FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 8, 2019

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING Docket No. YORK 2017-0047 A.C. No. 17-00609-425848
v.	
CORMIER CONSTRUCTION, Respondent.	Mine: Church Quarry

DECISION AND ORDER

Appearances: James L. Polianites, Esq., U.S. Department of Labor, Office of the Regional Solicitor, Boston, Massachusetts, for Petitioner;

Mark Cormier, Pro Se, Cormier Construction & Granite, Deer Isle, Maine, for Respondent.

Before: Judge L. Zane Gill

This proceeding is before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 815. This case involves three section 104(a) citations issued by the Secretary to Respondent Cormier Construction.

I. STATEMENT OF THE CASE

On November 2, 2016, the Secretary issued Citation Nos. 9311390, 9311393, and 9311394 following an E01 MSHA inspection. Citation No. 9311390 alleges a violation of 30 C.F.R. § 56.11003[1] for not maintaining a ladder in good condition. Citation No. 9311393 alleges a violation of 30 C.F.R. § 56.11002[2] for failing to provide a railing on a bench. Citation No. 9311394 alleges a violation of 30 C.F.R. § 56.11001[3] for failing to provide safe access to two

[1] Section 56.11003 reads, "Ladders shall be of substantial construction and maintained in good condition."

[2] Section 56.11002 reads, "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."

benches. Based on the penalty conversion table in 30 C.F.R. § 100.3(g), the Secretary proposed a penalty of $2,043.00 for each violation for a total combined proposed penalty of $6,129.00.

I held a hearing on April 24, 2018, in Portland, Maine. The Secretary presented testimony from MSHA Inspector Michael Powers. Respondent presented testimony from Quarry Foreman Mark Cormier. The parties each submitted post-hearing briefs.

II. ISSUES

The Secretary asserts that Cormier Construction violated sections 56.11003, 56.11002, and 56.11001. (Sec'y Br. 2–3) The Secretary also asserts that the violations were significant and substantial ("S&S"), inasmuch as they were reasonably likely to result in a fatality and were the result of the operator's moderate negligence. (*Id.* at 6–7) In contrast, Respondent argued at the hearing that the Secretary's negligence and gravity determinations were over-assessed. (Tr.14:6–13) Specifically, Respondent argued that MSHA did not prove that a fall, as contemplated in the citations, would reasonably be expected to be fatal. (Tr.61:23–25; Resp't Br. 1) Additionally, Respondent argued that the recommended penalty amount is too high, especially considering its long history of not having lost-work accidents and its small size. (Tr.66:22–67:11) Respondent did not dispute MSHA's jurisdiction.

The following issues are before me: (1) whether Cormier Construction violated sections 56.11003, 56.11002, and 56.11001 as alleged in Citation Nos. 9311390, 9311393, and 9311394; (2) whether the Secretary's gravity and S&S determinations are proper for the three citations; (3) whether Respondent's negligence is properly designated as "moderate"; and, (4) whether the proposed penalties are appropriate.

III. STIPULATIONS AND FACTUAL BACKGROUND

The parties agreed to 14 stipulations, which were read into the record at hearing. They are as follows:

> (1) On November 2, 2016, the Mine Safety and Health Administration, MSHA, conducted a regular safety inspection of the Church Quarry Mine on Deer Isle, Maine, by Inspector Michael Powers.
>
> (2) Mr. Powers held a pre-inspection conference with Tim Ray and also spoke to the owner Francis Cormier and Mark Cormier.
>
> (3) Mr. Powers conducted a general inspection of the quarry and its equipment.
>
> (4) With respect to the part of the quarry for which the subject citations were issued, the quarry was composed of benches from which the granite was cut.

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[3] Section 56.11001 reads, "Safe means of access shall be provided and maintained to all working places."

(5) Photographs taken by Mr. Powers are fair and accurate depictions of the quarry during his inspection.

(6) Mr. Powers observed that an aluminum ladder used to access bench number 1 in the quarry was bent and deformed at the 8th rung, and left and right rails were bent at the 9th rung.

(7) Mr. Powers also observed that there was no railing in place for 40 feet along the right side of bench number 1.

(8) Bench number 1 was used by employees to access the ladders to benches 2 and 3; and employees had been working at the end of bench number 1 splitting stone from bench number 2.

(9) The area of bench number 1 depicted in the photographs taken by Mr. Powers measures 7 to 8 feet and approximately 4 feet wide where the stone was being split by employees.

(10) The drop from the surface of bench number 1 to the ground below was measured to be 89 inches.

(11) Mr. Powers also observed that safe access was not provided and maintained to access benches 2 and 3. The ladder to bench number 3 had its bases removed and the left rail was broken at the midpoint.

(12) In addition, Mr. Powers observed that there was no railing along the right side of bench number 2, which was measured to be 54 inches wide and 10 feet 6 inches long.

(13) Mr. Powers was informed that this area of bench number 2 was accessed throughout the shift.

(14) Mr. Powers conducted a closing conference in which the fall hazards he observed and described to the foreman were discussed.

(Tr.7:1–8:24)

Powers issued Citation No. 9311390, alleging a violation of 30 C.F.R. § 56.11003, Citation No. 9311393, alleging a violation of 30 C.F.R. § 56.11002, and Citation No. 9311394, alleging a violation of 30 C.F.R. § 56.11001. (Exs. S–4, S–7, S–10) He designated each of the three violations as "S&S" and "reasonably likely" to result in a "fatal injury" to "one miner." (Exs. S–4, S–7, S–10) Additionally, all three citations allege that the operator's negligence was "moderate." (Exs. S–4, S–7, S–10)

Cormier Construction abated Citation No. 9311390 by removing the defective ladder from the worksite and replacing it with an aluminum ladder in good visible condition. (Exs. S–4, S–5 at 4) Cormier Construction abated Citation No. 9311393 by placing a railing along the

bench. (Exs. S–7, S–8 at 5) Finally, Cormier Construction abated Citation No. 9311394 by removing and discarding the broken ladder on bench 2, removing access to bench 2, and providing a new ladder to go from bench 1 to bench 3. (Exs. S–10, S–11 at 4–5) Powers then terminated each of the violations. (Exs. S–4, S–7, S–10)

IV. LEGAL PRINCIPLES

A. Burden of Proof

In order to establish a violation of a safety standard or provision of the Act, the Secretary must prove "by a preponderance of the credible evidence" that a violation occurred. *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *citing Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). The Secretary may establish a violation by inference in certain situations, but only if the inference is "inherently reasonable" and there is "a rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek Pocahontas Co.*, 11 FMSHRC at 2152–53, *citing Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984); *see also Eagle Energy, Inc.*, 23 FMSHRC 1107, 1118 (Oct. 2001).

The weight of evidence is a measure of the believability or persuasiveness of evidence. To satisfy the burden of proof—preponderance of the evidence—the Secretary must convince me that the evidence in support of his case outweighs the evidence offered by the Respondent.

B. Significant and Substantial

A violation is S&S if, based on the facts surrounding that violation, there is "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). To establish an S&S violation, the Secretary 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) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming ALJ's application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 104 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission clarified that in analyzing the second *Mathies* element, Commission Judges must determine whether there is a reasonable likelihood of occurrence of the hazard "against which the mandatory safety standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016). In evaluating the third *Mathies* element, the Commission assumes the hazard identified in the second *Mathies* element exists and determines whether that hazard is reasonably likely to cause injury. *Id.* at 2045 (citing *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 161–62 (4th Cir. 2016); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal*, 52 F.3d at 135). The Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

C. Negligence

The Commission evaluates negligence using "a traditional negligence analysis." *Am. Coal Co.*, 39 FMSHRC 8, 14 (Jan. 2017) (quoting *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citation omitted)). Because the Commission is not bound by the Secretary's regulations in 30 C.F.R. Part 100, the Commission and its Judges are not required to consider the negligence definitions in 30 C.F.R. § 100.3(d). *Id.* (citing *Mach Mining, LLC*, 809 F.3d at 1263–64). Under a traditional negligence analysis, an operator is negligent if it fails to meet the requisite standard of care. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). In determining whether an operator met its duty of care, the Commission considers what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *Id.* at 1702 (citation omitted). In making a negligence determination, a Judge is not limited to an evaluation of allegedly "mitigating" circumstances, but may consider the totality of the circumstances holistically and thus find "high negligence" in spite of mitigating circumstances or "moderate" negligence without identifying mitigating circumstances. *Id.*

D. Penalty

Administrative Law Judges are given broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). When assessing a civil penalty, section 110(i) of the Mine Act requires that the Commission consider six criteria: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and, (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

In addition, deterrence is a relevant factor that judges may consider separately from the statutorily-prescribed criteria in assessing penalties. *See Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864–69 (Aug. 2012).

The Commission has repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g.*, *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620–21 (May 2000); *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983). A judge need not make exhaustive findings, but the judge must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 621.

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010) (judge justified in relying on gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (appropriate for judge to raise a penalty significantly based upon findings

of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria).

With regard to the penalty's effect on the operator's ability to continue in business, the Commission has held that "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur." *John Richards Constr.*, 39 FMSHRC 959, 965 (May 2017), *citing Sellersburg Co.*, 5 FMSHRC at 294 (citing *Buffalo Mining Co.*, 2 IBMA 226, 247–48 (Sept. 1973)). Evidence of an operator's financial condition is relevant to the ability to continue in business criterion. *Georges Colliers, Inc.*, 23 FMSHRC 822, 825 (Aug. 2001)

Finally, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151–52 (7th Cir. 1984) ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties [. . .] . [W]e find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission.").

V. ANALYSIS AND CONCLUSIONS OF LAW

A. Citation No. 9311390

1. Fact of the Violation

For Citation No. 9311390, the Secretary asserts that Cormier Construction violated 30 C.F.R. § 56.11003 by using a 10-foot portable aluminum ladder that was not maintained in good condition. (Ex. S–4) The cited standard provides: "Ladders shall be of substantial construction and maintained in good condition." 30 C.F.R. § 56.11003.

According to the Secretary, the #8 rung was bent and deformed and the left and right rails were bent at the #9 rung. (Tr.25:11–18; Jt. Stip. 6; Ex. S–4) Additionally, the bottom rung was broken and a steel rod was stuck through it. (Tr.26:8–24; Ex. S–4) Inspector Powers stated there was nothing there to keep the steel rod from sliding through or falling out. (Tr.27:6–8)

In contrast, Respondent suggested at the hearing that it did not violate the standard because this ladder was previously inspected by other inspectors and deemed to be sufficiently safe in this condition. (Tr.15:11–23; 50:19–21) Additionally, Respondent argued the #9 rung would not bear any weight because it was above the bench. (Tr.51:19–25) Finally, Respondent argued that the rod at the bottom rung was a steel drill rod, which fit snuggly into the rung. (Tr.52:1–53:4)

Regarding Respondent's contention that previous inspectors had not cited the ladder at issue, it is long established that MSHA cannot be estopped from enforcing its regulations simply because it did not previously cite the mine operator. *See Mainline Rock & Ballast, Inc. v. Sec'y of Labor*, 693 F.3d 1181, 1187 (10th Cir. 2012) (citing *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1416–17 (10th Cir. 1984)). The Mine Act is a strict liability statute. As long as a

regulation is sufficiently specific that a reasonably prudent person, familiar with the conditions the regulation is meant to address and the objective the regulation is meant to achieve, would have fair warning of what the regulation requires, then the due process requirements for notice are satisfied. *Id.* at 1187 (citing *Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1083–84 (10th Cir. 1998)). While the terms "substantial construction" and "good condition" are inherently subjective, the obvious bend at rung #9, the damage in the middle of rung #8, and broken bottom rung would give a reasonably prudent person familiar with the regulation notice that this ladder violated the safety standard. Respondent's contentions about rung #9 being non-weight bearing and the nature of the steel drill rod involve the gravity analysis and will be addressed below.

Based on the photographic evidence depicted in the exhibit photos, I agree that the ladder was not of substantial construction and had not been maintained in good condition. I conclude that Respondent violated 30 C.F.R. § 56.11003 as alleged in Citation No. 9311390.

2. S&S and Gravity

To establish the first element of the *Mathies* test, the Secretary must prove an underlying violation of a mandatory safety standard. Cormier Construction's violation of section 56.11003 establishes the first element of an S&S violation.

In regard to the second *Mathies* element, the Secretary must show that the violation created a reasonable likelihood the hazard that section 56.11003 aims to prevent would occur. Section 56.11003 requires that ladders be of substantial construction and maintained in good condition; thus, the standard aims to prevent a fall hazard. (*See* Tr.29:7–10; Jt. Stip. 14; Ex. S–6)

The ladder was the means of accessing bench 1 (Tr.26:7–11; Jt. Stip. 6; Ex. S–5), and it was used numerous times throughout the shift and on a regular basis. (Tr.28:25–29:1) Beyond this, however, the Secretary failed to illustrate with convincing specificity the reasonable likelihood of the occurrence of the hazard. Regarding this important step in the *Mathies* test, the Secretary's brief makes the following arguments: (1) the "broken rungs and deformed rails [. . .] presented a hazard of failing to bear the weight put upon it" (Sec'y Br. 4); the "iron rod had been inserted, ostensibly to strengthen the rung to bear weight" (*Id.*); and, (3) "the degree of damage [. . .] put the miners who climbed those ladders at risk of falling if the ladder should fail." (*Id.* at 7)

In contrast, Respondent argued at the hearing that the bend at the #9 rung would not bear any weight because it was above the bench. (Tr.51:19–25) Respondent also suggested that the steel drill rod used to enforce the broken bottom rung made the ladder usable and safe. (Tr.52:2–53:4)

The Secretary carries the burden of establishing all of the claims he brings. The Secretary did not address the strength and efficacy of the steel-rod-enforced broken bottom rung, did not discuss how the bend at the rail above the #9 rung would contribute to a fall, given that it was above bench 1, and did not describe the extent of the damage at rung #8 to supplement the view provided by the close-up photo. (Ex. S–5 at 1) The Secretary has not established that the

ladder, in its current condition, would fail to bear the weight put upon it. Nevertheless, two factors persuade me that a fall was reasonably likely to occur.

First, the ladder was used frequently and on a regular basis. Because the ladder was used to access bench 1 from the ground level (Tr.26:7–11; Jt. Stip. 6; Ex. S–5), miners would have to use it to get to and leave the active working section. Even with a single miner working at the time, frequent, daily use would increase exposure to potential harm and accelerate wear and tear.

Second, even assuming the ladder's condition at the time of the citation was safely jury-rigged as depicted by Cormier, its future condition would likely have become hazardous. The Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130 (quoting *U.S. Steel Mining Co.*, 6 FMSHRC at 1574). The Commission has held that the S&S inquiry considers "the violative conditions as they existed both prior to and at the time of the violation and as they would have existed had normal operations continued." *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016), *citing Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1132 (May 2014); *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991 (Aug. 2014).

Cormier's hearing testimony suggested these problems had existed for a significant period of time without being properly addressed. (*See* Tr.15:11–23; 52:24–25) It is thus reasonable to conclude this ladder would have continued to deteriorate beyond its current state without replacement but for the citation issued by Inspector Powers. Indeed, Mr. Cormier admitted at the hearing that he now uses the ladder, in its cited condition, at his home. (Tr.52:10–12) The normal wear and tear of the ladder, especially given its frequent, daily use, in conjunction with the attitude of mine management strongly indicate that the problems with this ladder would get worse. I determine that it was reasonably likely for the hazard to occur.

Regarding the third and fourth *Mathies* elements, the Secretary must demonstrate a reasonable likelihood the hazard will result in a reasonably serious injury. In analyzing the third element, I must assume that the hazard identified in the second *Mathies* element exists. *Newtown*, 38 FMSHRC at 2045. A fall from a ladder of any height is reasonably likely to result in an injury to a miner. Consequently, I determine that the hazard of a miner falling from the ladder would be reasonably likely to result in an injury, thus satisfying the third *Mathies* element.

The primary reason Powers gave at the hearing for the fatal designation was a statistic that, between 2013 and 2016, five fatal injuries occurred with falls of less than 8 feet in metal/non-metal mining. (Tr.29:7–10) The Secretary did not brief the severity of injury with any specificity. The severity of injury for all three citations was addressed in a single sentence: "Since a miner falling from a ladder would likely land on a solid granite surface, or on to the waste rock, the prospect of a serious, even fatal injury was ever-prevalent on the day of Mr. Power's inspection." (Sec'y Br. 7)

The evidence does not support the Secretary's argument by a preponderance of the evidence that an injury in this citation could reasonably be expected to be fatal for three reasons.

First, the Secretary failed to provide specific information on the fatality data Powers relied on. During cross-examination by Respondent, Inspector Powers was unable to discuss or provide additional, useful fall data. (Tr.51:5–7) Notably, Powers was unable to discuss the total number of falls. The Secretary's citation language—"could reasonably be expected to be"—indicates probability. The concept of "likelihood" is necessarily probabilistic. The five fatalities cited let us know that a fatality is possible, which Respondent fully acknowledged (Tr.64:21–65:1), but the information is not sufficient to determine probability without establishing the denominator of total falls. I realize, and as the parties discussed at hearing, the difficulty in collecting this data since near-misses or non-serious injuries are not reported to MSHA. (Tr.51:3–18) While not dispositive, more data on the number of falls during that multi-year period would have been helpful and instructive.

Second, the Secretary's statistic does not necessarily apply here. Powers' data on fatalities from falls of less than 8 feet does not parse the numbers to show the likelihood of a fatality from a fall of 89 inches (7.42 feet)—the distance from the surface of bench 1 to the ground below. For example, I would be less convinced of the Secretary's conclusion that a fall could reasonably be expected to result in a fatal injury if the data showed that all five of the noted fall fatalities between 2013 and 2016 occurred in the range of 7.50 feet and 7.99 feet.

In any event, the Secretary's calculation of a fall height of 89 inches for this citation is unreasonable. As evident from the photographic evidence, rung #9 was positioned four inches above bench 1. (Ex. S–5 at 1) In agreement with Respondent's argument (*see* Tr.51:19–25; Ex. S–5), the Secretary failed to prove why a miner would need to stand on rung #9 to get to bench 1. Miners likely stood on rung #8, which was measured five inches below bench 1 (*see* Ex. S–5 at 1), or possibly rung #7 before stepping up to bench 1. While the specifics of weight distribution on the ladder are not clear, what is clear, however, is that any fall would most likely occur at rung #8 or below: a height lower than the 89 inches cited by the Secretary.

Third, the Secretary focused solely on fall height and failed to discuss other important factors involved in the cited fatalities. For example, inspectors considering fall hazards have previously taken into account where the miner might fall, what he might fall into, what he might fall on, the height of the miner, the weight of a miner, the surface the miner was standing on, and the types of the tools the miner might be carrying. *See, e.g.*, *Boart Longyear Co.*, 36 FMSHRC 106, 120 (Jan. 2014) (ALJ) (inspector theorized that toolbox door on the side of a truck was not strong enough to support the weight of the driver and could snap); *Granite Rock Co.*, 34 FMSHRC 261, 264 (Jan. 2012) (ALJ) (inspector testified that he took into account the surface itself, the tools, loose rock, dust conditions, height of the miner, configuration of equipment, and possibility of falling on different surfaces depending if the fall was to the left side or right side in determining the likelihood and severity of an injury); *D. Holcomb & Co.*, 33 FMSHRC 1435, 1451–52 (June 2011) (ALJ) (where the inspector testified a rung on a ladder could give way, resulting in a fall that would either involve a hit to the head or result in contact with the nearby jaw crusher's moving parts).

While the lack of detail provided by Powers here is not dispositive, more information on the circumstances in each of the cited fatalities, which served as the primary basis for the fatality

designation in this violation (Tr.29:7–10), would have been helpful in guiding my analysis, especially when compared to the facts in this case.

Here, given the area surrounding the ladder as depicted in Exhibit S–5, a falling miner might fall onto a collection of large tires (on the left), onto the ground below (directly behind), or onto a lone sledgehammer (on the right). (*See* Ex. S–5 at 2–4) Contrast this with the fall area in Citation No. 9311393, which was filled with jagged waste rock (*see* Ex. S–8 at 1) or the potential fall heights in Citation No. 9311394. (*See* Ex. S–11 at 4–5) The Secretary does not distinguish between these important factual considerations in his brief, instead bundling them as factually identical violations. Thus, while a fall would undoubtedly be serious here, the Secretary has not sufficiently met his burden to prove the fall could reasonably be expected to be fatal in this case. Instead, I determine that such injuries could reasonably be expected to be permanently disabling given the likely height a miner might fall from and the types of surfaces and objects below.

The Secretary has satisfied all four elements of the *Mathies* test. I conclude that Citation No. 9311390 was appropriately designated as S&S. However, for the reasons stated above, I determine the gravity for this citation to be "reasonably likely" to result in a "permanently disabling" injury to "one miner."

3. Negligence

The Secretary asserts that Cormier Construction's conduct involved moderate negligence. (Ex. S–4) Interestingly, the Secretary's post-hearing brief does not discuss negligence. At the hearing, Inspector Powers testified that mine management was not aware because the condition was not reported or listed in the daily workplace examination. (Tr.28:10–13) However, the fact that somebody had put a bar in the bottom rung suggests that somebody on the mine property knew about the structural problems of the ladder. (Tr.28:5–15)

In an attempt to argue against the occurrence of a violation, Cormier stated at the hearing that the ladders had been in place and in the cited damaged condition for years and were never cited by previous MSHA inspectors. (Tr.15:11–23) Cormier's own words cut sharply against the argument that mine management was not aware of the condition, which admittedly existed for a long period of time.

While reliance on a previous MSHA inspector's incorrect interpretation cannot estop MSHA from issuing a citation, it can be considered in reducing the level of negligence and penalty amount for a violation. *Mach Mining, LLC*, 809 F.3d at 1266, *citing Mettiki Coal Corp.*, 13 FMSHRC 760, 770–71 (May 1991); *U.S. Steel Mining Co.*, 6 FMSHRC 2305, 2310 (Oct. 1984); *King Knob Coal Co.*, 3 FMSHRC 1417, 1422 (June 1981). The three structural problems with this ladder were obvious. Additionally, according to Cormier's testimony, the problems existed for years and were known about by mine management. (Tr.15:11–23) However, I deem Respondent's reliance on previous inspectors' statements about the condition of this ladder an important mitigating factor.

Considering the totality of the circumstances, I conclude that the operator's conduct involved moderate negligence.

B. Citation No. 9311393

1. Fact of the Violation

For Citation No. 9311393, the Secretary asserts that Cormier Construction violated 30 C.F.R. § 56.11002 by failing to have a railing in place. (Ex. S–7) The cited standard provides: "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.

The parties stipulated: (1) there was no railing in place for 40 feet on the right side of bench 1 (Jt. Stip. 7); (2) bench 1 was active at the time of inspection (Jt. Stip. 8); and, (3) the drop-distance to the ground below bench 1 was 89 inches. (Jt. Stip. 10) At the end of bench 1, employees split stone from bench 2. (Jt. Stip. 8) The area of bench 1 depicted in the photographs taken by Powers measured 7–8 feet and approximately 4 feet wide where the stone was being split by employees.[4] (Jt. Stip. 9; Ex. S–8 at 1, 4) A wooden scaffold was in place at the narrow (i.e., 4 foot) end of bench 1. (Ex. S–8 at 1, 4, 5) The scaffold was elevated about a foot above bench 1, 6–7 feet wide, and the platform planks were approximately 16 inches deep. (Tr.31:5–7; *see* Ex. S–8 at 1) Additionally, bench 1 was used by employees to access the ladders to benches 2 and 3. (Jt. Stip. 8)

Powers testified a railing existed, but it had been taken down the day before at the end of the shift to remove a block on bench 2. (Tr.33:13–14) Powers did not see anybody working in the area at the time of the inspection, but Ray stated they had broken stone from bench 2 on the previous shift. (Tr.30:16–19) Additionally, Ray stated to Powers they had been up on the benches to retrieve some tools during the shift on the morning of the inspection. (Tr.55:4–10)

In contrast, Respondent argued at the hearing that factors outside of its control created a conundrum. Respondent stated the railing had to be removed in order to pull granite slabs with a lifting crane; if the railings were not removed, they would be destroyed in the process. (Tr.54:3–8) Accordingly, the railing was removed at the end of the shift the day before. (Tr.54:8–9) However, because of a noise ordinance, diesel equipment and air equipment could only be used at the mine from 10 a.m. to 2 p.m. (Tr.53:22–25) Thus, until 10 a.m., Respondent was not able to use air drills or compressors and could not reinstall the railing.[5] (Tr.54:10–13) Respondent stated that inspectors often show up earlier in the morning—at 7:00 or 8:00 a.m.—which has resulted in Respondent being cited on multiple occasions for not having a railing in place. (Tr.54:18–22)

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[4] Despite stipulating to these dimensions, Mr. Cormier testified at the hearing that the planks were 12 inches wide; thus, the width of the narrow portion of bench 1 was wider than estimated by Inspector Powers. (Tr.55:12–22) Upon viewing the exhibit photo (Ex. S–8 at 1) at the hearing, I noted that there were at least a few feet on either side of the planks. (Tr.55:23–56:1) Ultimately, this discrepancy—whether the narrow portion of bench 1 was 4 feet or 5–6 feet—does not change my analysis here.

[5] During this "quiet" period before 10 a.m., miners are generally directed to do cleanup, maintenance, and things of that nature. (Tr.54:13–15)

Based on the photographic evidence (*see* Ex. S–8 at 1, 3, 5), I determine that bench 1 was an elevated walkway. Further, the parties stipulated that no handrail existed at the time of the citation. (Jt. Stip. 7) As bench 1 was an elevated walkway with no handrail provided at the time of the citation, I conclude that Respondent violated 30 C.F.R. § 56.11002 as alleged in Citation No. 9311393.

2. S&S and Gravity

To establish the first element of the *Mathies* test, the Secretary must prove an underlying violation of a mandatory safety standard. Cormier Construction's violation of section 56.11002 establishes the first element of an S&S violation.

To satisfy the second *Mathies* element, the Secretary must show that the violation created a reasonable likelihood the hazard that section 56.11002 aims to prevent would occur. Section 56.11002 requires that elevated walkways be of substantial construction, provided with handrails, and maintained in good condition; specifically, the standard aims to prevent a fall hazard. (*See* Tr.30:6–7; Jt. Stip. 14; Ex. S–9) Powers stated that he designated this citation as "reasonably likely" because workers had been working on the bench multiple times throughout the shift and were not using any fall protection equipment. (Tr.34:16–18) Specifically, Powers testified that Ray told him that they went up on the benches to retrieve tools earlier that morning. (Tr.55:4–10) Powers also testified that there were no tie-off points in lieu of a railing at the scaffolding. (Tr.34:19–25)

Respondent's contention that the railing would have been reinstalled after 10 a.m. does not change the fact that miners were accessing the benches to collect tools earlier that morning. (Tr.55:4–10) It is reasonable to infer that miners collected tools from the narrow end of bench 1 since they were working there the day before to split stone from bench 2. (Tr.30:16–19; Jt. Stips. 8, 9) Given the narrow 4 foot width and the existence of the elevated wooden scaffolding situated in the walkway, it is also reasonably likely that a miner collecting tools from this area could misstep, slip, or trip and fall.

For these reasons, a fall was reasonably likely to occur, particularly at the narrow end of bench 1, where employees had been splitting stone the day before.

To satisfy the third and fourth *Mathies* elements, the Secretary must demonstrate a reasonable likelihood the identified hazard would result in a reasonably serious injury. In analyzing the third element, I must assume the hazard identified in the second *Mathies* element existed. *Newtown*, 38 FMSHRC at 2045. Unlike a fall in the previous citation, a fall in this case would be from a higher point, either from a standing position on bench 1 (89 inches) or possibly from the elevated wooden scaffold (101 inches). (Ex. S–8 at 1–3; *see* Tr.31:5–6) Further, as evident from the photographic evidence, granite waste rock, metal bars, and other sharp-edged objects lay in the area parallel to the right-side edge of bench 1. (Ex. S–8 at 1–3) Assuming a fall, an injury would be certain and could reasonably be expected to be fatal.

Accordingly, the Secretary has satisfied all four elements of the *Mathies* test. I conclude that Citation No. 9311393 was appropriately designated as S&S. For the reasons stated above, I

determine the gravity for this violation to be "reasonably likely" to result in "fatal" injuries to "one miner."

3. Negligence

The Secretary asserts that Cormier Construction's conduct involved moderate negligence. (Ex. S–7) At the hearing, Inspector Powers stated that he chose the moderate designation because a railing had been provided, but somebody had removed it and failed to properly put it back up. (Tr.35:16–20) Powers believed Cormier Construction just forgot to reinstall the railing. (Tr.33:18) As mentioned above, the Secretary's post-hearing brief does not discuss negligence.

In response, Respondent stated that the railings had to be removed in order to pull the blocks with the lifting crane. (Tr.54:3–8) If the railings were not removed prior to pulling the granite blocks with the lifting crane, they would be destroyed. (Tr.54:5–6) According to Respondent, the railings were removed at the end of the shift the previous day. (Tr.54:8–9) However, the company is only able to run diesel equipment or air equipment between 10 a.m. and 2 p.m. due to noise concerns with the town. (Tr.53:22–25) Powers acknowledged that he had been told about the noise ordinance. (Tr.54:1)

The operator has a duty of care to avoid violations of mandatory standards, and the failure to do so can lead to a finding of negligence when a violation occurs. *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In cases where a rank-and-file miner has violated the Act or its mandatory standards, the Commission examines the operator's supervision, training, and disciplining of its employees to determine whether the operator had taken reasonable steps necessary to prevent the rank-and-file miner's violative conduct. *S. Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982) ("SOCCO"), *citing Nacco Mining Co.*, 3 FMSHRC 848, 850–51 (Apr. 1981). The Commission also considers the foreseeability of the miner's conduct and the risks involved when determining whether the operator was negligent. *A.H. Smith*, 5 FMSHRC at 15, *citing SOCCO*, 4 FMSHRC at 1463–64; *Nacco*, 3 FMSHRC at 850–851.

Here, Respondent claims to have found itself between a regulatory Scylla and Charybdis—seemingly forced to choose between violating the town noise ordinance by using heavy equipment before 10 a.m. or MSHA's safety regulation requiring the railing. It is clear from the record that this problem has led to Respondent being cited before. (Tr.54:17–22) It is also clear that mine management was aware of the standard and the reasons for having a railing as evident by the fact that they normally had railings installed on the benches. (Tr.33:10–14; 34:3–9; 56:2–3) It is not clear, however, how frequently the railing was taken down and for how long. It is also not clear if Ray's accessing the railing-less benches to collect tools was done in conformance with or defiance of management's instructions or policies.

Although life presents things outside of our control, whether noise ordinance regulations or rogue rank-and-file miners, Respondent did not take the necessary, reasonable steps it should have taken to create a safer environment. Respondent stated that workers used the period prior to 10 a.m. to do clean up and maintenance work. (Tr.54:13–15) It is foreseeable that miners doing cleanup and maintenance work might clean and maintain the area they were last working

at. Thus, in order to ensure no miners accessed the benches while the railing was down, a reasonably prudent operator would have taken actions—perhaps removing the first ladder, placing signs and warnings, adding a barricade—to prevent miners from accessing the benches before the railing was reinstalled. However, no preventative measures were taken to deter access to the benches while the railing was down.

Further, Ray is listed in the MSHA Post-Inspection Report as the mine foreman. (Ex. S–2 at 1) As a foreman, Ray is held to a higher standard of care. *E.g.*, *Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997) ("[A] foreman [. . .] is held to [a] high standard of care"); *see also Lehigh Anthracite Coal*, 40 FMSHRC 273, 280, 280 n.12 (Apr. 2018) (holding a supervisor to a higher standard of care because he was the only supervisor on duty at the time of the incident and was thus "the agent responsible on behalf of the operator for the health and safety of each of [the] miners").

Considering the totality of the circumstances, I conclude the operator's conduct involved moderate negligence.

C. Citation No. 9311394

1. Fact of the Violation

With Citation No. 9311394, the Secretary asserts that Cormier Construction violated 30 C.F.R. § 56.11001 by failing to provide and maintain safe access to benches 2 and 3. (Ex. S–10) The cited standard provides: "Safe means of access shall be provided and maintained to all working places." 30 C.F.R. § 56.11001.

The parties stipulated that the ladder to bench 3 had its bases removed, and the left rail was broken at the midpoint.[6] (Jt. Stip. 11) Powers testified that the ladder had been put in place at the end of the previous shift after Cormier Construction removed a section of bench 2. (Tr.36:11–13)

In addition, Inspector Powers observed that there was no railing along the right side of bench 2, which measured 54 inches (4.5 feet) wide and 10 feet 6 inches (10.5 feet) long. (Jt. Stip. 12; Ex. S–10) Powers was informed that this area of bench 2 was accessed throughout the shift. (Jt. Stip. 13)

Respondent argued at the hearing that its understanding of "a safe means of access" was informed by prior inspectors over the years as not applying to falls less than 6 feet.[7] (Tr.48:21–50:22)

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[6] The ladder's bases were also referred to as "feet" or "shoes" during the hearing. (*See* Tr.38:4; 56:15–25; 57:4–16) To distinguish this ladder from the ladder in Citation No. 9311390, I will refer to the ladder here as the "footless ladder."

[7] Cormier at hearing was likely referring to the language in OSHA's fall protection standard, which states: "Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level

The Commission has held that section 56.11001 comprises the "dual requirements of providing and maintaining safe access to working places." *Watkins Eng'g & Constructors*, 24 FMSHRC 669, 680 (July 2002) (citation omitted). The Commission has previously used a plain meaning approach when interpreting this safety standard. *See W. Indus. Inc.*, 25 FMSHRC 449, 452 (Aug. 2003) (applying the judge's definition of "safe" as "secure from threat of danger, harm, or loss"); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 707–08 (July 2001) (using the plain meaning of the word "maintained" in the regulation). Unlike OSHA, MSHA has not specified a specific height requirement, instead opting for the more general language of "safe means of access." Thus, a "five foot elevation is neither inherently safe nor inherently unsafe; site specific conditions must be taken into account." *Boart Longyear Co.*, 36 FMSHRC 106, 113 (Jan. 2014) (ALJ) (challenging respondent's contention that an elevation of five feet does not create a danger of falling for a section 56.15005 citation).

As discussed previously, MSHA cannot be estopped from enforcing its regulations simply because it did not previously cite the mine operator. *See Mainline Rock & Ballast, Inc.*, 693 F.3d at 1187. Instead, reliance on an MSHA inspector's incorrect interpretation can reduce the level of the operator's negligence, which will be discussed in the section below.

Here, there was a risk of falling from bench 2 to bench 1 given that there was no railing in place on the right side of bench 2. Additionally, the ladder to bench 3 was both footless and significantly damaged on its left rail, which presented the possibility of a slip or collapse while in use. Neither of these conditions allowed miners accessing bench 2 to be secure from threat of danger, harm, or loss. Accordingly, I determine that Cormier Construction failed to provide and maintain a safe means of access for benches 2 and 3 and violated 30 C.F.R. § 56.11001 as alleged in Citation No. 9311394.

2. S&S and Gravity

To establish the first element of the *Mathies* test, the Secretary must prove an underlying violation of a mandatory safety standard. Cormier Construction's violation of section 56.11001 does that.

For the second *Mathies* element, the Secretary must show that the violation created a reasonable likelihood the hazard section 56.11001 aims to prevent would occur. In this case, the standard aims to prevent a fall. (*See* Tr.40:9–12; Jt. Stip. 14; Ex. S–12) Powers assessed that a fall was reasonably likely since the footless ladder was used multiple times per shift. (Tr.39:19–22) He also noted on his citation documentation (MSHA Form 4000–49E) that no tie-off points were available. (Ex. S–12)

On cross examination, Powers clarified that he based his assessment that the footless ladder on bench 2 was used multiple times solely on statements made by Ray that miners had been going up to bench 3 to retrieve tools and do some cleanup. (Tr.58:16–23) However, Powers testified that the ladder had been put in place at the end of the previous shift (Tr.36:11–13), and his citation documentation noted the footless ladder was placed on bench 2 for

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shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems." 29 C.F.R. § 1926.501(b)(1) (emphasis added).

temporary use. (Ex. S–12) Nevertheless, his understanding was that this was a repeat process. (Tr.59:7–10)

Powers testified that the footless ladder could slide out while in use. (Tr.38:8) Moreover, the work environment was wet, increasing the possibility that the ladder would slide out. (Tr.38:9–13) Cormier countered by suggesting the footless ladder was actually secure—and possibly more secure than a footed ladder—due to the notched texture at the top of bench 2. (Tr.56:21–57:16) According to Cormier, when the block was lifted, drill lines and perforations were created on the top surface of bench 2, which functioned as divots to hold the footless ladder in place. (Tr.57:12–24)

Respondent did not provide further evidence to support its argument that the alleged drill lines and perforations created a safe surface on bench 2 for the footless ladder. But even assuming the surface of bench 2 was safer for a footless ladder than a footed ladder, Respondent did not address the severe damage on the ladder's left rail. Unlike the damage on rung #8 of the ladder from Citation No. 9311390, the damage on the left rail of the footless ladder was significant, possibly affecting the structural integrity of the ladder. (*Compare* Ex. S–5 at 1, *with* Ex. S–11 at 1–3)

Weighing these factors—with the temporary use of the ladder on one hand and the railing-less edge of bench 2 and the multiple problems with the ladder, especially the damaged left rail, on the other—and assuming continued normal mining operations, I conclude that a fall was reasonably likely to occur.

Vis-à-vis the third and fourth *Mathies* elements, the Secretary must demonstrate a reasonable likelihood the hazard will result in a reasonably serious injury. In analyzing the third element, I must assume the existence of the hazard identified in the second *Mathies* element. *Newtown*, 38 FMSHRC at 2045.

Assuming a fall from the footless ladder, a miner could be expected to fall in one of three ways: to the right side, backward, or to the left side.[8] A fall to the right side would result in a fall to bench 2, a distance of up to 7 feet. (*See* Ex. S–11 at 1, 2, 4) A fall backward would result in a fall to either bench 2 or down to bench 1, a distance of up to 13 feet. (*See* Exs. S–8 at 3–5, S–11 at 2, 4) A fall to the left side would result in a fall to bench 2 or, more likely, bench 1, a fall of up to 13 feet. (*See* Exs. S–8 at 3–5, S–11 at 1, 2, 4) Assuming a fall from a standing position on bench 2, a miner would fall to bench 1, a fall of approximately 6 feet. (*See* Exs. S–8 at 3–5, S–11 at 2, 4)

In all of these scenarios, the fall would be directly onto the flat granite surfaces of the benches, which would undoubtedly result in serious injury. If a miner were to fall from the

[8] While the parties discussed and measured bench 1 at 89 inches, there were no stipulations or testimony pertaining to the heights of benches 2 or 3. Thus, I am forced to estimate the possible fall heights from bench 2 and bench 3 based solely on the photographic evidence provided in Exhibits S–8 and S–11.

ladder, given the range of possible fall heights, it could reasonably be expected to result in a fatal head injury.

Accordingly, the Secretary has satisfied all four elements of the *Mathies* test. I conclude that Citation No. 9311394 was appropriately designated as S&S. For the reasons stated above, I determine the gravity for this violation to be "reasonably likely" to result in a "fatal" injury to "one miner."

3. Negligence

The Secretary asserts that Cormier Construction's conduct involved moderate negligence. (Ex. S–10) Inspector Powers testified that he designated moderate negligence because Respondent had previously installed a railing on bench 2 and understood that the railing was removed the day before, on November 1, 2016. (Tr.40:13–20) Again, the Secretary's post-hearing brief does not discuss negligence.

As with Citation No. 9311390, Respondent argued at the hearing that it relied on the incorrect interpretation of former MSHA inspectors. (Tr.50:17–22) And, as with Citation No. 9311393, Respondent argued it could not replace the rail because it is only able to run diesel equipment or air equipment between 10 a.m. and 2 p.m. due to noise concerns with the town. (Tr.53:22–25)

Cormier Construction knew it was supposed to have a railing as evident by the fact it previously had a railing in place on bench 2 the day before. Additionally, the damage on the left rail of the footless ladder was extensive and obvious, which would have given notice to a reasonably prudent operator that it was unsafe for use. I determine Respondent's reliance on previous MSHA inspector statements as to what constitutes a "safe means of access" to be a slightly mitigating factor.

Considering the totality of the circumstances, I conclude that the operator's conduct involved moderate negligence.

D. Penalty

Respondent was concerned about the proposed penalty and, specifically, the severity of injury or illness criterion. (Tr.14:16–15:6; 66:8–13) Cormier stated at the hearing that this was the first time Cormier Construction had ever contested citations. (Tr.65:24–66:6)

Under Section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and, (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

1. Gravity, Negligence, and Good Faith Abatement

I have affirmed the Secretary's S&S and negligence determinations. However, I lowered the severity of injury or illness from "fatal" to "permanently disabling" for Citation No. 9311390. Additionally, Cormier Construction demonstrated good faith by abating the citations quickly after notification of the violations. (Exs. S–5 at 4, S–8 at 5, S–11 at 5)

2. History of Previous Violations, Appropriateness of Penalty Relative to Size, and Ability to Continue in Business

Respondent contested these three citations because the penalties were significantly higher than those it had received in the past. (Tr.65:24–66:13) Indeed, the 15 citations prior to this inspection had a range in penalties from $100 to $270, with an average penalty of $152.07. (Ex. S–15 at 4–6) However, after looking at Cormier Construction's history of violations (Ex. S–15), while it is clear that the "fatal" designation significantly increased the Secretary's proposed penalties, the most notable factor for this inspection was the high VPID ("Violations Per Inspection Day") score. (*See* Exs. S–14, S–15 at 1)

The VPID is calculated by first dividing the number of violations that have been paid, finally adjudicated, or have become final orders during the Violation History Period[9] by the number of inspection days.[10] The resulting number is then applied to Table VI of 30 C.F.R. § 100.3(c)(1) and converted into a penalty point number ranging from 0 to 25.

Here, Respondent's history of violations shows 15 violations with a final order date in the preceding 15 months.[11] (Ex. S–15 at 1) Per the formula, the VPID on November 2, 2016, was 2.50, resulting in a maximum 25 penalty points. (*Id.* at 1–2; 30 C.F.R. § 100.3(c) (Table VI)) By way of comparison, the national average during that same time period for surface metal/nonmetal operators was 1.06, or 10 penalty points. (Ex. S–15 at 2; 30 C.F.R. § 100.3(c) (Table VI)) I have previously held that a VPID score, as calculated by the Secretary's algorithm, was unfairly high. *Oil-Dri Prod. Co.*, 40 FMSHRC 876, 891–92 (June 2018) (ALJ). In that case, the timing of the inspection a day earlier or later would have made a significant difference in the VPID score. *Id.* at 891. That discrepancy arose from the timing of a series of five final

[9] The "Violation History Period" covers the preceding 15 months. 30 C.F.R. § 100.3(c).

[10] "Inspection Days" are calculated by dividing the total MSHA on-site inspection hours for Authorized Representatives of the Secretary for certain types of inspection activities by five. *History of Previous Violations: Violations Per Inspection Day (VPID); Repeat Violations Per Inspection Day (RPID)*, MSHA (last visited Feb. 4, 2019), https://arlweb.msha.gov/drs/ASP/MineAction.asp. Any remainder amount increases the number of inspection days by one. *Id.*

[11] Respondent had previously violated sections 56.11001 and 56.11002 within the preceding 15 months. (Exs. S–14, S–15 at 1) This had no effect on the penalty points for the RPID ("Repeat Violations Per Inspection Day") column since the repeat aspect of the history criterion applies only after a nonmetal mine operator has received 10 violations and has accrued a minimum of six repeat violations. 30 C.F.R. § 100.3(c)(2).

orders, which were added to the violation history table the day immediately preceding the inspection. *Id.* at 892. I found that those conditions created a "perfected storm" scenario for a short-lived spike in the VPID and held that the "process cannot be deemed fair in the rare instance where the mere order of operations or the random timing of an investigation—issues completely outside the control of the mine operator—yields vastly different results." *Id.*

The unique circumstances in *Oil Dri* that warranted lowering the VPID score are not present in this case. While I am sympathetic to the struggles of small operators like Cormier Construction, the continued issues at the Church Quarry are concerning. The VPID formula was designed to address continued and numerous violations over time. It has done so appropriately here.

Respondent is a small operator. (Tr.67:6–11) The Church Quarry, Respondent's only mine, had 3,131 annual hours worked (Ex. S–14), with only two full-time employees in the spring. (Tr.67:8–9) Cormier Construction is a solely owned corporation with one shareholder. (Tr.67:19–21) Although the Secretary's Exhibit A allocated zero penalty points for Mine Size and Controller Size for all three citations, I find the particular facts here justify a slight reduction in the penalty.[12]

Respondent asserts that the Secretary's proposed penalty would create significant financial hardship (Resp't Br. 1; Tr.67:4–18; 68:10–11), and it has provided tax information regarding its ability to pay. (Ex. R–3) However, upon my questioning at hearing, Respondent admitted that the company would continue to operate if the Secretary's full proposed penalty were assessed. (Tr.68:5–11) As the Secretary argued in his brief, mere financial discomfort is not a sufficient reason to reduce the penalty.

Taking into account Cormier Construction's small size, its history of violations, the effect of the penalty on its ability to continue in business, its good faith efforts to abate the violations, its negligence, and the gravity, including the modification to Citation No. 9311390, as well as considering all the facts and circumstances set forth above, I assess a civil penalty of $800.00 for Citation No. 9311390 and $1,600.00 each for Citation Nos. 9311393 and 9311394, for a total penalty of $4,000.00.

[12] Table IV shows the smallest operator size as measured by annual hours worked are those operators with 0–50,000 hours. 30 C.F.R. § 100.3(b) (Table IV). This means, theoretically, an operator with nearly 16 times as many hours worked (i.e., 50,000 hours) is treated identically as Cormier Construction (3,131 hours) per the Secretary's regulation.

VI. ORDER

Based on the above discussion, it is hereby **ORDERED** that Citation No. 9311390 be **MODIFIED** to reduce the severity of injury or illness from "fatal" to "permanently disabling."

IT IS FURTHER ORDERED that Respondent pay a total penalty of $4,000.00 within forty (40) days of the date of this order.[13]

L. Zane Gill
Administrative Law Judge

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[13] Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.