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April 11, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. NORTHSHORE MINING COMPANY, Respondent	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2015-340-M A.C. No. 21-00831-374635 Docket No. LAKE 2015-395-M A.C. No. 21-00831-376944 Docket No. LAKE 2015-529-M A.C. No. 21-00831-381656 Mine: Northshore Mining Company

DECISION AND ORDER

Appearances: Timothy J. Turner, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner

R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Respondent

Before: Judge McCarthy

I. STATEMENT OF THE CASE

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

At issue in this matter are 58 citations issued by the Secretary of Labor ("the Secretary") under section 104(a) of the Mine Act charging mine operator Northshore Mining Company ("Northshore") with violations of mandatory health and safety regulations. The parties settled 54 of the citations prior to hearing and litigated the remaining four.

The four citations that proceeded to hearing were Citations 8840455 and 8840744 in Docket Number LAKE 2015-529-M and Citations 8840631 and 8840659 in Docket Number LAKE 2015-395-M. Each citation presented the following issues: whether Northshore violated the mandatory health and safety standard cited by the Secretary; if so, whether the Secretary properly assessed the gravity of the violation and the level of negligence attributable to Northshore; and what penalties, if any, should be assessed against Northshore.

A hearing was held in Duluth, Minnesota on November 23-24, 2015. During the hearing, the parties presented testimony and documentary evidence.[1] Witnesses were sequestered. I vacated Citation Number 8840631 from the bench, finding that the Secretary had failed to prove the violation alleged therein.

I now issue further findings of fact and conclusions of law, beginning with findings of fact and discussion of legal principles germane to the disposition of all four disputed citations and continuing with separate findings of fact and conclusions of law for each citation. For the reasons set forth below, I find that Citations 8840455, 8840744, and 8840659 were properly issued and affirm them, as written. Applying the penalty criteria set forth under section 110(i) of the Mine Act to my findings, I assess penalties totaling $3,503.00 for those three citations. I also discuss and affirm my bench findings supporting the decision to vacate Citation Number 8840631, and I review and approve the parties' settlement of the 54 citations that did not proceed to hearing.

Based on the entire record, including my observation of the demeanor of the witnesses,[2] and after considering the post-hearing briefs, I make the following findings:

II. STIPULATIONS AND GENERAL FACTUAL BACKGROUND

A. Stipulations of Fact and Law

At hearing, the parties agreed to the following stipulations:

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[1] Exhibits R-4, R-6, R-12, R-14, and S-1 to S-18, except for the portion of Exhibit S-17 consisting of a September 26, 2015 coal mine fatality notice (see Tr. 154 for my discussion of why the notice was excluded), were received into evidence at the hearing. Tr. 8-9, 268. The abbreviation "Tr." refers to the transcript of the hearing. In addition to the exhibits and testimony admitted at hearing, Northshore attached to its closing brief an exhibit, marked as Exhibit R-16, consisting of printouts from online weather services showing the temperature at the mine on January 25, 2015, the day one of the citations was issued. I decline to admit the printouts into evidence because the Secretary did not have an opportunity to respond to them. However, I will take judicial notice that publicly available weather reports show that the temperature was 19 degrees Fahrenheit at the mine on the day in question. I further admit into the record the Secretary's settlement motions with regard to the 54 settled citations. I have marked the settlement motion for Docket Number LAKE 2015-340-M as Exhibit ALJ-1, the settlement motion for Docket Number LAKE 2015-395-M as Exhibit ALJ-2, and the settlement motion for Docket Number LAKE 2015-529-M as Exhibit ALJ-3.

[2] In resolving conflicts in the testimony, I have taken into consideration the demeanor of the witnesses, their interest in this matter, their experience and credentials, the inherent probability of their testimony in light of other events, the corroboration or lack of corroboration for the testimony given, and the consistency, or lack thereof, within and between the testimony of witnesses.

1. Northshore was at all times relevant to these proceedings engaged in mining activities at the Northshore Mining Company where the citations in this matter were issued.

2. Northshore's mining operations affect interstate commerce.

3. Northshore is subject to the jurisdiction of the Mine Act.

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

5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to section 105 of the Mine Act, 30 U.S.C. § 815.

6. On the dates the citations in these dockets were issued, the issuing MSHA inspectors were acting as duly authorized representatives of the Secretary, were assigned to MSHA, and were acting in their official capacity when conducting the inspections and issuing the subject MSHA citations.

7. The citations at issue in these proceedings were properly served upon Northshore as required by the Mine Act.

8. The citations at issue in these proceedings may be admitted into evidence.

9. The certified copy of the MSHA Assessed Violation History (marked as Exhibit S1) reflects the history of the citation issuances at the mine prior to the date of the last citation.

10. Northshore demonstrated good faith in abating the violations.

11. The penalties proposed by the Secretary in this case will not affect the ability of the Respondent to stay in business.

Ex. S-2; Tr. 8-9.

B. General Factual Background

The four citations in dispute in this case were issued at the Northshore Mining Company mine ("the Northshore mine") in Silver Bay, Minnesota. Tr. 22. The mine, which is currently controlled by Northshore's parent company, Cliffs Natural Resources, has been in operation since the 1950s. Tr. 22, 48, 56. It is an aboveground processing facility that receives raw iron ore extracted at one of the controller's other mines and converts it into taconite pellets. Tr. 22, 39-40, 92. Work areas within the facility include the pelletizing plant, which houses various components of the pelletizing process such as the furnace where the pellets are dried and fired, and the yards and docks from which the finished product is shipped to buyers. Tr. 77-78, 113, 238. All of the structures, facilities, equipment, and machinery at the mine are subject to the mandatory health and safety regulations for surface metal and nonmetal mines promulgated by the Secretary in Title 30, Part 56 of the Code of Federal Regulations.

One of the citations at issue in this proceeding, Citation Number 8840455, was issued by MSHA Inspector Mindy A. Meierbachtol[3] for an electrical violation after a phase-to-ground fault occurred at the pelletizing plant while she was inspecting it in March 2015. Ex. S-6. The other three disputed citations were issued by MSHA Inspector Terrance Norman[4] for conditions he observed while inspecting the Northshore Mining Company mine in January and March 2015. Ex. S-9; Ex. S-15; Ex. S-18. All four of the citations were issued on separate dates and are unrelated to each other, although some of them involve the same witnesses. The independent facts and circumstances surrounding each of the citations are discussed in greater detail below.

III. PRINCIPLES OF LAW

A. Establishing a Violation

To prevail on a penalty petition, the Secretary bears the burden of proving by a preponderance of the evidence that a violation of the Mine Act occurred. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001). A mine operator is held strictly liable for violations that occur at its mine. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). The operator may avoid liability only by showing that it was not properly on notice of the violative nature of its conduct. Even in the absence of actual notice, the Secretary may properly charge the operator with a violation when a reasonably prudent person familiar with the protective purposes of the cited standard and the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would have recognized a hazard warranting corrective action within the purview of the applicable regulation. *LaFarge North America*, 35 FMSHRC 3497, 3500-01 (Dec. 2013); *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

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[3] Meierbachtol has been a mine safety and health inspector since September 2013. To become an inspector, she completed thirteen months of classes and field training at the Mine Safety and Health Academy in Beckley, West Virginia. She previously worked as a pilot. Along with her flight certificates, she also holds a Master's Degree in safety science. Meierbachtol testified that she is familiar with the Northshore mine because she spent about six weeks there during her Mine Academy training period and has since headed two regular inspections of the mine. Tr. 20-22, 39, 41.

[4] As of the hearing date, Norman had served as an MSHA inspector for about a year and a half after completing approximately one year of training. Before coming to MSHA, he spent fourteen years working at a steel mining plant, two years working for a sand and gravel company, and seven years working for a conveyor belt company called Northern Belt and Conveyor that installed and repaired belts at facilities including the Northshore mine. He served as a safety director for the conveyor belt company until he was laid off. Norman holds a B.S. and a Master's Degree in safety from University of Minnesota-Duluth. Tr. 91-92, 172-73.

B. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See, e.g.*, *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ).

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that an assessment of the likelihood of injury is to be made assuming continued normal mining operations, without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

C. Significant and Substantial (S&S)

The Mine Act describes an S&S violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1).[5]

In a seminal early decision interpreting this statutory provision, the Commission held that a violation is S&S "if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In so holding, the Commission rejected the Secretary's argument that all violations are S&S except technical violations or violations that pose only a remote or speculative risk of injury or illness. The Commission found that the Secretary's interpretation would result in almost all violations being categorized as S&S, which would be inconsistent with the statutory language and the role the S&S provision is intended to play in the Mine Act's graduated enforcement scheme. 3 FMSHRC at 825, 828. The Commission also found that the Secretary's interpretation would leave little room for inspectors to exercise their independent judgment. *Id.* at 825-26.[6]

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[5] See also *id.* § 814(e), the Mine Act's pattern-of-violations provision, which is the only other provision that mentions S&S, and which defines the term the same way as § 814(d)(1).

[6] The Commission has consistently reiterated that the inspector's judgment is an important element of the S&S determination. However, the concept has generally been raised in the context of deferring to the inspector's opinion that a violation was S&S, rather than in the context of examining whether the inspector exercised independent judgment in forming this opinion as opposed to merely following the "mechanical approach" advanced by the Secretary and rejected by the Commission in *National Gypsum*, 3 FMSHRC at 825. *See, e.g.*, *Wolf Run*

In addition, the Commission found that the Secretary's interpretation would render the Act's S&S language almost superfluous, and would render the Act's pattern-of-violation provisions wholly punitive by making it almost impossible for a mine to be relieved of withdrawal order liability once placed on notice of a pattern of violations. *Id.* at 826-27. Although the Commission did not develop a test to determine whether violations are S&S, it enunciated several guiding principles. Specifically, it stated that the term "hazard" denotes "a measure of danger to safety or health" and that a violation is S&S if it "could be a major cause" of such a danger. *Id.* at 827.

In its subsequent *Mathies* decision, the Commission set forth a four-prong test for determining whether a violation is S&S under *National Gypsum*. *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984). To establish an S&S 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 in question will be of a reasonably serious nature. *Id.* at 3-4. The Secretary, mine operators, and the federal appellate courts have accepted the *Mathies* test as authoritative. *See Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 160 (4th Cir. 2016) (noting federal appellate courts' uniform adoption of *Mathies* test and parties' recognition of authority of test); *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016) (applying *Mathies* criteria); *Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria).

Ensuing case law has solidly established several general principles regarding the proper application of the *Mathies* test. The Commission has held that the S&S determination should be made assuming "continued normal mining operations." *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1990-91 (Aug. 2014) (citing *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985)). The assumption of continued normal mining operations considers "the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued," without any assumptions as to abatement. *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff'd sub nom. Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989); *see also Knox Creek*, 811 F.3d at 165-66 (upholding Commission's rejection of "snapshot" approach to evaluating S&S for accumulations violation); *Mach Mining*, 809 F.3d at 1267-68 (citing with approval *McCoy Elkhorn*'s discussion of operative timeframe for S&S). The Commission has repeatedly stated that the S&S determination must be based on the particular facts surrounding the violation. *See, e.g.*, *Wolf Run Mining Co.*, 36 FMSHRC 1951, 1957-59 (Aug. 2014) (remanding S&S finding for further consideration of relevant circumstances); *Black Beauty*, 34 FMSHRC at 1740; *Peabody Coal Co.*, 17 FMSHRC 508, 511-12 (Apr. 1995); *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988).

A line of cases beginning with the Seventh Circuit's decision in *Buck Creek*, *supra*, has established that an operator cannot rely on redundant safety measures to mitigate the likelihood

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Mining Co., 36 FMSHRC 1951, 1959 (Aug. 2014); *Maple Creek Mining, Inc.*, 27 FMSHRC 555, 563 n.6 (Aug. 2005); *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

of injury for S&S purposes. *See, e.g.*, *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015).[7] Finally, Commission precedent indicates that the likelihood of injury is the key consideration in determining whether a violation is S&S. *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996) (comparing S&S inquiry, which focuses on "the reasonable likelihood of serious injury," with gravity inquiry, which focuses on "the effect of the hazard if it occurs").

The evolving case law, however, has presented conflicting guidance as to how some of these principles should be applied. In particular, there is some confusion about how to evaluate the facts surrounding the violation and the likelihood of injury under the second and third prongs of the *Mathies* analysis. The Fourth Circuit's recent decision in *Knox Creek*, *supra*, and the Seventh Circuit's decision in *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014), have cast doubt on whether the traditional application of the literal language of the second and third prongs of the *Mathies* test is still valid.

Traditional Application of *Mathies* Test

Under the traditional approach, Commission Administrative Law Judges (ALJs) have conducted the fact-intensive component of the analysis and evaluated the reasonable likelihood of injury at the third prong. In one of its earliest decisions applying the *Mathies* test, the Commission explained that "the reference to 'hazard' in the second element [of the test] is simply a recognition that the violation must be more than a mere technical violation – i.e., that the violation present a measure of danger." *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836. "There is no requirement of 'reasonable likelihood'" encompassed in this element. *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1280 (Sept. 2010). Rather, longstanding Commission precedent indicates that the likelihood of harm should be accounted for in the third *Mathies* element, which "requires that the Secretary establish a *reasonable likelihood* that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel*, 6 FMSHRC at 1836 (quoted by the Commission on numerous occasions over the next two decades, including in *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Bellefonte Lime Co.*, 20 FMSHRC 1250, 1254-55 (Nov. 1998); *Zeigler Coal Co.*, 15 FMSHRC 949, 953 (June 1993); and *Texasgulf*, 10 FMSHRC at 500). As the Commission explained in another early decision, "The third element embraces a showing of a reasonable likelihood that the hazard will occur, because, of course, there can be no injury if it does not." *Consolidation Coal Co.*, 6 FMSHRC 189, 193 (Feb. 1984).

Following this guidance, ALJs have traditionally applied *Mathies* by identifying the potential hazard at the second prong, and then at the third prong, assessing whether there is a reasonable likelihood that the hazard will result in injury under the particular facts of the case at

[7] It is not completely clear whether redundant safety measures are precluded from consideration such that it is error to take them into account, which could make it difficult for judges at the trial level to discharge their duty of considering all the particular facts surrounding the violation, or whether arguments that rely on redundant safety measures are simply disfavored as a defense to S&S. Compare *Brody Mining*, 37 FMSHRC at 1691 (stating that evidence regarding redundant safety measures has been "consistently rejected as irrelevant") with *Black Beauty Coal Co.*, 36 FMSHRC 1121, 1125 n.5 (May 2014) (stating only that such measures "do not prevent a finding of S&S") and *Buck Creek*, 52 F.3d at 136 ("The fact that Buck Creek has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners.").

hand, with the caveat that normal mining operations are assumed to continue without abatement of the violation. The crux of this traditional *Mathies* analysis is the third and fourth prongs of the test, which effectuate *National Gypsum*'s definition of S&S (reasonable likelihood of a reasonably serious injury) and are often combined into a single showing (reasonable likelihood that a particular serious injury will occur under the facts of the case). Consistent with this approach, MSHA inspectors determine whether a violation meets the criteria for S&S by the likelihood of injury and the expected severity of injury, which correspond to the third and fourth *Mathies* elements.[8]

Over the years, it appears that the Commission, with court approval, has developed special rules for applying the *Mathies* test in two situations. First, for violations that contribute to the hazard of an ignition, fire, or explosion, the Commission has held that the third *Mathies* element is satisfied only when a "confluence of factors" is present that could have triggered an ignition, fire, or explosion, under continued normal mining operations. *Zeigler Coal Co.*, 15 FMSHRC at 953; *Texasgulf*, 10 FMSHRC at 501; *see, e.g.*, *Paramont Coal Co. Va., LLC*, 37 FMSHRC 981, 984 (May 2015). Second, for violations of emergency safety standards, the Commission assumes the emergency when making the S&S evaluation. *See, e.g.*, *Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1027-28 (D.C. Cir. 2013); *Mill Branch Coal Corp.*, 37 FMSHRC 1383, 1394 (July 2015).

Effect of Recent Fourth & Seventh Circuit Decisions

The Fourth Circuit's recent *Knox Creek* decision issued in January 2016 appears to shift the focus of the S&S analysis from the third to the second *Mathies* prong and to restrict consideration of the facts bearing on the reasonable likelihood of injury under the third prong. The Fourth Circuit interpreted the second *Mathies* prong to entail an inquiry into the likelihood of harm, stating:

> In our view, the second prong of the test ... primarily accounts for the Commission's concern with the *likelihood* that a given violation may cause harm. This follows because, for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm.

Knox Creek, 811 F.3d at 162. Significantly, the Fourth Circuit further held that the occurrence of the hazard must be assumed under the third prong of the *Mathies* test. *Id.* at 161-65. Evidence of the likelihood that the hazard will occur is not considered at this prong, according to the Fourth Circuit. Rather, the inquiry is whether the hazard, assuming it occurred, would result in serious injury. *Id.* at 162. The particular hazard confronted by the Fourth Circuit was the escape of ignited gas into the mine atmosphere through impermissible enclosures. *Id.* at 164. The

[8] The Secretary's citation/order form contains boxes for inspectors to check the likelihood of injury and the expected severity of injury immediately above the line where they designate the violation S&S or non-S&S. *See, e.g.*, Ex. S-6. Inspectors are trained not to designate a violation as S&S, unless item 10.A on the form is marked "reasonably likely," "highly likely," or "occurred," and item 10.B is marked "lost workdays or restricted duty," "permanently disabling," or "fatal." *See* MSHA, PROGRAM POLICY MANUAL, Vol. I, § 104 (2003).

parties had stipulated that the mine was a "gassy" mine that liberated more than 500,000 cubic feet of methane or other explosive gases per day. *Id.* at 164. Consequently, the ALJ had found that methane was reasonably likely to accumulate to explosive concentrations. *Id.* The ALJ had also found that a resulting explosion was reasonably likely to cause serious injuries, but he had ultimately declined to find that the violation was S&S because the Secretary had failed to prove the likelihood of an ignition. *Id.* at 154, 164-65. Without discussing the likelihood of ignition, the Fourth Circuit deemed the ALJ's other findings sufficient to satisfy the third *Mathies* prong. *Id.*

Previously, in *Peabody Midwest Mining*, the Seventh Circuit had similarly suggested that the S&S analysis assumes the occurrence of the hazard. The violation at issue in that case was the mine operator's failure to erect berms on an elevated roadway. The Seventh Circuit defined the hazard as the risk that a vehicle would veer off the roadway and go over the edge. *Peabody Midwest*, 762 F.3d at 616. The operator had argued that a vehicle was not reasonably likely to veer off the road. *Id.* However, the Seventh Circuit stated that the question "is not whether it is likely that the hazard (a vehicle plummeting over the edge) would have occurred" but "whether, if the hazard occurred (regardless of likelihood), it was reasonably likely that a reasonably serious injury would result." *Id.*

Peabody Midwest does not discuss the proper role of deference in the S&S context, but the Fourth Circuit reached its holding in *Knox Creek* by deferring to the Secretary's interpretation that the third *Mathies* element requires proof that the hazard, not the violation itself, is likely to cause injury. 811 F.3d at 161 (declining to afford deference under *Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), but finding the Secretary's interpretation persuasive and therefore entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). The Fourth Circuit further asserted that this interpretation is consistent with a number of prior cases, including the Seventh Circuit's decisions in *Peabody Midwest* and in *Buck Creek*, *supra*, 52 F.3d at 135 (assuming occurrence of fire at third *Mathies* prong when ALJ had engaged in "confluence of factors" analysis at second prong); the Fifth Circuit's decision in *Austin Power*, *supra*, 861 F.2d at 103-04 (declining to require evidence that the hazard was likely to occur); and the Commission's decision in *Musser Engineering*, *supra*, 32 FMSHRC at 1280-81 (stating that the third *Mathies* prong requires a showing that the hazard, not the violation itself, will cause injury). 811 F.3d at 161-62.[9] The Fourth Circuit rejected the operator's

[9] It is debatable to what extent *Austin Power* and *Buck Creek* truly stand for the proposition the Fourth Circuit seems to be embracing, which is that the actual likelihood of injury is irrelevant, except to the extent necessary to establish a "discrete" hazard at the second *Mathies* prong. In *Austin Power*, the Fifth Circuit upheld an S&S finding for a fall protection violation, reasoning that "[a] danger of falling is a necessary element of this violation, so by the very nature of a violation there was a discrete safety hazard." 861 F.2d at 103. However, the hazard had actually occurred and had resulted in a fatality, which may have influenced the Court's failure to require additional evidence of likelihood at the third *Mathies* prong. 861 F.2d at 100. In *Buck Creek*, the Seventh Circuit did not expressly discuss the proper application of the *Mathies* test, but simply rejected the mine operator's argument that the ALJ had not put enough emphasis on the third and fourth *Mathies* factors when evaluating S&S for an accumulations violation. 52 F.3d at 135. The ALJ had made a finding at the second *Mathies* prong (rather than the third) that there existed a confluence of factors, including fuel sources and ignition sources, that could trigger a

argument that under *Zeigler Coal Company*, *supra*, the Secretary must show that an ignition is reasonably likely under the third *Mathies* prong. 811 F.3d at 164. The Court found this position to be "flatly contradicted" by *Musser Engineering* and by decisions of other federal appellate courts. *Id.*

The Fourth Circuit emphasized, however, that the *Mathies* approach that it has adopted "still allows plenty of room for a fact-intensive S & S analysis, both under prong two, where the Secretary must establish that the violation contributes to a discrete safety hazard, and within prongs three and four, where evidence is still necessary to establish that the hazard is reasonably likely to result in a serious injury." *Id.* Realistically, however, it will likely require very little fact-specific analysis to conclude that any given non-technical violation contributes to a discrete safety hazard, because the Secretary generally does not promulgate a mandatory health and safety regulation (except technical regulations), unless the Secretary has already found that violating the standard would contribute to a hazard. Under the third *Mathies* prong, judges must consider all of the facts surrounding the violation, but must assume continued normal mining operations without abatement of the violation, and may not rely on redundant safety measures to mitigate the likelihood of injury. Now, under *Knox Creek* and *Peabody Midwest Mining*, judges must also assume that the hazard will actually occur. At some point, so many circumstances are either assumed or precluded from consideration that judges will find themselves evaluating the likelihood of injury in the abstract. If this is the case, the Commission will have turned its back on the principles set forth in *National Gypsum* because the *Mathies* test will have become a longhand expression for "non-technical violations." S&S will apply to almost all violations and therefore will no longer serve as a statutory tool by which the Secretary can single out the violations that he believes the Commission should consider significant and substantial when assessing a penalty.

As noted above, the Fourth Circuit reached its result in *Knox Creek* by deferring to the Secretary's interpretation of the Mine Act, and the Seventh Circuit reached a similar result. At the outset of its analysis, the Fourth Circuit indicated that it would review the Commission's legal conclusions *de novo* but would afford deference to the Secretary's, not the Commission's, legal interpretations. *Id.* at 157 (citing *Sec'y of Labor ex rel. Wamsley v. Mut. Mining, Inc.*, 80 F.3d 110, 113-15 (4th Cir. 1996), in which the Fourth Circuit discussed the Mine Act's split-enforcement scheme and concluded that an informal rule created and implemented by the Secretary was entitled to deference over a contrary Commission decision).

It is not surprising that the Circuit Courts have departed somewhat from the traditional *Mathies* analysis in favor of the Secretary's legal interpretation, given the rule of deference mentioned above, and given the fact that the Secretary's attorneys, and not the Commission's, are the ones who argue for enforcement of the Commission's decisions in the Circuit Courts of Appeals. That latter protocol is strange. Notwithstanding the propriety of the rule of deference applied by the Fourth Circuit, which raises concerns that I previously discussed in *Knife River Corporation Northwest*, 34 FMSHRC 1109, 1125-27 (May 2012) (ALJ), it does not make sense that although Congress conferred independent adjudicatory authority upon the Commission to serve as an impartial forum for Mine Act litigation, and although the Commission itself laid out

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fire. *Id.* By contrast, in *Knox Creek*, the Fourth Circuit did not require a "confluence of factors" analysis or a showing that an ignition source existed at any prong of the *Mathies* test.

the test that parties have followed for more than thirty years to litigate S&S in this forum, the Secretary is permitted to challenge the Commission's interpretation of this long-standing test in the Circuit Courts of Appeals and litigate his own interpretation on behalf of the Commission. It should be obvious that since the Secretary is one of the litigating parties before the Commission at the trial level, the Commission's and the Secretary's views on interpretation of the Act may differ. *See e.g., The American Coal Co.*, 36 FMSHRC 1311 (May 2014) (ALJ), *petition for interlocutory review granted,* Unpublished Order dated July 11, 2014. In my view, the Commission's interpretations of Mine Act provisions that turn on adjudication and not enforcement should be accorded at least some form of deference based on the power to persuade, as evidenced by the fact that courts and litigants have uniformly followed the Commission-derived *Mathies* test.[10] *Compare Chevron, supra* (according full deference to agency's reasonable interpretation of ambiguous statutory provision) *with United States v. Mead Corp.*, 533 U.S. 218 (2001) (according deference based on "power to persuade" under *Skidmore, supra*, and finding that *Chevron* applies only where the agency was authorized by Congress to make rules carrying the force of law and did in fact promulgate the proffered interpretation in the exercise of that authority). It is within the Commission's authority to specify how the second and third factors of the *Mathies* test should be applied – particularly, whether the hazard must now be assumed at the third factor, and if so, what steps of the test account for the facts surrounding the violation – and whether the *Mathies* test is still intended to effectuate *National Gypsum*'s interpretation of the S&S provisions of the Mine Act or whether the Commission now interprets S&S differently.

Because I am bound by the *Mathies* test, but it is unclear how the second and third prongs of the test should be applied going forward, I will evaluate S&S under both the traditional approach and the more recent approach set forth in *Knox Creek* and *Peabody Midwest Mining.*

D. Negligence

Negligence is not defined in the Mine Act. The Commission has found "[e]ach mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted). In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984). *See also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975, 1976-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated).

The Mine Act imposes a high standard of care on foremen and supervisors. *Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997) (holding that "a foreman ... is held to a high standard of care"); *see also Capitol Cement Corp.*, 21 FMSHRC 883, 892-93 (Aug. 1999)

[10] *But see Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1027 (D.C. Cir. 2013) (expressly declining to address validity of *Mathies* test).

("Managers and supervisors in high positions must set an example for all supervisory and nonsupervisory miners working under their direction," *quoting Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987)); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995) (heightened standard of care required of section foreman and mine superintendent).

Although MSHA's regulations regarding negligence are not binding on the Commission, *see Wade Sand & Gravel Co.*, 37 FMSHRC 1874, 1878 n.5 (Sept. 2015), MSHA defines negligence by regulation in the civil penalty context as follows:

> Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices . . . .

30 C.F.R. § 100.3(d).

MSHA regulations further provide that mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, and that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions. 30 C.F.R. § 100.3(d). According to MSHA, the level of negligence is properly designated as high when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3, Table X. The level of negligence is properly designated as moderate when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* The level of negligence is properly designated as low when there are considerable mitigating circumstances surrounding the violation. *Id.*

Recently, the Commission held that Commission judges are not required to apply the level-of-negligence definitions in Part 100 and *may* evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015); *accord Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016). Moreover, because Commission judges are not bound by the definitions in Part 100 when considering an operator's negligence, they are not limited to a specific evaluation of potential mitigating circumstances, and may find "high negligence," in spite of mitigating circumstances, or moderate negligence, without identifying mitigating circumstances. *Brody*, 37 FMSHRC at 1701; *Mach Mining*, 809 F.3d at 1263-64. In this regard,

the gravamen of high negligence is "an aggravated lack of care that is more than ordinary negligence." *Brody*, 37 FMSHRC at 1701, *citing Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998). Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances and may consider the totality of the circumstances holistically. Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Id.*

E. Penalty Assessment

The Act requires that the Commission consider the following statutory criteria when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business; (3) the operator's negligence; (4) the operator's ability to stay in business; (5) the gravity of the violation; and (6) any good-faith compliance after notice of the violation. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. § 820(i). The Commission is not required to give equal weight to each of the criteria, but must provide an explanation for any substantial divergence from the proposed penalty based on such criteria. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

As I discussed in my final *Big Ridge* decision, in an effort to avoid the appearance of arbitrariness, I look to the Secretary's penalty regulations and assessment formula as a reference point that provides useful guidance when assessing a civil penalty. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 2014) (ALJ); *see also Wade Sand & Gravel*, *supra*, at 1880 n.1 (Chairman Jordan and Commissioner Nakamura, concurring). *See also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (holding that an agency's interpretation of its own regulation should be given controlling weight unless it is plainly erroneous or inconsistent with the regulation). This formula is not binding, but operates as a lodestar, since factors involved in a violation, such as the level of negligence, may fall on a continuum rather than fit neatly into one of five gradations. Unique aggravating or mitigating circumstances will be taken into account and may call for higher or lower penalties that diverge from this paradigm. My independent penalty assessment analysis applies to each of the citations at issue in this case.

IV. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Citation Number 8840455 (Deficient Splice in Recoup Fan Panel)

1. Further Findings of Fact

Citation Number 8840455 alleges that a cable at the pelletizing plant was not properly spliced, in contravention of 30 C.F.R. § 56.12013. Ex. S-6. The cable in question helps energize the recoup fan, which is located at the firing furnace on the bottom floor of the pelletizing plant. Tr. 82. The recoup fan serves the dual functions of pulling air through the pellet bed to cool the pellets as they exit the furnace, and pushing the hot air from the pellet bed back into the drying section of the furnace, thereby recouping some of the energy from the firing process. Tr. 25, 57, 77-78. The fan runs continuously, unless there is a power outage or the furnace is shut down for maintenance. Tr. 49-50, 57. It has a ten-foot blade powered by a fifteen-ton, 4160-volt motor running on 3000 amps of current. Tr. 25, 72-73.

The wires that energize the fan motor run through an electrical panel or junction box located on the bottom floor of the pelletizing plant, adjacent to a travelway. Tr. 30, 41. Inside the panel, they are joined to other wires to form three cables referred to by the parties as "phases," which supply three-phase power to the fan motor and can be seen in photographs of the fan panel's interior taken by Inspector Meierbachtol. Tr. 27-28, 58-59; *see* Ex. S-7 (photographs). Each phase consists of two wires coming from the starter that connect and terminate onto a larger cable that carries power to the fan motor. Tr. 61. The ends of the wires and cable are fitted with metal lugs that are bolted together to physically connect the conductors, and the entire connection is wrapped in tape to protect and insulate it. Tr. 66, 75-76.

A phase-to-ground fault (an unexpected flow of electrical current to ground) occurred at one of the connections inside the recoup fan panel in March 2015. This triggered an investigation that culminated in the issuance of Citation Number 8840455.

Events Surrounding Citation's Issuance

Inspector Meierbachtol, accompanied by Northshore safety representative Jared Conboy,[11] was at the pelletizing plant conducting a regular inspection on March 25, 2015 when a partial power outage caused one of the plant's furnaces to shut down. Tr. 22-24, 50. Meierbachtol and Conboy heard over the radio that there was a problem at the control room and smoke was coming from the MCC (motor control center) room. Tr. 50, 52. They traveled to the control room to investigate, where they learned that company electrician Chris Mattson, who was not called to testify at the hearing, had traced the problem back to a phase-to-ground fault that had occurred at the recoup fan panel. Tr. 24-25, 46, 50-51. The fault had tripped at least one breaker, shutting down the power and blowing open the door to the MCC room. *See* Tr. 39 (Meierbachtol's testimony agreeing that the fault "kicked the breakers and shut down the power"); Tr. 51-52 (Conboy's testimony that "the secondary main breaker blew, and that was when the door came open"); Ex. S-8 at 5 (Meierbachtol's field notes stating that Mattson told her two lighting arrestors blew out in the MCC room, tripping the fuses and blowing the door open). Fortunately, no one was injured. Tr. 39.

Meierbachtol and Conboy examined the recoup fan panel and Meierbachtol took several photographs, which have been admitted into evidence in Exhibit S7. The panel door had been removed before Meierbachtol and Conboy arrived, revealing two intact phases and one twisted, burnt phase that had failed at the point where its constituent wires were joined. Tr. 25, 34, 46-47; *see* Ex. S-7. Burnt insulation and dust, which Inspector Meierbachtol assumed to be conductive taconite dust, were also visible inside the panel. Tr. 30, 41, 48.

[11] At the time of the hearing, Conboy had been working for Northshore for almost four years. His job duties as a safety representative at the mine include identifying workplace hazards and escorting MSHA inspectors on the property. Previously, he earned a college degree in health education and worked for six years as a safety director for a construction company that installed mantels and built refrigerated buildings and warehouses. He has no electrical background. Tr. 44-45, 47.

A few days later, Inspector Meierbachtol discussed the phase-to-ground fault with Jeff Bagwell, an electrical master at MSHA who was not called to testify at the hearing. Tr. 25, 36; *see* Ex. S-8 at 1 (containing notes Meierbachtol wrote during her discussion with Bagwell). Bagwell told Meierbachtol that the failed electrical connection in the recoup fan panel was a splice that had not been properly constructed. Tr. 36-37, 48; Ex. S-8 at 1. A splice, Meierbachtol explained at hearing, is an insulated connection made between terminal ends to continue an electrical circuit. Tr. 26-27[12] According to Meierbachtol's field notes, Bagwell told her that the failed splice had been insufficiently insulated and should have been constructed using special tape and a high-voltage splice kit. Ex. S-8 at 1.

Based on her observations and the information that she had gathered, Inspector Meierbachtol issued Citation Number 8840455 on March 30, 2015, alleging as follows:

> Inside the panel for the Recup [sic] Fan, a cable was not properly spliced to be insulated to that of the original and was not provided with damage protection as near as possible to that of the original. A phase to ground occurred on 3/25/2015 inside the enclosure where the improper splice was found. This condition exposed miners to electrical shocks/burn hazards resulting in injury.

Ex. S-6. The citation does not specifically reference the mechanical strength of the splice. However, Meierbachtol noted at the time the citation was written that an electrician at the mine had said that the mechanical connection may have come loose, and she later testified that she found a violation in part because the splice "was not properly up to the mechanical standard of the original or better." Ex. S-6 (Citation/Order Documentation); Tr. 26. She assessed the level of negligence as "moderate," the probability of injury as "reasonably likely," the severity of the expected injury as "fatal," and the number of persons affected as one, and she characterized the violation as S&S. Ex. S-6. She testified that the violation could result in 4160-volt electrical shocks and burns, and opined that it had, in fact, caused an arc flash. Tr. 30-31.

Inspector Meierbachtol traveled to the mine the day after she issued the citation to terminate it. Electricians had repaired the splice by cutting off the damaged parts of the wires, cleaning the conductors, installing and bolting together four new lugs, and wrapping the area with ten layers of high-voltage electric tape and a layer of scotch 33+ tape, which is general

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[12] Specifically, Meierbachtol stated, "A splice is when you have one terminal end and you have another terminal end, and when you put them together you connect them together to keep the circuit going, and you use electrical tape to put around it." Tr. 26. The crux of this definition is the concept of creating an insulated connection between electrical conductors to continue a circuit. Northshore argues that Meierbachtol relied on Bagwell to tell her that the failed connection was a splice and that she "was not really qualified to testify on this issue." Resp. Br. 8, 9. However, Meierbachtol completed an electrical training module at the Mine Academy and professed to have some experience constructing low-voltage splices. Tr. 33, 41. Although she is not an electrician, it does not take years of experience to learn to identify a splice. I find her qualifications sufficient to lend reliability to her testimony identifying the cited electrical connection as a splice. I also find that her reasonable decision to talk to an electrical master before issuing a citation does not detract from the reliability of her testimony in this regard.

electrical tape rated for 500 volts. Ex. S-6; Tr. 31-33, 37-38, 64-65, 78, 81. The electricians who had performed the repairs told Meierbachtol that they had used a high-voltage splice kit. Tr. 33, 37. They also told her that "they don't do splices here, they make connections." Tr. 38; Ex. S-8 at 7 (noting mine's lack of procedures for making splices).

While at the mine to terminate the citation, Meierbachtol further discussed the cause of the phase-to-ground fault with numerous Northshore employees. *See* Ex. S8 at 2-7. Ultimately, she concluded that the bolt and lugs holding the wires together in the splice had loosened over time, and because because material could penetrate the loose connection and electricity was flowing through it, "eventually it just arc flashed inside [the recoup fan panel] and failed." Tr. 29-30. She "was told that these failures happen quite often" at the mine. Tr. 31; Ex. S-8 at 3.

Testimony of Northshore's Electrical Engineer, Michael Ketola

Northshore called electrical engineer Michael Ketola[13] to discuss the cited equipment and the March 25 electrical incident. Tr. 55. Ketola was not involved in the incident or the subsequent repair work, but offered testimony based on his professional experience and knowledge, and his after-the-fact observations of the recoup fan panel. Tr. 57-58, 78.

When asked at hearing whether the failed connection in the recoup fan panel was a splice, Ketola conceded that it was "a splice of some sort, you could say. You're splicing – you're taking two cables that come from the starter and you're terminating to one cable that comes from the motor. So you're making a physical connection." Tr. 81-82. Counsel for the Secretary subsequently elicited the following exchange:

> Q [by counsel for the Secretary]: You just mentioned when you were talking to Judge McCarthy that the connection that we're dealing with here of the lugs being connected with a bolt was a type of splice; is that correct?
>
> A [by Ketola]: Yeah, it's a termination, whatever you want to call it.
>
> Q: It's a type of splice, correct?
>
> A: Correct.

Tr. 85-86. On redirect, Ketola explained that he typically thinks of a splice as a connection between two conductors of the same size in the middle of a run. Tr. 87-88. By contrast, he typically considers an end-to-end connection between multiple conductors of different sizes, (the type of connection at issue in this case), to be a termination, "but it could be considered a splice."

[13] Ketola has worked for Cliffs Natural Resources for twenty years, fifteen or sixteen of which have been at the Northshore mine. He is in charge of maintenance for the substations, high voltage motors, and other infrastructure at the mine. He previously worked as an electrical engineer for another construction company for about seven years. He holds a four-year degree in electrical engineering from Michigan Technological University. Tr. 55-56, 73.

Tr. 87. Thus, while he considered the connection at issue in this case to be an unusual type of splice, he nonetheless conceded unequivocally that it could still be considered a splice.

The splice had been in place for years. Tr. 35, 63. According to Ketola, the connection originally was wrapped in a material called varnished cambric (VC) to pad the sharp edges of the lugs and bolt. Tr. 61-62. The connection was then covered with a layer of insulating tape and a layer of protective tape. Tr. 62-63. By contrast, after the phase-to-ground fault occurred, the splice was repaired by wrapping the lugs and bolt in a particular type of yellow tape instead of VC before adding a layer of 130C insulating tape and a layer of 33+ protective tape. Tr. 63-65. Ketola explained that Northshore had switched from using VC to using the yellow tape after 2001 because VC has an undesirable tendency to become dry and brittle over time, "caramelizing" to the connection, such that it cannot be easily removed. Tr. 63-64, 79. Although the mine no longer uses it, Ketola opined that VC provides protection and insulation equivalent to that provided by the yellow tape and stated that the VC and tape combination formerly used at the mine was intended to be equivalent to the insulation on the cables themselves. Tr. 65-66. Ketola suggested that using VC does not affect the integrity of a connection because VC's main function is simply to cover the sharp edges of the lugs and bolts to prevent the outer layers of tape from being pierced, not to serve as an insulator. Tr. 78-79. Asked how long the VC plus tape combination would be expected to last, he indicated that it would depend on environmental factors and concluded "it's really hard to say." Tr. 79.

Ketola described a number of safety measures that are in place at the mine to prevent or mitigate shock hazards. The phase-to-ground fault had opened two breakers, one at the fan motor starter and the other at the powerhouse that feeds the starter. Ketola testified that these are redundant safety measures intended to prevent injury by shutting off the power. Tr. 67. In addition, the fan motor and recoup fan panel are grounded, and Northshore performs annual grounding and resistance testing on its equipment in accordance with MSHA requirements. Tr. 67-68, 71. Northshore also hires a contractor to perform motor circuit analysis on large motors such as the fan motor at six- or nine-month intervals to test the integrity of the grounding and insulation systems. Tr. 68-69. In fact, the recoup fan motor had just been tested eight to ten days before the phase-to-ground fault occurred. Tr. 69. As of the hearing date, Northshore was also in the process of implementing thermography analysis at the mine to detect heating at electrical connection points, but this had not been implemented at the fan motor or recoup fan panel before the phase-to-ground fault occurred. Tr. 70-71.

Ketola did not identify any safety measures that would have helped to ensure that the splice inside the recoup fan panel was physically sound and functioning as intended. Although the fan motor is periodically replaced, the wiring in the fan panel is not. Tr. 74-75, 85. The panel is bolted shut and likely would not have been opened, absent a problem, meaning that it is possible that no one had examined or even looked at the splice since its installation. Tr. 80, 84. Ketola himself did not recall ever looking in the panel before the phase-to-ground fault occurred, and he would not have expected the contractors, who performed circuit analysis on the motor, to do so either. Tr. 70, 79-80, 84. However, Ketola opined that even if the panel had been opened before the incident, there would have been no visible indication that a failure was imminent. Tr. 83.

Ketola was not aware that Northshore had performed any analysis to determine why the phase-to-ground fault occurred. Tr. 72. In his opinion, the connection "just must have developed a high resistance and started heating and it deteriorated the insulation." Tr. 72, 80. He posited that the re-energization of the fan motor, after undergoing circuit analysis eight to ten days before the incident, may have placed stress on the electrical system because the motor would have drawn higher amperage than usual while accelerating the fan to its normal speed. Tr. 72, 81-82. "[T]hat change over time could somehow loosen the lug washers or the bolt, or you could just have stress on the bolts themselves," leading to high resistance, he explained. Tr. 81. He also acknowledged that taconite dust, which was visible in the picture of the recoup fan panel and is "typically all over everything" at the pelletizing plant, could have exacerbated an arc flash by trapping heat. Tr. 86-87, 89.

2. Analysis and Conclusions of Law

i. Violation of 30 C.F.R. § 56.12013

Section 56.12013 requires permanent splices and repairs in power cables to be mechanically strong, sufficiently insulated, and protected from damage. The regulation states:

> Permanent splices and repairs made in power cables, including the ground conductor where provided, shall be:
> (a) Mechanically strong with electrical conductivity as near as possible to that of the original;
> (b) Insulated to a degree at least equal to that of the original, and sealed to exclude moisture; and
> (c) Provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket.

30 C.F.R. § 56.12013.

The Parties' Positions

The Secretary contends that the evidence establishes a violation of § 56.12013 because the cited electrical connection was a splice that failed because it was not mechanically strong or sound. Noting that Northshore pointedly used the word "connection" rather than "splice" at hearing, the Secretary characterizes this distinction as purely semantic and argues that Northshore's own witness admitted the connection was a splice. To support the contention that the splice was not mechanically strong or sound, the Secretary cites testimony from Ketola and Inspector Meierbachtol indicating that the phase-to-ground fault occurred because the bolt holding the spice together had loosened. Sec'y Br. 9-13.

Northshore argues that the Secretary has failed to establish a violation of § 56.12013 because he has failed to prove that the connection in question was a splice or that it was not mechanically strong and sufficiently insulated. Northshore argues that the failure of the connection does not prove a violation occurred, that Inspector Meierbachtol's testimony regarding the cause of the failure is vague and speculative, and that I should credit the testimony of Northshore's more experienced and knowledgeable witness, Ketola, that the splice was adequately insulated and mechanically strong. Even if the connection was defective, Northshore

asserts that it does not fit within the ordinary meaning of the term "splice," as defined by Ketola. Resp. Br. 5-9.

Discussion

As a threshold matter, I find that Northshore has conceded that the cited electrical connection was a splice. Northshore's own witness, Ketola, admitted that this connection was "a splice of some sort" and could still "be considered a splice" even though it did not conform to his idea of a typical splice. Tr. 81, 87. Because this connection was a permanent splice, it was required to conform to the requirements of § 56.12013.

Even if Northshore had not conceded the issue, I would still reject its suggestion that the term "splice" should be narrowly interpreted to encompass only connections between two conductors of the same size in the middle of a run. The Secretary's regulations do not expressly define what constitutes a splice, such that it falls within the ambit of § 56.12013. However, to the extent that the regulation is ambiguous, the Secretary's interpretation is entitled to deference unless it is unreasonable, plainly erroneous, inconsistent with the regulation, or does not reflect the agency's fair and considered judgment on the matter. *Drilling & Blasting Systems, Inc.*, 38 FMSHRC _, slip op. at 5 (Feb. 22, 2016) (citing *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) and *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997)). In this case, the Secretary's interpretation of § 56.12013 to encompass electrical connections of the type cited by Inspector Meierbachtol is reasonable, persuasive, and entitled to deference, for the following reasons.

First, the Secretary's interpretation is supported by the evidence presented by both parties. The Secretary presented testimony from Inspector Meierbachtol, who consulted an electrical master at MSHA, and then concluded that a splice is an insulated connection made between the ends of conductors to continue a circuit. Tr. 26, 36. Consistent with this definition, the connection at issue here was an insulated connection made between the ends of conductors to continue the power circuit feeding the recoup fan motor. As noted above, Northshore's electrical engineer, Ketola, also testified that the connection at issue here is a type of splice.

Further, the Secretary's interpretation of § 56.12013 is more consistent than Northshore's with the text of the regulation, the pertinent regulatory framework, and the safety-promoting purposes of the Mine Act. Section 56.12013 applies to "[p]ermanent splices" and "repairs made in power cables." The requirements that the regulation sets forth for mechanical strength, insulation, and protection are appropriate and promote safety when applied to the connection at issue here. If the regulation were interpreted, as Northshore suggests, to apply only to splices made in the middle of a run, which are essentially repairs, the reference to "splices" would be superfluous, and permanent electrical connections of the type at issue here would be excluded from regulation entirely. Review of the Secretary's electrical standards reveals no intent to distinguish between different types of permanent splices or to exclude certain types of electrical connections from regulation, which would undermine the Act's safety-promoting purposes. *See* 30 C.F.R. Part 56, Subpart K. The Secretary's interpretation, by contrast, furthers the Act's safety-promoting purposes and conforms to the regulatory framework governing electrical equipment.

For the foregoing reasons, I find that the connection at issue here was a type of permanent splice. I accept and accord deference to the Secretary's interpretation of § 56.12013 as applying to this splice.

A preponderance of the evidence establishes that the cited splice was not sufficiently well-insulated or mechanically strong to meet the requirements of § 56.12013. The splice failed when a phase-to-ground fault occurred. Although the failure itself does not necessarily prove the violation, the fact that electrical current was able to escape from the power circuit at this point supports an inference that the splice was not as effectively insulated or mechanically sound as the rest of the cable. The evidence wholly supports this inference.

No one observed the splice just before the phase-to-ground fault occurred. However, the evidence indicates that the connection likely failed because the insulation had deteriorated and the mechanical connection had loosened over time. It is unclear when, if ever, the splice had last been visually checked to ensure the connection was tight and properly insulated. Ketola testified that the splice had been constructed using lugs, a bolt, varnished cambric, and tape intended to provide the same insulation and protection as the cables themselves, but he could not say how long this construction would be expected to last. Tr. 61-62, 65, 79. Northshore stopped using varnished cambric after 2001. Tr. 63. This means that the splice was probably installed in 2001 or earlier, providing ample time for the integrity of the connection to deteriorate if it was not being checked, at least occasionally, and repaired, tightened, or reinsulated, as needed. Inspector Meierbachtol opined that the phase-to-ground failure had been caused by the splice's mechanical connection loosening over time. Tr. 29-30. This would have increased resistance at the connection, permitting heat to accumulate and setting the stage for a failure.

Contrary to Northshore's assertions, Meierbachtol's findings regarding the cause of the phase-to-ground failure are neither vague nor too speculative to credit. She reached her conclusions only after examining the damaged splice and speaking to an electrical master at MSHA and to several of Northshore's own electricians, one of whom told her that the possible cause of the failure was that the connection had become loose. *See* Tr. 25; Ex. S-6, (Citation/Order Documentation); Ex. S-8 at 1. Moreover, Ketola's testimony is consistent with her conclusions. He attributed the splice's failure to high resistance at the connection, which he said would cause heating and deterioration of the insulation. Tr. 72, 80-82.

I accept Ketola's testimony that the failure of the splice may have been precipitated by the recent restarting of the fan motor, after it underwent circuit testing. He explained that high resistance paired with high current would be expected to place stress on the mechanical connection, causing the lugs and bolt to loosen. Tr. 80-81. However, this would not relieve the operator of its duty to maintain the splice in safe condition in accordance with the requirements of § 56.12013, which it failed to do.

I affirm Inspector Meierbachtol's findings that the splice failed because it was not as mechanically strong or as well insulated as the rest of the cable. Accordingly, I find that a violation of § 56.12013 occurred.

ii. S&S and Gravity

The Parties' Positions

In support of Inspector Meierbachtol's S&S designation, the Secretary argues that this violation exposed at least one miner to multiple severe and discrete safety hazards, including the hazard of being exposed to an arc flash or electrical shock, and the hazard of a fire occurring in the recoup fan panel. The Secretary further contends that these hazards were reasonably likely to immediately result in serious injury in this case because arc flashes potentially occurred inside the recoup fan panel, which was next to a travelway, and in the MCC room, which is frequented by miners. The Secretary also notes that Inspector Meierbachtol was told "these failures happen quite often" at the mine, indicating a continuing risk. Sec'y Br. 13-15.

Northshore disputes the S&S designation and claims that the Secretary has not established a potential for injury to any miners. Northshore argues that because the cited splice was located inside the recoup fan panel and the panel was grounded, there was no likelihood of exposure. Northshore also points out that the electrical circuit itself features built-in protections that functioned, as intended, to shut down the power supply when the fault occurred. Northshore's closing brief does not mention the possibility of an ignition or arc flash, except to note in passing that Inspector Meierbachtol failed to explain how the dust in the box could be ignited or conduct electricity. Resp. Br. 9-12.

Discussion

I have already found that a violation of a mandatory safety standard occurred, satisfying the first element of the *Mathies* test.

Turning to the second *Mathies* element, I find that this violation contributed to the discrete hazard of the deficient splice failing and allowing electrical current to escape from the fan motor circuit at the failure point, creating additional discrete hazards of an arc flash, an electrical shock, or an electrical fire. These hazards created a measure of danger to safety for any miners working nearby in the pelletizing plant.

As discussed above, the Fourth Circuit has held that the second *Mathies* element requires a further showing that the violation is "at least somewhat likely to result in harm." *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 163 (4th Cir. 2016). I find that this violation was more than somewhat likely to result in harm because the hazards to which it contributed were highly likely to occur, it was reasonably likely that miners would be exposed to the hazards, and injury was reasonably likely to result.

The hazards to which this violation contributed were highly likely to occur, and some of the hazards did in fact occur. The splice failed, allowing electrical current to escape along an unintended path. Fortunately, no one was injured. However, the phase-to-ground fault pulled the cited splice apart, burned its insulation, and destroyed the ends of its constituent wires. *See* Ex. S-7. An arc flash almost certainly occurred. Tr. 30, 81. Enough heat or force was created to trip at least one breaker and blow open the door to the MCC room. Tr. 39, 51-52, 67; Ex. S-8 at 5. Even if the failure had not yet occurred at the time the citation was issued, the deficiencies in

the splice were highly likely to eventually cause it to fail in a similar manner if normal mining operations had continued. The recoup fan panel apparently was never opened unless there was an obvious problem, even when the fan motor was periodically replaced. Tr. 70, 80. This made it unlikely that the splice would be examined or that any structural deficiencies would be discovered and addressed in the normal course of operations before the violation contributed to a catastrophic failure, such as the phase-to-ground fault that actually occurred. In fact, Inspector Meierbachtol was told that "these failures happen quite often" at the mine. Tr. 31.

Miners were reasonably likely to be exposed to the hazards created by this violation. The splice was located in the pelletizing plant inside the recoup fan panel, which is adjacent to a travelway used by miners and vehicles. Tr. 30. There was a reasonable likelihood that miners using the travelway or working nearby would be exposed to the hazards of an arc flash or electrical fire at this location. Additionally, a more serious electrical event at the fan panel could cause problems elsewhere along the fan motor circuit, which spans about 500 feet of cable from the starter in the MCC room to the fan itself. Tr. 79. This potential occurrence could have exposed miners to electrical hazards at other locations or equipment along the circuit.

Miners' exposure to the hazards contributed to by this violation was reasonably likely to result in injury or harm. The hazards in question included the failure of the splice and resultant escape of electricity, and by their nature, these hazards would be expected to cause an arc flash and shock a nearby miner or spark a fire. Further, this violation involved dangerously high amounts of electricity. The splice was feeding a 4160-volt, 3000-amp motor. Tr. 25, 73. This increased the risk of injury from an electrical shock or arc flash. In fact, Ketola testified that arc flashes can jump further at higher voltages. *See, e.g.*, Tr. 87. In addition, the conductive taconite dust inside the recoup fan panel would have exacerbated an arc flash and increased the risk of a fire being propagated. Tr. 86. Although Northshore argues that redundant safety measures, such as circuit breakers and grounding systems for the recoup fan panel and fan motor, were in place to mitigate the risk of injury to miners, the Commission has made clear that redundant safety measures do not operate as a defense in the S&S context. *E.g.*, *Black Beauty Coal Co.*, 36 FMSHRC 1121, 1125 n.5 (May 2014) (noting that redundant safety measures do not prevent S&S finding); *see also Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015) (taking this principle even further by characterizing evidence of redundant safety measures as "irrelevant").

Because this violation contributed to hazards that were highly likely to occur, miners were reasonably likely to be exposed to the hazards, and injury was reasonably likely to result, I find that this violation was more than somewhat likely to result in harm. Accordingly, the second *Mathies* element is satisfied under the Fourth Circuit's *Knox Creek* analysis.

As discussed in the "Legal Principles" section above, a hotly disputed aspect of the S&S analysis is whether the third step of the *Mathies* test requires consideration of the likelihood that the hazard itself will occur or simply the likelihood that injury will occur as a result of the hazard. The federal appellate courts have assumed the occurrence of the hazard at this step of the analysis, which is in line with recent Commission precedent. *See Knox Creek*, 811 F.3d at 161-62 (citing *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135 (7th Cir. 1995);

Austin Power, Inc. v. Sec'y of Labor, 861 F.2d 99, 103-04 (5th Cir. 1988); and *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010)).

Applying this approach and assuming that the hazards contributed to by this violation were to occur, I find that injury was reasonably likely to occur as a result of the hazards. Miners were reasonably likely to be exposed to the hazard of the splice failing, due to its location adjacent to a travelway in the pelletizing plant where miners frequently work and travel. Any miners exposed were reasonably likely to incur injuries, given the high voltage and amperage involved, and the nature of the condition, which was likely to result in an arc flash or shock hazard at unexpected locations, or could spark a fire. In making these findings, I rely on, and incorporate by reference, my findings and discussion with regard to the second *Mathies* element above.

Under the traditional approach to the *Mathies* analysis, the third element requires consideration of the likelihood of an injury-causing event without assuming the occurrence of the hazard. I have already found that the hazards contributed to by this violation were highly likely to occur and reasonably likely to result in harm, for the reasons discussed above in my consideration of the evidence at the second *Mathies* prong. Accordingly, I find the evidence sufficient to satisfy the third *Mathies* element under either the traditional approach or the approach embraced by the Fourth Circuit in *Knox Creek*.

Because of the high voltage and amperage this violation involved, any electrical shock caused by the violation would be reasonably expected to be serious or fatal. An electrical fire would also be expected to result in serious or fatal burn injuries. Thus, the fourth *Mathies* element is satisfied.

Because all four of the *Mathies* criteria are met, this violation is S&S. I further find that the gravity of this violation was high in light of its contribution to a serious electrical event that caused damage to electrical equipment and exposed miners working at the pelletizing plant to a potential shock and fire hazard.

iii. Negligence

Inspector Meierbachtol charged Northshore with moderate negligence because she was told that failures such as the one that occurred on March 25, 2015 happened quite often, and therefore Northshore was aware of this recurring problem and should have been checking the splices in the recoup fan panel to ensure that they were tight and properly insulated. Tr. 31. The Secretary asks me to uphold the moderate negligence designation, asserting that Northshore should have been checking the splices, but that mitigating factors exist, such as the redundant safety measures that were in place to prevent or mitigate the hazards of an electrical shock or surge. Sec'y Br. 15-16. Northshore has presented no arguments with respect to negligence.

I affirm Inspector Meierbachtol's finding of moderate negligence. The operator should have known that this splice was defective. The splice had been installed so long ago that one of the materials used in its construction, varnished cambric (VC), was no longer in common use at the mine. During the splice's lengthy life, the fan motor it helped energize was likely replaced numerous times due to regular wear and tear, yet there is no indication that the operator ever

opened the recoup fan panel to make sure the splice was still intact and in safe condition. Section 56.12013 requires a splice's insulation and degree of mechanical strength to be maintained as near as possible to the same level as the original wire. Northshore's conduct failed to meet or even approach this high standard of care. Periodic checks of the wiring inside the recoup fan panel could have revealed that the splice's insulation was deteriorating or its mechanical connection was loosening, but Northshore failed to take this simple step that could have possibly prevented the phase-to-ground fault.

I note, however, that Northshore does engage a contractor to conduct regular motor circuit analysis that should have revealed any abnormal resistance levels along the circuit, including at the splices inside the recoup fan panel. Tr. 68-69. Also, the defective condition could have arisen recently if the splice's mechanical connections became loose due to the fan motor being stopped and restarted eight to ten days before the citation was issued. Tr. 69. After weighing all of the evidence, I find that Northshore's conduct in connection with this violation was moderately negligent.

iv. Penalty Assessment

As discussed above, the Mine Act requires the Commission to consider the six criteria set forth in section 110(i), 30 U.S.C. § 820(i), when assessing a civil penalty, and I look to the Secretary's penalty regulations and proposed assessment as a useful starting point.

The Secretary proposed a penalty of $2,678.00 for this violation after considering the six statutory penalty criteria under his penalty formula set forth in 30 C.F.R. Part 100. Ex. S-3; Ex. S-5. I have affirmed the Secretary's gravity and negligence findings. Exhibit A to the Secretary's penalty petition shows how he weighed Northshore's size and violation history, and Northshore has not challenged his findings in this regard. Ex. S-5; *see also* Ex. S-1 (MSHA's Assessed Violation History Report for the mine). The parties have stipulated and the evidence reflects that Northshore promptly abated this violation in good faith, and the Secretary accounted for this factor in his proposed assessment. Ex. S-2; *see* Ex. S-5 (showing 10% penalty reduction for good faith). The parties have also stipulated that the proposed penalty will not affect Northshore's ability to remain in business. Ex. S-2.

Based on the legal principles outlined above, after considering the six statutory penalty criteria, I find that the proposed assessment of $2,678.00 is appropriate.

B. Citation Number 8840744 (Uncovered Welding Lead)

1. Further Findings of Fact

Citation Number 8840744 alleges that Northshore failed to properly guard an electrical connection where one of two welding leads was attached to an arc welding machine. Ex. S9. An arc welding machine generates electrical current that passes through a welding lead to an electrode and arcs to the piece of metal on which the work is being performed. This welding lead, which supplies current to the electrode, is referred to as the electrode lead or positive lead. Tr. 99, 118. The second welding lead, referred to variously as the negative, neutral, ground, or work lead, is electrically common with the ground and with the chassis of the welder and is

clamped to the work piece to complete the welding circuit. Tr. 118-19, 126.[14] Thus, the two welding leads form a circuit similar to that created by a pair of jumper cables running between two car batteries. Tr. 99, 119-20.

Events Surrounding Issuance of Citation

Inspector Norman was at the pelletizing plant conducting a regular inspection on March 31, 2015 when he spotted a portable 480-volt arc welding machine sitting on the side of a travelway along the 107N conveyor. Tr. 93-94; Ex. S-9. According to Conboy, who was accompanying Norman on the inspection, this was the welder's storage location. Tr. 106. The welder was not in use, although it was not locked or tagged out, and the welding leads were coiled and hanging on the side of the machine. Tr. 103-04; *see* Ex. R-12 (photographs submitted by Northshore).

Inspector Norman noticed that the welder's negative lead, unlike the positive lead, was unguarded at the point where it connected to the welder. Tr. 94. Photographs submitted by both parties show that the two welding leads terminate in a metal lug that slips over a stud protruding from a panel at the bottom of the welder, which is tightened down with a nut. Ex. S-10; Ex. R-12; *see also* Tr. 95-96, 101. The lug nut assembly at the end of the positive lead was covered by a plastic sleeve, preventing contact with the conductive metal pieces, but the negative lead's terminal, connective, lug-nut assembly was bare. *See* Ex. R-12.

Inspector Norman observed that the negative terminals were guarded on other welders that he examined during the inspection. Tr. 94, 102. Norman opined that leaving a negative terminal bare and unprotected could create a hazard if anything fell against it, explaining, "I've welded myself. I've taken that stinger with a piece of rod in it, draped it over the machine and made contact with that [the bare terminal]. So you can get an arc flash. You could become the ground." Tr. 96.

Based on his observations and concerns, Inspector Norman cited Northshore for a violation of 30 C.F.R. § 56.12023, which he believed required the negative terminal to be "insulated to protect anybody from coming into contact with it." Tr. 94.[15] The narrative portion of the citation alleges that the welder "was not properly insulated at the terminal where the welding lead connects to the welder," which "exposed the miner to contacting the 480 volt terminal, resulting in shock and or electrocution." Ex. S-9. Norman assessed the violation as unlikely to cause injury, non-S&S, capable of causing a fatal injury, affecting one person, and

[14] I accept Ketola's testimony that the ground lead is clamped "to your project or to whatever you're welding to complete the circuit" (Tr. 118) and reject Conboy's contrary testimony that it is clamped to "a ground conductor" or "anything metal" such as a beam in the building (Tr. 108). Conboy has no electrical background and has never operated a welding machine. Tr. 47, 108, 115. By contrast, Ketola has served as an electrical engineer for more than twenty years, (Tr. 55), and his testimony, as a whole, makes sense and evinces a thorough knowledge of welding.

[15] Considering the context, I find that Norman was using the term "insulated" to mean "guarded." I therefore reject Northshore's contention that the Secretary alleged only that the connection was uninsulated, not that it was unguarded. *See* Resp. Br. 14-15.

resulting from moderate negligence. Tr. 97; Ex. S-9. He terminated the citation the next day, after Northshore had abated the violation by covering the negative terminal with electrical tape. Tr. 98; Ex. S-9.

Testimony from Northshore's Witnesses

Conboy, who had observed the welder at the time the citation was issued, did not dispute that the end of the negative lead was bare at the point where it connected to the welder. Tr. 109-10. He also agreed that the negative terminals were covered on many of the other welders that he and Norman had seen during the inspection. Tr. 116. However, Conboy expressed doubt that the standard cited by Norman, § 56.12023, applied to the negative welding lead. *See* Tr. 109. Conboy testified that nothing would happen if a person were to touch the bare terminal where the negative lead meets the welder. Tr. 114. He asserted that he had accompanied an MSHA inspector named Dan Goyen on two past inspections at the mine. Conbuy testified that during these inspections, a welder was twice found to be in the same condition as the welder at issue here, with a cover over the end of the positive welding lead but not the negative. Conboy testified that Inspector Goyen had not cited or mentioned the condition on either occasion. Tr. 110-14.

Ketola was called to testify in his capacity as an electrical engineer. Like Conboy, Ketola did not recall that the mine had received any citations solely for a bare negative terminal on a welder, but he acknowledged that the mine had been cited eight to ten years earlier when neither the negative nor the positive terminal was covered. Tr. 123-25. Thereafter, Ketola purchased dozens of cheap plastic covers intended for use on the positive terminals. Tr. 123-25. Ketola opined that it was unnecessary to cover the negative terminals because the negative leads were grounded to the chassis of the welder. Tr. 118-19, 123, 126-27. However, mine employees ended up using the covers on both terminals because the covers were "pretty cheap compared to coming out here [to a hearing] and spending half a day." Tr. 123. In other words, Ketola was of the view that covering the negative terminals, while unnecessary, was cheaper than risking a citation, "[s]o it's just one of [those] things where we do it just because it doesn't bring unwanted meetings down here in the Federal Building." Tr. 120-21.

2. Analysis and Conclusions of Law

i. Violation of 30 C.F.R. § 56.12023

Section 56.12023 provides: "Electrical connections and resistor grids that are difficult or impractical to insulate shall be guarded, unless protection is provided by location." 30 C.F.R. § 56.12023.

The Parties' Positions

The Secretary argues that § 56.12023 was violated because the negative terminal cited by Inspector Norman is part of an electrical connection that was exposed, protruding, and unprotected, unlike the negative terminals on other welding machines at the mine. Sec'y Br. 17-19.

Northshore argues that a violation has not been established under the reasonably prudent person standard because insulating a neutral lead is unnecessary and the mine has not been cited for failing to do so in the past. In a footnote, Northshore also states that the cited connection is protected by its recessed location at the bottom of the welding machine. Northshore further disputes that the cited connection is an "electrical connection" within the meaning of § 56.12023, arguing that it is not an electrical connection because the negative lead is neutral and carries no current. Resp. Br. 14-16.

Discussion

I reject Northshore's argument that the cited connection is not an "electrical connection" within the meaning of § 56.12023. Although the negative welding lead is electrically common with the ground, it is an essential part of the welding circuit, which conducts direct current in a manner similar to jumper cables connecting car batteries. *See* Tr. 99, 118-21, 126. Thus, the connection between the negative lead and the body of the machine is an electrical connection because it is a conductive connection between electrical components of the machine. *See Falkirk Mining Co.*, 19 FMSHRC 149, 152 (Jan. 1997) (ALJ) (finding that connection between negative welding lead and welder "is clearly an electrical connection" because it is a connection of insulated wires to each other or equipment permitting flow of electrical current).

Under § 56.12023, the cited electrical connection should have been either guarded or protected by its location. There is no dispute that the connection was unguarded, as depicted in a close-up photograph submitted by Northshore showing that the lug-nut assembly connecting the negative terminal to the welding machine was completely bare. Tr. 94; *see* Ex. R-12. The photograph shows that the stud to which the negative lead connects sits in a slightly recessed panel at the bottom of the welding machine. Ex. R-12. However, the metal lug at the end of the negative lead protrudes beyond the plane of the machine, and therefore that portion of the connection is not protected by its location. *Cf. Falkirk*, 19 FMSHRC at 152-53 (finding violation when negative terminal lug protruded outside vertical plane of welder); *Ammon Enters.*, 30 FMSHRC 799, 813 (July 2008) (ALJ) (finding no violation when photograph showed lugs were recessed a few inches into a relatively small opening). Although the welder was not in use at the time of the inspection, it was not locked and tagged out. Tr. 103-04. The equipment should have been maintained in compliance with the Secretary's safety requirements because it was available for use and had not been removed from service. *Cf. Wake Stone Corp.*, 36 FMSHRC 825, 828 (Apr. 2014) (requiring that equipment be maintained in functional condition even when not in use, unless it has been removed from service).

Northshore contends that a reasonably prudent person would not have recognized a need to cover the negative terminal. However, the negative terminal is part of an electrical connection and part of the welding circuit, and the plain language of § 56.12023 requires that it be either guarded or protected by location. Significantly, the negative terminals were covered on the other welding machines at the mine. Tr. 94, 102, 116, 123. Northshore presented testimony suggesting that covering the negative terminals is a senseless practice carried out merely to avoid "unwanted meetings down here in the Federal Building." Tr. 121; *see* Tr. 114, 118-27. However, even though Northshore's witnesses questioned the rationale behind this application of § 56.12023, the operator's act of covering the negative terminals on most of its welding machines evinces an implicit recognition that the standard does apply and that these linkage

points constitute electrical connections that must be guarded. Given that the plain language of § 56.12023 applies and that the negative terminals were covered on the other welding machines at the mine, I reject Northshore's argument that a reasonably prudent person would not have recognized a violation.

Based on all the foregoing, I find that the Secretary has established a violation of § 56.12023 because the cited electrical connection was not guarded or protected by its location.

ii. Gravity

Inspector Norman assessed this violation as non-S&S and unlikely to cause injury, but capable of causing a fatal injury to one person. He testified that a person touching the exposed negative terminal could "become the ground." Tr. 96. He failed to explain how this could occur given that the negative lead is electrically common with the ground. However, he also identified a risk that an arc flash could occur if the electrode at the end of the positive welding lead were to come into contact with the bare conductor at the negative terminal, and illustrated the plausibility of this scenario with a first-hand example. *See* Tr. 96 ("I've taken that stinger with a piece of rod in it, draped it over the machine and made contact with [the negative terminal]."). Ketola agreed that the electrode would draw an arc if it came into contact with the bare negative terminal, while the welding machine was running. Tr. 120. The machine was not in use at the time of the inspection, but it was not locked and tagged out. Tr. 104.

I find that this violation created a hazard of electricity arcing and potentially shocking a miner. This could result in serious or even fatal injuries given that this is a 480-volt welding machine. Tr. 95, 116. However, the gravity of the violation is not serious because only a small portion of the negative conductor was exposed near the bottom of the welding machine and the probability of injury was low.

iii. Negligence

Inspector Norman attributed this violation to Northshore's moderate negligence because it was obvious and should have been detected during workplace exams. Tr. 97. His opinion on negligence was also influenced by the fact that the negative terminals were covered on all the other welders that he had seen at the mine. Tr. 97.

The Secretary asks me to uphold the moderate negligence designation. The Secretary asserts that the operator should have known of the violative condition, but concedes that mitigating factors existed because the welding machine was not in use at the time of the inspection and the duration of the violation is unclear. Sec'y Br. 19.

Northshore makes no arguments with respect to negligence except to note that the inspector's designation "would appear to be excessive." Resp. Br. 16 n.9.

I affirm the Secretary's moderate negligence designation. This violation was not extensive, the degree of danger it posed was low, and the cited electrical connection was located at the bottom of the machine, meaning the violation may not have been obvious to a casual observer. However, the violation would have been obvious to anyone checking the machine for safety hazards, and it should have been detected and addressed during a workplace exam.

iv. Penalty Assessment

The Secretary proposed a penalty of $540.00 for this violation after considering the six statutory penalty criteria. *See* Ex. S3; Ex. S5. I have affirmed the Secretary's gravity and negligence findings. The parties have stipulated that Northshore abated this violation in good faith and that the proposed penalty will not affect Northshore's ability to remain in business. Ex. S2. The Secretary's penalty petition reflects that he adequately accounted for Northshore's size, violation history, and good-faith abatement efforts in formulating his proposed penalty. *See* Ex. S5.

Based on the legal principles outlined above and my consideration of the six statutory penalty factors, I find that the proposed assessment of $540.00 is appropriate.

C. Citation Number 8840631 (Alleged Fall Protection Violation)

1. Summary of Evidence

Citation Number 8840631 alleges that Inspector Norman observed a miner disconnecting his fall protection gear from its tie-off point, walking approximately four feet along an elevated conveyor belt without being tied off, then climbing down a ladder to reach the ground six feet below. Ex. S-15. Norman cited Northshore for a violation of 30 C.F.R. § 56.15005, which requires miners to wear safety belts and lines wherever there is a danger of falling. Ex. S-15. At hearing, the parties presented conflicting evidence as to the events surrounding the issuance of the citation, particularly the positioning of the ladder.

Inspector Norman's Testimony

Inspector Norman issued the citation at the pelletizing plant during a regular inspection on January 13, 2015. Tr. 134-35; Ex. S-15. Norman testified that he and company safety representative, Scott Blood, were walking in an upper level of the plant, when Norman caught sight of two miners, a Northshore employee named David Aho, (who was called to testify at the hearing), and a contractor named Chris Harris, (who was not called to testify), standing on an elevated conveyor belt, one level down. Tr. 135-36, 142-43; Ex. S-15. The miners were changing the B-belt next to the belt drive motor, wearing harnesses with the lanyards tied off to a lifting eye for the motor. Tr. 139. Inspector Norman estimated the lifting eye was about five feet above the belt. Tr. 139. The belt was locked and tagged out. Tr. 166. While Norman watched, the miners disconnected their lanyards and walked along the belt toward a ladder which Norman estimated to be four feet away. Tr. 135, 140-41.

Norman initially testified that the two miners disconnected their lanyards "[a]t the same moment," then acknowledged he did not remember which miner unhooked his lanyard first. Tr. 140-41. He did not see the miners reach the ladder four feet away, or climb down it, because by that time, he was descending a nearby stairway. Tr. 141, 166-67. When asked how Blood had reacted to seeing the miners walking along the belt without fall protection, Inspector Norman responded, "I don't remember him saying anything. I just said what the heck are they doing, you know, and I went down." Tr. 137.

By the time Norman and Blood reached the lower level, Aho and Harris had descended the ladder and were on the ground. Tr. 135. According to Norman, when he asked why Aho and Harris had not been properly tied off, they told him there was no place to do so. Tr. 142-43. After speaking to the miners, Norman issued Citation Number 8840631 and terminated it immediately because the miners were already on the floor. Tr. 160-61. He also issued a citation for the same violation to VanHouse Construction, the contracting company that employed Harris. Tr. 159-60.

When asked what Blood said during the conversation with the miners, Norman spontaneously asserted that Blood had moved the ladder Aho and Harris had used to dismount from the belt. Tr. 143-46. According to Norman, this ladder is about six or seven feet tall and the top step is either "pretty even" with the belt or "a few inches" above it. Tr. 141, 163. As I noted at hearing, however, the ladder actually appears to be about a foot higher than the belt in a photograph submitted by the Secretary. Tr. 163; *see* Ex. S-16. Norman, who took the photograph, asserts that it shows the ladder's position at the time the miners used it. His contention is that Blood moved the ladder before the photograph was taken and asked if this would have prevented the violation. Tr. 144. Norman then chided Blood for "disturb[ing] my scene" and asked him to move the ladder back. Tr. 144, 145. According to Norman, Blood retorted that he had moved it only a few inches. Tr. 144, 145. An argument ensued. In Norman's words:

> He [Blood] moved it [the ladder] back, and I said you can see the drag marks in the dirt. I said you can see it was back about two more feet, and he moved it a couple more times a couple inches at a time, he moved it back, and I took the ladder and I moved it about ten inches, and it wasn't quite all the way back to the drag marks. There was probably about approximately three inches from where the drag marks started. And I told him, I said, my concern here is that the miners are on top of this belt not properly tied off.

Tr. 145-46. On cross examination, Inspector Norman admitted that Blood had accused him of moving the ladder, but claimed that he (Norman) had made his accusations first. Tr. 163-64.

Inspector Norman has raised two theories as to how § 56.15005 was violated. The citation alleges that Aho and Harris violated the standard by traveling approximately four feet on the elevated belt, without being tied off. Tr. 136; Ex. S15. "They should have had somebody come and move that ladder closer to them so they could get down safely," Norman explained at hearing. Tr. 146. His testimony raised the additional theory that the miners "shouldn't have been up there in the first place the way they were tied off" because their fall protection was inadequate. Tr. 146. Specifically, he testified that both miners were tied off to the same lifting eye, which was intended to lift a 100-pound motor, and that the lanyards they were using would not have stopped them from falling six feet to the ground below because each lanyard was six feet long with a three-foot shock absorber, and "[w]ith the safety factor it takes 18 feet to stop them." Tr. 136.

The Secretary presented no field notes, measurements, pictures, corroborating testimony, or other evidence that supports Inspector Norman's testimony regarding the strength of the lifting eye or the stopping distance of the lanyards. The citation and Norman's contemporaneous notes give no indication that he questioned the adequacy of the miners' fall protection at the time he wrote the alleged violation (see Exhibits S15 and S19), and Norman admitted on cross examination that he did not raise this allegation when he issued the citation. Tr. 161-62.

Inspector Norman attributed the alleged violation to Northshore's moderate negligence because Respondent provided him with no evidence that the company had provided safety talks regarding how to properly tie off. Tr. 158; Ex. S-15. He further assessed the violation as S&S and reasonably likely to result in fatal injuries to one miner. Ex. S-15.

The hazard Inspector Norman was concerned about was a fall from the belt, which he asserted was slippery and unstable and about six feet high. Tr. 140, 146-47. He claimed to have measured the belt's height using a tape measure, while Blood, Aho, and Harris were present. Tr. 147, 157, 164-65. However, no measurements appear in his field notes or citation documentation.

The height of the belt is significant because MSHA has indicated that compliance with OSHA's fall protection standard, which applies only at elevations of six feet or higher, will often satisfy the requirements of § 56.15005. Tr. 165-66; *see* 29 C.F.R. § 1926.501(b)(1) (OSHA's fall protection standard). Northshore submitted a copy of a Program Policy Letter (PPL) issued by MSHA, which states that compliance with OSHA's fall protection standard will satisfy MSHA's standards in many cases. Ex. R-14; Tr. 165-66. When asked what the PPL means to him, Norman testified, "It means not all cases." Tr. 170. When prodded, he elaborated that the PPL discusses "[c]ompliance with OSHA, whatever their standard is, their six-foot fall rule or four-foot fall rule." Tr. 170. Questioned further, he conceded that the OSHA rule is six feet, not four feet. Tr. 170-71. He testified that he had mentioned a four-foot rule because he "did hear once they were going to lower it to four feet." Tr. 171.

In support of his opinion that a fall from six feet would likely be fatal, Norman testified that he knew of fatalities caused by falls from lesser elevations. Tr. 147-48. The Secretary offered several Fatalgrams and accident reports purporting to show that falls from a lesser elevation were fatal in six past cases. Tr. 153, 167-68; Ex. S-17. I excluded one of them (the September 26, 2015 notice) because it contained no evidence that a fall hazard existed or that the victim actually fell, and I find that two others (the May 18, 2015 notice and November 26, 2014 report) are entitled to very little probative weight because neither specifies the height from which the victim fell. Tr. 148-56; Ex. S-17.

Testimony of Scott Blood[16]

[16] Blood has worked for Northshore for more than 26 years, including at least 14 years in the safety department. As a safety representative, he is responsible for safety activity at the mine and sometimes accompanies MSHA representatives during inspections. He also handles the workers' compensation program at the mine and is a facilities' security officer for homeland security. Before working for Northshore, he worked in the finance department at a

Blood testified that he and Inspector Norman were walking down some stairs when they first saw Aho and Harris on the elevated conveyor belt. Tr. 177. Norman did not say anything to direct Blood's attention to the miners on the belt, and Blood did not notice whether they were tied off, nor did he see them unhook their lanyards. Tr. 177, 191-93. Blood testified he did not even notice that Norman was watching the miners until the inspection party reached the lower level. Tr. 203. By the time they got there, one of the miners had climbed down the ladder and the other was just reaching the floor. Tr. 178-79.

Norman asked Blood if the mine had a fall protection training program and if mine employees were aware of the three-point contact rule, which requires miners working on an elevated surface to wear fall protection whenever they cannot maintain three points of contact. Tr. 177-78. At that time, Blood belatedly realized that Norman was referring to Aho and Harris. Tr. 203. The miners were called over to speak to the inspector, and supervisors for Northshore and the contracting company were summoned to the scene because both operators were being cited. Tr. 179-80, 183.

According to Blood, as the men were standing in a group about six to ten feet away from the ladder and he was contacting Harris's supervisor, Blood saw Inspector Norman walk over and move the ladder to the left away from the belt drive motor to the position where it is depicted in Norman's photograph. Tr. 183-84, 195. Blood returned to the scene about an hour later and took pictures showing what he believed to be the ladder's initial position, which was several feet closer to the motor than in Norman's picture. Tr. 180-81, 191; *compare* Ex. R-4 *with* Ex. S-16. Blood asserted that he had immediately confronted Norman about moving the ladder, but did not himself touch the ladder until he was taking pictures later. He provided the following account of the incident:

> Q [by Mr. Moore, counsel for Northshore]: And what was your discussion with the inspector about his moving the ladder?
>
> A [by Blood]: I says Terry, you can't move that ladder prior to us taking pictures. And he said this is where the ladder was. And I said no, it wasn't. And basically [he] took his picture and walked away.
>
> THE COURT: Did you move the ladder before –
>
> THE WITNESS: No, I moved the ladder back before I took my picture. I did not touch the ladder prior to him touching it. So I did move the ladder back after – as you can see in my picture, when the guard [to the motor] was on.
>
> BY MR. MOORE: So you're saying you did not move it prior to his taking his picture?

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manufacturing company for about a year and worked for a railroad. Tr. 175-76. Blood was one of the witnesses, who was sequestered at the commencement of the hearing. *See* Tr. 10.

> A: No. I've been accompanying inspectors for 15 years, and I know I cannot alter a scene prior to them taking a picture. I've been told that many times, and I would not do that.

Tr. 183-84.; *see also* Tr. 193-95 (Blood's testimony on cross-examination consistently repeating this account). Blood explained that he was able to move the ladder back to its proper position because he could see marks in the dust on the floor where it had been dragged, which he said he had mentioned to Inspector Norman when he confronted him about the ladder. Tr. 185.

When counsel for the Secretary suggested that Northshore may have initially moved the ladder rather than Inspector Norman, Blood – apparently unaware that this accusation was directed at him – testified that the miners at the scene probably would not have been paying attention to the ladder once the inspector arrived because they would have been wondering what they did wrong and whether they were in trouble. Tr. 194. On redirect, Blood testified that moving the ladder farther away from the belt drive motor, as he asserted Norman had done, would have made the citation more supportable because miners dismounting from the belt could not have maintained three-point contact if the ladder had been that far away from the motor. Tr. 198-99.

Blood is six feet tall. Tr. 182. He testified that the ladder was also six feet tall and the top of the belt was approximately five feet off the floor, or about the height of his chest and shoulders. Tr. 181-82, 190. Thus, the distance between the top of the ladder and the belt was approximately one foot. Tr. 182. The pictures he took appear to support these height estimates. *See* Ex. R-4. The belt, which is made of rubber, is flat, dry, and not slippery, according to Blood. Tr. 185, 190. He did not recall seeing Inspector Norman measure the belt's height. Tr. 182, 203-04.

Blood opined that no violation had occurred because mine employees are trained to maintain three-point contact when dismounting from the belt and to use fall protection when there is a danger of falling. Tr. 185, 202. He further opined that Aho and Harris had in fact been tied off to the lifting eye for the belt drive motor while working atop the belt. Tr. 185-86. Blood did not recall Inspector Norman raising any issues about the adequacy of the lifting eye as a tie-off point. Tr. 186. Blood could not testify definitively whether the miners had maintained three-point contact when climbing down the ladder because he did not watch them descend. Tr. 179, 192. However, he testified that it would have been possible for them to do so based on the placement of the ladder. Tr. 199, 201-02.

On cross-examination, counsel for the Secretary questioned Blood as to whether he had been charged with impeding inspections, whether he held a reputation for being intimidating and verbally abusive to inspectors, and whether he had, in fact, sworn at Inspector Norman when the fall protection citation was issued. Tr. 187-90. Blood denied ever being issued an impedence, although he recalled that Inspector Norman had threatened to issue one in an unrelated matter that occurred after the issuance of the fall protection citation. Tr. 187-89, 196-200. He also denied engaging in any verbal abuse or intentionally intimidating inspectors. Tr. 189-90, 196. I note that there is no record evidence of Blood swearing at Norman, but Norman's field notes

disclose an unrelated verbal altercation with Conboy that occurred in March 2015, which resulted in Conboy apologizing for hostile behavior and profanity. Ex. S-11 at 17-19.

Testimony of David Aho[17]

Aho is a shift maintenance technician, who performs mechanical work and repairs conveyor belts at the Northshore mine. Tr. 205. On the day the citation was issued, Aho was serving as the go-to person for a group of contractors, who were performing maintenance and repair work while a conveyor was shut down. Tr. 206. The job required Aho and one contractor, Harris, to climb onto the conveyor belt to remove the guard from the belt drive motor and inspect some of the motor's components. Tr. 206-07; *see also* Tr. 217-18, 222-23 (Aho's testimony describing where he and Harris were working with reference to the photographs submitted by the parties).

Aho testified that the stepladder, which he and Harris climbed to get onto the belt, was six feet tall. Tr. 206-07. He initially testified that the belt was about four feet high, but then decided it was probably closer to five feet, as he is 5'5" tall and the belt was approximately at his eye level. Tr. 205, 208-09. The belt was broad, dry, and easy to stand on. Tr. 215. He never saw Inspector Norman measure the belt. Tr. 214.

Aho described how he and Harris had climbed onto, and off of, the conveyor belt. After setting their tools on the belt and climbing the ladder, Aho tied his fall protection to the eye bolt on top of the motor, which he estimated to be approximately three feet above the belt, and Harris tied off to "a different spot on the framework." Tr. 208, 219. To climb down, Aho turned around to face away from the ladder; gripped the framework of the motor with his right hand; stepped off the belt onto the conveyor framework with his right foot; stepped off the belt onto the painter's platform on the ladder with his left foot; unhooked his lanyard from the tie-off point with his left hand and attached it to his safety harness; grasped the ladder; then moved both feet onto the ladder and proceeded down. Tr. 210-12, 219-22. Aho asserted that he maintained three points of contact throughout this process and denied that it felt "risky" to stand with one foot on the ladder and one on the conveyor frame. Tr. 221. He initially testified he did not remember whether he or Harris had dismounted from the belt first and did not pay attention to how Harris unhooked his fall protection device, but later recalled that he had unhooked and dismounted first. Tr. 211, 218, 224.

Aho testified that he did not recall whether Blood and Inspector Norman were present when he climbed down from the belt because he was watching Harris dismount. Tr. 224. Once Harris reached the ground, Inspector Norman asked Aho why the guard was off the motor, and Aho responded they were working on it. Tr. 225. Inspector Norman then stated that Aho and Harris had not maintained three-point contact while climbing down the ladder, an allegation that Aho denied. Tr. 225. A few minutes later, while he was standing in a group and talking to the contractor's safety representative, Aho heard that he and Harris had been further accused of walking four steps or more down the belt without being tied off, an allegation that Aho also denied. Tr. 213-14, 225-26.

[17] Aho has worked for Northshore for six years. He previously worked for a paper mill for 32 years. Tr. 205.

Aho then overheard Blood asking the inspector why the ladder had been moved. Tr. 213, 226. Afterward, he saw Blood move the ladder back to its initial position, which could be ascertained by the marks on the floor. Tr. 214-16. According to Aho, the photographs taken by Blood accurately reflected the ladder's position at the time that he and Harris had used it, but in the photograph taken by Inspector Norman, the ladder was too far away from the eye bolt to permit three-point contact, while dismounting from the belt. Tr. 207, 214, 216-17.

2. Bench Decision

I rendered the following decision from the bench: "I'm going to dismiss this citation. I'm going to find that there were three points of contact held at all times. I'm going to credit the testimony of Mr. Blood that the inspector moved the ladder. I'm going to find that the Secretary has failed to establish by a preponderance of the evidence that this event occurred, as written in the citation." Tr. 227.

3. Further Discussion

I hereby reaffirm my bench decision, for the following reasons.

The cited standard provides in pertinent part: "Safety belts and lines shall be worn when persons work where there is a danger of falling." 30 C.F.R. § 56.15005. The Commission has interpreted this provision to require miners to wear fall protection "in a safe and proper manner in the vicinity of a fall hazard." *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 681-82 (July 2002); *Mar-Land Indus. Contractor, Inc.*, 14 FMSHRC 754, 757 (May 1992). Applying the reasonably prudent person test, the pertinent inquiry is "whether an informed, reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines." *Great Western Elec. Co.*, 5 FMSHRC 840, 842 (May 1983).

In this case, the Secretary has not established by a preponderance of the credible evidence that Northshore's employee, Aho, failed to wear fall protection gear in a safe and proper manner when there was a danger of falling. I reached this conclusion from the bench after evaluating and comparing the witnesses' credibility based on the substance of their testimony and my observations of their respective demeanors. I found that I could not credit Inspector Norman's account of the events surrounding the issuance of the citation.

A number of imprecisions and discrepancies in Inspector Norman's account cast doubt on its reliability. His initial theory of violation was that Aho and Harris had walked four feet along the conveyor belt and climbed down the ladder without being tied off, but admittedly, he did not see the miners reach the ladder or climb down it. Tr. 141, 166-67. Thus, he could not have seen whether the miners maintained three points of contact. He did not know which miner had disconnected his lanyard first, and could not describe with clarity his conversation with the miners. *See* Tr. 140-42. Taken as a whole, his testimony on direct examination implausibly suggested that Aho and Harris said and did the same things at the same time throughout his interactions with them. Norman's testimony gave the impression he had exclaimed, "What the heck are they doing?" as soon as he saw the miners atop the belt and had hurried down the stairs to stop what he perceived as a dangerous situation. Tr. 137. However, Blood did not recall

Norman making such an exclamation and stated that Norman did not call attention to the situation until the inspection party had descended the stairs. Tr. 177-78, 192-93, 203. Inspector Norman's assertion that he measured the height of the belt with a tape measure in front of Blood and Aho was also contradicted by both witnesses and is not supported by his field notes or any other contemporaneous record of measurement, even though this is an important factor in finding a violation of the fall protection standard. Tr. 164-65, 182, 203-04, 214.

Norman's theory of violation appeared to evolve at hearing to include unsupported new allegations regarding the adequacy of the fall protection the miners were using, which struck me as a post-hoc rationalization spurred by a realization that the initial theory of violation might not be adequately supported. *See* Tr. 136, 146, 161-62. Additionally, when discussing MSHA's Program Policy Letter, which essentially adopted OSHA's six-foot fall protection standard, Norman seemed to be straining to bend the rules to conform to the facts of this case. Tr. 170-71. Again, this suggests an attempt at after-the-fact rationalization of a poorly supported theory.

I found unusual and noteworthy the manner in which Inspector Norman raised, unbidden, the issue of the ladder being moved on direct examination. *See* Tr. 143-46. His description of the incident was confusing and cast blame on Blood. However, Blood testified he had been accompanying inspectors for years and knew better than to move anything before pictures were taken, and he provided a simpler and clearer description of the ladder being moved first by Inspector Norman. Tr. 183-85, 193-95. Aho corroborated Blood's account of this incident in all respects. Tr. 213-17, 226. I note that Inspector Norman had a motive to move the ladder, as he clearly relied on its alleged positioning to support his initial theory of violation. *See* Tr. 146, 198-99.

After considering all the foregoing at the hearing, I declined to credit Norman's account of the alleged violation. Instead, I credited Blood's testimony, corroborated by Aho, that the inspector had moved the ladder to position it farther away from the point where Aho and Harris had disconnected their lanyards. I also credited Aho's cogent, detailed testimony explaining how he had maintained three points of contact at all times after unhooking his lanyard. Tr. 210-12, 219-22. This was bolstered by Blood's testimony that the miners were trained in maintaining three-point contact and would have been able to do so under the circumstances. *See* Tr. 199, 201-02. Because the Secretary failed to establish that Aho did not maintain three-point contact after his fall protection gear was unhooked, I declined to find a violation.

D. Citation Number 8840659 (Defective Seatbelt)

1. Further Findings of Fact

This citation alleges: "The passenger seat belt latch in the GMC pickup c/n 621 … did not function properly. The Shift Supervisor stated that the seat belt latch wasn't functioning properly 'last week.'" Ex. S-18.

Events Surrounding Issuance of Citation

Inspector Norman issued this citation on January 25, 2015, during a regular inspection of the mine. Ex. S-18. He was accompanied on his inspection that day by shift supervisor Molly Burger, who was not called to testify at the hearing. Tr. 229. According to Conboy, the crew's

regular supervisor was out of work on disability at the time, and Burger was filling in for him to gain supervisory experience. Tr. 237. Burger was "fairly young" and was working at the mine through "an internship of some sort." Tr. 237-39.

About an hour into the inspection, Norman climbed into the passenger seat of the shift supervisor's service truck, which was a GMC pickup truck with a bench seat, in preparation to ride to the yard and docks. Tr. 229, 233, 244; Ex. S-19. However, he was unable to buckle the seat belt, despite getting out of the truck and trying multiple times to latch it. Tr. 230. Norman testified , "As I came over and tried to get [the shoulder strap] into the lock part of the seat belt it wouldn't lock, and I was trying and trying, and [Burger] said they had been having intermittent problems with it latching" during the past week. Tr. 229, 234. Norman further testified that Burger could not get the seat belt to latch either, although his field notes from the inspection indicate that she was able to get the belt to work after two tries. Tr. 230; Ex. S-19. Regardless, because Norman was unable to wear the belt, he exited the truck to continue the inspection on foot, and wrote Citation Number 8840659, which alleged that the seat belt was defective and had not been timely repaired. Tr. 229-30.

Inspector Norman assessed the violative condition as unlikely to cause injury, but capable of causing permanently disabling injuries to one miner, explaining that the condition could lead to a head injury if an accident were to occur. Tr. 230-31. He designated Northshore's level of negligence as "moderate," but asserted at hearing that he should have marked it as "high" because the shift supervisor had been aware of the condition for a week. Tr. 231. The citation was terminated eight days after its issuance because a new seat belt latch had been installed in the truck. Tr. 231-32, 241; Ex. S-18.

Northshore's Testimony

Conboy arrived at the mine and met with supervisor Burger shortly after the citation had been written and after the inspection party had moved on to the yard and docks. Tr. 238, 248. Burger told Conboy that the seat belt "was sticky and it wasn't working right." Tr. 239. At hearing, Conboy attempted to downplay the significance of this admission, explaining that "[s]he said sometimes you have to jam it in there to get it to work, but it's no big – I mean you just plug it in and it will work." Tr. 239. On cross-examination, Conboy asserted that Burger had been able to get the seat belt to function properly once and denied that she told him she could not get it to work, instead quoting her as making the more general observation that seat belts "get sticky sometimes." Tr. 247. Conboy also testified that Burger had seemed "very nervous" and "flustered" by her encounter with an MSHA inspector, due to her age and inexperience. Tr. 238-39, 250. Inspector Norman, however, provided rebuttal testimony that Burger was calm and did not appear intimidated at the time the citation was written. Tr. 265.

Although Conboy and Inspector Norman discussed the citation on the day it was written, Norman did not testify as to the substance of this conversation. Tr. 235-36, 248. The conversation "got to be a little bit heated," according to Conboy. Tr. 248. He testified that Inspector Norman told him the seat belt had worked once, but then began sticking. Tr. 240-41, 248. Conboy said he asked why Norman had ridden in the truck without a functioning seat belt and whether every seat belt in a vehicle now needed to be checked before the vehicle was used. Tr. 248-49. However, he did not actually see Norman ride in the truck after Norman determined

that the seat belt was defective, and I credit Norman's testimony that he did not do so, a point which is corroborated by Norman's contemporaneous field notes.

According to Inspector Norman, when he discussed the termination date for the citation with Conboy, Conboy requested an extension of time to order a new seat belt latch because the cited latch was broken. Tr. 231-32. Conboy, however, denied telling Norman that the latch was broken. Tr. 241, 246. He testified that Dean Floen,[18] the truck shop mechanic who repaired the seat belt, was unable to find anything wrong with the latch, but stated, "I told [Floen] to swap it out anyway because we got cited on it." Tr. 241. Floen appeared at the hearing and confirmed that he had replaced the latch, but that it had seemed to be working properly when he tested it after removing it from the vehicle. Tr. 254.

Conboy had subsequently retrieved the latch from Floen and had taken pictures of it. Tr. 241-42, 245, 254-55; *see* Ex. R-6 (photographs). At hearing, Northshore offered the latch as a demonstrative exhibit over the Secretary's objections on grounds that the chain of custody was not established. Tr. 244-45, 255-60. However, I declined to admit it as a demonstrative exhibit, finding that Northshore had failed to make any demonstration because the other half of the seat belt was not available, which precluded me from drawing any conclusions as to the latch's functionality. Tr. 260. Nonetheless, Conboy testified that the latch had functioned properly when he had tested it on the car he drove to the hearing. Tr. 243-44.

Conboy attributed Inspector Norman's inability to latch the seat belt to "operator error," opining that Norman may have tried to plug the belt into the wrong buckle or may not have pushed it all the way closed due to his size and bulky coat. Tr. 246. Conboy testified that it was cold on the day of the inspection and that Norman, who is a large man, was wearing a Carhartt or similar heavy winter work coat. Tr. 238, 240. Conboy also recalled two past incidents when he had been traveling in his work vehicle with Inspector Norman and Norman's seat belt had spontaneously unlatched. Tr. 239, 246, 250-51. In addition, safety representative Blood testified that he had once helped Norman buckle his seat belt because Norman was having trouble latching it. Tr. 261-63. Norman weighs 315 pounds and acknowledged that he is a large man, and he conceded that the temperature may have been about 19 degrees Fahrenheit on the day of the inspection. Tr. 234-35. However, he denied wearing a bulky jacket the day the citation was issued, or having trouble buckling seat belts at the mine in the past due to his size. Tr. 235, 265.

I take judicial notice that publicly available weather reports show that the temperature was below freezing in Silver Bay, Minnesota on the day the citation was issued. Considering the temperature, I find Norman's assertion that he was not wearing a heavy coat to be implausible, and I credit Conboy's testimony to the contrary. I also credit Blood's testimony, corroborated by Conboy, that he helped Inspector Norman buckle a seat belt one time. However, I decline to credit Conboy's uncorroborated testimony regarding seat belts popping open while Norman was wearing them, because Conboy did not explain how a seat belt would spontaneously unlatch and Norman denied that this had ever happened. I also reject, as purely speculative, Conboy's suggestion that Inspector Norman may have tried to plug the seat belt into the wrong buckle.

[18] Floen has worked at Northshore since 1990. As of the hearing date, he had worked as a light fleet mechanic for six years and previously worked in the operations and maintenance departments and as a heavy fleet mechanic. Tr. 252-53.

2. Analysis and Conclusions of Law

i. Violation of 30 C.F.R. § 56.14100(b)

Section 56.14100(b) mandates: "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." 30 C.F.R. § 56.14100(b). Thus, to prove a violation of this mandatory safety standard, the Secretary must establish (1) the existence of a defect that could create a hazard to persons, and (2) the operator's failure to correct the defect in a timely manner. The Commission has stated that whether a defect was timely corrected "depends entirely on when the defect occurred and when the operator knew or should have known of its existence." *Lopke Quarries, Inc.*, 23 FMSHRC 705, 715 (July 2001) (finding no violation of § 56.14100(b) when Secretary failed to show when the cited equipment became defective).

The Parties' Positions

The Secretary argues that § 56.14100(b) was violated because the failure of the seat belt to consistently lock constituted a defect affecting safety and Northshore failed to correct the defect in a timely manner, despite supervisor Burger's awareness of intermittent problems. Sec'y Br. 21.

Northshore characterizes the evidence as equivocal and contends that the Secretary has failed to prove that the seat belt could not be buckled, or that the cited defect existed for a definite time period. Resp. Br. 19-23.

Discussion

Uncontroverted testimony from both Inspector Norman and safety director Conboy establishes that shift supervisor Burger, an agent of the operator, was aware that the seat belt "was sticky and it wasn't working right" during the week preceding the issuance of the citation. Tr. 229, 234, 239. Without calling Burger as a witness, Northshore suggested that she was nervous and flustered at the time that she reported the problems with the seat belt to Inspector Norman. Tr. 238-39, 250. Norman disagreed. Tr. 265. I find it logical to believe that Burger may have been flustered, considering that she was a relatively young and inexperienced intern, confronted by an authority figure about a safety problem. However, Burger's state of mind at the time that she made the comments is irrelevant, because Northshore has not contended or established that these comments were inaccurate. I find that Northshore was aware, through Burger, that the seat belt was defective during the week preceding the issuance of the citation. The defective seat belt created a hazard to anyone riding in the passenger seat of the truck, especially a large person like inspector Norman. Northshore's failure to promptly address the problem by fixing the seat belt or at least tagging out the equipment amounted to a violation of § 56.14100(b).

Northshore presented evidence to dispute that the seat belt was broken. Conboy testified that Norman and Burger each were able to get the seat belt to work on the day the citation was issued. Tr. 240-41, 247-48. In addition, both Conboy and Floen testified that the seat belt latch

worked properly when they tested it after it was removed from the truck. Tr. 243-44, 254. However, this testimony is not inconsistent with Norman's allegation that the seat belt was *intermittently* nonfunctional. I credit his testimony that he issued the citation because he was unable to get the seat belt to work when he tried to put it on to ride to the yard and docks on January 25. The belt's failure to work on that occasion provided a valid ground to find it defective.

Northshore has emphasized Inspector Norman's size, suggesting that he could not get the seat belt to work because he is a large man. This suggestion is not persuasive. There is no allegation that the belt was too short. Rather, the latch was not engaging properly. The latch had been "sticky" for a week before the citation was issued. To the extent that the operator is suggesting the latch would not hold because of the strain created by a large passenger, I note that seat belt latches are intended to be strong enough to counter the force generated by the forward momentum of a passenger during a collision. A functional latch should certainly be strong enough to withstand the strain of the belt being pulled tighter than usual by a big man in a bulky coat.

Based on all the foregoing, after consideration of all the evidence and the parties' arguments, I find that a violation of § 56.14100(b) occurred.

ii. Gravity

As noted above, Inspector Norman assessed this violation as non-S&S and unlikely to cause injury, but capable of causing permanently disabling injuries to one miner. Ex. S18; Tr. 230-31. The parties did not address the gravity of this violation in their closing briefs.

I affirm the inspector's gravity designations. The seat belt was intermittently functional and the Secretary conceded that it was not used frequently because passengers rarely traveled in the truck. Sec'y Br. 23. Both of these factors decrease the likelihood of injury. Also, injury would occur only in the event that the truck was involved in an accident, and the Secretary presented no evidence as to where and how the truck is used at the mine, how fast it was typically driven, or any other factors that would shed light on the degree of danger presented by riding in the truck without a working seat belt. For these reasons, it was appropriate for Inspector Norman to characterize the probability of injury as unlikely. On the other hand, in the event of an accident, a defective seat belt could cause serious injury if an unrestrained passenger were ejected from the truck or flung against the windshield or other parts of the cab. Accordingly, I find that this violation created an unlikely risk of permanently disabling injuries to one miner.

iii. Negligence

Inspector Norman charged Northshore with moderate negligence in connection with this violation. Ex. S-18. The Secretary contends that this negligence designation is appropriate because Northshore knew the seat belt was defective, but the negligence is mitigated by the fact that passengers rarely traveled in the truck. Sec'y Br. 22-23. Northshore makes no arguments with respect to negligence in its post-hearing brief.

I affirm the Secretary's finding that this violation resulted from Northshore's moderate negligence. Section 56.14100(b) imposes upon mine operators a duty to promptly address defects affecting safety so as to minimize hazards to miners. In this case, a shift supervisor, Burger, was aware that the seat belt had not been working properly for the past week, yet she failed to take any corrective action. As a supervisor, she should have exercised a higher degree of care, and her negligence is imputable to Northshore. However, I reject Inspector Norman's suggestion at hearing that the degree of negligence should be raised from moderate to high due to Burger's failure to correct the condition for a week. *See* Tr. 231. The seat belt worked intermittently, and the Secretary has conceded that it was infrequently used because passengers rarely rode in the shift supervisor's truck. For these reasons, Burger may not have realized that the condition warranted immediate corrective action, mitigating her negligence somewhat. Accordingly, a finding of moderate negligence is appropriate.

iv. Penalty Assessment

After considering the six statutory penalty criteria, the Secretary proposed a penalty of $285.00 for this violation. Ex. S-12; Ex. S-13. I have affirmed the Secretary's gravity and negligence findings. The parties have stipulated that Northshore abated this violation in good faith and that the proposed penalty will not affect Northshore's ability to remain in business. Ex. S-2. Exhibit A to the penalty petition reflects that the Secretary accounted for Northshore's size, violation history, and good-faith abatement efforts in a reasonable manner in accordance with the Part 100 penalty regulations to reach the proposed penalty. *See* Ex. S-13.

Based on the legal principles outlined above and my consideration of the six statutory penalty factors, I find that the proposed assessment of $285.00 is appropriate.

V. REVIEW AND APPROVAL OF PARTIAL SETTLEMENT

As noted above, prior to hearing, the parties agreed to settle 54 of the 58 citations initially at issue in these three dockets. The Secretary has now submitted settlement motions setting forth the proposed settlement terms, which are summarized below.[19] *See* Ex. ALJ-1; Ex. ALJ-2; Ex. ALJ-3.

Docket Number LAKE 2015-340-M

[19] Each motion states that the Secretary believes, consistent with the position he has taken before the Commission in *The American Coal Co.,* 36 FMSHRC 1311 (May 2014) (ALJ), *petition for interlocutory review granted,* Unpublished Order dated July 11, 2014, that the pleadings submitted by the parties and a terse, factually unsupported summary of the proposed settlement give the Commission an adequate basis to review and approve it. *See, e.g.*, Ex. ALJ-1 ¶¶ 2-4. Pursuant to Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b), and Rule 12(f) of the Federal Rules of Civil Procedure, Fed. R. Civ. Pro. 12(f), I strike these assertions from each motion as impertinent and immaterial to the issues legitimately before me. In the *American Coal Company* case, the Secretary has misinterpreted and misrepresented Commission case law, the Mine Act and regulations, and Congressional intent regarding settlements under the Act. Rather than rubber-stamping the Secretary's proposed settlement terms, I have evaluated them in accordance with sections 110(i) and 110(k) of the Mine Act.

The Secretary originally proposed penalties totaling $7,981.00 for the eleven citations at issue in this docket and the proposed settlement is for $5,541.00. The settlement terms set forth in the settlement motion (Exhibit ALJ-1) are summarized in the table below:

Citation No.	MSHA's Initial Proposed Penalty	Settlement Amount	Other Modifications
8840637	$807.00	$807.00	None; Respondent accepts citation as issued.
8840634	$243.00	$0.00	None; citation has been vacated. The Secretary's discretion to vacate a citation is not subject to review. *RBK Constr., Inc.*, 15 FMSHRC 2099 (Oct. 1993).
8840403	$1,203.00	$843.00	Reduce severity of injury from "fatal" to "permanently disabling."
8840411	$308.00	$216.00	Reduce negligence from "moderate" to "low."
8840619	$1,795.00	$1,256.00	Reduce negligence from "moderate" to "low."
8840620	$362.00	$253.00	Reduce negligence from "moderate" to "low."
8840621	$362.00	$253.00	Reduce negligence from "moderate" to "low."
8840622	$362.00	$253.00	Reduce negligence from "moderate" to "low."
8840623	$1,304.00	$807.00	Change cited standard from 30 C.F.R. § 56.12030 to 30 C.F.R. § 56.12023.
8840636	$873.00	$600.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840638	$362.00	$253.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
TOTAL	**$7,981.00**	**$5,541.00**	

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i).

Docket Number LAKE 2015-395-M

The parties have agreed to settle 21 of the 23 citations at issue in this docket. The Secretary originally proposed penalties totaling $17,711.00 for the 21 citations and the proposed settlement is for $12,341.00. The settlement terms set forth in the settlement motion (Exhibit ALJ-2) are summarized in the table below:

Citation No.	MSHA's Initial Proposed Penalty	Settlement Amount	Other Modifications
8840643	$362.00	$253.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840644	$362.00	$253.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840645	$362.00	$253.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840648	$285.00	$200.00	Reduce negligence from "moderate" to "low."

8840650	$285.00	$200.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840652	$190.00	$150.00	None; penalty reduction only.
8840653	$2,473.00	$1,701.00	Remove S&S designation.
8840654	$2,473.00	$1,731.00	None; penalty reduction only.
8840661	$687.00	$481.00	Reduce negligence from "moderate" to "low."
8840662	$946.00	$700.00	Reduce severity of injury from "permanently disabling" to "lost workdays or restricted duty."
8840664	$634.00	$444.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840668	$1,795.00	$1,257.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty"; reduce negligence from "moderate" to "low."
8840669	$1,304.00	$913.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840676	$540.00	$378.00	Reduce negligence from "moderate" to "low."
8840677	$1,203.00	$842.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840681	$540.00	$540.00	None; Respondent accepts citation as issued.
8840682	$540.00	$378.00	None; penalty reduction only.
8840686	$1,203.00	$842.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840687	$1,203.00	$725.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840688	$162.00	$100.00	Reduce negligence from "moderate" to "low."
8840691	$162.00	$0.00	Citation has been vacated.
TOTAL	**$17,711.00**	**$12,341.00**	

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i).

Docket Number LAKE 2015-529-M

The parties have agreed to settle 22 of the 24 citations initially at issue in this docket. The Secretary originally proposed penalties totaling $17,437.00 for the settled citations and the proposed settlement is for $12,379.00. The settlement terms set forth in the settlement motion (Exhibit ALJ-3) are summarized in the table below:

Citation No.	MSHA's Initial Proposed Penalty	Settlement Amount	Other Modifications
8840750	$100.00	$100.00	None; Respondent accepts citation as issued.
8840758	$207.00	$207.00	None; Respondent accepts citation as issued.
8840762	$207.00	$207.00	None; Respondent accepts citation as issued.

8840723	$1,203.00	$842.00	Reduce negligence from "moderate" to "low"; reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840725	$873.00	$611.00	None; penalty reduction only.
8840728	$585.00	$410.00	Reduce severity of injury from "permanently disabling" to "lost workdays or restricted duty."
8840731	$1,203.00	$842.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840735	$1,203.00	$842.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840736	$1,203.00	$842.00	Reduce negligence from "moderate" to "low"; reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840737	$1,203.00	$842.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840740	$1,203.00	$842.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840741	$1,203.00	$842.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840739	$1,203.00	$842.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840745	$873.00	$611.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840746	$540.00	$378.00	Reduce negligence from "moderate" to "low."
8840751	$138.00	$138.00	Change cited standard from 30 C.F.R. § 56.4402 to 30 C.F.R. § 47.44(a).
8840759	$460.00	$360.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840760	$460.00	$262.00	Reduce negligence from "moderate" to "low."
8840765	$207.00	$145.00	None; penalty reduction only.
8840767	$1,026.00	$718.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."[20]
8840768	$1,026.00	$718.00	Reduce severity of injury from "fatal" to "lost workdays or restricted duty."
8840470	$1,111.00	$778.00	None; penalty reduction only.
TOTAL	**$17,437.00**	**$12,379.00**	

[20] With regard to Citations 8840767 and 8840768, I note that although the parties have agreed to modify the gravity of the violations, the Respondent's arguments pertained to negligence. However, sufficient facts were presented for me to conclude that the Secretary's acceptance of this compromise was appropriate.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i).

VI. ORDER

The parties' three settlement motions are hereby **GRANTED**. It is **ORDERED** that the 54 settled citations are **AFFIRMED OR MODIFIED** as set forth in the tables above. Northshore is **ORDERED** to pay the sum of $30,261.00, in satisfaction of the three settlement agreements, to the extent such amounts have not already been paid, within thirty (30) days of the date of this Decision and Order.[21]

For the reasons discussed in the body of my decision, Citation 8840631 is hereby **VACATED** and Citations 8840455, 8840744, and 8840659 are hereby **AFFIRMED, AS WRITTEN**. In addition, I **AFFIRM** as appropriate the Secretary's proposed penalties of $2,678.00 for Citation 8840455, $540.00 for Citation 8840744, and $285.00 for Citation 8840659. Northshore is **ORDERED** to pay the sum of $3,503.00 in penalties for these three violations within thirty (30) days of the date of this Decision and Order.

Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

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