FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. OIL DRI PRODUCTION COMPANY, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. SE 2013-0507 M A.C. No. 22-00035-325870 Docket No. SE 2013-0558 M A.C. No. 22-00035-328667 Docket No. SE 2014-0104 M A.C. No. 22-00035-337763 Mine: Ripley Mine and Mill

DECISION AND ORDER

Appearances: Daniel Brechbuhl, Esq, U.S. Department of Labor, Denver, CO, for the Petitioner;

Douglas Graham, Esq., Oil-Dri Corporation of America, Chicago, IL, for the Respondent.

Before: Judge L. Zane Gill

This proceeding, under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994), involves five section 104(a) citations, 30 U.S.C. § 814(a), issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Oil Dri Production Company at its Ripley Mine and Mill. The Secretary and the Respondent settled seven citations prior to trial: 8731992, 8731994, 8731995, 8731999, 8730316, 8730317, and 8730318. The parties presented testimony regarding the remaining five citations in Nashville, Tennessee. In summary, I find that:

- For Citation No. 8731981, the Secretary failed to prove by a preponderance of the evidence that the accumulated waste material created a fire hazard. I vacate the citation;
- For Citation No. 8731989, Oil Dri violated Section 56.20003(a), there was moderate negligence, and I assess a penalty of $100.00;
- For, Citation No. 8731997, Oil Dri violated Section 56.14201(b), there was high negligence, the significant and substantial designation was warranted, and I assess a penalty of $4,300.00;

- For Citation No. 8731998, Oil Dri violated Section 56.17001, there was high negligence, the significant and substantial designation was warranted, and I assess a penalty of $4,800.00;
- For Citation No. 8636886, Oil Dri violated Section 56.14132(b)(1), there was high negligence, the significant and substantial designation was warranted, and I assess a penalty of $6,000.00.

Basic Legal Principles

Significant and Substantial

The citation and orders in dispute and discussed below have been designated by the Secretary as significant and substantial ("S&S"). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999). The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd*, 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Res., Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ Zielinski) ("The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.")

In *Mathies Coal Co.*, the Commission established the standard for determining whether a violation was S&S:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC 1, 3-4 (Jan. 1984).

The third element of the *Mathies* test presents the most difficulty when determining whether a violation is S&S. In *U.S. Steel Mining Co.*, the Commission provided additional guidance: "[T]he third element of the *Mathies* formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.'" 7 FMSHRC 1125, 1129 (Aug. 1985) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1834,

1836 (Aug. 1984)). The Secretary, however, "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)), *aff'd*, 717 F.3d 1020 (D.C. Cir. 2013). Further, the Commission has found that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005) and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC at 905; *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).[1]

Negligence

"Negligence" is not defined in the Mine Act. The Commission, has, however,

> recognized that "[e]ach mandatory standard ... carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, we consider what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

Brody Mining, LLC, 37 FMSHRC 1687, 1702 (Aug. 2015); *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008). "Thus in making a negligence determination, a Judge is not limited to an evaluation of allegedly 'mitigating' circumstances. Instead, the Judge may consider the totality of the circumstances holistically." *Brody Mining, LLC*, 37 FMSHRC at 1702.

Indeed, Part 100 regulations "apply only to the *proposal* of penalties by MSHA and the Secretary of Labor; under both Commission and court precedent, the regulations do not extend to the independent Commission, and thus the MSHA regulations are not binding in any way in Commission proceedings." *Id.* at 1701-02 (citing *Jim Walter Res., Inc.*, 36 FMSHRC at 1975 n.4; *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties ... we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the

[1] It must be noted that the Fourth and the Seventh Circuits have changed the Commission's precedent under *Mathies* by placing the emphasis and bulk of the analysis on the second element of the test. *See Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148 (4th Cir. 2016); *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014). This Respondent, however, is not located in either of those Circuits, and thus, my analysis uses the traditional *Mathies* test.

Commission."), *aff'g* 5 FMSHRC 287 (Mar. 1983)). Although the Secretary's part 100 regulations are not binding on the Commission, the Secretary's definitions of negligence in those provisions are illustrative.

Mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions.

Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984) and *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ Fauver). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130.

Penalty

The principles governing the authority of Commission administrative law judges to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges 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). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess said penalty. 29 C.F.R. § 2700.28.

Under section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (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 in abatement of the violative condition. 30 U.S.C § 820(i). Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties ... we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."); *see American Coal Co.*, 35 FMSHRC 1774, 1819 (June 2013) (ALJ Zielinski).

The Commission has repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the Section 110(i) criteria. *E.g.,*

Sellersburg Stone Co., 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 621.

Stipulations

1. Oil Dri was at all times relevant to these proceedings engaged in mining activities at the Ripley Mine and Mill in or near Ripley, Mississippi;

2. Oil Dri's mining operations affect interstate commerce;

3. Oil Dri is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.;

4. Oil Dri is an "operator" as that word is defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Ripley Mine and Mill (Federal Mine I.D. No. 22-00035) where the contested citations in these proceedings were issued;

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

6. On or about May 20, 2013 through May 28, 2013, MSHA Supervisor Inspector Billy Randolph was acting as a duly authorized representative of the United States Secretary of Labor, assigned to MSHA, and was acting in his official capacity when conducting the inspection and issuing the citations from dockets SE 2013-507-M, 2013-558-M, and 2014-104-M at issue in these proceedings;

7. The citations at issue in these proceedings were properly served upon Oil Dri as required by the Act, and were properly contested by Oil Dri;

8. The citations at issue in these proceedings may be admitted into evidence by stipulation for the purpose of establishing their issuance. The truthfulness or relevancy of any statements asserted therein is not stipulated to by the parties;

9. Oil Dri demonstrated good faith in abating the violations;

10. Without Oil Dri admitting the propriety or reasonableness of the penalties proposed herein, the penalties proposed by the Secretary in this case will not affect the ability of Oil Dri to continue in business.

Joint Prehearing Report, pg. 1-2.

Citation No. 8731981

Inspector Randolph[2] issued Citation No. 8731981, pursuant to Section 104(a) of the Mine Act, to Oil Dri at its Ripley mine May 20, 2013, alleging a violation of 30 C.F.R. § 56.4104(a). (Ex. S-3) Section 56.4104(a), a mandatory safety standard, states that "[w]aste materials, including liquids, shall not accumulate in quantities that could create a fire hazard." 30 C.F.R. § 56.4104(a). The citation alleges:

> Oil and other combustible material had accumulated around the new Ag hot kiln. 55 gallon drums and gallon buckets of lubricant were stored on the working platform. Miner[s] are exposed to this hazard daily during routine maintenance. Injuries to miners would result in smoke inhalation, burns, and other disabling injuries.

(Ex. S-3)

The citation alleged that an injury was unlikely but could be reasonably expected to be permanently disabling, one person could be affected, and the violation was a result of moderate negligence. *Id.* The Secretary argued that the accumulation of waste materials (excess oil from a kiln stored in open buckets) could create a fire hazard if exposed to heat because of its inherent combustibility. (Sec'y Br. at 6) The Respondent argued that there was no risk of ignition because the oil's flashpoint exceeded the temperature in the area. (Resp. Br. at 7) The Respondent also argued a lack of fair notice because MSHA inspectors had never cited Oil Dri for this or identified it as a violation in the past. (Resp. Br. at 8)

The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd*, 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Res., Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ Zielinski) ("The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence."). Here, the Secretary must prove by a preponderance of evidence that waste material accumulated, and that the accumulation "create[d] a fire hazard." 30 C.F.R. § 57.4104(a).

> The regulation, however, is silent on the quantity of waste that is allowed to accumulate before a waste pile is considered to be a fire hazard. Therefore, the appropriate analysis is whether a "reasonably prudent person familiar with the mining industry and

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[2] At the time of the hearing, Randolph had been working for MSHA for approximately 15 years, and had been a field office supervisor since 2005. (Tr. 21:5-22) He had approximately 40 years' experience in the mining industry before coming to MSHA. (Tr. 24:15-16) A trainee, Bill Hyde, was present during the inspections, shadowed Randolph, wrote the field notes, and assisted in drafting the citations. However, at the time of the inspection he was not an authorized representative, and did not sign his name on the citations. None of this decision is based on Hyde's field notes.

> the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987); *Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 156 (2d Cir. 1999); *Walker Stone Co. v. Secretary of Labor*, 170 F.3d 1080, 1083-1084 (10th Cir. 1998). This test is an "objective – not subjective – analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue." *Canon Coal Co.*, 9 FMSHRC at 668. In *Essroc Cement Corp.*, 33 [F]MSHRC 459 (Feb. 2011) (ALJ Manning), Administrative Law Judge Manning vacated a citation that alleged a violation of § 56.4104(a) and found that: "[T]he Secretary did not meet the burden of establishing that the condition created a fire hazard. The flashpoint of hydraulic fluid is quite high and there were no ignition sources in the area. A spark or other similar event would be insufficient to ignite the fluid [...] Without a realistic possibility of a fire hazard, there is no violation." 33 FMSHRC at 465.

Hecla Ltd., 36 FMSHRC 2600, 2604 (Sept. 2014) (ALJ Gill) (footnotes omitted).

A trunnion is used to rotate the kiln at Oil Dri's mine. High flashpoint oil is used to prevent steel-on-steel contact where the kiln drum contacts the trunnion. The oil must be changed frequently. (Tr. 238:25 – 239:17) The waste oil at issue here came from the trunnion's oil-changes. *Id.*

There is no dispute that high flashpoint waste oil was stored in buckets on a walkway near the kiln.[3] (Tr. 35:25 – 36:6; Tr. 40:18-23; Tr. 41:13-21; Tr. 241:25 – 242:3; Tr. 275:5-11) The Secretary argued that if the oil got hot enough, it would ignite. (Tr. 41:25 – 42:2) However, Inspector Randolph could not remember what the oil was called or what the label on the buckets said. (Tr. 119:1-11) He believed that the trunnion oil was a mixture of two oils, one with a flashpoint of 250 degrees Fahrenheit, and the other 700 degrees. (Tr. 44:11-17) Randolph did not say where he got this information. Respondent's witness, Steve Gibens,[4] testified that Oil Dri uses 460 oil, which has a flashpoint of 338 degrees Fahrenheit. (Tr. 243:9 – 243:16; Ex. R-7) I credit Gibens' testimony regarding the type of oil, its flashpoint, and its use.

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[3] There is a dispute whether there were rags in the area as well. However, the only testimony from Randolph about rags in the area were "yes" answers to two leading questions from Secretary's counsel. Rags were not mentioned in the citation. There is no testimony about how many rags there were, where the rags were located, or whether they were saturated with oil. There is also no evidence in the record to show whether or how the rags could ignite. I therefore disregard all testimony about the presence of rags in the area. It must be noted, however, that even if I found that there were rags in the area, there was no ignition source, and therefore, no fire hazard.

[4] At the time of the hearing, Gibens was the plant superintendent. (Tr. 236:9-13)

Despite the fact that Randolph testified that it was hot in the area where the oil was kept (Tr. 40:25 – 41:6), he did not measure the temperature. (Tr. 118:19-21) Gibens, however, testified that at the cap of the trunnion, where the oil is applied, the temperature is approximately 200 degrees Fahrenheit. (Tr. 245:2-4) Additionally, the temperature of the handrails and the catwalk in the area was approximately 150 degrees Fahrenheit. (Tr. 245:5-6) These temperatures are not high enough to ignite the oil. Randolph also testified that there were no open flames in the area and no other ignition source. (Tr. 32:23 – 33:3; Tr. 42:9-12; Tr. 122:1-4) There was no realistic fire hazard here. The Secretary failed to prove by a preponderance of the evidence that the accumulated waste material created a fire hazard. The citation is vacated.

Citation No. 8731989

Randolph issued Citation No. 8731989, pursuant to Section 104(a) of the Mine Act, to Oil Dri at its Ripley mine on May 20, 2013, alleging a violation of 30 C.F.R. § 56.20003(a). (Ex. S-4) Section 56.20003(a), a mandatory safety standard, states that "[w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." 30 C.F.R. § 56.20003(a). The citation alleges that:

> The work walk way adjacent to the RVBM dryer had spillage running over the toe boards extending down approximately 8 feet in length[,] and also on the tail end of the walkway [there] was spillage on the steps extending up [the] belt line another 8 foot [sic] approximately. A slip and fall hazard existed.

(Ex. S-4)

Violation

The citation alleged that an injury was unlikely, that an injury could reasonably be expected to be permanently disabling, one person could be affected, and the violation was a result of the Respondent's moderate negligence. *Id.* The regulation has two elements: 1) the area cited must be a "workplace," "passageway," "storeroom," or "service room"; and 2) the area shall be kept clean and orderly. 30 C.F.R. § 56.20003(a). The Respondent did not dispute that an accumulation existed, but it argued the area was not a "workplace" or a "passageway." (Resp. Br. at 9)

"Workplace" and "passageway" are not defined in the Mine Act or in the Part 56 definitions section. The Commission "looks to the commonly understood definition of the term." *Taft Prod. Co.*, 36 FMSHRC 522, 526 (Feb. 2014) (ALJ Gilbert) (citing *Nat'l Cement Co.*, 27 FMSHRC 721, 726 (Nov. 2005); *Jim Walter Res., Inc.*, 28 FMSHRC 983, 987 (Dec. 2006); *Drillex, Inc.*, 16 FMSHRC 2391, 2395 (Dec. 1994) (stating that "[i]n general, absent express definitions, statutory terms should be defined according to their commonly understood definitions.")). However, the ordinary meaning of the words used in a statute cannot be applied to produce absurd results. *Jim Walter Res., Inc.*, 28 FMSHRC at 987; *Nat'l Cement*, 27 FMSHRC at 728. In *Taft,* the ALJ defined workplace as "a place where work is done"; defined passageway as "a way that allows passage"; and defined passage as a "way of exit or entrance: a

road, path, channel, or course by which something passes." *Taft Prod. Co.*, 36 FMSHRC at 526 (citing *Merriam Webster's Online Dictionary*). When applied to the facts before me, these definitions do not produce absurd results.

Randolph believed the area in question was a travelway, or passageway, because there were handrails, toe boards, and a ladder going up to a platform. (Tr. 47:2-8) Additionally, miners worked in the area. Miners did various types of maintenance on the machinery in the area, e.g., changing out motors, equipment, belt sheathing, or simply greasing or servicing equipment. (Tr. 47:12-23) No one was working in the area at the time the citation was written, and there were no footprints in the spillage. (Tr. 128:15-22) The Respondent admitted that miners would access the area from time to time to clean or perform maintenance. (Tr. 251:18-22)

A reasonably prudent person familiar with the mining industry would recognize that the area in question was a workplace and a passageway. Accumulation of Oil Dri's clay product in this area was thus prohibited under the standard. *See U.S. Silica Co.*, 32 FMSHRC 1699, 1706-08 (Nov. 2010) (ALJ Miller); *USS, a Div. of USX Corp.*, 13 FMSHRC 145, 153 (Jan. 1991) (ALJ Broderick); *Brubaker-Mann, Inc.*, 8 FMSHRC 1482, 1483 (Sept. 1986) (ALJ Morris). I conclude that Oil Dri violated Section 56.20003(a).

Gravity and Negligence

The spillage in question was approximately four inches deep and eight feet long. (Tr. 49:11 – 50:5) Randolph testified that a miner could not access the middle of the belt line without going through the spillage. (Tr. 131:12-14) Randolph envisioned slip, trip, and fall hazards, which could result in restricted duty injuries or worse. (Tr. 49:15 – 50:20) Randolph believed an injury was unlikely because miners were not in the area on a regular basis. Management would have to send a miner to the area for a specific reason. (Tr. 53:6-16) Randolph did not expect more than one person to fall at a time. (Tr. 51:14-20) I agree.

Randolph characterized the negligence as moderate because Oil Dri did not have a history of the committing violation, and it cleaned the area daily. (Tr. 52:9-14) A reasonably prudent person familiar with the mining industry would not have allowed clay spillage to accumulate as it did in this area. The violative condition should have been found during a workplace examination. I agree that this violation arose from moderate negligence.

Penalty

The operator does not have a history of violating this standard. The mine operates 128,832 mine hours per year. The operator was moderately negligent. An injury here could result in lost work days or restricted duty. Payment of a penalty will not the affect the operator's ability to continue in business. The operator demonstrated good faith in abating the violation. For these reasons, I assess a penalty of $100.00.

Citation No. 8731997

Randolph issued Citation No. 8731997, pursuant to Section 104(a) of the Mine Act, to Oil Dri at its Ripley mine on May 21, 2013, alleging a violation of 30 C.F.R. § 56.14201(b). (Ex. S-5) Section 56.14201(b), a mandatory safety standard, states: "[w]hen the entire length of the conveyor is not visible from the starting switch, a system which provides visible or audible warning shall be installed and operated to warn persons that the conveyor will be started. Within 30 seconds after the warning is given, the conveyor shall be started or a second warning shall be given." 30 C.F.R. § 56.14201(b). The citation alleges that:

> Five open conveyors were noted as not having an audible or start up warning system installed. A system to alert person who could be exposed of [sic] the hazard of the equipment starting was not provided. Other exposed belt conveyors were also not provided with a warning system. Crushing fatal injuries are likely to result if normal mining operation continues to exist with this hazard.

(Ex. S-5)

Violation

The citation alleged that an injury was reasonably likely, could reasonably be expected to be fatal, the violation was significant and substantial, there was moderate negligence, and one person could be affected. (Ex. S-5) There is no dispute that the entire length of the conveyor was not visible from the start switch. (Tr. 58:8-13; Tr. 234:2-8) There were approximately five conveyors of different lengths located throughout the mine. (Tr. 58:18-24) The Respondent put on evidence that a manual start-up alarm[5] was in place and all operators were trained to use it.[6] (Sec'y Br. at 15; Resp. Br. at 10) Respondent argued that the citation should be vacated. (Resp. Br. at 10)

It was very noisy in the area where the conveyors were located. (Tr. 59:3-5) Inspector Randolph felt that a permanently installed start-up alarm of some sort was needed to warn miners working near conveyors to stand clear when the conveyors were about to start. (Tr. 61:15-23; Tr.139:19-23) During the inspection, Randolph asked the plant operator and the miners' representative if there was a start-up alarm for the conveyor belts. Both admitted that there was none. (Tr. 55:23 – 56:18; Tr. 61:1-6; Tr. 136:14-20) Both also admitted that start-up alarm systems had existed in the past, but none was in place at the time of the inspection. (Tr. 136:14-20)

The day after the inspection, the Respondent claimed that a manual alarm system was, in fact, in place. (Tr. 64:14-20; Tr. 228:25 – 229:14; Tr. 256:8-11) The Respondent's witnesses testified that miners were trained to activate the alarm before the conveyor belt was turned on.

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[5] This case did not deal with whether a visible warning device was in place.

[6] There had been no training for a start-up alarm system since August 2011. (Ex. R-6)

But, the miners present during the inspection, including the plant operator, did not know an alarm system existed. (Tr. 228:18-21; Tr. 279:4-7)

Respondent's post-hearing argument focused on the language of the regulation. Respondent argued that all the regulation required was that a start-up alarm system, which could be a manual alarm, be *installed.* (Resp. Reply Br. 18-19) It is true that having a manual alarm installed can satisfy the standard. *See Tilcon Conn., Inc.*, 18 FMSHRC 90, 95-96 (Jan. 1996) (ALJ Hodgdon); MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Vol. IV, Part 56/57, at 54 (Feb. 2003: Release IV-21) (stating the standard "has been uniformly interpreted by MSHA, and its predecessor organizations, to include both automatic and manual conveyor alarm systems"). However, merely installing a manual alarm defeats the fundamental purpose of the Mine Act, which is to protect the health and safety of miners. To satisfy the standard, an alarm must be installed *and actually used before the conveyor starts.* Anything else "would thwart the underlying purpose of the standard and must be avoided." *RAG Cumberland Res.*, 26 FMSHRC 639, 648 (Aug. 2004) (citing *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993)). Indeed, the purpose of the Part 56 regulations is "the protection of life, the promotion of health and safety, and the prevention of accidents." 30 C.F.R. § 56.1. The mere installation of a start-up alarm does not satisfy the purpose of the standard. I conclude that Oil Dri violated Section 56.14201(b).

Negligence

Randolph testified that there was an alarm mechanism for shut-down, but not for start-up. To him, this proved that the Respondent had to know that there was no start-up alarm. (Tr. 66:16-19) Randolph justified the moderate negligence determination because the violating condition had existed for years, which he felt constituted a form of mitigation based on "fair notice." (Tr. 67:21 – 68:2) It is unclear from the record what Randolph's reference to "fair notice" meant or how it related to mitigation. In general, fair notice is not considered a mitigating circumstance. Mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. Nonetheless, Oil Dri was not performing required workplace exams, which, if it had, would have alerted miners to the existence or lack of a start-up alarm. (Tr. 62:22 – 63:2; Tr. 64:5-13; Tr. 135:20-24)

I find that the mine had not used a start-up alarm system for years, had not been performing workplace examinations, and the miners, including the plant operator, did not know anything about a start-up alarm. It is clear that the Respondent failed to train its employees properly and failed to perform adequate workplace examinations. A reasonably prudent person familiar with the mining industry would have known of the need for and lack of a start-up alarm system, would have installed such a system, and would have trained miners to use the start-up alarm before starting the conveyor. I conclude that this violation arose from high negligence.

Gravity

Randolph believed this violation was reasonably likely to cause a fatal injury because he was aware of fatalities resulting from this type of violation in the past. (Tr. 62:4-12) He testified

to the danger inherent in a conveyor starting up when miners are not aware of it. (Tr. 62:4-12) Randolph believed that only one miner would be involved if the conveyor started without an alarm. (Tr. 65:17-21) I agree with the inspector's assessment.

Significant and Substantial

The first and fourth prongs of the *Mathies* test have been satisfied. Respondent's failure to have and use a start-up alarm created a discrete safety hazard which could have resulted in serious injuries to a miner. The remaining question is whether there was a reasonable likelihood that the hazard contributed to would result in an injury.

Randolph designated the gravity as reasonably likely to occur because there were multiple conveyors in the plant, and because the workspace next to the conveyors was confined. (Tr. 62:13-21) A miner could be seriously injured by a conveyor starting up without his knowing about it. (Tr. 73:16-20) It is reasonably likely that an unsuspecting miner working on a belt could get pulled into the conveyors.

I conclude that the Secretary proved by a preponderance of the evidence that the significant and substantial designation was warranted here.

Penalty

The operator does not have a history of violations for this standard. The mine operates 128,832 mine hours annually. The operator was highly negligent, and the violation was S&S. A fatal injury could have resulted. Payment of a penalty will not affect the operator's ability to continue in business. The operator demonstrated good faith in the abatement of the violative condition. I assess a penalty of $4,300.00.

Citation No. 8731998

Randolph issued Citation No. 8731998, pursuant to Section 104(a) of the Mine Act, to Oil Dri at its Ripley mine on May 21, 2013, alleging a violation of 30 C.F.R. § 56.17001. (Ex. S-6) Section 56.17001, a mandatory safety standard, states that "[i]llumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas." 30 C.F.R. § 56.17001. The citation alleges that:

> The truck warehouse loading dock employee is stated [sic] to average 4 to 6 trucks at night being loaded. The illumination where the trucks back up into the locking system was not adequate. The light directly above the loading surface perimeter would not come on. Also four other lights surrounding the dock area was [sic] not working. Miners climb down the dock and manually chock the truck wheels at times. A hazard to one of these miners exist [sic] of being crushed by a truck due to poor illumination.

(Ex. S-6)

Violation

The citation alleged that an injury was reasonably likely, could reasonably be expected to be fatal, the violation was significant and substantial, there was a high degree of negligence, and one person could be affected. (Ex. S-6) The parties disputed whether there was sufficient illumination at the loading dock.

The Commission has found that the judge must make a factual determination based on the working conditions in the cited area and the nature of the illumination provided to determine whether there was "illumination sufficient to provide safe working conditions." *Capitol Aggregates, Inc.*, 3 FMSHRC 1388, 1388 (June 1981), *aff'd*, 671 F.2d 1377 (5th Cir. 1982) (unpublished table decision). Randolph admitted that MSHA's standards do not speak of a minimum number of lights. It is up to the inspector to determine whether there was sufficient illumination. (Tr. 148:21 – 149:15)

Randolph testified that when he inspected the loading dock it was dark. Five out of the seven lights installed at the loading dock were not working. (Tr. 75:15-19; Tr. 78:20 – 79:1; Tr. 145:9-17; Ex. S-6) He asked workers at the dock if the lights could be turned on. The lights were burnt out, not turned off. (Tr. 79:4-11) Respondent admitted that at least one of the loading dock's main lights was not functioning on the day of the inspection. (Tr. 255:25 – 266:15)

Randolph testified that when a truck backed into the loading dock, there was an area approximately 150 feet in back of it with no light at all. (Tr. 145:9-17) He did not think there was sufficient lighting at the loading dock, particularly in the area where the trucks maneuvered to back into the dock. He believed the lack of illumination violated the intent of the standard, which is to prevent a truck driver from running over a miner while backing up. (Tr. 156:20-23)

Respondent argued that the lights in the loading dock area were sufficient to illuminate the dock itself and several feet beyond it. (Tr. 196:18 – 197:7; Tr. 219:14-20; Tr. 222:24 – 223:2; Tr. 226:16-18)

Respondent's photo exhibits R-12 and R-13 were not taken the day of the inspection. They were taken at a later date and showed more working lights than existed at the time of the inspection. The photos show a shed with lights which had not been built at the time of the inspection. All four lights on the loading dock are on in the photos, even though the Respondent admitted at least one of them was out at the time of the inspection. (Tr. 180:15-18; Tr. 284:16-23; Tr. 285:10-16; Ex. R-11)

Based on Randolph's testimony and the photo exhibits R-11, R-12, and R-13, I find that the illumination at the loading dock was insufficient. Respondent violated Section 56.17001.

Negligence

Randolph chose to classify this violation as involving high negligence because there had been a fatality at a sister plant under similar circumstances, and the miners present during this inspection knew about it. (Tr. 81:15-17; Tr. 83:2-9; Tr. 92:3-10; Ex. S-10) Additionally,

Randolph testified that to ameliorate the lack of lighting, the Respondent should have used a spotter to help drivers back their trucks into the loading dock. (Tr. 91:11-16) Respondent used a spotter at another dock at the same mine site. (Tr. 80:22 – 81:6) Randolph asked the miners present during the inspection if the Respondent performed workplace exams, to which they responded that they did not. (Tr. 75:20-23) This was an aggravating circumstance for Randolph.

A reasonably prudent person familiar with the mining industry would have made sure that the loading dock was adequately illuminated at night, especially when trucks back into the dock. Further, if the Respondent had been performing workplace exams, the poor illumination issue would have been corrected. I concur with Inspector Randolph that this violation involved high negligence.

Gravity

It was reasonably likely that a pedestrian walking in the poorly lit loading dock parking area could be hit and possibly killed by a truck. (Tr. 81:10-12; Tr. 90:20-22) If this were to occur, it is likely that only one person would be injured. (Tr. 90:24-25)

Significant and Substantial

The first and fourth prongs of the *Mathies* test have been satisfied. The lack of adequate illumination created a discrete safety hazard which could have resulted in serious injury. The remaining issue is whether there was a reasonable likelihood that the hazard would occur.

Miners loaded five to seven trucks at this dock every night. (Tr. 81:22-23) Randolph observed truck drivers getting out of their trucks and walking around the loading area. (Tr. 89:2-13) There was poor visibility due to insufficient illumination. The truck Randolph saw backing into the dock area had no back-up alarm (discussed below), and pedestrians were in the area. (Tr. 92:11-20) It was reasonably likely that this situation could result in serious injury to a miner. The Secretary proved by a preponderance of evidence that the significant and substantial designation was warranted.

Penalty

The operator had no history of violating this standard. The mine operated 128,832 mine hours per year. The operator was highly negligent and the violation was S&S. It was reasonably likely that a fatality could result from this violation. Payment of a penalty will not affect the operator's ability to continue in business. The operator the demonstrated good faith in abating the violation. A penalty of $4,800.00 is justified and reasonable.

Citation No. 8636886

Randolph issued Citation No. 8636886, pursuant to Section 104(a) of the Mine Act, to Oil Dri at its Ripley mine on May 28, 2013, alleging a violation of 30 C.F.R. § 56.14132(b)(1). (Ex. S-7) Section 56.14132(b)(1), a mandatory safety standard, states that:

> *[w]hen the operator has an obstructed view to the rear, self-propelled mobile equipment shall have* -- (i) *An automatic reverse-activated signal alarm*; (ii) A wheel-mounted bell alarm which sounds at least once for each three feet of reverse movement; (iii) A discriminating backup alarm that covers the area of obstructed view; *or* (iv) *An observer to signal when it is safe to back up.*

30 C.F.R. § 56.14132(b)(1) (emphasis added). The citation alleges that:

> The 18 wheel over the road customer truck Freightliner #104 vin# 211J44788 had backed into the loading dock without an automatic alarm. The fork lift operator stated he was in the area on the ground at this time [and] stated that he had spotted the truck. The driver had no idea of a spotter program and [the] plant supervisor stated they [did not have] a spotter program. Crushing fatal accident had occurred at another Oil Dry [sic] plant on Oct. 20th 2010[.] [T]he company has exhibited aggravated conduct by not controlling this violation at this operation.

(Ex. S-7)

Violation

The citation alleged that injury was reasonably likely and could reasonably be expected to be fatal, the violation was significant and substantial, it involved high negligence, and one person would be affected. (Ex. S-7) This citation was issued a week after the first set of citations described above, when Randolph went back to the mine for abatement purposes. He observed a truck at the same loading dock as the previous week (Tr. 94:10-18) backing up without a back-up alarm or spotter.[7] (Tr. 79:24 – 20:2; Tr. 94:20-22; Tr. 94:24 – 95:2; Tr. 95:25 – 96:6; Tr. 97:18-24)

The Respondent argued that it had an observer program in place to signal trucks while backing up into the loading dock. (Resp. Br. at 16) It argued that as soon as a truck came on site, the driver was directed by signage to go to the drivers' lounge to sign in, receive instructions and a loading slip, and for the Respondent to tell the driver which loading dock to use. (Tr. 182:11 – 183:6; Tr. 198:23 – 199:2) After that, the miner working the loading dock (the same miner who checked the truck in) was to observe the truck back into the loading dock and lock the truck into place. (Tr. 183:19 – 184:3; Tr. 199:19-25) The Respondent claimed that if the observer saw a pedestrian miner in the path of a truck backing up, the observer could stop the truck. (Tr. 222:10-17)

[7] The Respondent argued that there is a difference between a "spotter," as Randolph testified, and an "observer," as the regulation signifies. It is clear from the record that "spotter" and "observer" mean the same thing for purposes of this regulation. (Resp. Br. at 15) As such, I find the Respondent's argument unconvincing.

Despite this argument and the testimony of Respondent's witnesses, Randolph testified that he saw no spotter or observer and concluded that no such program was in place, and if it was in place, it was ineffective. (Tr. 100:13 – 101:25; Tr. 173:2-5) Indeed, when Randolph asked a driver if there was a spotter program in place at the loading dock, the driver denied knowing about it. (Tr. 89:25 – 90:9) Randolph also asked Diego Mejia[8] if the Respondent had a spotter program, and Mejia answered in the negative. (Tr. 179:15-20) Even if the Respondent intended for there to be an observer in place, there was no communication between the miner claiming to be the observer and the driver backing into the loading dock. (Tr. 90:13-15) This defeats the purpose of the standard, which is to protect pedestrian miners from being hit by a truck backing up.

I find that there was no observer program in place, and if Respondent intended for there to be one in place, it was ineffective. A reasonably prudent person familiar with the mining industry would have had an observer program in place, and would have communicated this to the truck drivers. Oil Dri violated Section 56.14132(b)(1).

Negligence

Randolph believed this citation arose from high negligence because there had been a fatal truck accident at a related company, the Respondent knew about it, and Randolph considered it Respondent's responsibility to ensure that a similar accident did not happen again. (Tr. 107:10-14; Tr. 108:2-7) This was the only testimony regarding the negligence determination.

This is sufficient evidence to support the conclusion that a reasonably prudent person familiar with the mining industry would have assured there was an adequate observation program in place and properly implemented. The inspector had been at the mine the previous week discussing the fatality at the sister plant and the lighting issues at the loading dock, which implicated a claim by the Respondent that it had an observer program in place. This violation involved high negligence.

Gravity

It is likely that a miner would be killed if hit by a truck backing into the loading dock area. (Tr. 105:15-19) Randolph believed that one person would be affected per incident. (Tr. 105:21-23) I agree.

Significant and Substantial

The first and fourth prongs of the *Mathies* test have been met. The failure to have an observer in place to monitor a truck without an alarm while backing up creates a discrete safety hazard. This hazard could have resulted in serious injuries. The remaining question is whether there was a reasonable likelihood that the hazard would result in an injury.

[8] At the time of the inspection, Mejia was the night shift plant supervisor. (Tr. 177:18)

Randolph thought it reasonably likely that an accident would happen because truck drivers get out of their trucks and walk around in the loading dock area for various reasons, including chocking their wheels (Tr. 105:25 – 107:1; Tr. 219:23-220:3) or going into the break room or bathroom. This increases the chance that one of them might get hit by another driver's truck, particularly at night. (Tr. 102:14 – 103:6; Tr. 1047:6-11; Ex. S-8) Randolph felt that the lack of a functioning observer system was unsafe, even if the lighting issue were resolved. (Tr. 96:10-16)

The Secretary proved by a preponderance of evidence that the significant and substantial designation was warranted.

Penalty

The operator does not have a history of violating this standard. The mine operates 128,832 mine hours per year. The operator was highly negligent and the violation was S&S. A fatal injury could have resulted. Payment of a penalty will not affect the operator's ability to continue in business. The operator demonstrated good faith in abating the violating condition. The Secretary specially assessed this penalty at $9,300.00. I find that because Randolph had been at the mine the previous week discussing the loading dock and the issues that were present, Oil Dri should have been on notice that greater efforts to comply with the Mine Act were warranted. I therefore assess the penalty at $6,000.00.

WHEREFORE, it is **ORDERED** that Oil Dri pay a penalty of **$15,200.00** within thirty (30) days of the filing of this decision.

It is further **ORDERED** that Citation No. 8731981 be **VACATED.**

L. Zane Gill
Administrative Law Judge

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