**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
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April 6, 2016

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| SECRETARY OF LABOR<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | CIVIL PENALTY PROCEEDINGS<br><br>Docket No. WEST 2015-448-M<br>A.C. No. 02-03312-373291 |
| v. | Docket No. WEST 2015-574-M<br>A.C. No. 02-03312-377914 |
| THE SILVER QUEEN MINE, LLC,<br>Respondent | Silver Queen Mine |

**DECISION**

Appearances: John Lauer, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, and D. Scott Horn, Mine Safety and Health Administration, U.S. Department of Labor, Vacaville, California, for the Secretary;
Trenton Davis, Clovis, California for The Silver Queen Mine, LLC.

Before: Judge Manning

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against The Silver Queen Mine, LLC ("Silver Queen") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The parties presented testimony and documentary evidence at a hearing held in Henderson, Nevada. Silver Queen was represented by Trenton Davis, its agent. Davis cross-examined MSHA Inspector Miles D. Frandsen and introduced three exhibits, but did not offer any witnesses. The Secretary filed post-hearing briefs but Davis elected not to do so. I considered the arguments presented in the briefs but I have not summarized them in this decision except as necessary.

The Silver Queen Mine is a small underground silver mine in Mojave County, Arizona, that employed about four miners in late 2014 and early 2015. Sixteen section 104(a) citations were adjudicated at the hearing.

## I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. WEST 2015-448-M

At the start of the hearing, Silver Queen moved to dismiss WEST 2015-448-M and vacate the ten citations contained in the docket. (Tr. 12). Silver Queen argued that the Secretary violated a provision in MSHA's "Metal and Nonmetal General Inspection Procedures Handbook." (Ex. R-1). Silver Queen maintained that under a section entitled "Regular

Inspection Procedures," the Handbook limits the number of inspections that MSHA may make at a mine in any given year. *Id.* at 2. Silver Queen argued that it had already been subjected to the mandatory number of inspections for the year before Inspector Frandsen commenced the inspection that is the subject of this case. (Tr. 20).

I denied Silver Queen's motion at the hearing. (Tr. 141). I relied on the language of section 103(a) of the Mine Act which states that "[i]n carrying out the requirements clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety *at least* four times a year[.]" 30 U.S.C. § 813(a) (emphasis added).[1] It is clear that the Mine Act and the Inspection Handbook mandate a *minimum* number of inspections and do not restrict the Secretary from completing more inspections than this statutory minimum. In addition, the Secretary argued that the record shows that the mine had not been subjected to more inspections than the statutory minimum. I relied of the language of the Mine Act in denying the motion and I note that there has been no showing that the Secretary abused his discretion by using his inspection authority to harass the mine.

In December 2014, MSHA Inspector Miles D. Frandsen[2] inspected the Silver Queen Mine and issued ten citations, as discussed below.

1. **Citation No. 8871120**

Safety Standard: 57.6306(g)
Gravity: Reasonably likely, S&S, fatal accident reasonably likely, 1 person affected
Negligence: High
Proposed Penalty: $2,678

This citation alleges that the mine did not conduct a proper post-blast inspection following a blast that occurred on December 1, 2014. (Ex. P-A). During Inspector Frandsen's inspection the following day, he noticed that two of the blasting holes had not detonated. The yellow blasting devices were clearly visible upon examination of the area. Section 57.6306(g) provides that "[w]ork shall not be resumed in the blast area until a post-blast examination addressing potential blast-related hazards has been conducted by a person with the ability and experience to perform the examination." 30 C.F.R. § 57.6303(g).

Frandsen testified that, while traveling to the mine portal, he had a discussion with miners coming out from underground who indicated to him that they had observed undetonated blasting holes from the blast the day before. (Tr. 146-147, 150). The operator told Frandsen that it had

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[1] Clause (3) requires MSHA inspectors to conduct inspections to determine whether an imminent danger exists at the mine and clause (4) requires inspectors to determine whether the mine is in compliance with safety and health standards or with any citation or order.

[2] Inspector Frandsen has been an inspector with MSHA for about eleven years. (Tr. 31). He is trained as an electrical inspector. Prior to his employment with MSHA he worked as a mechanic at various mines; acquired electrical papers; and was a maintenance supervisor and production supervisor. (Tr. 32-33).

conducted a post-blast examination. (Tr. 147, 151, 155). According to Frandsen, it is the practice in the mining industry to do the post-blast examination shortly after the blast. (Tr. 159). When Frandsen traveled underground he observed yellow shock tubes hanging out of the face. (Tr. 147). According to Frandsen, the shock tubes were extremely obvious and indicated that undetonated explosives had been left in the face from the day before. (Tr. 147, 160). There were no warning signs or barricades in the area and miners had been working underground after the post-blast examination. (Tr. 151, 160-161).

I find that Silver Queen violated the cited standard. Frandsen testified that mine employees told him that it a post-blast examination had been conducted following the blast on December 1, 2014. However, the post-blast examination clearly was not properly performed, as evidenced by the obvious yellow shock tubes that Frandsen observed in the face, which should have been addressed immediately following the post-blast examination. Frandsen testified that miners had been working underground in this small mine since the post-blast examination. Moreover, the miners whom Frandsen encountered while traveling to the portal entered the blast area in order to discover that the post-blast examination had failed to address the obvious hazard of undetonated explosives that remained in the face. Consequently, I find that a violation has been proven.

Frandsen determined that, given the presence of explosives and the obviousness of the shock tubes that were not detected, the mine's failure to conduct a proper post-blast examination was reasonably likely to lead to a fatal injury, and that the violation was significant and substantial ("S&S"). (Tr. 148). Moreover, he noted that an inadequate examination could result in poisonous post-blast gases not being detected. (Tr. 147).

I find that the violation was S&S.[3] I find that a discrete safety hazard existed in that the failure to conduct a proper post-blast examination exposed miners to the hazard of being in an area where they were unknowingly in close proximity to undetonated explosives. Moreover, the inspector noted that an inadequate examination like the one performed here could lead to miners being exposed to poisonous gases. I agree with Frandsen that, given the presence of explosives, the failure to conduct a proper examination was reasonably likely to lead to an injury and that injury was likely to be fatal. The fact that the shock tubes were so obvious, yet went unnoticed by the examiner, leads me to believe that serious injuries were likely at this mine for failure to

[3] An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). In order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An experienced MSHA inspector's opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

conduct competent examinations, assuming continued mining operations. Consequently, I find that the violation was S&S.

Frandsen testified that, given the obviousness of the yellow shock tubes and the fact that he previously issued a separate citation under the same standard to this mine, the mine was highly negligent. (Tr. 148-149).

I find that the violation was a result of Silver Queen's high negligence. I agree with the inspector's assessment that the obviousness of the shock tubes and the fact he had previously cited the mine for a violation of this same standard lend themselves to a finding of high negligence. Like any mandated examination under the Mine Act, post-blast examinations are fundamental in assuring a safe work environment for miners. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (Jan. 1997); *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 198 (Feb. 1991). Silver Queen's blatant failure to properly conduct the post-blast examination denied the miners this fundamental assurance. Consequently, I uphold the Secretary's high negligence finding.

Based on my findings and the penalty factors discussed below, I find that a penalty of $1,500.00 is appropriate. I have reduced the penalty solely on the basis of Silver Queen's small size.

2. **Citation No. 8871121**

Safety Standard: 57.6202(a)(5)
Gravity: Unlikely, not S&S, fatal accident possible, 1 person affected
Negligence: Moderate
Proposed Penalty: $162

This citation alleges that the Kawasaki Mule used to transport explosives did not have any placards or warning signs to identify the presence of explosive materials. (Ex. P-F). The vehicle was used to transport explosive materials the day of the inspection and is used almost daily for that purpose. Section 57.6202(a)(5) provides that "[v]ehicles containing explosive materials shall be . . . [p]osted with warning signs that indicate the contents and are visible from each approach." 30 C.F.R. § 57.6202(a)(5).

Frandsen testified that the cited vehicle, which was used by the mine to transport blasting caps, was not equipped with any warning signs. (Tr. 164-165). Frandsen took a photograph of the vehicle which shows no warning signs. (Tr. 164; Ex. P-H).

I find that Silver Queen violated the cited standard. The photograph taken by Frandsen, along with his testimony, confirms that there were no warning signs to indicate the contents of the vehicle. Consequently, I find that a violation existed.

Frandsen testified that, although an injury was unlikely to occur as a result of the cited condition, if one were to occur it was reasonably likely to be fatal. (Tr. 166). He based his assessment on the fact that only three persons worked at the mine, and the two individuals who

worked underground would have been the ones to drive the vehicle. (Tr. 166). A BLM road goes through the mine site and non-mine personnel were seen driving the road the day the inspector was there. (Tr. 166-167). On cross-examination Frandsen acknowledged that the box in the bed of the vehicle met the standard for being an approved container for hauling explosives. (Tr. 168).

I agree with the inspector's gravity assessment. Given the limited number of people who would be using the vehicle, it is unlikely that anyone would fail to remember that the vehicle is used to haul explosives. Moreover, protection would be provided by the explosives transport box, which Frandsen testified was to code. Consequently, I affirm the inspector's gravity determinations.

Frandsen testified that the mine operator was moderately negligent. He based his determination on a conversation he had with mine personnel. Miners told him that they previously had a magnetic warning cone on the roll bars of the vehicle, but it had fallen off. (Tr. 167). I find that Silver Queen was moderately negligent.

Based on my findings and the penalty factors discussed below, I find that a penalty of $162.00 is appropriate.

3. **Citation No. 8871122**

Safety Standard: 57.14132(b)(1)
Gravity: Unlikely, not S&S, fatal accident possible, 1 person affected
Negligence: High
Proposed Penalty: $540

This citation alleges that the Chevy flat-bed truck had an obstructed view to the rear. The truck was not equipped with any sort of reverse-activated signal alarm and spotters were not used when the vehicle was moved in reverse. (Ex. P-J). A 55 gallon barrel of oil and a diesel fuel tank obstructed the rear view. The truck was regularly used at the mine. Section 57.14132(b)(1) provides that "[w]hen the operator has an obstructed view to the rear, self-propelled mobile equipment shall have . . . [a]n automatic reverse-activated signal alarm; . . .[a] wheel-mounted bell alarm which sounds at least once for each three feet of reverse movement; [a] discriminating backup alarm that covers the area of obstructed view; or . . . [a]n observer to signal when it is safe to back up." 30 C.F.R. § 57.14132(b)(1).

Frandsen testified that miners told him that, before backing up the vehicle, they walk around the vehicle. (Tr. 170, 172-173). The miners then get into the vehicle and back it up without the use of a spotter. (Tr. 170-173). There was no backup alarm present on this vehicle, nor a wheel bell. (Tr. 170, 172). Frandsen testified that, although he did not climb into the vehicle and look out the rear view mirror, there were multiple objects in the back of the truck that restricted the view to the rear, including a barrel, fuel tank, and rack. (Tr. 173; Ex. P-L). According to Frandsen, miners told him that the items in the back of the vehicle are always present. (Tr. 172).

I find that Silver Queen violated the cited standard. The rear view from the cab of the truck was obstructed. The photograph the inspector took of the condition clearly shows a number of items which obstructed the view of an individual backing up the vehicle. The vehicle was not equipped with any kind of backup alarm or wheel bell. Moreover, the mine was not using a spotter. Consequently, I find that the Secretary has proven a violation of the cited standard.

Frandsen testified that an injury was unlikely as a result of the cited condition because the vehicle operator walks around the vehicle before getting in to back up. (Tr. 171). He explained that if the truck backed over a miner, any injuries would likely be fatal, however. *Id.*

I agree with the inspector's gravity assessment. Although walking around the vehicle before entering it may alert the vehicle operator to persons or objects that are in the area at that moment, it does not alert or prevent persons from entering the area before the operator actually begins backing up the vehicle. In this instance, I find that an injury was unlikely to be sustained. Nevertheless, I agree with the inspector that, if a miner were struck and run over or pinned against something, the injuries would likely be fatal.

Frandsen testified that the operator was highly negligent. He based his determination on a conversation he had with Ken Graham, the mine manager, in which Graham provided no mitigating circumstances and told Frandsen that he never made the miners aware that they needed to have a spotter. (Tr. 65).

I agree that Silver Queen was highly negligent. The fact that Graham, the mine manager, did not make his employees aware of the need for a spotter is especially troublesome. As discussed above, an accident stemming from the failure to provide a spotter could result in a fatal injury. Management's failure to alert miners that they the need to comply with the standard is inexcusable. Consequently, I find that the inspector's high negligence designation is appropriate.

Based on my findings and the penalty factors discussed below, I find that a penalty of $540.00 is appropriate.

4. **Citation No. 8871123**

Safety Standard: 57.4102
Gravity: Unlikely, not S&S, lost workdays/restrict duty possible, 1 person affected
Negligence: High
Proposed Penalty: $162

This citation alleges that there were excessive amounts of oil and fuel spillage on the Chevy flatbed truck. (Ex. P-M). The bed, frame, back window and part of the truck body were splashed and covered with oil and spilled diesel fuel. Section 57.4102 provides that "[f]lammable or combustible liquid spillage or leakage shall be removed in a timely manner or controlled to prevent a fire hazard." 30 C.F.R. § 57.4102.

Frandsen testified that he observed oil and fuel spillage on the flatbed truck. (Tr. 177). According to Frandsen, oil and fuel from the oil barrel and fuel tank in the back of the truck covered the truck bed, the frame, and had splashed on the truck cab and back window. (Tr. 177-178). He explained that the condition had existed for some time and had not been cleaned up. (Tr. 177, 181-182). Graham told Frandsen that sometimes the oil hose falls down and leaks. (Tr. 177).

I find that Silver Queen violated the cited standard. Fuel and oil were observed covering much of the back of the truck. I credit Frandsen's testimony that the condition had existed for some time. Graham's statement that the hose sometimes falls and leaks confirms the extent of the condition. It would take time for the spillage from a leaking hose to cover the truck to the extent described by Frandsen. Nothing had been done to clean up the oil and fuel. Consequently, I find that a violation existed.

Frandsen testified that, although an injury was unlikely to occur as a result of the cited condition, if one were to occur it would result in lost work days or restricted duty. (Tr. 179). Frandsen explained that, although the welder in the back of the truck presented an ignition source, there was a lot of dirt that had blown onto the back of the truck and mixed with the oil and fuel. (Tr. 178-179). Moreover, there was at least one fire extinguisher present. (Tr. 181). As a result, he thought that an injury was unlikely. (Tr. 179). However, in the event there was an ignition, he testified that individuals would suffer smoke inhalation and burns while fighting the fire. (Tr. 179).

I agree with the inspector's gravity assessment. The presence of the fire extinguisher and the dirt that had mixed with the combustible materials mitigated the hazard to some extent. I credit the inspector's conclusion that, despite the presence of the welder/ignition source, an ignition and injury was unlikely. However, in the event of an ignition, burns and smoke inhalation were reasonably likely to be sustained, both of which are injuries that are likely to result in lost workdays or restricted duty.

Given the obviousness of the condition, and the mine manager's acknowledgement that the hose sometimes fell and leaked, Frandsen determined that the mine was highly negligent. (Tr. 180). He explained that Graham's acknowledgement amounted to a concession that the mine knew there was a problem, but had done nothing to remedy it. (Tr. 180).

I find that Silver Queen was highly negligent. As Frandsen explained, the condition was obvious and extensive, covering much of the rear of the truck. Graham's statement indicated a lack of understanding on the part of management as to the proper standard of care. Here, Graham's concession that a problem existed, combined with the fact that the accumulation was obvious and had existed for some time, lends itself to a finding of high negligence.

Based on my findings and the penalty factors discussed below, I find that a penalty of $162.00 is appropriate.

5. **Citation No. 8871124**

Safety Standard: 57.12032
Gravity: Unlikely, not S&S, fatal accident possible, 1 person affected
Negligence: Moderate
Proposed Penalty: $162

This citation alleges that the cover plate for the variable-frequency drive ("VFD") control to the ventilation fan was missing. (Ex. P-R). This control is at the mine portal and was in a junction box that did not have a cover plate. Power cables and exposed connections were inside the box, which subjected miners to the potential of electrocution, shocks, and burns. Section 57.12032 provides that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing and repairs." 30 C.F.R. § 57.12032.

Frandsen testified that he observed no cover on the electrical box for the soft start controls. (Tr. 185-186; Ex. P-T). He could see the three 480 volt leads to the right of the soft start. (Tr. 186). According to Frandsen, he was told by Graham that the cover had been left off because the box needed to be ventilated. (Tr. 187).

I find that Silver Queen violated the cited standard. The cover plate for the soft start was not on the box. (Ex. P-T). Graham's explanation to Frandsen as to why the plate was not on the box makes it clear that the plate had not been removed for testing or repairs. Consequently, I find that a violation of the cited standard existed.

Frandsen testified that, although an injury was unlikely to occur as a result of the cited condition, if one were to occur it was reasonably likely to be fatal. (Tr. 186-187). He explained that mine employees told him that, once the soft start was set, one would not have to work on it very often. (Tr. 186). However, if any injury were sustained, given that the wires were 480 volts, it would result in a fatal electrocution. (Tr. 187).

I find that the inspector's gravity designations are appropriate. I credit the inspector's testimony that the cited condition would cause a fatal injury if a miner were to come in contact with the wires. I agree that an injury was unlikely to be sustained.

Frandsen testified that Graham told him the cover had been left off the box because an electrician told him that the box needed to be ventilated. (Tr. 187). However, Frandsen stated that the condition was obvious and the ventilation issue could have been addressed without leaving the cover off of the electrical box. (Tr. 187-188). Based on his observations, he designated the violation as being a result of Silver Queen's moderate negligence. (Tr. 187). Given that the violation was a result of the operator's attempt to comply with the recommendation of an electrician, I find that the operator was moderately negligent.

Based on my findings and the penalty factors discussed below, I find that a penalty of $162.00 is appropriate.

6. **Citation No. 8871125**

Safety Standard: 57.13011
Gravity: Unlikely, not S&S, fatal accident possible, 1 person affected
Negligence: Low
Proposed Penalty: $100

This citation alleges that the old water heater that was underground was not equipped with an automatic pressure-relief valve. (Ex. P-V). The unit was pressurized by air to push water to the drills and hoses at the face. Miners were exposed to potential fatal injuries from the tank if the air pressure became too great. Section 57.13011 provides in part that "[a]ir receiver tanks shall be equipped with one or more automatic pressure-relief valves." 30 C.F.R. § 57.13011.

Frandsen testified that he observed a water tank without an automatic-pressure relief valve. (Tr. 191-192). The water tank was pressurized with air, which would push the water to the heading where the mine was drilling and blasting. (Tr. 192). Frandsen explained that, although this was a water tank, it is considered an air receiver tank under the standard because the water is pressurized with air and the air is used to push the water. (Tr. 196).

I find that Silver Queen violated the cited standard. I accept the inspector's explanation as to why this water tank is considered an "air receiver" tank under the cited standard. *See Lhoist North America of Virginia*, 36 FMSHRC 2413, 2421-2424 (Sept. 2014) (ALJ) (upholding a violation of 57.13011 that involved an ANFO tank that was pressurized with air that pushed ANFO through the tank and into hoses). The water tank was not equipped with an automatic pressure-relief valve. Consequently, I find that a violation existed.

Frandsen testified that, although an injury was unlikely to occur as a result of the cited condition, if one were to occur it was reasonably likely to be fatal. (Tr. 194-195). He explained that the mine told him the water tank was rated for 150 psi of pressure and had a regulator on it that was set at 50 psi. (Tr. 194, 197). Further, on cross-examination he testified that the miners told him that the compressor which pressurized the tank could only go to 120 psi. (Tr. 198). As a result, he opined that an injury was unlikely. (Tr. 194). However, if the tank were over-pressurized and exploded, he believed that it would result in fatal injuries. (Tr. 193, 195).

I find that the inspector's gravity designations are appropriate. Given that the pressure ratings for both the regulator and outside compressor were less than that of the tank, it was unlikely that the lack of an automatic pressure relief valve would result in the tank exploding. Nevertheless, if the tank did explode, I agree with the inspector that the injuries were likely to be very serious. Consequently, I affirm the gravity designations.

Frandsen determined that Silver Queen exhibited low negligence. He based his determination on the fact that an automatic pressure relief valve was found in the area (Ex. P-Y) and a statement made by Graham that he did not know why the relief valve they found was not on the tank. (Tr. 193-196).

I find that the violation was the result of Silver Queen's low negligence. It is unclear why exactly a relief valve was not attached to the tank. Graham's statement to Frandsen indicates that the mine was aware of its responsibility to equip the tank with an automatic pressure relief valve. Graham was apparently unaware that the tank was not equipped with one. The tank was equipped with a regulator set at 50 psi. For these reasons, I find that Silver Queen only exhibited low negligence.

Based on my findings and the penalty factors discussed below, I find that a penalty of $100.00 is appropriate.

7. **Citation No. 8871126**

Safety Standard: 57.8528
Gravity: Unlikely, not S&S, fatal accident possible, 1 person affected
Negligence: Low
Proposed Penalty: $100

This citation alleges that the old East Drift had been removed from ventilation but Silver Queen only placed a small berm across the entry and hung a warning sign with brattice material. (Ex. P-AA). The drift was neither barricaded nor sealed. Miners could easily travel past the berm and be exposed to air containing insufficient oxygen or poisonous gases. Section 57.8528 provides that "[u]nventilated areas shall be sealed, or barricaded and posted against entry." 30 C.F.R. § 57.8528.

Frandsen testified that he observed an unventilated drift that had been removed from service and had not been barricaded or sealed. (Tr. 201, 203). A curtain, which had openings on both sides, had writing on it that said "Keep out. No vent." (Tr. 203, 207; Ex. P-CC). A two to three foot berm existed but, according to Frandsen, did not prevent passage. (Tr. 203, 207). Frandsen explained that "barricaded" means "obstructed to prevent a passage of persons, vehicles, or flying materials." (Tr. 201). Here, neither the berm nor the curtain functioned as a barricade because they would not prevent passage. (Tr. 203). On cross-examination Frandsen explained that, in his years of experience, it was not reasonable to expect that miners would not go back in the drift simply because of the steps taken by the mine operator in this instance. (Tr. 207-208).

I find that Silver Queen violated the cited standard. The abandoned drift was not being ventilated. Although the writing on the curtain stating "Keep out . . . No vent" satisfies the standard's requirement that the unventilated drift be posted against entry, the mine had not sealed or barricaded the area. Clearly, the drift was not sealed. (Ex. P-CC). The Secretary's regulations define "barricaded" as "obstructed to prevent the passage of persons, vehicles, or flying materials."[4] 30 C.F.R. § 57.2. I agree with the inspector that the two to three foot berm

[4] At hearing, Respondent's representative referenced a section of MSHA's Program Policy Manual which deals with "Barricades and Warning Signs." (Tr. 205-206). However, that particular section of the Program Policy Manual is aimed at providing interpretive guidance on sections 56.20011 and 57.20011, neither of which is at issue here.

and loose hanging curtain did not prevent the passage of persons into the unventilated area. I credit his testimony explaining that, in his experience, miners go places they should not be. The standard and accompanying definition of "barricaded" direct that the barricade *prevent* passage of persons. Here, although the berm and curtain may suggest that miners not enter the area, they cannot be said to *prevent* passage of persons. *See Newmont USA Limited*, 34 FMSHRC 146, 161 (Jan. 2012) (ALJ) (holding that a rope strung from rib to rib was incapable of preventing the passage of persons, vehicles or flying materials). A miner could easily step over the berm and walk around the curtain. Consequently, I find that a violation has been proven.

Frandsen testified that, although an injury was unlikely to occur as a result of the cited condition, if one were to occur it was reasonably likely to be fatal. (Tr. 202). He determined that there was a sign in place which directed against entry and, as a result, it was unlikely that an injury would be sustained. (Tr. 202). Nevertheless, if a miner were to enter that area he could suffocate due to poisonous gases. (Tr. 202).

I find that the inspector's gravity designations are appropriate. Although the curtain and berm may not have prevented miners from entering the area, they likely would have dissuaded miners from doing so. Accordingly, it is unlikely miners would go past the curtain and berm into the unventilated area. However, if they did go into the unventilated area, they would likely suffocate due to the lack of oxygen or the presence of poisonous gases. Consequently, I uphold the inspector's gravity findings.

Frandsen designated the violation as being the result of Silver Queen's low negligence. He based his designation on Graham telling him that he considered the sign and berms adequate to meet the standard. (Tr. 203). I agree that the violation was caused by Silver Queen's low negligence. I credit the inspector's testimony that the operator was mistakenly under the impression that the steps it had taken satisfied the standard. Consequently, I affirm the low negligence designation.

Based on my findings and the penalty factors discussed below, I find that a penalty of $100.00 is appropriate.

8. **Citation No. 8871127**

Safety Standard: 57.11053(c)
Gravity: Unlikely, not S&S, fatal accident possible, 1 person affected
Negligence: Low
Proposed Penalty: $100

This citation alleges that an escape plan was not posted underground, at the portal or where the check in/check out board is located. (Ex. P-EE). If miners were to become confused during an emergency, they could travel into dead ends rather than out to the portal. Section 57.11053(c) provides that every mine shall develop "[a]n escape plan for each working area in the mine to include instructions showing how each working area should be evacuated." 30 C.F.R. § 57.11053(c). The safety standard goes on to require that each "plan shall be posted at appropriate shaft stations and elsewhere in working areas where persons congregate." *Id.*

Frandsen testified that the mine did not have escapeway maps or an escapeway plan anywhere underground. (Tr. 211-212). He explained that, although there was only one way in and out of this mine, miners congregated in areas underground, such as near the mine phone, first aid station and work area, and the escape maps and plans were required to be posted in those areas. (Tr. 214-215).

I find that Silver Queen violated the standard. No escape plan was posted anywhere underground. The standard requires that the plan be posted in working areas where miners congregate. The inspector testified that a person could walk out of the mine in five to ten minutes under normal circumstances. (Tr. 36). Although this particular mine may have been small and uncomplicated when compared to other mines, miners could still get confused during an emergency. I credit the inspector's testimony on this point. Consequently, I find that a violation has been proven.

Frandsen testified that, although an injury was unlikely because the mine was not complicated and there was only one way in and out, if an injury were to occur it was reasonably likely to be fatal. (Tr. 212-213). He explained that if miners are caught underground and are unable to locate the escape plan, they could be exposed to poisonous gases and other hazards in the event of a mine fire. (Tr. 213). Frandsen has fought several mine fires and explained that it is very easy to get disoriented and confused in an emergency. (Tr. 213). I credit this testimony.

I find that the inspector's gravity designations are appropriate. This is a small underground mine with only a few miners. The mine's layout is, as Frandsen testified, uncomplicated. I agree that it is unlikely that Silver Queen's failure to post the escape plan underground would lead to an injury. Still, if a miner became disoriented and confused during an emergency, such as a mine fire, the lack of an escape plan underground could certainly contribute to a fatal injury as described by the inspector. Consequently, I affirm his gravity determinations.

Frandsen determined that the operator exhibited low negligence. (Tr. 214). Frandsen testified that Graham told him that, because there was only one way in and out of the mine, he did not think they needed to have a plan underground. (Tr. 214). Graham explained to Frandsen that the escape plan is posted on the surface in an area where miners congregate. (Tr. 214).

Given the lack of complexity of this mine, I find that the operator's belief that it did not need to maintain a copy underground is understandable. Consequently, I agree with the inspector that the violation was caused by Silver Queen's low negligence.

Based on my findings and the penalty factors discussed below, I find that a penalty of $100.00 is appropriate.

9. **Citation No. 8871134**

Safety Standard: 57.12018
Gravity: Unlikely, not S&S, fatal accident possible, 1 person affected
Negligence: Moderate
Proposed Penalty: $162

This citation alleges that two 480 volt knife-blade disconnects and two start/stop buttons at the portal were not labeled. (Ex. P-HH). The disconnects and buttons control separate fans, one on the surface and one underground. Employees were exposed to a fatal injury because they could accidently deactivate and lock out the wrong circuit when working on equipment or during an emergency. Section 57.12018 provides that "[p]rincipal power switches shall be labeled to show which units they control, unless identification can be made readily by location." 30 C.F.R. § 57.12018.

Frandsen testified that the labels on the electrical disconnect and start/stop buttons for the underground and surface fans had faded and were no longer legible. (Tr. 219). He explained that the disconnects and start/stop buttons are principal power switches. (Tr. 221). He further explained that he could not easily identify what these components controlled since he could not see either the underground or surface fans from the switches. (Tr. 221). It was not obvious where the cables went. (Tr. 222). He explained that, if you have to start tracing the cables to see what they control, then identification cannot be made readily by location, and there is a violation of the standard. (Tr. 222).

I find that Silver Queen violated the cited standard. Given that these switches controlled the underground and surface fans, I find that they were principal power switches. *See FMC Corp.*, 6 FMSHRC 1294, 1299 (May 1984) (ALJ) (affirming a violation of 30 C.F.R. § 57.12–18, the predecessor standard to the one at issue, where a switch which controlled a fan was not labeled). I credit the inspector's testimony that the labels were not legible and that he could not readily identify what the various electrical components controlled. Consequently, I find that a violation of the standard existed.

Frandsen testified that an injury was unlikely because the few miners that worked at the mine were familiar with the switches. (Tr. 220). He explained that, in the event one of the wrong disconnects or switches was locked out, a miner could get fatally electrocuted. (Tr. 220).

I find that the inspector's gravity designations are appropriate. Although the miners may have been aware of what components controlled which equipment, a serious injury could certainly occur if a miner worked on a piece of equipment that he mistakenly thought was locked out. *See FMC Corp.*, 6 FMSHRC 1294, 1299 (May 1984) (ALJ).

Frandsen determined that the operator exhibited moderate negligence. (Tr. 221). He testified that labels were present, but had been allowed to fade to the point where they were illegible. (Tr. 222).

I find that the violation was the result of Silver Queen's low negligence. Silver Queen had taken steps to satisfy the standard in the past, as evidenced by the presence of labels. It is understandable that a small mine like this one, where only a few individuals would ever be regularly working with these electrical disconnects and buttons, could fail to notice labels slowly fading over time. The few miners who used these components were so familiar with them that Frandsen found it unlikely that they would fail to properly identify the correct component when they needed to use it or lock it out. The Secretary did not meet his burden of proof.

Based on my findings and the penalty factors discussed below, I find that a penalty of $100.00 is appropriate.

10. **Citation No. 8871135**

Safety Standard: 41.12
Gravity: No likelihood, not S&S, no lost workdays, no person affected
Negligence: Moderate
Proposed Penalty: $100

This citation alleges that changes to the mine's legal identification had not been filed by the operator. The mine's phone number changed about one year before the inspection. (Ex. P-LL). Section 41.12 provides, in part, that the "operator of a coal or other mine shall, in writing, notify the appropriate district manager" within 30 days of any changes in the information required by section 41.11. 30 C.F.R. § 41.12.

Frandsen testified that he attempted to call the mine multiple times at the phone number on file with MSHA, but that the number did not work. (Tr. 226). According to Frandsen, Graham later told him that the number had been changed and he thought he had filed the documentation with MSHA. (Tr. 225-226).

I find that Silver Queen violated the cited standard. Section 41.12, in conjunction with section 41.11, requires that operators notify MSHA of the mine's telephone number and, within 30 days of a change in the telephone number, notify MSHA of the new telephone number. 30 C.F.R. §§ 41.11-41.12. Here, the telephone number on file with MSHA was incorrect and Frandsen was unable to get in touch with mine personnel when needed. No testimony was offered by the operator regarding the timing of the phone number change. Under section 41.12, it is the mine's responsibility to ensure that the correct information is on file and it must bear the consequences of its failure to do so. *See The Pit*, 16 FMSHRC 2033, 2034 (Oct. 1994). I credit Frandsen's testimony that Graham did not verify that he had filed the necessary paperwork to change the mine's telephone number. I find that a violation has been proven.

Frandsen determined that, given that this was a paperwork violation, there was no likelihood of an injury, and any injury would not result in lost workdays or restricted duty. (Tr. 225). I agree with Frandsen's assessment.

Frandsen, relying upon Graham's statement that he thought he had changed the phone number, determined that the mine was moderately negligent. (Tr. 225-226). I find that the

Secretary did not meet his burden of proof and I conclude that Silver Queen's negligence was low with respect to this violation.

Based on the findings and the penalty factors discussed below, I find that a penalty of $50.00 is appropriate due to the fact that it is a low negligence paperwork violation.

**B. WEST 2015-574-M**

In February 2015, MSHA Inspector Frandsen inspected the Silver Queen Mine and issued six citations, as discussed below.

1. **Citation No. 8871177**

Safety Standard: 57.14100(a)
Gravity: Unlikely, not S&S, fatal accident possible, 1 person affected
Negligence: Low
Proposed Penalty: $100

This citation alleges that the operator of a mucker failed to do a proper pre-operational inspection prior to operating a mucker (loader). (Ex. G-1). It is clear that the mucker operator failed to check the fire suppression system because one of the nozzles was missing, which was readily obvious. Section 57.14100(a) provides that "[s]elf-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift." 30 C.F.R. § 57.14100(a).

Frandsen testified that he observed a nozzle missing from part of the fire suppression system on a mucker. (Tr. 41, 43). Frandsen has conducted pre-operational inspections on similar equipment many times. (Tr. 41). According to Frandsen, the fire suppression system consisted of two pieces of copper tubing, one on each side of the mucker engine, that were used to deliver a chemical fire suppression agent to each side of the engine in the event of an equipment fire. (Tr. 41-43). Frandsen saw that one of the copper tubes had a red nozzle at the end, while the other did not. (Tr. 41; Ex. G-3 pp. 2-3). The purpose of the nozzles is to spread out the chemical agent into a fan-shaped spray to put out fires. (Tr. 45). Without a nozzle, the chemical agent would not spray where it is supposed to and, instead, would just shoot out and hit the rib. (Tr. 42). Frandsen explained that the missing nozzle was obvious and should have been found during the pre-operational inspection of the mucker. (Tr. 41-42). The fire suppression system is a safety feature of the mucker, needs to work in the event of a fire, and should be checked during the pre-operational inspection of the mucker. (Tr. 42-43). Although Frandsen testified that a miner told him that he performed a pre-operational inspection before using the mucker that day, Frandsen found no record noting the missing nozzle. (Tr. 43, 53). Frandsen opined that the condition had existed for some time because the end of the tubing had a lot of scale on it, was not clean, and no one could find the missing nozzle in the area. (Tr. 54-55).

I find that Silver Queen violated the cited standard. It was obvious that there was no nozzle on the end of the copper tubing on one side of the mucker engine. I credit Frandsen's testimony and find that the nozzle is a safety feature of the fire suppression system and needs to

be inspected during the pre-operational inspection of the mucker. Without the nozzle, the fire suppression system is rendered useless on that side of the engine. I credit Frandsen's testimony that the nozzle had been missing for some time, as evidenced by the rust and scale on the end of the tubing. Given the obviousness of the condition, I find that the equipment operator did not conduct an adequate inspection. Consequently, I affirm the fact of violation.[5]

Frandsen testified that, although an injury was unlikely due to the presence of a fire extinguisher on the mucker and the properly functioning fire suppression system on the other side of the engine, if an injury were sustained it was reasonably likely to be fatal. (Tr. 45-46, 52). Frandsen explained that he has fought several underground mine fires and, in the event of a fire on the mucker, smoke would either pour over the miner who was operating the mucker and/or the fire would be between the miner and the portal. (Tr. 46). Frandsen acknowledged that the mine is small, requiring only a 5-10 minute walk to exit, has a ventilation system, and the miners wear self-rescuers. (Tr. 52-53).

I find that the inspector's gravity designations are appropriate. I defer to the inspector's testimony that it was unlikely that the conditions created by the violation would contribute to an injury. However, as discussed above, there is only one way in and out of the mine. As a result, if a fire were to occur on the mucker, a miner would be in a difficult situation. I credit Frandsen's testimony that, depending on the location of the mucker at the time of a fire, a miner could either be trapped inby the fire or would have to deal with smoke pouring over him. Given these findings, and acknowledging the seriousness of hazards associated with underground mine fires, I find that the violation was very serious.

In his brief, the Secretary argues that the court should find that the violation was "S&S" despite the testimony of the inspector to the contrary. (Sec'y Br. 12-14). The Secretary argues that decisions of the Commission make clear that, with respect to violations relating to equipment used in an emergency, the existence of the emergency should be assumed for purposes of the S&S analysis. As a consequence, the court should assume that the mucker caught fire and the lack of a nozzle on one side of the fire suppression system created an emergency situation. The Secretary also maintains Commission case law provides that that the presence of the fire extinguisher on the mucker should not be considered. The Secretary states that the inspector's testimony supports an S&S finding given this Commission case law.

I decline to modify the citation to an S&S violation on narrow grounds specific to the situation in this case. The Secretary did not raise this issue at the hearing. (Tr. 40-48). Silver Queen was represented by an inexperienced company representative. Inspector Frandsen specifically testified that an injury was unlikely as a result of this violation. (Tr. 45). Thus, until the Secretary filed his post-hearing brief, the Secretary's position was that the violation was not S&S. The Secretary's request to modify the citation is, in effect, a motion to amend the

[5] At hearing, the operator's representative moved to vacate this citation, arguing that "[t]here was no chance of any fatal accident occurring. The mine had abundant ventilation, a very short walk outside, miner had a self-rescuer, chances of fatality would be nil." (Tr. 52). Respondent's arguments are directed at the question of gravity, which is addressed in this decision. Respondent's motion to vacate the citation is **DENIED**.

pleadings. I recognize that Rule 15(b)(2) of the Federal Rules of Civil Procedure provides that a "party may move – at any time, even after judgement – to amend pleadings to conform them to the evidence and to raise an unpleaded issue." However, that provision assumes that the issue was "tried by the parties' express or implied consent." Fed. R. Civ. P. 15(b)(2). The S&S issue was not tried by the parties and there was no consent to do so in this *pro-se* case. The Secretary's motion to amend the citation is **DENIED**.

Frandsen determined that Silver Queen exhibited low negligence based on statements made to him by the mine that the fire suppression system was usually checked during service every couple of weeks. (Tr. 47). According to mine personnel, the missing nozzle had been present during the service check two weeks prior. (Tr. 44, 46-47). The equipment operator who was in charge of conducting the pre-operational inspection of the mucker only had two weeks of experience. (Tr. 44).

I find that the violation was the result of Silver Queen's low negligence. It is clear that the subject inspection was inadequate. I find that the fact that the mine checks the fire suppression system every few weeks, that the nozzle had been present during the last service check, and given the limited experience of the mucker operator who conducted the subject pre-operational inspection, there is evidence to justify the inspector's low negligence determination.

Based on my findings and the penalty factors discussed below, I find that a penalty of $100.00 is appropriate.

2. **Citation No. 8871178**

Safety Standard: 57.15004
Gravity: Reasonably likely, S&S, permanently disabling accident reasonably likely, 2 persons affected
Negligence: Moderate
Proposed Penalty: $285

This citation alleges that two miners working underground were not wearing eye protection and no eye protection was available underground. (Ex. G-3). The miners had installed three rock bolts that were pressurized to about 2,700 psi using jack leg drills. Section 57.15004 provides that "[a]ll persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of the mine or plant where a hazard exists which could cause injury to unprotected eyes." 30 C.F.R. § 57.15004.

Frandsen testified that he observed two miners whose faces were covered with mud. (Tr. 58). The miners told Frandsen that they had been drilling and installing Swellex rock bolts, which, when pressurized, expand to lock the layers of rock. (Tr. 58-59). Frandsen testified that the miners did not have eye protection with them, there was no eye protection underground, and the miners could not produce eye protection when asked. (Tr. 58-59, 63, 64). Frandsen explained that a miner using the drill would be exposed to oil mist, mud, rock dust, chips, chunks and cuttings blowing back out of the drill hole with the water. (Tr. 60, 63). This particular drill, a jack leg drill, required the miners to use a lot of pressure to get the hole started. (Tr. 61). As a

result, the miners' faces would be right at the jack when starting the hole, which is the most dangerous time. (Tr. 61-62). In order to pressurize the rock bolts and cause them to swell, 2700 psi was required, which presented an additional hazard in case a hose or other component used to pressurize the bolts breaks. (Tr. 62).

I find that Silver Queen violated the cited standard. Miners using the jack leg drill were exposed to flying mud and rock which were blown back out of the drill hole. Both rock and mud present a hazard when projected toward an individual's unprotected eyes. Here, the two miners' faces were covered in mud and they told the inspector they had been drilling and installing pressurized rock bolts. Neither miner had eye protection on, nor could either produce any eye protection when asked to do so. Consequently, I find that a violation has been proven.

Frandsen testified that, because the miners did not have eye protection and could not produce any when asked, he concluded that not wearing eye protection was a common practice at the mine. (Tr. 65). If the mine continued this practice, it was reasonably likely to result in an eye injury, such as the loss of sight, given all of the flying rock, dust, dirt and oil. (Tr. 66). Further, when drilling, the miners' faces were very close to where the rock, mud, water, and dust projectiles were flying. If they were struck in the eye, they would lose eyesight, which is a permanently disabling injury. (Tr. 63). Based on his observations, he designated the citation as S&S. (Tr. 66).

I find that the violation was S&S. I find that a discrete safety hazard existed in that the failure to use eye protection while drilling and installing rock bolts exposed the miners' eyes to flying rock, dust, dirt and oil. Any of these substances, when projected at the eye, has the potential to cause permanent damage to one's vision. I credit Frandsen's testimony regarding the miners' inability to produce any eye protection and find that it was apparently a common practice at the mine to not use eye protection. Moreover, given that miners using this kind of drill would be required to have their faces close to where the projectiles were flying back out of the drill hole, I find that that an injury was reasonably likely to occur. Clearly the loss of sight is a serious, and potentially life altering, injury. Consequently, I find that the violation was S&S.

Frandsen determined that the mine was moderately negligent. (Tr. 65). Miners told Frandsen that there should be some glasses in the office. (Tr. 63). Frandsen explained that Graham told him that that the mine had glasses and that the miners knew they were supposed to use them. (Tr. 65).

I find that the mine was moderately negligent. It was mine management's job to ensure that the miners were using eye protection when needed. Although Graham, the mine manager, told Frandsen that the mine had eye protection and the miners knew they were supposed to use it, the miners did not do so, nor could they produce any when asked by the inspector. Frandsen explained that miners "hate" wearing eye protection because of the need to constantly clean the glasses. (Tr. 64). I credit the inspector's testimony on this issue and defer to his finding of moderate negligence.

In his brief, the Secretary maintains that the evidence establishes that the violation was the result of Silver Queen's high negligence. (Sec'y Br. 18-19). The Secretary relies on

MSHA's penalty regulations in making this argument. 30 C.F.R. § 100.3(d) Table X. I am not bound by the Secretary's Part 100 regulations and I decline to follow the classifications that MSHA uses in defining the levels of negligence.[6] Moreover, counsel for the Secretary asked the inspector "could you have designated this as a higher level of negligence?" (Tr. 65). The inspector replied, in part, "No. They had some mitigating evidence." *Id.* Thus, the Secretary tried to raise this issue at hearing but the inspector did not agree. For the reasons set forth above and set forth with respect to the Secretary's motion to amend Citation No. 8871177, the Secretary's motion to amend this citation is **DENIED**.

Based on my findings and the penalty factors discussed below, I find that a penalty of $550.00 is appropriate. I raised the penalty above that proposed by the Secretary because of the serious nature of the violation.

3. **Citation No. 8871179**

Safety Standard: 57.18006
Gravity: Reasonably likely, S&S, permanently disabling injury, 1 person affected
Negligence: Moderate
Proposed Penalty: $263

The citation alleges that the operator had not ensured that a new miner was using PPE or following safe work practices. (Ex. G-5). This miner had about two weeks of underground experience and had helped install rock bolts without safety glasses. He was also the miner who operated the mucker, discussed above, without performing a competent pre-operational check. Section 57.18006 provides that "[n]ew employees shall be indoctrinated in safety rules and safe work practices." 30 C.F.R. § 57.18006.

Frandsen testified that one of the two miners involved in the eye protection citation, discussed above, was a new and inexperienced miner, while the other was an experienced miner. (Tr. 77). According to Frandsen, the experienced miner was not modeling safe mining practices for the inexperienced miner. (Tr. 78). In particular, Frandsen noted that the experienced miner was allowing the inexperienced miner to drill without eye protection. (Tr. 79). Further, the experienced miner did not make sure that the inexperienced miner conducted a proper pre-operational inspection of the mucker, also discussed above. (Tr. 80). Frandsen explained that the new miner had incorrectly received "experienced miner training," had not been underground before, and needed to have "40 hours [of] inexperienced miner training." (Tr. 80-81, 86-87). Frandsen testified that, based on his observations, he could have issued multiple 104(g) orders to the mine for the inadequate training of the new miner. (Tr. 81).

I find that Silver Queen violated the cited standard. Clearly this new miner had not been trained in safe work practices. Both the new miner and experienced miner failed to wear eye

[6] In determining whether an operator has met its duty of care, I consider "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Jim Walter Res. Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014) (footnote omitted).

protection when hazards necessitating such protection were present. I agree with the inspector that the experienced miner failed to set an example for the new miner and did not indoctrinate him in the safety rules and safe work practices. The same could be said with regard to the citation issued for the inadequate pre-operational inspection. The violation is affirmed.

Frandsen testified that, because the new miner was not being trained correctly, it was reasonably likely that a permanently disabling injury would be sustained and that the violation was S&S. (Tr. 82-84). He explained that the poor example set by the experienced miner, in particular the failure of that individual to wear eye protection, should make "the hair on the back of your head . . . stand up." (Tr. 82). Further, he noted multiple other dangers that could stem from the experienced miner's failure to set a good example, namely, improper pre-operational equipment inspections, roof and rib concerns and knowing how to safely bar them down, and having proper personal protective equipment. (Tr. 82-83, 85). Frandsen explained that the miner's lack of training would have eventually led to the loss of eyesight due to drilling without eye protection. (Tr. 83).

I find that the violation was S&S. I find that a discrete safety hazard existed in that the inadequate training regarding safety rules and safe work practices made the new miner a "hazard to himself and to others." 30 U.S.C. § 814(g)(1). Here, as discussed above, the new miner was lucky to escape injury while drilling without eye protection. Moreover, also discussed above, the miner clearly had not been properly trained on how to conduct a proper pre-operational inspection, as evidenced by his failure to note the obvious condition of the missing nozzle on the fire suppression system. Consequently, I find it reasonably likely that, assuming continued mining operations, this miner would have injured either himself or another miner. In the event an injury was sustained as a result of the lack of training that resulted in the citations discussed above, the injuries would be serious. I affirm the S&S designation.

Frandsen determined that the mine was moderately negligent. (Tr. 84). Although he believed that the experienced miner did not set a good example, he felt that putting the new miner with the experienced miner was a mitigating circumstance. (Tr. 84).

I find that the mine was moderately negligent. I agree with Frandsen that having the new miner work with an experienced miner was a good decision. However, the experienced miner failed to teach safe work practices to the new miner. Management has a responsibility to not only train its miners, but also to ensure that the miners comply with the training. The mine failed to do so. Consequently, I find affirm the inspector's moderate negligence determination.

As with the previous citation, the Secretary maintains that the evidence establishes that the violation was the result of Silver Queen's high negligence. (Sec'y Br. 26). Inspector Frandsen testified that the violation was caused by management's moderate negligence. (Tr. 85). The Secretary did not attempt to modify the citation at the hearing and did not raise this issue until it filed his post-hearing brief. For the same reasons set forth above and set forth with respect to the Secretary's motion to amend Citation No. 8871177, the Secretary's motion to amend this citation is **DENIED**.

Based on my findings and the penalty factors discussed below, I find that a penalty of $550.00 is appropriate. As with the previous violation, I raised the penalty based on the serious nature of the violation.

4. **Citation No. 8871180**

Safety Standard: 57.20011
Gravity: Unlikely, not S&S, lost workdays or restricted duty, 1 person affected
Negligence: Moderate
Proposed Penalty: $100

The citation alleges that warning signs were not in place to warn miners that rocks could fall from an open hole at the South drift raise. (Ex. G-7). The citation further states that miners travel past the "area daily and regularly throughout the shift." *Id.* The miners were exposed to broken bone injuries from falling and rolling rock. Section 57.20011 provides 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." 30 C.F.R. § 57.20011. The safety standard also requires that any warning signs "shall be readily visible, legible, and display the nature of the hazard and any protective action required." *Id.*

Frandsen testified that he observed a hole in the roof of the mine. (Tr. 90). The mine had blasted the hole while evaluating whether to develop a raise to another level. (Tr. 92). Frandsen explained that the hole presented a hazard because rocks could fall from the hole and strike a miner. (Tr. 92). A lunch box was seen in the area and miners regularly walk through this area when going into and out of the mine. (Tr. 92). There were no warning signs in the area to indicate the presence of the hole and, according to Frandsen, the hole was not obvious. (Tr. 90, 96, 97). Frandsen did not immediately notice the hole. (Tr. 96-97, 101-102). Rock was piled up below the hole. (Tr. 96-97; Ex. G-8 p. 2). Frandsen initially assumed that the rock was just a muck bay where the muck was being temporarily stored. (Tr. 96-97). There were all different sizes of rock in the pile. (Tr. 99). It was not until he saw ventilation tubing in the area that he discovered the hole. (Tr. 92, 97, 102). Although Frandsen testified that the mine told him the hole was boarded up, that was not the case. (Tr. 93-94, 100). Rather, there were a few boards in the hole and there were plenty of gaps, including a ladder opening, through which rock could fall. (Tr. 94; Ex. G-8 p. 3).

I find that Silver Queen violated the cited standard. I find that a hazard existed. The hole had not been boarded up and sizeable rocks could easily fall through the openings seen in the picture taken by the inspector. (Ex. G-8 p. 3). I credit Frandsen's testimony that rocks falling from the hole could have struck and injured a miner walking in the area. I further find that the hazard was not obvious. I credit the inspector's testimony that he did not initially see the hole when he entered the area. Consequently, I find that the hazard was not obvious. Given that no barricades or warning signs were present to alert persons to the non-obvious hazard presented by the hole, I find that a violation has been proven.

Frandsen testified that, although an injury was unlikely because the muck pile would probably stop falling rocks from rolling too far and he was not certain what was up in the hole, if

a miner were hit by a rolling rock he could suffer an injury that would result in lost workdays or restricted duty. (Tr. 96, 101). Frandsen explained that, although he thought the rocks were at the angle of repose, a larger rock could bounce and roll off the pile and strike a miner in the ankle, leg, or foot, causing broken bones, strains, or sprains. (Tr. 96, 99-100). A preponderance of the evidence supports the inspector's gravity designation.

Frandsen determined that the mine was moderately negligent based on comments made by a mine examiner who said he knew the hole was there, but did not see it as a problem since rocks would not fall on anyone's head. (Tr. 98). However, according to Frandsen, the individual did not consider the possibility of rocks rolling and hitting miners. (Tr. 98). I affirm the inspector's moderate negligence determination.

Based on my findings and the penalty factors discussed below, I find that a penalty of $100.00 is appropriate.

5. **Citation No. 8871182**

Safety Standard: 57.12028
Gravity: Reasonably likely, S&S, fatal injury reasonably likely, 1 person affected
Negligence: Moderate
Proposed Penalty: $585

This citation alleges that the operator failed to perform a ground continuity test after a new cable was installed between the generator on the surface and the two fan control stations at the portal. (Ex. G-9). The cable was changed out on or about January 4, 2015 by the operator's employees who had no electrical experience. Miners were exposed to fatal electrocution or electrical shock. Section 57.12028 provides that "[c]ontinuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification and annually thereafter." 30 C.F.R. § 57.12028. The safety standard also requires that the operator keep a record of such examinations.

Frandsen testified that, at the direction of an electrical contractor, Graham and some miners changed out a 480 volt rated three phase main power cable between a generator and the controls for two fans used to ventilate the mine. (Tr. 107-109, 111). The mine failed to conduct a ground continuity test following the installation of the new cable. (Tr. 107).

I find that Silver Queen violated the cited standard. I agree with the inspector that, under the cited standard, following the installation of the new cable, a ground continuity test was required. The operator did not conduct a ground continuity test following the installation. Consequently, I find that a violation occurred.

Frandsen testified that the mine's failure to conduct a ground continuity test following the installation of the cable was reasonably likely to result in a fatal accident and designated the citation as S&S. (Tr. 114). Frandsen explained that the miners who installed the cable had limited electrical experience. (Tr. 109). Although they had been task trained by the electrical contractor on how to conduct a ground continuity test, neither the contractor nor the miners could

remember if they were trained on the need to conduct the test following the installation, which is something Frandsen said an experienced electrician would have known to do. (Tr. 109-111). Frandsen explained that when electrical work is done by someone with little electrical experience the risk is extremely high. (Tr. 114). This cable is not like a household extension cord and, instead, is part of a 480 volt system that requires someone replacing it to wire it, use proper lugs and fittings, check the rotation, and hook it up to the grounding. (Tr. 114). Failure to properly ground the cable could result in a fatal electrocution, especially because the fan controls that were supplied power by the cable were located in an area where there was a lot of water. (Tr. 115-116). By failing to conduct the ground continuity test the mine ran the risk that the cable was ungrounded, which could result in a loss of life. (Tr. 112).

I find that the violation was S&S. I find that a discrete safety hazard existed in that by failing to conduct a ground continuity test, miners could not know if they were at risk of electrocution when starting fans that were supplied power by this cable. The miners who changed the cable had little electrical experience and, although they knew how to do a ground continuity test, they failed to do so. Further, I credit the inspector's testimony that the risk of injury is high when miners with minimal electrical knowledge conduct this kind of work. Consequently, I agree that, assuming continued mining operations, it was reasonably likely that an injury would be sustained as a result of the mine's failure to conduct a ground continuity test as required by the standard.[7] The inspector did not know whether the cable passed the ground continuity test without any corrections being made when the test was performed to abate the citation. (Tr. 117-18). Nevertheless, I find that the hazard created by the violation was reasonably likely to lead to a serious injury. The "Secretary need not prove a reasonable likelihood that the violation itself will cause injury" but, rather, that the hazard contributed to by the violation will cause an injury. *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011). The Secretary established that the violation was S&S.

Frandsen determined that the violation was the result of Silver Queen's moderate negligence. (Tr. 116). He believed mitigating circumstances existed because the mine replaced the cable for safety reasons. (Tr. 116). Moreover, according to Frandsen, the miners told him that they could not remember if the electrical contractor told them that they needed to re-test the ground continuity after the new cable was installed. (Tr. 116-117).

I credit the inspector's testimony and find that Silver Queen was moderately negligent. Although the mine's decision to replace the old cable is commendable, the failure to test the cable after installation demonstrates moderate negligence.

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[7] During cross-examination the representative for the mine asked multiple questions regarding whether the inspector checked the cable to see if it was in fact grounded. (Tr. 120-123). However, the question whether the cable was grounded at the time of the inspection does not resolve the issue before the court. Rather, the relevant issue is whether the mine checked to see if it was grounded. Here, the mine did not determine whether the cable was grounded and, as a result, could not have known if the cable was safe for use.

As with two other citations, the Secretary maintains that the evidence establishes that the violation was the result of Silver Queen's high negligence. (Sec'y Br. 31). Inspector Frandsen testified that the violation was caused by management's moderate negligence. (Tr. 116). The Secretary did not attempt to modify the citation at the hearing and did not raise this issue until he filed his post-hearing brief. For the same reasons set forth above and set forth with respect to the Secretary's motion to amend Citation No. 8871177, the Secretary's motion to amend this citation is **DENIED.**

Based on my findings and the penalty factors discussed below, I find that a penalty of $584.00 is appropriate.

6. **Citation No. 8871183**

Safety Standard: 57.18002(a)
Gravity: Unlikely, not S&S, lost workdays or restricted duty, 1 person affected
Negligence: Moderate
Proposed Penalty: $100

The citation alleges that the operator had not designated a competent person to perform workplace examinations for the surface area of the mine. (Ex. G-11). The citation further states that surface areas include repair benches, bulk oil and fuel storage areas, the explosive magazine, and other work areas. The inspector stated that miners could be injured because the areas were not examined and noted that the mine manager said that every miner regularly looks over the area because cows travel through the site and tear things up. Section 57.18002(a) provides, in part, that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions that any adversely affect safety or health." 30 C.F.R. § 57.18002(a).

Frandsen testified that Graham told him that the mine did not have a designated person to examine the surface of the mine. (Tr. 126). The surface areas of the mine were not being inspected despite the fact that miners worked in some of those areas daily. (Tr. 126-127). Rather, according to Frandsen, Graham told him that if the miners saw something that was not safe, they would fix it. (Tr. 128, 139).

I find that Silver Queen violated the cited standard. The surface had multiple working places that were accessed daily and needed to be examined at least once each shift. I credit Frandsen's testimony that Graham told him that the mine did not have a designated person who examined the surface. As a result, I find that the violation is proven.

Frandsen testified that an injury was unlikely because the miners generally fixed problems when they found them. Any injury was reasonably likely to result in lost workdays or restricted duty. (Tr. 128-129). Frandsen noted that the types of injuries generally associated with failure to examine these areas are electrical injuries, broken bones, tripping injuries, and housekeeping, fire and smoke related injuries. (Tr. 129). I agree with the inspector's gravity findings.

Frandsen determined that the mine was moderately negligent based on what Graham told him about the miners fixing problems on the surface when they found them. (Tr. 129). Frandsen noted that, aside from this citation, he did not see any violations on the surface. (Tr. 129). I affirm the inspector's moderate negligence determination.

Based on my findings and the penalty factors discussed herein, I find that a penalty of $100.00 is appropriate.

## II. APPROPRIATE CIVIL PENALTY

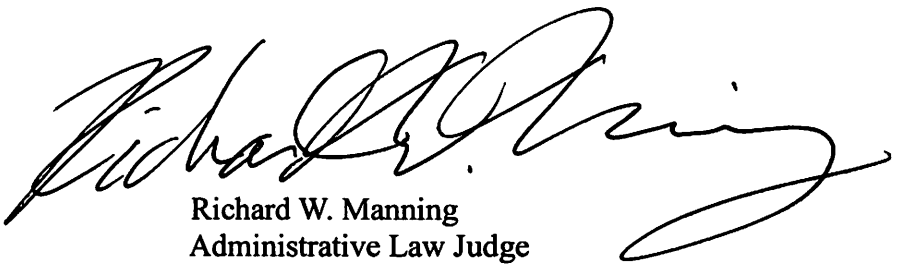
Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. 30 U.S.C. § 820(i). Silver Queen had a history of 13 violations during the 15 months preceding the issuance of the subject citation, but only two were S&S. Respondent is a small operator that worked just over 8,000 hours in 2014. The violations were abated in good faith. The operator did not establish that the proposed penalties will have an adverse effect upon its ability to continue in business.

## III. ORDER

Based on the penalty criteria, I assess the following civil penalties:

| Citation/Order No. | 30 C.F.R. § | Penalty |
|---|---|---|
| WEST 2015-448-M | | |
| 8871120 | 57.6306(g) | $1,500.00 |
| 8871121 | 57.6202(a)(5) | 162.00 |
| 8871122 | 57.14132(b)(1) | 540.00 |
| 8871123 | 57.4102 | 162.00 |
| 8871124 | 57.12032 | 162.00 |
| 8871125 | 57.13011 | 100.00 |
| 8871126 | 57.8528 | 100.00 |
| 8871127 | 57.11053(c) | 100.00 |
| 8871134 | 57.12018 | 100.00 |
| 8871135 | 41.12 | 50.00 |
| WEST 2015-574-M | | |
| 8871177 | 57.14100(a) | 100.00 |
| 8871178 | 57.15004 | 550.00 |
| 8871179 | 57.18006 | 550.00 |
| 8871180 | 57.20011 | 100.00 |
| 8871182 | 57.12028 | 584.00 |
| 8871183 | 57.18002(a) | 100.00 |
| TOTAL PENALTY | | $4,960.00 |

For the reasons set forth above, the citations are **AFFIRMED** or **MODIFIED** as set forth above. The Silver Queen Mine LLC is **ORDERED TO PAY** the Secretary of Labor the sum of $4,960.00 within 40 days of the date of this decision.[8]



Richard W. Manning
Administrative Law Judge

Distribution:

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D. Scott Horn, Conference & Litigation Representative, Mine Safety & Health Administration, 991 Nut Tree Road, 2nd Floor, Vacaville, CA 95687 (First Class Mail)

Trenton Davis, The Silver Queen Mine LLC, 1477 Menlo Avenue, Clovis, CA 93611 (Certified Mail)

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