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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. LAKE 2013-458-M A.C. No. 21-00831-319425 Docket No. LAKE 2013-596-M A.C. No. 21-00831-327651
v.	Docket No. LAKE 2013-674-M A.C. No. 21-00831-330143
NORTHSHORE MINING COMPANY, Respondent	Mine: Northshore Mining Company

DECISION AND ORDER

Appearances: Carol Liang, Esq., Ryan L. Pardue, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, CO for Petitioner

Arthur M. Wolfson, Esq., Jackson Kelly, PLLC, Pittsburgh, PA for Respondent

Before: Judge Barbour

This consolidated case is before me on petitions for assessment of civil penalty filed by the Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA) against Northshore Mining Company ("Northshore"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 815(d). The Secretary alleges that Northshore is liable for 34 violations of various mandatory safety standards for the nation's metal and nonmetal mines.[1] The Secretary proposed a total assessment of $79,023.00 for the alleged violations. The parties presented testimony and documentary evidence at a hearing in Duluth, Minnesota. They also filed post-hearing briefs.[2]

Twenty-five violations were settled before the conclusion of the hearing. Details of the settlement are discussed at the end of this decision. The Secretary asserts that a total penalty of

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[1] The standards are set forth at 30 C.F.R. Part 56 (safety).

[2] In this opinion, the Secretary's post-hearing brief is abbreviated as "Sec'y Br." Northshore's post-hearing brief is abbreviated as "Resp. Br."

$35,983.00 is appropriate for the nine remaining violations, which are alleged in Citation Nos. 8672113, 8672114, 8672460, 8672461, 8672520, 8672522, 8672527, 8672530, and 8672537. These citations were issued pursuant to section 104(a) of the Mine Act. 30 U.S.C. § 814(a). The Secretary further asserts that five of the violations were significant and substantial contributions to mine safety hazards ("S&S"),[3] that each of the violations affected one person, and that all of the violations were a result of negligence by the operator ranging from "low" to "high."

STIPULATIONS

1. At all times relevant to this matter, Northshore was the operator of Northshore Mining Co. [4] ("Mine" or "Northshore Mine").

2. Northshore's operation at the Mine involved products which entered commerce or products which affected commerce.

3. Between January 9, 2013 and April 8, 2013; and between June 10, 2013 and August 21, 2013; the Mine Safety and Health Administration ("MSHA") inspected the Mine.

4. The individuals whose signatures appear in Block 22 of the citations at issue were acting in their official capacities and as authorized representatives of the Secretary of Labor when the citations were issued.

5. True copies of the citations at issue were served on Northshore as required by the Mine Act.

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[3] An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a … mine safety or health hazard." 30 U.S.C. § 814(d). A violation is properly designated 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 establish the S&S nature of a 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 will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.* 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.,* 861 F. 2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

[4] The facility to which the term refers is Northshore's taconite pellet processing plant, although it also shares its name with the operator of the mine.

6. The certified copy of the MSHA Assessed Violations History reflects the history of the citation issuances at the Mine for the 15 months preceding the citations at issue, and may be admitted into evidence without objection by Northshore.

7. The parties stipulate to the authenticity of their exhibits but not the relevance or truth of the matters asserted therein.

8. Northshore demonstrated good faith in the abatement of the citations.

9. The proposed penalties will not affect Northshore's ability to continue in business.

Sec'y Prehearing Report 1-2; Resp. Prehearing Statement 1-2, 23; Tr. 14-15.[5]

BACKGROUND

Northshore Mine, which is located in Silver Bay, Minnesota, is a surface processing and shipping facility for taconite ore, a form of iron. Tr. 21-22, 46, 48. The raw material is originally mined in Babbitt, Minnesota, and delivered by rail to the Northshore Mine, where it is crushed, separated, concentrated, and "pelletized" before being shipped to steel mills. Tr. 21, 48-50.[6] Northshore contracts out a portion of its maintenance work at the Mine to various independent contractors, including Northern Belt & Conveyor, Inc. ("NBC") and C.R. Meyer & Sons, Co. ("CR Meyer"). *See* Tr. 98, 258-59.

Annually, during what Northshore refers to as "the summer outage," the Mine is "offline completely" and "not producing any pellets" in order to allow for maintenance. Tr. 269, 304. Northshore employees and the employees of independent contractors both perform cleaning and maintenance work during this period. *See* Tr. 269-70. Several of the contested citations in this case were issued during the summer outage.

Between January 9, 2013, and April 8, 2013, and June 10, 2013, and August 21, 2013, MSHA Inspectors, including William Soderlind, primarily, and Richard Allen King, secondarily, conducted regular inspections at the Northshore Mine. Tr. 23-24.[7] Northshore's plant safety

[5] In this opinion, the abbreviation "Tr." refers to the hearing transcript.

[6] The iron ore is concentrated into powder form through a series of mills and separators in the concentrator plant, mixed with binding agents and turned into rounded pellets in the pellet plant, and sent into a load-out facility or to the yard to await shipment. A number of conveyor belts carry the material in its various states to each facility. The pump house allows the company to pump water used to process the ore back into the system instead of into Lake Superior. The contested citations in this matter were issued in the concentrator, pellet plant, pump house entrance, and the yards and dock area. Tr. 49-50, 203-04.

[7] Soderlind testified that he "probably inspected 80 percent of the mine," while "King came up to help with the inspection to try to get it done faster." *Id.* At the time of the hearing, Soderlind was an MSHA field office supervisor. He had worked as an MSHA inspector for five and a half years. Tr. 18. He had experience with "[n]umerous different types of mines" and had inspected

inspector, Jared Conboy, and its safety representative, Scott Alan Blood, accompanied Soderlind and King respectively during the Mine inspections that give rise to this dispute. Tr. 48, 153.

HOUSEKEEPING VIOLATIONS

Citation No. 8672460

Inspector Soderlind testified that he issued the citation after observing a "loose mud-like" mixture of "fines material" and "standing water" on the floor of the concentrator basement alongside a conveyor belt. Tr 28-30. Soderlind tested the material with one foot and found that his foot "would slide." Tr. 31. Conboy, on the other hand, walked through the material while abating the condition and found the mixture "thick, cake-like, dense, and walkable" rather than slippery. Tr. 52-54. However, he agreed that the area of the material that Soderlind tested would have had more of a mixture of fines and water than the area he walked through. Tr 78.[8]

Soderlind found the condition to be S&S. GX-2 at 1. He testified that the material was located along "the side of the conveyer [one] would typically walk on to travel through," that the area was traveled "daily" by "people that work in the concentrator," and that he observed footprints traveling through the walkway. Tr. 29-30. A photograph taken by Soderlind confirms the presence of footprints. *See* GX-2 at 3. Soderlind also testified that the area was dark. Tr. 28. Conboy disagreed, but admitted that "a low-hanging pipe . . . does block a little bit of the light out in [the] area." Tr. 60. Soderlind found it reasonably likely that a miner would walk through the area, slip, and suffer an injury, resulting in lost work days or restricted duty. GX-2 at 1; Tr. 30-32.

Soderlind believed that "somebody" at Northshore "had reason to know that…there was a . . . condition that needed attending." Tr. 33. He testified that he was told that "miners that work in the area conduct their own work area inspections and then report that back to management." *Id.* The issue was "obvious" and did not look as though it had "just happen[ed]." Tr. 33-34. As a result, Soderlind found Northshore to be moderately negligent. *Id.* During cross examination, Soderlind admitted that he did not see anyone working "in the immediate area" at the time of the inspection, and that contractors were working in the concentrator that day. Tr. 40-41, 44. The company contends that the Secretary did not provide any evidence that the area had been visited during the timeframe of the violation by anyone other than a contractor or a rank-and-file miner, neither of whose negligence can be imputed onto the operator. Resp. Br. 9-10. Further, the company argues that if no Northshore employee was working in the area, it would not have been required, under 30 C.F.R. § 56.18002, to conduct workplace inspections there. *Id.*; Tr. 38-39.

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the Northshore Mine "at least four times," each inspection lasting about "three to four" months. Tr. 20-21. King was an MSHA inspector who had worked in various capacities for the agency since 2005. Tr. 112.

[8] Conboy also testified that six months earlier a "slip-test" conducted in the same area found a similar type of mixture to be "not slippery." But the court chooses to disregard this testimony because the test was conducted too far in the past to offer a reliable comparison, and Conboy himself admitted that the consistency of spills could be different on different days. Tr. 62-70, 76.

Citation No. 8672461

Soderlind issued this S&S citation after observing a slick oil, water, and grease spill "up to half an inch deep" across the walkway of the concentrator sub-basement area. Tr. 83; GX-3 at 1. He felt that the spill posed a slip and fall hazard, particularly if a miner were to "step on a slippery spot in the oil." Tr. 86. He observed "several footprints" and "cart" tracks running through the spill, and "more than two or three" miners working in the area. Tr. 84-85. According to Soderlind, in order to bypass the hazard, a miner would need to go up a level and come back down around from the other side of the walkway. Tr. 86. As with the previous citation, Soderlind believed that it was reasonably likely that a miner would suffer an injury in a fall, resulting in lost workdays or restricted duty. *Id.*

Conboy testified that he was able to step over the spill without difficulty to avoid walking through it (Tr. 101), and that even were a miner to walk through the spill, the solid concrete floor and "ANSI certified boot[s]" that miners wear would provide traction on the floor. Tr. 101-102.[9] Further, Conboy believed that the spill was "more water" than oil (Tr. 104), which the company argues is supported by photographs depicting all of the oil being swept up and cleared through the use of a limited number of thin absorbent pads. *See* Resp. Br. 16; RX-14(b).

Soderlind found Northshore to be moderately negligent because in his opinion the spill was obvious and "people [were] working" in the area. Tr. 88-89. He concluded that the extent of the spill and the absence of any ongoing leak indicated that the spill had been present for "a good amount of time." Tr. 89. Soderlind reiterated that Northshore miners are expected to conduct their own workplace examinations and report safety violations to management, and that this practice applies in this area as well. Tr. 88. His understanding, based on discussions with Northshore, was that management would also try to inspect an area such as this once a week. *Id.*

Conboy testified that electrical contractors and CR Meyer's employees worked in the area from which the oil spill originated and that the footprints observed in the spill were "more likely" from one of them. Tr. 98, 109. The company disputes that any Northshore employees were working in the area and, once again, argues that there is no clear evidence that any Northshore employee encountered the spill or had reason to know about it. *See* Resp. Br. 18-19. Rather, there is more reason to think that contractors were primarily negligent in this situation. *Id.*

Citation No. 8672522

Soderlind observed a mix of pellets and standing water on the ground of the pellet plant, near the tail pulley. Tr. 250, 252-53. According to Soderlind, the pellets—which were approximately 1/4 to 3/8 of an inch in diameter—were scattered across inclined walkways on either side of the No. 46 conveyer belt. Tr. 250, 252-53. Additionally, guards, planks, and a hose were submerged under two feet of water in the area. *Id.*

[9] Presumably, Conboy was referring to standards for safe footwear set by the American National Standards Institute ("ANSI").

Soderlind saw a miner slipping on the pellets on the floor, although Conboy clarified that this did not result in a fall. Tr. 255, 276-77. Soderlind also observed other miners working in the area, and he testified that the area provided passage between different parts of the pellet plant. Tr. 257. When asked directly, Soderlind answered that the miners in the area were "Northshore employees[]." Tr. 266. Conboy testified that, because it was summer, the individuals in the area would have been a contractor's employees, as he was not aware of any "Northshore employees [being] given any tasks with respect to the [No.] 46 conveyor," during the summer outage. Tr. 269-70. The nearest Northshore workers Conboy recalled seeing "were working on [a separate] conveyor . . . on the opposite side of the wall from the [No.] 46 conveyer, . . . somewhere around 100 feet from the tail pulley." Tr. 270.

According to Conboy, independent contractor NBC had contracted with Northshore to replace a conveyor. Tr. 269. NBC's employees had been on the job "for quite some time." Tr. 286. NBC had a foreman and safety representative on site during the timeframe in which the violation occurred. Tr. 259, 263. Additionally, NBC's Master Service Agreement with Northshore specified that NBC would "remove all debris and trash daily." RX-73 at 2, 15. However, the Agreement also allowed Northshore to implement corrective measures at its contractor's expense for housekeeping violations if the contractor neglected to correct those problems immediately upon request. RX-73 at 15.

The Secretary argues that Northshore should be held responsible for its contractors' conduct because the company failed to implement additional training for contractors on housekeeping and orderliness, outside of the single paragraph instructions in the 18-page "Master Services Agreement" that all of Northshore's contractors must sign. *See* Sec'y Br. 16; RX-73 at 2, 15.[10] Conboy did however testify that Northshore requires its contractors to "receive the same training" that it requires of its own employees through MSHA and that contractors are "not allowed on the property without their 5000-23 [inspection certificates]." Tr. 287-88[11]

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[10] The full "Housekeeping and Orderliness" paragraph of the Master Service Agreement states:

> In additional [*sic*] to any requirements in the Agreement, Provider agrees that all equipment, tools, materials and other apparatus will be stored, stacked, placed, temporarily spotted or setup [*sic*] in such a manner as to maintain safe egress and a clean and orderly workplace. Provider agrees to remove all debris and trash daily. Should Company or its representative deem the Provider in nonconformance with these requirements, Company or its representative will direct Provider to take immediate corrective action. Should the Provider neglect to take such corrective measures, Company may terminate the Agreement or implement the corrective measures at the expense of Provider and may also deduct the cost thereof from any payments due or to become due to Provider.

RX-73 at 15.

[11] Form 5000-23 "provides a means for mine operators to record and certify Part 48 mandatory training received by miners." *MSHA - Forms and Online Filings – Form 5000-23 Certificate of Training*, Mine Safety and Health Administration, http://www.msha.gov/forms/elawsforms/5000-23.htm (last visited Feb. 24, 2015)

Further, contractors have to "watch [a] site-specific safety video in which [Northshore] cover[s] [b]riefly" housekeeping protocol. *Id.*

THE VIOLATIONS, THEIR S&S NATURE, THEIR GRAVITY, AND THE COMPANY'S NEGLIGENCE

The Violations

Section 56.20003(b) requires that, "The floor of every workplace shall be maintained in a clean and, so far as possible, dry condition . . . ." The floors of the three cited areas were not maintained in such a condition. Both Soderlind's and Conboy's photos indicate extensive spills in violation of the mandatory standard. *See* GX-2 at 3-4, GX-3 at 3-6, GX-10 at 6-16; RX-3, RX-14, RX-72. The court finds that the conditions of the cited areas were as depicted in these photographs and in Soderlind's testimony (*see* Tr. 30-32, 86, 252-53) and that the housekeeping violations existed as charged.

The Gravity and S&S Nature of the Violations

Soderlind found that all three violations were S&S and reasonably likely to result in lost workdays or restricted duty. GX-2 at 1, GX-3 at 1, GX-10 at 1. The court agrees. The discrete safety hazard contributed to by each of the violations was a slip and fall accident, and the conditions in each area made it reasonably likely that an injury would result from this hazard. Tr. 30-32, 86, 252-53. Citation No. 8672522 presented an additional hazard of tripping over submerged items, with the same likelihood of resulting injury. Tr. 252-53.

For Citation No. 8672460, the court credits Soderlind's testimony on the slipperiness of the material and the diminished visibility in the area. Tr. 28, 31. Conboy's testimony does not refute these assessments. While he did not find the area slippery, he admittedly walked through a different portion of the material with a different consistency than Soderlind. Tr. 52-54, 78. Regarding the lighting, he agreed that a low hanging pipe in the area blocked some of the light, and his own photographs appear to confirm the inadequacy of the area lighting. Tr. 60; *see also* RX-3(d). Furthermore, a miner attempting to avoid a low hanging pipe in a dimly lit area would be at an increased risk of slipping and falling after failing to observe the hazard.

Regarding Citation No. 8672461, the court finds that the extent of oil and grease in the mixture was sufficient to create a discrete slip and fall safety hazard. Neither work boots nor solid concrete can sufficiently counteract this risk. This hazard would be reasonably likely to lead to injury as well. There was extensive evidence of work being conducted in the area, including right through the spill itself, increasing the chances of a miner contacting the spill and losing his or her footing. *See* Tr. 84-85.

Citation No. 8672522 presents an even clearer case of reasonably likely injury, given that an individual actually slipped on the pellets in the middle of the inspection. Tr. 255. The submerged debris in the area presented miners with additional slip and fall hazards as well. Tr. 252-53. With miners working in the area at that time and others potentially accessing the area to perform maintenance on the belts or pumps or to travel to other parts of the pellet plant,

continued normal mining operations would make further slips, and consequent injuries, reasonably likely. Tr. 257.

The court is convinced that the resulting injury from each violation would likely be reasonably serious. While the S&S nature of a violation and the gravity of a violation are not synonymous, (*see Consolidation Coal Co.*, 18 FMSHRC 1541, 1550) (explaining the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs"), the facts in these citations justify findings of both S&S and serious gravity. Soderlind detailed various injuries that could occur from a slip and fall accident in either area, including joint or muscle strains or sprains, all of which strike the court as entirely plausible and likely to result in lost workdays or restricted duties. Tr. 30-32, 86, 255-56.

The Company's Negligence

Soderlind found Northshore moderately negligent for Citation Nos. 8672460, 8672461, and 8672522. GX-2 at 1, GX-3 at 1, GX-10 at 1. Moderate negligence reflects the Secretary's determination that "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. §100.3(d). Northshore contends that the court should reduce the negligence finding for Citation No. 8672460 and find no negligence for Citations Nos. 8672461 and 8672522. *See* Resp. Br. 9, 19, 45. "Low negligence" is appropriate when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." 30 C.F.R. § 100.3(d). A finding of "no negligence" indicates that "[t]he operator exercised diligence and could not have known of the violative condition of practice." *Id.*

Northshore cites the holding in *Fort Scott Fertilizer-Cullor*, 17 FMSHRC 1112, 1115-16 (citing *Southern Ohio Coal*, 4 FMSHRC at 1464), that "conduct of a rank-and-file miner is not imputable to the operator in determining negligence for penalty purposes" and argues that the Secretary has not proven by a preponderance of the evidence that anyone other than a contractor or a rank-and-file miner knew or should have known about the violations. Resp. Br. 9, 18, 45. However, the Commission has also stated that "[t]he fact that a violation was committed by a non-supervisory employee does not necessarily shield an operator from being deemed negligent." *A.H. Smith Stone, Co.* 5 FMSHRC 13 at 15. In assessing an operator's negligence in such cases, the Commission takes into account "such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue." *Id.* Finally, the Commission has explained that "a history of similar violations at a mine may put an operator on notice that it has a recurring safety problem in need of correction and thus, this history may be relevant in determining the degree of the operator's negligence." *Peabody Coal Co.*, 14 FMSHRC 1258, 1264.

The court finds that Northshore was minimally negligent in all three citations. The company had a significant history of housekeeping violations over the prior 15 month period, as well as a history of slip and fall injuries. *See* GX-1 at 5-6; Tr. 87. This history put the company on notice that it had a recurring safety problem in need of correction and gave rise to a heightened duty to carefully inspect for housekeeping violations. The court credits Soderlind's

testimony that the spills were obvious and likely occurred over an extended period of time, as these conclusions are supported by both parties' photographic evidence. *See* Tr. 33-34, 89, 257; *see also* GX-2 at 3-4, GX-3 at 3-6, GX-10 at 6-16; RX-3, RX-14, RX-72. Given these conditions, Northshore should have discovered all three of these violations before the citations were issued.

There is however insufficient evidence to support Soderlind's finding of moderate negligence for any of the three citations. The court finds that there was no work being conducted in the cited area in Citation No. 8672460 at the time of the violation, consistent with Soderlind's own testimony (*see* Tr. 44), and that only contractors were working in the cited areas in Citation Nos. 8672461 and 8672522. The Secretary failed to present testimony that any Northshore employees had worked in the cited area in Citation No. 8672461, while Conboy testified that contractors worked in the vicinity. *See* Tr. 110. There is conflicting testimony from Soderlind and Conboy regarding whether Northshore employees were working in the area in Citation No. 8672522 (*see* Tr. 266, 269-70), however the court credits Conboy's testimony that they were not. He provided greater detail on the specific location of the closest Northshore employees -- around 100 feet from the tail pulley -- and adequately explained why no Northshore employee would have been near the cited area. *See* Tr. 269-70. As the mandatory safety standards for surface metal and nonmetal mines only require an operator to conduct shift examinations of working places, Northshore would not have discovered the violations through such means. 30 C.F.R. § 56.18002

Finally, the court does not find that Northshore's selection, training, or supervision of its contractors elevated its level of negligence. Its contractors assumed some responsibility over the areas in which they worked through their Master Service Agreement with the company and took considerable steps to assure Northshore that they could meet this responsibility, including appointing experienced foremen and safety representatives and completing safety training. Tr. 259, 263. The Secretary's argument that Northshore should have provided further training or instruction to its contractors is unpersuasive given the absence of any evidence that MSHA cited Northshore for inadequate training of its contractors. *See* Sec'y Br. 16. Accordingly, the court finds low negligence on Northshore's part for Citation Nos. 8672460, 8672461, and 8672522.

<u>Citation No. 8672530</u>

Soderlind issued this citation for a violation of 30 C.F.R. § 56.20003(a) after observing pellets on the "dark," "inclined" walkways on each side of conveyer belt H, at a landing at the top of a set of stairs. Tr. 293-94, 296, 298. He designated the violation non-S&S because the conveyer belt in the area was not running, and "there [were] not a lot of people working in the area at the time." Tr. 297. The injury reasonably expected was a "sprain and strain" from a slip and fall, leading to "lost work days or restricted duty." Tr. 298. Soderlind found low negligence because Northshore employees were not working in the area at the time. Tr. 299. Conboy clarified that this was during the two weeks summer outage (Tr. 304-05), that the closest miners in the area were "250 to 300 feet" away (Tr. 309), and that during the summer outage he could not conceive of any reason why miners would have to go the H belt area. Tr. 310. Moreover, the pellets were cited on a "U-shaped walkway" that only provides "roundabout" access around the H conveyer belt. Tr. 306. An individual who traveled on the walkway would end up "back to where [he] started" and nowhere else. Tr. 310.

<u>THE VIOLATION, ITS GRAVITY, AND THE COMPANY'S NEGLIGENCE</u>

Section 56.20003(a) states that, "Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." The cited walkway was clearly not kept clean or orderly due to the extensive presence of pellets scattered about the floor. *See* Tr. 293-94; *see also* GX-12 at 3-4. Neither party contends that the walkway was a workplace, and due to the absence of any work being performed in the area during the summer outage, the court agrees that the cited area was not a workplace. The key area of dispute between the parties is whether the cited area was a "passageway" under the terms of the standard. *See* Sec'y. Br. 23; Resp. Br. 52. The Mine Act and mandatory safety standards do not define the term, and the Commission has not addressed the issue. The company relies on *Spencer Quarries*, Inc., 32 FMSHRC 644 (June 2010) (ALJ) to argue in its brief, "Whether an area is considered to be [a] passageway that requires cleaning is determined, in part, by whether it is an active area at the time at issue." Resp. Br. 51. In *Spencer Quarries*, Commission Administrative Law Judge Richard Manning vacated a citation alleging a violation of Section 56.11016 due to inactivity on the cited walkway. But Section 56.11016, unlike Section 56.20003(a), makes no mention of the term "passageway" and therefore the court finds that *Spencer Quarries* fails to provide meaningful guidance in defining the term.

The Secretary cites *U.S. Silica Co.*, 32 FMSHRC 1699 (Nov. 2010) (ALJ) in which Commission Administrative Law Judge Margaret Miller directly dealt with the question with which this court is now confronted. Judge Miller first noted that the standard does not use the term "travelway," which is defined in Part 56 as a "passage, walk or way regularly used and designated for persons to go from one place to another." *Id.* at 1706 (quoting 30 C.F.R. § 56.2). She then contrasted the regulatory definition of "travelway" with the dictionary definitions of "passageway" ("a way that allows passage") and "passage" ("a way of exit or entrance: a road, path, channel, or course by which something passes"). *Id.* (quoting *Webster's New Collegiate Dictionary* 830 (1979)). Judge Miller concluded that the cited area was both a passageway and a workplace, as "people access it, pass through it, and perform work there." *Id.* at 1707. She further concluded that work did not have to be ongoing and an individual did not have to be traveling through the area for it to qualify as such. *Id.*

The court agrees with Judge Miller's analysis and finds that the cited area qualifies as a "passageway" under the *Webster's New Collegiate* definitions of "passageway" and "passage." The area may not have been regularly used or designated for persons to go from one place to another, but those factors are primarily relevant in determining whether or not an area is a "travelway." The cited area satisfies the much more limited requirement of allowing passage, or a path by which miners may pass. Because the cited area was a passageway that was not kept clean and orderly, the court finds the violation existed as charged.

Finally, the court agrees with Soderlind's determination that injury was unlikely and negligence was low due to the summer outage and lack of activity in the area, but that if an injury did occur it would result in lost workdays or restricted duty, from sprains or strains. Tr. 297-98; GX-12 at 1. The court finds that the violation's gravity was serious, while the company's negligence was low.

THE SAFE ACCESS VIOLATION

Citation No. 8672113

Inspector King issued this citation after observing "icicles hanging down in front of doors at the pump house." Tr. 181. He found that the violation was reasonably likely to cause a fatal injury, and that it was S&S. GX-6 at 1. He believed that the icicles could fall on and seriously injure or kill a miner passing underneath them. Tr. 182. His belief was supported by his recollection of a "fatality in Kentucky in [19]95" caused by falling icicles. Tr. 182, 200-01. King testified that the icicles at Northshore's mine were between 6 and 24 inches in length and "an inch to an inch and a quarter" in diameter. Tr. 186. Blood testified that they were "a couple inches . . . to about a foot and a half long." Tr. 206. King also testified that the icicles were twelve feet above the ground and that they were "big enough to cause damage if they hit you right." Tr. 187, 189.

Northshore argues that "[t]he Secretary did not produce any . . . evidence to detail the nature of the event in Kentucky . . . [including] the size of the icicles or how far away they were from the miner," presumably suggesting that the icicle fatality King was relying on in his gravity assessment may have involved much bigger icicles falling from a much greater height. Resp. Br. 24; Tr. 193. The Secretary, however, points out that both King and Blood testified that due to the rapid freezing and thawing cycle in the region at that time of the year, icicles could grow considerably overnight. Sec'y Br. 33; Tr. 198, 214. Any gravity determination would have to account for the likelihood of the icicles developing and growing more dangerous, assuming continued mining operation.

King's notes suggest that the area was accessed daily (GX-6 at 2; Tr. 185), but he also testified that the pump house was "out by itself," and that he could not remember if there was a lot of traffic in the area. Tr. 190, 196. Blood clarified that the area was not an access point for anything other than the sump pump (Tr. 204) and that employees had "no need to go in there" unless the red light above the door indicated that the room needed maintenance. Tr. 205. Furthermore, the area was not known to "require . . . a lot of maintenance." *Id.*

Blood also spelled out a number of protections that minimized the risk of injury to miners from falling icicles. First, overhangs on the buildings above the doors ensured that icicles would not fall on miners while they were opening or closing a door (Tr. 206), which is one scenario that King speculated could "cause [the icicles] to jar loose." Tr. 189. Second, the icicles were "tiny" and "fragile." Tr. 206. Last, all miners were also provided hard hats and winter coats with collars that icicles would be unable to pierce. Tr. 207-08.

King designated Northshore's negligence as "high" due to the "open and obvious" nature of the violation, the expectation that the violation should have been found and abated by the time of the inspection, and the fact that the area was not flagged or barricaded off for the benefit of other miners. Tr. 189-90. The company argues that King's negligence assessment was based on the false premise that Northshore employees had been in the area all morning. Resp. Br. 30. Blood testified that, as far as he was aware, no one had been at the pump house since the icicles developed the previous day. Tr. 209.

Blood also testified that Northshore places signs and barricades for "very large" icicles in "high areas," or simply takes them down, but that these icicles were not deemed hazardous. Tr. 209, 220. According to Blood, after they were cited, the icicles were knocked down with a broom handle to abate the violation, and they "shattered into many pieces and . . . little chunks." Tr. 220. Further, Blood testified that Northshore had never previously been cited for icicles hanging off of overhangs, nor, to the best of his knowledge, had a company employee ever suffered an icicle-related injury, in spite of icicles developing every spring at the mine. Tr. 208-09.

THE VIOLATION, ITS S&S NATURE, ITS GRAVITY, AND THE COMPANY'S NEGLIGENCE

Section 56.11001 states that, "Safe means of access shall be provided and maintained to all working places." The court concludes that the Secretary has narrowly established the fact of a violation by a preponderance of the evidence. Based on the photographic evidence and areas of agreement in King's and Blood's testimony, the court finds that the icicles were up to a foot and a half in length, roughly an inch in diameter, and twelve feet above ground. *See* GX-6 at 3-4; Tr. 187, 206. The specific icicles in this case rendered access to the pump house minimally unsafe. However, the court finds the gravity and negligence to be considerably lower than the Secretary has alleged. While the court accepts that the violation contributed to a discrete safety hazard, it was unlikely that an injury would result, and such an injury could not reasonably be expected to have been fatal or even permanently disabling. Therefore, the S&S designation cannot stand.

The court credits Blood's testimony on the infrequency with which the area was accessed. *See* Tr. 204-05. His testimony that the pump house was not an access point for any other area, that operators would only enter if maintenance was required, and that maintenance was not often required went unrefuted and leads most naturally to the conclusion that the entrance was not frequently accessed. *Id.* King's own testimony about the area being out by itself and his lack of recollection of traffic in the area support this conclusion. Tr. 190, 196. The court also agrees with Conboy that the precautions taken by Northshore significantly decreased the likelihood of an icicle directly contacting a miner. *See* Tr. 207-08. For an injury to occur, an icicle would have to fall while a miner was looking up or was positioned in such a way to expose an unprotected part of his or her face or body to the falling icicle. And the miner would have to stop far enough away from the door to avoid the shelter of the overhang when the icicle fell. In every other conceivable scenario, the combination of a hard hat, winter coat, and the overhang was sufficient to prevent or to significantly minimize injury.

Given that the icicles shattered harmlessly upon contact during the violation's abatement, the court finds it likely that the only injury that could reasonably be expected would at most involve lost workdays or restricted duty, although this injury still renders the violation reasonably serious. *See* Tr. 206.

The Secretary did not demonstrate that the cited icicles bore any resemblance to those that may have proven fatal in the case King recalled (Tr. 193), and although the Secretary is correct to point out that, assuming continued mining operations, the rapid thawing and cooling cycle could have caused the icicles to grow to dangerous proportions overnight, (Sec'y Br. 33;

Tr. 198, 214), the fluctuating temperature could just as easily have caused the icicles to shrink to entirely harmless proportions. Moreover, Northshore's stated practice of dealing with more hazardous icicles and the company's absence of any history of injuries from such icicles indicate that, in the event of continued mining operations, Northshore likely would have knocked down the icicles before they harmed anyone. *See* Tr. 208-09, 220.

Finally, the court finds that Northshore's negligence was low. It is unlikely anyone had encountered the icicles between their prior night's formation and the afternoon inspection, given the remoteness of the pump house and the absence of any need to visit it that day. *See* Tr. 190, 196, 204-05. Further, had anyone visited the area, he or she might well have failed to recognize a safety hazard. The court accepts Blood's testimony that icicles are common in the area and that the cited icicles were not especially hazardous. *See* Tr. 208-09, 220. The court further notes that Northshore's lack of a history of icicle-related injuries and icicle-related violations would not necessarily alert the company to the potential safety hazards of otherwise routine icicles. *See* Tr. 208-09.

THE ICY WALKWAY VIOLATION

Citation No. 8672114

King cited Northshore for failing to sand or salt what he deemed to be a "slick ice" walkway, approximately "six [feet] wide and 40 inches deep," in front of the pump house entrance. Tr. 223, 226.[12] The icy walkway created a slip and fall hazard, which King designated as S&S. GX-7 at 1. King testified that the ice was "slicker" than normal because it was "starting to melt." Tr. 223. He also believed that Northshore employees contributed to this hazard by "tromp[ing] down" or "walking over the snow" that later became ice in front of the entrance. Tr. 227-28. Footprints near the entrance indicated to King that miners traveled through the area at some point between the buildup of snow and the formation of ice without clearing the snow. *See* Sec'y. Br. 37; Tr. 227.

King thought that an injury was reasonably likely because the area was, from what the operator had told him, "accessed daily." Tr. 227. The injury, whether it be "a sprain, a bone bruise, [or] a broken arm," could reasonably be expected to cause lost workdays or restricted duty. Tr. 228. King viewed Northshore's negligence as high because the hazard was "open" and could have been dealt with simply by placing a "bucket of sand...by the entrance." Tr. 229. Additionally, the area was not flagged or barricaded for the protection of miners. Tr. 230.

Blood testified that the ice was not in fact slippery. Tr. 238. Instead, it was "uneven and . . . hard to walk on." *Id.* Blood also disagreed with King's contention that the area was "accessed daily." Tr. 228. Being that this was the same area cited in Citation No. 8672113, Northshore notes that Blood's testimony for that violation regarding the infrequency of access applies equally here. *See* Resp. Br. 36. Northshore also argues that infrequent access mitigates against a high negligence finding by making it less likely that any agent of Northshore knew or should have known about the hazard. *See* Resp. Br. 38. Additionally, Northshore notes that the company provided buckets of sand and tailings "inside [all Northshore] doorways," so that

[12] This was the same structure discussed in Citation No. 8672113. Tr. 241.

miners could deal with this problem when it arose, and the company provided training to all employees to ensure compliance. Resp. Br. 38, Tr. 237-38. The Secretary responds that these measures are inadequate because, as Blood admitted, a miner would still have to traverse the unsalted icy terrain to get to the bucket and take care of the hazard. *See* Sec'y. Br. 39, Tr. 242.

THE VIOLATION, ITS S&S NATURE, ITS GRAVITY, AND THE COMPANY'S NEGLIGENCE

Section 56.11016 requires regularly used walkways and travelways to be "sanded, salted, or cleared of snow and ice as soon as practicable." There is no dispute that there was snow or ice leading up to the pump house entrance, and that the cited area had not been sanded, salted, or cleared. *See* Tr. 223, 238. The preponderance of evidence further suggests that Northshore failed to clear the snow that later became ice when it would have been practicable to do so. This should have occurred when someone walked through the snow earlier, causing the footprints that can be seen in the inspector's photograph of the cited entrance. *See* GX-7 at 4; Tr. 227. Therefore, the court finds that Northshore violated the standard.

There is, however, insufficient evidence to support an S&S designation and a high negligence finding. As with the prior citation, and for the same reasons, the court credits Blood's testimony that the area was infrequently accessed. *See* Tr. 204-05. [13] And given both Blood's testimony that he did not find the ice to be slippery when he walked on top of it and the indeterminate amount of ice in the Government's photographs, the court is not convinced that the ice was slippery or extensive enough to injure the rare individual that might walk through there. *See* GX-7 at 3-8; Tr. 238. The chance of injury was unlikely. Therefore, the inspector's S&S finding must be vacated. However, were a slip and fall injury to occur on the ice, it was reasonable to expect lost workdays or restricted duty to result, just as King determined. Tr. 228. Although the violation was not S&S, it was nonetheless serious.

As for negligence, the court finds that the remoteness of the area and Northshore's institution of a policy to address icy entrances when miners encounter them slightly mitigate the company's negligence. *See* Tr. 237-38. The court concludes that the company's negligence was "moderate" rather than "high."

THE ELECTRICAL JUNCTION BOX VIOLATIONS

Citation Nos. 8672520 and 8672527

Both of these citations deal with closely related facts and issues. Citation No. 8672520 involved an electrical junction box with its door ajar and holes exposing live, energized 120 volt wiring inside. Tr. 327-28. The cover plate door was "rusted through." Tr. 335. Citation No. 8672527 involved an electrical junction box near the No. 161 conveyer belt with the cover plate

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[13] While neither party has raised the issue, the court understands that its finding that the area was infrequently accessed could be viewed as inconsistent with its finding of a violation, since the standard only applies to regularly used walkways and travelways. However, the court accepts that the walkway was "regularly" used, as the term is used in the standard, even if it was not traveled frequently enough to sustain an S&S designation.

and the box itself "corroded through," according to Soderlind, exposing the same type of wiring, although the wires were not energized. Tr. 373-74, 386. There was no evidence in either case that the wires lacked insulation (*see* Tr. 335, 382), but Soderlind noted that both areas were wet and therefore water could get inside the boxes through the exposed areas and damage the inner conductors. Tr. 327, 339, 375-76. Soderlind concluded that rust had formed on the first box as a result of "water [being] sprayed in the area to clear the area and . . . splash[ing] up" onto the box. Tr. 333. He did not know how the second box came to be in the condition he cited. Tr. 379

Soderlind designated each alleged violation as Non-S&S. GX-9 at 1, GX-11 at 1. The first did not occur in a regularly accessed area; the second was "behind a handrail" and the "belt [in the area] was shut down" for the summer outage, making contact with the box unlikely. Tr. 328, 374-75. But, Soderlind determined that were a miner to experience an electrical shock from either box, a fatal injury could be reasonably expected. Tr. 328, 375. Soderlind stated that "120 volts has been known to kill people . . . on mine sites." Tr. 329. However, Northshore points out that Soderlind also acknowledged that individuals "get shocked by 120 volts, probably every day," without injury, (Resp. Br. 57, Tr. 329), and that Soderlind had actually written "lost workdays or restricted duties" as the injury that could reasonably be expected when he wrote a citation for a similar violation. Tr. 332. Soderlind maintained that he "didn't evaluate [the cited condition] correctly" when he wrote the citation to which Northshore refers. *Id.*

The primary dispute over Soderlind's "fatal" designation in both citations concerns the circumstances under which a fatal shock could plausibly occur. Chris Goerdt, an electrical supervisor for Northshore, testified that for a fatality to occur, "a person would have to have . . . one hand in the box . . . making contact with the live wires" and the other hand either "on steel" or also in the box. Tr. 364.[14] The company argues that this would not be reasonably likely to occur with either box, in part because both boxes had fully insulated wires. *See* Resp. Br. 56-57, 63-64. Goerdt also felt this would not happen in the cited area in Citation No. 8672520 because of the inability to "fit [one's] hand in the box without it being open" and because of the difficulty of even reaching the box in the first place. Tr. 364. Goerdt and Conboy testified that this box is located "underneath [a] conveyer" belt, past support beams, and that there was no reason to cross the beams except "to do work on that electrical [junction] box" itself, in which case "the power [would be] locked out." Tr. 364, 345-46. The Secretary argues that someone might have to enter the area and cross the beams in order to replace the tail pulley guards from the No. 44 conveyor next to the box, and Conboy agreed that this was a possibility. Sec'y Br. 26-27; Tr. 356. Soderlind testified that a miner could contact the second box while "sweeping[,] shoveling[,] or changing a...belt." Tr. 376-77.

The Secretary also does not agree that a miner would need to reach inside the box itself to be shocked. *See* Sec'y Br. 27, 30. Soderlind and Goerdt both agreed that the insulation for the wires could be damaged as a result of water being sprayed on them and because of the conditions

[14] This is apparently because electricity is more likely to flow through an individual if he is contacting another conductor, such as steel.

outside of the box. *See* Tr. 339, 368, 384.[15] Goerdt also agreed that if an exposed wire were to contact the inside of the box and the grounding failed, "it could energize the metal around the box" and "any other metal component that the box might be touching." Tr. 367-68. The Secretary argues, in such a circumstance, that the entire box and metal framework around it would become an electrocution hazard. Sec'y Br. 27-28. Additionally, Soderlind testified that there was "a lot of chance to make contact with metal or water [in the area] and complete the circuit." Tr. 329. He clarified later that since "water is a conductor," the combination of water and metal was "just increasing the likelihood that electricity would flow through" an individual, from either box into a conductor. Tr. 376.

Regarding Citation 8672520, Soderlind designated Northshore's negligence as high, because the violation was obvious and he had written "the same citation for the same box under the same condition on an inspection that was two years prior." Tr. 329-31. The only difference this time was "there [were] holes that actually had rusted through." Tr. 332. The company addressed that problem at the time of the original citation by re-attaching a loose cover. Tr. 336. Conboy did not believe that two years was an inordinate amount of time between maintenance efforts when dealing with "thousands of boxes" along "hundreds of miles of conduit." Tr. 352. But Soderlind's concern was that the company did not appear to have done anything to address the problem of corrosion from splashing water since he first observed it two years prior. Tr. 338-39. Soderlind concluded that the rusting must have been occurring for "a long time" to generate these types of "holes that show . . . through." Tr. 330. Conboy responded that no mention was ever made of the need to alleviate a problem of water splashing in the original citation that was issued two years prior. Tr. 351. But Conboy did not accompany Soderlind during the issuance of that prior citation and was not privy to Soderlind's conversations regarding abatement of the citation at the time. Tr. 358.

As for Citation 8672527, Soderlind found Northshore's negligence to be moderate because the violation was "open and obvious," it was his understanding the area was inspected "at least once per shift," he was told that supervisors "try to get to every area at least [once a] week," and his experience led him to conclude that the rusting he observed happened over the course of "at least a year, [or] longer." Tr. 377-78.

Northshore argues that the normal mining conditions in the area undercut Soderlind's negligence analysis. *See* Resp. Br. 65. According to Conboy, Soderlind observed the area during the company's summer outage when the hazard was "easy to see." Tr. 390-92. Conboy testified that no work was planned in the area during the two week summer outage, so no employees passed by the belt when the box was easier to see. Tr. 393, 396. When the belt *was* actually running and employees *were* present, Conboy felt that the violation would not be open and obvious due to "heavy steam" in the area clouding visibility and the box's obscured "location, next to . . . guarding, behind a handrail." Tr. 391-92.

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[15] The Secretary's questions during direct and cross-examination made reference to damage to both the "inner conductors" and "insulation" of the wires. The court assumes that the Secretary was primarily concerned with damage to the insulation.

THE VIOLATIONS, THEIR GRAVITY, AND THE COMPANY'S NEGLIGENCE

The Violations

Standard 56.12032 mandates that inspection and cover plates shall be kept in place at all times on electrical equipment and junction boxes. Neither party expressly disputes that Northshore violated this section by having an open cover plate on one box and a cover plate with holes on each box, and the court agrees. In the first citation, the cover was partially open and was therefore not kept in place. In addition, both the first and second violations deal with covers that had rusted through, conditions that have been held to be functionally equivalent to open covers. *See*, *e.g.*, *LTM Inc. – Knife River Materials*, 33 FMSHRC 1210, 1238 (May 2011) (ALJ) (finding a violation of the standard for holes in electrical panel boxes and noting that "the regulation has been applied to require that there be no openings in electrical control boxes"). The court finds that these conditions violated the standard.

The Gravity of the Violations

The court finds that it was unlikely an injury would result from either violation for the very reasons the Secretary has offered. Both boxes were in remote or, at the time, empty areas, and miners were unlikely to make contact with the boxes and their contents. Tr. 328, 374-75.

However, the court finds that the injury that could reasonably be expected in each case would have been fatal. The Secretary presented a more than plausible scenario where outside conditions and the water that potentially damaged the boxes could also damage the insulation, exposing the conductor wiring, and those wires could energize the boxes themselves if the grounding failed. A miner cleaning or replacing a guard or belt could very well contact the box and "complete the circuit," with the amount of metal and water in each room serving as a conductor. *See* Sec'y Br. 27-28; *see also* Tr. 329, 339, 367-68. The court finds that both violations were very serious.

The Company's Negligence

The court finds "high" negligence on the company's part with regard to Citation No. 8672520. Northshore was cited for a violation of the same standard involving the same box two years prior and had not made any attempt to address the issue of rusting which left the inner wires exposed. Tr. 329-31. Regardless of whether Soderlind expressed concern over the rusting or splashing issues two years prior or allowed Northshore to abate the violation without addressing them, the court credits Soderlinds testimony that the issues existed at the time. Tr. 339. The initial citation should have alerted Northshore to the need to address any and all issues with this box that were present at the time and to closely monitor the situation as mining continued.

The court finds Northshore to be moderately negligent with regard to Citation No. 8672527. The court accepts as reasonable Northshore's contention that it did not have an opportunity to identify the violation during the two week summer outage, and that conditions significantly impaired visibility in the area prior to the outage. Tr. 391-93. In the court's view,

both factors serve to mitigate the company's negligence. This stated, the court agrees with the Secretary that the company should have discovered the very large holes in the junction box during the year or more that the Secretary credibly maintains the rusting occurred. *See* Tr. 377-78. The poor visibility only increased Northshore's duty to inspect the area carefully, which the court finds it failed to do.

THE GUARDING VIOLATION

Citation No. 8672537

Soderlind issued this citation for a violation of Section 56.14107(a) on July 1, 2013, after determining that adequate guarding needed to be installed at the head of the No. 163 conveyer belt to protect miners from the shaft and head pulley. Tr. 397, 399. The head pulley was "partially guarded" by a "plate steel" (Tr. 400, 414-15), but the existing guard left "a square opening over the shaft," a smaller opening to the right of the shaft, and a larger opening in the "top right-hand corner" exposing the pulley itself. Tr. 402, 405; *see also* GX-13 at 7. Soderlind was concerned about the risk of a miner getting an arm entangled with the rotating pulley or shaft through the unguarded areas. Tr. 403. Soderlind's main focus was on the "center piece that was cut out," (*see* GX-13 at 7) (labeled "unguarded area"), because the "bolted coupling on the inside" of that area would "tend to grab [one's] clothing" if it got caught inside. Tr. 430-31. That particular opening to the shaft was located behind a pillow block (Tr. 422) and was "four to five feet" above the ground, while the larger opening to the right was, according to Soderlind's unmeasured estimation, "six to seven feet up" above the ground. Tr. 433-34.

Soderlind designated the violation non-S&S and unlikely to lead to injury due to the remoteness of the area. Tr. 403, GX-13 at 1. But by that same token, Soderlind concluded that the injury that could reasonably be expected would be "fatal," since Northshore might not "discover somebody missing an arm or a hand" in such a remote location until after a miner had already "[bled] out." Tr. 404. Additionally, Soderlind deemed Northshore to be moderately negligent because, he testified, he had already "made a strong recommendation" to the company "a week prior" that it "need[ed] to get this [area] guarded better." Tr. 406. According to Soderlind, he did not cite Northshore at the time because the conveyor belt was not running. Tr. 411. But when he returned to the area a week later and found that the belt was running and the head pulley was still inadequately guarded, Soderlind decided to issue a citation for a violation of section 56.14107(a) along with a finding that the company was moderately negligent. Tr. 401.

Conboy's recollection was quite different. Conboy recalled Soderlind telling him during the previous week's inspection that the head pulley was "primarily guarded by location" and therefore did not need further guarding. Tr. 421. In other words, "based on [the hazard's] location, a miner would not be able to make contact with the moving machine parts." Tr. 407. Soderlind's inspection notes from the prior week's walk through of the area do not reference this conversation near the head of the No. 163 conveyor belt, neither corroborating his own account nor Conboy's. *See* Resp. Br. 75, *see also* RX-107. Conboy's notes from that week are similarly silent on this point. *See* RX-103. But, Conboy recalled a conversation on June 26, 2013, almost a week prior, about "the tail of the [No.] 63" conveyer belt, which "run[s] parallel" to the No. 163 belt, albeit "a thousand feet…or more" from the cited area. Tr. 419. According to Conboy,

Soderlind made guarding recommendations for the No. 63 belt, and Northshore promptly complied. Tr. 420. Conboy's June 26 notes are fully consistent with this account. *See* RX-103. Soderlind's June 26 notes also reference this recommendation shortly after mentioning his inspection of the No. 63 conveyer belt tail. *See* RX-107 at 15.

Conboy also testified that the cited area of the head pulley had to his knowledge remained in its partially guarded state going back to the structure's creation in 1956, yet had never been cited despite regular MSHA inspections of that area. Tr. 417.

The Violation

Section 56.14107(a) requires, in relevant part, "Moving machine parts shall be guarded to protect persons from contacting....pulleys,...shafts,...and similar moving parts that can cause injury." Section 56.14107(b) further states, "Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces." The company raises two arguments for why Northshore should not be held liable – first pleading adequate guarding, second pleading inadequate notice. *See* Resp. Br. 70-77. The court finds that second argument to be persuasive and dispositive in this citation. Effectively, Northshore is arguing that the citation should be vacated for lack of notice of the Secretary's interpretation of the standard as applied to the cited area, regardless of whether this court agrees with that interpretation and application.[16] *See* Resp. Br. 73-77.

The Commission has held that a "broad [mandatory standard] must afford reasonable notice of what is required or proscribed." *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (Jan. 1983). The test for whether an operator has had fair notice is "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, 2416 (Nov. 1990). In applying this standard, the Commission has taken into account a wide variety of factors, including the text of the regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with "ascertainable certainty" of its interpretation of the standard in question. *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694–95 (July 2002).

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[16] The court recognizes that other courts and judges have come to different conclusions on questions of notice involving this standard. For cases rejecting inadequate notice arguments for guarding violations, see *Mainline Rock & Ballast, Inc. v. Sec'y of Labor*, 693 F.3d 1181 (10th Cir. 2012); *Crimson Stone v. FMSHRC*, 198 F. App'x 846 (11th Cir. 2006); *Highland Enterprises, LLC*, 34 FMSHRC 1633 (July 2012) (ALJ); and *D. Holcomb & Co.*, 33 FMSHRC 1435 (June 2011) (ALJ). Unlike the present matter before the court, however, none of the above cases involved allegations of prior explicit assurance from MSHA that the cited areas were adequately guarded. For decisions vacating a guarding violation due to inadequate notice, see *Blue Mountain Production* Co., 32 FMSHRC 1464 (Oct. 2010) (ALJ); *Sangravl Company, Inc.*, 30 FMSHRC 1111 (Nov. 2008) (ALJ); *Weirich Brothers Inc.*, 28 FMSHRC 66 (Feb. 2006) (ALJ); and *Higman Sand & Gravel, Inc.*, 24 FMSHRC 87 (Jan. 2002) (ALJ).

In *Alan Lee Good, an individual doing business as Good Construction*, 23 FMSHRC 995 (Sept. 2001), the Commission applied these principles to the Secretary's enforcement of Section 56.14107(a), the standard at issue here. In that case, Commissioners Jordan and Beatty concluded the judge erred in applying the "reasonably prudent person test" and believed the case should be remanded for that reason. *Id.* at 1004-07. Chairman Verheggen and Commissioner Riley concluded the operator did not have notice of the Secretary's interpretation of the standard and would have reversed his decision and vacated the subject guarding violations. However, to avoid an evenly split decision that would have left standing the judge's affirmance of the citations, the Chairman and Commissioner Riley joined Commissioner Jordan and Beatty in agreeing to remand the case. *Id.* at 1009-10. Although the Commissioners produced a split decision, all agreed that the standard was ambiguous as applied, and all focused heavily on the inconsistency of prior enforcement as a key factor in determining whether the "reasonably prudent person" test had been satisfied.

This court does the same. The standard does not clearly specify the extent of guarding necessary in cases such as this where significant guarding efforts are already in place. Accordingly, this court finds the standard to be broad and ambiguous as applied to these facts. MSHA agrees hazards that are seven feet or more above the ground are guarded by location. 30 C.F.R. § 56.14107(b), Tr. 430. Soderlind testified that at least one of the exposed moving parts in this citation may have been up to seven feet high, although he did not measure the distance. Tr. 434. The Secretary therefore did not meet his burden to demonstrate inadequate guarding for that particular hazard. The other exposed area of primary concern required an individual to reach over a pillow block to access it. Tr. 433. Conboy testified that he believed the specific exposure to be adequately guarded due to the pillow block in front of it. Tr. 422. A reasonably prudent person familiar with the mining industry and the protective purposes of the standard could have easily agreed and failed to recognize this as a hazard that required guarding.

Further, the court finds that the inconsistency of the Secretary's prior enforcement at this mine is serious enough to outweigh all other notice considerations in a "reasonably prudent person" test. Conboy's testimony is credible and raises serious doubts about whether Soderlind ever warned Northshore about the potential violation, instead of suggesting that it was adequately guarded. *See* Tr. 419-21. Soderlind lacks any documentation supporting his claim that he had warned Northshore; indeed, his own notes, as well as Conboy's, from a week prior to the citation reinforce Conboy's claim that Soderlind had only warned the company about a different unguarded area. *See* RX-103, 107. Consequently, this court finds Conboy's version of events more credible than Soderlind's, including his testimony that Soderlind had informed him the cited area was adequately guarded within the past week. In the face of this explicit reassurance from Soderlind and a long history of non-enforcement from MSHA, Citation No. 8672537 indeed "amounts to a grossly inconsistent enforcement practice" just as Northshore contends. Resp. Br. 77. Accordingly the citation will be vacated for a lack of notice.

OTHER CIVIL PENALTY CRITERIA

The court has found violations and it must assess civil penalties taking into account the statutory civil penalty criteria. 30 U.S.C. § 820(i).

History of Previous Violations

The mine's history of violations is reflected in a report from MSHA's database. GX-1. The report lists violations issued at the mine and indicates that 234 violations became final between December 2011 and June 2013. The court accepts the figures in the report as accurate and finds that the exhibit reflects a large history.

Size of the Operator

The parties did not stipulate to the size of the operator, however on Exhibit A of the civil penalty petitions, the Secretary recorded 2,410,235 controller hours worked for the operator and 812,741 hours worked for the mine, and assigned 7 out of a possible 10 points for the size of the operator and 10 out of a possible 15 points for the size of the mine. Based on this record, I find that Northshore is a moderately large operator.

Ability to Continue in Business

The parties stipulated that the proposed penalties will not affect Northshore's ability to continue in business, and the court finds that the same is true for the penalties assessed below. Tr. 15; Stip 9.

Good Faith Abatement

The parties stipulated that Northshore terminated the conditions giving rise to the violations in a good faith manner. Tr. 15; Stip. 8.

CIVIL PENALTY ASSESSMENTS

Citation No. 8672460

The court has found that the violation was serious, that an accident was reasonably likely, and that the violation was due to the company's low negligence. The Secretary proposed a civil penalty of $1,304.00, but given these findings and the civil penalty criteria discussed above, the court finds that a penalty of $586.00 is appropriate. The court has departed from the proposed penalty because it has found the company's negligence to be lower than the Secretary alleged.

Citation No. 8672461

The court has found that the violation was serious, that an accident was reasonably likely, and that the violation was due to the company's low negligence. The Secretary proposed a civil penalty of $1,304.00, but given these findings and the civil penalty criteria discussed above, the

court finds that a penalty of $586.00 is appropriate. The court has departed from the proposed penalty because it has found the company's negligence to be lower than the Secretary alleged.

Citation No. 8672113

The court has found that the violation was serious although an accident was unlikely and that the violation was due to the company's low negligence. The Secretary proposed a civil penalty of $8,209.00, but given these findings and the civil penalty criteria discussed above, the court finds that a penalty of $250.00 is appropriate. The court has departed from the proposed penalty because it has found the negligence, likelihood of injury, and severity of injury that could reasonably be expected to be lower than the Secretary alleged.

Citation No. 8672114

The court has found that the violation was serious although an accident was unlikely and that the violation was due to the company's moderate negligence. The Secretary proposed a civil penalty of $2,473.00, but given these findings and the civil penalty criteria discussed above, the court finds that a penalty of $300.00 is appropriate. The court has departed from the proposed penalty because it has found the negligence and likelihood of injury to be lower than the Secretary alleged.

Citation No. 8672520

The court has found that the violation was very serious although an accident was unlikely and that the violation was due to the company's high negligence. The Secretary proposed a civil penalty of $11,306, and given these findings and the civil penalty criteria discussed above, the court finds that a penalty of $11,306 is appropriate.

Citation No. 8672522

The court has found that the violation was serious, that an accident was reasonably likely, and that the violation was due to the company's low negligence. The Secretary has proposed a penalty of $3,405.00, but given these findings and the civil penalty criteria discussed above, the court finds that a penalty of $1,400.00 is appropriate. The court has departed from the proposed penalty because it has found the company's negligence to be lower than the Secretary alleged.

Citation No. 8672527

The court has found that the violation was very serious although an accident was unlikely and that the violation was due to the company's moderate negligence. The Secretary has proposed a penalty of $4,689.00, and given these findings and the civil penalty criteria discussed above, the court finds that a penalty of $4,689.00 is appropriate.

Citation No. 8672530

The court has found that the violation was serious although an accident was unlikely and that the violation was due to the company's low negligence. The Secretary has proposed a penalty of $329, and given these findings and the civil penalty criteria discussed above, the court finds that a penalty of $392 is appropriate.

Citation No. 8672537

The court has found that the Secretary did not prove the alleged violation. Therefore, a penalty cannot be assessed.

SETTLED VIOLATIONS

The parties have agreed to the following settlements:

Docket No. LAKE 2013-458-M

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8672441	2/20/13	56.12004	$499	$499

Northshore will accept the citation as written and pay the proposed penalty. Tr. 436.

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8672446	2/25/13	56.12004	$392	$220

The Secretary will change the inspector's finding of the injury that could reasonably be expected from "fatal" to "permanently disabling." Tr. 436.

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8672447	2/25/13	56.12032	$425	$425

Northshore will accept the citation as written and pay the proposed penalty. Tr. 436.

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8672451	2/26/13	56.12004	$392	$220

The Secretary will change the inspector's finding of the injury that could reasonably be expected from "fatal" to "permanently disabling." Tr. 436.

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8672452	2/26/13	56.12032	$425	$270

The Secretary will change the inspector's finding of the injury that could reasonably be expected from "fatal" to "permanently disabling." Tr. 436.

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8672458	3/5/13	56.12030	$745	$500

The Secretary will change the inspector's finding of the injury that could reasonably be expected from "fatal" to "permanently disabling." Tr. 436.

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8672459	3/5/13	56.12032	$1,111	$800

The Secretary will change the inspector's finding of the injury that could reasonably be expected from "fatal" to "permanently disabling." Tr. 437.

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8672465	3/6/13	56.12008	$334	$200

The Secretary will change the inspector's finding of the injury that could reasonably be expected from "fatal" to "permanently disabling." Tr. 437.

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8672111	3/12/13	56.20003(b)	$4,329	$2,500

The Secretary will delete the inspector's finding that the violation was S&S and will change the inspector's evaluation of the likelihood of injury from reasonably likely to unlikely. Tr. 437.

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8672112	3/12/13	56.12032	$5,961	$2,600

The Secretary will delete the inspector's finding that the violation was S&S and will change the inspector's evaluation of the likelihood of injury from reasonably likely to unlikely. Tr. 437.

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8672116	3/12/13	56.11016	$2,473	$1,500

The Secretary will delete the inspector's finding that the violation was S&S, will change the inspector's evaluation of the likelihood of injury from reasonably likely to unlikely, and will change the negligence finding from high to moderate. Tr. 437.

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8672117	3/12/13	56.12004	$1,111	$950

The Secretary will reduce the proposed penalty. Tr. 437.

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8672118	3/12/13	56.20003(a)	$362	$100

The Secretary will change the inspector's negligence finding from moderate to low.[17]

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8672120	3/13/13	56.12004	$1,111	$800

The Secretary will change the inspector's negligence finding from moderate to low. Tr. 437.

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8672121	3/13/13	56.12032	$1,203	$800

The Secretary will change the inspector's finding of the injury that could reasonably be expected from "fatal" to "permanently disabling" and will change the negligence finding from "moderate" to "low."

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8735065	3/18/13	56.12032	$362	$362

Northshore will accept the citation as written and pay the proposed penalty. Tr. 437.

Docket No. LAKE 2013–596-M

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8672119	3/12/13	56.14100(b)	$2,473	$722

The Secretary will delete the inspector's finding that the violation was S&S and will change the inspector's evaluation of the likelihood of injury from reasonably likely to unlikely. Tr. 437-38.

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8672505	6/11/13	56.20003(a)	$7,578	$6,798

The Secretary will reduce the proposed penalty. Tr. 438.

Docket No. LAKE 2013-674-M

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8672525	6/19/13	56.12018	$2,901	$1,900

The Secretary will change the inspector's finding of the injury that could reasonably be expected from fatal to permanently disabling and will change the negligence from moderate to low. Tr. 438.

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[17] In a series of emails following the hearing, representatives for the Secretary and Northshore informed the court that Citation No. 8672118 had settled at the hearing but that the settlement was missing from the transcript. The parties articulated the settlement terms for the citation in those emails, and the court accepted those terms into the record.

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8672528	6/24/13	56.12008	$1,203	$900

The Secretary will reduce the proposed penalty. Tr. 438.

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8672533	7/1/13	56.12032	$1,530	$850

The Secretary will change the inspector's finding of the injury that could reasonably be expected from fatal to lost workdays or restricted duties. Tr. 438.

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8672534	7/1/13	56.12032	$1,530	$500

The Secretary will change the inspector's finding of the injury that could reasonably be expected from fatal to lost workdays or restricted duties. Tr. 438.

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8672536	7/1/13	56.12032	$1,530	$1,070

The Secretary will change the inspector's finding of the injury that could reasonably be expected from "fatal" to "permanently disabling." Tr. 438.

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8672547	7/11/13	56.12032	$1,530	$1,070

The Secretary will change the inspector's finding of the injury that could reasonably be expected from "fatal" to "permanently disabling." Tr. 438.

Citation No.	Date	30 C.F.R. §	Proposed Penalty	Assessed Penalty
8672549	7/15/13	56.12032	$1,530	$1,070

The Secretary will change the inspector's finding of the injury that could reasonably be expected from "fatal" to "permanently disabling." Tr. 438.

ORDER

In view of the above findings, conclusions, and settlement approvals, within 30 days of the date of this decision the Secretary **IS ORDERED** to:

Modify Citation Nos. 8672460, 8672461, and 8672522 to reduce the level of negligence from "moderate" to "low;" modify Citation No. 8672113 to reduce the likelihood of injury from "reasonably likely" to "unlikely," to reduce the level of injury that could reasonably be expected from "fatal" to "lost workdays or restricted duty," to delete the "significant and substantial" designation, and to reduce the level of negligence from "high" to "low;" modify Citation No. 8672114 to reduce the likelihood of injury from "reasonably likely" to "unlikely," to delete the

"significant and substantial" designation, and to reduce the level of negligence from "high" to "moderate;" and vacate Citation No. 8672537.

Further, if he has not already done so, within 30 days of the date of this decision, the Secretary **SHALL** modify Citation Nos. 8672446, 8672451, 8672452, 8672458, 8672459, 8672465, 8672536, 8672547, and 8672549 to reduce the level of injury that could reasonably be expected from "fatal" to "permanently disabling;" modify Citation Nos. 8672111, 8672112, and 8672119 to reduce the likelihood of injury from "reasonably likely" to "unlikely" and to delete the "significant and substantial" designation; modify Citation No. 8672116 to reduce the likelihood of injury from "reasonably likely" to "unlikely," to delete the "significant and substantial" designation, and to reduce the level of negligence from "high" to "moderate;" modify Citation Nos. 8672118 and 8672120 to reduce the level of negligence from "moderate" to "low;" modify Citation Nos. 8672121 and 8672525 to reduce the level of injury that could reasonably be expected from "fatal" to "permanently disabling" and to reduce the level of negligence from "moderate" to "low;" and modify Citation Nos. 8672533 and 8672534 to reduce the level of injury that could reasonably be expected from "fatal" to "lost workdays or restricted duty."

Finally, within 30 days of the date of this decision, the company **SHALL PAY** civil penalties in the amount of $19,509.00 for the contested violations found above and pay $27,626.00 for the settled violations. Upon payment of the civil penalties, modification of the citations, and vacation of the citations, this proceeding **IS DISMISSED**.

David F. Barbour
David F. Barbour
Administrative Law Judge

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