address spillage as it occurs. Tr. 115. The miners typically clean spills by spraying water or shoveling, and occasionally they also use a skid steer or loader. Tr. 115, 121. If a miner finds an accumulation and is unable to address it himself, management will shut down the plant and send someone to help. Tr. 118.

Jackson observed the three screen shaker area with the inspector, although he left before the citation was issued. Tr. 118. He agreed that there were four inches of material on the left side of the walkway, but thought there was an inch or less on the rest of the walkway. Tr. 126, 141. He stated that the cited accumulation had been noted on the workplace examination the day before, but the spillage was minor at that time. Tr. 120. The spillage was caused by a hole in the chute, and the company had plans to fix it the day of the inspection. Tr. 120. Additionally, a miner had just arrived to clean the area. Tr. 120. Jackson explained that the cited area is a walkway used to reach the screens and catwalks. Tr. 123. Miners enter the area to do pre-shift checks and to check the screens, but would not be in the area when the rail loader was running, as it was that day. Tr. 123, 144.

## 1. The Violation

Tijerina again cited the mine for a violation of 30 C.F.R. § 56.20003(a), requiring that “Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly.”

Martin Marietta argues that the standard requires a showing that a miner accessed the cited area before cleaning it. Resp. Br. 18-20 (citing *Nelson Quarries, Inc.*, 30 FMSHRC 254, 266-67 (Apr. 2008) (ALJ)). That interpretation has been adopted by one ALJ cited in Respondent’s brief, but not by the Commission.<sup>6</sup> I decline to adopt it here. The standard at issue applies to “workplaces,” which I interpret to mean places where work is done, and to “passageways,” which I interpret to mean places that miners use to travel between areas of the mine. *See Oil Dri Prod. Co.*, 38 FMSHRC 990, 997-98 (May 2016) (ALJ) (applying similar definitions of these terms).

Here, the cited area was used to access the screens and catwalks and was open to access by miners at the time of the inspection. Tr. 49, 123. Tijerina observed a miner attempt to enter the area before he was stopped by a supervisor. Tr. 49. I therefore find that the area was a “workplace” or “passageway” under the standard. The area was covered in a layer of material up to four inches in depth. Tr. 48. The condition had been noted in a workplace exam, which supports the inspector’s opinion that it constituted a hazard. Tr. 120. I find that the area was not “clean and orderly.”

Martin Marietta argues that in operations like its quarry, accumulation of materials is inevitable, and requiring the operator to constantly clean up accumulations would be unreasonable. Resp. Br. 20. However, the record suggests that the accumulations cited here were not the ordinary accumulations that occur in the course of operating the quarry. The inspector found that the spillage was caused by a hole in the chute, and it had been noted in a workplace exam the day before but had not yet been corrected. Tr. 46, 120.

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<sup>6</sup> The *Southwest Rock Products* case cited by Respondent involved a mine that was not in operation at the time of the inspection, and the ALJ noted that that fact was essential to his decision to vacate a housekeeping citation. *Southwest Rock Products, LLC*, 38 FMSHRC 2750, 2758 (Nov. 2016) (ALJ). Respondent also cites a case decided by me, *A & G Coal Corp.*, 37 FMSHRC 1046 (May 2015) (ALJ), which does not stand for the proposition it claims.

I find that the Secretary has proven a violation.

## 2. Gravity

The Secretary alleges that the violation was unlikely to cause injury and that if injury occurred it would likely result in lost workdays or restricted duty. Based on the testimony of Jackson, it seems that the area was not frequently used. Tr. 123, 144. Tijerina believed the accumulated material was fairly stable to stand on. Tr. 50. Tijerina testified that if a miner were to trip and fall on the material, he could strike the floor or railing, causing broken bones or lacerations. Tr. 50. I credit the inspector's testimony and affirm the Secretary's gravity designation.

## 3. Negligence

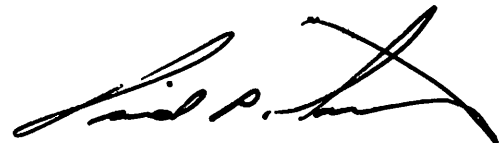
The Secretary alleges that the violation involved moderate negligence on the part of the operator. The inspector believed the condition had not been present for very long and that the supervisor was unaware of it. Tr. 51. Jackson testified that the miner assigned to the area was on his way to do a workplace exam at the time of the inspection, and management had made plans to fix the hole in the chute. Tr. 142-43. It seems that if management was aware of the hole in the chute, it should have been obvious that spillage was going to occur. However, I accept the inspector's findings that the condition did not present significant danger, and thus it was not highly negligent for the operator to delay maintenance on the chute for a brief period of time. Therefore, I affirm the Secretary's moderate negligence designation.

## 4. Penalty

The Secretary proposed a penalty of \$429.00. Martin Marietta had been cited under the same standard seven times in the fifteen-month period prior to the inspection. Sec'y Ex. 11. The parties stipulated that the company demonstrated good faith in abating the violation. Jt. Stips. ¶ 9. I assess the proposed penalty of \$429.00.

## V. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the total sum of **\$4,698.00** within 30 days of this order.<sup>7</sup>



David P. Simonton  
Administrative Law Judge

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<sup>7</sup> 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: (U.S. First Class Mail)

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