FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEST 2015-850-M A.C. No. 04-01299-383413 Docket No. WEST 2015-851-M A.C. No. 04-03065-383417 (Plumbago Mine)
v.	Docket No. WEST 2016-70 A.C. No. 04-01299-393844 Docket No. WEST 2016-71 A.C. No. 04-03065-393850 (Plumbago Mine)
	Docket No. WEST 2016-0149-M A.C. No. 04-01299-396253 Docket No. WEST 2016-183 A.C. No. 04-01299-398656
ORIGINAL SIXTEEN TO ONE MINE, INC., Respondent	Docket No. WEST 2016-243 A.C. No. 04-01299-400615 Mine: Sixteen To One Mine

DECISION

Appearances: Laura Ilardi Pearson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner

Michael Miller, President, and Director, Original Sixteen To One Mine, Inc., Alleghany, California, for Respondent

Before: Judge Moran

Introduction

This case involves seven dockets encompassing a total of 22 citations. A hearing was held in the above docketed matters in Truckee, California commencing on September 20, 2016. Two of the citations were vacated by the Secretary. The Secretary's discretion to vacate a citation or order is not subject to review. *RBK Contr. Inc.*, 15 FMSHRC 2099 (Oct. 1993).

Because the Court determines that the Secretary did not meet its burden of proof, nine of the citations are dismissed. Based on the Court's evidentiary conclusions, the Court imposes penalties for a number of other citations that are lower than the amounts sought by the Secretary.

Preliminary Matters Applicable to All Alleged Violations

Jurisdiction challenge for the Plumbago Mine

Regarding Mr. Miller's claim that Plumbago is not a mine: Miller stated about the activity at the site that "they were in there, they were -- they were – they were doing kind of an exploration development. They were mucking out old ground fall that was in their primary haulage. They were running a slusher. They were putting in steel sets and lagging. They were doing a good job with that." Tr. 101. Miller added, "Number one, there has never been any gold production at the Plumbago Mine. I have never seen any production, there is no product that's ever been produced." Tr. 103-104. Also, Plumbago "never asked for an I.D. number for that mine because it never felt it needed one." Tr. 104.

The Court added that, based on the hearing testimony alone, "this inspector has testified sufficiently to me that there was activity going on at this Plumbago Mine that would constitute mining as construed by dozens and dozens of Federal Courts in reviewing the jurisdiction of the Mine Act." Tr. 110. While Miller asserted that no gold had been found there, the Court explained, by way of a hypothetical, the following:

> Even if you never realized a penny in terms of any ore, whether it be gold or copper or lead or silver, you name it. If nothing came out of it and you went through all these efforts, all of that past activity, though it bore no fruit, would still be mining.

Tr. 111-12.

As discussed below, the Respondent also admitted that the Plumbago Mine is a mine within the meaning of the Mine Act in its submissions to the Court.

The Statutory Penalty Criteria

A number of the statutory penalty factors apply uniformly to each alleged violation. Therefore they are dealt with here, leaving individual discussion for negligence and the gravity of the violation, and the related factors, where applicable, of unwarrantability and significant and substantial findings.

The operator's ability to continue in business

At hearing, Mr. Miller raised an issue concerning the statutory penalty criterion of the effect of civil monetary penalties on the operator's ability to continue in business. The Court then identified problems with the assertion of that defense, beginning with its late assertion, coming only at the start of the hearing. In that regard, it stated,

> this information should have been provided well before today. In other words, it was incumbent upon the Respondent prior to the hearing to provide documentation to show that a penalty, and let's work from the pre-vacated standard, the responsibility was upon Sixteen To One Mine to provide information to show that a penalty of $3,900 would have an effect on the operator's ability to continue in business.

Tr. 464-465.

Nevertheless, the Court extended extra fairness to Miller by providing him the opportunity to submit within 30 days from the close of the hearing such information as he may be able to muster in order to establish that the civil penalties sought would affect its ability to continue in business. Tr. 465. The Court emphasized that Miller would need to show how a penalty of $3,000 could affect the operator's ability to continue in business, adding that "a company that could not withstand a civil penalty of less than $3,000 is in a precarious position to begin with." Tr. 465-466.

Post-hearing the Respondent submitted information designed to show that the penalties sought by MSHA impacted its ability to continue in business. The Secretary then responded to that submission. Respondent sent the Secretary "10-Ks" the week prior to the hearing. Tr. 53.

In its post-hearing submission on this issue, dated October 20, 2016, Miller stated that the "Original Sixteen to One Mine, Inc. (operator) is insolvent." R's post-hearing letter at 1. Miller added that "MSHA is significantly responsible for creating this situation." *Id.* Inadvertently, the letter effectively conceded that it is a mine, stating that MSHA "has a significant impact on our ability to carry out the necessary work *in order to produce gold.* Unlike a mid-size or large mining operation, the very small ones are working against the odds to survive the rigorous issuance of citations by MSHA." *Id.* Miller elaborated that, when miners have to deal with MSHA inspectors, that is time away from "the work necessary to produce gold." *Id.* at 2. Miller also states that significant expenses to correct *alleged* violations are incurred and as a result it has had to reduce the size of its workforce. In the past year its workforce has dropped from 11 to

four miners. *Id.* at 3. Miller concludes by pointing to the three past annual financial reports, which it concedes are not audited reports. However, it contends that those reports are accurate and sufficient for the Court to consider, asserting that it is "reasonable for [the Court] to reduce or eliminate [the] penalties sought by MSHA ... [and to] protect California underground gold miners' jobs." *Id.* at 4.

The Secretary filed a response to Miller's submission. In that Response, the Secretary noted the Court's statement that the information the Respondent intended to submit would need to demonstrate "that information would have to show [the Court] that a penalty in the neighborhood of $3,000 would [a]ffect the Sixteen To One's ability to continue in business." Sec. Response at 2, quoting transcript at 464-65. As the Secretary also observes, the burden of proof to establish inability to pay is upon the mine operator and that specific evidence must be presented to show such an effect. The specific evidence requirement is not satisfied by introducing items such as "unaudited tax returns, balance sheets [ ] tax liens and judgments." *Id.* at 3, citing *Spurlock Mining Co, Inc.*, 16 FMSHRC 697, 700 (1994).

The Court agrees with the Secretary that the mine did not present the required evidence to establish that a civil penalty in the neighborhood of $2,562 would impact the operator's ability to continue in business.[1]

The operator's history of previous violations

Gov. Ex. GX -1 is the Certified Assessed Violation History for the Original Sixteen to One Mine. Tr. 15. That exhibit reflects 21 paid violations over the period covered, 6 of which were "S&S." There was no violation history for the Plumbago Mine at the time of the hearing. Tr. 16-17. The Court concludes that the mines' violation history is negligible.

The appropriateness of any penalties to the size of the business

There was no formal statement regarding evidence on this factor. However, uncontradicted testimony supports the finding that the Sixteen to One Mine and the Plumbago Mine are small operations.

The demonstrated good faith in attempting to achieve rapid compliance after notification of a violation

There was no formal statement regarding evidence offered on this factor. However,

[1] Without upsetting the Court's finding that the Respondent did not provide the type of evidence to demonstrate that the penalties sought in this litigation could have an effect on its ability to continue in business, the Court does agree with Miller's point that when an operator is faced with a citation and is unwilling to challenge the validity of it by absorbing the issuance of a withdrawal order being issued, the process of abating the citation may involve expenses. If, later, it turns out that the citation was improvidently issued, those unwarranted abatement expenses do not evaporate. That said, even if such circumstances arise, the operator would still need to establish that such unjustified associated abatement expenses when coupled with other civil penalties affect the mine's ability to continue in business.

uncontradicted testimony supports the finding that the Sixteen to One Mine and the Plumbago Mine demonstrated such good faith in attempting to achieve compliance after issuance of alleged violations.

Docket No. WEST 2015-0850[2] Original Sixteen to One Mine, Inc.

Inspector Stephen Rogers is an MSHA safety specialist, with some 20 years' employment with that agency. Tr. 20. Inspector Rogers also had many years of employment as a miner. His family owned mines and he began working as a miner in 1973. Then, at age 17, he began work as an underground miner for Union Carbide. Tr. 22.

Citation No. 8793844

On May 6, 2015, Inspector Rogers issued Citation No. 8793844. Tr. 27, Ex. GX 2, citing 30 C.F.R. § 57.6102(b).[3] That standard, titled, "Explosive material storage practices," provides "Explosives and detonators shall be stored in closed nonconductive containers except that nonelectric detonating devices may be stored on nonconductive racks provided the case-insert instructions and the date-plant-shift code are maintained with the product." 30 C.F.R. § 57.6102(b).

Rogers related that during the course of his inspection, when traveling in the 800 haulage, at the 848 split, he observed some explosives along a rib. Tr. 28. He determined that there were two different types of explosives present, both were nitroglycerine-based dynamite sticks of powder, which he identified by their color. Tr. 31-32. Under the inspector's evaluation of the gravity, he marked the injury as unlikely to occur, since the area was not used for travel and there were no overhang issues that could cause a sympathetic (i.e. unplanned) detonation through material falling on the explosives. Tr. 34. However, though unlikely to occur, he marked the injury that could be reasonably expected as "fatal," as the two sticks, if they were detonated, could result in an injury of that degree. *Id.* At the time he issued the citation there were only two miners working in the mine. Tr. 35. For negligence, Rogers marked that as "moderate," because Mr. Miller's son, Reid Miller, didn't appear to know of the powder's presence. *Id.* However, Rogers identified the powder "pretty quickly," so it was not difficult to detect its presence. Tr. 36. The condition was abated by "washing" the powder in a bucket of water, rendering it harmless. *Id.* **MSHA's proposed penalty was $150.00.** Ex. A (referencing WEST 2015-0850).

Upon cross-examination, Mr. Miller acknowledged that Inspector Rogers was well qualified. Tr. 38. For the purpose of showing that the old powder presented no real hazard, Miller suggested that one could simply burn the dynamite. Rogers did not agree, stating that one

[2] The entire testimony was reviewed and considered by the Court. However, some aspects of the testimony received were considered to be either irrelevant and/or immaterial and accordingly discussion of such matters is omitted from this decision. *See*, as one example, Tr. 38-39.

[3] Throughout the hearing, the Secretary's exhibits were referred to as "GX 1" and so on. Hereinafter, this decision cites the Secretary's exhibits as "GX 1," etc. to mirror the transcript and exhibits.

doesn't "just burn powder," as there "is a very specific way of doing it." Tr. 42. The Court noted that the violation did not claim that there was an improper disposal of the powder. Tr. 43. Miller took issue with the inspector marking the violation as "fatal." *Id.* The inspector elaborated on his reasoning for the "fatal" designation, stating,

> [i]f [the powder] received energy from an outside unplanned source and that energy can be impact, friction, variety of issues that could cause detonation of the explosives, and if someone was in the close proximity walking through that area when that detonated, [he] believe[d] that that would be a -- cause a fatal. [sic]

Tr. 44.

Rogers expressed that if a detonation occurred, anyone within 20 to 25 feet of it could be killed. Tr. 44. The inspector was not claiming that one merely walking by the powder would cause an explosion, but rather if there was a ground fall at the time a miner happened to be walking by, within 25 feet of a detonation, "the concussion of the -- that type of powder, because it's fairly high strength, you know, gelatin, one of them was a gelatin-based, but they are both nitroglycerine-based, would probably cause enough concussion to collapse a lung." Tr. 45.

Rogers agreed with the Court's summary that two events would have to occur at the same time: a sympathetic action and one walking within 20 to 25 feet of the material at the moment of detonation. *Id.* Diminishing the likelihood of a sympathetic event, Rogers added that there was no evidence of rock movement that could land on the explosives. *Id.* Had that been the case, that material could easily fall down, he would have marked the gravity as "reasonably likely." Tr. 46. In support of the "moderate negligence" designation, Rogers explained, "somebody put the powder there somehow. Some miner at some point somehow the powder ended up there, which is always concerning, and it didn't take me long to observe it." *Id.* Rogers acknowledged that there was yellow ribbon at the cited area, and that he went beyond that ribbon barrier and discovered the powder. Tr. 47.

Mr. Miller testified regarding this citation. Stating that he is 74 years old, Miller added that he has significant knowledge about explosives. Tr. 49. He stated he did not know of the explosive's presence, estimating that the cited powder "must have been there for 20 years or more." Tr. 50. In his opinion, there was *no* sympathetic event capable of causing detonation. Tr. 51. Thus, Miller contended that,

> there is no chance of a fatality to those two guys or probably to even 10 or 20 guys if they were there working, but they weren't. . . . I can accept the citation easily as darn it, we missed something. Glad you found it. But it wouldn't have been fatal, and it should have been low or no negligence. We were not negligent in going to an area that was off limits with two guys walking a main travelway at that particular point in time in the mine.

Tr. 51.

He added that the area has very little ambient light. *Id.*

Conclusion

Upon consideration, the Court finds that the violation was established. It also finds, in line with the inspector's evaluation, that the gravity was properly marked as unlikely, that it was not significant and substantial ("S&S"), that if the hazard occurred, it would be fatal, although, as the testimony showed, it would require a *very* unlikely confluence of events.

However, the Court also finds the negligence to be low, as the material had been there for a long period of time without being cited, and because it was in an out of the way location, which required that the inspector go beyond a ribboned-off area. In consideration of these factors, and the previously discussed factor of the effect of the penalties on the operator's ability to continue in business for all of the citations, together with the across-the-board determinations for the Sixteen to One Mine of the operator's history of previous violations, size of business, and good faith in attempting to achieve rapid compliance,[4] **a penalty of $50.00 (fifty dollars) is imposed as appropriate.**

Citation No. 8793845

This citation invoked 30 C.F.R. § 57.9300(b). That standard, titled, "Berms or guardrails", provides, at subsection (b) "Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway." 30 C.F.R. § 57.9300(b).

Rogers issued this citation on May 6, 2015. It alleges "a 40-foot section of roadway landings area that -- that had from zero percent berm to 0.8, which is about ten inches." Tr. 55, GX 5. Associated with that exhibit are Exhibit GX 6, the inspector's notes, and Exhibit GX 7, photographs he took of the condition. Tr. 55. The area was located in "the lower landing area down by the 800 portal where . . . they drive down there they tag in and go to work and go through the portal, and this is that lower landing area where they tend to park." Tr. 56. The largest piece of equipment using that road is a 966 loader, which has a mid-axle height of 2.3 feet. Tr. 58. Exhibit GX 7, photo 2 of 4, shows an area with zero to ten inches of berm. Tr. 59. Exhibit GX 6 complements the photos with a drawing the inspector created of the roadway and its berm deficiencies. Tr. 60.

Rogers marked the citation as "unlikely" to result in an injury because the road was a large, open, area, meaning that vehicles did not have to drive close to the roadway's edge. Tr. 61. He marked the likely injury as lost work days or restricted duty based upon his conclusion that if one of the smaller vehicles went over the road edge, it would roll down to the second bench. Tr. 62. Moderate negligence was marked on the basis that Reid Miller stated he had not observed the condition. A snow bank in that area had made it less obvious. Still, he could not consider it low negligence, as it was still "pretty obvious." Tr. 63. While the deficient area was

[4] The Court will not tire the reader by repeating each of the other statutory penalty factors for every citation. Suffice it to say that, as they are uniform considerations for each citation, the Court considered the operator's ability to continue in business, the operator's history of previous violations, the size of its business, and its good faith in attempting to achieve rapid compliance.

not large, the road was used every time miners go to the mine. Tr. 64. Exhibit GX 7 shows the berm that was installed to abate the citation. *Id.*

Mr. Miller believed that the citation should be vacated. His reasoning was that there had been a lot of rain, requiring annual replenishment of berms from those events. He asserted that such water run off created the gap for the small area cited. Thus, he contended that the mine does maintain its berms. Tr. 67-68. He believed that because the loader referenced by the inspector was at the shop, it was not available for use. Tr. 68. That left only a pickup truck using the road. *Id.* Miller reasoned, "We cannot fix things if they are not needed to be fixed. We need to fix the things that are -- might be a problem or a safety issue right now." Tr. 69. On that basis, he considered it unreasonable to interpret the standard as requiring a berm under the circumstances presented. *Id.*

The Court then inquired if the inspector still would have issued the citation if it were assumed that the loader was not being used and that only privately owned vehicles or pickup trucks were using the road. Rogers stated he still would have issued the citation because vehicles still were using the cited road. Tr. 70. The largest berm in the cited area was .8 inches (i.e. approximately 10 inches) and, in some of the cited area, it was zero. By comparison the mid-axle height of the pickup truck was 1.3 inches. *Id.* Thus, even where some berm was present within the cited area, at best it was still some 7 to 8 inches too short. *Id.* The mid-axle height for the pickup was about 12 to 14 inches. Tr. 72. Nor, the inspector stated, if it were assumed only a pickup used the road, would he have changed his gravity or negligence designations, as there still was road use by such vehicles. Tr. 71.

Mr. Miller then posited whether, under the circumstances presented, one could have essentially a technical violation, but with no hazard created. Tr. 73. Rogers did not see it that way. Mr. Miller then added that, as the posted speed is five miles per hour on the road, the likelihood of an occurrence was zero. Tr. 75. The Court inquired if Miller believed that no berm was ever required for the cited area, and he explained that affirmed that no berm should have been required *under the specific circumstances cited.* Tr. 76. He elaborated that the berm should have been reestablished the next time the loader used the road. As for the pickup truck usage, he believed that under the conditions then present, there was *no* danger at all. Tr. 78. The Secretary did not cross-examine Miller. Tr. 80.

Conclusion

Upon consideration of the record evidence, the violation was established. **MSHA's proposed penalty was $100.00**. Again, the Court notes that the gravity was assessed as unlikely and the likely injury as lost workdays. However as the deficient area was relatively small and the roadway area itself was wide and taking into account that only the pickup truck was then using the roadway, that a snow bank had made it less obvious and that recent rains had contributed to the creation of the berm gap, the Court finds it to be more accurately to say that an injury was *very* unlikely. The citation form does not recognize a category below unlikely and "no likelihood," but that does not restrict the Court from such a characterization.

Further, under all the attendant the circumstances, as presented by Miller, whose testimony was not challenged through any cross-examination, the negligence should be deemed low, not moderate. Given these findings, **a penalty of $25.00 (twenty-five dollars) is imposed.**

WEST 2015-0851[5] Plumbago Mine

Citation No. 8793846

Inspector Rogers also issued this citation, alleging a violation of 30 C.F.R. §57 20032. That standard, titled, "Two-way communication equipment for underground operations," provides, "Telephones or other two-way communication equipment *with instructions for their use* shall be provided for communication from underground operations to the surface." 30 C.F.R. §57.20032 (emphasis added).

On May 7, 2015, Inspector Rogers was at the Plumbago Mine to conduct an inspection. Tr. 82; GX 8; GX 9; GX 10. He stated that, like the Sixteen to One Mine, the Plumbago is also a gold mine, run by Mr. Miller. *Id.* The Plumbago has an MSHA mine ID. Tr. 84. Further, in preparation for his visit, Rogers reviewed past inspection files for the mine, as prior MSHA inspections had occurred at the mine. Tr. 86. When he first arrived, no one was at the mine. However, not long after his arrival, a vehicle arrived with three miners. Tr. 84. It appeared to Rogers both that work had been conducted at the site and that the persons who arrived there were present to work. Tr. 85.

As noted, Rogers cited 30 C.F.R. §57.20032, which requires an underground telephone or some other type of two-way communication device *along with instructions for its use*. Tr. 91. There was, as the citation states, such a phone present; which was described as a "new mine phone." *Id.* The essence of the violation was the phone lacked an instruction manual for the phone's use and operation and Miller stipulated that Rogers found that the phone lacked instructions. Tr. 88. The Court then expressed that it seemed that this was a "rather miniscule violation," unless the Secretary could establish that a person of normal intelligence could not figure out how to use the phone. Tr. 89. The Secretary contended that this phone was atypical and did not operate like a normal household phone. Tr. 91. The Court opined that if the evidence is that use of the phone was intuitive, that would bear upon the gravity involved. Tr. 92.

Rogers described use of the phone as follows:

> Well, depends on what you want to achieve. . . . in the handset there is a -- a mic system that you depress in the center of the phone. The phone handle looks like your standard old, not that anybody has them anymore, but the old phones. And so you don't just pick it up, you have to depress the inner section of one of the mics and then you have to, if you are trying to call out, there is speakers [sic] on those. And then you have to also, at the same time, depress a toggle and then you can speak. . . . Once you have contacted the person that you want to talk to, you

[5] Docket No. WEST 2015-0851 was not listed in the Secretary's opening statement, but the docket and the alleged violations contained within it, were considered at the hearing. Tr. 9.

> no longer depress the toggle, but you depress the inner mic system that's connected to the handle and you can have a two-way conversation, but any other phone can still pick that up. It's not a private line at that point, and so it requires a number of steps in order to make it activated.

Tr. 94.

Accordingly, Rogers did not think that use of the phone was intuitive, noting that if one had never used a mine phone of any sort, while in time one could figure out how to use it, in his experience, miners had to train on how to use a mine phone. *Id.* Further, use of the phone was for practical needs: "if there is accident, injury, things like that or you are needing advice, information, a condition that you have run into. It was very common to get on the phone, call the surface." Tr. 94-95.

Rogers affirmed that there were no instructions on the phone itself, and "no manual that was presented to [him] or instructions at that location." Tr. 95. However, he then conceded that "[t]he operation of this phone was extremely similar to standard Phemco phones." *Id.* Further, and of importance, Rogers had the miners *show him* how they would operate it, stating, "[*t*]*hese were experienced hands and they didn't have any problem operating the phone.*" Tr. 96 (emphasis added). His issue was, aside from the lack of a manual, that he "had just never seen a mine phone ever made that didn't have, by the manufacturer, instructions on it." *Id.* Rogers' notes reflect that there were three miners at the Plumbago, but that he didn't know about their experience level, either at that mine or at the Sixteen to One Mine for that matter. Tr. 97.

In marking lost work days or restricted duty as the type of injury, Rogers' conclusion was based on "Confusion . . . confusion, lack of information can slow down rescue efforts, injury, et cetera." Tr. 98. He marked the negligence as low, because most miners would be unaware of the requirement for an instruction manual and because the phone itself was labeled as "MSHA approved." Tr. 99.

Upon cross-examination, Rogers agreed that miners are to be task-trained and that he found no violation with regard to training on any piece of equipment at the mine. Tr. 101-02. Rogers was not definitive in answering whether the phone was equipment for which task-training was required. Tr. 102.

Miller then testified about this citation, asserting that each miner had been task trained on every piece of equipment, including the cited phone. Tr. 104. He added, establishing the importance of the phones, that they "are so critical out there that we have a very expensive radio phone in the trucks and a station in our office." *Id.* In the Court's view, this reinforces, rather than detracts from the importance of the cited standard. However, Miller also pointed out that the miners showed the inspector how the phone works. Tr. 105.

It was Miller's position that the standard should be vacated, as everyone was trained on its use and the phone itself was MSHA approved. Tr. 106. He added that the inspector's claim of possible confusion, and therefore the need for the instructions, was hollow as everyone knew how to use the phones. Tr. 107. Miller did admit however, that there were no instructions, as the

citation alleged. Tr. 107-08. The Court then commented that the points made by Miller go to gravity and negligence, but not fact of violation. Tr. 108. Miller countered that "instructions" can be established, as here, if the miners can give oral instructions on the use of the phone, as happened here when they told the inspector how the phone was used. The Court rejects that interpretation of the standard. Tr. 109.

Conclusion

The proposed penalty amount was $100.00. Upon consideration, the Court imposes a penalty of **$25.00 (twenty-five dollars)**. This amount is derived upon consideration that the phone was fully operational, that the miners knew how to use it (indeed they had to show the inspector how it operated), and that the negligence was low. Therefore, while there were no instructions for its use, the violation was under the circumstances, of a technical, and non-safety threatening nature.

WEST 2016-0070[6] Sixteen to One Mine

Citation No. 8873829

Citation No. 8873829, dated August 18, 2015, was issued at the Sixteen to One Mine by MSHA inspector Steven Hagedorn. GX-11; GX 13. The cited standard, Section 56.12002, titled "Controls and switches," provides "Electric equipment and circuits shall be provided with switches or other controls. Such switches or controls shall be of approved design and construction and shall be properly installed." 30 C.F.R. § 56.12002.

Inspector Hagedorn offered the following basis for his issuance of this citation,

> after plugging in a circuit tester [ ] it gave [him] the indications of improperly installed circuit or possibly other conditions. But the circuit tester gave [him] the indication that it had a[n] open ground.[7] So with that said, open ground is not something that you would want in a wet environment using an appliance that has a metal -- a metal housing. You have the chance of electrocution.

Tr. 187.

The inspector discovered this in the course of checking electrical outlets at the mine. Tr. 188. The outlet location "was in the transformer room ... on [the] 800 level." Tr. 190. The

[6] Testimony from this docket actually followed testimony for WEST 2016-71. Out of sense of numerical order, it is presented here.

[7] The inspector explained that an "open ground in the circuitry of today, you have a dedicated path to ground back to the source. That dedicated path to ground is designed to take a path faster than the body can react to its actually becoming electrocuted. So electricity typically takes the least path of resistance back to the source. And this is saying that that path of resistance back to the source is no longer there." Tr. 189.

testing device illuminated, indicating an open ground. Tr. 189-90. Asked if miners used the area in which the issue was detected, Hagedorn stated,

> it is an area that can be used, and it's in the path coming into the mine. It's probably 200 or so feet into the mine where there is a -- a -- stepdown transformer that's continuously illuminated. And at times it's been used -- that area is used for a laydown area for maybe hand tools, power tools or -- but miners can and do access it possibly on day-to-day basis.

Tr. 190-91.

The inspector is knowledgeable about electrical matters. *Id.* For matters involving 110 volts, which was the voltage here, one may receive only a shock, but death is possible too. Tr. 192. Because death can be a result, he marked it as fatal. However, the inspector learned that the miners preferred to use battery powered tools, thus reducing the exposure to 110 outlets. Tr. 193. Consequently, the inspector then modified his citation to non-S&S and "unlikely." *Id.* The negligence was marked down from high to moderate, in consideration of what the inspector deemed a mitigating factor: that another entity installed the circuit. Tr. 195. The inspector accepted Miller's representation that the work had been done by another entity, although no documentation was provided to support the claim. *Id.* The condition at the outlet was abated by installing a cover plate over it, making it somewhat less accessible. Tr. 196.

Miller challenged the assertion that there was an open ground. Tr. 191. Although Miller agreed that the miners often use battery powered tools, the reason for that is that most of the mine doesn't have electrical outlets. Tr. 198. Miller, in his testimony, affirmed that the electrical work was done by another entity, prior to his operation taking over the mine, in June 1991. *Id.* Miller stated that multiple prior inspections found no issue with the cited outlet. He disputed that the outlet was cross-wired, contending instead that "there was some corrosion which affected the Greenlee meter reading, which is possible." *Id.* Further, Miller asserted that the cited location has a lock and key on part of it and that only the mine's two electricians enter that room. Miller then reasserted that there was no open ground; that the problem was the corrosion. Tr. 199. Thus, while he agreed with the inspector that there was an *indication* of an open ground, in fact there was none. In fact, Miller stated that, after the cover plate was installed to abate the citation, one of his electricians returned to the outlet, removed the cover plate and discovered the corrosion. With that solved, the plug was reactivated. Tr. 200. Thus, Miller stated that the troubleshooting, required after the tester light indicated an issue, revealed that there was no cross wiring and no open ground after all. Tr. 200-01. Miller offered two declarations in support of his claim regarding this citation. Tr. 201; Ex. R 8. The Secretary did not cross-examine Miller.

Conclusion

MSHA proposed a penalty of $150.00.[8] Accepting the testimony of Miller, and with the Secretary offering no rebuttal testimony from the inspector on redirect, the Court concludes that the Secretary did not meet the burden of proof in this instance to establish that there was, in fact, an open ground. That claim was the fundamental assertion in the citation. **Accordingly, upon consideration of the evidence of record, the citation is DISMISSED.** This conclusion is not dependent upon either of the two declarations offered by Miller in support of his claim regarding this citation.

Citation No. 8873830

Citation No. 8873830, cited standard 30 C.F.R. § 57.11001. GX 14; GX 16. That standard, titled, "Safe access," provides: "Safe means of access shall be provided and maintained to all working places." 30 C.F.R. § 57.11001.

The issue for this citation was whether certain steps used to access the controls for the hoist were being maintained to provide safe access. Inspector Hagedorn stated that upon arriving at the Tightner Trail level,[9] "there was a tugger or hoist set up, and in order to get to it to operate, it -- it had a series of cut-in or semi cut-in steps which were irregular. And there was also some timbering that was in the travelway." Tr. 207-08. The inspector stated that the hazard was the

> footing, as [one goes] from one tread [i.e. step] to the next tread to the next tread to get up to where [one is] going. It is ingress and egress has two different hazard exposures. It's easier to climb up it than it is to come down in the absence of an irregularity of each step.

Tr. 210.

Simplified, the inspector was concerned about the steps, which were created of dirt. Wood steps and a railing were constructed at the location to abate the citation. Tr. 210-11; 214. Initially, the inspector put the risk of slips, trips and falls as "reasonably likely," as he stated that such mishaps are one of the top ten causes of lost time injuries, but he then marked it "unlikely," although his reasoning for the modification was that a "reasonably likely" designation would "hamper mining in general." Tr. 211. Exposure to the hazard, the inspector stated, would be any time one had to operate the tugger to pull the ore cart. Tr. 212. He marked the negligence as moderate, because there had been some effort to establish access to the tugger, with the dirt steps they had cut, instead of leaving the access via what he described, figuratively, as a "goat trail." Tr. 213.

Upon cross-examination, the inspector was asked how long the cited condition had existed. Hagedorn could not recall if he asked about that. Tr. 215. Pressed, he stated it had been

[8] Although the testimony was initially unclear, Counsel for the Secretary subsequently advised that the $150 proposed assessment was based on a non-S&S and unlikely findings. Tr. 313.

[9] The Tightner area is "a location of the mine [where] ... the ore is harvested from the 1100 level pulled up to the Tightner, which, in turn, is carried on out of the mine." Tr. 208.

there for at least a year. The inspector added that the step-up was 15 to 20 inches. Tr. 216. He considered that distance to be steep, therefore increasing the risk of a fall. *Id.* He acknowledged that, at least for the past two years, the mine had no violation history of slips or trips. Tr. 217.

Testifying about the citation, Miller stated that the tugger and skip were infrequently used, on the order of once a month, and at most three times a month. Tr. 218. He asserted the mine has no history of trips, slips or falls in 15 or 20 years. *Id.* He also asserted that it presented no hazard and that he has walked the cited area. Noting his age (74), he stated that he has walked that area, simply to check things. *Id.* Thus, he maintained that the access was not unsafe, because, "of the ... conditions ... it didn't have any steep slopes, didn't have anything to fall down on. .... it was a very, very short distance. .... It's not more than eight feet up above it ... might even only be six feet above it." Tr. 219.

When the Court inquired, "one has to ascend eight feet?" Miller explained that it was up an incline and that one can walk it. *Id.* Further, Miller stated that the access that was present was rock, not dirt. Tr. 220. Thus, he contended that the steps were created by the mine by cutting into the rock, creating steps "of a fashion." *Id.* He asserted that the steps had been that way for "at least ten years." Tr. 221. In fact, Miller contended that the wooden steps were more dangerous than the cited condition. *Id.* He added, that if an inspector wants something fixed, the mine has no choice but to do it in order to abate the citation, safe or not. *Id.* Further, expressing that it was not a formidable ascent, he stated that the miners could "scamper" up the slope. *Id.* Thus, Miller concluded, there was no hazard and consequently no negligence either. *Id.* The citation was assessed at $100.00.

Conclusion

There was no cross-examination, nor additional testimony on direct, by the Secretary. Tr. 221. Given Miller's unrebutted testimony, the Secretary did not meet its burden of proof. It was not established that the means of access was unsafe. **Therefore this citation is DISMISSED.**

Citation No. 8873831

This citation alleged a violation of 30 C.F.R. §57.11008. GX 17. That standard, titled, "Restricted clearance," provides, "Where restricted clearance creates a hazard to persons, the restricted clearance shall be conspicuously marked." 30 C.F.R. § 57.11008.

Hagedorn stated that this citation was issued for "restricted clearance." He explained that in traveling throughout the mine he "made contact with the roof or back multiple times." Tr. 222. He added that the miners remarked having the same experience. *Id.* Thus, he contended that, as one is focusing on the ground while walking in the mine, one will "run into the roof." Tr. 223. Put simply, he bumped his head on the roof several times. GX 19, a photograph the inspector took, shows the mine's use of paint, a caution strip, to indicate a restricted clearance. Tr. 224. He indicated that illumination paint was applied after the citation was issued. Tr. 225-26. It was his understanding that the citation was terminated on September 29th. Tr. 228.

In support of his reasonably likely finding, the inspector stated that he hit his own head, and that he witnessed miners, and Miller, strike their head while he was inspecting. Tr. 226. Some of the areas were traveled frequently. He often had to duck. In terms of marking lost work days or restricted duty, Hagedorn asserted that he experienced that injury himself stating, he "personally experienced restricted duty [ ] from the events." Tr. 227. Marking the negligence as moderate, the inspector stated that there was some signage alerting miners to some low clearances, adding that one sign is not sufficient. Tr. 228.

Miller then testified, first offering a declaration from Reid Miller. Ex. R 6; Tr. 230. He stated that no one enters the mine unless approved by the operator and they are then accompanied by an experienced miner. In addition, all of the miners carry a secondary light in their pocket. Regarding the inspector's statement that Miller himself hit his head on the roof, Miller stated that his hard hat merely scraped the roof. Further, in all his years he has never had a neck injury, and has he never fallen. Nor, he added, to his knowledge has any of his miners sustained any neck or head problems or any problem associated with hitting their heads. Tr. 232.

Miller acknowledged that, following the issuance of the citation, the mine installed some signs "where it appeared that there could possibly be the potential of a problem." Tr. 233. However he described these as a "potential speculative problem that may or may not exist." *Id.* He added that the mine has some 35 miles of tunnels, with roofs ranging from three to four feet high and some stopes likely 20 feet high. *Id.* However, all his miners are lead miners with many years of experience and all have been task trained. *Id.* In fact, Miller maintained that the only danger was with the MSHA trainee inspector accompanying Hagedorn as she was not properly dressed, nor adequately trained. *Id.* He also noted that, by wearing hard hats, a mere scrape causes no injury. Further, given the scope of the mine, "it is physically impossible to go around and spend the time and money to mark every place in the mine where you might have to duck." Tr. 235. As to the S&S marking, Miller noted that in "years and years" of inspections, this condition has never been cited. *Id.*

The Court then inquired of the inspector about the breadth of travel involved with the citation, asking, "Are we talking about a football field? Miles? I am not sure what the extent of your citation covers?" Tr. 236. The inspector confirmed that his citation alleging restricted clearance covered about a half-mile of the mine. Tr. 237. When the Court asked if the inspector pointed out each location of restricted clearance, the response was that he spoke only generally, with the onus then on the mine to go through the half mile and look for any areas of restricted clearance. Tr. 237-38. The Secretary again conducted no cross-examination of Miller, nor did it seek additional testimony from the inspector upon re-direct. Tr. 241. The proposed assessment was $224.

Conclusion

The standard applies where restricted clearance creates a hazard to persons. This citation must be **DISMISSED** for two reasons. First, the Secretary did not establish a genuine hazard existed, given that the miners wear hardhats and in light of Miller's testimony. Accordingly, the Court concludes that, in the absence of any cross-examination, the Secretary failed to meet its burden of proof. The Court also concludes that the citation presents a problem of vagueness. The inspector merely advised the Respondent that there were unspecified low spots along the

half-mile distance, but left it to the operator to find and mark them. This placed the operator in the position of traveling the half-mile distance and attempting to determine if the standard applied to each area. This would place the operator in the position of potentially guessing incorrectly, and therefore being subject to the next inspector's view of areas deemed to present restricted clearance. As Miller expressed it, the mine is then "in a treadmill," under such circumstances. Tr. 240. Without contradiction, Miller stated that, in years and years of inspections, this condition had never been cited as a hazard.

Citation 8873832.

This citation, No. 8873832, cited 30 C.F.R. § 57.11051(a). GX 20. Titled, "Escape routes," it provides that escape routes shall be "(a) Inspected at regular intervals and maintained in safe, travelable condition." 30 C.F.R. § 57.11051(a).

The inspector issued this citation for the secondary escapeway, 21 tunnel, where he found "numerous areas that had water that was in excess of 12 to -- 12 inches in depth, and it was very irregular footing." Tr. 242. The 21 tunnel is used primarily as a secondary escapeway, but also it is used as part of the de-watering process of the mine.[10] *Id.* Hagedorn assumed that in using an escapeway, one may be on stretcher, unable to walk on their own. *Id.* As to the water depth, the inspector stated that it was some 16 to 17 inches. Tr. 243. The inspector stated that the cited standard requires "that the secondary escapeway be travelable in respect to exiting the mine in a[n] emergency situation." Tr. 244. Upon the Court's noting that the standard refers to escape routes, not simply secondary escapeways, the inspector agreed that he misspoke. In any event, he affirmed that the citation was issued because of his view that the escapeway was not in safe, travelable, condition. *Id.* Exhibit GX 22 consists of photos of the conditions cited by the inspector. Hagedorn added that it was not only the water, but also the presence of some four to five inches of mud or muck at the bottom. He stated that the mud adversely affected one's footing. Tr. 246. This tunnel was approximately a quarter mile, and he added that the water and mud issue was present along its entire length. Tr. 247. He marked it as "reasonably likely" to cause an injury, such as strains, sprains, twists and falls. Hagedorn could not specify how often miners used this escapeway. The negligence was marked as moderate because the mine had been cited for this condition in the past and abated it. Tr. 249.

Miller testified that the tunnel, created in 1868, is the oldest one in the mine. It is not used for anything, but it is the lowest discharge point for water to exit the mine. Tr. 252. Miller noted that the issue of water removal at that location is not simple, as the state of California has water purity requirements to reduce silt before discharge reaches the nearby creek. He acknowledged that the mine has "probably been cited for this ten times or more. 20 times, since 1990 . . . from probably around 2012 on, there seems to be a great excitement about trying to [c]ite this particular escapeway." Tr. 252-53. More significantly, Miller asserted that "[t]he escapeway is adequate. It has been adequate for 30 years in case of an emergency. . . . there's never been an issue. . . with unsafe travel for any reasons, including mud, silt, water or anything reported to the operator about this particular area or on record." Tr. 253. Miller therefore

[10] De-watering refers to "pumps that are piped from a lower level of the mine that, in turn, water is ditched out to exit the mine." Tr. 243. Over the course of a year, hundreds of gallons of water come into the mine, creating the need to pump that water out. *Id.*

contended that the escapeway was both safe and travelable. *Id.* Again, he contended that, when faced with a citation, the mine really has no choice but to abate the condition, even if it disagrees with it, believing there is no violation. *Id.* In contrast to Hagedorn's testimony, Miller disputed the depth of the water, noting that his boots are 12 inches high and that he has never had any "slop" go over his boots, nor have any miners told him that the water was high or that water got in their boots. Tr. 254. As to the S&S claim, Miller maintained the condition did not create any remote possibility for hindering the removal of a miner in a dangerous situation. *Id.* He also challenged the inspector's statement about the water's depth. Tr. 255. **MSHA's proposed penalty was $190.00.**

Conclusion

The Secretary did not cross-examine Miller, nor offer additional testimony from the inspector through re-direct. The violation was established. However, given the disputed testimony about the water's depth and the amount of mud under foot, the Court concludes that it was not established that there was a reasonable likelihood that the hazard contributed to will result in an injury. Therefore the S&S designation was incorrect.[11] The Court finds that, given these determinations, a civil penalty of **$100.00 (one hundred dollars)** is appropriate.

WEST 2016-0071 Plumbago Mine

Citation No. 8873835

Citation No. 8873835 alleged a violation of **30 C.F.R. §57.5037(a)(2)**. In relevant part the cited section provides:

> (a) In all mines at least one sample shall be taken in exhaust mine air by a competent person to determine if concentrations of radon daughters are present. ... (2) Where uranium is not mined - when radon daughter concentrations between 0.1 and 0.3 WL are found in an active working area, radon daughter concentration measurements representative of worker's breathing zone shall be

[11] A violation of the Act is significant and substantial ("S&S") if it is of "such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d). It is proper to apply this designation when the facts surrounding the violation demonstrate a reasonable likelihood that the hazard contributed to by the violation "will result in an illness or injury of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822,815 (Apr. 1981). In *Mathies Coal Co.*, the Commission has explained that, "In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); accord *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); Austin Power, Inc. v. Secretary of Labor, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

> determined at least every 3 months at random times until such time as the radon daughter concentrations in that area are below 0.1 WL, and annually thereafter. If concentrations of radon daughters are found in excess of 0.3 WL in an active working area radon daughter concentrations thereafter shall be determined at least weekly in that working area until such time as the weekly determinations in that area have been 0.3 WL or less for 5 consecutive weeks.

30 C.F.R. § 57.5037(a)(2).

Inspector Rogers first testified about Citation No. 8873835, which was issued on August 26, 2015. GX 23. However, that citation was not issued by Rogers, but rather by Inspector Steven Hagedorn. Tr. 113. Rogers' testimony was to lay a foundation for subsequent testimony on that citation. Rogers stated that, while at the Plumbago mine in May 2015, he did radon gas and other sampling, such as for dust and noise. Tr. 114. MSHA does radon sampling at every underground mine once a year. *Id.* Though MSHA has a protocol to follow when performing radon sampling, Rogers did not follow it at that time. Tr. 117. Anticipating that there would be no radon hazard issue, he simply did a random sample. That evening, upon doing the necessary calculations from the results, he found a radon level which was much higher than he anticipated. Tr. 117-18. Consequently, he informed the miners at Plumbago of those results and he returned less than a week later, this time taking six samples. His highest sample reading was 0.275. Tr. 119. Such a reading is too high a radon level and it triggers certain actions under the standard. Tr. 121. Rogers stated that such a reading requires a mine to take quarterly samples until the reading is below 0.1. *Id.* Next, because of the readings he found, Rogers issued a compliance assistance visit notice, ("CAV"), dated May 7, 2015. Exhibit GX 25 is the CAV notice Rogers issued. Tr. 122. At that point in time, no citations were issued. *Id.* However, the radon findings *did* trigger certain obligations on the part of the mine. *Id.* Exhibit GX 25 also reflects the sample results that concerned Rogers. Tr. 125.

Rogers made suggestions as to how the mine could come into compliance regarding the radon levels. Tr. 128-29. It was his impression that, after speaking with Miller and his administrative assistant, Ms. Bell, that they understood what had to be done to address the elevated results. Tr. 129.

Upon cross-examination, Miller acknowledged that the inspector was trying to help the mine deal with the issue. Tr. 131. Rogers' additional testing occurred on May 12th. Tr. 136. Those subsequent tests confirmed the first tests he had done, in that the radon levels were too high. The Court discerned that Miller incorrectly thought that Rogers' initial tests, on May 7th, were the trigger date for his action. That is incorrect. Rogers, concerned about the reliability of his first tests, asked for permission from his office to return to the mine and conduct the tests anew. Tr. 139.

Miller challenged the accuracy of the readings. Tr. 151. He also maintained that he was never notified of the May 12th results, and consequently not informed that the mine needed to take further action. Tr. 140. The Court acknowledged this concern, stating, "All right. Well, the government will have to show at some point that [MSHA] notified Plumbago Mine about these

results and that [those results] triggered subsequent action by Inspector Hagedorn." Tr. 140. The Secretary acknowledged it had to show that. *Id.*

Regrettably, MSHA backdated, to May 7th, instead of the operative date of May 12th, its notice that the Plumbago mine had elevated levels of Radon 222 and that the mine would then be required to take quarterly radon sampling. Tr. 142. As Rogers conceded, MSHA's determination that radon levels were elevated was based *only* on his second testing for radon, which occurred on May 12th. *Id.* Rogers confirmed that he first told Miller and Ms. Bell about the need for quarterly testing *after* he conducted his second set of tests. Tr. 142-43. That conversation by Rogers with Bell occurred on May 12th. At that time he explained that he had a sample level for radon at 0.275 working level ("WL"). Tr. 148. Following that, Rogers spoke with the miners, exploring with them methods to increase the ventilation, as that is the best way to reduce the radon levels. Tr. 148. Rogers also affirmed that on May 12th, he did deliver to Bell the highest radon level result he found. Tr. 149. In terms of informing the mine of all the radon results, Rogers stated he "held a closeout at the mine on [May 28, 2015] with Mr. Miller, where [he] explained [his] sampling, and sampling procedures." Tr. 150. He stated that Miller believed the inspector's conclusion was based on only one sample, but Rogers advised that he returned to the mine and took more samples on May 12th and he explained those results to Miller. *Id.* It was after that explanation that Rogers then issued his CAV notice, which was misleadingly dated May 7th, but actually stemmed from Rogers' May 12th testing results. *Id.* However, Rogers could not recall if he gave the mine his May 12th testing results when he held his May 28th closeout conference. Tr. 151. Shortly after that remark, Rogers stated "we are not allowed to give that information out anymore." *Id.*

MSHA inspector Steven Hagedorn then testified for the Secretary. Tr. 152. Hagedorn has been an MSHA inspector since December 1998. Tr. 154; GX 23. On August 26, 2015 Hagedorn, though technically inspecting the Plumbago Mine, was physically at the Sixteen to One's office. Tr. 160. On that date he issued Citation No. 8873835, citing 30 C.F.R. § 57.5037(a)(2). Tr. 162. He stated that the citation's issuance occurred because "there had been some previous enforcement activity that radon was determined to require additional sampling by the mine operator. And when it came to this -- this particular date and time [August 26, 2015], they had not done any." Tr. 160. On that August 26th date Hagedorn inquired if the mine had done any radon sampling and was informed by Ms. Bell that they had not. Tr. 161. Bell explained that the mine was trying to do this while facing a financial hardship over the expense of such sampling. Tr. 162. As noted, this exchange occurred at the Sixteen to One mine, not the Plumbago mine, because the Sixteen to One serves as an "umbrella" for the two mines. Tr. 161.

Hagedorn stated that the standard he cited, 30 C.F.R. § 57.5037(a)(2), requires "[t]hat the mine operator conduct his independent sampling per at least once a year, or until he can determine the proper ventilation to exhaust out the --the radon daughters themselves." Tr. 162. Hagedorn then refined his answer, stating that the mine had to determine "whether they needed to sample, at least come to a conclusion of what the -- the contaminant was. Or what the -- the elevation of the contaminant. How serious it was." Tr. 163. Further, it was his understanding that this required quarterly testing. *Id.* As he expressed it, the citation was issued because it was his "understanding they were supposed to do sampling to determine whether they needed to establish a schedule, and they hadn't done it. And by not doing it, that's what triggered the

issuance of the citation." Tr. 163-64. He listed the gravity as unlikely because the miners had been primarily working at the Sixteen to One mine, not at the Plumbago mine. Tr. 164. Another consideration was that the mine has considerable natural ventilation. *Id.* However, he marked the injury or illness as fatal, because of the inherent dangers of exposure to radon. Tr. 165. Negligence was marked as low because to the inspector, "it sounded like there was a lot of confusion between MSHA and Mr. Miller and the people involved of coordinating, and they did have -- they had considerable mitigating circumstances on the amount of effort that they put into acquiring somebody to do the testing." Tr. 166.

Hagedorn also stated that there was "some confusion, actually, between the agency, and ... Mr. Miller, that he -- the requirement -- was he required or was he not required?" Tr. 166-67. The inspector supported the idea that MSHA could assist and do some testing, "because we do it for other people for dust and noise." Tr. 167. To make sure it understood the inspector's view, that MSHA could have helped the mine with the issue, the Court inquired, "But you are telling me that based on your experience as an MSHA inspector, that you have seen MSHA cooperate and go out and do this testing that . . . that Plumbago requested, but didn't get?" The inspector affirmed that was his statement, qualifying it only by noting that previous assistance had been for dust and noise. Tr. 167-68.

Miller was of the view that MSHA didn't have to issue the citation when it did; that it had other options. The Court noted that the citation's abatement was extended twice. Tr. 172. The Secretary stated that, to the best of its knowledge, the citation was abated and, following that, a civil penalty of $100.00 (one hundred dollars) was proposed. Tr. 173. The Secretary stipulated that the violation was properly terminated and that no 104(b) order was issued. *Id.* In terms of the "fatal" designation, the inspector maintained his earlier testimony, analogizing the gravity to radon in basement homes in New York. Tr. 174. The inspector has never actually been *inside* the Plumbago Mine, at least underground. However, he did measure the air velocity emanating from the mine, at a portal, with that velocity recorded at 21 miles per hour. Tr. 175.

When Mr. Miller testified about this citation in response to the Court's inquiry as to how it was abated, Miller stated,

> On July 16th the notification came for this need to do it, on – something on CAV approximately May 28th. It was presented to Rae Bell. Rae Bell is corporate secretary and also does handle the paperwork. . . . [Miller] turned this whole issue over to Rae Bell, who is competent to do -- to handle these types of situations. She had numerous conversations with [MSHA] . . . asking for help.

Tr. 178-79.

Miller's point was that there was communication confusion about the whole matter and what the mine was obligated to do, stating, "we were in serious communications about how to resolve a problem." Tr. 179. However, Miller ultimately did not know how the violation was abated. Tr. 180. According to Miller, they were unable to find a company that could do the testing and it then "[s]ent a letter asking, begging, for some help from MSHA." Tr. 180. However, the mine subsequently did find a company to do the testing, at a cost of $1,720.00. Miller's version of the

events continued, as he then asserted that Rogers informed him that the mine was "*within the threshold of not needing to continue this.*" Tr. 181 (emphasis added). As noted, ultimately Respondent paid to have the testing performed and from those results it was determined that the mine was within the threshold, meaning by that description that the radon levels were within the permissible limits. *Id.* Inspector Hagedorn confirmed Miller's recounting. That is, upon receiving the test results, MSHA accepted them and terminated the citation. Tr. 182. Upon learning of these events, the Court inquired if the Secretary wished to vacate the citation, but Counsel responded that she was without authority to do that. Tr. 183. With regard to this suggestion, the Court also commented, "there are some issues here that make for troublesome resolution of this case, including testimony from your own witness, that MSHA has acted inconsistently. Cooperated, and helped other mines, but for some reason didn't want to help this mine." Tr. 183-84.

Testimony on this citation concluded with Miller's statement that he did not feel "fatal" was an accurate designation, as the dosage and duration were insufficient and the inspector's New York analogy was not apt. His view was that even lost work days was an incorrect designation. Tr. 184-85. **MSHA's proposed penalty for this citation was $100.00.**

Conclusion

It must be kept in mind that the mine was cited for an alleged violation of subsection (a)(2) of standard 30 C.F.R. §57.5037. Accordingly, such a violation is based upon an alleged failure to perform a *procedure*, not on the radon results themselves. One does not arrive at the requirements of (a)(2) until, per subsection (a), there has been "at least one sample ... taken in exhaust mine air by a competent person to determine if concentrations of radon daughters are present. After that, the standard differentiates between mines where uranium is being mined and those mines, such as the Plumbago Mine, where uranium is not mined.[12]

However, there was testimony from the inspector that MSHA is to assist in conducting such testing. That assistance didn't happen here and no reason for that failure to assist was presented. Upon consideration, the Court concludes that this Citation must be **DISMISSED**. This determination is based on the questionable results of the radon testing, the inadequate communication to the mine about the results MSHA was relying upon, and most importantly, MSHA's failure to assist the mine in conducting the testing required under subsection (a)(2). In addition, while technically not part of the analysis in determining whether a violation occurred, it cannot be ignored, as an equitable consideration, that the citation was abated, and that it was achieved without the mine having to make changes to its ventilation. Instead, on this record, the mine came into compliance by doing nothing, other than expending funds for an outside contractor to perform testing, the results of which apparently showed that the radon levels fell outside of the requirements of 30 C.F.R. §57.5037(a)(2).

[12] Standard 30 C.F.R. §57.5037(a)(2) provides, in relevant part, that "[w]here uranium is not mined - when radon daughter concentrations between 0.1 and 0.3 WL are found in an active working area, radon daughter concentration measurements representative of worker's breathing zone shall be determined at least every 3 months at random times until such time as the radon daughter concentrations in that area are below 0.1 WL, and annually thereafter."

WEST 2016-0149

Citation No. 8873833 Sixteen to One Mine

Citation No. 8873833 cited 30 C.F.R. § 57.3360. That standard, titled, "Ground support use," provides:

> Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks. Damaged, loosened, or dislodged timber use[d] for ground support which creates a hazard to persons shall be repaired or replaced prior to any work or travel in the affected area.

30 C.F.R. § 57.3360.

The testimony for this citation began discordantly, with the inspector vaguely referring to the alleged violation,[13] as if the condition and violation had already been discussed, referring to a photograph and a "cross-member that had been put in place to ... substantiate ground [sic]." Tr. 256-58; GX 26. Agreeing with the remark of an MSHA trainee who was accompanying him, that the member looked like it was breaking, Hagedorn added that they then went through the mine, observing numerous timbers that were buckling. Tr. 258. The inspector's worry was that during blasting, the tremors produced could cause the timbers to fail. *Id.* In his view, any little event could cause the timbers to fail and thereby not supporting the integrity of the roof. Tr. 259.

Finally, the inspector was directed to the essence of his claim – decayed timbers. Tr. 260. In the area cited, throughout the 800 level, he stated observing about 40 decayed timbers. *Id.* The cited standard addresses ground support and hazards created by a failure of such support. *Id.* Hagendorn could not predict when the hazard, failure of the timbers, would occur, but stated that at some point they would fail. Tr. 261. What will ensue from a failure cannot be stated with certainty either, as it could involve only splintering of a timber but there could also be a slab coming out. *Id.* For there to be an injury, such a failure would also have to accompany the misfortune of a miner traveling the location when the event occurred.

In terms of negligence, which the inspector designated as moderate, Hagedorn admitted that the mine had areas where additional timbering or stays had been installed. He also conceded

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[13] Asked why he issued the citation, Hagedorn stated, "Well, it was one of them [sic] moments where my [MSHA] trainee, Julie Hooker, goes, 'Are these really supposed to look like this?'" Tr. 257. He responded that they were not, and then added that they "started seeing that it's not just one, that it was multiples." *Id.* Adding to his introductory statements about the reason for issuing the citation, Hagedorn continued that Miller informed him "that he was trying to preserve the historical portion of the mine and maintain the historical look." *Id.* Hagedorn responded that the standard doesn't allow for such an exception, advising "[y]ou need to, when they fail, you remove them and/or replace or re -- re-establish a competent support mechanism." *Id.*

that leaving in the original timbers was consistent with the mine's attempt to maintain the historical appearance of the mine. Tr. 263. The Court then noted that the citation was issued on August 18th, with four extensions issued thereafter, and an acknowledgement that "[t]here has been a great deal of effort by the mine operator to correct the conditions." Tr. 264.

Upon cross-examination, Miller inquired about the inspector's knowledge of rock mechanics and blasting and other questions, aimed at learning about the extent of his knowledge on those issues. Tr. 265-70. In the Court's view, the inspector demonstrated adequate general background knowledge as well as sufficient particular knowledge about the support issues for the photos he took.

Mr. Miller testified about this citation as well, asserting first that there was no danger to miners. Tr. 271. He then acknowledged the intent to preserve, for historical purposes, as much of the mine's historical appearance as possible. Tr. 272-73. More importantly, Miller asserted that if any of these older timbers needed additional support, such support has been and continues to be, installed. Tr. 273. He challenged the inspector's assertion that the timbers could collapse from the weight on them, as inaccurate observations and conclusions. *Id.* To begin, he asserted there was no weight of any ore, as any ore would have been removed. Tr. 273-74. As an example, referring to a photograph in Exhibit GX 28, he agreed there was a bow depicted, but that the bow was not due to ground support issues, but rather because it was holding up electrical wires. In that instance, the timber was removed, but nothing was installed in its place. Tr. 274. Several other timbers, he asserted, were for the purpose of holding up utilities. *Id.* Further, at the cited level, the 800, there is no blasting, no ore, nor headings that they are working. *Id.* However, seemingly contradicting himself, Miller added that the old timbers "are the evidence to the miners and to our entire operation of if there is any more stress that's coming on those areas, if they are already bowed, every person that works in that mine is very, very well aware of when they walk through and they see things." Tr. 275.

Challenging the breadth of the inspector's knowledge about timbering, Miller stated,

> A timber man can look at the wedges and see whether they are under compression. They can look to see if a wedge that goes in the top of one of these, as long as that wedge is still in there like that, it's not under any type of compression. Because if the compression is continuing, especially when they are rotten, the other part of the wedge will fall out and the existing wedge will still be there. If we saw something like that, we'd know that that particular timber is still under compression.

Tr. 276.

In addition, regarding the inspector's statement that some 40 places needed ground support, Miller stated that another MSHA official, when advised why some timbers remained, told him to "just take some of them out," inferring that, while unnecessary, removing some would placate the inspector. Tr. 277. As to the inspector's claim that some tremor elsewhere in the mine could cause such timbers to fall, Miller asserted that none of the timbers fell out, even after earthquakes in the area. *Id.*

With these counter-contentions in mind, Miller challenged the inspector's S&S designation, especially considering how long those timbers have been present and the many preceding inspections when no support issue had been claimed by MSHA. Miller characterized the inspector's knowledge as an example of the gulf between book learning and real world experience. Tr. 277. He noted that the mine has plenty of timber and installs it, when needed. Essentially, Miller was contending that his experience and expertise, along with that of his seasoned miner employees, ensures that, per the cited standard, in fact ground support is used where ground conditions or mining experience in similar ground conditions in the mines indicates it is necessary. Tr. 280. Given that, Miller maintained, "That there is no place on the 800 level where it would be necessary to put a timber in that there is not a timber, a steel set, or rock bolts in there." Tr. 280-81.

Accordingly, Miller summed up that,

> [t]his is not a valid citation in the eyes of a person that would truly be qualified to come in and do ground support evaluation. If that were true, we would have had 40 citations, or we would have been doing this five years ago, eight years, or 10 years ago, when finally MSHA brought somebody from Kentucky or someplace that had had some ground support experience. ... It does not create a hazard to anybody in the mine, and there was no liability, there was no negligence. No one could have been hurt.

Tr. 282.

The Secretary had no cross-examination of Miller, nor further questions of Hagedorn. Tr. 283. The Court then asked some questions of the inspector, inquiring if it was his opinion that any of the timbers that are depicted in Exhibit GX 28, photo 2 of 16, were damaged, loosened, or dislodged. Tr. 283. The inspector responded that he saw damaged timber. Tr. 284. However, when asked if believed that the timber depicted in 2 of 16 *was used for ground support*, the inspector answered, "[i]t was not." *Id.* He said instead, that it was used to support a wall, until what was on the back side of the wall was stabilized. Tr. 285. Asked if consider such a condition as ground support, Hagedorn answered he "would consider it for support of the wall that's supporting the ground behind it." *Id.* Noting that the standard talks about timber used for ground support, the inspector seemed to equivocate, stating,

> They had did some ground support at the other -- at the other end of this, and this was in place to support the ground that they had -- they did backfill, and if it wasn't for this supporting the wall to support the backfill, it would just ooze out into the travelway.

Tr. 285-86.

Regarding photo 3 of 16, the inspector stated that, for that one, there definitely was timber used for ground support, stating that the "peeled log" was "specifically a roof back support." Tr. 286. He affirmed that it was damaged and used for roof support. Tr. 287. Next,

addressing photo 4 of 16, the inspector stated that timber was damaged, through decay and rot and that its integrity was gone. *Id.* He added that for solid timber one could drive a screwdriver only an eighth (1/8th) of an inch into it, whereas for this timber the screwdriver would penetrate 2 inches. *Id.* When asked *how* he knew that it was actually serving as a support, as opposed to just being there, the inspector's response was again, in the Court's estimation, vague.[14]

When asked by the Court whether there was "other timber there that was, apart from this timber taking weight, that was providing adequate ground support apart from the one [the inspector] took a picture of . . . [that is to say] [w]as there other nearby timber that was supporting the ground, irrespective of the condition of this," the inspector responded, "Yes." Tr. 289. The inspector did not know, if that timber were removed, whether the remaining timbers would support the roof. Tr. 290.

As for photo 6 of 16, the inspector stated that he considered that timber to be damaged and that it provided ground support in that area. *Id.* In support of that view, he stated that the timber was wedged at the top. Tr. 291.

Addressing photo 7 of 16, the Court noted that the timber appeared to be kicking out, presenting a V shape. The inspector asserted that the timber was damaged and that it was used for ground support. *Id.* Nevertheless, the Court noted that it looked like,

> on either side of that, that there is steel or some other support. . . .[prompting the question whether] that timber kicking out [was] superfluous? In other words, was there adequate ground support by what appears to be on either side of it . . . [as it] appears to be some sort of ground support which is there besides this timber that's kicking out.

Tr. 291-92.

Hagedorn responded that the Court was correct and on point. He then informed about the use of arch sets to maintain ground stability and prevent a failure from occurring. Tr. 292. Clearing up a miscommunication between the Court and the witness, the Court asked again whether, given the presence of the arch supports, the timber kicking out did not matter. The inspector agreed with the Court's description, prompting it to ask how there could be a violation, given the arch sets.

The explanation offered by the inspector was that,

> the condition of the timber is what's creating a hazard to the person that would be in the -- as it becomes a projectile. That's the arch supports are put in to support

[14] The inspector stated, "The -- it was -- there was another stope where they had angled the stope and there was a different strata there where you could see one – a contact. Where the -- where the contact occurs, typically that's where the gold is defined or where it's deposited. So once they peel that away, that back is -- now needs to be maintained. So you don't have it come down. ... And by it bowing, gives me the indication that it's either upheaval or it's being compressed from either top or bottom. For some -- some reason, it's being compressed." Tr. 288.

> because the timber has failed. The timber -- the timber has little to -- it's completely lost its competency. So by the timber remaining there, a person traveling through there, should that fail at the time that they are traveling by having it come out into the travelway would expose a person to the impact of it buckling.

Tr. 294.

In short, the inspector's concern was not directly with ground support but with the claim that the timber could splinter and become a projectile. *Id.* The response perplexed the Court, as the inspector testified that the timber was no longer used for ground support and the concern raised by the inspector was quite different, namely if this timber were to collapse, then someone walking by might be injured if that happened. The Court commented that the concern the inspector raised is not what the standard addresses, because damaged timber has to also be used for ground support. Tr. 294-95. The inspector responded "that's entirely accurate." Tr. 295. The Court then expressed its doubts whether, in that instance, there was an established violation. *Id.*

Next was photo 8 of 16. The inspector informed that the vertically-placed wood, that appears to be spread out at the top, are wedges. Tr. 296. Hagedorn stated that he considered that timber to be damaged, based on its "discoloration of its separating." Tr. 296. He added that it had lost its competency and was failing. *Id.* He determined that the timber was used for ground support based on the two different strata. Where that exists, he asserted, one should support that as "there is usually a strata on the other side of it." Tr. 297.

The Court concluded its questions about the citation and the Secretary advised that it had no further questions to ask. Mr. Miller then testified additionally about the matters. He began with photo eight of 16, stating that the wedges were critical to understanding the situation of the ground in this particular location, asserting that they had no effect on the ground control. As to the strata, as mentioned by the inspector, Miller asserted that that came in more than 120 million years ago and that the strata has done a lot of moving over the years. Tr. 298. Miller agreed that the timber was damaged, but that it was not used for ground support. Tr. 299. At one time, Miller stated, it was used for ground support, and many old mines simply leave the support there after they are done working the area. *Id.* . Miller added that the support was likely installed there as a safety measure when miners were actually working in that area. He maintained that one could remove the old timber and nothing would happen. Tr. 300.

Photo 2 of 16 was next discussed. Miller stated that the photo showed damaged timber, but that the damage was not sufficiently damaged to require its removal, because it was not cracking but instead had a bend. Tr. 302. However, Miller added that the timber was not then used for ground support . *Id.*

Photo 3 of 16, Miller asserted, was similarly not used for ground support. Tr. 303. As for photo 4 of 16, Miller agreed that the timber in that photo was rotten and damaged. *Id.* However, critically to the issue of the citation, he stated that it also was not used for ground support. Tr. 304. Miller added that sometimes timbers may be installed during the construction

phase of a mine, but never intended for ground support. As one example, a timber may appear to be near a stope but that doesn't mean it was used for ground support. Instead the timber may be used to hold up a chute. Tr. 304-05. He added that photo 6 of 16 is the same situation. While he conceded that the timber was damaged, it is not taking any weight and accordingly not used for ground support. Tr. 305. As for photo 7 of 16, Miller stated that the inspector's observations were incorrect because it had no effect on safety and that it was more akin to what one might find in a Disneyland display. *Id.* Accordingly, Miller agreed that it was his position that *none* of cited timbers were used for ground support at the time of the inspection. *Id.*

Conclusion

Upon consideration of the record testimony for this citation and taking into account that the Secretary neither cross-examined Miller, nor sought additional testimony from the inspector, following Miller's testimony and the Court's questions of the inspector, the Court concludes that the Secretary failed to meet its burden of proof on the critical question of whether the cited locations were in fact used for ground support. **Accordingly, this citation, for which a $224.00 penalty was proposed, is DISMISSED.**

WEST 2016 183

Citation No. 8873843

Citation No. 8873843, invokes 30 C.F.R. § 56.4402, titled, "Safety can use." It provides, "Small quantities of flammable liquids drawn from storage shall be kept in safety cans labeled to indicate the contents." 30 C.F.R. § 56.4402.

At the start of the second day of the hearing, Miller stated that he stipulated to the fact of violation for this citation as well as to unlikely designation for gravity, the high negligence and to the permanently disabling designations. Tr. 314; GX 29. Except for Miller's across the board assertion concerning the proposed penalties' impact on the mine's ability to stay in business, he accepted the proposed assessment of $138.00 (one hundred and thirty-eight dollars). Tr. 314-15.

Citation No. 8873844

Citation No. 8873844 alleges a violation of 30 C.F.R. §56.12002. GX 32. That standard, titled, "Controls and switches," provides "Electric equipment and circuits shall be provided with switches or other controls. Such switches or controls shall be of approved design and construction and shall be properly installed." 30 C.F.R. § 56.12002.

The Court noted for the record that this involved a 104(a) citation, which alleged a table saw with a 7.5 horsepower electric motor that it is being energized with a blade type safety switch and which is out of compliance with the national electrical code. Tr. 315. Before any testimony on the citation, Miller stated that he accepted the inspector's observations, but still challenged his conclusions. Tr. 316. Miller contended that the inspector missed that the saw was grounded, making the condition not a violation. *Id.*

Inspector Hagedorn then testified, stating,

> after interviewing the people that were in the area [he]came up to the conclusion that they were starting and stopping the saw by using the disconnect, and anything over 1 horsepower is to be gone through a motor starter because these specific disconnects aren't designed to open under load or close under load.

Tr. 317

He added that "the arcing that takes place during the starting and stopping is one of the reasons why [one] horsepower or less is allowed to be done in this manner [but] [a]nything over [one] horsepower has to have what is called a magnetic motor starter." Tr. 317. The inspector agreed that the disconnecting method he observed was "basically" pulling the plug out. Tr. 318.

The inspector described the method an employee would use to disconnect the table saw, by referring to a cover which, when closed, has an accessible lever. If one pulls the lever down that action opens the disconnect and thereby de-energizes the circuit. If one pushes the lever up, to the closed position, the circuit is energized. The inspector agreed that the problem with using that method is that the motor is too powerful. Tr. 319-20. Instead, the inspector stated, the mine should've used a motor starter that incorporated a magnetic push button process. As an example, Hagedorn stated that a nearby air compressor had such an arrangement. Tr. 320. He marked the gravity of the condition as unlikely to cause an injury, but employed odd reasoning to support that conclusion, stating that he knew it "could be an expensive citation." Tr. 322 That inappropriate consideration caused him to be "generous" in his evaluation. *Id.* In fact, he then agreed that he could have marked it as "reasonably likely." *Id.* Hagedorn contended that the saw was an entirely metallic structure which therefore could become an energized appliance as it didn't have a dedicated path to ground. Tr. 322-23. The result, he asserted, was that the whole appliance can be energized. Body contact in that situation exposes one to possible electrocution. Tr. 323. For negligence, he marked the citation as moderate because, though antiquated, such an arrangement was once common. Tr. 324-25. The proposed penalty was $100.00. Tr. 326.

On cross-examination, the inspector stated that he had conversations with mine employees as well as with Miller, on the issue of whether disconnects can be a means of starting and stopping such a device. *Id.* While the inspector referred to what he believed was evidence of an arc flash, he could not state when it occurred. Tr. 327. Although the standard itself does not state that a 7.5 horsepower engine requires a magnetic or a push button starter, the inspector maintained that the national electric code provides guidelines as to the proper installation of such a circuit. *Id.* The saw was located above ground. Tr. 328.

Miller began his testimony for this citation by introducing Ex. R-7, which was another declaration. Tr. 328. The Secretary objected to the exhibit, on the same grounds as its objections to other exhibits (R 6 and R 8) offered at the hearing, on the basis of timeliness and a lack of foundation. Tr. 329. While this and the other exhibits of the Respondent were admitted, the Court reserved judgment on the issue of the weight it would afford them. Tr. 328-29. Miller stated that the saw had been on the mine property for over 20 years, yet it had never been cited before. Tr. 329. Miller added that a 7.5 horsepower motor is "not a big deal" and asserted that the saw was grounded. Tr. 330-31. Pointing to Exhibit GX 34, photo 4 of 4, he maintained that

it shows it was grounded. Tr. 330. Essentially, Miller asserted that the inspector's claim about the harm that could ensue amounted to "speculations" and "fabrications." *Id.* He agreed that the equipment is dangerous, because one must handle wedges properly, *but it does not present* a hazard of electrocution. *Id.* Again, the Secretary elected not to cross-examine Mr. Miller. Tr. 333.

The Court then asked the inspector, if it were assumed that the saw was in fact grounded, whether he would still have issued this citation, he responded, a different standard would need to be cited. Tr. 333. Apparently, in that circumstance, he would have cited 30 C.F.R. 56.12028, pertaining to the requirement for grounding continuity testing. Of course, that standard was not cited and the key part of his answer was "no" he would not have issued the citation if the saw was grounded. The Court inquired further, in an attempt for a clearer response, asking, "was it an essential finding of yours that this table saw was not properly grounded?" Tr. 332. The inspector then seemed to recant his previous answer, this time stating that he wasn't "going by it wasn't properly installed." Tr. 334. He added that he did not conduct the specific test to determine grounding, and therefore that his citation was based on the saw not being properly installed. *Id.* Asked the basis for the "not properly installed" assertion, he responded, it was because "[t]hey were using the disconnects as a means of starting and stopping the saw." *Id.*

As noted, the cited standard requires that "electric equipment and circuits shall be provided with switches or other controls." 30 C.F.R. § 56.12002. The inspector's comments to the citation, as reflected in the photographs which were introduced in support of it, show that the inspector's concern was a "[p]ower source without any dedicated grounding conductor." GX 34 (photo 2 of 4). Instead, as per Exhibit GX 34, Photo 3 of 4, a separate safety switch was being used to energize the table saw. The final photo for this citation records that "[t]he table saws [sic] safety switch has been tagged out." GX 34-4.

Conclusion

The problem with the Secretary's evidence for this citation is that it did not demonstrate that the switch that was present ran afoul of the standard. The standard only requires that electric equipment be provided with switches. Here, per Photo 4 of 4, the table saw *had* a switch, as the inspector noted in the text accompanying the photo. That photo is informative because it shows the cover the inspector referenced in his testimony and the switch which one uses when the cover is closed. However, the inspector did not explain, other than a vague reference that the national electric code provides guidelines as to the proper installation of such a circuit and the assertion that the mine should've used a motor starter that incorporated a magnetic push button process, to (one will pardon the expression) "connect" the standard to such a requirement. The Court concluded that, per the wording employed in his citation, the inspector's true concern was a lack of grounding. Faced with Miller's claim that the saw was grounded, the Secretary did not challenge his testimony, nor recall the inspector to refute that claim. Further, the Secretary did not establish that the switch which was associated with the table saw violated the standard.

This is not to say that a violation could not have been established, but only that, in this instance, due to insufficient proof or perhaps invoking the wrong standard, no violation was demonstrated. Accordingly, the Court has no choice but to **DISMISS** this citation.

Citation No. 8873845

Citation No. 8873845 cited 30 C.F.R. § 56.20003(a). GX 35. That standard, titled, "Housekeeping," provides "[a]t all mining operations - (a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." 30 C.F.R. § 56.20003(a).

Photos of the cited condition were taken. GX 37. The alleged violation was at the upper shop behind a steel storage container. Tr. 337. The inspector stated that "the main structure which had accumulated battery chargers, rheostat switch gear, and passageways was -- to meander through there you would have to negotiate all the different trip and stumble conditions. . . . it was just haphazardly stored. Wherever it hit the ground that's where it stayed." Tr. 337-38. Exhibit GX 37, Photo 5 of 7 shows

> inside a shipping container that typically you would see the oversea shipping container sort of scenario that had a steel rack in it and there was a considerable amount of material out in front of the steel rack itself and going on in there it didn't have a clear passageway if you were carrying anything in your hands and it was obstructing your view to where your footing was, which also creates a poor footing or trip, slip and fall hazard.

Tr. 338.

In contrast, Exhibit GX 37, photo 6 of 7 reflects a scene after some of the clean-up was done. GX 37-6.

The inspector stated that each photo, from Photo 2 of 7 through 5 of 7 are all separate areas up around the upper shop but that he grouped them, so that multiple citations were not issued for the area. Tr. 339. Miners access these areas if they need supplies. *Id.* Among his findings, the inspector listed the negligence as moderate because there had been some "slight clean-up" from when he was last there. Tr. 342. He toyed with marking the negligence as high, because the condition should be corrected immediately, not with a "when we get to it" approach. Still, he recognized the mine "had a turnover of personnel, there was a limitation of miners availability, and they do have to do their job to make their living and that is gold mining and not housekeeping, but it is part of the mining process." Tr. 342. Two examples of the cited conditions are the before and after photos in Exhibit GX 37, photo 2 of 7 (before) and photo 4 of 7 (after) and with photo 3 of 7 (before) and photo 7 of 7 (after). Tr. 345.

Mr. Miller testified that the upper shop, referenced by the inspector, "had basically been abandoned for years" but around August they moved to the upper shop. Tr. 348. However, Miller contended that these areas were storing junk and none of the areas were places where miners would go to get things. *Id.* He contended that, when enough junk is stored in these areas, it is taken to the dump for its scrap value. Tr. 349. Thus, he asserted, "[i]t's not a place where a miner is going to go in and trip and fall and have a slipping hazard," adding that the inspector did not appreciate its purpose. *Id.* In sum, Miller contended that none of the cited areas are "that place[s] where goods are being stored so the miners can go in there and get them. That is

absolutely one hundred percent not true." Tr. 350. Miller advised that to abate the citation they simply,

> moved the junk out to a different place. We had to get equipment to do it. We had to put it into trucks and we moved it someplace obviously where our other junk piles were that were sitting out there with metal that could get rained on. I guess the positive thing is we made more space to store things, but we didn't need it.

Id.

Conclusion

In the Court's estimation, the problem with this citation, as with numerous other citations which were the subject of this hearing, was the Secretary's failure to meet its burden of proof. The standard invoked pertains to "[w]orkplaces, passageways, storerooms, and service rooms," but the Secretary did not establish, following Miller's testimony, that the cited areas fell into any of the standard's categories. 30 C.F.R. § 56.20003(a). Perhaps the applicability could have been demonstrated, but in light of the Secretary's failure to recall the inspector and the decision not to cross-examine Miller, the Court has no choice but to **DISMISS** this citation.

Citation No. 8873846

For Citation No. 8873846, GX 38, the inspector again cited standard 30 C.F.R. §57.11001, "Safe access," which, as noted above, provides that a safe means of access shall be provided and maintained to all working places.

The condition was observed on the 1076 level, and involved a ladder where the inspector observed persons walking down the ladder, which he noted was not a safe way to descend it. As he viewed the practice, there was a risk in coming down it, as if it were as set of stairs, which created the possibility of "slipping off and coming between the rungs." Tr. 353. Thus, the essence of the violation was employees were using the ladder as stairs. Tr. 356. The Court then inquired how the inspector would want this abated in order to achieve a safe means of access; changing the ladder itself or changing *the method* used to descend it. The inspector answered that his concern was "the culture" of the way the ladder was used when descending. Tr. 357. The inspector admitted there was nothing wrong with the ladder itself. Tr. 358. In fact, the inspector admitted that if the miners were ascending and descending the ladder facing towards the rungs, he would not have issued the citation. *Id.*

Attempting to resuscitate the citation, Counsel for the Secretary pointed to language in the citation itself that stated the ladder was twisted, bent and distorted. Tr. 359. The inspector tried to explain the contradiction with his earlier testimony, stating, "This was one section of the access. At the footing that doesn't show in this photo, and then where it transitioned to another -- transition point is where the twisting, bending and distorted description comes into play." *Id.*

The inspector then stated his

> understanding of [the court's] question was to the -- facing the ladder or not facing it coming down. I didn't take into consideration further up the entryway, how they were actually accessing the compromised area. Then when the miner elaborated that well, now we have handrails was another issue in which the handrails is plural and that's not part of the – what we were talking about as safe means of access. It was interactions of different –

Tr. 360.

The Court interrupted the prolix answer, informing that it was dismissing the citation. *Id.* In taking that step, the Court notes that, moments before, the inspector was asked, "So what specifically about this did you believe was unsafe?" The response was "[t]he possibility of coming down it as you would a set of stairs and stepping or slipping off and coming between the rungs. So it was a practice and the culture of the workforce on how I observed them traveling that area." Tr. 353.

Conclusion

Because the inspector clearing stated the basis for the alleged violation in his direct testimony, and then attempted to contradict his own testimony, returning to the text of his citation, to revise his answer, the Court must dismiss the citation as internally conflicted. It is true that the citation does mention other issues, but it also notes "that miners shall have both hands free when climbing and descending," and it expresses that the ladder "was not improved upon after active mining was started." GX 38. These remarks in the citation support the inspector's initial remarks expressing his concern and there is no explanation as to how the safe access requirement changed when the ladder was initially being used for exploration and development and then to an "active mining area." *Id.*

The initial basis for the citation's issuance – the *manner* in which miners were using the ladder – not the safety of the ladder itself, was an inapplicable reason to establish a violation of the standard's requirements. **The citation is therefore DISMISSED.**

Citation No. 8873848

Citation No. 8873848 cited 30 C.F.R. § 57.11002. That standard, titled, "Handrails and toeboards," 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. § 57.11002.

This matter involved a set of stairs with no handrail. Tr. 362; GX 41. The stairs are depicted in photo 2 of 3. GX 43. As noted, the standard requires handrails be provided on stairs. The Citation added that "the construction of the steps are not equal in the tread and rise" and that the first step has a 15 inch drop down, as opposed to an industry standard of 7 ½ inches. GX 41.

In this instance, the stairs, which were made of concrete, had been present for "years and years" with no report of an accident. Tr. 362-63. Because of that, the inspector marked the citation as "unlikely" and the negligence as moderate. *Id.* The stairs consisted of three steps; the next step brings one to the entrance door level. As the stairs had been that way for many years, the inspector conceded that many previous inspections had not found it to be a violative condition. Tr. 365. The Court, reading from the standard cited, asked if the sole issue was the lack of handrails. The inspector agreed. Tr. 366. Thus, the 15 inch drop down was withdrawn as part of the violation.

This makes sense, as the closest the standard comes to that issue would be the "substantial construction" language, which on its face does not apply to tread and rise issues. Upon hearing the inspector's testimony and reviewing the photo of the stairs, the Court then informed the parties that, given the long history of no prior inspector finding an issue with the stairs, it could not justify a penalty of more than $10 (ten dollars). As the Court noted, "there's a history here." Tr. 367.

Consistent with the Court's remarks, Mr. Miller then testified, stating that, following the citation, another inspector arrived for the abatement issue, telling Miller, "just do something." Tr. 368. Miller advised that they "welded a pole that goes down [so that] . . . the door acted as a handrail. *Id.* Miller believed that adding handrails made it more dangerous, because,

> on those narrow stairs you're eliminating the box theory, so to speak, or whatever you have to take in and out of there. If we are allowed to operate our own mines it was in management and the miner's best interest ... that there wasn't a handrail ... you're talking about something where it's a dangerous situation where someone could fall off.

Tr. 370.

Conclusion

Accordingly, for the foregoing reasons, **the citation is upheld and a civil penalty of $10.00 (ten dollars) is imposed.**

Citation No. 8873851

Citing 30 C.F.R. 57.4131(a), that standard is titled, "Surface fan installations and mine openings." It provides at subsection (a) "On the surface, no more than one day's supply of combustible materials shall be stored within 100 feet of mine openings or within 100 feet of fan installations used for underground ventilation." 30 C.F.R. § 57.4131(a).

The inspector stated that "[a]t the upper shop there is [sic] openings that go into the mine and the standard requires that anything that has combustibility or grease that be moved back at least a hundred feet away and they were all still parked there when I went back the second time." Tr. 371; Ex. GX 44. He maintained that when he made his second visit he realized that remains of fan housing were within 100 feet of the opening. *Id.* Exhibit GX 46, Photo 4 of 6, shows the

opening in a "before" state, while Photo 5 of 6 shows the 'after" condition. Tr. 372. The opening was for ventilation purposes. Tr. 373. The inspector measured the distance of the materials to be around 80 feet of the mine opening, not the required 100 feet. Tr. 376. The inspector asserted that Miller refused to move the items to area beyond 100 feet without first receiving a citation. Tr. 377. Reiterating that both Miller and his son, Reid Miller, refused to move the materials until a citation was issued, that stance prompted the inspector to mark the negligence as moderate. Tr. 378.

In any event, the inspector stated that he observed,

> lumber clearly, the dozer had fuel onboard and also just part of it. The dump truck itself, the white dump truck had -- it had rubber-tired dozer tracks or possibly for an excavator. They had a similar excavator on the site that had rubberized tracks, and then there was – So each one of those vehicles, tires, oil, oil containers all could fall under the definition of combustible.

Tr. 379.

It must be said that the inspector's view of combustible materials is seriously at odds with the definition for Part 57. 30 C.F.R. Section 57.2, "Definitions," provides that "Combustible material means a material that, in the form in which it is used and under the conditions anticipated, will ignite, burn, support combustion or release flammable vapors when subjected to fire or heat. Wood, paper, rubber, and plastics are examples of combustible materials." Therefore, given the definition, it is dubious that the standard encompasses several of the items the inspector named: the dozer, the dump truck, and the excavator.

The inspector marked an injury or illness as unlikely because he found little air movement at the fan opening and that such air was exhaust, not intake, air. In addition he conceded that most of the items he named have a high flash point and therefore are not easily started on fire. Tr. 379. However, later, he contradicted himself, asserting that the air was entering the mine. Tr. 380.

The Court noted that the cited standard allows not more than a one day's supply of combustible materials within the 100 feet limit. The inspector acknowledged that the standard "gives the mine the latitude if they -- for instance, the wood on the trailer. If they are bringing supplies to the mine opening that gives the mine operator the ability to have it for easy accessibility to take it underground." Tr. 381. The Court inquired how the inspector determined that the material was more than a day's supply. The inspector answered, "[t]he accumulation of junk wasn't -- hadn't moved for days, and *the only one day of supply that you would put under that category of being a supply would be the lumber on the trailer.*" Tr. 382 (emphasis added). The Court then inquired if the inspector was "there on November 4th, the day before you issued the citation and observed this condition?" *Id.* The inspector responded that he would have to review his field notes. The Court then remarked, "there is nothing in your citation which supports a conclusion ... that there was more than one day's supply of combustible materials there. You haven't articulated how you have reached a conclusion that there was more than one day's supply." Tr. 382.

During cross-examination, Miller asked for the basis behind the inspector's conclusion that the opening affected the mine's ventilation. The inspector answered, "throughout [his] travels throughout the mine [the mine wasn't] using any kind of [stoppings] or [brattices] or any curtains that would seal off the mine. So the air is going to go where it's going to go. I've never seen a seal that was airtight." Tr. 384.

The Court then noted that the,

> standard doesn't restrict -- is not restricted to any mechanized ventilation. It simply says that if you have a mine opening that you can't have more than one day's supply of combustible materials within a hundred feet of a mine opening and this is a mine opening. It doesn't matter whether there is a fan there or not. It's a mine opening.

Tr. 384.

Noting that the standard allows no more than a day's supply of combustible materials may be stored, Miller then testified about the conditions,

> There were no supplies being stored there. None of the stuff that he mentioned were supplies. Those were two -- another area of storing junk, which he basically said. They were -- they had -- there were no supplies. This was not a place to put supplies next to an opening or whatever you want to say about what that hole was, which was sealed in the inside. You couldn't get passage into it. . . . [therefore Miller contended] this standard does not meet the conditions of that particular situation. Those were two areas of immobile trucks that were tagged out where junk was being put onto them for a later time to haul to the dump or haul away. So it's such a reach to try to say, number one, this was a storage of supplies, whether it's one day or not.

Tr. 385.

While Miller agreed with the Court's remark that there was an opening, he asserted that it was an area they later opened up, called the zero level. He added that MSHA, through another inspector[15] recognized that it was, "like [a] totally separate part of an area that had been abandoned. ... since 1966." Tr. 386. Thus, Miller contended that what the inspector observed was the work of some loggers who had installed an electrical box there and it remained there when Miller took over the mine in 1983. Accordingly, it was his assertion that the cited area "was never any part of a connection to the existing Sixteen To One." *Id.* Miller continued that the trucks were both inoperable, and been present for some eight to ten years. As he summed up his testimony, Miller repeated that the area "was abandoned. It had no effect on ventilation. . .

[15] In this instance, Miller only referred to the inspector as "Jerry," in this instance, but throughout the transcript, the name Jerry only arose in reference to Inspector Jerry Hulsey. *See* Tr. 325; 330; 357; 368-69; 400; and 41. Therefore, it seems reasonable to conclude that Miller was referring to Inspector Jerry Hulsey.

That truck could have caught on fire and burnt like hell all the rubber and it wouldn't have affected anybody in the mine at all. It was not connected. They weren't supplies." Tr. 387.

The Court noted there are two key elements to the standard – combustibility and a one day's supply. *Id.* The term mine opening is not among the defined terms for this Part. The inspector confirmed that he identified certain combustible materials, including wood, and that these were within 100 feet of an opening. *Id.*

The Secretary, referencing Exhibit GX 67, the inspector's field notes, inquired when those notes indicate he first spoke with Miller. He answered November 3rd, which would be two days before the citation was issued. Tr. 389. It was the inspector's contention that the material he cited was also present when he was at the mine in August or July. Tr. 390.

Miller then commented on his view of the "one day supply" phrase used in the cited standard, expressing it

> means you can have one day supply of anything, combustible or not combustible, that you would use up in one day. It doesn't mean that you have to use it up the next day. We have one day supplies of lumber stored within a hundred feet of the portal, which we do during the winter, during the summer, during any time so that's just the way the miners operate. The concern addressed by the standard is not to have a "thousand board feet stored right next to the portal.

Tr. 391-92.

Miller added that his view was based upon what other mine inspectors have told him. Tr. 392. He added that Inspector Hagedorn's interpretations, for several of the citations in this litigation, are different from those of previous inspectors. Tr. 393. Again, the Secretary opted to forego additional direct testimony from the inspector and did not elect to cross-examine Miller. Tr. 392.

Conclusion

The problem with this matter is one that arose in many of these challenged citations – the Secretary declining to cross-examine Miller's testimony, coupled with the decision to not recall the inspectors after Miller testified. Miller asserted that the "opening" the inspector observed was the work of some loggers who had installed an electrical box there and it remained there when Miller took over the mine in 1983. Given that claim, he maintained that the area was never connected to the mine. Thus, the state of the evidence was in conflict as to whether the mine opening was of any function and merely preceded Miller's mining activity there. The inspector's photo, Exhibit GX 46, 3 of 4, acknowledges that there was no power to a fan which was there, but there is no mention of a fan in the citation itself. The inspector's notes reflect that the operator claimed that the opening was sealed off.

Accordingly, this citation must be **DISMISSED**, for the failure of the Secretary to meet its evidentiary burden of proof.

Citation 8873847

For this citation, No. 8873847, Exhibit GX 47, 30 C.F.R. § 57.5005,[16] was initially cited as the standard violated. However, the inspector then modified the citation to cite 30 C.F.R §57.8528. The latter standard, titled, "Unventilated areas," provides simply: "Unventilated areas shall be sealed, or barricaded and posted against entry." 30 C.F.R. § 57.8528. The inspector asserted that the modification was made because he "was elaborating on the respirable dust" and the latter standard was more appropriate to the conditions as that standard addresses ventilation itself. Tr. 396.

The inspector stated that he issued this citation in reference to providing adequate ventilation. He was then at the 1076 level, and to reach that location one must travel nearly a mile. Tr. 395. The citation alleges that there was not adequate ventilation at that location. GX 47. The issue was the absence of mechanical ventilation. Only natural ventilation was present. Tr. 394-95. Explaining further, the inspector added "there was no discernible ventilation from exhaling and the miner, we were both blowing out our breath with our camp lights looking as it levitates in the air. It wasn't going in any noticeable direction." Tr. 395. He described the mine's natural ventilation as coming "from all the different openings of the mine as it goes into a convection from ambient temperature and different temperature ranges of the interior of the mine to the exterior of the mine will cause a Venturi or Venturi principle or it creates a suction or a draft." Tr. 395-96. The inspector stated that miners had been working in the cited area, performing blasting, and drilling, all part of the prep work to recover ore. Tr. 396.

The Court inquired about the standard cited, noting that it provides, "unventilated areas shall be sealed or barricaded and posted against entry." Tr. 397. Asked if the inspector considered the violation to be "that this area should have been sealed or barricaded and posted against entry," the inspector responded that sealing or barricading was required "[u]ntil they could get mechanical ventilation." Tr. 397. However, he added "[t]hat's what was determined as management reviewed the allegations." *Id.* The Court then advised the Secretary's Counsel that, per Section 57.8528, the cited standard, it seemed there was a problem with establishing a prima facie case. Tr. 397. The Court stated that, to start, the Secretary would need to establish that the cited area was unventilated. *Id.*

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[16] § 57.5005, titled, "Control of exposure to airborne contaminants," provides in part, "Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment. Whenever respiratory protective equipment is used a program for selection, maintenance, training, fitting, supervision, cleaning, and use shall meet the following minimum requirements ..."

Asked the basis for concluding that the area was unventilated, the inspector stated that he used a smoke tube, that smoke lingered in the area, and was not carried away. Tr. 397-98. Thus, he asserted that the smoke tube provided more reliable information than simply observing one's breath. The inspector wrote that the mine was not providing "adequate" ventilation, but the standard cited refers to "unventilated" areas. In support of the unventilated element, the inspector stated that "location was a good litmus test, ... [air] wasn't exiting. It was a closed area." Tr. 400. However, he admitted that his recollection was imperfect and that he was relying on his notes. *Id.* He did not abate the citation, but then recollected that a fan was brought in to abate it. *Id.* The inspector reaffirmed that the mine uses natural ventilation, brought about through various mine openings and ambient temperature versus mine temperature. These act to cause a differential in airflow for the natural ventilation to occur. Tr. 401. The inspector asserted that, at least for the cited area, there was no natural ventilation. *Id.* Again, he stated that upon using the smoke tube there was no indication of ventilation; all he observed was the smoke rising and staying. Tr. 402.

Hagedorn marked the injury or illness as "reasonably likely" because he saw no respiratory protection and such exposure can create COPD and emphysema. Tr. 403. However, he marked the negligence as "moderate" because the mine relied upon natural ventilation. *Id.* The inspector also contended that any air coming from the jack leg would create some ventilation but that it was not an acceptable air ventilation source because such air lines have contaminated air. Tr. 404.

Upon cross-examination, Miller first inquired if the inspector knew of the type of oil that was coming through the jack leg air lines. The inspector noted that he saw oil cans at the compressor but that, to be acceptable, such air would need to go through a scrubbing system. *Id.* In terms of whether the mine was employing "common sense" regarding ventilation, the inspector responded that a miner who was with him admitted that it didn't look like they had ventilation at that location. Tr. 405. The inspector also stated that he did his smoke test in the 1076, asserting that he went to various locations in that area. *Id.*; GX 49 (photos 2 of 3 and 3 of 3). He ran an oxygen test too. The result was about 20 and his sensor, set to alarm at 19.5, never went off. Tr. 406.

Miller then testified, first challenging the claim that there was inadequate ventilation. He asserted that claim was false. *Id.* He then asserted that there was mechanical ventilation, through use what they call a "bazooka." *Id.* As for the oil used in its jackleg drill, Miller asserted it uses a vegetable oil and that it's perfectly safe to breathe. Tr. 406-07. He acknowledged that there might be times when there is no discernable air, but that miners moving in that environment creates air movement. Tr. 407. Miller felt that isolating a small area of no air movement is misleading, given that, through natural convection, there is "probably ten million cubic feet of air that is breathable underground in that particular mine." *Id.* Beyond that, Miller asserted that his miners will advise him of "every tool to use when they feel the need to do it. ... [and he has] had no complaints about breathing bad air." Tr. 408.

The Court would note that such a process is an odd way to determine that area is adequately ventilated. Miller further explained about the use of a "bazooka" which he seemed to equate with a fan which is run off of compressed air. Tr. 408. Thus, he asserted that the bazooka

provides ventilation. Tr. 409. Miller maintained that another MSHA inspector terminated the citation, but did not require that the area be sealed off. Tr. 411. The abatement was accomplished by showing the inspector the mine's bazooka and a fan that could be used if the miners wanted it. *Id.*

Conclusion

This violation was established and Miller offered no evidence to challenge the Secretary's evidence. The inspector's gravity and negligence findings were supported by his testimony, as was his S&S finding. **The proposed assessment was $162.00 (one hundred and sixty-two dollars), an amount which the Court finds to be appropriate and imposes.**

Citation No. 8873850

Citation No. 8873850 was assessed a penalty of $100, and cites Section 57.12002. GX 50; 52. The cited standard, titled "controls and switches," provides, "Electric equipment and circuits shall be provided with switches or other controls. Such switches or controls shall be of approved design and construction and shall be properly installed." 30 C.F.R. 57.12002.

The inspector, referring to Exhibit GX 52, 2 of 3, stated that the photo reflects "disconnect that is laying on the ground or on -- being supported by the cabling coming in or out of it." Tr. 413. This was observed at the 800 level. *Id.* The inspector asserted that it was a main disconnect which was not properly installed. "That [m]ain disconnect would be supplying power to whatever is downstream from this power source." *Id.* The voltage was three phase 480, and it was not properly installed in that "the way it was supported had deteriorated, rotted away and that's what allowed it to be ... [as depicted] in the picture 2 of 3." Tr. 414. The inspector asserted that it created a shock or electrocution hazard. This could occur "if someone was needing to have it turned off downstream you would have to be grabbing onto the cabling or the box to actually open it." *Id.*

The Court then inquired of Miller if he agreed that, per Exhibit GX 52 photo 2 of 3, the safety switch, which was on the floor, was not properly installed. *Id.* Miller did not agree. Tr. 415. The inspector expressed that someone could be injured "if you're grabbing on to it trying to de-energize it in a moment of chaos it exposes persons to take actions without taking safety first." *Id.* He added that one would grab it in "a turn off situation where it had to be turned off because of possible fire or some moment that is happening to what it actually supplies." *Id.* He agreed that, as the Secretary's counsel suggested, that because of it not being mounted, one would need to grab it to turn it off. He added that, "because of the amount of resistance in the lever turning it off, turning it on, it takes a considerable amount of strength to get it to turn off." *Id.* However, upon learning more about the circumstances, he marked the violation down from reasonably likely to "unlikely." Tr. 414.

This was based on his,

> noticing that the cables after it was de-energized and after they had remounted ... [that there was no] noticeable damage to the cabling and the insulation and there wasn't anything that was obvious and all the connections were tight and sealed, which in turn takes away the disconnecting of the internal wires.

Tr. 416.

Negligence was marked as moderate because "they had attempted to mount it. It was mounted at one point. It's just over the course of time the wood rotted away and then ... [the] corrections needed to be done." Tr. 417.

Miller elected not to cross-examine the inspector, but testified about the matter. He contended that the box was properly installed and properly hanging on November 5th, prior to the inspector arriving for his inspection. Tr. 418. When the miners went to work that morning, they passed the box and it was properly hanging at that time. Some 5 to 6 hours after the mine went to work, the inspector observed the condition. *Id.* In fact, Miller went further, alleging that the inspector "went in and tried to do something and adjust that or take a measurement and touched that box and somehow knocked it down unintentionally. That's what I'm saying."

However, Miller advised that he was not with the inspector at the time of the alleged incident. Tr. 419-20. Further, while no one was with the inspector at the time of the alleged incident, Miller stated, "Not at this box, but ... someone told [him] that they have seen him and he even testified that he got in to help doing something on a box." Tr. 420. He added that he had "two reports that [the inspector] was working with electrical areas of the mine by himself on his own ..." *Id.* The Court then noted that Miller had "no direct evidence apart from these other stories, you have no evidence that you or from any employee who told you that they observed [inspector] Hagedorn as the MSHA inspector do something which caused this control switch to fall to the ground." Tr. 420. Miller agreed with the Court's statement. Tr. 421. The Court then stated that this was speculation on Miller's part and that it could not place any weight on the claim. *Id.* It summed up the claim as follows "What we're talking about is speculation as to whether this inspector took some affirmative action which caused this control switch to flop to the ground. You [i.e. Miller] have no evidence to demonstrate that that happened regarding this citation 8873850, you've just said that; correct?" *Id.* Miller agreed, stating he had "no eyewitnesses that saw [the inspector] touch [the switch box] and caused it to fall to the ground, because he was by himself." *Id.* Miller then continued that the box was a very important piece of equipment and if any of his miners had observed that it had fallen down, they would have fixed it. Accordingly, he reiterated that "this was something that had to have happened extremely recent to the inspector issuing the citation because no one observed it that morning." Tr. 422.

Miller then added more information about the cited area. Looking at picture 3 of 3 of Exhibit GX 52, he expressed that photo shows the "backs of the ceiling are confirmed." Tr. 423. From this photo he contended that "there is no rock fall that could take place in there [and that it showed the] the existing pole that was used before." Tr. 423. It was terminated immediately, he

asserted, and concluded that it was "highly unlikely that anything of the nature of this particular location caused that to fall down." *Id.*

Given the nature of Miller's testimony, Counsel for the Secretary recalled the inspector. Asked directly if he knocked the box down, the inspector stated he did not and that it was reestablished on a different pole, a conclusion he supported by "the location of the cabling coming into the top of the box." Tr. 424.

Conclusion

Wisely, the Secretary did recall the inspector who, credibly, in the Court's assessment, denied knocking the box off its support. As noted, Miller conceded that he was not present at the time the citation was noted. Miller did not even offer hearsay to support his claim that the inspector caused the main disconnect safety switch to fall. The Court concludes that the inspector's version is more credible and finds that **the proposed penalty of $100.00 (one hundred dollars) is appropriate.**

WEST 2016-0243

Citation No. 8873849

Citation No. 887384930 invoked C.F.R. § 56.14207, which is titled, "Parking procedures for unattended equipment," and provides, "Mobile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank." 30 C.F.R. § 56.14207.

The inspector described the condition that led him to issue this citation. It involved his observing a vehicle parked on a hill, the steepness of which he estimated to be greater than 22 degrees. Ex. GX 53. No chocks were in place for the vehicle, nor was it turned into a bank or rib, and if it were put in neutral and the parking brake released, it would roll away. Tr. 426; GX 55 (photo 3 of 3). He marked the violation as "unlikely" to cause an injury, because the vehicle did have the parking brake on and, as it had an automatic transmission, it was in the park position. Tr. 427. If it were to roll, he marked the injury as lost work days, if it rolled into a person or if one were injured trying to escape the rolling vehicle. *Id.* He classified the negligence as moderate because,

> all the other vehicles on the mine site they are very good at trying to find a place, a pothole or some kind of a rock or a bank to park the vehicles and everything within the vicinity had rocks or chocks underneath the tires on the downhill side to prevent it from rolling.

Id.

The violation was abated by relocating the vehicle. The violation was created by a contractor performing a job at the mine site. The Respondent was cited because it bears the responsibility

to give such contractors mine site specifics and thus the contractor should have been advised of the parking procedure as part of the introduction to the mine. Tr. 428. The inspector interviewed the four workers associated with the vehicle and they advised the mine had not told them to park a certain way. *Id.*

Upon cross-examination Miller, who stated that he never observed the situation, asked if the standard identifies the degree of a grade that requires turning into a bank or rib. The inspector responded that if the parking brake is released and the vehicle is in neutral and the vehicle can free roll, there is a violation. Tr. 429.

The Court inquired why the inspector did not mark the negligence as low, and he responded that low negligence would not be unreasonable. Tr. 430. However, he marked it as moderate because the mine did not advise the contractor through site specific hazard awareness. Tr. 431.

Miller then testified that the contractor was PG & E and that it was at the mine site addressing their power transmission line, which they maintain. They come to the property each year. Miller stated when they arrive, "they are informed by our office before they come to the property and they are informed about our gate issues, our hazard issues when they go on the property and how to park." Tr. 432. Although he couldn't state whether anybody from the mine spoke to the particular PG & E visitor on this occasion, he asserted that he has no control as to whether PG&E advises its subcontractors about the mine site specifics. *Id.*

Seeking clarification, the Court inquired of Miller if it was the mine's practice of informing people who come to the property of items such a parking procedures. Tr. 433. Miller stated that when contractors arrive they are advised of the mine's procedures but that it may speak to *one* of the several individuals who arrive. *Id.* As noted, in this instance, PG & E had four individuals performing the subcontractor work. The practice employed, Miller clarified, is that a contractor will approach the mine and advise the operator of their plan to arrive at the mine at a certain date. It is at that time that the mine goes over all the rules. Tr. 434.

The Court, wanting to be sure it understood Miller's testimony, inquired if the mine gets some sort of notice that a contractor is coming out and at that point in time it informs the contractor about the procedures and that this information includes the parking procedures. Miller affirmed that was the mine's policy and practice. *Id.* Miller added the point that PG & E is not a contractor hired by the mine. In other words, the electric company has the right to come onto the property to service its lines.

Miller had more to say about the standard's enforcement, asserting that other inspectors have been satisfied if the parking brake is set. *Id.* In reaction, the Court noted that the standard speaks to vehicles parked on a grade. It summed up the standard and the testimony as follows:

> The testimony here is that this vehicle was parked on a grade. You have no testimony to contradict that it was parked on a grade. If you're in a situation where a vehicle is parked on a grade, then you have to do one of two things. You have to chock it, the wheels, or turn into a bank or rib. It's very simple.

Tr. 435.

Miller replied by noting that the citation alleged that "the mining company failed to review parking procedures with the tree cutting service when on the property, mine property," contending that assertion was false. *Id.* Miller repeated that he was not asserting that the mine spoke to the particular individuals in the vehicle that day, and that such a practice would be impractical. Instead, the mine employs the procedure he previously testified about. Miller then noted that there was a conflict about how the citation was abated, with the citation stating that the vehicle was turned into a bank, but with testimony stating that abatement was accomplished by the vehicle leaving the location. The inspector then stated that he "misremember[ed]" and that the vehicle was in fact moved to a level location. Tr. 437.

Conclusion

The violation was established but as the vehicle's transmission was in park mode, and the parking brake was also set, the only violation was the failure to also chock or turn the vehicle into a bank. **MSHA proposed a penalty of $100.00**, but the Court, upon considering the attendant and unrebutted circumstances reaches a different conclusion. It notes that the infraction was created by a contractor, and that the contractor was there, not at the mine's invitation, but rather to carry out its utility maintenance duties. In addition, with the vehicle in "park" and the parking brake set, there was no reasonable likelihood that the hazard would occur. Further, it was not contested that Miller advised a representative of the parking policy, as no cross-examination occurred. Given these findings, the negligence was *very* low, and the gravity was *very* unlikely to occur. Consequently, the violation was not S&S. **A penalty of $25.00 (twenty-five dollars) is imposed.**

Citation No. 8873855 [17]

Citation No. 8873855 invoked **30 C.F.R. § 57.11003**, which is titled, "Construction and maintenance of ladders." The standard provides, "Ladders shall be of substantial construction and maintained in good condition." 30 C.F.R. § 57.11003.

The inspector, referring to Exhibits GX 59 and GX 61, photograph 2 of 3, stated that as he was descending the ladder a portion broke off in his hand. Tr. 440. This occurred when they were traveling through the secondary escapeway, from the 600 level down to the 800 level. *Id.*

[17] The Secretary reminded the Court that Citation No. 8873853 was vacated, and consequently, GX 56 through GX 58 were no longer exhibits in the record. Tr. 438.

This access was a "defined location to travel." *Id.* He asserted that the wooden ladder failed under his weight due to rot. As to likelihood of injury, the inspector noted that he was almost injured himself when the rung broke. Therefore he marked it as "reasonably likely" to cause an injury. Tr. 441. He added that this secondary escapeway will be traveled by new miners as part of their site specific training. Tr. 441-42. In terms of the injury expected, it would be sprains, strains and bruising resulting in lost workdays or restricted duty. The violation was marked as S&S. Moderate negligence was listed by the inspector on the basis that there was no report during the workplace examinations of the need to replace the ladder. Tr. 442-43. The abatement was done in what seemed like an unusual manner,

> by excavating out the travel way to the point that the ladder wasn't needed and then they left a rope there to further assist a person should -- because of the grade of the ground. It was relatively steep, 40 degrees or so in the area. So a rope was there to supply additional handhold and also for [rappelling] down to the 800 level.

Tr. 443.

Upon cross-examination, the inspector stated that he weighs about 210 pounds. Describing the event, he stated that a miner went down ahead of him. Tr. 444. In Miller's direct testimony he stated that the designated secondary exit is not the only way to travel through this area. Also, he asserted that it is infrequently used. There is a monthly inspection of the exit. Tr. 445. The mine was not aware of any issue with the ladder until the inspector broke it. Further, all wood begins rotting when it is installed. That said, it is difficult to know when the wood has weakened to the point that it might break. Tr. 446. Miller viewed these as mitigating circumstances and that it certainly was not S&S. *Id.*

Conclusion

The violation was established with **a proposed penalty assessed at $108.00**. Miller did not offer any evidence to rebut the findings made by the inspector, and each of them is upheld, the record evidence supporting those findings. The Court finds a penalty assessment of **$108.00 (one hundred and eight dollars)** to be appropriate.

Citation 8873856

Citation 8873856 invokes 30 C.F.R. § 57.11006. That section, titled, "Fixed ladder landings," provides that fixed ladders shall project at least 3 feet above landings, or substantial handholds shall be provided above the landings." 30 C.F.R. § 57.11006.

The inspector stated this citation also involved a ladder way,

> that went down to another level and it's pretty specific in the standard that as you come to a landing the ladder shall extend approximately three feet or three feet above the landing so it will give you something to assist yourself off the ladder and/or handholds or some other apparatus will be in the area for getting off the ladder, and it also assists you getting onto the ladder because you're coming down.

Tr. 448.

In this instance the ladder did not extend above the landing; rather it was flush with it and there were no handholds provided. GX 62; Tr. 449. The inspector believed that it was reasonably likely to cause an accident based on "[j]ust historical events that have happened from not having the ... assistance of the ladder extending past the three feet and/or having handholds and there wasn't no rope there either..." Tr. 449-50. By not extending three feet out, the inspector asserted that one could be injured: typically, it would be "a moment of falling ... from the exit point or the time of getting on, slipping off the rungs." Tr. 450. He marked the injury as lost workdays or restricted duty, but added that it is difficult to predict exactly what would happen. One might only need to brush oneself off, but an injury could be more significant too. The fall, if it occurred, would be about 10 feet. *Id.* He also marked it as S&S. Negligence was marked as moderate because there was a ladder present. Tr. 451.

The violation was abated in what seemed to be an unusual manner, as the,

> miners had taken shovels and thin hose and they literally excavated out the knobs. So essentially there was no landing left because they pulled it all down and just basically made a run down this secondary escape way with the assistance of a rope to give you stabilization. Basically you're [rappelling].

Tr. 452.

For a secondary escapeway, the inspector considered the abatement to be satisfactory. *Id.*

The Court then inquired of the Secretary's counsel whether, following the abatement, there was no longer any fixed ladder landing. *Id.* Both Counsel and the Secretary agreed with the Court's comment. Tr. 453. Mr. Miller did not cross-examine the Secretary's witness but did testify, asserting first that, in numerous previous inspections, no one had any issues with the ladder. It is also a very restricted area. He added that at about eight feet, "it's really not a landing going from a landing down to another level." Tr. 453. Instead he characterized it as "walking down a stope." *Id.* Miller disagreed with the inspector's description and asserted there was no violation.

As for the issue of a handhold, Miller stated that it is something that you can help support yourself, while moving up or down. Having used the ladder personally on many occasions, Miller contended that there are many natural places that act as handholds for him to use his

hands to help support use of the ladder. In fact, he asserted that extending the ladder would be more hazardous. Consequently, their abatement consisted of removing the landing itself. He also asserted that the cited place had been present since the early 2000s and never had been cited. Tr. 455.

The Court inquired further about Miller's assertion that there were natural handholds, asking if there were any handholds other than natural ones. Miller stated there were – he has grabbed water discharge lines. With Miller conceding that the ladder did not extend three feet above the opening, the remaining question was whether there were substantial handholds. Tr. 456. Miller reiterated that he considered the water lines acted as handholds and that they met the standard. Tr. 457. The Court does not agree with Miller's view; there were no substantial handholds provided.

Conclusion

The violation was established, and the method of abatement does not impact the penalty assessment. Based on the uncontradicted evidence, the Court adopts the inspector's view as to gravity, negligence and the S&S finding. The S&S finding is supported by the inspector's testimony, as described above. **The Court imposes the $108.00 (one hundred and eight dollar) penalty proposed by the Secretary.**

Closing Remarks

The Court notes that many of the citations litigated in this matter could have been sustained were it not for the absence of cross-examination of Respondent Miller and/or the lack of redirect testimony of MSHA's witnesses. The Court suggests that Mr. Miller may be able to avert some future litigation by additional taking proactive steps. As one example, by painting low spots, this could prevent subsequent citations on that subject.

Summary of determinations and applicable civil penalties imposed by the Court

Docket No. WEST 2015-0850 Sixteen to One Mine

Citation No. 8793844: $50.00

Citation No. 8793845: $25.00

Docket No. WEST 2015-0851 Plumbago Mine

Citation No. 8793846: $25.00

Docket No. WEST 2016-0070 Sixteen to One Mine

Citation No. 8873829: DISMISSED

Citation No. 8873830: DISMISSED

Citation No. 8873831: DISMISSED

Citation No. 8873832: $100.00

Docket No. WEST 2016-0071 Sixteen to One Mine

Citation No. 8873835: DISMISSED

Docket No. WEST 2016-0149 Sixteen to One Mine

Citation No. 8873833: DISMISSED

Docket No. WEST 2016-0183 Sixteen to One Mine

Citation No. 8873843: $138.00

Citation No. 8873844: DISMISSED

Citation No. 8873845: DISMISSED

Citation No. 8873846: DISMISSED

Citation No. 8873848: $10.00

Citation No. 8873851: DISMISSED

Citation No. 8873847: $162.00

Citation No. 8873850: $100.00

Docket No. WEST 2016 0243 Sixteen to One Mine

Citation No. 8873849: $25.00

Citation No. 8873853: vacated by the Secretary

Citation No. 8873854: **vacated by the Secretary**

Citation No. 8873855: **$108.00**

Citation No. 8873856: **$108.00**

ORDER

It is hereby **ORDERED** that Respondent Original Sixteen to One Mine and Plumbago Mine pay the Secretary of Labor a total civil penalty in the sum of **$851.00 (eight hundred and fifty-one dollars)** within thirty (30) days of this decision.[18]

William B. Moran
William B. Moran
Administrative Law Judge

Distribution: (U.S. First Class Certified Mail)

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Michael Miller, President, Original Sixteen To One Mine, Inc., P. O. Box 909, Alleghany, CA 95910

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