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

April 7, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. NEWMONT SLATE COMPANY, INC., Respondent.	CIVIL PENALTY PROCEEDING: Docket No. YORK 2016-20-M A.C. No. 43-00011-393999 Mine: Newmont Slate Co.

AMENDED DECISION[1]

Appearances: Emily B. Hays, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado for Petitioner

John Williams, President, Newmont Slate Company, Inc., West Pawlet, Vermont for Respondent

Before: Judge Barbour

In this civil penalty proceeding arising under sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. §§ 815, 820 (2012) (the "Mine Act"), the Secretary of Labor on behalf of his Mine Safety and Health Administration ("MSHA") petitions for the assessment of civil penalties for 16 violations of mandatory safety, health, and training standards found in Parts 56, 46 and 62 of Title 30 Code of Federal Regulations. The violations are alleged to have occurred at a slate quarry and mill owned and operated by Newmont Slate Company, Inc. ("Newmont"). At the facility slate is quarried and then cut and shaped into shingles used primarily for roofing and cladding. Newmont is one of the few companies in the United States that does such work.

[1] The court's original decision issued on March 30, 2017, contained several clerical errors regarding the Secretary's proposed penalties in Citation Nos. 8917956, 8917960, and 8917966. The decision has been amended to reflect the correct proposed and assessed penalties. As a result of these changes, Newmont shall be required to pay civil penalties in the amount of $4,462, instead of the amount of $3,592 originally specified in the March 30 decision. Further, the final order has been amended to reflect the modifications made to Citation Nos. 8917954 and 8917963 in the body of this decision.

The citations were issued by MSHA Inspector John Burton who made findings regarding the existence of the alleged violations, the gravity of the violations and the negligence of the company.[2] Burton also found that three of the alleged violations were significant and substantial contributions to mine safety hazards ("S&S violations"). The Secretary proposed civil penalties that in the aggregate total $6,002.00. Newmont contested the violations and the proposed penalties asserting that some of the violations did not occur or if they did that Burton's findings and many of the proposed penalties were not justified by the facts.

After the chief judge assigned the case the court issued an order requiring the parties to confer to determine if they could resolve their differences. When they could not the court asked a special counsel to intervene in the hope that an independent and impartial official could facilitate a settlement. When counsel's efforts failed the court scheduled a hearing in Rutland, Vermont. The Secretary was represented by counsel. The company was represented by its president, John Williams.[3]

Prior to going on the record the court asked the parties to make a final attempt to reach an agreement on the case or at least to resolve their differences with regard to some of the alleged

[2] John Burton is a duly authorized mine inspector working out of the MSHA field office in Albany, New York. Burton graduated from high school in 1988 and then went into the United States Army where he served as a combat engineer and a heavy equipment operator. Following his honorable discharge Burton worked for a construction company as a foreman and a heavy equipment operator. After leaving the construction company Burton worked for a company producing and selling concrete redi-mix and the aggregates from which redi-mix is produced. While working in the redi-mix business Burton operated and maintained a wash plant, a screening plant, and he operated various types of mobile equipment. Tr. 33. He also was responsible for conducting workplace examinations and mobile equipment examinations. Tr. 33-24. Burton next worked as a haul truck driver for a construction company where he once again operated various types of heavy equipment.

[3] Williams has been mining slate for 53 years. He knows the business inside and out. However, he is not conversant with the mechanics of the Mine Act. Williams explained to the court that while in the past he accepted citations as written and paid fines as assessed, he found the process "downright annoying." Tr. 19. Adding to his pique was his claim that the inspection during which the subject citations were issued resulted in the most citations the company ever received in a single inspection. Tr. 77. Williams stated he decided to use the present case to "see how the system works." Tr. 19. He credited the Secretary's counsel with perseverance and patience in explaining to him how violations are assessed and how they are contested. The court also recognizes and commends counsel's willingness to add a teaching function to her many other duties. In going out of her way to assist Williams counsel acted in the best interests of her client and the public. The court also commends Williams for his efforts to better understand the Mine Act. The court recognizes the company was engaged in a learning experience that required a more than ordinary investment of counsel for the Secretary's and the court's time, but the court believes that the experience was worthwhile and that it will lead to a safer mine and a more harmonious relationship between the company and the agency.

violations. The parties conferred, but again were unable to come to an understanding, and the case then went forward. Tr. 9-10.

AGREED UPON FACTS AND CONCEDED VIOLATIONS

Prior to hearing the witnesses, counsel for the Secretary reported that she and the company agreed upon several relevant facts, namely:

1. When the subject citations were issued, the company was subject to the jurisdiction of the Mine Act.

2. The company engaged in slate mining operations at the subject mine.

3 The company's mining operations affected interstate commerce.

4 At all times relevant the company [was] an "operator" as defined in section 3(d) of the Mine Act.

5 Inspector Burton was acting in his official capacity as a duly authorized representative of the Secretary when he issued the subject citations.

6 The proposed penalties will not affect the company's ability to remain in business.

Tr. 17-18, 21.

After stating his agreement with the facts, Williams advised the court that through his better understanding of the assessment and contest processes there were several citations he could accept as written, or, as Williams put it, he could "skip right over." Tr. 20. As further explained below, ultimately Williams withdrew Newmont's contests of seven citations. *See* "The Uncontested Citations," *infra.*

THE CONTESTED CITATIONS

CITATION NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT
8917961	8/25/15	56.4101	$263

The citation states:

> There were no signs readily visible prohibiting open flame or smoking or open flames at the 4 propane tanks [at] the west side yard area of the mill. The propane tanks supply propane to the mill building and miners transport and cleave slate in the west side yard area of the mill. This condition exposes a miner to a fire/explosion hazard. In the event an accident were to occur it

would be likely that fatal injuries would be expected.

Gov't Exh.9 at 1. The citation contains the inspector's findings that the cited condition was unlikely to lead to a fatal injury and was due to the company's low negligence.

In August 2015 Burton was assigned to inspect Newmont's quarry. Although he had inspected other slate quarries, the August inspection was his first visit to Newmont's facility. [4] Tr. 40. Burton began the inspection on August 25. Burton had been conducting inspections on his own for about 18 months. Tr. 70. When Burton arrived the mine was operating and production was ongoing. Tr. 62. During the inspection Burton was accompanied by Albert Gallupe, Newmont's maintenance foreman. *Id.*

Among the first things Burton observed were four propane tanks on the west side of the mill building. Burton looked but saw no signs prohibiting open flames or smoking in the vicinity of the tanks. Tr. 50. Burton described mandatory safety standard section 56.4101 (30 C.F.R. § 56.4101) as requiring "a mine operator [to] post readily visible signs where a . . . fire [and/or] explosion hazard exists." Tr. 50-51.

Burton explained that the tanks supply propane to the mill where miners cleaved slate into shingles.[5] No signs were posted on the tanks or in the area of the tanks warning miners of a fire or explosion hazard. Tr. 51. Burton found that the lack of signs constituted a violation of section 56.4101. *See* Gov't Exh. 9 at 3. However, he also found that it was unlikely the company's failure to post the signs would result in an accident. Still, if the gases in one of the tanks "were to vent" (meaning were to escape the tank) and to do so in the vicinity of an open flame, a fatal accident could occur.[6] Tr. 54. Burton stated that even though, "There were no open flames or sparking materials observed in or around the . . . tanks[,]" (Tr. 52) if an accident occurred, "the fireball and flying projectiles that would come from the steel tank would be expected to kill a miner." *Id.*; *see also* Tr. 130. Burton testified that only one person was subject to the hazards of a tank explosion, the person who regularly cleaved the slate. Tr. 55. He noted however that the area was traveled, albeit not regularly, by other miners in mobile equipment. Tr. 56 (*referencing* Gov't Exh. 9 at 4.), 58.

Burton found that Newmont's negligence was low. He acknowledged that Newmont management officials did not travel the area on a regular basis. He was of the view that the officials might not have been aware of the absence of the required signs. This was especially true

[4] At the time the mine consisted of the quarry where slate was extracted, the mill buildings in and around which slate was processed and other structures related to the business. Tr. 41. The mine employed approximately 45 to 48 people. Tr. 43. Burton described the facility as "one of the larger slate mines in the region." Tr. 42. Burton stated if he were to rate the mine for cleanliness and organization he would consider it "about average." Tr. 69.

[5] According to Burton, the process of cleaving the slate requires the use of pneumatic hammers to "size the slate for thickness." Tr. 51.

[6] Indeed, as Burton noted, such a fatal accident occurred in 2001 at a different metal/nonmetal facility. Tr. 53-54; *see* Gov't Exh. 9(b).

since the area was not required to be pre-shift or on-shift examined on a regular basis. Tr. 58. To abate the alleged violation the company placed a sign stating "No Smoking –Danger" at the edge of the road adjacent to the tanks. Tr. 64; Gov't Exh. 9 at 4.

For his part Williams maintained that miners would recognize the propane tanks for what they were and would know not to have open flames or lighted cigarettes around them. Therefore, in William's opinion a fatal accident was very unlikely. *See, e.g.,* Tr. 76.

THE VIOLATION, ITS GRAVITY AND NEWMONT'S NEGLIGENCE

Section 56.4101 states, "Readily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists." Burton's unrefuted testimony established the violation. A precondition for posting the required signs is a "fire or explosion hazard." It is common knowledge that propane is highly flammable and explosive and as Burton stated, if the gases in any one of the tanks "were to vent" an open flame could spark an explosion. Tr. 54. The record supports finding the propane was regularly used in the process of cleaving slate in the mill and mill yard. Tr. 55. While it is true that Burton saw no open flame or flames in the vicinity of the tanks (*Id.),* without a warning sign or signs there was the potential hazard of a miner using flame producing equipment (*e.g.*, welding) or of lighting a cigarette dangerously near the tanks. If one or more of the tanks vented the gas could ignite and a catastrophic explosion could result. The court credits Burton's testimony that such an event would likely result in a fatality. Tr. 130. Because of the grave consequences, the court concludes that violation was moderately serious, even though a resulting fire or explosion was unlikely given the small chance of a tank venting and of an ignition source being in the area.[7]

Burton found that Newmont's negligence was low and the record supports the finding. Burton's testimony that the area containing the propane tanks was not subject to regular pre-shift or on-shift examination and management officials did not travel past the tanks frequently was not contradicted. Tr. 58. Given this, it would have been easy for the company frequently to fail to note and correct the lack of warning signs.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT
8917962	8/25/15	56.13011	$585

The citation states:

> There were two air receiver tanks . . . that did not have automatic relief valves or pressure gauges installed. First a blue Emglo 50 gallon air tank was connected to the air compressor in the yard splitting area. Second a 30 gallon air tank was mounted to air compressor c9804 in the quarry. Both air tanks did not have automatic pressure

[7] The court fully agrees with Williams that most miners would recognize the propane tanks and would know not to produce an ignition source in their presence. Tr. 76.

> relief valves or an air pressure gauge installed on the air tanks. This condition does not allow a miner to know how much air is inside the portable air tanks nor does it allow the tank to vent if the maximum allowable working pressure is exceeded creating and exploding of a pressure vessel hazard [(*sic.*)]. In the event an accident were to occur it would be likely that a fatal injury would be expected.

Gov't Exh.10 at 1. The citation contains the inspector's findings that the cited condition was unlikely to lead to a fatal injury and was due to the company's moderate negligence.

Burton issued the citation because, "There were two receiver tanks at the mine that were not equipped with safety valves or pressure gauges." Tr. 84. Burton found the condition violated section 56.13011, which states that such tanks "shall be equipped with one or more automatic pressure relief valves" and that "[a]ir receiver tanks also shall be equipped with . . . pressure gauges." 30 C.F.R. § 56.13011; Tr. 84. Burton testified the words "shall" as used in the standard mean that the presence of pressure relief valves and gauges on the tanks are mandatory. *Id.* Burton maintained that one of the air tanks (the Emglo 50 gallon tank) was connected to an air compressor in the slate splitting area of the mill yard (also known as the slate cleaving area). The tank was not equipped with a pressure relief valve or a pressure gauge. Tr. 85. He further testified that he saw another air tank that was mounted on an air compressor. That tank, like the Emglo 50 gallon tank, did not have a pressure relief valve or a pressure gauge. *Id.* The two tanks were approximately 700 to 1000 feet apart. *Id.*

Burton identified a photograph of the Emglo 50 gallon tank and circled two ports on the tank where a pressure relief valve should have been located. Tr. 86; Gov't Exh. 10 at 3. Burton also identified a photograph of the air receiver tank that was mounted on an air compressor. Gov't Exh. 10 at 4. Neither a pressure relief valve nor a pressure gauge was present. Tr. 92. On the photograph Burton circled the ports where the relief valve and the pressure gauge should have been. Tr. 91-92; Gov't Exh. 10 at 4. Burton explained that the valves protected against the tanks exploding if they were "over pressured" (Tr. 86), and the gauges insured miners knew the tanks contained the right amounts of air. (Tr. 87).

In Burton's opinion both tanks presented with two conditions that violated section 56.13011. The tanks had no pressure relief valves and no pressure gauges. Tr. 88-89. Burton explained that the relief valves and pressure gauges are sometimes combined as a single piece of equipment and sometimes they are two separate pieces of equipment. Tr. 90-91. However, neither tank had either configuration.

Burton found that an injury was unlikely to occur as a result of the missing valves and gauges. Tr. 93. He noted the Emglo 50 gallon tank had a cracked air valve. Because of this it was operated at a lower air pressure than otherwise would have been the case. Tr. 93. Nonetheless, if either of the tanks became over pressurized and exploded, flying shrapnel could easily kill a miner. Tr. 95; Gov't Exh. 10 at 1. Burton believed the persons most likely to be affected were miners who used the tanks to cut slate. Tr. 96. He concluded that the hazard was enhanced by the

fact that both tanks were portable. They "could be moved anywhere on the mine site" and could be used by a miner who was not familiar with the equipment. Tr. 121, *see also* Tr. 125, 128.

Burton found that the company was moderately negligent. Gov't Exh. 10 at 1. He based his finding on the fact that a miner told him it was permissible to operate the tanks without the valves and gauges because the tanks were usually connected to a "regulated compressor" and the regulated compressor system contained the required valves and gauges. Tr. 96. Based on the miner's statement Burton concluded that mine management knew the condition existed. *Id*.

Williams was able to provide more information regarding the operation of the tanks. He explained that they were used to power a "rivet buster," a pneumatic hammer used to break slate. He agreed pressure relief valves and pressure gauges were required but in his opinion their presence on the tanks was not mandatory. Rather, he thought they could be located as part of the regulated compressor system.[8] Tr. 103-04. Williams testified that the system's compressor was located inside the mill. The compressor was connected to the cited tanks with a three quarter inch airline. Tr. 105. Although at the time of the inspection the Englo 50 gallon air tank was disconnected from the system and the air compressor was 400 feet away from the tank, Williams agreed that the tank could be moved and was available for use. Tr. 115-16. The same thing was true of the other cited tank. Tr. 116.

Williams maintained there was no chance the cited tasks would explode because the air pressure in the tanks was below the level necessary to cause their failure. Tr. 116. While an "oddball tank" could be dangerous, he noted the cited tanks had been checked and tested prior to use to confirm their integrity. Tr. 106. Williams argued that although the standard refers to "tanks," technology had advanced to the point where the standard should be revised to apply to "[a]ir receiver systems." *Id; See also* Tr. 114. If the standard were reworded this way the company would be in compliance. *Id.* Nonetheless, Williams agreed that both of the cited tanks were air receiver tanks and that neither had a pressure relief valve and a pressure gauge on the tank. Tr. 109-10.

THE VIOLATION, ITS GRAVITY AND NEWMONT'S NEGLIGENCE

The court finds the violation existed as charged. The standard is clear. It states that air receiver tanks "shall be equipped" with one or more automatic pressure relief valves and with pressure gauges. 30 U.S.C. § 56.13011. As Burton correctly noted, "shall be equipped" means that the specified items must be present on the tanks. Tr. 84-85. Burton testified that the items were not present on either tank (Tr. 85-86, 88-89, 91-92), and Williams agreed. Tr. 108-10.

While there was a violation, the testimony leads the court to conclude the violation was technical and that it presented virtually no hazard to the company's miners. Burton agreed with

[8] Burton recognized that the system as a whole might have a pressure relief valve and that if it did the likelihood of an injury would be much reduced, but in his opinion the presence of a valve or gauge elsewhere in the system did not invalidate the violation. Tr. 119. Burton also agreed that the PSI rating of the tanks was lower because they were part of a system and that this too reduced the likelihood of an injury arising from the cited conditions. Tr. 120-21.

Williams that because the tanks were each part of a system they had a PSI rating below the level that was necessary for the tanks to pose an explosion hazard. Tr. 120-21. Moreover, according to Williams, there were valves and gauges in the system which served the same purpose as valves and gauges on the tanks. Tr. 106, 114. Williams's suggestion that the standard be revised to apply to "air receiver systems" rather than to tanks, was reasonable, and it may well be that such a revision would provide miners with the same level of protection as the present regulation.

Burton was concerned about the portability of the tanks. He feared they could be moved and used when not part of an overall system and thus be totally without the protection afforded by the valves and gauges. Tr. 121, 125, 128. However, the court notes that while Williams agreed such use was possible (Tr. 115-16), there is nothing in the record to indicate it was likely. Rather, Williams's testimony establishes that the tanks were primarily used to provide pneumatic pressure to the rivet buster and that when used this way the system of which the tanks were a part was protected with the valves and gauges. Tr. 103-04. Further, while Williams agreed that an "odd ball" tank could be dangerous, nothing in the record indicates either of the cited tanks was structurally defective in a way that posed a danger. For many of these reasons Burton found that it was unlikely a miner would be injured due to the violation. Gov't Exh. 10 at 1. The court goes further and for all of these reasons finds that it was extremely unlikely.

The court also departs somewhat from Burton's negligence finding. Burton believed the company knew its tanks lacked the required valves and gauges because a miner told him the tanks could be operated without that equipment since the tanks were connected to a regulated compressor. Tr. 96. The court credits what Burton was told, but unlike Burton the court concludes it significantly mitigates the company's negligence. The court finds that the miner was conveying to Burton the same belief about which Williams testified, to wit that if the required vales and gauges are a part of the system they are not required on the tanks. Tr. 103-04, 114. The company's belief, although mistaken, was reasonable, and the court concludes that Newmont's genuine, good faith belief it was in compliance reduced the company's otherwise moderate negligence to low.

CITATION NO.	**DATE**	**30 C.F.R. §**	**PROPOSED ASSESSMENT**
8917959	8/25/15	56.12018	$585

The citation states:

> There were two circuit breaker panels . . . that had circuit breakers that were not labeled to show the units they controlled. First, the main mill, east splitting room circuit breaker had one 480 volt 30 amp breaker that was not labeled. Second, the new mill 480 volt circuit breaker panel had one 100 amp and one 15 amp circuit breaker that were not labeled. The circuit breakers were in the [“]on[”] position. This condition does not allow a miner to know which circuit to de-energize in an emergency. In the event an accident were to occur it would be likely that fatal injuries would be expected.

Gov't Exh. 7 at 1. The citation contains the inspector's findings that the cited conditions were unlikely to lead to a fatal injury and were due to the company's moderate negligence.

During the course of his inspection Burton examined two circuit breaker panels that he found to be defective. One panel was in the main mill. The other was in a different mill, the "new mill." Tr. 141; Gov't Exh. 7 at 3. Each panel contained circuit breakers that were not properly labeled. Tr. 139. Therefore, Burton issued a citation to the company for violating section 56.12018, a mandatory safety standard requiring "the identification of power switches." Tr. 140, Gov't Exh. 7.

Burton described the first circuit breaker panel as the panel containing the breakers for the main mill's east slate splitting room. In the panel there was one 480 volt 30 amp circuit breaker that was not labeled. *Id.* The unlabeled circuit breaker was in the "on" position, which indicated to Burton that the panel was energized. Tr. 141. The second panel was for the new mill building. It too was a 480 volt panel. The second panel contained two unlabeled circuit breakers, one for a 100 amp circuit and one for a 15 amp circuit. Tr. 140. These breakers also were in the "on" position. Tr. 141, 144. Burton testified that the lack of labels meant that a miner would not know which circuits to de-energize in an emergency or which breakers to lock out when making repairs. Tr. 141-42. Burton physically checked the unlabeled circuits with a "tick tracer" and confirmed that power was flowing to each of the three unlabeled circuits.[9] Tr. 142, 143-44; *See* Gov't Exh. 7 at 3, 4.

Section 56.12018 requires the identification of "principal power switches." In Burton's view, both of the cited panels were principal power switches for the circuits controlled by the circuit breakers. Tr. 163-64. He explained when electricity enters the panels and comes to the circuit breakers, the breakers "[become] the principal power switch[es] for[the] circuit[s] from the circuit breaker panel[s] to the equipment." Tr. 163-64. He stated, "[T]he power is subbed out from the panel and it is branched down to that circuit breaker which is the primary switch . . . for that circuit." Tr. 155.

Burton described the hazard posed by the lack of labeling. "An unlabeled circuit breaker does not allow a miner to know which circuit to de-energize in an emergency, and it also does not allow [a] miner to know which circuit to de-energize, lock and tag out for repairs." Tr. 141-42. However, Burton did not believe the conditions were likely to result in an injury. He noted that both panels were subject to main circuit breakers and that to de-energize the circuits in either panel "a miner could go to the main and switch that main breaker off in an emergency." Tr. 149. Also, if work needed to be done on equipment on any of the subject circuits a miner would likely call on an electrician to do it. Referring the work to a knowledgeable electrician would reduce the chance of injury. Tr. 149. Nonetheless, were an injury to occur, Burton believed it was likely to result in a fatality. He noted that a "480 volt electric shock is often associated with fatal-type injuries." Tr. 150.

Burton found the company was moderately negligent. There were numerous circuit breaker panels at the mine and the company knew the requirements of the standard since all but the cited circuits were labeled properly. Tr. 154. He also testified that although the company

[9] A "tick tracer" is a pocket tool designed to detect the presence of voltage in a wire or in a piece of equipment without actually making direct contact with the conductor or energized part.

subcontracted its electrical work, a management official told him that the company did not follow up with the subcontractor to ensure contracted electrical work was done correctly.[10] Finally, there is a requirement that the panels be inspected and none of the three unlabeled circuits was reported on a workplace examination report. Tr. 154-55.

Williams testified there are three safety features on the cited circuits. There is the main circuit breaker that cuts off power to all of the circuits, the individual circuit breakers that cut off power to the individual circuits and "fuse cut-offs" at the particular machines powered by the cited circuits. Tr. 159-60. In Williams's view each protection reduced the likelihood of an electrical accident. Tr. 160.

THE VIOLATION, ITS GRAVITY AND NEWMONT'S NEGLIGENCE

The standard is simply worded, "Principal power switches shall be labeled to show which units they control unless identification can be made readily by location." It is certain that there were three circuit breakers in two panels that were not labeled. Burton's oral testimony and the photographs introduced into evidence by the Secretary prove this. Tr. 139-42; Gov't Exh. 7 at 3, 4. The unresolved issue is whether the circuit breakers were "principal power switches" within the meaning of the standard. Based solely on the record presented in this case, the court concludes they were.

As the court has previously noted:

> [Q]uestions regarding the meaning of the phrase 'principal power switch' and whether particular cited equipment come within the meaning have repeatedly been brought to the Commission's judges. While the judges have decided whether certain equipment is covered by the standard based on the facts of the cases before them, a definitive meaning of the phrase 'principal power switch' has yet to emerge. *See, e.g., Beverly Materials, LLC,* 35 FMSHRC 88, 95-97 (Judge Moran); *Cemex Construction Materials of Florida, LLC* . 34 FMSHRC *170, 174 (Jan*. 2012 (Judge Zielinski); *Omya Arizona, A Division of Omya, Inc.*, 33 FMSHRC 2738, 2739-40 (Judge Miller); *Blue Mountain Production Co*., 32 FMSHRC 1464, 1473-74 (Oct. 2010) *(Judge Miller)*; *Tide Creek Rock, Inc.*, 19 FMSHRC390, 399 (Judge Manning); *Walker Stone Co., Inc.*, 12 FMSHRC 256, 264 (Feb. 1990 (Judge Fauver); *FMC Corp.*, 6 FMSHRC 1294, 1299 (May 1984) (Judge Vail) (decided under identically worded standard (30 C.F.R. § 57.12-18.)

US Silica Company, 36 FMSHRC 517, 519 (Feb. 2014) (*fn omitted*); *see also Northern Illinois Service Co.*, 37 FMSHRC 1225 (June 2015) (ALJ Barbour).

[10] Williams seemed to agree with Burton that although work on the panels was subcontracted, the company should have known the circuits were not labeled. He stated that although it was the electrical contractor who "screwed up," "I should have caught it." Tr. 160; *see also* Tr. 162.

In this particular case the record establishes that, as Burton testified, the circuit breakers were power switches in that they were components that could break an electric circuit. While, as the court has noted, there is no accepted meaning of the phrase "principal power switch" there is an accepted meaning of the word "principal" when it is used as an adjective. It means "chief" or "leading." *See* Houghton Mifflin Harcourt, *The American Heritage Dictionary of the English Language, Fourth Edition* (2009) at 1395. Here, as Burton testified, the cited circuit breakers were the first switch[es] in the line of the individual circuit[s]" (Tr. 156) so that each switch was "the primary switch . . . for [its] circuit." Tr. 155. The court construes a primary switch as the chief or leading switch in a circuit, and the court concludes that each cited circuit breaker was a "principal power switch" for its circuit. It may be, as Williams's questions on cross examination suggest, that there was a principal power switch for all of the circuits in each breaker box. *See* Tr. 155-58. Indeed, Burton himself alluded to the presence of such a switch when testifying that the cited conditions were unlikely to result in an accident because "a miner could go to the main and switch the main breaker off in an emergency." Tr. 149. However, Williams did not offer oral or visual evidence regarding such a switch or switches, and the court must rule based on the record before it, not on speculation as to what the record might have been if Williams had pursued the issue. The court therefore finds that the Secretary proved the violation.

Burton found that the violation was unlikely to result in an accident, and the court fully agrees. There evidently were other ways to shut power off to the affected circuits prior to working on them and the employees of the company's electrical subcontractor would have been much more likely to recognize this than the company's employees who did not specialize in electrical work. However, had an accident occurred, the court agrees with Burton that a fatality was likely. Burton stated the obvious when he testified that "a 480 volt electric shock is often associated with fatal-type injuries." Tr. 150.

Finally, the court concurs with Burton that the company was moderately negligent. While Williams may have been right when he testified the company's electrical subcontractor "screwed up" and failed to ensure the three circuits were labeled, as Williams also recognized, the company should have "caught" the mistakes. Tr. 160. Further, and as Burton testified, the workplace examination forms for the panels did not record the missing labels. While the company may have relied on the "expertise" of its subcontractor, it still was under a duty to ensure compliance with the standards. The company failed in its duty.

CITATION NO.	**DATE**	**30 C.F.R. §**	**PROPOSED ASSESSMENT**
8917956	8/25/15	56.14112(a)	$1,304

The citation states:

> The guard for "The Beast" [trimmer] saw was not secured in place. The saw was equipped with a nine-inch (approximate) cutting blade. The saw[']s sliding table top is (approximately) 22 inches wide. The trimmer saw[']s cord was plugged in and the saw was available for use. The saw is used at the mill to custom trim dimension slate as needed. This condition exposes a miner to

> contact with the trimmer[']s rotating blade. In the event an accident were to occur it would be reasonably likely that permanently disabling injuries would be expected.

Gov't Exh. 4 at 1. The citation contains the inspector's findings that the cited condition was S&S, was reasonably likely to cause a permanently disabling injury and was due to the company's moderate negligence. Gov't Exh. 4 at 1.

Burton stated that he issued the citation because the trimmer saw's guard had been removed.[11] Tr. 173. The trimmer saw has a nine-inch blade and a 22-inch-wide tabletop. *Id.* The saw is used to trim slate to order. Tr. 183-84. When Burton inspected the saw he noticed that the guard for the blade was off and was sitting on a shelf beside the saw. Tr. 173-74; Gov't Exh. 4 at 6. Burton believed the saw had been used. Tr. 174. The saw was plugged into an energized wall outlet, and near the saw Burton observed pieces of slate that were typical of slate trimmed with the saw. Tr. 174-75, 177; Gov't Exh 4 at 7. Burton also noted dust around and on the pieces of the guard, which indicated to Burton that the "guard [had] been off . . . for a particular period of time, long enough to accumulate dust on it." Tr. 175. During that time Burton thought it likely the saw had been used since it was usually used daily at the mine. Burton also recalled that the mine foreman told him the guard was purposefully removed because it "may have been sticking." Tr. 185. This was another reason Burton thought it was likely that the saw had been operated with the guard off. Tr. 204

Burton believed the lack of a guard violated section 56.14112(b), which requires that guards be securely in place while machinery is operated. Gov't Exh. 4. He was quick to point out, however, that he could have cited the company for a violation of section 56.14107(a), a standard requiring the guarding of moving machine parts that can cause injury to persons. Tr. 200. In view of Burton's testimony counsel for the Secretary moved to amend the Secretary's petition to plead in the alternative a violation of section 56.14107(a). Williams did not object, and the motion was granted. Tr. 205-08.

Burton testified that the danger presented by the condition was that a miner's hands might contact the rotating saw blade. Tr. 178. He explained that when a miner trims slate, the miner secures the slate piece to the saw's table top, places his hands on the hand holds of the table top and pushes the table top and slate through and past the saw's rotating blade. The procedure brings the miner's hands very close to the turning blade. Tr. 180-81. The lack of a guard means there was "direct exposure of a miner to the rotating and moving machine parts" of the saw. Tr. 183-84. While only the miner who operated the saw was likely to be affected by the alleged violation (Tr. 188), Burton thought an accident involving the miner was reasonably likely and that as a result of the accident the miner was likely to lose all or part of his or her hand, and possibly all or part of his or her limb. Tr. 186. Burton termed such an injury a "dismemberment-type injury." *Id.* Burton emphasized that the saw was not tagged out and that electricity was flowing to it. Tr. 184, 186. He also noted that the saw was typical of the type that is used daily at mine. Tr. 185. Because the lack of a guard meant that a miner was directly exposed to the moving saw blade and therefore was "reasonably likely . . . [to] make contact with [the saw's

[11] Burton described the guards as ""two pieces [of plastic] that join together." Tr. 176.

moving blade]" and suffer a permanently disabling injury, Burton found that the alleged violation was S&S. Tr. 187-88.

Williams testified that the company owned the saw for approximately five years. Because the saw did not come with a guard the company manufactured and installed one. Tr. 197. Williams agreed the saw was "safer if it is guarded." *Id.* Williams stated that one of his employees removed the guard on purpose. Tr. 198.

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

Section 56.14112(b) requires guards to be "securely in place while machinery is being operated." Although the standard can be read narrowly as requiring an inspector to observe cited machinery in operation without a required guard, the court believes a more expansive reading is equally valid, to wit that a violation can properly be cited if it is reasonable to infer cited machinery was operated without a required guard. A persuasive argument can be made that the dust that accumulated on the parts of the guard (Tr. 175, 190), the slate ready to be cut and trimmed that was near the guard's parts (Tr. 174-75, 177; Gov't Exh. 4 at 7), the fact that the saw was plugged into an energized outlet (177-78) and the fact that Burton and Williams were told the guard was purposefully removed (Tr. 204, 198), when coupled with the fact that the saw was of the type in daily use at the mill (Tr. 185), support the inference that the saw was used without the guard prior to Burton's inspection. In the court's opinion, this inference would establish the alleged violation of section 56.14112(b), and the court would find a violation of the standard were it not for the court's belief that the Secretary's alternative theory rests on an even more solid legal footing.

Section 56.14107(a) states that moving machine parts shall be guarded to protect persons from contacting "gears, sprockets, chain . . . pulleys, flywheels, couplings, shafts, fan blades and similar moving parts that can cause injury." While saw blades are not specifically mentioned in the standard they are similar to the moving parts mentioned and contact with moving saw blades can cause injury. Therefore, saw blades must be guarded. The blade of the cited stripping saw was not guarded, and the court finds the failure to guard the blade violated section 56.14107(a).

An S&S violation is "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety . . . 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 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.*, 53 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.* 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria). An experienced MSHA inspector's opinion that a violation is S&S is an important element for the court to consider when making an S&S determination. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

The Commission has explained that the focus of the *Mathies* analysis "centers on the interplay between the second and third steps." *ICG Illinois*, 38 FMSHRC 2474, 2475 (Oct. 2016)

(*citing Newtown Energy Inc.*, 28 FMSHRC 2033 (Aug. 2016)). The second step requires the judge to adequately define the "particular hazard to which the violation allegedly contributes[,]" and then determine whether "there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Id.* at 2475-76. This determination must be made "based on the particular facts surrounding the violation[.]" *Id.* The third step requires the judge to assume the existence of a hazard and assess whether the hazard "was reasonably likely to result in a serious injury." *Newtown* at 2038; *ICG Illinois* at 2476. Applying that test, the court concludes the violation of section 56.14107(a) was S&S.

First, as the court has found, the company violated section 56.14107(a). The second step requires the court to define the particular hazard to which the violation contributed and then to determine whether there existed a reasonable likelihood of the occurrence of the hazard. The hazard in this instance was of a miner being cut by a moving saw blade, and it is clear to the court that the lack of a guard for the blade contributed to this hazard. Therefore the question is whether there was a reasonable likelihood a miner would be cut by the moving, unguarded blade. Burton's testimony established that there was. He described how a miner must place his or her hands on hand holds adjacent to the blade as the miner pushes the table top through and past the rotating blade. Tr. 180-81. A misplaced hand, a slip while pushing the table top, and a lack of attention to the task, singly or in combination, could result in the loss of a finger or hand or the maiming of an arm. In other words, the nature of the task and the closeness of the saw operator's hands to the moving blade in the court's view support Burton's finding that it was reasonably likely the saw operator would be injured. It is obvious to the court that the injury would be serious. The saw operator would be lucky if he or she only lost a finger. The court affirms Burton's opinion that the violation was S&S.

In addition to being S&S the violation was serious. A violation that places a miner in reasonably likely danger of being maimed or dismembered cannot be viewed otherwise.

There is also the question of Newmont's negligence. The court accepts the inspector's finding that the company's lack of care was moderate. Management should have detected and corrected the violation. It was, as Burton testified, open and obvious. Tr. 189. Moreover, the dust on the pieces of the guard leads to the reasonable inference that the violation existed for some time. Management certainly understood that the guard should have been in place. After all, the company provided the protection in the first place. Tr. 197. The company was under a duty to ensure that the saw was guarded, and it failed to meet its duty.

CITATION NO.	**DATE**	**30 C.F.R. §**	**PROPOSED ASSESSMENT**
8917963	8/25/15	56.14103(b)	$392

CITATION NO.	**DATE**	**30 C.F.R. §**	**PROPOSED ASSESSMENT**
8917968	8/26/15	56.14103(b)	$362

The two citations concern cracked windows, one on a haul truck and one on an excavator.

Citation No. 8917963 states

> The front window of . . . [a] haul truck . . . was cracked creating a hazard to the operator. The front window had two vertical cracks and one horizontal crack spanning the width of the window. A pen tip test of the widow[']s cracks indicated the cracks had raised edges. A miner was observed touching the glass with finger tips. This condition creates a laceration hazard to a miner[']s hands while touching the glass. In the event an accident were to occur it would be likely that injuries resulting in lost work days or restricted duty would be expected.

Gov't Exh. 11 at 1. The citation contains the inspector's findings that the cited condition was S&S, was reasonably likely to lead to a lost workdays or restricted duty injury and was due to the company's low negligence.

Citation No. 8917968 states:

> The lower window in the operator's station of the Volvo EC290CL . . . [excavator] was damaged creating a hazard to the operator. The lower window measured (approximately) $32\frac{1}{4}$ inches by $14\frac{5}{8}$ inches. The left side of the window and the upper right corner was taped with duct tape restricting an operator[']s vision and the lower right corner of the window had star shaped cracks with raised edges and divots in both sides of the glass. A miner was observed touching the glass with a bare hand. This condition restricts an operator[']s vision through the window and [creates] a laceration hazard to a miner[']s hands from contact with the broken window. In the event an accident were to occur it would be reasonably likely a miner would receive injuries resulting in lost work days or restricted duty.

Gov't Exh.16 at 1. The citation contains the inspector's findings that the cited condition was S&S, was reasonably likely to lead to a lost workdays or restricted duty injury and was due to the company's moderate negligence.

According to Burton, section 56.14103(b), the standard cited in both instances, requires that windows of the cabs of self-propelled mobile equipment be "maintained for visibility and also that [the windows] not create a hazard to the operator." Tr. 214-15. Burton described the subject front window of the haul truck as having "two vertical cracks and one horizontal crack. The horizontal crack spanned the width of the window." Tr. 215. *See* Gov't Exh. 11 at 6. He described the cracks as being toward the middle of the window. Tr. 221; S*ee* Gov't Exh. 11 at 6. He further observed that the cracks had "raised edges" that subjected the hand on anyone touching the window to cuts. *Id.* Burton knew the cracks had raised edges because he moved the tip of his ball point pen over the cracks and could hear the pen tip "click" when it traveled over a raised crack.[12] He also testified that the company's maintenance foreman agreed that the edges of

[12] Burton explained the "pen tip" test as follows:

> I don't put my hand against the glass. I take [a] pen tip and I go across the glass, and if that pen tip clicks when it comes to a crack

the cracks were raised. Tr. 218. According to Burton, the truck is used daily to move slate to the waste pile or to the mill. Tr. 220.

In Burton's view the raised cracks presented a cut hazard in that a miner would clean the window of the truck to maintain visibility. In addition, during the preoperational examination of the truck the truck driver would move his bare hand across the crack. Tr. 216. Burton testified that during his inspection of the truck, he saw the truck driver touch the crack with his bare hand, although this was in response to a pen tip test conducted by Burton. Tr. 217, 218-19. Burton also stated he determined "through interviews" that miners used "paper towels or rags to clean the glass," which would put a miner's hand directly on the cracks with only a piece of paper towel or a piece of cloth between the cracks and the miner's skin. Tr. 218. Burton believed that a miner was putting his bare hand "in close proximity" to the cracked glass every time he or she cleaned the windshield. Tr. 220. He further noted that the window needed to be cleaned frequently because of dust accumulating on it.[13] Tr. 221-22.

Burton believed an injury was reasonably likely because he "observed a miner reaching out and directly . . . exposing himself to [the] hazard" and because a miner put a bare hand in close proximity to the glass every time he or she cleaned it. Tr. 219-20. Burton found the resulting injury was likely to result in lost workdays or restricted duties because if a miner cut his or her finger the miner would first have to have someone look at the cut and then, perhaps, have the cut stitched. Also, if a glass shard lodged under the miner's skin the injury could lead to an infection and the infection could cause a miner to miss work. Tr. 220-21.

Burton found that the company's negligence was low. Burton testified he was told that two weeks prior to his inspection the truck had stopped abruptly, the hood had popped up hitting and cracking the front window, and the truck operator had not told mine management or noted the condition on his pre-shift report. Tr. 227. Burton learned that the haul truck driver was the only person who operated the truck and that the driver did not tell management because he did not believe the cracks interfered with his vision. Tr. 224. But, the condition had existed for two weeks and Burton thought that during the two weeks management officials should have seen the cracks and replaced the window. Tr. 225.

With regard to the excavator, Burton stated that it was used multiple times a day to move slate, stone or rubble to the mill or to the waste dump (Tr. 231-32) and that he issued the citation because the lower window of the operator's compartment on the excavator was damaged and Burton believed that the damage created a hazard to the excavator operator and others. Tr. 229. The left side (when viewed from inside the compartment) of the window was half covered with

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> I know that the two pieces of glass are not on the same plane and it indicates that there is a raised crack in the glass and a cut hazard to a miner's hand.

Tr. 215-16.

[13] However, when Burton was asked how likely it was a miner would clean the windshield in August when the cab side windows would be rolled up to take full advantage of the cab's air conditioning system, Burton responded that it was "tough to say." Tr. 223.

duct tape. There was also a smaller amount of duct tape on the right side of the window. Tr. 230; Gov't Exh. 16 at 4. Under the duct tape on the lower right side were star shaped cracks with raised edges. Both sides of the window had divots. *Id.* According to Burton, the duct tape, cracks and divots obscured the excavator operator's vision. Tr. 230. He feared that "with [the] reduced visibility . . . a miner might not be able to effectively see to operate the equipment." Tr. 321. Burton testified that the lack of full visibility could cause a fatality in that when the excavator was operated near the edge of a highwall or drop off, the miner operating the excavator might not see the edge or might misjudge the distance resulting in the excavator over-traveling the edge and causing serious injury or death to the excavator operator. Tr. 233. Moreover, other miners worked in close proximity to the excavator and they could be hit and/or run over because the operator's vision was limited. Tr. 233-34. The possible injury would affect one person, either the operator of the excavator or a miner working near the excavator. *Id.*

Burton also feared the cracks created a hazard by exposing the excavator operator to cuts on his or her hands. Tr. 230. Burton thought it was reasonably likely a miner would suffer hand cuts because he actually saw a miner touch the cracks with his bare hand after Burton conducted a pen tip test on the window. Tr. 231. He further believed the condition of the window was likely to lead to lost workdays or restricted duty because if a miner cut his hand while making contact with the glass it could involve a trip to the doctor and the cut or imbedded glass shards might lead to an infection. Tr. 232.

Burton concluded that Newmont was moderately negligent. The fact the window was taped indicated someone knew of the condition but did not correct it. Tr. 235.

Williams did not challenge the existence of the defective windows but he was skeptical of the inspector's S&S findings. He questioned if, given the small elevation between the cracks in the haul truck's window, anyone touching the cracks was likely to get more than a minor cut or an abrasion requiring a Band-Aid. Tr. 239. Williams also disputed Burton's scenario that

> A miner would receive a cut to the finger, he or she would have to go to a doctor [to] have it evaluated. There is the potential that bandaging would have to be applied, that there is a potential for infection to the cut and/or bandaging or stitches would have to be [applied and] a doctor would have to be visited a second time and those materials be removed and the cut inspected.

Tr. 243-244. Williams responded, "Pretty doomy and gloomy for a little cut. I've been cut a million times and never gone to a doctor for anything unless it was real deep." Tr. 244.

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

Section 56.14103(b) requires the replacement or removal of damaged windows on operators' stations of self-propelled mobile equipment if the damage obscures visibility necessary

for the safe operation of the equipment or if the damage creates a hazard to the equipment operator. The court finds the Secretary proved both of the alleged violations, albeit for somewhat different reasons. Because there was no evidence to the contrary the court concludes that the front window on the haul truck was cracked as described by Burton. Tr. 215, 221, Gov't Exh. 11 at 6. The cracks caused the edge of the glass on one side of the cracks to be slightly raised above the other side. The raised nature of the cracks was confirmed by Burton's "pen tip" test. Tr. 215-16. The court agrees that the raised cracks presented a cut hazard to the haul truck operator as he cleaned dust from the windshield. Tr. 217-19. The hazard caused by the damage to the window established the violation with regard to the haul truck.[14]

The damage to the window of the excavator as described by Burton also was not disputed by Newmont. Therefore, the court finds that the lower window of the operator's compartment was extensively taped to the point where the left side of the window was totally covered and the right side had a rectangular block of tape covering the upper right side of the lower window. Tr. 229-30; Gov't Exh.'t. 16 at 4. In addition, there were cracks with raised edges on the lower right side of the window. *Id.*

The court credits Burton's testimony that the damaged window presented a hazard to the excavator operator. The duct tape on the lower window obviously obscured his or her vision of the immediate vicinity in which he or she was operating the excavator. The court agrees with Burton that failing to see the ground near the equipment could lead to the equipment operator misjudging the room in which he or she had to maneuver. As Burton maintained, if the excavator was near a highwall or other drop off the operator might not see the edge or might mistakenly think there was more room to operate than in fact was the case sending the excavator and its operator over the edge. Tr. 233. Or, as Burton noted, the operator might not see a miner working in the immediate vicinity of the excavator and might because of his or her limited vision hit or run over the miner. Further, the court credits Burton's testimony that the raised cracks exposed the equipment operator to cuts as he or she tried to clear dust from the lower window. Tr. 230. Therefore, the court finds the damaged window of the excavator both created a cut hazard to the equipment operator and obscured the operator's visibility—visibility necessary to safely operate the excavator. Tr. 233.

While the court agrees with the inspector that the company violated section 56.14103(b) in both instances, it finds that only the damage to the excavator's lower window was an S&S violation. There is no gainsaying the fact that a haul truck driver would from time to time clean the inside of the haul truck's windshield to remove dust. However, as Burton testified the driver would have a rag or paper toweling between his fingers and hands and the glass. This minimized the chance of a severe cut and/or of a glass shard lodging in the driver's finger or hand. Even if the operator was bare handed nothing more than a painfully annoying cut or splinter was reasonable to expect, and such injuries do not rise to the level of being reasonably serious as required by *Newtown*. The court concludes Williams was correct when he stated that the cracks in the haul truck's windshield were most likely to result in a cut or an abrasion requiring a Band-Aid. Tr. 238. Burton's scenario of a cut or splinter requiring a doctor's care, bandaging, possible

[14] The court discounts the hazard allegedly posed by the driver touching the cracks with his bare hand. Burton's finding of this hazard was primarily premised on the driver responding to Burton's pen tip test, an action that was unlikely to recur.

stitches and a resulting infection with follow up doctor's visits is possible, but not reasonably so. Tr. 243-44.

On the other hand, the damaged lower window on the excavator was indeed an S&S violation. All of the *Mathies* criteria as explained in *Newtown* were met. There was a violation of section 56.14103(b). The excavator was used multiple times a day, and the danger created by the violation was that its operator being unable to see in full the ground to the front and to the side of the excavator, would not see the distance he or she had in which to maneuver or would misjudge the distance and would inadvertently send the excavator over a drop off. Tr. 231-32. Williams did not challenge Burton's testimony in this regard. Nor did he contradict Burton's belief that the excavator operator's lack of full vision subjected a miner working in the immediate vicinity of the excavator to the danger of being hit and/or run over. Tr. 233. The court concludes that the frequent use of the excavator made the occurrence of these hazards reasonably likely as mining continued and it is obvious that the occurrence of either scenario was reasonably likely to result in a serious injury.

Given the findings with regard to the S&S nature of the haul truck violation the court concludes the cracks in its windshield did not constitute a serious violation. While it is true one person was subject to possible injury, the court has found that the injury was likely to be minor in nature. This is not the case with regard to the damaged lower window of the excavator. The restricted visibility that resulted from the violation was likely to cause the serious injury or death of the excavator operator or of a miner working adjacent to the excavator. The court therefore finds the violation was serious.

Finally, the court concludes that both violations were caused by Newmont's moderate negligence. The defective windshields were visually obvious. Both the haul truck and the excavator were subject to pre-shift examinations. The violations should have been detected and corrected, and they were not. *See* Tr. 225, 227, 235.

CITATION NO.	**DATE**	**30 C.F.R. §**	**PROPOSED ASSESSMENT**
8917967	8/26/15	56.6900	$243

The citation states:

> There were deteriorated explosives in magazine #2 of the mine. There was one box of explosive[s] containing 48 sticks of 1 – ¼ by 8 inch 60% explosive[s] (Lot number 08JA14J1). The explosive sticks[']' wrapping paper was discolored and white crystals had begun to form on one of the sticks. This condition creates an uncontrolled detonation of explosive materials hazard. In the event an accident were to occur it would be likely that fatal injuries would be expected.

Gov't Exh. 15 at 1. The citation contains the inspector's findings that the cited condition was unlikely to lead to a fatal accident and was due to the company's moderate negligence. Gov't Exh. 15 at 1.

On August 26 Burton examined the mine's Magazine Number 2, a magazine containing dynamite.[15] Tr. 255. Burton was accompanied by the company's blaster. Tr. 256. Burton noticed a box of explosives labeled "Lot No. 08JA14J1." Tr. 256. The label indicated the box contained 48 sticks of dynamite. To verify the number of sticks inside the box the inspector and the blaster opened the box. Each stick was an inch and a quarter in diameter by eight inches long. The sticks contained sixty percent explosive material. Tr. 254. Burton described the wrapping paper of the sticks as "discolored." Tr. 254. In addition, according to Burton, "White crystals had begun to form on the outside of one of the sticks." *Id.* The white crystals indicated to Burton that the explosive material in the stick had deteriorated to the point where, "The explosive agent on the inside [of the stick] had started to bleed out through the paper." *Id.* Because of the deterioration Burton questioned if the explosives were safe to handle. The blaster too felt uncomfortable because of the discoloration and crystal formation. Burton testified the blaster said that," [T]he explosives contained in that box [are] unsafe." Tr. 257. Burton added that he was told by the blaster that agents from the Bureau of Alcohol Tobacco and Firearms ("ATF") visited the mine one week before Burton's inspection. The agents informed the company the explosives should be disposed of.[16] *Id*., Tr. 261. The blaster added that the company planned to detonate the explosives in an on-site blast the next day, August 27. Tr. 262.

Despite the company's plan to dispose of the dynamite, Burton issued a citation to Newmont because of the deteriorated explosives. Gov't Exh. 15. The inspector cited the company for a violation of section 56.6900, which states that, "Damaged or deteriorated explosive material shall be disposed of in a safe manner in accordance with the instructions of the manufacturer." Burton recognized that under the standard the company needed to know who the manufacturer of the explosives was so as to conform to the manufacturer's disposal instructions. Tr. 259. Austin Powder was the manufacturer, and Burton called Austen Powder. Austin Powder's representative told Burton that the discolored and crystalized sticks had in fact deteriorated and that such explosives typically are consumed in a nonproductive blast or are burned. Tr. 259-60. In Burton's opinion the company "had been warned " by the ATF to eliminate the dynamite but they "had already let [them] set for six days." Tr. 266. He added, "When they have deteriorated explosives they need to take corrective actions to remediate that hazard. The fact that they were told days prior actually indicates . . . that the issue is not being taken seriously." *Id.*

Burton recognized that the dynamite was being stored in an ATF approved magazine, which he stated was "about the safest place on the mine that explosives could be." Tr. 263. However, should an unplanned explosion occur, a fatality could be expected. Tr. 263. The person most likely to be killed would be a miner accessing the magazine. Tr. 264. He noted that an unplanned explosion could result from just handling the explosives because once they start

[15] There are a total of five magazines at the mine. Tr. 277.

[16] Burton explained that ATF personnel from time to time inspect blasting operations at mines.

deteriorating, "They become potentially unstable . . . and merely even handling the explosive[s] could set [them] off." *Id.*

Because the ATF put the company on notice and the company failed to act promptly Burton found the company to be moderately negligent. Tr. 265. Burton stated, "[O]ne week seems excessive." *Id.*

Williams explained that explosives usually deteriorate during the summer when the heat causes the components of the dynamite to separate Tr. 272-73. He further explained that dynamite is not easy to detonate. To cause it to explode dynamite has to be "hit with quite a shock." Tr. 273. In William's opinion it is best to leave deteriorated dynamite in a static location and to dispose of it when the next regularly scheduled blast takes place. *Id.*

Williams explained that the company kept only one or two boxes of dynamite on hand to use for small projects. He speculated that the relatively infrequent use of dynamite at the mine was why the subject explosives deteriorated. Tr. 274. He was adamant the deteriorated dynamite was not dangerous. He stated, "There was no unsafe factor there. So, it was just an overeager inspector trying to get another citation." *Id.* Williams added that a box of dynamite costs $300.00 and because the company "didn't feel like buying $300 worth of dynamite for no reason at all" it was waiting "until the next shot . . . [which] hadn't come yet." Tr. 275.

When Burton returned to the mine on September 14, he was advised that the deteriorated explosives had been consumed in a blast before his return visit (Tr. 286), and he terminated the citation. Gov't Exh. 15 at 2.

THE VIOLATION

The court concludes the Secretary did not prove a violation. The court has no doubt the inspector identified a safety hazard. The court credits Burton's description of the deteriorated dynamite and his explanation that the box and its contents posed a hazard. Tr. 254. The court also credits the blaster's opinion as expressed to Burton that the dynamite was not safe. Tr. 257. When Burton wrote the citation he described the violative condition as the presence of the defective explosives. ("There were deteriorated explosives in magazine #2 of the mine." Gov't Exh. 15 at 1.) During his testimony he expanded his reason for issuing the citation by adding that when deteriorated explosives are present the standard requires an operator to "take corrective actions to remediate that hazard." Tr. 266. In his view the company did not take the required corrective action in a timely manner. *Id.* The problem for the Secretary is that when drafting the regulation he said nothing overt about the time within which deteriorated explosives must be eliminated. Rather, the regulation addresses the manner in which such explosives must be destroyed or otherwise removed from the mine. The standard states that they must be eliminated, "in a safe manner in accordance with the instructions of the manufacturer." 30 C.F.R. § 56.6900. While it is conceivable a manufacturer would recommend a time within which a defective product should be removed or eliminated, the record does not reveal whether Austin Powder set or suggested such a time limit, or what that time limit otherwise was. *See* Tr. 260-66. Further, even if a "reasonable" time limit is implied in the otherwise silent standard, the court, like Burton, would credit the blaster's statement that the deteriorated explosives would have been

destroyed in a manner recommended by Austin Powder on August 27 [17], and the court would conclude that this was a reasonable time under all of the circumstances. Tr. 262, 266-67. The court notes the lack of any evidence the explosives would be handled before they were destroyed and the lack of evidence that their undisturbed presence in the magazine ("the safest place in the mine that explosives could be") until August 27 would pose a hazard. Tr. 263. The Secretary needed to prove the passage of a week and a day was an unreasonable risk, and he did not do so.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT
8917954	8/25/15	56.4201(a)(1)[18]	$585

The citation states:

> There were 4 fire extinguishers in the mill building at the mine that had not received monthly examinations. The [company's] designee to conduct examinations had retired and [he had] not been replaced. Records located on the extinguishers showed exams had been performed through June of 2015. This condition does not allow a miner to know if the extinguisher will function in an emergency. In the event an accident were to occur it would be likely that injuries resulting in lost workdays would be expected.

Gov't Exh. 2 at 1. The citation contains the inspector's findings that the cited condition was unlikely to lead to an accident resulting in lost workdays or restricted duty and that the violation was due to the company's high negligence. Gov't Exh. 15 at 1.

During the course of the August 25 inspection Burton found four fire extinguishers in the mill that apparently had not been examined in more than a month. Tr. 295-96. According to Burton, under section 56.4200(a)(1) the extinguishers "are required to receive an exam on a monthly basis." [19] Tr. 296. Burton stated that a tag on each of the four extinguishers recorded the last examination as taking place in June 2015. *Id.* Burton acknowledged that none of the extinguishers were functionally defective. *Id.* However, in Burton's view a monthly examination is important because it "allows a miner to know that a . . . fire extinguisher will effectively function in an emergency situation." Tr. 297. If an extinguisher malfunctions a miner can suffer prolonged exposure to smoke and fire and may lack the ability to control a fire in its early stages, which may in turn lead to smoke inhalation or burns. *Id.*

[17] Burton stated that he "took [the blaster] at his word." Tr. 266.

[18] The inspector mistakenly cited the condition as violating section 56.4200(a)(1). At the hearing counsel for the Secretary moved to amend the citation to allege a violation of section 56.4201(a)(1). The company did not object, and the motion was granted. Tr. 310-11.

[19] Burton misspoke; he meant to say that monthly examinations are required under section 56.4201(a)(1).

Burton found that the company was highly negligent. Gov't Exh. 2 at 1. He stated the company knew the employee who conducted the examinations retired and Newmont should have assigned another miner to undertake the examinations. Tr. 298. Burton also observed that management officials traveled through the mill building daily. The fact the examinations had not been recorded was visually obvious given the last dates on the tags. *Id.* Burton stated that the only explanation he was given for the fact the inspections had not been conducted and recorded was that "the company had overlooked replacing the retired miner." Tr. 299.

Williams maintained a person in fact examined extinguishers at the mine, and he asked Burton how many extinguishers Burton inspected. Burton stated he looked at "numerous" other extinguishers.[20] Tr. 299. Williams observed that "a new man missed [only] four of them." *Id.* In Williams view failing to inspect and record the inspections of four of its many fire extinguishers was not egregious. Tr. 303-04.

Burton responded that Williams walked through the mill every day. In Burton's opinion Williams knew the monthly examinations of the fire extinguishers had not been performed. Tr. 305-06. As Burton put it, "It is the mine operator's responsibility to conduct [the] examinations or to designate somebody and follow up to make sure they have been done." Tr. 308.

THE VIOLATIONS, ITS GRAVITY AND NEWMONT'S NEGLIGENCE

The Secretary easily established that Newmont violated section 56.4201(a)(1) which requires that "fire extinguishers be inspected visually at least once a month to determine that they are fully charged and operable." Burton's testimony that the inspection tags on four extinguishers in the mill showed that the extinguishers were last inspected in June was not challenged by Newmont. Tr. 295-96. The court infers that Newmont's failure to record the monthly visual inspections in July meant that the July inspections were not done with regard to the four extinguishers, just as Burton alleged, and it concludes Newmont violated section 56.4201(a)(1). While it is possible, as Burton testified, that the failure to monthly examine a fire extinguisher could lead to a miner suffering excessive smoke inhalation and/or burns, in the matter at hand the four extinguishers were in no way defective rendering the likelihood of injury somewhere between minimal and non-existent. Tr. 297. The violation was technical and non-serious in nature.

Further, the court concludes the company's negligence was low. While Burton maintained the company should have assigned another employee to replace the missing examiner (Tr. 298, 299), the record supports finding that is exactly what the company did. Burton agreed that he examined "numerous" fire extinguishers at the mine and that only four were in violation of section 56.4201(a)(1). Tr. 299. The court concludes that someone conducted and recorded the monthly inspections for all of the fire extinguishers except four. In the court's opinion this mitigates Newmont's negligence to the point where its failure to comply was of a low degree.

[20] Burton put the number between a dozen and twenty-five. Tr. 309.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT
8917957	8/25/15	56.14100(b)	$585

The citation states:

> The manufacturer installed left hand seat belt on the #5 TMC forklift . . . was fastened to the manufactured mounting point by a knot tied in the seatbelt. The forklift is used to move slate products in the mill building of the mine. This condition exposes a miner to a fall/run over by mobile equipment hazard. In the event an accident were to occur it would be likely that fatal injuries would be expected.

Gov't Exh. 5 at 1. The citation contains the inspector's findings that the cited condition was unlikely to lead to an accident resulting in fatal injuries and was due to the company's moderate negligence. Gov't Exh. 5 at 1.

On August 25 Burton testified he inspected four or five forklifts at the mine. Tr. 325. All were manufactured by the same company, TCM. Tr. 325-26. Burton explained that when inspecting the No. 5 forklift he found that its left hand seat belt was fastened to the mounting point with a knot. The belt had "been cut off and . . . had been threaded back through the bracket and literally tied in a knot to hold it onto the forklift." Tr. 317. When seat belts are installed by TMC they are attached to a bracket and the bracket is bolted to the frame of the forklift. Tr. 317-18. Burton also explained that the No. 5 forklift was equipped with a falling object protection structure (a "FOPS") and that there is no standard requiring a forklift with a FOPS to have a seatbelt. However, Burton understood if the equipment comes from the manufacturer with a seatbelt, because the seatbelt affects safety, defects to the seatbelt must be timely corrected to prevent a hazard to the equipment operator. Tr. 318. Because the knot in the cited seat belt was hand tied, there was no way to ensure whether it would hold as intended by the manufacturer. Burton therefore believed that the hand tied seatbelt was defective and violated section 56.14100(b). Tr. 319.

The No. 5 forklift was used daily to move slate in and around the mill buildings. Tr. 319, 322. The danger posed by the condition was that in the event of an accident the seatbelt might not hold the forklift operator on the equipment. He or she could fall off and be hit or run-over by the forklift or by another piece of equipment. Tr. 319, *see also* Tr. 324

Burton checked and found that the defective seatbelt was not reported on any of the pre-shift examinations of the forklift. In his view this reflected management's misplaced belief that the seatbelt was not required to be maintained on the forklift, and he found that the company was moderately negligent. Tr. 325; Gov't Exh. 5 at 1.

Williams stated that only the No. 5 forklift came from the manufacturer with a seatbelt. Like Burton, Williams noted that seatbelts are not required on equipment with FOPS, and he questioned why the company was required to maintain a seatbelt that was not a requisite component of the equipment. Tr. 327. Williams further stated that the mine's forklifts travel on

level ground at about five miles per hour and that all have centers of gravity about one foot off of the ground, making them extremely unlikely to overturn. Tr. 328.

THE VIOLATIONS, ITS GRAVITY AND NEWMONT'S NEGLIGENCE

Section 56.14100(b) states, "Defects on any equipment . . . that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." When determining whether the standard has been violated the evidence must be evaluated in the light of what a "reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *See e.g., Cannon Coal Co.*, 9 FMSHRC 667. 668 (April 1987); *Quinland Coal, Inc.*, 9 FMSHRC 1614-1618 (September 1987). *Ideal Cement Co.*, 12 FMSHJRC 2409, 2415 (September 1990). Applying this test, the court finds that the Secretary established the violation. TMC manufactured the fork lift with a seat belt. In the court's opinion a reasonably prudent person would assume the seat belt served its intended purpose of keeping the fork lift operator in place in case the fork lift was involved in an accident or overturned. To provide the maximum amount of protection the seat belt had to be securely affixed to the frame of the fork lift. Tying the seatbelt to its mounting point offered less protection in that the knotted belt would tend to give in the event of a mishap. In the court's view a reasonably prudent person would have replicated the condition of the seat belt as it came from TMC by permanently reattaching the belt to the frame.

The Commission addressed the timeliness requirement in section 56.14100(b) in *Lopke Quarries, Inc.*, 23 FMSHRC 705 (July 2001). The Commission determined that, "[w]hether the operator failed to correct the defect in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of its existence." *Id.* at 715. Little evidence was offered by the Secretary regarding "timeliness." However, a reasonable inference can be drawn that Newmont did not timely comply. Burton testified to his understanding that the forklift was used daily (Tr. 322). Williams did not dispute Burton or offer other evidence of the frequency of use, and the court concludes that the forklift was in fact used every day the mine operated. Burton also testified that he looked at the pre-shift examination reports for the forklift for several days prior to the inspection and found that the defective seatbelt was not reported. Linking the daily use with the non-reporting and with William's stated belief the company was under no obligation to return the seatbelt to its original condition, Burton inferred the defective seatbelt was not repaired in a timely manner. The court finds Burton's inference to be reasonable under the circumstances, and it affirms the violation.

The inspector found the violation was unlikely to result in a fatal injury. The court agrees and finds the gravity of the violation was nil. Williams's statement that the forklift was all but impossible to overturn because of its low center of gravity was not disputed, nor was his testimony that when in use the forklift traveled at about five miles per hour, a speed making collisions extremely unlikely. Tr. 328. Moreover, the fact that the parties agreed the forklift could have come from TMC without a seatbelt and not run afoul of any safety standards speaks volumes about the minimal hazard posed by the cited condition. Tr. 318, 327.

Burton found that Newmont was moderately negligent. The court finds the company's negligence was low. The violation was based upon the company's good faith belief compliance

was not required because the seatbelt was not required. *See* Tr. 327. The company's conclusion was reasonable even though it was wrong. In the court's view Newmont's reasonable, good faith belief greatly mitigated its negligence.

OTHER CIVIL PENALTY CRITERIA

Counsel for the Secretary asserted that in the 15 months prior to August 25, 2015, there were 43 cited, assessed and paid violations at Newmont's mine, which counsel described as an" average" number. Tr. 166-67, 25; Gov't Exh. 1. The court finds the company's history of previous violations not to be such as to increase or decrease the court's assessments. With regard to the size of the mine, counsel maintained that the company was "not small." Tr. 168. However, the court notes that in proposing penalties the Secretary appears to have regarded the mine as somewhere between a small and medium size facility. *See* Petition for Assessment of Civil Penalty, Exh. A. The court finds the size to be such as not to warrant assessments above those proposed. The court further notes that in proposing penalties the Secretary credited Newmont with good faith in attempting to achieve timely compliance. *Id.* Finally, the parties agreed that any penalties assessed will not affect Newmont's ability to continue in business. Relevant Fact 6.

ASSESSMENT OF CIVIL PENALTIES

THE CONTESTED CITATIONS

CITATION NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT	ASSESSMENT
8917961	8/25/15	56.4101	$263	$263

The court finds that the violation was serious and that the company's negligence was low. Given these findings and the other civil penalty criteria the court assesses the penalty proposed by the Secretary.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT	ASSESSMENT
8917962	8/25/15	56.13011	$585	$200

The court finds that the violation was not serious and that the company's negligence was low. Given these findings and the other civil penalty criteria the court assesses a penalty of $200 for the violation.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT	ASSESSMENT
8917959	8/25/15	56.12018	$585	$585

The court finds that the violation was moderately serious and that the company's negligence was moderate. The court's findings do not diverge significantly from Burton's, and the court assesses the penalty proposed by the Secretary.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT	ASSESSMENT
8917956	8/25/15	56.14112(a)	$1,304	$1,304

The court finds that the violation was moderately serious and that the company's negligence was moderate. The court's findings do not diverge significantly from Burton's, and the court assesses the penalty proposed by the Secretary.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT	ASSESSMENT
8917963	8/25/15	56.14103(b)	$392	$250

The court finds that the violation was not serious and that the company's negligence was moderate. The court further finds that the violation was not S&S. Accordingly, the court will modify the citation to reflect that an injury could reasonably be expected to result in no lost workdays. In addition it will delete the inspector's S&S finding and modify his negligence finding from low to moderate. Given these findings and the other civil penalty criteria the court assesses a penalty of $250 for the violation.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT	ASSESSMENT
8917968	8/26/15	56.14103(b)	$362	$362

The court finds that the violation was S&S, was serious and was caused by the company's moderate negligence. The court's findings do not diverge from Burton's, and the court assesses the penalty proposed by the Secretary.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT	ASSESSMENT
8917967	8/26/15	56.6900	$243	$0

The court finds that the Secretary did not prove the violation. A penalty cannot be assessed.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT	ASSESSMENT
8917954	8/25/15	56.4201(a)(1)	$585	$200

The court finds that the violation was not serious and that the company's negligence was low. Given these findings and the other civil penalty criteria the court assesses a penalty of $200 for the violation.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT	ASSESSMENT
8917957	8/25/15	56.14100(b)	$585	$200

The court finds that the violation was not serious and that the company's negligence was low. Given these findings and the other civil penalty criteria the court assesses a penalty of $200 for the violation.

THE UNCONTESTED CITATIONS

As noted above, during the course of the hearing and after a discussion with counsel, Williams in effect withdrew the company's contest of the citations set forth below. Tr. 135-36, 165-66. Given Newmont's withdrawal the court finds that the violations existed as charged. The penalties are assessed as proposed.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT	ASSESSMENT
8917955	8/25/15	56. 12032	$176	$176

CITATION NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT	ASSESSMENT
8917958	8/25/15	56.14115(b)	$263	$263

CITATION NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT	ASSESSMENT
8917969	8/25/15	46.9(a)	$100	$100

CITATION NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT	ASSESSMENT
8917966	8/25/15	62.170(b)	$108	$108

CITATION NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT	ASSESSMENT
8917965	8/25/15	56.6132(a)(6)	$108	$108

CITATION NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT	ASSESSMENT
8917964	8/25/15	56.4201(a)(1)	$100	$100

CITATION NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT	ASSESSMENT
8917960	8/25/15	56.9301	$243	$243

Tr. 135-36, 165-66.

ORDER

The inspector's negligence finding in Citation No. 8917954 **IS MODIFIED** from "high" to "low," his negligence finding in Citation No. 8917962 **IS MODIFIED** from "moderate" to "low," his gravity and negligence findings in Citation No. 8917963 **ARE MODIFIED** from reasonably likely to result in "lost workdays or restricted duty" and "low" negligence to reasonably likely to result in "no lost workdays" and "moderate" negligence, his S&S finding in Citation No. 89817963 **IS DELETED**, and the inspector's negligence finding in Citation No. 8917957 **IS MODIFIED** from "moderate" to "low." Further, Citation No. 8917967 **IS VACATED**.

Within 30 days of the date of this decision, Newmont **SHALL PAY** civil penalties in the amount of $4,462 ($3,364 for the violations found in the contested citations and $1,098 for the violations found in the uncontested citations).[21] Upon **PAYMENT** of the penalties, this proceeding is dismissed.

/s/ David F. Barbour
David F. Barbour
Administrative Law Judge [22]

Distribution: (Certified Mail)

Emily B. Hays, Esq., U.S. Department of Labor, Office of the Solicitor, MHSA Backlog, 1244 Speer Blvd., Suite 216, Denver, Colorado 80204

John Williams, President, Newmont Slate Company, Inc., 720 Vt. Rte. 149, West Pawlet, Vermont 05775

/db

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

[22] This is the last decision the court will author. The court thanks all who have appeared before it for the civility and respect they have shown the court and one another. The court believes it is decorum grounded in the recognition that through playing our parts to resolve disputes that inevitably arise over the interpretation and implementation of the Mine Act and the regulations promulgated thereunder, we are furthering the law's fundamental purpose – to enhance "the health and safety of [the industry's] most precious resource – the miner." 30 U.S.C. § 802 (a). It has been a privilege for the court to be part of the process.