# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

March 13, 2015

| | |
|---|---|
| SECRETARY OF LABOR<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | CIVIL PENALTY PROCEEDINGS<br><br>Docket No. LAKE 2014-110-M<br>A.C. No. 21-02623-335857-01<br><br>Docket No. LAKE 2014-111-M<br>A.C. No. 21-02623-335857-02<br><br>Mine: Portable Crusher<br><br>Docket No. LAKE 2014-180-M<br>A.C. No. 21-03781-338680<br><br>Docket No. LAKE 2014-217-M<br>A.C. No. 21-03781-341073<br><br>Mine: Plant 5<br><br>Docket No. LAKE 2014-183-M<br>A.C. No. 21-03527-338678<br><br>Docket No. LAKE 2014-216-M<br>A.C. No. 21-03527-341072<br><br>Docket No. LAKE 2014-430-M<br>A.C. No. 21-03527-347702<br><br>Mine: Plant 3 |
| v. | |
| NORTHERN AGGREGATE, INC.,<br>Respondent | |

## DECISION AND ORDER

Appearances: Michele A. Horn, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, CO, for the Petitioner

Benjamin Wangberg, Esq., Jones, Fuller, Wallner, Cayko, Pederson & Huseby, Ltd., Bemidji, MN, for the Respondent

Before: Judge Rae

## I. STATEMENT OF THE CASE

This case is before me upon seven petitions for assessment of civil penalties filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, ("the Mine Act"), 30 U.S.C. § 815(d).

The above-captioned dockets were consolidated for hearing. Violation 8740833, which was the sole violation at issue in consolidated docket LAKE 2014-182, was settled prior to hearing. The following violations were also settled prior to hearing: Violations 8740831, 8740832, and 8740834 contained in docket LAKE 2014-111; Violations 8740697, 8740700, 8740702, 8740703, and 98740706 contained in docket LAKE 2014-183; and Violation 8740707 contained in docket LAKE 2014-180. My order approving settlement of these violations is dated October 7, 2014. Thirteen violations contained in the seven consolidated dockets remained for hearing.

A hearing was held in Carlton, Minnesota on October 21-22, 2014, at which time testimony was taken and documentary evidence was submitted. The parties also filed post-hearing briefs. I have reviewed all of the evidence at length and have cited to the testimony, exhibits and arguments I found critical to my analysis and ruling herein without including a summary of testimony given by each witness. Based upon the entire record and my observations of the demeanor of the witnesses, I uphold Violations 8672802, 8740705, 8740698, 8740699, 8740701, 8740827, and 8740836, modify Violations 8740695, 8740828, 8740829, and 8740835, and vacate Violations 8740696 and 8740830 for the reasons set forth below.

## II. BACKGROUND

The parties have stipulated to the following facts:

1. Northern Aggregate, Inc. ("Northern Aggregate" or "Northern") at all times relevant to these proceedings engaged in mining activities and operations at Plant 3 and the Portable Crusher in Beltrami County, Minnesota and at Plant 5 in Hubbard County, Minnesota.

2. Northern Aggregate's mining operations affect interstate commerce.

3. Northern Aggregate is subject to the jurisdiction of the Mine Act.

4. Northern Aggregate is an "operator" as defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the mines where the contested citations in these proceedings were issued.

5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to section 105 of the Mine Act.

6. Stephen Dale Cotie, Wilbert Wayne Koskiniemi, and Thaddeus J. Sichmeller were at the time the citations were issued authorized representatives of the United States of America's Secretary of Labor, assigned to MSHA, and were acting in their official capacity when issuing the citations at issue in these proceedings.

7. The certified copy of the MSHA Assessed Violations History reflects the history of the citation issuances at the mines for 15 months prior to the date of the citations at issue and may be admitted into evidence without objection by Northern Aggregate.

Joint Exhibit 1; Tr. 12.[1]

Northern Aggregate operates portable sand and gravel mines owned by Rick Schulke and his two sons Eric and Kyle. Tr. 13, 425. Northern Aggregate uses two portable crushing plants which change operational locations and close during the winter months, typically from December through March. Tr. 13-15, 283. They employ cone crushers, which rotate and funnel large rocks down against the walls of the cone exerting pressure on the rocks thereby breaking them into small marketable sizes. Tr. 19, 378-79. The violations charged in these dockets arose out of inspections conducted in September and October 2013 by MSHA Inspectors Stephen Dale Cotie, Wilbert Koskiniemi, and Thaddeus J. Sichmeller.[2]

## III. LEGAL PRINCIPLES

### A. Gravity/Significant & Substantial (S&S) Designation

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). A violation is properly designated S&S "if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Company*, the Commission set forth the following four-part test to determine whether a violation is properly designated S&S:

> 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;

---

[1] In this decision, the abbreviation "Tr." refers to the transcript of the hearing. The Secretary's exhibits are numbered S-1 through S-14 and the Respondent's exhibits are numbered R-1 through R-4.

[2] Cotie is an industrial hygienist with a Master's Degree of Science in public health and industrial hygiene and toxicology. He has worked in this field for three decades, spending the last ten or eleven years as a health specialist and general inspector for MSHA. Tr. 16. Koskiniemi has been an MSHA inspector since 2013. Before that, he worked as a police officer and court security officer for many years and ran an excavating company from 2004 to 2008. Tr. 65-67. Sichmeller has about 20 years of experience in the mining industry, including about 7 years of work as a millwright performing mechanical work relating to the milling process. He has worked as an MSHA inspector since 2003. Tr. 156-57.

and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988); *Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1075 (D.C. Cir. 1987). The inspector's judgment is also an important element of an S&S determination. *Wolf Run Mining Co.*, 36 FMSHRC 1951, 1959 (Aug. 2014); *Mathies*, 6 FMSHRC at 5. The S&S determination must be based on the particular facts surrounding the violation at issue. *Peabody Coal Co.*, 17 FMSHRC 508, 511-12 (Apr. 1995); *see, e.g.*, *Wolf Run*, 36 FMSHRC at 1957-59 (remanding S&S finding for further consideration of relevant circumstances).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. This element is established only if the Secretary proves "a *reasonable likelihood* the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). Evaluation of the reasonable likelihood of injury should be made assuming "continued normal mining operations," *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984), i.e., the evaluation should be made "in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued." *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989).

The S&S nature of a violation and the gravity of the violation are not synonymous. Gravity, generally expressed as the degree of seriousness, is an element that must be assessed for every violation, while an S&S determination is made only in the context of enhanced enforcement under section 104(d) of the Mine Act. The gravity assessment and a finding of S&S are frequently based upon the same or similar factual circumstances, *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (Sept. 1987), but the focus of the inquiries differs. The Commission has pointed out that the focus of the gravity inquiry "is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996); *see also Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140-41 (Jan. 1990) (ALJ) (explaining that notwithstanding likelihood of injury, some violations are serious in the context of the standard violated and the Mine Act's deterrent purposes – for example, violations of an important safety standard; violations demonstrating recidivism or defiance on the operator's part; or violations that can combine with other conditions to set the stage for disaster).

B. Negligence/Unwarrantable Failure

Negligence is conduct that falls below the standard of care established under the Mine Act. Under the Mine Act, an operator is held to a high standard of care and is required to be on the alert for conditions and practices that may cause injuries and to take necessary precautions to prevent or correct them. 30 C.F.R. § 10.0(d). High negligence is defined as having occurred in connection with a violation when "[t]he operator knew or should have known of the violative condition or practice, and there were no mitigating circumstances." *Id.* § 100.3, Table X.

More serious consequences can be imposed under the Mine Act for violations that result from the operator's unwarrantable failure to comply with mandatory health or safety standards. The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (Feb. 1991); *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors or mitigating circumstances exist. These factors often include (1) the extent of the violative condition, (2) the length of time the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3520 (Dec. 2013); *see Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2011). Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *Lopke Quarries*, 23 FMSHRC at 711.

The factors listed above must be viewed in the context of the factual circumstances of a particular violation, and it is not necessary to find that all factors are relevant or deserving of equal weight in order to determine that the violation is unwarrantable. *Wolf Run*, 35 FMSHRC at 3520-21; *E. Associated Coal Corp.*, 32 FMSHRC 1189, 1193 (Oct. 2010); *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009). However, all factors that are relevant should be considered. *San Juan Coal Co.*, 29 FMSHRC 125, 129 (Mar. 2007).

C. Acceptable Means of Service of Violations

Northern argues that all thirteen of the violations at issue here should be vacated because the Secretary has failed to present proof they were actually served upon the operator. Resp.'s Br. at 1. Northern also contends that because the Secretary did not serve violations properly, the operator lacked knowledge of prior violation 8672801 contained in Exhibit S-5g, which was the basis for the Secretary's unwarrantable failure designation for Citation Number 8740698. *Id.* at 10-11; Ex. S-5.

Of the thirteen violations at issue in this docket, twelve were personally served on the operator at the time of issuance: Inspector Sichmeller personally served violations 8740827, 8740828, 8740829, 8740830, 8740835, and 8740836 to Foreman Alan Speck during the September 4, 2013 inspection of the Portable Crusher, and Inspector Koskiniemi personally served violations 8740705, 8740695, 8740696, 8740698, 8740699, and 8740701 to Eric Schulke during the October 31, 2013 inspection of Plant 3 and Plant 5. Tr. 105-07, 224-25. Northern's witnesses confirmed it is typical for MSHA inspectors to discuss violations with a company

representative during the inspection and provide a copy of the violation on the spot. Tr. 279, 374-75, 424. This constitutes adequate service.

The remaining violation at issue in this docket, Citation Number 8672802, was issued verbally by Inspector Cotie at Plant 5 on October 22, 2013 and a hard copy was later sent by certified mail to Northern's address of record on file with MSHA. Tr. 29, 33. The prior violation that the operator denies knowing about, Citation Number 8672801, was issued in the same manner by Cotie on September 12, 2013. Tr. 42-43. The inspector's testimony that the citations were mailed to Northern's address of record is credible and I find that they were in fact mailed. This is adequate service under the Mine Act. Section 104(a) of the Mine Act does not require personal service of violations. 30 U.S.C. § 814(a). Section 109 specifies only that violations "shall be delivered" to the mine office and requires operators to maintain an up-to-date address on file with MSHA for this purpose. *Id.* § 819; *see also* 30 C.F.R. Part 41 (placing burden on mine operator to ensure address is correct). The MSHA Citation and Order Writing Handbook does not mandate that the operator be given a written violation at the time it is observed but requires the inspector to tell the operator about the violation and discuss the circumstances. *Citation & Order Writing Handbook*, Ch. 7 § II, *available at* http://www.msha.gov/READROOM/HANDBOOK/PH13-I-1.pdf. Consistent with these guidelines, Cotie discussed each citation with a company representative during the inspection before mailing the written copies to the office. Tr. 29, 42. Cotie's actions were appropriate and sufficient to effect service and notice.

## IV. FINDINGS OF FACT AND ANALYSIS

### 1. Citation No. 8672802/Docket No. LAKE 2014-217[3]

This section 104(d)(1) citation was issued on October 22, 2013 by Inspector Cotie at Plant 5 and alleged a violation of 30 C.F.R. § 56.20011. This mandatory standard requires that "[a]reas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches." Signs are required to be visible, legible, and display the type of hazard present and any necessary protective action required. 30 C.F.R. § 56.20011.

The citation is predicated upon Cotie's observation of rocks being ejected into the workplace from the Norberg cone crusher absent the appropriate warning signs or barricades, which had been removed from all approaches. Ex. S-1; *see* Ex. S-1a; Photographs S-1b, c, d. The citation documents that the operator had been informed of the hazard on a previous occasion but had continued to conduct business without properly correcting the situation. Ex. S-1.

Cotie evaluated the violation as S&S with high negligence, highly likely to cause a permanently disabling injury affecting one person, and an unwarrantable failure. Ex. S-1. The Secretary has proposed a penalty of $6,458.00.

[3] The dockets and violations were not presented at trial in numerical order. They will be addressed herein in the order in which they were presented at trial.

Prior to the issuance of this citation, Cotie had issued two other citations for the same hazardous condition. On September 11, 2013, Cotie had issued Citation Number 6190795[4] at Plant 5 when he observed rocks being ejected from the Norberg cone crusher. Ex. S-1e; *see* Exs. S-1f, g. A barricade had been erected only on the north side of the crusher. The rocks in the debris field were sufficiently large, in Cotie's opinion, to cause significant injuries to a miner entering the area whether or not he was wearing hard hat. Tr. 19-21. Upon making this observation, Cotie spoke with the operator about some options that would eliminate the danger, such as erecting a screen above the crusher or, as a less expensive option, using old conveyor belting material to act as a barrier. Tr. 21-24. Cotie returned 14 days later to check on the operator's progress in building the suggested barrier and extended the citation. Ex. S-1e. However, when Cotie returned on November 25, 2013 to terminate the citation, the barrier had not been constructed and the crusher had been moved from the mine site. Tr. 25; Ex. S-1e.

On September 12, 2013 Cotie issued the second prior violation, Citation Number 6190800,[5] for rocks flying from a cone crusher at a different operation (Plant 3) at the same pit. At this operation, Northern had erected a barricade on only one side of the crusher. Mining operations were moved before the condition was rectified and the citation was terminated on September 23, 2013 for this reason. However, Cotie had discussed the violation with the lead man who was present when the citation was issued; also, the citation states that the operator must comply with the cited standard and the condition must be corrected prior to resuming crushing activities, otherwise MSHA will consider continued activity to be "aggravated conduct constituting more than ordinary negligence." Ex. S-6g, h, i; Tr. 35-38.

The Violation

When Cotie returned to the mine on October 22, 2013 on a follow-up inspection, he saw the crusher back in operation. Tr. 27, 29. It was still ejecting rocks of significant size to distances of up to 25 feet, but this time there were no barriers on any of the approaches, no warning signs or berms, and the operator had not heeded MSHA's warning to remedy the situation before resuming operations. Tr. 27-28; Ex. S-1a. In Cotie's opinion, the situation had in fact deteriorated from the last time he cited the crusher because now there was nothing at all restricting access to the hazard zone and the crusher was in a more active part of the work site, increasing the chances that miners would be exposed to flying rocks. Tr. 27-28. Due to this increased danger and Northern's failure to take any corrective action since the September citations were issued, Cotie issued this enhanced unwarrantable failure citation for failure to erect barricades and signage to warn of a hazard that was not immediately obvious to miners. Ex. S-1; Tr. 30-31.

Northern argues that the hazardous condition was immediately obvious and therefore does not fit within the meaning of the standard at 30 C.F.R. § 56.20011. However, the condition did not become obvious until a miner was close enough to be struck by the ejecting rocks. Depending upon which direction a miner approached, his view of the danger could be blocked by equipment, the crusher, or other objects in the area until it was too late. Also, the crusher was

[4] MSHA's Mine Date Retrieval site shows this citation was not contested and payment of the $2,106.00 penalty is delinquent. *See* http://www.msha.gov/drs/drshome.htm.
[5] This citation has been paid and is closed.

not necessarily ejecting rocks constantly. There were likely lulls in which a miner could approach and be very close to the crusher before it spewed rocks once again without barricades or signs warning employees not to draw near.

I find this violation has been established.

S&S/Gravity

The violation was assessed as S&S because Northern's failure to erect barricades or signage allowed unrestricted access to the crusher, which was spewing rocks large enough to cause serious head injuries to a miner whether or not he was wearing a hard hat and safety glasses. Tr. 32. At the time the violation was observed, there were tire tracks in the area as well as a small Bobcat in the trajectory path, showing that miners accessed the area around the crusher where the rocks were being thrown. *See* Exs. S-1b, S-1c.

The foregoing evidence establishes that this violation of a mandatory safety standard contributed to the discrete safety hazard that a miner would be struck in the head or other parts of the body by flying rock. Northern's failure to take any remedial action before putting the crusher back into production despite having been issued two prior citations for the same hazard shows that the hazardous condition would have continued to exist under continued normal mining operations. This, along with the Bobcat, tire tracks, and other evidence that miners routinely accessed the debris field, is sufficient to establish a reasonable likelihood that the hazard contributed to by this violation would result in injury if normal mining operations were to continue. Due to the size and weight of the rocks, any injury resulting from this violation would be very serious, if not fatal, in nature. This violation is properly assessed as S&S.

The gravity of this violation is very serious in that it exposed any miner within a substantially large radius of the ejecting rock to a potentially fatal injury.

Negligence/Unwarrantable Failure

Inspector Cotie testified he issued this citation as an enhanced 104(d)(1) citation (i.e., an unwarrantable failure to comply with a safety standard) because he had spent time discussing the situation with management in the past and believed the operator was aware of the hazard but had taken no action to address it. Tr. 30-31.

Operator's Knowledge of Existence of Violation

The operator knew that this violation existed long before the citation was issued. Inspector Cotie had issued two citations six weeks earlier on September 11 and 12, 2013 for the same hazard – rocks being ejected from cone crushers at the pit without safety barriers. Exs. S-1e, S-6g. Cotie had discussed the situation at length in person with company representatives. Tr. 21-24, 37-38. Eric Schulke, the overseer of the pit, was personally aware of the situation. *See* Tr. 373-74, 384-87, 403-13.

Operator's Notice that Greater Efforts at Compliance Were Necessary

The two prior citations and the discussions with Cotie sent a clear message to Northern that it needed to address the hazard identified in the citations, thereby placing Northern on notice that greater efforts at compliance with the Mine Act were necessary. After Northern moved its operations without addressing the hazard, it was notified by MSHA on September 23, 2013 that failure to correct the hazard before resuming mining activities would be considered aggravated conduct constituting more than ordinary negligence. *See* Ex. S-6g. This specific warning from MSHA provided the operator with further notice of the need for greater compliance efforts.

Operator's Abatement Efforts

The abatement effort factor measures an operator's response to violative conditions that it knew or should have known about before the citation was issued. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). Both the abatement efforts undertaken, and the level of priority the operator has placed on abating conditions for which it received notice that greater compliance efforts were necessary, should be considered. *IO Coal Co.*, 31 FMSHRC 1346, 1356 (Dec. 2009). It must then be determined whether the operator's efforts "were taken with sufficient care under the circumstances, even if ultimately unsuccessful in completely preventing a violative condition." *Windsor Coal Co.*, 21 FMSHRC 997, 1005 n.9 (Sept. 1999).

Cotie's conversations with the operator about the two prior citations had included discussion of various options for addressing the hazard. Tr. 22-23, 385, 406. Yet despite the two prior citations, the pointed conversations with Cotie, and the warning that failure to correct the hazard before resuming mining activities would result in enhanced penalties, the Plant 5 crusher was operational once again on October 22, 2013 without any corrective action having been taken. In fact, the berm that had been erected on the north side of the crusher was no longer present, leaving no barriers to prevent access to the debris field around the crusher. Tr. 27-28. The situation had deteriorated. I find that Northern's failure to take any abatement action despite full knowledge of the need to do so is a significant aggravating factor in this case.

Extensiveness of Violation & Degree of Danger Posed

The degree of danger posed by Northern's failure to prevent access to the area around the crusher was very high. Rocks the size of cantaloupes were being flung from the crusher up to 25 feet outward into an area trafficked by miners on foot and in small equipment such as the Bobcat seen in the photograph in Exhibit S-1b. This placed miners at risk of serious, if not fatal, injuries.

This condition was extensive in that its scope and magnitude, including the size of the rocks and the large area affected, put any miner within a 25-foot radius of the crusher in danger of potentially fatal injuries.

Obviousness & Duration of Violation

The violative condition, while not immediately obvious to all miners, was obvious to management. The inspector's photographs depict an unmistakable debris field that extends into

areas traversed by miners, clearly indicating the presence of a hazardous condition. *See* Exs. S-1b, S-1c, S-1d.

This condition had existed at least since the previous citation was issued at Plant 5 on September 11, 2013. Most likely the condition dated back to April 2013 when Northern's season had begun, as the mine's entire purpose is to crush rock for sale and there is no reason to believe Northern's mode of operating had changed since the season started. I find this condition was of substantial duration and was patently obvious.

Conclusions

The factors discussed above establish unwarrantable failure, particularly the operator's knowledge of the violation; the fact that the operator was on notice of the need for greater compliance efforts; the high degree of danger posed by the violation; and the operator's failure to abate the condition despite the foregoing three factors. Eric Schulke admitted that after having received two prior citations for the same hazardous condition, he chose to simply continue operating the crusher without fixing the problem. Tr. 409-10. This shows a disregard for safety amounting to more than ordinary negligence. I find that this violation was an unwarrantable failure to comply with a mandatory safety standard.

High negligence is appropriate because the operator knew of this violation and there are no mitigating circumstances.

2. Citation No. 8740705/Docket No. LAKE 2014-180

This 104(a) citation was issued by Inspector Koskiniemi on October 31, 2013 at Plant 5 for a violation of 30 C.F.R. § 56.16006, which requires that "[v]alves on compressed gas cylinders shall be protected by covers when being transported or stored, and by a safe location when the cylinders are in use." The narrative portion of this citation indicates that Inspector Koskiniemi found oxygen and acetylene cylinders by the control trailer with regulators, torch heads, and hoses attached without the protective caps on the valves. Ex. S-2; *see* Photographs S-2b. He did not know when the cylinders had last been used, but he determined they were not in use at the time he saw them because the hoses were coiled and the torch head was resting on the regulator. Tr. 114-15. He assessed the violation as non-S&S and unlikely to cause an injury, with low negligence and potential to cause a fatal injury affecting one person. Ex. S-2. The Secretary seeks a penalty of $176.00.

The Violation

The cylinders were secured to a stable cart on a platform where there was little likelihood they would be hit and damaged, and the company representative told Koskiniemi he had merely forgotten to put the caps on the valves. Tr. 69-70, 112-15; Ex. S-2a. Koskiniemi's concern was that the valves could be broken off the cylinders while they were being stored without the protective caps on them. The cylinders, which held pressurized gas, would then become projectiles that exposed any miner within their path to a fatal injury. The pressure behind a

launched cylinder, in Koskiniemi's opinion, would be sufficiently forceful to penetrate a brick wall. Tr. 68-69.

Northern's position is that the valves did not need to be capped because the cylinders were not being stored, as they were being used intermittently throughout the day of the inspection. Resp.'s Br. at 4-5; Tr. 399-403, 418-20. In *FMC Corporation*, the Commission discussed the meaning of the term "storage" within the context of a safety standard that regulated storage of blasting agents and found that the term was sufficiently broad to include both short-term and long-term storage. 6 FMSHRC 1566 (July 1984). Several ALJ cases since then have relied on *FMC Corporation* to conclude that compressed gas cylinders were being temporarily stored within the meaning of § 56.16006 under various circumstances. *See Woodring Co.*, 16 FMSHRC 1716 (Aug. 1994) (ALJ) (finding that cylinders were stored, not in use, when operator had used them briefly earlier in the day then placed them in truck with no indication of immediate need or intention to reuse them); *Martin Marietta Aggregates*, 11 FMSHRC 633 (Apr. 1989) (ALJ) (finding that cylinders were "temporarily stored," despite being readily available for use with gauges and hoses attached, because there was no evidence suggesting when they were last used or would next be used); *Phelps Dodge Corp.*, 6 FMSHRC 1930, 1937 (Aug. 1984) (ALJ) (finding that cylinders were being stored temporarily or semi-permanently when evidence suggested they had been left in a walkway without being used since at least the prior shift).

I find that the cylinders were being stored and were not in use at the time of the inspection. Because the valves were not capped, a violation of § 56.16006 occurred.

Gravity & Negligence

Low negligence is appropriate here, as there are sufficient mitigating circumstances: the tanks were secured to a stable cart, they were in an out-of-the-way location where there was little likelihood they would be hit or damaged, and the company representative stated that he had simply forgotten to put the caps on.

This violation is non-S&S and the gravity is low in that an injury was unlikely to occur because the tanks were unlikely to be hit or damaged.

3. Citation No. 8740695/Docket No. LAKE 2014-183

This 104(a) citation written by Inspector Koskiniemi on October 31, 2013 at Plant 3 charges a violation of 30 C.F.R. § 56.11027. The cited mandatory standard requires, in relevant part, that working platforms "be of substantial construction and provided with handrails and maintained in good condition." The citation alleges that the railing on an elevated work platform above the jaw crusher had come out of its pocket. This allowed the railing to swing open, creating a 16-inch gap directly over the jaw crusher hopper into which a miner could fall and suffer a fatal injury. Ex. S-3; Tr. 72; *see* Ex. S-3b. Koskiniemi assessed the violation as S&S, reasonably likely to result in a fatal injury to one miner, and the result of low negligence. Ex. S-3. The Secretary proposes a penalty of $117.00.

The Violation

The platform above the jaw crusher is about ten feet off the ground. Ex. S-3a. Miners access the platform to observe the crusher, check clogs, and perform routine maintenance on the crusher. Tr. 73-74. The jaw crusher's function is to take the large rocks as they are dug out of the pit and break them down into sizes that can be further broken down by the cone crushers. Tr. 72. It was the inspector's opinion that the vibration attendant to the operation of the crusher caused the railing on the crusher's top work platform to pop out of place. Tr. 73, 116.

The operator established on cross-examination that the platform was of substantial construction and that the railing had been in place at the time the required shift examination had been performed. Tr. 116-17. The railing is removable and no one was on the platform at the time of the inspection. Tr. 117-18, 395-96, 416. However, § 56.11027 is a strict liability standard, and the duty to maintain working platforms includes keeping the railings "popped into" the pockets to ensure the platform can be used safely. *See Ames Constr., Inc.*, 33 FMSHRC 1607, 1611 (July 2011) (noting Mine Act imposes liability for violation of mandatory health and safety standards "without regard to fault"), *aff'd*, 676 F.3d 1109 (D.C. Cir. 2012). The platform was available for use at the time it was cited and it provided access to work areas. I find that a violation occurred.

S&S/Gravity

The inspector testified he assessed this violation as S&S because miners were required to access the platform to perform maintenance of the jaw crusher and other duties. He also stated he was aware of prior fatalities from miners falling into jaw crushers. Tr. 73-74.

A violation of a mandatory safety standard occurred in that the handrail was not in place, satisfying the first *Mathies* element. Miners were required to access the platform for maintenance and other tasks, which could have exposed them to a fall hazard when the handrail was in the condition the inspector observed. Thus, this violation contributed to the discrete safety hazard of a miner falling from the platform, satisfying the second *Mathies* element.

However, the Secretary has not established a reasonable likelihood the hazard contributed to would have resulted in injury even assuming continued normal mining operations. The handrail had been in place when the platform was last examined and could have popped out at any time due to the normal vibration and shaking of the crusher. Tr. 73, 116-20. It was not physically damaged. Its condition was patently obvious and easily fixed. There is no evidence anyone accessed the platform while the railing was out of place, and plant operator Eric Schulke credibly testified that this condition would have been fixed immediately as soon as it was noticed. Tr. 396. Thus, no miners were exposed to the hazard while it existed, and if normal mining operations had continued there is no evidence to suggest that the operator would not have shut down the crusher and safely put the railing back into place before the platform was accessed for any purpose that would have exposed a miner to danger. For this reason, I find this violation was not S&S.

I accept the inspector's testimony that falling onto the jaw crusher could cause a fatal injury. Even if the jaw crusher were not operational, a fall from the platform's 10-foot elevation onto equipment or the ground could cause a serious or fatal injury. I find the gravity of this violation to be reasonably serious in that it could have resulted in a fatal injury to a miner.

Negligence

This violation was properly assessed as low negligence as there is no evidence to establish that the operator knew of the violative condition before Koskiniemi discovered it and it had existed for a short period of time.

4. Citation No. 8740696/Docket No. LAKE 2014-183

Inspector Koskiniemi issued this 104(a) citation on October 31, 2013 at Plant 3 for a violation of 30 C.F.R. § 56.12004. The cited mandatory standard requires in relevant part that electrical conductors exposed to mechanical damage be protected. The narrative section of the citation states:

> The energized 480 volt cable for the Pioneer jaw crusher was pulled out of the fitting under the electrical panel on the west side of the JCI dual screener. About 1-1 ½ inches of the inner conductors were exposed to mechanical damage. The insulating covers on the inner conductors appeared to be in good condition. This condition exposes persons to shock/burn hazards of 480 volts with resulting injuries.

Ex. S-4. The violation was assessed as non-S&S, unlikely to result in injury, with low negligence and potential to cause a fatal injury. Ex. S-4. The Secretary seeks a penalty of $100.00.

The inspector was told that the cited cable energizes the jaw crusher. Tr. 76-77. As depicted in Ex. S-4b, the outer insulating cable had pulled down and out of the fitting at the bottom of the electrical panel, leaving the inner conductors exposed to the elements and potentially to mechanical damage. Tr. 77. The individual inner cables each have insulating jackets, which were undamaged. Tr. 78, 124, 336. The area where the exposed portion of the cable was located is rarely if ever accessed and the condition was not easily seen, forming the basis of the inspector's non-S&S and low negligence assessments. Tr. 78-79, 121-23.

While the Secretary established that the inner conductors were exposed, there is no evidence the exposed portion of the cable was subject to mechanical damage, as the exposed part was not in contact with other equipment and was located below the electrical panel in an area that was not accessed by miners or exposed to the weather. The violation is VACATED.

5. Citation No. 8740698/Docket No. LAKE 2014-430

This section 104(d)(1) citation was written on October 31, 2013 by Inspector Koskiniemi for another violation of 30 C.F.R. § 56.11027 at Plant 3. The lengthy Condition or Practice section of the citation reads:

> The railings on the elevated work platform on the south end of the JCI dual screener 6203 were broken in numerous places creating a fall hazard of about 6-7 feet to the ground or 3-4 feet onto the tail end of a transfer conveyor with resulting injuries. All four of the railing uprights on the south end were broken at the base, one upright on the west side was broken at the base, two uprights on the east railing was broken on the south end so that it would give way under pressure. The condition was cited two times prior to this. The last citation, #8672801, was terminated due to moving and the operator was informed that they were required to repair the railings prior to working at another mine site. The operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-5.

This violation was assessed as reasonably likely to result in a fatal accident affecting one miner, S&S, and the result of high negligence in addition to the unwarrantable failure designation. Ex. S-5. The Secretary proposes a civil penalty in the amount of $2,700.00.

About six weeks earlier on September 12, 2013, Inspector Cotie had cited the same screener platform for a violation of the same safety standard. Ex. S-5g (Citation No. 8672801).[6] The function of the screener is to shake materials back and forth to separate them by size. Tr. 39. Cotie testified that miners need to access the elevated work platform at the end of the screener to perform maintenance activities and remove materials such as large rocks from the screen. Tr. 41-42, 47. He cited the screener platform for a violation because five of the seven upright supports for the platform's handrail were broken and the remaining two were severely damaged to the point that he doubted they could support a person's weight, creating a fall hazard for miners accessing the elevated platform. Tr. 38-41; Exs. S-5g, S-5h, S-5i. Cotie testified he discussed the violation with the lead man who was running the screener and mailed a hard copy of the citation paperwork to Northern's office by certified mail. Tr. 42-43.

The Violation

On October 31, 2013, Inspector Koskiniemi again observed that numerous vertical uprights to the railing on the dual screener platform were broken, substantially compromising the integrity of the railing. Tr. 80. He was aware that Cotie had issued a citation for several of the same uprights being broken about six weeks earlier. Tr. 81-82. He identified in photographs S-5c, S-5d, and S-5e the specific parts of the damaged railing that Cotie had cited in September that were still damaged on October 31, 2013. Tr. 83-84. The Secretary presented Exhibits S-5g, S-5h, and S-5i from the September 12, 2013 inspection conducted by Cotie. Exhibit S-5g is Cotie's written citation, which states that the operator had been cited during the previous inspection (in September 2012) for the same violation, and the condition had deteriorated since then. Cotie terminated the citation on September 23, 2013 because Northern had moved its mining operations to a different location without correcting the cited condition. Ex. S-5g; Tr. 60-61. The citation contains a warning that the operator must comply with the cited standard before

[6] MSHA's Mine Data Retrieval System shows this violation has been paid and closed.

resuming activities at another mine, and failure to do so will be considered aggravated conduct constituting more than ordinary negligence. Ex. S-5g. Exhibit S-5i contains various photographs of the damaged railing as it existed on September 12, 2013. It is apparent from the photographs that the damage cited by Cotie corresponds with the damage cited by Koskiniemi on October 31, 2013, depicted in Exhibits S-5c through S-5e.

Koskiniemi said the cited platform was located above a transfer conveyor that was fed by a hopper that in turn was fed by the output conveyer exiting the screener. Tr. 85; Photograph Ex. S-5f. The platform was six or seven feet above the ground. Tr. 85; Ex. S-5. Koskiniemi described the breaks on the railing as rusted, indicating they were not fresh. Tr. 130, 154. The inspector stated that Eric Schulke was agitated when confronted with this violation but did not deny that he knew of the condition. Tr. 88-90, 127, 129. Schulke testified that he was unaware of the prior citation and was not aware of the poor condition of the railing. Tr. 414-15. However, Foreman Sam Goeden, who accompanied Koskiniemi during the October 31 inspection,[7] acknowledged that the railing supports had been broken for some time. Tr. 129-30.

I find the evidence supports a violation of the mandatory standard.

S&S

Because miners performed maintenance on this platform elevated six or seven feet above the ground and above moving conveyors and tail pulleys, the broken railings exposed them to a potentially fatal fall. Tr. 86-87. The inspector had personal knowledge of a fall from a lesser height resulting in a fatality. Tr. 87, 132. For these reasons, he determined the condition was S&S and reasonably likely to cause a fatal injury.

Northern argues that this violation is not S&S for the same reasons Citation Number 8740695 was not S&S, specifically in that the platform was not frequently accessed and would not be prior to being repaired. I find a significant distinction between the two violations, however. In the prior situation, a railing had popped out of its pocket sometime after the previous examination had been done. The evidence established that this could occur at any time from vibrations created by the machinery. The railing needed no repair. Here, the welds had broken and the rails were rusted and damaged. It is clear from Cotie's citation and the photographs taken by Koskiniemi that this condition had existed for a significant period of time and required more substantial welding and repair work to make safe. The operator failed to make these repairs despite being warned of the repercussions and had no intentions of doing so, as evidenced by the fact that they put the platform back in service without repairing it. Thus, it is clear to me that in the course of continued normal operations it was reasonably likely that this continuing violation contributed to a discrete safety hazard that was reasonably likely to result in an injury-causing event. A miner could lose his footing or lean against the railings, which would give way under pressure, resulting in a fall either onto dangerous moving equipment or to the

[7] *See* Tr. 87, 92, 129, 145 (Koskiniemi's testimony identifying Sam Goeden as the plant operator who accompanied him during the October 31, 2013 inspection); Tr. 417 (Eric Schulke's testimony confirming Goeden is a foreman at the plant). I do not credit Eric Schulke's remark that he "doubt[ed] that [Goeden] was there the whole time or all of the time" with Koskiniemi during the inspection. Tr. 417.

ground below. Such a fall would be reasonably likely to result in very serious, if not fatal, injuries. This violation is S&S.

The gravity of this violation is very serious in that it exposed at least one miner to a fatal injury.

Negligence/Unwarrantable Failure

Inspector Koskiniemi testified he characterized this violation as a section 104(d)(1) unwarrantable failure with high negligence because the mine owners were aware of the hazard and had been cited for it a month and a half before but had not repaired it. Tr. 86.

Operator's Notice of Need for Greater Compliance Efforts
& Operator's Knowledge of Violative Condition

As discussed above, Cotie had issued prior citation 8672801 for the same violative condition just six weeks earlier on September 12, 2013. In fact, Cotie noted that the platform had been cited for the same condition during the last inspection and the condition had since worsened, giving rise to his subsequent warning to repair the railing before resuming operations at any location. Exs. S-5g, S-5h. The two prior citations and Cotie's warning served to place Northern on notice that greater efforts at compliance with the cited standard were necessary.

Northern denies it had knowledge of the prior citation issued by Cotie or the condition of the railing. Resp.'s Br. at 10-12; *see* Tr. 388-95, 413-15. However, Cotie credibly testified he had discussed the violation with a company representative at the time he cited it and Koskiniemi and Cotie both testified that the citation had been sent by certified mail to Northern's address on file with MSHA. Tr. 42-43, 126-27. As discussed above, this was proper service.

Moreover, the breaks in the handrail supports were old and rusted and the photographs clearly show these were the same breaks observed by Cotie six weeks earlier. Tr. 130, 154; *compare* Exs. S-5c, S-5d, S-5e *with* photos in Ex. S-5i. The damage was obvious and had existed long enough that it should have been discovered during shift examinations. Indeed, the foreman accompanying Koskiniemi during the October 31 inspection acknowledged the damage had existed for a long time. Tr. 129-30. I conclude that the operator knew of this violation.

Operator's Efforts in Abating the Violation

Northern was aware of the violation and the need for greater compliance efforts due to the prior similar citations. Koskiniemi had returned to the mine on October 31, 2013 because he had received a commencement of operations filed by Northern indicating they had resumed operations at this location. Tr. 128. Yet the violative condition persisted with the operator's full knowledge of the situation. Tr. 129-30. In fact, when Koskiniemi issued the citation he was confronted by Eric Schulke, who accused Koskiniemi of trying to put him out of business. Tr. 88. Schulke then informed the inspector that he intended to fire up the plant in 30 minutes whether the railings were repaired or not because he had production to meet. Tr. 89. When he was told that a closure order would be issued in that event, he replied that regardless of the

closure order, he was not going to shut down production. Tr. 89-90. Eventually, he calmed down and repaired the railing. Tr. 90.

Schulke's behavior evidences Northern's intentional failure to abate the hazardous condition. I find this to be a significant aggravating factor.

Obviousness, Extensiveness, Dangerousness, and Duration of Violation

As evidenced by the inspector's photographs, this violation was obvious in that the damage to the railing would have been easy to see during a shift examination. *See* Tr. 145-46; Exs. S-5b to S-5e. The violation was extensive in that the majority of the uprights supporting the handrail were broken all the way through at the base, defeating the purpose of having a railing. *See* Ex. S-5. This violation posed a high degree of danger because it placed miners at risk of a potentially fatal fall from the elevated platform onto equipment or the ground below if they leaned on the defective railing. The evidence suggests that this dangerous violation had existed for a lengthy duration because it had been cited during the two previous inspections and the fractured pieces of the railing were rusted, showing that these clearly were not fresh breaks.

Conclusions

Based upon the two prior violations issued for the same condition, the operator's failure to abate the September 12, 2013 citation issued by Cotie, the further deterioration and extensive damage to the railings, the obviousness of the violation, the operator's knowledge of the condition both when Cotie cited it and when Koskiniemi cited it again on October 31, 2013, the length of time the condition had existed, the threat by Eric Schulke to operate the plant without repairing the railing, and the extremely dangerous hazard and serious result likely to occur therefrom, I find that the operator exhibited an extreme and reckless, if not intentional, disregard for the safety of its miners. This was an unwarrantable failure to comply with the mandatory standard. The operator also displayed high negligence.

6. Order No. 8740699/Docket No. LAKE 2014-216

Issued on October 31, 2013 by Inspector Koskiniemi, this section 104(d)(1) order alleges another incidence of rocks being ejected from a Norberg cone crusher, this time at Plant 3, without barricades, warning signs, or any devices that would provide protection against flying rocks. The order alleges a violation of the mandatory standard at 30 C.F.R. § 56.14110, which states: "In areas where flying or falling materials generated from the operation of screens, crusher, or conveyors present a hazard, guards, shield, or other devices that provide protection against such flying or falling materials shall be provided to protect persons."

The order describes the affected area as the main travelway between the crusher trailer and the control/generator trailer, which is a location frequented by miners on foot. The violation is written as an unwarrantable failure, referring back to Citation Number 6190800 (Ex. S-6g), a 104(a) citation written by Cotie on September 12, 2013 for failure to erect barricades at the Plant 3 crusher. It is also assessed as reasonably likely to result in a fatal injury affecting one miner and S&S with high negligence. Ex. S-6. The Secretary has proposed a penalty of $2,000.00.

The Violation

Koskiniemi testified that as he was walking towards one of the conveyors, he heard "a lot of noise, racketing, shaking vibrating by the cone crusher." Tr. 90. Apparently, a piece of steel had fallen into the crusher, and as he approached the area, he suddenly noticed dozens of rocks up to eight inches in size "strewn everywhere" and being ejected from the crusher without warning. Tr. 91. His photographs illustrate the size and quantity of rocks being ejected from the crusher and the debris field. *See* Exs. S-6b to S-6f. The rocks had fallen around the electrical panel, which is accessed by miners in order to start up and shut off the equipment. Tr. 95; *see* Ex. S-6e. The stairway to the control trailer, which is frequently accessed for storage purposes and to control the plant, was also within the debris field. Tr. 99, 138.

Foreman Sam Goeden was operating the crusher the day of the inspection. He made a comment to Koskiniemi about walking into the area of the rock shower, at which point Koskiniemi told him there should be some sort of warning or barricade. Tr. 91-92, 139-40. According to the order documentation, Goeden was aware that Northern had previously been cited for this hazard. Ex. S-6a.

The Respondent argues that although it is impossible to entirely eliminate ejection of rocks from the cone crusher, there were signs on the crusher itself warning of falling rocks and employees knew to stay out of the area. Resp.'s Br. at 14-15. As Koskiniemi testified, however, the signs on the crusher were not readily observable from all directions and were not obvious enough to keep him out of the area. Tr. 136, 147; *see* Exs. R-2, R-3. There were employees on-site and rocks were being ejected some 15 to 20 feet outward right up to the control trailer, the electrical panel, and other regularly accessed sites. Ex. S-6a; Tr. 151-53. Section 56.14110 requires protection from such flying or falling materials. The regulatory language is much stronger than merely advising that employees must be aware of the danger: the regulation requires actual protection against the danger by use of a guard, shield, or other device. 30 C.F.R. § 56.14110. Barricades and warning signs at the perimeter of the debris field would have accomplished this protection, but were not provided. This violation has been established.

S&S/Gravity

The violation was assessed as S&S because the cone crusher was ejecting dozens of rocks large enough to cause serious injuries 15 to 20 feet outward into a well-traveled area. Ex. S-6a; Tr. 91, 99. This contributed to the discrete safety hazard that miners would be struck in the head or other parts of the body by flying rock.

Northern had been issued three prior citations for this same hazard yet had failed to take any remedial action before putting the Plant 3 cone crusher back into operation in an area that was frequently accessed. Exs. S-1, S-1e, S-6g. This shows that the hazard would have continued to exist if normal mining operations had continued. The electrical panel that employees used to start and stop the equipment and the stairway to the control trailer were both within the crusher's debris field, establishing a likelihood that miners would walk through the debris field during normal mining operations. Tr. 95, 99; *see* Ex. S-6e. Because the debris field was a frequently accessed area and the operator displayed no intent to correct the hazard, I find

that the hazard contributed to by this violation was reasonably likely to result in injury during continued normal mining operations.

The rocks being ejected from the cone crusher were up to 8 inches in diameter. Ex. S-6a. Koskiniemi testified that hard hats would have been insufficient to prevent serious injury in the event of being struck by one of these large rocks. Tr. 99. I find that the evidence establishes a reasonable likelihood that any injury caused by this violation would be very serious, if not fatal.

This violation is S&S.

The gravity of this violation is very serious in that it exposed any miner within a substantially large radius of the cone crusher to a potentially fatal injury.

Negligence/Unwarrantable Failure

Inspector Koskiniemi testified he issued this order under section 104(d)(1) because the operator had been cited previously for the same condition and was aware of the hazard, yet once again he had observed rock strewn everywhere without the operator taking any action to address the problem. Tr. 97-98.

Operator's Knowledge of Existence of Violation

The operator knew of this violation. Inspector Cotie had previously issued citations to the operator on September 11, September 12, and October 22, 2013 for the same hazard. Exs. S-1e (Citation No. 6190795), S-6g (Citation No. 6190800); S-1 (Citation No. 8672802). Cotie had discussed each of the prior citations with company representatives at the time of issuance. Tr. 21-24, 37-38, 54-56. Eric Schulke, the overseer of the pit, was personally aware that ejection of rocks from the cone crushers was a problem. *See* Tr. 373-74, 384-87, 403-13. The plant operator, Sam Goeden, was also aware of the problem. Ex. S-6a.

Operator's Notice that Greater Efforts at Compliance Were Necessary

The three prior similar citations and Cotie's discussions with company representatives placed Northern on notice that greater efforts at compliance were necessary. The most recent prior similar citation, Citation Number 8672802, had been issued just a week earlier and assessed as a 104(d)(1) unwarrantable failure to comply with a mandatory safety standard. Ex. S-1. Although that citation had been issued under a different mandatory standard, the hazard was the same, and the unwarrantable failure designation should have served as a strong warning to the operator that greater compliance efforts were needed. In addition, Northern had been specifically notified on September 23, 2013 at the time Cotie terminated Citation Number 6190800 that failure to correct the hazard in the future would be considered aggravated conduct constituting more than ordinary negligence. *See* Ex. S-6g.

Duration of Violation & Operator's Abatement Efforts

This violation had existed at least since Citation Number 6190800 was issued at Plant 3 on September 12, 2013. Most likely the condition dated back to April 2013 when Northern's operating season began, as there is no indication that this was an unusual condition at the mine or that it had arisen suddenly.

Despite the three prior citations, MSHA's specific warnings to correct the hazardous condition, and the operator's full knowledge of the situation, Northern took no action to abate the condition from the time it was first cited in September until this violation was issued six weeks later. I find that the operator's failure to abate the violation for six weeks showed a blatant disregard for safety.

Obviousness, Extensiveness, and Degree of Danger Posed

This violation was very obvious. Dozens of rocks up to eight inches in size were "strewn everywhere" in the vicinity of the crusher. Tr. 91. The photographs the inspector took show airborne rocks being flung from the crusher and large rocks piled on top of energized electric cables and in the main travelway next to the electrical control panel. Exs. S-6b, S-6d, S-6e, S-6f. The danger was clear and the violation was occurring in plain sight of the crusher operator, Foreman Goeden.

This violation also posed a high degree of danger. The crusher was throwing large, heavy rocks 15 to 20 feet outward into areas frequently traversed by miners, including the main travelway and the area where the electrical panel and control trailer were located. *See* Tr. 95, 99, 138, 151-53; Exs. S-6a, S-6d, S-6e. This placed miners at risk of very serious or fatal injuries regardless of whether they were wearing safety gear.

This condition was extensive in that its scope and magnitude, including the size of the rocks and the large area affected, put any miner within a substantial radius of the crusher in danger of potentially fatal injuries from flying rock.

Conclusions

Considering the operator's knowledge of this violation, the three prior citations and the specific warnings from Cotie that failure to correct the condition would constitute aggravated conduct, the obviousness of the violative condition, the high degree of danger it posed within an extensive and frequently traveled area of the mine, and the fact that the violation had existed for more than six weeks without being abated, this violation was an unwarrantable failure.

Because the operator knew of this violation and there are no mitigating factors, the operator also demonstrated high negligence.

7. Citation No. 8740701/Docket No. LAKE 2014-183

Koskiniemi issued this 104(a) citation during his October 31, 2013 inspection at Plant 3 for another alleged incidence of damage to an electrical cable under 30 C.F.R. § 56.12004. Koskiniemi observed that the outer covering of the 480-volt cable to the Kolberg Superstacker conveyor was cut in two places, exposing the inner conductors to mechanical damage. The inner

conductors were in good condition. The damaged areas were approximately nine feet above the ground. Koskiniemi assessed the violation as unlikely to result in a permanently disabling injury to one miner, non-S&S, and the result of low negligence. Ex. S-7. The Secretary proposes a penalty of $100.00.

The Violation

The damaged cable runs from the electrical panel to the conveyor, which moves crushed rock to the stockpiles. Tr. 101. The inspector surmised that the damage was caused by the cable rubbing on steel or being pinched. Tr. 102; *see* Ex. S-7d (photograph depicting metal equipment near cable). The area where the damage occurred is not easily accessed. Tr. 104.

The Respondent argues that § 56.12004 was not violated because the damaged portions of the cable were not subject to mechanical damage. Resp.'s Br. at 16-17. However, the very fact that the cable's outer jacket was damaged – in this case, apparently by rubbing or pinching – gives rise to an inference that the exposed interior of the cable will be subject to the same damage if the condition is not corrected. *See Carmeuse Lime & Stone*, 33 FMSHRC 1654, 1661-63 (July 2011) (ALJ); *Sangravl Co.*, 33 FMSHRC 1242 (May 2011) (ALJ). As explained by the inspector, the damage to the outer jacket meant that the cable's inner insulation was "out in the harsh elements" exposed to mechanical damage through contact with rocks, dirt, water, and pinch points and sharp edges on the metal equipment nearby.[8] Tr. 110-11, 141-43. Accordingly, I reject Northern's argument that the cable was not subject to mechanical damage.

Respondent's witness, Master Electrician Dean Prestby,[9] opined that the damaged cable was adequately protected and posed no risk to humans because the inner insulation was intact. Tr. 340-42. However, damage to an electrical cable's outer cover gives rise to the discrete safety hazard of an electric shock in the event that the exposed inner insulation is damaged by the same work conditions that damaged the outer cover. Thus, the conductors are not adequately protected when the outer cover is damaged, which constitutes a violation of § 56.12004 due to the strict liability nature of the Mine Act and the mandatory safety standards. *See Northshore Mining Co.*, 35 FMSHRC 1889, 1893 (June 2013) (ALJ); *Concrete Materials, Div. of Sweetman Constr. Co.*, 35 FMSHRC 690 (Mar. 2013) (ALJ); *Carmeuse Lime & Stone*, 33 FMSHRC 1654; *Sangravl*, 33

[8] Northern argues I should adopt a definition of "mechanical damage" that includes only "damage to electrical conductors as part of a machine's operative function . . . or from being exposed to operating machines." Resp.'s Br. at 8. However, the language of the mandatory safety standards is intended to be interpreted broadly and the Secretary and Commission have never adopted such a narrow definition of mechanical damage. *See, e.g., Northern Illinois Serv. Co.*, 36 FMSHRC 2811, 2819 (Nov. 2014) (ALJ) (finding that "the effects of weathering and/or friction" can constitute mechanical damage); *Northwest Aggregates*, 20 FMSHRC 518, 526 (May 1998) (ALJ) (finding that a cable was subject to mechanical damage when moisture and dirt could enter it). The Secretary's interpretation of a mandatory safety standard is entitled to deference where reasonable, *Auer v. Robbins*, 519 U.S. 542, 461 (1997), and in this case it is reasonable to conclude that the cable was exposed to mechanical damage.

[9] Prestby testified he is an electrical contractor with 28 years of experience working on mining equipment such as crushers and hot mix plants. He is licensed as a Master Electrician in Minnesota and North Dakota. Tr. 332-33.

FMSHRC 1242; *Carmeuse Lime, Inc.*, 29 FMSHRC 266 (Mar. 2007) (ALJ); *John Cullen Rock Crushing & Gravel*, 17 FMSHRC 375 (Mar. 1995) (ALJ). Prestby did not know that damage to a cable's outer jacket violates § 56.12004 and generally displayed a lack of familiarity with MSHA's safety regulations. *See* Tr. 356-58. For example, he said he would not cut the power to make an electrical repair to a cable if there were no bare wires showing, but this would be a violation of MSHA's lock out/tag out requirements. Tr. 360-61. Prestby was also very reluctant to admit on cross-examination that a cable's inner wires are less protected when the outer cover is missing, and suggested that rather than repairing a damaged cable jacket or providing another layer of insulation, his preferred method for preventing contact with the inner wires was simply to avoid touching them. Tr. 359-61. This testimony detracts from his credibility and indicates to me that regardless of his electrical background, he is far more willing to take short cuts and expose persons to danger than the Mine Act contemplates. For these reasons, I discredit his opinion that the cable's inner conductors were adequately protected.

I find that this violation has been established.

Gravity & Negligence

This violation is non-S&S and unlikely to cause injury because the damaged portion of the cable was not easily accessed by miners and the inner conductors were in good shape. Tr. 104. Low negligence is appropriate because the damage to the cable was not easily seen due to its location approximately nine feet above the ground. Tr. 105.

8. Citation No. 8740827/Docket No. LAKE 2014-111

Inspector Sichmeller issued this 104(a) citation on September 4, 2013 for a violation of 30 C.F.R. § 56.12004 at the Portable Crusher. In this instance, the outer protective jacket of the 480-volt power cord supplying power to the superior power stacker was cut in four places. The cuts ranged from one to two inches in length and exposed the inner conductors, which were found to be discolored from exposure to dirt and moisture. Ex. S-8.

This violation was assessed as S&S, reasonably likely to cause a fatal injury affecting one miner, and the result of moderate negligence. The violation was terminated on September 11, 2013 because the mine had closed without being inspected for compliance. A warning was included in the termination paperwork placing the operator on notice that the hazard must be corrected before putting the cable back into use to avoid an unwarrantable failure violation. Ex. S-8. The Secretary has proposed a $1,944.00 penalty.

The Violation

Foreman Alan Speck told Sichmeller that this was a 480-volt cable. Tr. 161. It ran from the generator down the conveyor frames and connected to a number of pieces of equipment. Tr. 164. It had been used earlier in the day. Tr. 161. The largest of the cuts the inspector observed in the cable's outer jacket was a half inch or more in width and two inches long. Tr. 159-60; *see* Ex. S-8c. He could not determine if the inner conductors were damaged or not because there was so much dirt packed inside the cable. Tr. 159.

The Respondent again argues that it did not violate § 56.12004 because the cable was not exposed to mechanical damage and was adequately protected in that its inner insulation and conductors were intact. Resp.'s Br. at 17-18. I reject these arguments for the reasons discussed above in connection with Citation Number 8740701. The cited cable was subject to mechanical damage in that the same conditions that had damaged the outer jacket could also damage the inner insulation, exposing miners to an electric shock hazard due to the exposure of the inner conductors. In fact, there is evidence the inner parts of the cable had already incurred mechanical damage, as the insulation was discolored and encrusted with mud and dirt and some of the inner conductors were visible. Tr. 251-53. The inspector could not even tell whether the conductors were intact. Tr. 159. Although Prestby testified that the cable was adequately protected and posed no shock hazard, he did not observe it in situ and apparently failed to consider the evidence that the cable's interior was already damaged. Tr. 358. For the reasons noted above, his opinion is further discredited because his views on safety do not comport with the protective purpose of the Mine Act and regulations.

I find that the cable's inner conductors were not adequately protected from mechanical damage. This violation has been established.

S&S/Gravity

Sichmeller assessed this violation as S&S because, unlike the situation cited by Koskiniemi, the condition of the inner conductors could not be determined because they were covered with dirt and moisture. It was apparent, however, that there was discoloration, indicating that deterioration had already set in. Tr. 162, 251-52. Also considered was the location of the cable. Because the cable connected conveyors and other pieces of equipment, it crossed over frames and other "exposure points," making mechanical damage likely. Tr. 163. The final consideration was that the electrical power system to which the cable was attached was improperly grounded at the time of the inspection. Had a miner made contact with the damaged cable while it was connected to the improperly grounded system, the miner could have become the ground fault, leading to electrocution. Tr. 163-64, 275-76. The inspector believed that the injury reasonably likely to occur would be a fatality, based upon his knowledge of the mining industry. Tr. 164.

I find that this violation contributed to the discrete safety hazard that a miner would come into contact with the cable's inner wires. This hazard was reasonably likely to result in injury during continued normal mining operations based on the cable's location, which was subject to both continued mechanical damage and human contact; the fact that the cable's inner insulation was already damaged, exposing some of the inner wires; the improper grounding of the electrical system to which the cable was attached; and the voltage carried by the cable. These factors establish a reasonable likelihood of human contact with a bare conductor and resultant electrical shock. I reject Prestby's contrary testimony that the cable posed no shock hazard because he did not observe the wires himself, and moreover he appears not to have accounted for the preexisting damage to the cable's inner insulation that had already exposed the inner wires, which by his own testimony would have presented a shock hazard. *See* Tr. 358-59. This was a 480-volt cable capable of producing an electrical shock that would cause very serious or even fatal injuries.

Because this violation contributed to a discrete safety hazard that was reasonably likely to result in serious injury with continued normal mining operations, the violation is S&S.

The gravity of this violation is serious in that it posed a risk of serious injury or death due to electrical shock.

Negligence

Moderate negligence is appropriate because the four damaged sections of the cable were relatively large, were visible from the main travelway alongside the conveyors, and should have been discovered during a workplace examination. Tr. 165.

9. Order No. 8740828/Docket No. LAKE 2014-110[10]

This section 104(d)(2) order was written on September 4, 2013 by Inspector Sichmeller for a violation of 30 C.F.R. § 56.12025 at the Portable Crusher. The cited mandatory standard states in pertinent part: "All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection." 30 C.F.R. § 56.12025. The narrative section of the citation reads as follows:

> There was not ground provided for on site (sic) Generator trailer and the ground rod provided for the job trailer was pulled and sitting in the Job trailer. This did not ensure proper grounding of the electrical equipment and exposed personnel to the electrical hazards. Reportedly by the on site (sic) foreman he had pulled the ground for the job trailer and had never reinstalled prior to putting the plant back in operation today, and that he was never provided anything for grounding the Main generator trailer and the trailer has been on site since he arrived and moved to this location in 8-13-2013. The company was cited for this violation on the past regular safety inspection. The company has engaged in aggravated conduct constituting more then (sic) ordinary negligence by not ensuring that proper grounding of equipment is being conducted or providing proper grounding equipment to be installed at the site. This violation is a (sic) unwarrantable failure to comply with a mandatory standard.

Ex. S-9.

---

[10] Initially issued as a 104(d)(1) citation, this violation was amended to a 104(d)(2) order after Sichmeller reviewed the mine file and realized the mine was on the d-chain. Tr. 166. The d-chain refers the Mine Act's graduated enforcement scheme promulgated in section 104(d). Once a section 104(d)(1) order has been issued, subsequent similar violations at the same mine must be issued as 104(d)(2) orders until such time as an inspection of the mine discloses no similar violations. 30 U.S.C. § 814(d)(2); *see Lodestar Energy, Inc.*, 25 FMSHRC 343, 345 (July 2003). During the most recent previous inspection of the Portable Crusher slightly less than a year earlier on September 25, 2012, the operator had been issued a 104(d)(1) citation (No. 8665360) and two 104(d)(1) orders (Nos. 8665362 and 8665263), one of which was issued for a grounding violation. *See* Ex. S-14; Ex. S-9e. Sichmeller's amendment of the type of issuance was based on these prior violations.

The violation was assessed as reasonably likely to result in a fatal injury to one miner, S&S, and the result of high negligence. The citation states that the cited standard was violated on one prior occasion at the mine within the preceding two years. Ex. S-9. The Secretary proposes a penalty of $7,176.00 for this violation.

The Violation

*Secretary's Evidence*

As Sichmeller was conducting his inspection, his attention was drawn to the main generator trailer, the metal trailer housing the electrical system that powers all the plant equipment, by a sign posted on the trailer stating that it must be grounded. Tr. 167, 172; *see* Ex. S-9b. Electrical grounding is the process of connecting an electrical circuit to the ground to make the earth part of the circuit. 30 C.F.R. § 56.2. This can be accomplished through various means, such as a ground plate or a rod driven into the ground and wired to the electrical system. Tr. 170.

Sichmeller saw there were no ground plates or rods at Northern's generator trailer and it was not in direct contact with the ground because it was sitting on tires and wooden blocks. Tr. 167-68; *see* Ex. S-9c. He discussed the situation with Foreman Alan Speck. The generator trailer had recently been moved to the site on August 13, 2013. Tr. 168. Speck had spoken with Kyle Schulke about grounding the generator trailer but nothing was ever brought to the site to provide grounding. Tr. 176; Ex. S-9a. Sichmeller observed a ground rod hanging in a different trailer, the job trailer, but the rod was not in use. *See* Ex. S-9d. Speck said the rod had previously been used to ground the job trailer but was pulled before Labor Day weekend to avoid vandalism and was never reinstalled. Tr. 176-77.

Northern had been issued a 104(d)(1) order by Inspector John Koivisto approximately one year earlier on September 25, 2012 under similar circumstances. In that instance, the inspector found the ground rod inside the generator trailer. The inspector determined that the foreman on duty had engaged in aggravated conduct constituting more than ordinary negligence in that the foreman was aware the trailer needed to be grounded but simply had not taken the time to install the ground rod. Ex. S-9e.[11]

*Respondent's Evidence*

Kyle Schulke testified based on his experience working at the mine and conversations with electricians that ground rods are useful only for guarding against lightning strikes. Tr. 288, 322, 331. He believed that all the equipment at the plant was tied together in a single system or circuit and that grounding at any point in the system was sufficient to protect all of the linked components. Tr. 288-89, 293, 316, 327. At first he testified the system was grounded by means of a panel lying on the ground with all the wires running to it. Tr. 288-89, 293. He later said that the ground rod at the job trailer provided grounding for the entire system. Tr. 314. Subsequently he stated that even though the ground rod at the job trailer had been pulled over Labor Day

[11] The Mine Data Retrieval System indicates this order, Order No. 8665362, was paid without contest and is closed.

weekend and not replaced, the entire system was still grounded by virtue of the interlinked plant equipment that was in contact with the ground. Tr. 317-18. He also stated without explanation that the generator itself was "internally" grounded. Tr. 292-93.

Master Electrician Prestby testified ground rods serve no purpose and have no effect on electrical systems. Tr. 347, 370-71. He prepared a report stating that a ground rod has "nothing to do with personal safety" because it cannot clear a ground fault, since it does not provide a path back to the power source to trip the circuit breaker and thereby disconnect the electrical current. Ex. R-1. On cross-examination, however, he conceded that the generator trailer needed to be provided with some method of grounding and that MSHA prefers use of a grounding electrode such as a plate or rod. Tr. 364-65.

*Analysis*

The cited generator is the source of electrical power to the entire plant. Electricity tends to run back to the source in the case of a short circuit, making the fault to ground at the generator very important. Tr. 182. Power would run back to the generator if a short circuit were to occur, and anyone coming into contact with the metal generator trailer would suffer a shock because no grounding electrode was provided and the trailer was on wooden blocks and rubber tires, meaning the metal frame was not in contact with the ground to serve as an alternate means of protection. Also significant is the fact that during the inspection, power cables running from the generator to the conveyors and other electrical equipment were found to be deteriorated, posing an additional shock hazard.

It appears from the two almost identical grounding violations issued during two consecutive inspections that Northern is extremely lax in its adherence to the mandatory grounding standard. *See* Exs. S-9, S-9e. Northern offered testimony that the entire electrical system at the mine was grounded, but I find this testimony to be not credible and manufactured after the fact. Kyle Schulke is not an electrician and has no formal training in this discipline, and his testimony was inconsistent and unconvincing. Tr. 286-87. Prestby's testimony was evasive but ultimately he grudgingly conceded on cross-examination that the generator trailer should have been grounded.[12] Tr. 286-87, 364-65. The evidence does not demonstrate that there was a

---

[12] Prestby's testimony on this point exemplifies the evasiveness and reluctance to admit obvious facts that detract greatly from his credibility:

Q: Okay. Do you agree that the generator trailer needed to be grounded?
A: The generator needed to have an equipment grounding conductor. Grounded as far as connected to the earth, or cords, or what?
Q: I'm asking in general.
A: That's a loose term, grounding is a loose term.
Q: So it needed to have some kind of grounding, correct, regardless of it was earth grounding or wire grounding?
A: Wire grounding, yes.
Q: It needed to have some kind of grounding?
A: Yes.

Tr. 363-64.

ground on the mine's electrical system at any point. Furthermore, the generator as the source of the power was the most important component to be grounded. This violation is established.

S&S/Gravity

The inspector assessed this violation as S&S. He testified based upon his training and knowledge of mining industry fatalities that improper grounding is reasonably likely to result in fatal electrocutions. Tr. 186.

There is sufficient evidence to conclude this violation contributed to the discrete safety hazard of the generator not being properly grounded, which could result in a potentially fatal electrical shock if a miner were to inadvertently become a ground fault. Because there was a violation of a mandatory safety standard which contributed to a discrete safety hazard and any injury resulting from the hazard would likely be serious, the first, second, and fourth *Mathies* elements are satisfied.

However, there is no evidence of the likelihood a ground fault would occur or the likelihood a miner would come into contact with any source of electrical shock resulting from the failure to ground the generator trailer. The Secretary presented no evidence as to where the generator trailer was located, who accessed the area, whether access had occurred while the trailer was ungrounded, and when or how often access would be expected to occur during continued normal mining operations. The Secretary also did not present evidence of any factors or conditions, such as wet conditions around the trailer, that would have increased the likelihood of a ground fault or other dangerous electrical event occurring. There is also no evidence as to how often or why someone would contact one of the damaged cables that the inspector cited as making this violation more serious. Because the Secretary has not established a reasonable likelihood of human contact or a ground fault, he has not established a reasonable likelihood the hazard this violation contributed to would result in an injury-causing event during continued normal mining operations. For this reason, the evidence does not establish this violation is S&S.

Although the violation is not S&S, its gravity is serious by virtue of its contribution to the discrete safety hazard of a potentially fatal electrocution accident.

Negligence/Unwarrantable Failure

The inspector believed that high negligence was appropriate here because the operator had previously received a 104(d)(1) citation from Koivisto for the same hazard and because Foreman Speck had discussed the need for grounding with Kyle Schulke, yet nothing had been done to ground the trailer. Tr. 187. The same considerations led the inspector to issue this violation as a 104(d)(2) unwarrantable failure order. Tr. 188. The inspector's testimony does not address the unwarrantable failure factors, but the Secretary argues in his closing brief that the unwarrantable failure designation is appropriate because of the additional electrical violations issued the same day, the prior similar citation issued by Koivisto a year earlier, the conversation between Speck and Schulke, and the fact that the electrical system had not been properly grounded since the operator moved to the site on August 13, 2014. Br. of Sec'y at 17.

Operator's Notice that Greater Efforts at Compliance Were Necessary

Inspector Koivisto had cited the mine for the same violation during the previous annual inspection on September 25, 2012. That violation was issued to a different foreman, Jeff Johnson, who had promptly abated the condition by reinstalling the ground rods, which had been pulled and sitting in the generator trailer at the time of the inspection. Ex. S-6e. Kyle Schulke testified he was not familiar with the prior violation. Tr. 319.

The Secretary's reliance on the prior similar violation as a factor supporting unwarrantable failure implies that the violation placed the operator on notice that greater efforts at compliance with § 56.12025 were necessary. However, a single prior violation does not serve to place the operator on notice of an ongoing serious problem at its mine. Also, because the prior violation was easily abated by a different foreman and promptly terminated without the involvement of any other company representatives, I credit Schulke's testimony that he was not aware of the prior violation and I find that the violation likely did not engender in the operator a heightened awareness of the need for greater compliance efforts.

Duration of Violation

This violation existed at least from the time the generator trailer was moved to the site on August 13, 2013 to the time the inspector noticed it on September 4, 2013. The inspector confirmed through his conversation with Foreman Speck and his review of continuity and ground resistance testing records that the generator trailer had not been grounded the entire time it was on-site. Tr. 175-76. Thus, this violation lasted at least three weeks.

Operator's Knowledge of Existence of Violation
& Abatement Efforts

Foreman Speck told the inspector he had discussed the need for grounding with Kyle Schulke when the generator trailer was moved to the site, yet no form of grounding had been provided. Tr. 176; Ex. S-9a. Schulke said he believed the entire electrical system at the site was grounded through alternative means, but his explanation of how the system was grounded was not persuasive. Additionally, Prestby, who set up the system, admitted that the trailer needed to be grounded. Tr. 363-64. I do not credit mine management with a good faith belief that the generator trailer was in compliance with the requirements of § 56.12025, which clearly required the trailer itself to be grounded. The operator knew of this violation.

Although the operator knew of this violation, no abatement efforts were undertaken during the three weeks the violation existed.

Obviousness, Extensiveness, and Degree of Danger Posed

The Secretary has not presented evidence that this condition was obvious, extensive, or posed a high degree of danger to miners. There is no evidence as to where the generator trailer was located, who accessed it, how often, or why, making it impossible to determine whether the violative condition was readily visible and to whom; whether it would have been obvious during

a shift examination; whether it affected an extensive area or number of people; or whether there was a likelihood of human access that would increase the danger posed by the violation. There is also no evidence of the likelihood that a dangerous electrical event such as a ground fault would occur, which hinders my ability to assess the degree of danger posed. However, there is evidence that the violation was not extensive in that the only measure required to abate it was to reinstall the ground rod at the generator trailer.

Conclusions

On balance, I find that this violation is not an unwarrantable failure. Although the operator knew of this violation and failed to take any abatement efforts for the three weeks it existed, the evidence does not show that the violation was obvious, extensive, or highly dangerous to miners, or that the operator was on notice of an ongoing problem that required greater compliance efforts. The operator's conduct demonstrated a disinterest in worker safety, but the evidence is insufficient to establish that this conduct rose to the level of intentional misconduct or a reckless disregard for safety. Accordingly, I find that the Secretary has not presented enough evidence to support an unwarrantable failure designation. Because this violation is not an unwarrantable failure, the type of action is hereby modified to a section 104(a) citation.

High negligence is appropriate here, as the grounding rod was intentionally pulled out and never reinstalled when the generator trailer was moved to this location. The fact that a grounding rod was found in the job trailer indicates the operator was well aware of the necessity for grounding but was lax in providing such grounding and disinterested in the safety of the miners in this respect.

10. Order No. 8740829/Docket No. LAKE 2014-110

Sichmeller issued this section 104(d)(2) order[13] on September 4, 2013 for another electrical violation relating to grounding at the Portable Crusher. This violation was written under 30 C.F.R. § 56.12028, which requires continuity and resistance testing of grounding systems immediately after installation, repair, or modification and annually thereafter. The safety standard also requires the operator to keep a record of the resistance measured during the most recent tests that can be made available to the Secretary or his representatives upon request. 30 C.F.R. § 56.12028. Sichmeller issued this violation after determining that such testing had not been conducted at the main generator trailer since its installation at the site on August 13, 2013. Testing also had not been conducted on the job trailer when it was placed back in service after its grounding system had been modified by pulling the ground rod before Labor Day weekend. Ex. S-10.

This violation was assessed as reasonably likely to result in a fatal injury to one miner, S&S, and the result of high negligence. The citation also states the violation is an unwarrantable failure and references the fact that the cited standard had been violated on one prior occasion at

[13] As with violation 8740828, Sichmeller initially wrote this violation as a 104(d)(1) order and later modified it to a 104(d)(2) order.

the mine within the preceding two years. Ex. S-10. The Secretary proposes a penalty of $7,176.00 for this violation.

The Violation

The circumstances of this violation are similar to those surrounding violation 8740828. Sichmeller testified that under the cited mandatory safety standard, continuity and resistance testing, which is a means of verifying adequate grounding by measuring "earth resistance to ground" in ohms, should have been conducted at the generator trailer when it was installed on-site on August 13, 2013 to ensure it was properly grounded. Tr. 190-92. The operator's records show the job trailer and various other equipment underwent a continuity test on August 14, 2013, but the main generator trailer was not tested. Ex. S-10b; Tr. 320. Kyle Schulke had performed the test starting from the ground rod at the job trailer. Tr. 314-15.

Inspector Sichmeller was puzzled as to why the job trailer was provided with a ground rod, which he believed was unnecessary. *See* Tr. 177-80, 273-74. Nonetheless, because the job trailer had a grounding system and that system had been modified when the ground rod was pulled before Labor Day weekend, he felt that an additional continuity and resistance test should have been conducted on the job trailer when mining operations resumed after Labor Day. Tr. 192, 196.

A 104(d)(1) order had been issued by Inspector Koivisto a year earlier for a violation of the same safety standard under somewhat different circumstances. In that instance, Koivisto had found no records at all that continuity and resistance testing had been performed. The citation was terminated after the operator provided documentation that resistance measurements had been taken for various equipment at the mine, including the generator. Ex. S-10d.

Relying on its previously rejected argument that the generator trailer does not need to be independently grounded, Northern contends the August 14, 2013 continuity and resistance test did not need to include a resistance measurement at the generator. Resp.'s Br. at 21. Prestby also suggested that since the generator was the starting point of the circuit, it would have no individual resistance and therefore would not need to be tested. Tr. 368. I find no basis for the assertion that resistance testing does not need to be conducted at the generator. The mandatory safety standard does not provide an exception for the starting point of the circuit. Moreover, as the source of power, the generator poses the greatest risk of shock, since power tends to flow back to the source in the event of a short circuit. Thus, of all the components of the electrical system, it is particularly important to conduct resistance testing on the generator to ensure it is safely grounded. The operator conducted such testing to terminate the prior citation written by Koivisto and its witnesses testified resistance testing should start at the generator. Tr. 262, 274-75, 368; Ex. S-10d. Clearly the operator knew the generator should be tested yet failed to do so. This violation has been established.

The operator also failed to perform a continuity and resistance test at the job trailer after its grounding system was modified by pulling the ground rod. Presumably the test was not performed because the operator had never reinstalled the ground rod. The operator should have

reinstalled the ground rod and tested it to make sure it was functioning properly. Because no test was conducted, this was also a violation of § 56.12028.

S&S/Gravity

The inspector designated this violation S&S. The discrete safety hazard contributed to by this violation is the same as that posed by the operator's failure to ground the generator trailer. Specifically, if adequate continuity and resistance testing is not conducted, the operator has no way to detect inadequate grounding, which could result in a serious, potentially fatal electrical shock. Accordingly, I find that this violation contributed to a discrete safety hazard and could have been expected to cause a reasonably serious or even fatal injury.

However, the Secretary has presented no evidence that a ground fault or other dangerous electrical event was likely to occur and no evidence of the likelihood of human contact if such an event were to occur. With respect to the job trailer, the Secretary has not shown that the trailer posed a shock hazard. In fact, the inspector suggested that the job trailer's grounding system, although subject to the testing requirements of § 56.12028, may not actually be necessary. If the job trailer does not need to be grounded, presumably it does not pose a shock hazard at all. With respect to the generator trailer, the Secretary has failed to present evidence tending to show the trailer's location, the likelihood miners would access that area, or the existence of any conditions that would make a ground fault likely. In short, the evidence is insufficient to establish a reasonable likelihood the hazard contributed to by this violation would result in an injury-causing event during continued normal mining operations. Because the third *Mathies* prong is not satisfied, I find that this violation is not S&S.

Although the violation is not S&S, its gravity is serious by virtue of its contribution to the discrete safety hazard of a potentially fatal electrocution accident.

Negligence/Unwarrantable Failure

The inspector assessed this violation as an unwarrantable failure with high negligence because the operator had offered no mitigating circumstances, and because the inspector believed the prior similar violation issued by Koivisto on September 25, 2012 had placed the operator on notice that it needed to make greater compliance efforts. Tr. 199-200. The Secretary proffers the same arguments it offered for violation 8740828 to support the unwarrantable failure designation. Br. of Sec'y at 17.

For the same reasons that violation 8740828 was not an unwarrantable failure, I conclude that this one is not either.

Whether the Violation Was Extensive, Obvious, and Posed a High Degree of Danger

The hazard posed by this violation was the same as that posed by violation 8740828 – an electrocution hazard stemming from failure to ground the two trailers. The Secretary has presented no evidence concerning the location of the cited trailers, who accessed them, how often, or why. It is unclear what area was affected and who would have been endangered. There

is also no evidence as to whether conditions were wet or dry in the area or whether a ground fault was likely to occur, which would have increased the degree of danger if proven. I find that the evidence is insufficient to show this hazard was extensive, obvious, or posed a high degree of danger to miners.

Operator's Notice that Greater Compliance Efforts Were Necessary

Although the operator was issued a prior similar violation on September 25, 2012, the circumstances of that violation differ significantly from this one. On the prior occasion, the operator was cited for failure to conduct any continuity and resistance testing at all when it began operations at a new worksite. Ex. S-10d. By contrast, here, the operator produced documentation showing it had conducted some testing on August 14, 2013 after setting up operations at a new location. Ex. S-10b. However, the testing was deficient in that it did not include the generator trailer, and additionally, the operator had failed to conduct a new test when the electrical system was modified by pulling the ground rod at the job trailer. The prior violation would not have placed the operator on notice that these specific circumstances would necessitate greater compliance efforts.

Operator's Knowledge of Existence of Violation

The generator trailer had been included in the continuity and resistance testing performed on September 25, 2012 to terminate the prior violation issued by Koivisto. *See* Ex. S-10e. This shows the operator was aware the generator trailer needed to be included in such testing, despite its assertions to the contrary. Kyle Schulke had conducted a continuity test on August 14, 2013 when mining operations began at the new site and knew the generator trailer was not included in the test.

The operator also knew that the ground rod had been pulled at the job trailer and should have known that it was violating the mandatory safety standard by not reinstalling the rod and re-testing the grounding system at the job trailer.

Duration of Violation & Operator's Abatement Efforts

This violation began with respect to the generator trailer when the operator failed to include it in the initial continuity and resistance testing conducted on August 14, 2013. Thus, the violation lasted for three weeks before the inspector cited it. The operator took no efforts to abate the violation during this time period.

With respect to the job trailer, the violation existed for less than a day. The job trailer's grounding system had been modified before the Labor Day holiday, and the system should have been re-tested on the day of the inspection when mining operations resumed.

Conclusions

The operator should have known of this violation, but there is no evidence the violation was extensive, obvious, or posed a high degree of danger. With respect to the job trailer, the

duration of the violation was very brief. Although the violation lasted longer with respect to the generator trailer, which had not been tested since it was moved to the mine site, the operator had conducted some continuity testing when it moved to the site and was not specifically on notice from MSHA that greater compliance efforts were necessary. I find that the evidence is not sufficient to establish that this violation was an unwarrantable failure. The violation is hereby modified to a section 104(a) citation.

High negligence is appropriate here because the operator was aware of the necessity for continuity and resistance testing, as evidenced by its completion of such tests in the past, but failed to conduct proper tests.

11. Citation No. 8740830/Docket No. LAKE 2014-111

Sichmeller issued this 104(a) citation during his September 4, 2013 inspection of the Portable Crusher after finding that the rear brake light, turn signal, and tail light on the CAT 980H front end loader did not function when tested, in violation of 30 C.F.R. § 56.14100(b). He cited a collision hazard as a likely result of this condition and assessed the violation as S&S, reasonably likely to cause an injury resulting in lost workdays or restricted duty for one miner, and the result of moderate negligence. Ex. S-11. The Secretary proposes a penalty of $585.00.

The cited mandatory safety standard states, "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." 30 C.F.R. § 56.14100(b). Whether a defect is corrected in a timely manner depends on how long the defect existed and when the operator knew or should have known about it. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 715 (July 2001). Where there is no evidence as to when the defect arose, the Secretary has not established that it was not corrected in a timely manner. *Id.*

Here, the Secretary has presented no evidence as to how long the 980 loader's rear brake light, turn signal, and tail light were defective. The same loader was previously cited for the same defect on September 25, 2012. Ex. S-11b. That was almost a year earlier, which is not significant for this type of violation. Blown out light bulbs and loose wires on mobile equipment are common occurrences that can occur at any given moment without warning. *See* Tr. 244, 298-99, 439. Northern also presented evidence that this particular loader is "finicky" and known to have wiring issues. Tr. 300, 439. The loader was parked and not in use at the time of the inspection and there is no evidence showing when it was last used. Tr. 245. Thus, aside from the uncertainty over when the defect arose, it is also uncertain when the operator could or should have known about it.

The Secretary has failed to show the cited defect was not corrected in a timely manner. This citation is VACATED.

12. Citation No. 8740835/Docket No. LAKE 2014-111

During his September 4, 2013 inspection of the Portable Crusher, Sichmeller issued this 104(a) citation for a violation of the mandatory standard at 30 C.F.R. § 56.14101(a)(2). The citation states that the parking brake on the CAT 950G loader would not hold the truck when it

was tested with a fully loaded bucket on an inclined roadway. Ex. S-12. The cited standard is violated when a parking brake fails to hold equipment when tested on the maximum grade the equipment travels while holding its typical load. 30 C.F.R. § 56.14101(a)(2).

Sichmeller marked the citation as S&S, reasonably likely to result in a fatal accident affecting one miner, and the result of moderate negligence. Ex. S-12. The Secretary seeks a penalty of $1,944.00.

The Violation

The cited 950 loader is used to move materials at the mine. When tested on a feed ramp, which has less of an incline than the maximum grade at the mine, the 950 loader rolled backwards when the park brake was engaged. Tr. 220-21.

Richard and Kyle Schulke testified that a different loader, the 980, was used to feed the crusher in the pit area, whereas the 950 was used strictly to load outgoing trucks on flat land away from the pit's steep inclines. Tr. 301-02, 309-10, 436-37. However, neither of the witnesses was regularly onsite. Tr. 282, 285, 441. They did not have firsthand knowledge of how the loader was used on a day to day basis. Also, Kyle Schulke stated that the 950 and 980 were used interchangeably to load trucks. Tr. 297. As the inspector pointed out, the cited 950 loader is capable of being used anywhere at the mine and the common, expected practice in the industry would be to use it as a backup if another loader such as the 980 went down. Tr. 235-36.

I find the Secretary has established a violation.

S&S

The inspector designated this violation S&S. The Secretary has established an underlying violation of a mandatory safety standard that contributed to the discrete safety hazard of unexpected movement of the 950 loader when in the parked position, satisfying the first two elements of the S&S analysis under *Mathies*. *See* Tr. 222.

However, the Secretary has not established a reasonable likelihood that this hazard would result in injury with continued normal mining operations under the particular facts surrounding this violation. The inspector provided only two reasons for issuing the citation as reasonably likely to cause injury, neither of which is compelling.

First, the inspector noted that the operator had been cited one year ago for failing to lower the bucket on a loader when it was parked. Tr. 222-23; Ex. S-12a. Despite the inspector's assertion to the contrary, this single prior incidence in no way establishes a "practice" at the mine that would have contributed to the likelihood of an injury-causing event under the circumstances of this only tangentially related violation.

Second, the inspector stated that the safety standard Northern violated is included in MSHA's Rules to Live By, a group of standards for which MSHA provides additional training because of their past involvement in mining fatalities. Tr. 223. However, the inclusion of the

violated standard in the Rules to Live By fails to establish likelihood of injury under the particular facts of this case. These facts include the operator's undisputed testimony that the 950 loader was used primarily for loading stockpiled material onto trucks on flat land. *See* Tr. 233-34, 301-02, 309-10, 436-37. Even in the event that the loader were parked on an incline, the Secretary did not offer evidence that anyone would be near it to incur injury if it were to slide.

Because the Secretary has failed to prove a reasonable likelihood that the hazard this violation contributed to was reasonably likely to result in injury, I find that this violation is non-S&S. Although it is non-S&S, the violation is reasonably serious in that it contributed to the discrete safety hazard of the truck rolling unexpectedly when in the parked position, which could have caused a serious or fatal crushing injury.

Negligence

The inspector assessed this violation as involving moderate negligence, reasoning that the operator had been issued another parking brake violation during the same inspection and others in the past. Tr. 224; Ex. S-12a. However, the operator did not know of this violation before the citation was issued, and the Secretary has presented no evidence as to how long the violation existed or when the operator should have discovered it. *See* Tr. 224, 302; Ex. S-12a. The prior similar citations do not establish when the operator had reason to know the parking brake was defective on this particular vehicle; this particular defect could have been a recent development. I find that low negligence is more appropriate than moderate negligence based on what the Secretary has been able to prove.

13. Citation No. 8740836/Docket No. LAKE 2014-111

Inspector Sichmeller issued this 104(a) citation during his September 4, 2013 inspection of the Portable Crusher because the reverse alarm on the Bobcat Skidsteer Model 863 did not function when tested. The citation was issued under 30 C.F.R. § 56.14132(a), which requires that manually-operated horns or other audible warning devices on mobile equipment be maintained in functional condition. The violation is assessed as S&S, reasonably likely to result in a fatal injury affecting one miner, and involving moderate negligence. Ex. S-13. The proposed penalty is $1,944.00.

The Violation

Sichmeller testified that this piece of equipment may not have been equipped with a backup alarm from the factory, but one had been installed on it. Tr. 231. When tested it did not function. The skidsteer is used throughout the mine and was evidently used prior to the inspection near the job trailer, as tire tracks were visible there. Tr. 225-26, 231. The skidsteer can move as quickly in reverse as in forward motion and is not equipped with side mirrors, resulting in an obstructed or limited view when operating in reverse. Tr. 225, 232-33.

Northern asserts that this machine had a rearview mirror, enabling operation in reverse without obstructed views. Resp.'s Br. at 27; *see* Tr. 306, 440. But rearview mirrors alone are not sufficient to provide a panoramic backwards view to the skidsteer operator. They also do not provide an audible warning to miners on foot or operating other machinery that the skidsteer is

about to move in reverse. Section 56.14132(a) requires audible warning devices to be maintained in functional condition regardless of whether or not the operator's rearward view is obstructed. The presence of a rearview mirror thus has no bearing on whether or not a violation of the cited standard occurred.

Northern also argues the reverse alarm was an aftermarket installation not required by MSHA. Resp.'s Br. at 27; *see* Tr. 304, 439-40. This argument fails. Even if it was not factory-installed, the alarm was provided for safety on the machine and was not maintained in functional condition, violating the standard. *See* Tr. 265-66.

This violation has been established.

S&S/Gravity

The inspector issued this citation as S&S and reasonably likely to cause a fatality because the skidsteer is a very heavy machine capable of causing serious crushing injuries and can be used to move materials and clean up throughout the mine, including areas where other miners are working on foot. Tr. 227.

The skidsteer operates in congested spaces, as confirmed by Kyle Schulke, who testified it is used several times per day to clean underneath the conveyors. Tr. 303. He and Richard Schulke stated that miners are trained not to stand behind it, and therefore would not be at risk of being struck by the skidsteer. Tr. 304, 440. However, if training alone were sufficient to protect miners, the mandatory safety standards would all be superfluous. Miners do not always do what is most prudent, which is why operators are charged with a higher degree of care to protect the health and safety of the miners. Absent a reverse alarm, a miner would not necessarily know that the skidsteer was about to travel in reverse and that he was too close to it. The violation therefore contributed to the discrete safety hazard that a miner would be run over after failing to realize the skidsteer was about to travel backward. Such an injury-causing event was reasonably likely to occur during continued normal mining operations based upon the frequency with which the skidsteer was used every day, the congested location where it was operated, and the fact that as many as four miners would be working around it while in operation. *See* Tr. 230. The injuries expected to occur from being struck by this piece of heavy machinery, which would include broken bones and fatal crushing injuries, would be very serious in nature. I find that the *Mathies* criteria are met and this violation is S&S.

The gravity of this violation is serious due to the very serious nature of the injuries expected to result from the violation and the fact that there are often as many as four miners working in and around the skidsteer while it is operating.

Negligence

Because the skidsteer was operated frequently and therefore should have been examined frequently, and because it had just been used prior to this inspection, the operator should have known the reverse alarm was not working. *See* Tr. 231, 303. A mitigating factor is that the

condition could have been a fairly recent development, considering that the Secretary presented no evidence of how long it had existed. I find that moderate negligence is appropriate.

## V. PENALTIES

Legal Principles

The Commission has reiterated in *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763-64 (Aug. 2012):

> Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that the Commission, in determining penalty amounts, shall consider:
>
> The operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.
>
> 30 U.S.C. § 820(i).

The Commission and its ALJs are not bound by the penalties proposed by the Secretary nor are they governed by MSHA's Part 100 regulations, although substantial deviations from the proposed penalties must be explained using the section 110(i) criteria. *See Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983). In addition to considering the 110(i) criteria, the judge must provide a sufficient factual basis upon which the Commission can perform its review function. *See Martin Co. Coal Corp.*, 28 FMSHRC 247 (May 2006).

Assessment

The parties have stipulated that the penalties initially proposed by MSHA will not affect Northern's ability to remain in business and that the violations were abated in good faith. Joint Exhibit 1.

The size of the operator's business is relatively small, as it is a family owned, seasonally operated business with fewer than thirty employees. Tr. 425. I have taken into account the appropriateness of the penalties to the size of the operator's business, as well as the desired deterrent effect of the civil penalties in comparison to the size of the operator and its overall resources. *See Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864-69 (Aug. 2012); *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1505 (Sept. 1997).

I have also taken into account the operator's history of previous violations, which is set forth in Exhibit S-14. The exhibit shows that the operator was cited for 58 violations in the 15 months preceding the 2013 inspections, but it fails to set forth a qualitative assessment of whether this number of violations is high, moderate, or low, detracting from its utility in the penalty analysis. The Secretary requests that MSHA's initially proposed penalties for violations

8672802, 8740698, and 8740699 be doubled based on the operator's history of previous violations. Specifically, the Secretary argues the operator was cited for the same violations during the previous inspection. Br. of Sec'y at 25. I reject the Secretary's request. Pursuant to the Commission's statutory authority to assess all civil penalties under section 110(i) of the Mine Act, I have instead considered and weighed the six statutory penalty criteria *de novo* without basing the penalty assessment exclusively on MSHA's proposal and the prior violations.

The gravity and negligence of each violation is discussed within the body of the decision above.

Based upon the findings as set forth herein, I impose the following penalties:

A. Docket Number LAKE 2014-110

1. Order No. 8740828 - $1,449.00

2. Order No. 8740829 - $1,449.00

B. Docket Number LAKE 2014-111

1. Citation No. 8740827 - $1,944.00

2. Citation No. 8740830 - VACATED

3. Citation No. 8740835 - $750.00

4. Citation No. 8740836 - $1,944.00

C. Docket Number LAKE 2014-180 / Citation No. 8740705 - $176.00

D. Docket Number LAKE 2014-183

1. Citation No. 8740695 - $100.00

2. Citation No. 8740696 - VACATED

3. Citation No. 8740701 - $100.00

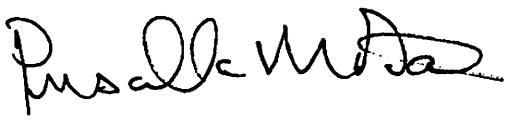
E. Docket Number LAKE 2014-216 / Order No. 8740699 - $2,000.00

F. Docket Number LAKE 2014-217 / Citation No. 8672802 - $6,458.00

G. Docket Number LAKE 2014-430 / Citation No. 8740698 - $2,700.00

## VI. ORDER

Northern Aggregate, Inc. is hereby ORDERED to pay the sum of $19,070.00 within thirty (30) days of the date of this Decision and Order.[14]



Priscilla M. Rae
Administrative Law Judge

Distribution:

Michele A. Horn, Esq., U.S. Department of Labor, Office of the Solicitor, 1244 Speer Boulevard, Suite 216, Denver, CO 80204

Benjamin Wangberg, Esq., Fuller, Wallner, Cayko, Pederson & Huseby, Ltd., 514 American Avenue NW, P.O. Box 880, Bemidji, MN 56601

[14] 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.