FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 27, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. VA 2013-0291 A.C. No. 44-00068-316647
v.	
SUNBELT RENTALS, INC., Respondent	Mine: Roanoke Cement Company

DECISION AND ORDER AFTER REMAND

Appearances: Willow E. Fort, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner

Respondent: Travis W. Vance, Esq., Fisher & Phillips LLP, Charlotte, North Carolina, for Respondent

Before: Judge McCarthy

I. Statement of the Case

This case is before me after remand from the Commission upon a Petition for Assessment of a Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (the Mine Act). Citation No. 8723677 remains at issue and charges scaffold-erection subcontractor Sunbelt Rentals, Inc. (Sunbelt or Respondent) with a highly negligent and significant and substantial section 104(a) violation of 30 C.F.R. § 56.18002(a) after a non-fatal accident occurred on January 8, 2013. At the time of the accident, section 56.18002(a) provided that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions." 30 C.F.R. § 56.18002(a) (2013). MSHA proposed a specially-assessed civil penalty of $51,900.

The issues presented are whether Sunbelt violated 30 C.F.R. § 56.18002(a); whether the violation was properly designated as significant and substantial (S&S) and contributed to a hazard that was reasonably likely to result in a fatal injury; whether the violation resulted from Sunbelt's high negligence; and whether the specially-assessed penalty proposal of $51,900 is appropriate.

II. Procedural Background

Roanoke Cement Company, LLC (Roanoke) operates a preheat tower at its facility in Troutville, Virginia. The preheat tower processes limestone material used to make concrete. Tr. 97-98. In January 2013, Roanoke contracted with LVR, Inc. (LVR) to perform annual refractory maintenance in the tower. Tr. 130, 250, 274, 460. LVR subcontracted with Sunbelt to erect scaffolding so LVR could perform the refractory work. Tr. 130, 250, 274, 460.

During the morning shift on January 8, 2013, Sunbelt employee Brian Tyler was struck by falling material while erecting scaffolding within Roanoke's preheat tower. Tr. 74, 374. Following an investigation, MSHA Inspector David Nichols issued 104(a) citations against Roanoke, LVR, and Sunbelt, and charged each with a violation of 30 C.F.R. § 56.18002(a). Based on the 104(a) citations issued by Nichols, the Secretary filed Petitions for the Assessment of Civil Penalties against Roanoke, LVR, and Sunbelt. All three dockets were assigned to me for disposition.

In August 2013, the Secretary moved for partial summary decision and alleged that Roanoke, LVR, and Sunbelt failed "to perform a workplace examination 'adequate' to discover latent defects" in violation of section 56.18002(a), and that "a mine operator and its contractors have a duty to either perform an adequate workplace examination or ensure that one is performed." *Sunbelt Rentals, Inc., et al.*, 35 FMSHRC 3208, 3209 (Sept. 2013) (ALJ). Roanoke and LVR filed a Joint Opposition and Cross-Motion for Summary Decision and argued that section 56.18002(a) neither contains an "adequacy" requirement, nor requires Roanoke or LVR "to perform separate or additional workplace examinations of the same working place that was examined by a competent person designated by Sunbelt." Roanoke's and LVR's Jt. Opp. and Cross-Mot. at 3. Sunbelt filed a separate Opposition and Cross-Motion for Summary Decision and argued that section 56.18002(a) does not contain an adequacy requirement, and even if it did, Sunbelt's examination was adequate. Sunbelt's Opp. and Cross-Mot. 2. Alternatively, Sunbelt argued that if section 56.18002(a) did contain an adequacy requirement, MSHA failed to provide fair notice of its interpretation. *Id.*

On September 24, 2013, I denied the Secretary's Motion for Partial Summary Decision, and granted Respondents' Cross-Motions for Summary Decision. I found that the plain language of the standard did not include an adequacy requirement (unlike numerous other standards that had been cited by Respondents), an adequacy requirement was not contained in MSHA's program policy guidance regarding the requirements of section 56.18002, and no adequacy requirement was present in erstwhile Commission case law interpreting the requirements of section 56.18002(a). *Sunbelt Rentals*, 35 FMSHRC at 3214.[1] Additionally, I concluded that Sunbelt construction manager Kendrick Lavon Davis "acted as examination agent for Roanoke, LVR, and Sunbelt on January 8, 2013," and I rejected the contention that section 56.18002 "imposes a duty on multiple operators to perform multiple examinations of the same working place when the examination has already been done by a competent person." *Id.* Finally, I

[1] I noted that that while section 56.18002(a) did not contain an "adequacy" requirement, "[t]his does not mean that an examiner can turn a blind eye toward numerous, obvious or egregious hazards, which may equate to failure to perform the requisite examination." *Sunbelt Rentals*, 35 FMSHRC at 3215 n.7.

determined, in the alternative, that Respondents lacked "fair notice of the Secretary's interpretation that the cited regulation included an adequacy requirement." *Id.* at 3215.

The Secretary filed a Petition for Discretionary Review (PDR), which the Commission granted on October 31, 2013. On November 26, 2013, Roanoke and LVR moved to be dismissed from these proceedings.

On July 12, 2016, the Commission denied Roanoke's and LVR's joint motion to be dismissed, vacated my summary decision in favor of all Respondents, and remanded all three dockets. *Sunbelt Rentals, Inc., et al.*, 38 FMSHRC 1619 (July 2016). Notwithstanding the express language of the standard, the Commission held that section 56.18002(a) must contain an implicit adequacy requirement and the "reasonably prudent" miner test is appropriate for determining whether a workplace examination was conducted adequately:

> We do not agree that the operator must only examine the workplace to a standard of care slightly surpassing not conducting the examination at all . . . . The requirement that the operator designate a "competent person" to conduct the examination must mean that there will be substance to the examination. Many miners could detect "obvious" or "egregious" hazards. The requirement that a competent person examine the working place certainly raises the substantive requirement for the examination to the level of a meaningful examination . . . . Having determined that under the standard, the examination must be adequate, *we must articulate the appropriate test for such an examination.* We conclude that the application of the "reasonably prudent" miner test is appropriate here. *U.S. Steel Mining Co., LLC*, 27 FMSHRC 435, 439 (May 2005).

Sunbelt Rentals, 38 FMSHRC at 1625-26 (emphasis added). The Commission stated:

> The Secretary did not define the term "adequate" before the Judge or in his PDR. During oral argument before the Commission, the Secretary sought to rectify this omission and stated that a workplace exam under the standard is 'adequate' 'if it is reasonably likely to identify conditions which may adversely affect safety and health.'

Id. at 1622.

Notwithstanding the Secretary's first articulation of the adequacy standard on appeal, the Commission found that Respondents did not lack fair notice that section 56.18002(a) contained an "adequacy" standard at the time of the citation:

> In light of the protective purposes of the Act and our extensive case-law [sic] regarding the reasonably prudent person test, we hold that the Respondents should have been aware that broadly-worded standards requiring examinations by competent persons must meet a standard of adequacy under the reasonably prudent person test. Respondents cannot claim to be surprised that the examination required under section 56.18002(a) must be adequate to uncover workplace hazards. This is, obviously, the purpose of the examination.

Id. at 1627. Finally, the Commission specifically instructed that consideration be given on remand to "whether the seventh level of the pre-heat tower was a 'working place,' and whether Davis' workplace examination was adequately conducted, *as defined by this decision.*" *Id.* at 1628 (emphasis added).

After issuance of the Commission's decision, I held a conference call with the parties and set this matter for hearing in May 2017. Thereafter, in November 2016 and January 2017, I approved a settlement agreement disposing of the citations against LVR and Roanoke, respectively.

In April 2017, Sunbelt again moved for summary decision and argued that the seventh floor of the preheat tower was not a "working place" as defined in section 56.18002(a), and that the Secretary was unable to establish a violation. Sunbelt's Mot. for Summ. Decision at 13. By Order dated May 18, 2017, I denied Sunbelt's motion and found that "issues of material fact still remain regarding the adequacy of Sunbelt's January 8, 2013 workplace examination and whether the seventh level of the preheat tower constituted a 'working place' within the meaning of section 56.18002(a)."

During pre-trial discovery in this matter, Sunbelt asserted that Davis conducted Sunbelt's January 8, 2013 workplace examination. *See* Sunbelt's Answer to the Secretary's Fourth Interrogatory, Ex. A (identifying Davis as the person who performed Sunbelt's workplace examination); *see also* Ex. B, ¶ 12 to Davis' affidavit, submitted by Sunbelt in support of its August 26, 2013 Motion for Summary Decision, (identifying Davis' January 8, 2013 examination as Sunbelt's workplace examination).

A hearing was held in Roanoke, Virginia on May 23-24, 2017. The parties stipulated to jurisdictional issues, the exclusion of certain testimony, and the fact that Sunbelt abated the alleged violation in a timely and good-faith manner. Tr. 11-12, 25-26. The parties offered testimony and documentary evidence.[2] Witnesses were sequestered.

[2] In this decision, "Tr.-#" refers to the hearing transcript followed by the page number(s); "Jt. Ex. #" refers to joint exhibits; "Gov. Ex. #" refers to the Secretary's exhibits; and "R. Ex. #" refers to the Respondent's exhibits. Jt. Ex. 1, Gov. Exs. 1-8, 10-12, and R. Exs. 8-11, 14, 19-20, and 34 were received into evidence.

At the outset of the hearing, Respondent proffered Respondent's Exhibit 10, a two-page Job Safety Analysis (JSA) on a Sunbelt Rentals form that was completed by Sunbelt foreman Douglas Redmond on January 8, 2013. Respondent represented that Redmond's JSA reflected the last two pages of Davis' January 8, 2013 workplace examination, recorded in a pre-shift hazard assessment form received into evidence as Government Exhibit 6. The Secretary objected to that representation, but did not object to the document being received into evidence as a January 8, 2013 JSA prepared by Redmond. Tr. 28-32.

Subsequently, when I inquired whether Sunbelt was going to argue that it did a second examination after Davis' examination during the January 8, 2013 shift, Respondent's counsel stated that Respondent did a workplace examination, continued to look for hazards throughout the shift, and would have removed and corrected any hazards found as scaffolding was being erected toward the seventh floor. Tr. 234-35. When the undersigned asked the Secretary about his position on the "*at least once each shift*" language, the Secretary averred that Respondent had contended up until hearing that Davis had conducted its workplace examination as evidenced by Davis' pre-shift hazard assessment form. Tr. 243-44; Gov. Ex. 6.

At the conclusion of the Secretary's case in chief, Sunbelt moved for judgment on partial findings under Rule 52(c) of the Federal Rules of Civil Procedure and moved to strike the proposed special assessment. After extended discussion, I denied Respondent's motions. Tr. 220-234.

By the close of the hearing, Respondent was indeed arguing that two workplace examinations were conducted on January 8, 2013, before Sunbelt miners entered the tower and the accident occurred. Therefore, Sunbelt argues that its compliance with the workplace examination requirement was met twice over. Tr. 440; *see* Gov. Ex. 6 (Davis examination) and R. Ex. 10 (Redmond JSA). At the close of the hearing, Respondent also renewed its motions and asked that I take judicial notice of MSHA's January 23, 2017 final rule, which amended 30 C.F.R. § 56.18002(a), with respect to examinations of working places in metal and nonmetal mines. Tr. 438-441. I have taken such judicial notice.[3] Otherwise, however, I denied Sunbelt's

[3] On January 23, 2017, MSHA issued a final rule amending its standards in Parts 56 and 57 of Title 30 of the Code of Federal Regulations for "Examinations of Working Places in Metal and Nonmetal Mines." 82 Fed. Reg. 7680, 7695 (Jan. 23, 2017) (to be codified at 30 C.F.R. § 56.18002). The proposed final rule was stayed. Following the expiration of the stay, MSHA proposed further changes to the proposed final rule. The additional changes, scheduled to effective June 2, 2018, amend section 56.18002(a) to provide as follows:

> **(a)** A competent person designated by the operator shall examine each working place at least once each shift *before work or as miners begin work in that place*, for conditions that may adversely affect safety or health.
>
> **(1)** *The operator shall promptly notify miners in any affected areas of any conditions found that may adversely affect safety or health and* promptly initiate appropriate action to correct such conditions.

motions and requested briefing on the following issues: the adequacy of the examination or examinations at issue, i.e., whether the falling material that struck Tyler was capable of being discovered by a reasonably prudent and competent person conducting an adequate workplace examination; whether the portion of preheat tower vessel number four, located on the seventh level above the heads of where the Sunbelt miners were erecting scaffolding, was a "working place;" how the potentially latent defect, if any, affects whether there was a violation of the standard; and whether the specially-assessed penalty proposal was appropriate. Tr. 439, 450-51.

After careful review of the record, and the parties' post-hearing briefs, and accepting the Commission's remand as the law of the case, I find that Sunbelt violated 30 C.F.R. § 56.18002(a) by failing to adequately examine the seventh level of the preheat tower at least once during the January 8, 2013 shift, and by failing to promptly initiate corrective action to remove a falling-material hazard. I find that the seventh level, located directly above the heads of the miners erecting scaffolding below, was a "working place."[4] I find that the violation

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> **(2)** *Conditions noted by the person conducting the examination that may present an imminent danger shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected (except persons referred to in section 104(c) of the Federal Mine Safety and Health Act of 1977) until the danger is abated.*

Examinations of Working Places in Metal and Nonmetal Mines, 83 Fed. Reg. 15055-2, 15064 (Apr. 9, 2018) (to be codified at 30 C.F.R. § 56.18002) (emphasis added to illustrate revisions). On April 24, 2018, the National Stone, Sand, & Gravel Association announced that MSHA would not issue citations under the new rule until October 1, 2018, although the agency may issue citations in the case of extremely dangerous hazards. News Release, Nat'l Stone, Sand, & Gravel Ass'n, MSHA Adding Time to Comply With Exams Rule (Apr. 24, 2018), https://www.nssga.org/msha-adding-time-to-comply-with-exams-rule/ .

[4] The Secretary argues on post-hearing brief that because Sunbelt failed to identify Redmond as a person who performed a workplace examination on January 8, 2013 at any time during the three years in which this case was pending before trial, it should be barred by the Federal Rules of Civil Procedure from successfully arguing that Redmond, as a undisclosed competent person, somehow satisfied Sunbelt's obligation to examine each working place at least once during the January 8, 2013 shift for conditions which may adversely affect miner safety or health. *See* Sec'y Br. at 22-23. As further explained herein, I agree with the Secretary, essentially for the reasons he articulates, that Sunbelt is barred from pursuing this theory of compliance with the cited standard. *See infra* section IV, A, 1. Alternatively, as further explained herein, even assuming that Redmond was a competent person as Davis testified, I find that it would not make any material difference in the circumstances of this case. I find that both of Sunbelt's examiners (Davis and Redmond) failed to conduct an adequate examination of the working place from the seventh floor portholes because they failed to identify extensive and obvious buildup of material that may fall on miners working below, and because they failed to promptly initiate appropriate action to correct the hazard.

was properly designated as S&S because it contributed to a hazard that was reasonably likely to result in a fatal injury to one person, and did, in fact, knock Tyler unconscious and leave him dangling from the scaffold. I further find that the violation resulted from Sunbelt's high negligence because Sunbelt's examiner(s) ignored site-specific training to inspect the vessel overhead and remove any potential loose material prior to entering the vessel. I assess a penalty of $23,750 based upon my consideration of the Section 110(i) penalty criteria and the deterrent purposes of the Act. The reduction in penalty from the Secretary's proposed special assessment is the result of Respondent's small size and diminutive history of prior violations, and my determination that the Secretary's non-binding, specially-assessed penalty points for the statutory criteria of gravity and negligence are duplicative, somewhat overstated, and excessive based on the record evidence.

III. Findings of Fact and Credibility Determinations

A. Roanoke's Preheat Tower

Roanoke operates a cement plant, including a preheat tower that uses raw-mix limestone to make concrete. Tr. 97-98. During production, the top of the tower operates at around 600 degrees Fahrenheit, and the bottom of the tower, nearest the kiln, operates at approximately 2800 degrees Fahrenheit. Tr. 257. Jason Oedel, Roanoke's pyro supervisor, is responsible for the preheat tower and kiln system. Tr. 247-48, 252-253.

Roanoke's preheat tower is comprised of six stages, called vessels (or cyclones). Tr. 95-97, 254. The six vessels protrude through the center of the tower. Tr. 93, 251, 268. The vessels are chamber-like structures, about fifty feet tall. Tr. 268. The vessels are vertically stacked, but offset, and not perfectly aligned. Tr. 256-57, 301.

An exterior elevator provides access to the floors of the preheat tower. Tr. 252. There are nine floors, approximately 50 feet apart. Tr. 268. The floors are numbered in ascending order from the ground level up, while the vessels are numbered in descending order from the top down. Thus, the stage-six vessel is accessed at the first floor, and the stage-one vessel is accessed at the ninth floor. Tr. 251-254.

Limestone is fed into the first vessel at the top of the tower. It is then heated at increasingly higher temperatures as it flows downward through each vessel. Tr. 257. Each vessel comprises one stage of the preheat process. The first vessel at the top of the tower is stage one. The last vessel at the bottom of the tower is stage six. Tr. 251-254.

The interior walls of each vessel are lined with refractory brick. Tr. 107, 115. Over time, the raw-mix limestone adheres to the refractory, resulting in buildup. Tr. 105-09, 113-18; Gov. Ex. 4, at 31-32, 34-38, 41, 43.

There are three two-foot by two-foot portholes (man doors) surrounding the circumference of each vessel at various heights. Tr. 255. The inside of the tower can be viewed and accessed through the portholes. Tr. 258, 262-63. Some of the vessels are situated between

multiple floors. Accordingly, some portholes are accessible at certain floors, but not at others. Tr. 253, 255-256. Each vessel also has a much smaller one-inch by 1inch porthole, which enables a miner operating an air lance to clear buildup of material. Tr. 259.

During normal production, the portholes are closed and the tower is sealed to prevent entry. Tr. 98-99. Once the tower has cooled, the larger portholes are used to access the interior of each vessel to inspect for damaged refractory and buildup of loose material, and to perform maintenance. Tr. 95-97, 187-88, 258.

There is no lighting on the inside of the preheat tower. Tr. 392. The only natural light comes into the tower through the small portholes when they are opened, so portable lights are necessary. Tr. 101-102.

B. Roanoke's Annual Shutdown and Workplace Examination Procedure

Roanoke shuts down the preheat tower each January for maintenance. Tr. 248-249. A scheduled maintenance outage was held between late December 2012 and early January 2013 so that the tower could cool before maintenance work was performed. Tr. 248-49, 257-58.

Roanoke contracted with LVR to perform annual refractory maintenance on the preheat tower in January 2013. LVR subcontracted with Sunbelt to erect scaffolding inside the tower so LVR could perform the maintenance work. Tr. 130, 240, 274, 416. Both Sunbelt and LVR had years of experience as contractors at the Roanoke Cement plant. Tr. 351-52, 382, 417.

LVR was scheduled to perform maintenance in the stage-four vessel, which has three accessible portholes on the sixth floor, and two on the seventh floor. Tr. 255-256. Specifically, LVR was going to replace the thimble, which extended at the top center of the tower from the sixth to the seventh floor of the stage-four vessel, and to replace any refractory brick that had disintegrated or cracked. Tr. 107, 129-130,191; Gov. Ex 4 at 31.

On or about December 30, 2012, Roanoke shut down the preheat tower and conducted its last workplace examination of the area as part of shutdown activities. Tr. 121-23. Once the tower began cooling, Roanoke employees performed an initial cleaning of the tower by opening the one-inch by one-inch portholes and using 20-foot long air lances to try to blow down any buildup material. Tr. 108, 123-25, 259-260. The Roanoke employees performing the air lancing did not enter the tower because of the intense heat. Tr. 122. Consequently, they did not do visual examinations inside the tower, other than what they could see through the tiny portholes used during air lancing. Tr. 285.[5]

[5] Contrary to Oedel's testimony that the Roanoke employees who air lanced through the 1-inch by 1-inch portholes did not do a visual examination inside the tower, Davis testified that the persons wanding the vessels must have looked inside because it was "kind of hard not to look inside when you are wanding. You have to look in there to wand something." Tr. 285, 398. I credit Davis, but find that the Roanoke air lancers' range of vision was very limited by the 1-inch size of the portholes.

Oedel testified that the Roanoke employees performed air lancing "all the way through the tower." Tr. 259-60. Oedel further testified that he saw documentation indicating that Roanoke performed a "Preheater Shutdown Cleaning Checkoff List" (R. Ex. 8), and that nothing unusual was noted, but the document is silent as to areas air lanced. Oedel did not personally observe the Roanoke employees perform the air lancing from top to bottom, although he testified that "they said they had did that." Tr. 260-261.

By contrast, Nichols testified that Roanoke employees air lanced the tower from the sixth floor down, but not from the seventh floor down. Tr. 118, 124.

> THE COURT: And you testified it was from the sixth level down?
> THE WITNESS: Yes, sir.
> THE COURT: How did they clean it from the sixth level up?
> THE WITNESS: They didn't.

Tr. 124. Nichols subsequently testified:

> THE WITNESS: The seventh level could have been cleaned, but it was not.
> THE COURT: And how could it have been cleaned?
> THE WITNESS: By lancing the sides of it. Now, that would not have been Sunbelt's responsibility to do the cleaning. That should have been Roanoke's. They did all of the cleaning on it, but that should have been done. Sunbelt should have recognized that hazard, had they done their proper workplace exam. It was very obvious to me and to Andy, when we went up on the seventh level, that there was a problem.

Tr. 126.

After the initial shutdown cleaning, Roanoke allowed the tower to cool and used fans over several days. Thereafter, Roanoke opened the two-foot by two-foot portholes on each vessel. Tr. 257-58. Oedel initially testified that there was no way to inspect the inside of the vessel without scaffolding in place. Tr. 267. Upon subsequent questioning, however, Oedel conceded that prior to the erection of scaffolding, the only way to check for potentially loose material was to go to each of the floors and look into the tower through the portholes. Tr. 305.

Once the tower was cooled, Oedel testified that he used a big light to inspect every open porthole throughout the tower. Tr. 263. Oedel testified that this initial walkthrough was conducted in early January, prior to LVR's arrival. Tr. 263. Oedel acknowledged that he was not performing or documenting any workplace examination at that time. Tr. 286. Oedel testified that he was looking "for any damage that [he] didn't know about, or work that needs to be replaced, and any type of buildup that we need to remove before contractors showed up on site." Tr. 264.

After his initial walkthrough, Oedel testified that he conducted an additional walkthrough of each floor of the tower with construction supervisor Gary Snyder from LVR. Tr. 250, 273, 298. Oedel also testified that Roanoke and LVR inspected each level of the preheat tower, including the seventh floor, by looking through the exterior doors for loose refractory and buildup. Tr. 262, 264-266, 268. Oedel further testified that the conditions of the tower remained the same during both pre-accident walkthroughs. Neither Oedel nor Snyder noticed any potential hazard, such as loose material, "because we thought that it was all part of the monolithic." Tr. 267, 298.

C. The Early January Arrival of Contractors

On January 2, 2013, Sunbelt arrived on site and started preparing to construct the scaffold in the preheat tower. Gov. Ex. 3 at 4. Roanoke provided site-specific hazard awareness training to Sunbelt (and LVR) at that time. Gov. Ex. 3 at 4; 290. Specifically, Roanoke provided Sunbelt supervisor Kendrick Davis and his crew with site-specific training prior to allowing them to perform work at the mine. Tr. 146-147, 386-87; Gov. Ex. 7. The training instructed contractors to remain alert and check for overhead hazards when entering any building other than an office building. Tr. 149, Gov. Ex. 7 at 1, ¶ 9. More specifically, Roanoke instructed Davis, as well as all contractors performing work inside the preheat tower, that "[p]rior to vessel entry inspect vessel overhead and remove any potential loose material." Gov. Ex. 7 at 3; Tr. 149-150; 288-292.

Davis had been trained as a "competent person" to perform workplace examinations for Sunbelt and had done so inside vessels at the Roanoke Cement plant since 2000. Tr. 330-31, 335. Furthermore, Davis had 26 years of experience working with scaffolding, safety supervision, and workplace examinations. Tr. 324-25. Davis had never received any reports of material falling inside the preheat tower, and never had an injury or accident on his crew. Tr. 335-37. Davis was trained to recognize potential hazards related to scaffold erection. Tr. 326-27, 329; R. Ex. 9. Davis testified that he and two other persons were designated as competent persons to perform Sunbelt's workplace examinations on January 8, 2013. Tr. 395-96. Davis subsequently testified that Douglas Redmond was a competent person. Tr. 426. Davis did not identify the other purported competent person.

Davis testified that Sunbelt began erecting scaffolding sometime prior to January 8, 2013. Tr. 345. Nichols testified that Sunbelt arrived to do setup work on January 5, 2013. Tr. 130. Each morning from January 5 through January 8, Davis conducted a workplace examination prior to the commencement of Sunbelt's work. Tr. 345-46, 353-56.

D. Sunbelt's January 8, 2013 Workplace Examination(s)

On January 8, 2013, Sunbelt was preparing to erect scaffolding on the sixth floor of the tower so that LVR could do refractory repair work. Tr. 336. Sunbelt was working in the designated work area of stage 4 of the pre-heat tower, accessed at the sixth floor, and Sunbelt was erecting the scaffolding towards the seventh floor. Tr. 250, 413; Gov. Ex. 6.

Davis spoke with LVR foreman Snyder at about 7 a.m. on January 8, 2013, before Sunbelt began work. Tr. 343. Snyder told Davis to begin erecting the scaffolding at stage 4, and also told Davis that that the tower had been prepped by Roanoke and was safe to begin work. Tr. 343-44. Davis testified that he did not know who had done this prep work, when they had done it, or what they had done, other than "they wanded it and did a visual inspection to look for loose material," although Davis did not know what areas of the tower had been wanded and visually inspected. Tr. 398-99. Despite Snyder's assurances that the preheat tower was safe to begin work, Davis knew that he had the responsibility to conduct Sunbelt's workplace examination and that this duty was not dependent upon being told by LVR that the area was safe for work. Tr. 346-347.

Davis' pre-shift hazard assessment form for January 8, 2013 indicates that he conducted a pre-shift examination at 7:00 a.m. Gov. Ex. 6 at 1; Tr. 396. Davis testified, however, that he first met with Snyder at 7 a.m. for approximately 20-30 minutes. Tr. 347-348. Thereafter, Davis testified that he took the elevator to the sixth floor of the preheat tower and walked around the floor looking for tripping hazards or other objects on the floor, because that was the area that Sunbelt was going to be working. Davis then visually inspected the interior of the vessel through the three portholes on the sixth floor, "looking for loose material, missing refractory, loose brick, loose thimbles—anything out of the ordinary." Tr. 348-49.

Davis testified that there was daylight when he performed his workplace examination and he could see inside the cyclone. Tr. 363. By contrast, inspector Nichols testified that he arrives at the Staunton Field Office every Monday morning at 7:00 a.m., and that in January, it is still dark when he gets to work. Tr. 144.[6] I credit Davis and find that by the time he arrived at the sixth floor to conduct his workplace examination after meeting with Snyder, there was first light at daybreak.

Davis testified that from the sixth floor portholes, he could see all the way up to the ceiling of the seventh floor: "You can see all the way through the top of the ceiling of the seventh, and you can also see the light shining in on the portholes from the seventh floor also." Tr. 349-50. When asked whether he could see the entire seventh floor, Davis testified that he "could see the roof from the sixth floor up to the seventh." Tr. 350. Davis was then asked the following leading question from Respondent's counsel: "[D]id you think that the sixth floor port holes gave you a better vantage point to examine the seventh?" Davis replied, "I did, because from the sixth floor, you can see the under-roof of the sixth floor, and you can see the top roof of the seventh floor from the sixth." *Id.*

Davis admitted that during his workplace examination, he did not go to the seventh floor to look through the portholes there. Tr. 350, 413-14. When asked why he did not go to the seventh floor, Davis testified, "[w]e was [sic] actually not working on the seventh floor. And my thoughts was [sic], looking from the sixth up through the seventh, I can see any loose material hanging from there, and also I could see the thimbles from the inside and outside and the brick

[6] I take judicial notice of the fact that the sun rose at 7:34 a.m. in Troutville, Virginia on January 8, 2013. U.S. Naval Observatory Astronomical Applications Department, Complete Sun and Moon Data for One Day, http://aa.usno.navy.mil/data/docs/RS_OneDay.php (follow hyperlink; then use "Form A: U.S. Cities or Towns" to search for January 8, 2013 in Troutville, Virginia).

on the outside of the thimble." Tr. 350-51. On cross examination, Davis testified that he did not go to the seventh floor because "you can only see straight across. I have a better vantage point looking from the sixth floor up, because you can see the outside of the thimble and the brick from—you can't see the brick from the side of the thimble from the seventh floor." Tr. 421. Davis further testified that Sunbelt had no employees working on the seventh floor on January 8, 2013. Tr. 382.

I do not credit Davis' testimony that he could see any loose material hanging from the sixth floor and that he could only see straight across from the portholes on the seventh floor. Rather, as further set forth below, accident investigator Nichols credibly testified and explained how pictures he took with his camera from a seventh floor porthole just after the accident scene was preserved under the 103(j) and (k) orders, show rough, gray buildup on top of reddish brick refractory in the "elbow" above the scaffold where Tyler was working. Gov. Ex. 4 at 31-32; Tr. 105-110. At the same porthole location on the seventh floor, Nichols also took close-up pictures of extensive buildup on the walls of the elbow and around the door, and a clear differentiation in color between gray buildup and reddish refractory is visible in some of the pictures. Gov. Ex. 4 at 34-38, 41; Tr. 113-18.

After Davis looked through the sixth floor portholes, but not the seventh floor portholes, Davis and his crew beat the sides of the vessel with hammers and four-foot tubing for 20 to 30 minutes in an effort to "vibrate this thing as much as possible" and cause loose rock and refractory to fall out. Tr. 353-354, 357-358. After Davis' crew beat the vessel, they "wait[ed] for the dust to settle" and then looked to see whether any buildup fell to the bottom of the vessel, "[a]nd if we don't see any buildup down through the small cylinder, we go ahead and proceed with the work." Tr. 354. Davis testified that he came up with the idea to beat on the outside of the tower back in 2000, without any input from Roanoke, although Snyder at LVR thought it was a good idea. Tr. 355-56, 406.

Davis testified that he had conducted his workplace examination the same way for the previous thirteen years, and that Oedel at Roanoke, and Snyder at LVR, never told him to do it a different way. Tr. 351. Davis further testified that he saw no hazards, buildup, or hanging material during his workplace examination; that the conditions he viewed on January 8, 2013 were no different than he had observed in previous years; and that he had never seen anything other than dust fall in the vessel. Tr. 351-52, 382.

When the undersigned expressed skepticism that the mining conditions observed were static and no different over the course of thirteen years of workplace examinations, Davis testified as follows:

> Well, this is a cement plant, so it is all dust and dirt in this thing, because they make powder concrete.
>
> So we expect to see dust and dirt off the sides when we go in there.
>
> So, you know, when we do our initial inspection—when I do my initial inspection, I also have another gentleman come up and do another initial inspection behind me.

> We also didn't bring the crew members up, and do a visual inspection, and then we also have them--I also have them take hammers and four-foot tubing, and beat around the sides of the cyclone.
>
> Because what we want to do, is we want—we want to vibrate this thing as much as possible to get—if any loose rock or loose refractory or loose brick were to fall, we don't want it to fall while we are inside of it.
>
> So we vibrate this thing and beat and bang for about twenty to thirty minutes to try to vibrate, because we are putting in tons and tons of scaffolding inside this unit, which is a massive amount of weight.
>
> So before I send these guys in, I want to try to vibrate and beat on this thing as much as possible.
>
> And, yes, when we beat and bang, it is dusty.
>
> Sometimes we can't even see in there, because that is how much dust comes down.
>
> So we wait for the dust to settle. We might do it again. And if we don't see any buildup down through the small cylinder, we go ahead and proceed with the work.

Tr. 353.

Davis' workplace examination lasted about 15-20 minutes. Tr. 356. Davis did not observe any hazards, including any hazards above where Sunbelt miners would be erecting scaffolding, during his workplace examination on January 8, 2013. Tr. 382; Gov. Ex. 6. Davis' pre-shift hazard assessment form listed "poor lighting, loose objects falling, and dust" as potential hazards. Gov. Ex. 6. When confronted with his pre-trial deposition, Davis confirmed that falling objects could be scaffolding and refractory brick falling from the sides and up above. Tr. 411-13. When asked what he meant when he listed potential falling objects in his workplace examination, Davis testified, "[w]ell, like I said earlier, there is always potential for loose brick or debris, so I wanted the guys to stay aware to keep their eyes and ears open." Tr. 413. Davis also testified that he noted potential falling objects as a workplace hazard because "loose material" such as "dust" was always falling within the tower and he "had seen dust fall before from working inside the tower, prior to the accident." Tr. 370, 418. Despite noting that lack of lighting was a workplace hazard, Davis did not use supplementary lighting when conducting his workplace examination, and no lighting had been installed within the vessel until Sunbelt installed swing lights while erecting the scaffolding. Tr. 371-372.

After his visual inspection, Davis testified that he sent another foreman, Douglas Redmond, to conduct another inspection to see if there was anything that Davis had missed. Tr. 357. As noted, Davis testified that Redmond was a competent person. Tr. 426. Davis testified that Redmond's inspection also lasted 15-20 minutes. Tr. 357. On cross examination, Davis testified that he did not go with Redmond when Redmond conducted his examination. Davis was then asked, "So you don't know where he went?" Davis testified, "I know he went to the floor that I went to." Tr. 425. I infer from Davis' testimony that Redmond, like Davis, also

did not conduct his examination from any seventh floor portholes. In any event, there is no evidence that Redmond went to the seventh floor to conduct his examination from the portholes there. Following Redmond's inspection and before Sunbelt began performing work on January 8, 2013, Davis and Redmond discussed their "notes" with the crew and the crew members signed off on both Davis' workplace examination form and Redmond's JSA. Tr. 357; Gov. Ex. 6; R. Ex. 10.

Inspector Nichols testified that during his investigation, he asked Davis if he had done a workplace examination on January 8, 2013 and Davis provided him with "a couple of forms," more specifically, Gov. Ex. 6, consisting of two, unstapled pages, and no other document. Tr. 130-31. As further explained below, Davis testified that he also gave Nichols the two-page JSA performed by Redmond at the same time that Davis gave Nichols his own pre-shift hazard assessment. R. Ex. 10; Gov. Ex. 6; Tr. 427. I credit Davis. I asked Davis early on during his direct examination, "What type of written document do you use for those workplace exams?" Davis testified that, "Roanoke Cement has a document that they would like us to fill out also for their workplace examination. So we fill that out. And we also have in-house, called 'JSA' that we fill out for Sunbelt." Tr. 335-36.

Thereafter, on direct examination, Davis identified Government's Exhibit 6, entitled "Pre-Shift Hazard Assessment," as two pages of Roanoke Cement's inspections sheets (comprising a single document) which Roanoke requested that Davis complete prior to work each morning. Tr. 362, 369; Gov. Ex. 6. Davis testified that he filled out the pre-shift hazard assessment form after he met with LVR supervisor Snyder, conducted his examination, and directed his crew to beat the vessel. Tr. 362-63; Gov. Ex. 6.

By contrast, Respondent's Exhibit 10 is a two-page JSA on a Sunbelt Rentals form that was completed by Douglas Redmond on January 8, 2013, and was received into evidence at the outset of the hearing. Tr. 28-32.[7] Redmond did not testify at the hearing. Rather, Davis testified about Respondent's Exhibit 10, the JSA that Redmond completed. Tr. 364-69. On cross examination, Davis testified that he gave Nichols a copy of Respondent's Exhibit 10 when he spoke with him on the day of the accident. Tr. 420-21. Davis further testified on cross examination, as follows:

[7] The first column on the first page of the JSA indicates that Sunbelt reviewed with the crew a sequence of basic job steps: review job survey, tool box talk, [illegible] the day; flex and stretch, and start erecting. The second column on the first page enumerates potential hazards as noise, hand and power tools, hand hazards, material handling, ladders, falls, slips and trips, pinch points, confined space, and emergency plan, although page two of the document contains check marks indicating that the foregoing are hazards on the job. The third column on the first page lists additional potential hazards and steps to correct or eliminate the hazard[s], i.e., "check all PPE, 100% fall protection, use twist method in chain line, overhead protection at all time falling rocks and dust, make sure everybody know[s] the location of the eyewash, communication is the key." The second page of the JSA contains checkmarks for the enumerated hazards on the job, a corresponding safety plan for each hazard, and checkmarks for required personal protective equipment (PPE) for each checked hazard. R. Ex. 10; Tr. 364-369.

Q Did you go with Mr. Redmond when he conducted his examination?
A No.
Q So you don't know where he went?
A I know he went to the floor that I went to. Did I supervise him when he did his inspections? No.
Q Okay. And when asked for a copy of your workplace examination, you provided Mr. Nichols with a copy of your workplace examination; correct?
A Yes.
Q And you were a competent person when you did this work?
A I was one of them, yes.
Q And you did one on January the 8th?
A Yes.

. . .

FURTHER REDIRECT EXAMINATION
BY MR. VANCE:
Q Mr. Davis, is Mr. Redmond a competent person?
A Yes.

Tr. 424-26. The undersigned then asked Davis the following:

Q And when I asked you whether you gave Douglas Redmond's job safety analysis to the inspector, what was your testimony?
A Yes.
Q Did you give it to him at the same time that you gave your workplace exam—the first two pages?
A Yes.
Q Did he ask you any questions about Mr. Redmond doing a separate exam or anything of that nature?
A He did not.

Tr. 427. An extensive colloquy then ensued between the undersigned and counsel for the parties as their respective positions about the import of Redmond's JSA. Tr. 427-33.

E. The January 8, 2013 Non-Fatal Accident and MSHA's Investigation

1. MSHA's Arrival at the Scene

On January 8, 2013, the non-fatal accident that injured Tyler occurred at about 10:30 a.m. Gov. Ex. 1; Tr. 171. The MSHA emergency hotline was notified of the accident at about 10:47 a.m. Gov. Ex. 1.

At the time of the accident, Nichols was inspecting the Castlewood Sand Plant, owned by Roanoke Cement, with safety director Andy Howell. Tr. 65. Howell received a call before MSHA was notified that there had been an accident at Roanoke Cement and a miner had been hit and knocked unconscious off a scaffold. Howell informed Nichols. Tr. 65-67. Nichols called his supervisor and received approval to investigate. Tr. 65, 67. At 11 a.m., Nichols issued a verbal 103(j) order to Howell directing him to preserve the accident site and shutdown the area around the preheat tower until they arrived. Tr. 68; Gov. Ex. 2, Gov. Ex. 3 at 1.[8] Nichols and Howell then drove to the nearby Roanoke Cement plan. Tr. 67.

When Nichols and Howell arrived at the accident site, the injured miner, Brian Tyler, had just been loaded into an ambulance. Nichols attempted to speak with Tyler, but he "really wasn't responding" to any of the questions that Nichols asked. Tr. 67. Rescue personnel told Nichols that Tyler was "a little out of it" and "really wasn't able to answer questions." Tr. 73-74. They also stated that Tyler "had complained about neck and arm pain and was bruised on his left side." Gov. Ex. 3 at 1-2.

Roanoke personnel on site informed Nichols that the accident occurred while Tyler was erecting scaffolding within the stage-four vessel on the sixth floor of the tower; that Tyler was working inside with his personal protective (PPE) equipment donned; and that some material had fallen, hit him in the head, knocked him unconscious for approximately one minute, and left him swinging from the scaffolding. Tr. 71-72, 74, 119-20; Gov. Ex. 3 at 3. Three of the four straps that held the headband to Tyler's hardhat were broken. Tr. 119-120.

At the time of the accident, Tyler had been receiving scaffolding material from another Sunbelt miner through the porthole on the sixth floor and handing it down to four Sunbelt miners working beneath him. Gov. Ex. 3 at 2. No one saw the material that hit Tyler. *Id.* Davis opined that Tyler was struck by dust. Tr. 395, 418. "From what I can tell, after the accident, it was all just dust. It could have been a big ball of dust that was clunkered up." Tr. 395. When I asked Davis how he knew that Tyler was not struck by dust on a brick that hit Tyler's hardhat and then fell down below, Davis testified, "It's really hard for me to say. I am just looking at the material that was on the landing platform itself." Tr. 418. The material on the landing platform after the accident was comprised of dust. Tr. 419; Gov. Ex. 4 at 3.

Tyler's extraction from the vessel was complicated due to the confined nature of the space and the request from rescue personnel that a "headache board" for overhead protection be installed for safety before rescue personnel entered the vessel. Tr. 81. Davis testified that a headache deck, designed to protect miners from falling objects, could be installed only after the initial frame of the scaffolding was completed, and the accident occurred before the scaffolding frame was completed. Tr. 361. Sunbelt was not cited for failure to erect overhead protection. Gov. Ex. 8.

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[8] Following his investigation after arriving on site, Nichols modified the 103(j) order to a 103(k) order at about 1 p.m., and confined the order to the stage-four vessel. Gov. Ex. 3 at 6. The 103(k) order was not terminated until January 10, 2013. Gov. Ex. 2 at 3.

2. Respondent's and MSHA's Post Accident Discovery of Buildup of Material Overhead at the Seventh Floor Level

After the accident, Oedel from Roanoke, and Snyder from LVR, went to the seventh floor to look at the area above where the miners had been working. Tr. 271. When they looked through the seventh floor portholes, they saw buildup. Tr. 272-273, 283, 306-309; Gov. Ex. 4 at 4, 11, 23. Oedel testified that "you could see that there was actual buildup, which was not noticed before when I did my walk-through twice." Tr. 272. Oedel opined that the buildup could have become loose and fractured due to vibration, tower movement, or the fact that the material had cooled since the last time he saw it. Tr. 276. Oedel noted that the tower takes up to eight days to cool and he had "seen stuff stick to a wall for a whole month and never move [but] [t]he same type of stuff could fall off three days later after cooling off." Tr. 276-77.

When asked why he had not noticed the buildup during his previous walk-throughs, Oedel testified:

> A The material—the way the air flow runs through there in this type of material, it will lay stuff in this crossover. And the buildup actually looked like it was part of the monolithic.
> So we went through the first couple of times, and there was no fractures, there were no cracks. To me it looked like: Hey, this is all good and fine. The first time it was okay, and the second time, myself and Gary Snyder went through. We saw nothing until the incident happened, and that was when we noticed it.
> Q Would you consider that to be a latent issue?
> A Yes.
> Q Would it be a true or false statement to leave one with the impression that all the refractory was brick type?
> A Not all the refractory is brick type.
> Q Was the buildup you saw when you went back out there the same color as the buildup or the same color as refractory brick or some other color?
> A It is all gray. It all looks the same, especially in those type of areas.

Tr. 272.

Oedel went on to testify that at the time of his pre-accident walk-throughs, the buildup "all looked the same. It looked like it was our refractory in there. It didn't look like buildup, until, obviously, after the fact when we saw that. I mean, it was–we can't notice–I mean we can't say anything if we don't notice it." Tr. 275. After the accident, Odel testified that "it was definitely different." *Id.* The only reason it looked different "is because of the small piece that came off, and that allowed us to see that there was buildup there. But you know, what made it fall or what made it change—it could be anything—vibration, the tower moving, because the whole tower is 400-plus feet tall. It can move a little bit when the wind blows." Tr. 276; *see also* Gov. Ex 4 at 40 (showing a small piece of buildup that had broken off).

Nichols testified that the brick was a reddish color. Tr. 115. Oedel testified it was the same gray color as the limestone buildup on the brick. Tr. 273. I credit Nichols. Oedel's testimony is clearly belied by the photographs in evidence. *See e.g.*, Gov. Ex. 4 at 31, 35-38. Furthermore, the extent of the buildup around the porthole door and adjacent walls that Nichols and Oedel observed from the seventh level directly after the accident (*see, e.g.*, Gov. Ex. 4 at 28, 29, 31, 34-38) far exceeded "the small piece that came off," (*see* Gov. Ex. 4 at 40), which Oedel testified about. *See* Tr. 276.

When I asked Oedel whether LVR or Sunbelt should have gone to the seventh level and looked through the portholes, Oedel testified:

> A Yeah. Anywhere they are working they should. LVR does their workplace exams and all that before they send people in. But nobody goes in until the scaffolding is built, so you have to have the scaffolding in there first. And it would be up to Sunbelt to go in and check. I know I have witnessed Von [Davis] doing that before.
> THE COURT: What do you mean you have witnessed him doing that before?
> THE WITNESS: I have witnessed him walk through the tower and check his areas before he allows guys to go in—a workplace exam or a job site, JSA, or whatever. I have seen him do it.
> THE COURT: And when you have seen him do it before, is that prior to the scaffolding being built?
> THE WITNESS: Yes.
> THE COURT: Okay. Would he walk to each of the levels?
> THE WITNESS: Yeah, where they are working at. We try to disconnect the levels, from where people are working. And what I mean by that is, we will remove sections of feed pipe, block things off. So let's say something at the top of the tower pulls off—if the material does come down, it will go out and hit the floor, and it doesn't go into the vessel where people are working at. So we really try to eliminate anything like that happening.

Tr. 277-79.

Meanwhile, after receiving a brief overview of the accident, Nichols and Roanoke safety director Howell proceeded to the preheat tower to perform an inspection. Gov. Ex. 3 at 4; Tr. 64, 66. They took the elevator to the sixth floor, put on fall protection, and entered the stage-four vessel through a sixth-floor porthole to assess where Tyler had been standing at the time of the accident. Tr. 91, 94. Nichols observed "a lot of small broken material" on the scaffolding where Tyler had been standing and took photographs of the scene. Tr. 84-86, 89-90; Gov. Ex. 4 at 6, 22.

Nichols took pictures shortly after the accident occurred, which indicate that the vessel was a large, confined, open space, accessible from the sixth and seventh floors. Tr. 100, 102-103; Gov Ex. 4 at 11, 30. A large circular metal structure or "thimble" ran between the floors and narrowed the vessel's width. Tr. 100-101; Gov. Ex. 4 at 11, 31. Nichols noticed that the thimble was located directly above the area of debris where Tyler had been working and extended up into the seventh floor of the tower. Tr. 102, 190-191. From within the vessel on the sixth floor, Nichols could see light shining in from a porthole on the seventh floor. Nichols and Howell then went to the seventh floor to observe the area of the vessel above the thimble. Tr. 105.

On the seventh floor, Nichols observed through the open porthole that there was obvious buildup material covering the walls and ceiling. Tr. 105-106, 111, 117; Gov. Ex. 4 at 31, 32, 34, 37. Nichols testified that he did not need to peer inside the porthole to see the buildup, because it was evident even from the outside. Tr. 117-118. As noted, Nichols credibly testified that most of the refractory brick was reddish in color, and the buildup was gray. Tr. 115. Nichols described the buildup as "pretty obvious, even when you look at the door and all the buildup on the door, on page number 43 [photo], even just standing on the outside looking in the door, you could see the buildup on the wall." Tr. 118; Gov. Ex. 4 at 37-38, 43. Given the obvious nature and amount of buildup on the seventh floor, Nichols concluded that the tower had only been cleaned from the sixth floor down, which posed a danger to the workers erecting scaffolding directly underneath:

> Q And standing outside the door on the seventh level, and seeing the buildup just inside the door, what did that tell you?
> A It told me we had a problem.
> Q What was the problem?
> A That it hadn't been cleaned or removed or anything on the seventh level.
> Q And why is buildup on the seventh level relevant to this case?
> A Because what was on the seventh level elbow could possibly fall right down through the holes that we looked at, onto the sixth level.
> Q Okay. And that hole we looked at, that is called what?
> A The thimble.
> Q And directly below the thimble is?
> A The sixth floor.
> Q The area where they were working?
> A Right.

Tr. 118-19. Based on the buildup that Nichols, Oedel, and Snyder all observed from the seventh level portholes directly after the accident, I find Nichols' testimony that the tower had not been air lanced from the seventh floor down to be more credible and probative than Oedel's general and unsubstantiated hearsay testimony set forth above that Roanoke employees air lanced "all the way through the tower." Tr. 259-60.

During his investigation, Nichols interviewed several Sunbelt employees, who told him that they had observed small amounts of material falling during their work. Tr. 150. A Roanoke employee alerted Nichols to a bend in the scaffolding that purportedly resulted from the falling material that injured Tyler. Tr. 79-81; Gov. Ex. 4 at 5.

Davis told Nichols that he had performed a workplace examination, but did not think about going to the seventh floor, and never went to the seventh floor to look through any portholes located there. Tr. 131-132, 158, 189. Davis testified that Nichols never asked him if he had examined the seventh floor from the sixth floor. Tr. 379. As noted, Nichols testified that Davis presented Nichols with a two-page pre-shift hazard assessment and told Nichols that this was his pre-shift inspection. Tr. 131-32, 199; Gov. Ex 6. Nichols also testified that Davis did not give him a copy of any other "inspections," but I have credited Davis' testimony that he also gave Nichols a copy of Redmond's JSA (Respondent's Exhibit 10). Tr. 132, 427.

The pre-shift hazard assessment form documenting Davis' workplace examination appears to have been generated by Roanoke for its contractors. Tr. 131-32; Gov. Ex. 6. Nichols testified that the document looked more like a "toolbox talk" form than a workplace examination form. Tr. 133-137; Gov. Ex. 6; *cf.* R. Ex. 8 (Roanoke's "Pre-heater Shutdown Cleaning Checkoff List," Dec. 30, 2012). The assessment form indicated that Davis conducted a workplace examination of designated work area stage 4 on January 8, 2013 at 7 a.m., where Sunbelt employees were working to erect a scaffold inside of the cyclone for (LVR's) refractory workers. The assessment form listed job specific hazards as dust, fall protection, heat/cold stress and lack of lighting. The form also listed the personal protective equipment (PPE) required. With regard to work area preparation, the form indicated that barricades/signs were posted, lockout was complete, and the work area (stage 4) was defined.[9]

3. The Issuance of Citation No. 8723677 to Sunbelt After Investigation

After conducting his accident investigation, Nichols concluded that Sunbelt should have traveled to the seventh floor during its workplace examination to visually inspect the area above its miners' heads and check for hazards. Tr. 152-155. More specifically, when asked why he

[9] The assessment form listed potential hazards as pinch points, falls, trip hazards, poor lighting, loose objects falling, dust, and hand crushing. It listed solutions for potential hazards as gloves and a [illegible]for pinch points and crushing, full body harness & lanyard for fall protection and full decks with guardrails, good housekeeping to help with trip hazards, dust mask for dust, light strings added to increase light, and overhead protection for possible falling objects.
Thirteen Sunbelt miners, including Davis, signed the form indicating that they fully understood the job scope, the nature of the hazards involved, the PPE, the designated work area, and the procedures necessary to work safely on this job assignment. They further agreed to comply with safety procedures and stay within the designated work area. Further, if hazards changed during the course of their work days, they agreed to stop work, make note of the hazard, and inform their supervisor (Davis), who agreed to correct the hazard immediately. Finally, Davis certified that the 13 miners were an all-inclusive list "of contractor employees assigned to work this job during this shift." Gov. Ex. 6.

issued a citation to Sunbelt for failure to perform an adequate workplace examination, Nichols testified:

> After surveying the area, and looking at the seventh floor, sixth floor, I determined that it would have been very easy for them to have went [sic] to the seventh floor as part of their inspection, since it was overhead of the sixth level.
>
> And had they done that, I think they would have very easily seen the material in there, and probably would have had Roanoke to remove it before they went into work.

Tr. 152-53.

Nichols testified that it is customary for a miner performing a workplace examination to look overhead "[b]ecause of the hazards, and you just don't know—like low hanging fruit, the hazards can be anywhere. Anytime you are in that area, if there could possibly be a hazard overhead, then you should examine that." Tr. 154. Nichols further testified that it did not matter how far overhead the hazard existed. Tr. 155. When asked how one examines the area if the hazard is very far overhead, Nichols testified, "[t]here are--where there is lighting, there is a light situation, such as here, if they just went up to the next level, they could have seen the hazard that was on that level." Tr. 155.

Davis testified that after Nichols came out of the tower, the inspection party went back to Howell's office for discussion, and just before they sat down, Nichols received a phone call. Davis testified that it was "quiet as a whistle," and the man on the other end was "real loud through the phone, and I could hear the conversation." Tr. 380. Davis testified as follows:

> And he was asking how things were going.
> And Mr. Nichols said, "Well, I didn't find anything that Sunbelt did wrong." And the guy on the other end said, "Well, I need you to cite Sunbelt on something." And I thought that was odd.
> And then Mr. Nichols said, "Well, let me call you back because I have Sunbelt in here with me now."
> Q How far away from Mr. Nichols were you during that conversation?
> A One to two feet. We were sitting right beside each other.
> Q Did he say—did the gentleman on the phone say anything to the extent about whether or not Mr. Nichols could leave without issuing a citation?
> A Say that one more time.
> Q Did the gentleman on the phone say anything about whether Mr. Nichols could leave without issuing a citation?
> A No. I heard him say, "You are going to have to cite somebody on something."

Tr. 380-81.

On cross examination, Davis opined that Sunbelt would not have received a citation had Nichols not been told to issue one. Davis testified that his examination was thorough, and that Howell explained [to Nichols] that Roanoke took all responsibility for the preheat tower and Sunbelt had no responsibility. Tr. 403-04.

After his accident investigation, Nichols issued Citation No. 8723677, which alleged that Sunbelt

> did not do an adequate work place exam in the area they were working as there [was] hanging material overhead that had not been noted on the workplace exam. The area above was never checked. This condition could result in serious injury or death. Exposure would be high as employees were working in the area at the time.

Tr. 151, 288; Gov. Exs. 8, 10. Nichols designated the gravity as reasonably likely to result in a fatal injury because miners were working in the area when the material fell and hit Tyler, and death could occur if a miner was struck by falling material. Tr. 155; Gov. Ex. 8 at 2. Nichols designated Respondent's negligence as high because Sunbelt never thought of checking the overhead wall conditions for falling material because it never had anything but dust fall from there, and "Davis said he never thought of the area on the 7th level." Gov. Ex. 8 at 2. MSHA's Narrative Findings for a Special Assessment of $51,900 indicate that the gravity of the violation was serious and contributed to the cause of a nonfatal, fall-of-material accident that resulted from Sunbelt's high negligence. Gov. Ex. 10.

IV. Legal Analysis

A. Sunbelt violated 30 C.F.R. § 56.18002(a)

1. Section 56.18002(a), related definitions of "working place" and competent person," and the Respondent's failure to identify Redmond during discovery as a "competent person"

At the time of Citation No. 8723677, section 56.18002(a), entitled "Examination of working places," provided: "A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions." 30 C.F.R. § 56.18002(a) (2013).

Section 56.2 defines "competent person" as "a person having abilities and experience that fully qualify him to perform the duty to which he is assigned." 30 C.F.R. § 56.2. MSHA's Program Policy further clarifies that "[t]his definition includes any person who, in the judgment of the operator, is fully qualified to perform the assigned task. MSHA does not require that a competent person be a mine foreman, mine superintendent, or other person associated with mine management." Mine Safety and Health Administration, Program Policy Manual Volume IV at

64 [hereinafter PPM]. The Commission has specified that "the term 'competent person' must contemplate a person capable of recognizing hazards that are known by the operator to be present in a work area or the presence of which is predictable in the view of a reasonably prudent person familiar with the mining industry." *FMC Wyoming Corp.*, 11 FMSHRC 1622, 1629 (Sept. 1989).

Section 56.2 defines "working place" as "any place in or about a mine where work is being performed." 30 C.F.R. § 56.2. MSHA's PPM further clarifies that "the phrase [working place] applies to those locations at a mine site where persons work during a shift in the mining or milling processes." PPM at 64.

As fully set forth above, on appeal of my original decision granting summary decision for Respondent(s), the Commission held that section 56.18002(a) contains not only a "competent person" requirement, but also requires that a workplace examination be conducted "adequately," i.e. conducted "to the level of a meaningful examination" as opposed to "only examin[ing] the workplace to standard of care slightly surpassing not conducting the examination at all." *Sunbelt Rentals, Inc.*, 38 FMSHRC at 1625-26. The Commission further held that Respondent had fair notice that the broadly-worded standard required that an examination by a competent person must be adequate to uncover workplace hazards under the reasonably prudent person test, first articulated by the Secretary and applied by the Commission on appeal. *Id.* at 1625-27. Under that test, a workplace examination under the standard is adequate if it is reasonably likely to identify conditions which may adversely affect safety and health. *Id.* at 1622.

I apply the Commission's decision as the law of the case. As instructed, I consider on remand "whether the seventh level of the pre-heat tower was a "working place," and whether Davis' workplace examination was adequate because it identified conditions which a reasonably prudent examiner would recognize as adversely affecting safety and health. *Id.* at 1627-28.

Before doing so, I find that Davis was a competent person under the standard. As noted, Davis had been trained as a "competent person" to perform workplace examinations for Sunbelt and had done so inside vessels at the Roanoke Cement plant since 2000. Tr. 330-31, 335. Davis had 26 years of experience working with scaffolding, safety supervision, and workplace examinations. Tr. 324-25. Davis was trained to recognize potential hazards related to scaffold erection. Tr. 326-27, 329; R. Ex. 9. I find that Davis was qualified as a "competent person" under the standard at issue, 30 C.F.R. § 56.18002(a). Tr. 326-27, 331; R. Ex. 9.

With regard to the Secretary's argument on post hearing brief that Sunbelt should be barred by the Federal Rules of Civil Procedure from successfully arguing that Redmond, as a undisclosed competent person, somehow satisfied Sunbelt's obligation to examine each working place at least once each shift for conditions which may adversely affect safety or health, I agree with the Secretary essentially for the reasons he articulates. *See* Sec'y Br. at 22-23. "On any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act . . . the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure . . . ." 29 C.F.R. § 2700.1(b). Rule 26 of the Federal Rules of Civil Procedure sets forth the duty to disclose information. Specifically, Rule 26(a)(1)(A)(i) requires a party to provide to the other party "the name and, if known, the address and telephone

number of each individual likely to have discoverable information -- along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment." Fed. R. Civ. P. 26(a)(1)(A)(i); *see also Ebewo v. Martinez*, 309 F.Supp.2dd 600, 607 (S.D.N.Y. 2004) (noting that the purpose of Rule 26(a) "is to prevent the practice of 'sandbagging' an opposing party with new evidence"). Rule 37(c)(1) of the Federal Rules of Civil Procedure provides that "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). Finally, Rule 26(e)(1)(A) provides that a party who has responded to an interrogatory "must supplement or correct its disclosure or response . . . in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1)(A); *see also Sender v. Mann*, 225 F.R.D. 645, 653 (D. Colo. 2004) (noting "the objectives underlying Rule 26(a)(1) suggest that information 'is incomplete or incorrect' in 'some material respect' if there is an objectively reasonable likelihood that the additional or corrective information could substantially affect or alter the opposing party's discovery plan or trial preparation").

Applying these principles, I find that because Sunbelt failed to identify Redmond as a competent person who performed a workplace examination on January 8, 2013 at any time during the three years in which this case was pending trial, Sunbelt is barred from successfully making this argument for the first time at trial. *See* Fed. R. Civ. P. 37(c) (a party is disallowed from relying upon information that should have been disclosed pursuant to Rule 26(a)). When asked to provide the identity of the person who conducted Sunbelt's January 8, 2013 workplace examination, Sunbelt had a duty to provide a complete response and identify Redmond as well as Davis. *See* Fed. R. Civ. P. 37(a)(4) (incomplete response should be treated as a failure to respond). Because Sunbelt did not do so, I preclude Sunbelt from sandbagging the Secretary and now arguing that Sunbelt designated Redmond as a competent person who satisfied its obligation to examine each working place at least once each shift for conditions which may adversely affect safety or health.

Alternatively, even assuming that Redmond was a competent person as Davis testified, I find that it would not make any material difference in the circumstances of this case. As noted, Redmond did not testify. His training is not in evidence. On cross examination, Davis testified that he did not go with Redmond when Redmond conducted his examination. Davis was then asked, "So you don't know where he went?" Davis testified, "I know he went to the floor that I went to." Tr. 425. I have inferred from this testimony that Redmond, like Davis, also did not conduct his examination from any seventh floor portholes. In any event, there is no evidence that Redmond went to the seventh floor to conduct his examination from the portholes there.

As shown below, I find that the seventh level of the preheat tower was a "working place." As further shown below, because Sunbelt did not send any competent person, including examiner Davis or Redmond, to look through the seventh level portholes where one was reasonably likely to identify extensive and obvious buildup of material, which adversely affected the safety and health of miners working directly below, Sunbelt failed to conduct an adequate

workplace examination, and failed to initiate prompt corrective action, thereby violating section 56.18002(a), as interpreted by the Commission. Furthermore, for the reasons explained below, even assuming that Redmond, unlike Davis, did go to the seventh level and peer through the portholes, I find that both Davis and Redmond failed to conduct an adequate workplace examination because they failed to identify obvious buildup of hanging material as conditions adversely affecting the safety and health of miners working directly below, and failed to initiate prompt corrective action.

2. The seventh level of the preheat tower was a "working place"

On January 8, 2013, when the accident occurred, the Sunbelt miners were erecting scaffolding from the sixth floor towards the seventh floor within the fourth vessel of Roanoke's preheat tower. Tr. 250, 413. The scaffolding was being built by Sunbelt so that LVR could replace the thimble, which extended from the sixth to seventh floor of the stage-four vessel, and replace any refractory brick that had disintegrated or cracked. Tr. 107, 129-130,191; Gov. Ex 4 at 31.

The fourth vessel is a single, open chamber accessed from both the sixth and seventh floors through two-foot by two-foot, inspection portholes. Tr. 253, 255-56, 301-02; Gov. Exs. 11, 23, 25 and 31-33. The main portion of vessel four is accessed through three portholes located at the sixth floor, and the top portion of vessel four is accessed via two portholes located at the seventh floor. Tr. 253, 255-256.

I find that on January 8, 2013, Sunbelt's "designated work area" was stage four, which includes both the sixth and seventh floor of the preheat tower. Gov. Ex. 6; Tr. 253-54. The Sunbelt miners were erecting scaffolding upward from the sixth floor of the designated work area toward the seventh floor of the designated work area. Tr. 413. I find that the seventh floor was a "place in or about a mine" in a designated active working area inside stage four of the tower. Accordingly, I find that the seventh level was a working place within the meaning of section 56.18002(a) because it was place in or about a mine directly above the heads of miners performing work below. *Cf.*, *Hecla Limited,* 38 FMSHRC 2117, 2122 (Aug. 2016) (where the Commission majority found under a different standard set forth in section 57.3401 that "[i]t is consistent with the policy goals of the Mine Act to require in a highly unusual mining situation the type of examination or testing that is necessary to discover latent hazards that cannot readily be observed, such as rock fractures above a roof, before miners are exposed to the hazards in their working area.") (internal citations omitted).[10]

[10] Concurring in part and dissenting in part, Commissioners Young and Althen found that "[b]ecause miners must visually examine and physically test a working place for loose ground in order to scale it down, the portion of the roof that could contain scalable ground is part of the working place." 38 FMSHRC at 2122.

3. Sunbelt failed to conduct an adequate workplace examination of the seventh level working place at least once during the January 8, 2013 shift, under the Commission's reasonably prudent miner test

As explained above, because Sunbelt failed to identify Redmond, or anyone other than Davis, as a competent person who performed a workplace examination on January 8, 2013 at any time during the three years in which this case was pending before trial, I have rejected its attempt to do so at trial. Furthermore, even assuming that Redmond was a competent person as Davis testified, I have found that it would not make any material difference here because I have inferred from Davis' testimony that Redmond, like Davis, also did not conduct his examination from any seventh floor portholes and there is no evidence that he did so. Furthermore, as further explained below, I have found that even assuming that Redmond, unlike Davis, did go the seventh level and peer through the portholes, an assumption that is not supported by any record evidence, both Davis and Redmond failed to conduct an adequate workplace examination because they failed to identify obvious buildup of hanging material as conditions that adversely affected the safety and health of miners working directly below, and failed to initiate prompt corrective action.

Davis admitted that during his workplace examination on January 8, 2013, he did not go the seventh floor to look through the portholes there. Tr. 350, 413-14. By contrast, right after the accident, Oedel and Snyder went to the seventh floor to look at the area above where the miners had been working. Tr. 271. When they looked through the seventh floor portholes, they saw buildup. Tr. 272-273, 283, 306-309; Gov. Ex. 4 at 4, 11, and 23. Accident investigator Nichols also peered through a seventh floor porthole shortly after the accident had been preserved by his 103(j) order. On the seventh floor, Nichols observed obvious buildup material covering the walls and ceiling through the open porthole. Tr. 105-106, 111, 117; Gov. Ex. 4 at 31, 32, 34, and 37. Nichols credibly testified that he did not need to peer inside the porthole to see the buildup, because it was evident even from the outside. Tr. 117-118. As noted, Nichols credibly testified that most of the refractory brick was reddish in color, and the buildup was gray. Tr. 115. Nichols described the buildup as "pretty obvious, even when you look at the door and all the buildup on the door, on page number 43 [photo], even just standing on the outside looking in the door, you could see the buildup on the wall." Tr. 118; Gov. Ex. 4 at 37-38 and 43.[11] Given the amount and obviousness of the buildup on the seventh floor level, Nichols credibly concluded that the tower had only been cleaned from the sixth floor down, which posed a danger to the workers erecting scaffolding directly underneath. Tr. 118-119.

[11] I have discredited Davis' testimony that one can only see straight across from the portholes on the seventh floor. Rather, I have credited Nichols testimony, as corroborated by photographs taken from a seventh floor porthole shortly after the accident, that there was rough, gray buildup on top of reddish brick refractory in the "elbow" above the scaffold where Tyler was working. Gov. Ex. 4 at 31-32; Tr. 105-09. At the same porthole location on the seventh floor, Nichols also took close-up pictures of extensive buildup on the walls of the elbow and around the door, and a clear differentiation in color between gray buildup and reddish refractory is visible in some of the pictures. Gov. Ex. 4 at 34-38, 41, and 43; Tr. 113-18.

Based on these facts, even assuming that the hazard was latent during Oedel's and Snyder's walkthroughs of the preheat tower in early January, and notwithstanding the Secretary's initial admission on Motion for Partial Summary Decision that the hazard was latent, I find that shortly after the accident, the buildup of the hanging material hazard was extensive and obvious. Given the relatively brief amount of time between Davis' workplace examination at about 7:30 a.m., the occurrence of the accident at 10:30 a.m., and Oedel's, Snyder's and Nichol's observation of buildup shortly after the accident while the conditions in the tower were preserved under the 103(j) order, I find that if Davis or another Sunbelt examiner had gone to the seventh floor working place during his examination and looked through the portholes *at least once during the January 8, 2103 shift*, he would have noticed extensive and obvious buildup on the tower walls and ceiling. This buildup created a hanging material hazard that adversely affected the safety of miners erecting scaffolding below and should have prompted immediate corrective action. Sunbelt's examiner(s) failed to identify conditions which a reasonably prudent and competent examiner would recognize as hazardous and adversely affecting the safety and health of miners working below, and they failed to take immediate corrective action. Therefore, I find that Sunbelt violated section 56.18002(a).

I have considered the fact that under the January 23, 2017 proposed rule, which amended the existing standard in effect at the time of the accident, MSHA stated:

> The existing standards for metal and nonmetal (MNM) mines requiring that workplace examinations be conducted at least once each shift potentially expose miners to adverse conditions during the shift because mine operators can perform the workplace examination anytime during the shift, which exposes miners to adverse conditions during the shift before any corrective action is taken. The final rule, like the proposed rule, amends this provision to require that each working place be examined before miners or other employees begin work in that place. The new requirement that mine operators notify miners of adverse conditions in their working places will make miners aware of such conditions and allow them to take appropriate protective measures or avoid the adverse conditions altogether until such conditions are corrected.

Examinations of Working Places in Metal and Nonmetal Mines, 82 Fed. Reg. 7680, 7681 (Jan. 23, 2017).[12]

[12] As noted above, *supra* note 3, MSHA made an initial proposal to amend section 56.18002 on January 23, 2017. 82 Fed. Reg. 7680. MSHA proposed additional amendments to that initial proposal on April 9, 2018. 83 Fed. Reg. 15055-2. Although the effective date of the new rule is June 2, 2018, the National Stone, Sand, and Gravel Association has indicated that MSHA will not issue citations under the new rule (except in cases of extremely dangerous hazards) until October 1, 2018. News Release, Nat'l Stone, Sand, & Gravel Ass'n, MSHA Adding Time to Comply With Exams Rule (Apr. 24, 2018), https://www.nssga.org/msha-adding-time-to-comply-with-exams-rule/.

When I asked Respondent's counsel whether Respondent could have done a workplace examination and found the hazard after the injury occurred under the existing regulation, Respondent demurred and argued that the scaffolding was being erected toward the seventh floor, and if the seventh floor was a working place, there was no requirement under the extant regulation to examine the seventh floor before the shift began, just at any point during the shift. Tr. 238-39; *but see* Tr. 171-172 (cross-examination of Nichols about the difference between the new regulatory language requiring that a competent person examine each working place at least once each shift *before miners begin work in that place,* and the extant regulation requiring the examination at least once each shift). Nichols essentially conceded on cross examination that under the regulation in effect at the time of the accident, Respondent could have performed its workplace examination(s) at any time before the end of the shift that day. Tr. 171-72. Respondent argues that the accident happened three hours into the shift, and there was no requirement to go back and do another workplace examination after Respondent had been removed by the 103(j) and 103(k) orders. Tr. 236-38. When asked by the undersigned whether Respondent assumed the risk of noncompliance if it did not go to the seventh floor to perform an adequate examination before the injury occurred, Respondent was unsure. Tr. 238.

I conclude that under the regulation extant at the time of the accident, the Secretary has shown that a competent person designated by Sunbelt did not adequately examine each working place, i.e., the seventh floor walls and ceiling from the seventh floor portholes directly above where miners were erecting scaffolding, *at least once during the January 8, 2013 shift*, for conditions which may adversely affect safety or health, and Sunbelt did not promptly initiate appropriate action to correct such conditions. I agree with the Secretary that the fall of material hazard was "very easily seen, very easily discoverable, very obvious, if one were to bother to look" from the seventh floor portholes before the shift was cut short by the accident and subsequent 103(j) and (k) orders.[13] Tr. 226. Although Respondent argues that under the extant regulation it had until the end of the shift to make the requisite examination, I find that Respondent assumed the risk of a violation by failing to conduct the requisite examination before the accident and subsequent 103(j) and (k) orders terminated the shift. This interpretation is consistent with the language and purpose of the standard to protect miner safety and health, and with Congress' declaration that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner." 30 U.S.C. § 801(a).

B. The Violation was S&S and of High Gravity

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. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4. (Jan. 1984).[14] The S&S

[13] The record reflects that the 103(k) order was not terminated until January 10, 2013. Gov. Ex. 2 at 3.

[14] 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

determination should be made assuming "continued normal mining operations." *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). This evaluation 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 regarding abatement. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).[15] An experienced MSHA inspector's opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

The Commission has explained that the focus of the *Mathies* analysis "centers on the interplay between the second and third steps." *ICG Illinois*, 38 FMSHRC 2473, 2475 (Oct. 2016) (citing *Newtown Energy Inc.*, 38 FMSHRC 2033 (Aug. 2016)). The second step requires the judge to adequately define the "particular hazard to which the violation allegedly contributes[,]" and then determine whether "there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Id.* at 2475-2476. This determination must be made "based on the particular facts surrounding the violation[.]" *Id.* The third step then requires the judge to assume the existence of a hazard and assess whether the hazard "was reasonably likely to result in serious injury." *Newtown* at 2038; *ICG Illinois* at 2476.

The "reasonably likely" provision does not require the Secretary to prove that an injury was "more probable than not." *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). In addition, the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury" but, rather, that the hazard *contributed to* by the violation is reasonably likely to cause an injury. *Musser Engineering, Inc. and PBS Coals Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (emphasis added); *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011).

The fourth *Mathies* factor requires the Secretary to show a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3. As a practical matter, the last two *Mathies* factors are often combined in a single showing. *Id.* Consistent with this approach, MSHA inspectors determine whether a violation meets the criteria

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(4th Cir. 2016) (noting federal appellate courts' uniform adoption of *Mathies* test and parties' recognition of authority of the 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).

[15] *See also 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); *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 (discussing the operative timeframe for violations in the context of S&S analyses).

for S&S by the likelihood of injury and the expected severity of injury, which correspond to the third and fourth *Mathies* factors.[16]

In applying the Commission's *Mathies* factors, I already determined that Sunbelt's failure to conduct an adequate workplace examination of the seventh level working place at least once during the January 8, 2013 shift, and to initiate prompt corrective action of the extensive and obvious buildup-of -material hazard present there, constitutes a violation of section 56.18002(a). Accordingly, I find that the first *Mathies* factor is satisfied.

Step two of the *Mathies* analysis focuses on "the extent to which the violation contributes to a particular hazard." The Commission has found that this step is "primarily concerned with likelihood of the occurrence of the hazard against which a mandatory safety standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016) (*citing Knox Creek Coal Corp.*, 811 F.3d at 163). Thus, step two of the *Mathies* test involves a two-part analysis: 1) identification of the hazard created by the violation of the safety standard; and 2) "a determination of whether, based on the particular facts surrounding the violation, there exists a reasonable likelihood of occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy*, 38 FMSHRC at 2038.

Here, the violation, i.e., the failure to conduct an adequate workplace examination of the seventh level working place at least once during the January 8, 2013 shift, and to initiate prompt corrective action of the extensive and obvious buildup-of-material hazard present there, contributed to the hazard that buildup material covering the walls and ceiling at the seventh floor porthole level would and fall and strike miners erecting scaffolding from the sixth to seventh floor below. Furthermore, based on the extensiveness and obviousness of the hazardous buildup, and the fact that the seventh level working place was not adequately examined by Sunbelt at least once during the January 8, 2013 shift, particularly after the vessel had been beaten with hammers and steel tubing for 20-30 minutes, I find a reasonable likelihood that the buildup material would, and indeed did, fall and strike a miner erecting scaffolding directly below. Accordingly, I find that the second *Mathies* factor is satisfied.

The third step of the *Mathies* analysis is "primarily concerned with gravity," and whether the hazard identified in step two "would be reasonably likely to result in injury." *Id.* at 2037 (internal citations omitted). As noted, the fourth *Mathies* factor requires the Secretary to show a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3. Thus, the relevant inquiry "is not whether it is likely that the hazard . . . would have occurred[,]" but "whether, if the hazard occurred (regardless of likelihood), it was reasonably likely that a reasonably serious injury would result." *Peabody Midwest Mining, LLC v. Fed. Mine Safety & Health Rev. Comm'n*, 762 F.3d 611, 616 (7th Cir. 2014).

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[16] Per training, MSHA inspectors do not designate a violation as S&S unless item 10.A on the citation 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).

Here, if the extensive and obvious buildup of refractory material did fall, it was reasonably likely to result in serious injury. The Sunbelt miners were erecting scaffolding directly below the hazard. Nichols designated the gravity as reasonably likely to result in a fatal injury because miners were working in the area when the material fell hitting Tyler, and death could occur if a miner was struck by falling material. Tr. 155; Gov. Ex. 8 at 2. I agree and find that it was reasonably likely that if the buildup of material or refractory brick fell from above, it would strike a miner working below and the miner was reasonably likely to suffer a serious or fatal injury. In fact, the record establishes that Sunbelt miner Tyler was erecting scaffolding while wearing his PPE, when some dust fell, hit him in the head, knocked him unconscious for approximately one minute, and left him swinging from the scaffolding. Tr. 71-72, 74, 119-20; Gov. Ex. 3 at 3. Three of the four straps that held Tyler's headband to his hardhat were broken. Tr. 119-120. The Secretary has met his burden of proof for the third and fourth *Mathies* factors. Consequently, I find that the violation was S&S and the gravity was high.

In conclusion, I find that the violation of section 56.18002(a) occurred as alleged by the Secretary, satisfying the first prong of the *Mathies* test. I have found that that the hazard contributed to by the violation was reasonably likely to result in a fatal injury and actually did result in a reasonably serious injury. I therefore find that the violation of was S&S and reasonably likely to result in a fatal injury for one person.

C. The Violation Resulted from Sunbelt's High Degree of Negligence

Negligence is not defined in the Mine Act. The Commission has found that "[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, 1975-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining*, 30 FMSHRC at 708 (negligence inquiry circumscribed by scope of duties imposed by regulation violated). In this regard, the gravamen of high negligence is "an aggravated lack of care that is more than ordinary negligence." *Brody Mining*, 37 FMSHRC 1687, 1701 (Aug. 2015) (*citing Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

Commission judges are not required to apply the level-of-negligence definitions in Part 100 penalty regulations and may evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *Brody Mining*, 37 FMSHRC at 1701; *accord Mach Mining*, 809 F.3d at 1263-64. Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances, but 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. *Brody Mining*, 37 FMSHRC at 1701.

Considering the totality of circumstances in this case holistically, I affirm MSHA's high negligence designation. As noted, LVR subcontracted with Sunbelt to erect scaffolding inside the tower so LVR could replace the thimble, which extended at the top center of the tower from the sixth to the seventh floor of the stage-four vessel, and to replace any refractory brick that had disintegrated or cracked. Tr. 107, 129-130, 191, 240, 274, 416; Gov. Ex 4 at 31. Roanoke provided Sunbelt supervisor Davis and his crew, including Redmond, with site-specific training prior to allowing them to perform work at the mine. Tr. 146-147, 386-87; Gov. Ex. 7. The training instructed Sunbelt contractors to remain alert and check for overhead hazards when entering any building other than an office building. Tr. 149, Gov. Ex. 7 at 1, ¶ 9. More specifically, Roanoke instructed Davis, as well as all contractors performing work inside the preheat tower, that "[p]rior to vessel entry inspect vessel overhead and remove any potential loose material." Gov. Ex. 7 at 3; Tr. 149-150; 288-292.

Sunbelt knew that the nature of the work exposed miners to falling material hazards in the stage 4 work area. The pre-shift hazard assessment documenting Davis' workplace examination listed potential hazards of loose objects falling and dust, and Redmond's JSA noted potential hazards as falling rocks and dust. Gov. Ex. 6; R. Ex. 10. Davis testified that he noted potential falling objects as a workplace hazard because "loose material" such as "dust" was always falling within the tower and he "had seen dust fall before from working inside the tower, prior to the accident." Tr. 370, 418. Further, during Nichols' investigatory interviews, several Sunbelt employees told Nichols that they had observed small amounts of material falling during their work. Tr. 150.

Although Davis visually inspected the interior of the vessel through the three portholes on the sixth floor, "looking for loose material, missing refractory, loose brick, loose thimbles--anything out of the ordinary," Davis never went to the seventh floor portholes at any time during the January 8 shift to look for loose material and buildup. Tr. 348-49, 350, 413-14. There is no evidence that Redmond went to the seventh level to perform his examination and I have inferred that he did not. Nichols designated Sunbelt's negligence as high because Sunbelt never thought of checking the overhead wall conditions for falling material because it never had anything but dust fall from there, and "Davis said he never thought of the area on the 7th level." Gov. Ex. 8 at 2. I have rejected Davis' testimony that the seventh level was not a working place that needed to be examined at least once during the January 8 shift, and I have discredited Davis' testimony that he could see any loose material hanging from the sixth floor and that he could only see straight across from the portholes on the seventh floor. When asked whether Sunbelt should have gone to the seventh level and looked through the portholes, Oedel testified, "Yeah. Anywhere they are working they should." Tr. 277.

I have found that if Davis or another Sunbelt examiner had gone to the seventh floor working place during his examination and looked through the portholes *at least once during the January 8 shift*, he would have noticed extensive and obvious buildup on the tower walls and ceiling. Since Sunbelt failed to adequately examine the working space from the seventh floor portholes directly above where miners were erecting or scheduled to erect scaffolding from the sixth to seventh floor, I find that Sunbelt breached its duty to conduct an adequate workplace examination under section 56.18002(a), breached its duty to identify conditions which a

reasonably prudent and competent examiner would recognize as adversely affecting the safety of miners working below, and breached its duty to initiate prompt corrective action. I have also found that even assuming that Redmond, unlike Davis, did go to the seventh level and peer through the portholes, both Davis and Redmond failed to identify the obvious buildup of hanging material as a condition that adversely affected the safety and health of miners working directly below, and failed to initiate prompt corrective action. Finally, because Sunbelt ignored site-specific training that before entering a vessel, "inspect vessel overhead and remove any potential loose material," and because Sunbelt failed to identify extensive and obvious buildup on the seventh level and initiate prompt corrective action to remove such material, which did fall and seriously injure Tyler erecting scaffolding below, I affirm Nichols' high-negligence designation.

D. Penalty Assessment

It is well established that the Commission Administrative Law Judges assess civil penalties de novo for violations of the Mine Act. Section 110(i) of the Mine Act delegates to the Commission the "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). When an operator contests the proposed penalty, the Secretary petitions the Commission to assess the proposed penalty. 29 C.F.R. § 2700.28. The Act requires, that "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. §820(i).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (March 1983), *aff'd,* 736 F.2d 1147 (7th Cir. 1984). Once factual findings on the statutory penalty criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration of the statutory criteria and the deterrent purposes of the Act. *Id.* at 294; *Cantera Green,* 22 FMSHRC 616, 620 (May 2000). In exercising this discretion to determine the amount of a penalty, the Commission has recognized that a judge is not bound by the penalty proposed by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). However, the Commission and its judges must provide a sufficient explanation of the bases underlying the penalties assessed when they substantially diverge from those originally proposed by the Secretary. *Sellersburg Stone Co.*, 5 FMSHRC at 293. Without an explanation for the divergence, the Commission has found that the "credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness." *Id.*

The Secretary proposed a specially-assessed penalty of $51,900 for Citation No. 8723677. Gov. Ex. 10 at 2. A regular assessment of the penalty amount by the Secretary would

have resulted in a proposed penalty of $1,530. Gov. Ex. 10 at 3. The Respondent argued at hearing that the Secretary provided no evidence regarding the rationale supporting a special assessment. The Secretary responded that he did not have any obligation to support MSHA's special-assessment determination. Rather, the Secretary argued that he had shown that the six penalty criteria weighed in favor of upholding the specially-assessed penalty proposal. I denied Respondent's motion to strike the special assessment. I found that the Secretary made a minimal showing that I should consider the special assessment as an initial proposal. Tr. 233-34.

In its August 2016 *American Coal* decision, the Commission majority (Commissioners Young, Cohen and Althen) observed that

> [f]or either regular or special assessments, the Secretary's proposal is not a baseline from which the Judge's consideration of the appropriate penalty must start. The Judge's assessment is made independently, and, regardless of the Secretary's proposal, the Judge must support the assessment based on the penalty criteria and the record.

38 FMSHRC 1987, 1995 (Aug. 2016). In *American Coal*, MSHA issued a special assessment without explaining the basis in its Narrative Findings. *Id.* at 1996. The *American Coal* majority noted that the Secretary bears the burden of "providing evidence sufficient in the Judge's discretionary opinion to support the proposed assessment under the penalty criteria." *Id.* at 1993. "When a violation is specially assessed, that obligation may be considerable." *Id.* While the Secretary may provide an explanatory narrative to support the special assessment sought, Judges must "be attentive to the rationale and facts and circumstances supporting the decision to seek a special assessment, so that the ultimate assessed penalty conforms to the Judge's findings and conclusions." *Id.*

Because the Secretary has proposed a penalty substantially higher than the $1,530 that would have been proposed under the regular assessment system, I look to the record to determine whether the Secretary introduced evidence to support the proposed elevated assessment. I then assess the penalty independently based on the record evidence of Section 110(i) criteria and the deterrent purposes of the Act.

The Secretary's narrative findings for the special assessment of Citation No. 8723677 indicate that "[t]he gravity of the violation was considered serious, and the violation contributed to the cause of nonfatal fall of material accident." Such findings also state that "[t]he violation resulted from the operator's high degree of negligence" and "was abated within a reasonable period of time." Gov. Ex. 10 at 2.

I have affirmed the Secretary's gravity, S&S, and high negligence findings, and find that the Secretary's rather limited special-assessment rationale, as contained in the narrative findings, is consistent with the record and the evidence introduced at hearing. Otherwise, however, the evidence provided by the Secretary in this case does not support the large, specially-assessed penalty proposal. I emphasize that I am not bound by the Secretary's Part 100 penalty regulations or special assessment penalty guidelines, but I must account for or explain any substantial divergence between the proposed penalty and the assessed penalty based on the record evidence and statutory penalty criteria. In this regard, I emphasize that the Secretary's

regular assessment point system already accounts for gravity and negligence findings, but the Secretary's proposal added a total of 34 additional penalty points to account for gravity and negligence findings in his special assessment calculation. Gov. Ex. 10 at 3. In the exercise of my discretion when considering the statutory penalty criteria, I conclude that many of the Secretary's 34 additional, non-binding penalty points for gravity and negligence appear overstated or excessive when viewed against the record evidence, which in addition to Respondent's small size and diminutive history of prior violations, largely account for the divergence between the Secretary's proposed penalty and my assessed penalty.[17]

With regard to Respondent's history of previous violations, the record establishes that Respondent had only three violations of the Act during the 15 months prior to the accident, none of which involved the same standard at issue here. Two of these violations were non-S&S and one was S&S, which resulted in total penalties paid of $338. Gov. Ex. 11. With regard to Respondent's demonstrated good faith in attempting to achieve rapid compliance after notification of the violation, the parties stipulated that the abatement was timely and made in good faith. Tr. 11. With regard to the appropriateness of the specially-assessed penalty to the size of the Respondent's business, I find that Respondent was a small contractor who worked only 26,667 hours in mines in 2012. *See* Contractor Overview, Mine Data Retrieval System, Mine Safety and Health Administration, https://arlweb.msha.gov/drs/drshome.htm (Contractor ID No. 4IN). With regard to effect of the specially-assessed penalty on the Respondent's ability to continue in business, Respondent failed to introduce any financial information or other specific evidence to support or substantiate its inability to pay or any adverse impact on its ability to remain in business. "[I]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur." *Sellersburg Stone Co.*, 5 FMSHRC 287, 294

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[17] By way of example, the record reflects that fifteen of the Secretary's non-binding and additional 34 penalty points in his special assessment calculation were added to gravity for severity of injury or illness. Gov. Ex. 10 at 3. The citation was appropriately written as reasonably expected to result in a fatality. Gov. Ex. 8. The non-fatal accident resulted in lost workdays or restricted duty. On this record, the Secretary's non-binding additional 15-point assessment calculation appears to be overstated, particularly since the Secretary added 5 additional points for the violation's contribution to a lost-time accident. Gov. Ex. 10 at 3. Nine of the Secretary's non-binding 34 additional penalty points were added to gravity to raise the persons affected from one person affected to 10 persons affected. Gov. Ex. 10 at 3. The citation was written as one person affected (Gov. Ex. 8) and the record reflects that the non-fatal accident resulted in one person affected, Tyler. Tr. 74, 374. The record also establishes, however, that one miner was working with Tyler outside the vessel at the time of the accident and four miners were working beneath him. Gov. Ex. 3 at 2. The Secretary failed to establish how ten crew members would be affected as opposed to potentially six miners. On this record, the Secretary's additional nine-point assessment calculation appears slightly overstated. Ten of the Secretary's non-binding and additional 34 penalty points were added to negligence. Gov. Ex. 10 at 3. I have found that the citation was appropriately written as high negligence. Gov. Ex. 8. On this record, the Secretary's additional 10-point assessment for high negligence, which was already accounted for in the regular assessment, appears arguably somewhat overstated.

(March 1983), *aff'd,* 736 F.2d 1147 (7th Cir. 1984) (citing *Buffalo Mining Co.,* 2 IBMA 226, 247-48 (Sept. 1973)); *accord Spurlock Mining Co.,* 16 FMSHRC 697, 700 (April 1994).

Based upon my consideration of the Section 110(i) penalty criteria and the deterrent purposes of the Act, I assess a penalty of $23,750. The reduction in penalty from the Secretary's proposed assessment is the result of Respondent's small size and diminutive history of prior violations and my determination that the Secretary's non-binding, specially-assessed, penalty points for gravity and negligence are somewhat overstated and excessive on this record.

IV. ORDER

For the reasons set forth above, Citation No. 8723677 is **AFFIRMED**, as written. Respondent, Sunbelt Rentals, Inc., is **ORDERED** to pay a total civil penalty of $23,750 within thirty days of the date of this Decision and Order.[18]

Thomas P. McCarthy
Administrative Law Judge

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