FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 3, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. ORIGINAL SIXTEEN TO ONE MINE, INC., Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2014-527-M A.C. No. 04-01299-345516 Docket No. WEST 2015-158-M A.C. No. 04-01299-366336 Docket No. WEST 2015-251-M A.C. No. 04-01299-368842 Mine: Sixteen to One Mine Docket No. WEST 2015-77-M A.C. No. 04-03065-363861 Docket No. WEST 2015-78-M A.C. No. 04-03065-363861 Docket No. WEST 2015-240-M A.C. No. 04-03065-368847 Docket No. WEST 2015-381-M A.C. No. 04-03065-372727 Mine: Plumbago Mine

DECISION AND ORDER

Appearances: Michele A. Horn, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner

Michael M. Miller, *pro se*, Alleghany, California, for Respondent

Before: Judge Moran

The Original Sixteen to One Mine and the Plumbago Mine are underground gold mines of historical significance within California's Alleghany Mining District. Tr. 17-18.[1] A hearing regarding the citations associated with the dockets listed above was held in Nevada City, California from November 17-19, 2015. Seven citations were settled or vacated at the hearing.[2]

Before turning to the particular contested matters, the Court believes it is important to make the following comments. For several of the citations in these various dockets the Court reduced the civil penalty from the amount proposed initially and, in some instances, from revised amounts sought by the Secretary at the hearing. The Court wishes to advise Respondent that it should not take the reductions as signaling that, by going to hearing, penalties may be reduced. Respondent is not new to mining, nor to MSHA, and as such, it may be that in future litigation penalty amounts may be adopted as originally proposed or as revised by the Secretary during a hearing. It is also possible that penalties may be increased by the Court beyond the amounts sought by the government. Of course, the penalty for established violations is dependent upon the particular facts adduced at each hearing.

A Preliminary Matter Pertaining to All of the Contested Matters in This Litigation

A running controversy during the hearing involving discovery was whether Respondent requested copies of the inspectors' field notes associated with the various citations. *See, e.g.*, Tr. 123, 302-04. The Court ultimately resolved this dispute by requiring counsel for the Secretary to determine if Mr. Miller made a request for the field notes of the inspectors who testified in this proceeding. If no request was made, that would end the matter, in terms of Respondent making objections about their absence. If the request was made, then the Secretary's Counsel was to advise as to the date such documents were delivered to Respondent, assuming such delivery was made. If, despite such a request, the field notes were not delivered, then the Court instructed that

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[1] The Court will use the designations "Tr." to refer to the hearing transcript, "GX" to refer to the Secretary's exhibits, and "RX" to refer to Respondent's exhibits.

[2] At the outset of the hearing Respondent withdrew its contests related to Citation Nos. 8698193 (WEST 2014-527-M), 8783100 (WEST 2014-527-M), and 8793807 (WEST 2015-251-M), agreeing to pay the associated penalties as proposed. Tr. 10-11. The Secretary's post-hearing brief includes Citation No. 8793615 as among those in which Respondent withdrew its contest, but that Citation was among the contested matters during the hearing. See discussion *infra* for GX 33, which is the exhibit associated with Citation No. 8793615. For Citation No. 8793616 (WEST 2015-78-M), the Secretary agreed to modify the citation to reflect lost workdays or restricted duty from the original designation as fatal, with the penalty remaining as proposed. Tr. 11. During the hearing, the Secretary agreed to modify Citation No. 8698194 (WEST 2014-527-M) to No Likelihood, No Lost Workdays and Low Negligence and to reduce the penalty to $50.00. The Secretary vacated Citation No. 8793619 (WEST 2015-158-M) at hearing. Citation No. 8698227 (WEST 2015-78-M) was accepted by the operator with the Secretary agreeing to remove from Section 8 of the citation the sentence, which reads, "This mine has been in operation in the past during times of favorable commodities prices, and the mine is having rehabilitation activity been [sic] performed." Sec'y's Post-hearing Br. 4, 35 (quoting the citation) ("Sec'y Br.").

Counsel was to deliver all such field notes to Respondent, and Respondent would then have 2 weeks to review those notes and, if applicable, to identify in what manner the absence of those notes disadvantaged Respondent. Tr. 304-05.

Following the Court's instructions at the hearing, Attorney Horn responded on November 21, 2015, as follows:

> Cc: Michael Miller (mmeistermiller@gmail.com)
> Subject: Original Sixteen to One discovery
>
> Your Honor,
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> In response to directions given by you at the hearing last week, I have inquired as to whether or not the General Field Notes associated with the seven dockets discussed at hearing were sent to Mr. Miller prior to hearing.
>
> Per my records I received only one discovery request from the operator. It was sent on September 30, 2015, via e-mail and the discovery portion of the message from Mr. Miller read, "Please send me the citations MSHA has issued for the next hearing."
>
> In response to this request, I sent the citations, citation notes and photographs for each citation which was discussed at the hearing last week. Contrary to my stated belief last week, I did not send the General Field Notes.
>
> However, as the Mr. Miller's discovery request was limited to "citations" it is my understanding that this ends any issue regarding the non-production of the General Field Notes.
>
> Thank you.
> Michele Horn

The Court responded to Attorney Horn's email as follows:

> Saturday, November 21, 2015
>
> Dear Attorney Horn (and Mr. Miller):
>
> Thank you, Attorney Horn, for your prompt attention to this issue. On the basis of your message below, you are correct that, per my order during the hearing, and your message, below, which relates that "as the Mr. Miller's discovery request was limited to "citations" it is [the Secretary's] understanding that this ends any issue regarding the non-production of the General Field Notes." Thus, absent Mr. Miller being able to show that he sent you or a representative for the Secretary a specific request seeking the General Field Notes related to the dockets in issue during our hearing this past week, the matter is ended.

I want to reiterate that I appreciate the professionalism displayed by all during the hearing.

Sincerely, Judge William Moran

No such showing was thereafter provided by Mr. Miller, thereby resolving the issue in the Secretary's favor.

Respondent's Post-hearing Brief

The Court read and considered Respondent's post-hearing brief and makes the following observations and comments about it. Not every point raised in the brief is discussed, but the entire brief was considered. Part of that consideration involves the Court's discretion as to the need to comment upon specific parts of the brief. The same principle was applied to the Secretary's post-hearing brief — not every contention is addressed. Among the contentions made in Respondent's Brief were the claims that some of the inspectors hired by MSHA are not qualified; that the Plumbago Mine, while a mining operation, is not conducting mining activities; and that the activities at that mine do not affect interstate commerce. Mr. Miller's position is that only Inspector Rogers was qualified and competent to conduct the inspections and issue the citations/orders which resulted from those events. The Court rejects each of these contentions, as they are without any merit.

The Court notes that even if one were to accept Respondent's claim that nearly all of the MSHA inspectors involved here were unqualified, *a claim with which the Court does not agree at all*, nearly all of the various citations in this litigation were established apart from one's mining knowledge. A few examples clearly show this. Citation No. 8783098 involved a violation of 30 C.F.R. § 57.15031(a) for failing to have a self-rescuer within 25 feet of a worker's location. If a self-rescuer is more than 25 feet away, there is a violation, and no previous mining experience is needed to make such a determination. Another example, among *many* such instances in this litigation, is Citation No. 8793805, which involved finding combustible materials, such as grass, brush, wood, and rubbish within 25 feet of a powder magazine. No mining expertise is required to make such a determination, though in fact the issuing inspector had 18 years of such experience. While more examples are not needed, a few more are here included. It is noted that Citation No. 8785247 involved a vehicle with no functioning brake or tail lights, a violation which Respondent acknowledged to exist. As a last illustration, Citation No. 8793806 involved a magazine that was not bullet resistant, as it had a steel exterior of about 1/8 inch with an interior lining of about 1/2 inch of plywood, instead of the required 1/4 inch of steel and 2 inches of hardwood.

Respondent also maintains that citations/orders must be the result of "specific conditions at the mine." Resp't's Post-hearing Br. 4. The Court was attentive to this claim, both at the hearing and during the Court's close review of the transcript, as reflected in this fifty-plus page decision, and finds that, for each alleged violation (other than the one that was dismissed), the violations were both established and based upon the specific conditions at the mine. To the extent that prior history was referenced during the course of the testimony, a mine's history of violations and extensive mining experience are factors which may be taken into account, per the statutory penalty criteria, where violations have been established.

Of great concern to the Court, Respondent asserts that its "miners are ragingly mad with the administrative agency legislated to protect them. Mr. Boylan and his supervisors put them out of work." Resp't's Post-hearing Br. 7. Except for the instances where inspectors found employees working at Respondent's mine, despite a live withdrawal order in place, no one with MSHA put any employee out of work. The larger problem, and it must be faced directly, is that Respondent objects to MSHA's lawful presence and the carrying out of its Mine Act obligations through the statutorily-mandated inspections under that Act. The sadly contentious nature of the relationship between MSHA and Respondent will not improve until Respondent comes to accept that MSHA's presence and its inspections are legitimate. While it may be potentially useful for the MSHA district office to have discussions with Respondent, nothing positive can come of such discussions until Respondent first accepts the legitimacy of MSHA, its authorized representatives, the inspectors, and their statutory inspection obligations and duties. **The Court calls upon Mr. Miller to discard the combative and non-productive approach, as reflected vividly in his post-hearing brief, and to have a change of heart and attitude, as he approaches the last years of working experience in the mining industry.**

The Court also fully considered Mr. Miller's Reply Brief. That submission largely continues with the themes raised in Respondent's post-hearing brief, and the Court will not revisit those contentions. One distinction is that, for the Reply Brief, Respondent raises specific objections for a few of the citations. Having reviewed those contentions, not all merit a response from the Court. Where the Court considers that a response is warranted, those will be addressed *infra*.

Respondent's Challenge to MSHA's Jurisdiction

Throughout this litigation, Respondent has also taken the position that MSHA lacks jurisdiction to inspect its mines. The Court read all of the contentions made by Respondent and rejects them without qualification. Nothing sums up Respondent's position better than the concluding line from its post-hearing reply brief which asserts that not a one of "[t]he citations and orders issued should not be affirmed by the court." Resp't's Reply Br. 9.

At the hearing, the Court explained to Mr. Miller that the federal courts have long ago affirmed the jurisdiction and breadth of the Mine Act. Nevertheless, a few cases, among a plethora of such holdings, are noted. In *Cyprus Industrial Minerals Co. v. FMSHRC*, 664 F.2d 1116 (9th Cir. 1981), it was held that digging a tunnel into a hill for the purpose of assessing the value of talc deposits constitutes mining, even if minerals were not being extracted. In *D.A.S.*

Sand & Gravel, Inc. v. Chao, 386 F.3d 460 (2d Cir. 2004), it was held that the Commerce Clause permits Congress to regulate mines whose products are sold *entirely intrastate*. Finally, in *Donovan v. Carolina Stalite Co*., 734 F.2d 1547 (D.C. Cir. 1984), it was held that Congress intended the definition of a mine under the Act to be given the broadest possible interpretation.[3]

Legal Standards

Significant and Substantial

The Significant and Substantial ("S&S") terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to "significant and substantial," i.e., more serious, violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

> 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.

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). The S&S determination "must be made at the time the citation is issued '*without any assumptions as to abatement*' and in the context of 'continued normal mining operations.'" *Paramont Coal Co.*, 37 FMSHRC 981, 985 (May 2015) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

Negligence

As the Commission recently clarified, "judges are not required to apply the definitions of Part 100." *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). Rather,

> judges may evaluate negligence from the starting point of a traditional negligence analysis rather than based upon the Part 100 definitions. Under such an analysis, an operator is negligent if it fails to meet the requisite standard of care - a standard of care that is high under the Mine Act[.]

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[3] As the D.C. Circuit noted its *Carolina Stalite* decision, "Cases decided by the Third, Ninth, and Fourth Circuits accord with [its] interpretation of the Act, and uniformly recognize *section 3(h)'s 'sweeping definition' of a mine*." 734 F.2d at 1554 (emphasis added).

Id. Accordingly, "a Commission Judge may find 'high negligence' in spite of mitigating circumstances or may find "moderate" negligence without identifying mitigating circumstances." *Id.* at 1703. The Commission has stated that "the gravamen of high negligence is that it 'suggests an aggravated lack of care that is more than ordinary negligence.'" *Id.* (quoting *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

Unwarrantable Failure

The Commission has stated that an "unwarrantable failure is aggravated conduct constituting more than ordinary negligence." *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013). Unwarrantable failures are characterized by such conduct as "'reckless disregard,' 'intentional misconduct,' 'indifference,' or a 'serious lack of reasonable care.'" *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1350 (Dec. 2009) (quoting *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (Dec. 1987)).

> Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, including (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance.

Manalapan Mining Co., 35 FMSHRC at 293. When determining whether a violation was due to an unwarrantable failure, the Court must consider all relevant factors and the relevant facts and circumstances of the case to determine whether the actor's conduct was aggravated and whether mitigating circumstances exist. *IO Coal*, 31 FMSHRC at 1351.

Penalty Determinations

"The Mine Act sets forth a bifurcated penalty scheme under which the 'Secretary proposes penalties before a hearing based on information then available to him and, if the proposed penalty is contested, the Commission affords the opportunity for a hearing and assesses [the] penalty.'" *Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3101 (Dec. 2014) (quoting *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1151-52 (7th Cir. 1984)). Under this bifurcated scheme, "[t]he Secretary's regulations at 30 C.F.R. Part 100 apply only to the Secretary's penalty proposals, while the Commission exercises independent 'authority to assess all civil penalties provided [under the Act]' by applying the six criteria set forth in section 110(i) [of the Mine Act]." *Id.* (quoting 30 U.S.C. § 820(i)). The six section 110(i) factors are:

the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and 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).

Findings of Fact and Conclusions of Law for the Citations and Orders in These Dockets

Docket No. WEST 2014-527-M (Sixteen to One Mine)

Citation No. 8783098[4]
Proposed Penalty: $100.00. Penalty Assessed: $50.00.

The Secretary called MSHA Inspector Miles Frandsen, regarding Citation No. 8783098, GX 2(a).[5] The inspector issued the citation to the Sixteen to One Mine on January 23, 2015, for an alleged violation of 30 CFR § 57.15031(a).[6] Sec'y Br. 5. Frandsen found a worker, a contractor employee, without his self-rescuer device within the specified footage of his work area. The type of self-rescuer used for this type of mine, a metal-nonmetal mine, scrubs carbon monoxide from the air. Tr. 20-21. The cited standard requires that the device be within 25 feet of the worker's location. The worker in this instance was about 50 feet away from the device. Tr. 22. The inspector listed the likelihood of injury as "unlikely." His concern was that if a wall of smoke were to enter the mine and the worker couldn't get to and find the self-rescuer, the worker could perish from the smoke exposure. Tr. 23. However, the inspector did not find anything that would be likely to cause a fire, noting, for example, that the mine's timbers were moist. *Id.* Frandsen's view was impacted by a personal experience where a miner couldn't get to his self-rescuer, even though it was on the other side of the shuttle car. In that instance, the self-rescuer was a mere 5 to 6 feet away from the miner. Tr. 24. The inspector considered the

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[4] The R-17 reports are GX 17 for the Sixteen to One Mine and GX 40 for the Plumbago Mine. Tr. 660. The reports detail the mines' respective histories of violations.

[5] By stipulation, Respondent agreed to the admission of the government's exhibits, designated GX 1 through GX 40. Tr. 26.

[6] Standard 30 C.F.R. § 57.15031, titled "Location of self-rescue devices," provides:

> (a) Except as provided in paragraph (b) and (c) of this section, self-rescue devices meeting the requirements of standard 57.15030 shall be worn or carried by all persons underground.
> (b) Where the wearing or carrying of self-rescue devices meeting the requirements of standard 57.15030 is hazardous to a person, such self-rescue devices shall be located at a distance no greater than 25 feet from such person.
> (c) Where a person works on or around mobile equipment, self-rescue devices may be placed in a readily accessible location on such equipment.

negligence to be moderate, as the owner, Mr. Miller, did not challenge the distance from the worker to the self-rescuer, and had advised the worker to keep it “in the area.” Tr. 25. The inspector stated that a self-rescuer is as important in a gold mine as it is in a coal mine. Tr. 33. Frandsen affirmed that he marked that a fatality could occur, a conclusion based on one not being able to breathe due to smoke from a fire. Tr. 34. However, he also marked that it was an unlikely to occur event. Thus, he expressed that “[i]t’s not the likelihood of the fire, it’s the result of not having [a self-rescuer] when [one is] in a fire.”[7] Tr. 35.

Jonathan Farrell, a long-term employee of Respondent, testified with regard to the self-rescuer citation. Farrell was not present when the citation was issued but he believed that, because the mine has a reversible fan, ventilation can be controlled. It was also his view that the individual was within a safe distance of the self-rescue device. Tr. 66.

Mr. Miller also testified, asserting that the person cited was not a miner, nor an employee, but instead was an outside contractor’s employee who was doing exploratory work. Tr. 49. The operator also defended this citation by attesting that at the time the citation was written there were no hazards in the mine that would lead to the self-rescuer being needed and that a self-rescuer is only needed in an emergency situation. As such, the contractor’s failure to wear the device should be evaluated as if conditions existed such that a self-rescuer was needed. Tr. 50. The Court rejects this viewpoint and incorporates the Secretary’s arguments addressing this issue in its post-hearing brief but, for the other articulated reasons, including those in footnote seven, *supra*, does not adhere to the claim that the violation was S&S.

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[7] Respondent stated that the cited area was a main adit and that there was no hazard present, as the rock there is very competent. Tr. 50. Respondent also expressed that there was no risk of a fatality because a person would only need to walk a short distance to safety, the mine is naturally ventilated, and the distance to the portal was less than 2,500 feet. Regarding the mine’s natural ventilation, the ventilation direction is determined by factors such as the barometric pressure and temperature. Tr. 52-53. Respondent’s argument in this regard, beyond air movement, is the amount of air in the mine. Respondent asserted that with “35 miles of tunnels” in the mine, there are millions of cubic feet of open space and many ways to exit the mine. In Respondent’s view, that makes the notion that one might not have sufficient air to breath farfetched. Tr. 53-54. Respondent also opined that there was not sufficient fuel to create a fire. Tr. 50. For those reasons, Respondent believed that the citation should have been marked as “no likelihood” and the mine’s negligence was none. Tr. 51. Under those conditions, Respondent urges, with the device not more than 50 feet away, the citation should not have been issued. Tr. 51. Respondent admitted that the cited worker was there at the invitation of Respondent and had been given the 40-hour site-specific mine training. Tr. 55. Respondent could not recall whether he informed the workers that the self-rescue device had to be within 25 of where they were working. Tr. 56. Respondent continued to assert that the worker was not a contractor, but did not commit as to whether he contended that the worker was not covered under the Mine Act. *Id.*

As the Secretary has noted, the standard requires, generally, that self-rescue devices be worn or carried "by all persons underground." 30 C.F.R. § 57.15031(a). However, where doing so would be hazardous, the 25 foot rule applies, and the citation in this instance involved that exception. The Secretary correctly observes that there "is no requirement of any legal relationship between the person underground and the mine operator nor is there any requirement that the person be employed as a miner." Sec'y Br. 6.

This violation was conceded in that Respondent admitted that the device was not within 25 feet of the miner. The citation was issued as unlikely, non-S&S, fatal, moderate negligence, and one person affected, with a proposed penalty of $100.00. The Secretary's Part 100 procedures for proposed assessment of civil penalties does not allow for a penalty of less than $100.00.[8] The Court is not so restricted as it looks to the statutory criteria, not Part 100. Given the conditions at this small mine, and the other evidence adduced, a fatal accident was not likely to be the result but rather lost workdays or restricted duty. Accordingly, the Court declines to modify the citation to reasonably likely and S&S. A penalty of $50.00 is imposed for this violation.

Citation No. 8783099
Proposed Penalty: $100.00. Penalty Assessed: Dismissed.

Citation No. 8783099, GX 3, citing 30 C.F.R. § 57.12010,[9] was addressed by Inspector Frandsen. Issued on January 23, 2014, the inspector alleged finding the mine's phone line touching a 480-volt power cable in several places underground. Tr. 37. The hazard was not what one might anticipate, however, as it did not involve any shock hazard. Instead, it pertained to the electrical field around the power cable. Where that cable touches the phone line, the electrical field from the cable has the potential to cause the phone line to malfunction, but only *during equipment start-up*. Photos showed the phone line touching the cable. GX 3c (the phone line is white). The inspector stated that it was *unlikely* that the power cable would short out the phone line. Tr. 40. This was because the mine did not then have any electrical equipment underground that would cause a surge when such equipment was started. *Id.* The inspector defended his designating the injury as "fatal" on the basis that if one couldn't use the phone for help one could perish. The negligence was marked as moderate because a part-time electrician was designated to do the electrical work and this problem was obvious. *Id.*

[8] Part 100 actually provides for a minimum penalty of $112.00, but a 10% "good faith" allowance may be factored in "where the operator abates the violation within the time frame set by the inspector." 30 C.F.R. § 100.3(f).

[9] The cited standard, § 57.12010, "Isolation or insulation of communication conductors," provides: "Telephone and low-potential signal wire shall be protected, by isolation or suitable insulation, or both, from contacting energized power conductors or any other power source."

The Court asked the inspector about this citation and the standard cited, which is titled "Isolation or *Insulation* of Communication Conductors." 30 C.F.R. § 57.12010 (emphasis added). The inspector stated that the standard requires that such telephone lines have to be protected either by isolation or by suitable insulation and in this instance there was neither protection. Tr. 42. Abatement was achieved by separating the lines. *Id.*

Upon questioning by Respondent, the inspector admitted that he had no idea how long the condition had existed. Tr. 43. He did not know precisely what type of phone line was being used. Respondent also inquired about SO wire[10] and its use for phone lines. Tr. 43-44. Respondent's non-attorney representative Mr. Michael Miller testified about this citation. He stated that the insulation on the phone line was approved for underground use when it was purchased, that the wire is "well-insulated," and that it works. Thus, Miller contended that the wire had suitable insulation. Tr. 67. Miller also asserted that the inspector's designating the violation as potentially involving a fatality was too speculative. Tr. 68. Still, Miller did concede that the phone lines did touch the 480 volt power cable in several locations. Miller stated that the power cable had been there for some 15 or 20 years and the phone line was there and subject to numerous MSHA inspections without any citations being issued for this issue. Miller believed that the issuing inspector cited the condition because his background was mostly associated with coal mines and Miller considered the comparison inapt because the differences between the Sixteen to One Mine and a coal mine are so profound. Tr. 70. Miller continued, stating that the phone line insulation, as shown by GX 3c, was intact. As to the electrical lines, he stated that, being SO wires, they were already double insulated, and such electrical wires are MSHA approved. Tr. 71. Thus, Miller maintained that the phone wires are unlike house phone wires and would not be subject to the concerns expressed by the inspector. Tr. 72. Miller then reaffirmed his stance that the phone wires were adequately insulated. *Id.* This view was based upon his knowledge of the phone wires when they were purchased. Tr. 73.

The Secretary recalled the inspector, who stated that the power line has insulation in that the individual conductors are insulated and the jacketing around those conductors serves as protection, as opposed to insulation. Tr. 74. The same, he stated, is true of the phone line as it too has insulation on the inside wires and, like the power line, there is an outer covering, which he again distinguished as "protection" as opposed to "insulation." *Id.* Still, the inspector stated that the phone line's insulation was not sufficient to meet the cited standard, 30 C.F.R. § 57.12010, asserting that the standard requires *additional* insulation for the phone line. Tr. 75. However, the Court observed that the standard does not express that there must be *additional* insulation. *Id.* The Court pressed the inspector to explain his basis for asserting that the insulation on the phone line was not suitable. Tr. 77. The inspector maintained that his MSHA training was that when such wires touch, they are to cite the standard as being violated. *Id.* The Court then asked the inspector if there was any telephone wire that would meet the standard's requirement for adequate insulation and was advised there is no such wire. *Id.*

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[10] SO refers to cable that is suitable for severe duty. Tr. 78.

While isolating the phone line from the power cable is an option, the phone line can be wrapped with simple electrical tape to provide the insulation sufficient to protect the signal. Tr. 79. The inspector repeated that he evaluated the violation as unlikely, noting that there was "no underground equipment that would probably generate [the electrical field that concerned him]." Tr. 79. Despite that concession, he believed that it was possible, *in the future*, that such equipment could be added at some time. Tr. 79. Based on the inspector's later response, the Court asked why he did not mark the citation as "no likelihood" as opposed to "unlikely." Tr. 80. In response, apparently not understanding the question, he stated that he did not remember what was in the mine. *Id.* Respondent was successful in bringing out the lack of prior MSHA enforcement of this standard for the phone lines. Tr. 81.

Upon consideration, this citation, No. 8783099, is DISMISSED. The Secretary was unable to authoritatively respond to the Respondent's contention that the SO cable meets the standard. Further, the inspector's admission that there was no underground equipment that would probably generate the electrical field that concerned him suggests that the violation was not present with the equipment then in the mine.

Docket No. WEST 2015-77-M (Plumbago Mine)

Citation No. 8698235
Proposed Penalty: $5,000.00. Penalty Assessed: $500.00 (five hundred).

Citation No. 8698235, GX 19, dated May 12, 2014, and citing 30 C.F.R. § 50.10(a),[11] was issued because there was a death on the mine property which was not reported to MSHA. Tr. 512. The deceased was Mr. Buck Barker, who was present at the mine site strictly as a caretaker, not as a miner. Tr. 513. He died on May 2, 2014.

The standard cited requires that MSHA be notified within 15 minutes when anyone dies on a mine site. In this instance, notification did not occur until after the citation was issued. Tr. 513. The inspector stated that the standard exists because MSHA has jurisdiction at mines and when someone dies it is part of their responsibility to determine the cause of death. Tr. 514. He acknowledged that some deaths at a mine are unrelated to mining activity. For example, one could simply have a heart attack. Nevertheless, the circumstances do not change the duty to report. Tr. 514. Mr. Barker's living quarters at the mine were near a historical building at the mine. Tr. 515; GX 19c, photo 1.

The citation was listed as non-S&S, no lost workdays, and no likelihood because it was a notification, that is, a reporting, standard. Tr. 516. However it was marked as high negligence because the operator has been in the mining industry for a long time and knew of the requirement when a person dies at a mine site. In fact, the inspector asserted that Mr. Miller had dealt with a mine site fatality previous to this one. *Id.* The inspector, speaking to the issue of the operator's

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[11] 30 C.F.R. § 50.10, titled, "Immediate notification," provides: "The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred involving: (a) A death of an individual at the mine."

knowledge of the mine site death, stated that workers at the mine informed him that the mine operator called the local authorities about the death. Tr. 518. The individual had died a couple of days before the inspector's arrival. Tr. 518. Mr. Miller did not ask any questions of the inspector about GX 19.

Mr. Miller testified about GX 19, stating that, far from Mr. Barker being a "caretaker," the mine was a caretaker for him. Tr. 532. Miller believed that the cited standard's reference to whether an operator knew or should have known of an accident occurring was inapplicable because no accident was involved; instead, the 80-year-old man simply died of natural causes. Tr. 533. Miller added that he believed he spoke with someone in the MSHA district office for clarification on this matter but never received any response. The Court then took note that the definition of "accident" under § 50.2(h), means the death of an individual at a mine. Tr. 536. Mr. Miller responded to the Court's observation, effectively acknowledging that he was in violation of the standard. Tr. 536.

Taking into account the undisputed role of the deceased, who was not in any manner a miner, nor one who provided service to the mine in the way, for example, that an independent contractor might aid in the mine's operation, and that this individual, who acted solely as a caretaker, essentially by his presence to deter trespassers, and also considering that the mine did contact other authorities, albeit not MSHA, the Court imposes a significantly reduced penalty of $500.00. This penalty is consistent with the "no likelihood," "no lost workdays," non-S&S findings on the citation. In context, the negligence is found to be "low," not the "high" designation made by the inspector.

Citation No. 8698236
Proposed Penalty: $112.00. Penalty Assessed: $75.00.

Citation No. 8698236, GX 20a, a section 104(a) citation, was issued on May 13, 2014, at the Plumbago Mine. This citation was issued because of an earlier-issued section 104(g)(1) order issued May 6, 2014, requiring the miners to be withdrawn from the mine until they received training. When the inspector returned to the mine for a compliance follow-up visit on May 13th, the miners were still working at the site, despite not having received the training. Tr. 519. At the time of the return visit, miners "Britt [McDaniel] and Joseph [Sauer]" were present and they were working in the shop at the mine site. Tr. 521, 525. They informed that they had received some training, that is, a "safety talk," from Mr. Miller, but did not know it if was in compliance with the earlier-issued order. Tr. 521-22. Also, Mr. Miller told them it was okay for them to be working at the site. Tr. 525. The inspector noted that if the required Part 48 training had been done, there would be a record of that. *Id.*

At the time of his follow-up visit on May 13, 2014, no training plan had been submitted to MSHA for the Plumbago Mine. No records were produced for the inspector, nor had the section 104(g) withdrawal order been terminated. Tr. 523-24. The citation was marked as no likelihood and non-S&S, since it was a violation of a section of the Act but not a violation of a safety or health standard. Though the inspector initially marked it as "reckless disregard," he ultimately marked the violation as high negligence, feeling that it met that lesser criteria better. Tr. 525. Mr. Miller did not ask any questions of the inspector about Citation No. 8698236.

Mr. Miller testified about the charge of working in the face of a withdrawal order. He began by stating that after the inspector raised the matter, he went back to the training records for the Sixteen to One Mine and determined that the only difference between that mine and the Plumbago was the communications. Tr. 537. However, this testimony related to the training plan, and not to the training itself. Tr. 538. Miller then conceded that there was a "paper problem" but adamantly asserted that no one was in any danger, and he believed they were not in violation based on his understanding of the law. Miller believed that everyone was trained and also had years of experience with his operations. *Id.* Miller reiterated that his men were trained but that, as a small operation, the paperwork lags behind. Tr. 539. Small mining operations such as these mines, Miller stated, are overwhelmed with paperwork. *Id.* Though he conceded that he allowed the miners to go back to work, he probably told them to work on the surface only, not underground. Tr. 540.

Miller then asserted that he had certificates of training for Britt McDaniel, Skyler Noble, Joseph Sauer and Kevin George, dated July 22, 2014, to support his contention that those miners were not "newly hired experienced miners." Tr. 541-42; RX 6. He stated that all the miners did was move over to a different mine, from the Sixteen to One Mine to the Plumbago. Tr. 542. An objection was made by the Secretary as the document related to the Sixteen to One Mine and it involved annual refresher training, not newly hired experienced miner training. *Id.* Besides, the training applied to the wrong mine, and there was the additional issue of it not being newly hired experienced miner training. Instead the proposed exhibit related to annual refresher training. Mr. Miller countered that the miners were not "newly hired," as that would mean, in Miller's view, that the miners were coming to the property for the very first time. Tr. 544. At most, he contended, they had made a paperwork error. The Court observed that, if it can be shown that the miners met the qualifications at the Sixteen to One Mine, such a fact could impact the penalty assessment. The Court allowed the exhibit, RX 6, a two page document, to be admitted. Tr. 545.

On cross-examination of Mr. Miller, he admitted that RX 6 reflects training records pertaining to the Sixteen to One Mine. Tr. 548. Miller stated that he completed the training for Britt McDaniel, Skyler Noble, and Joseph Sauer. Though he did not make out the forms, per RX 6, he did sign them. Tr. 549. Miller agreed that he is a certified MSHA trainer and that, as such, he is aware that annual refresher training is *not* the same as newly hired experienced miner training. Tr. 550. However, he stated he did not know that such training has to be site specific. *Id.* Mr. Miller expressed that he could not answer the question of whether every mine requires its own training plan, stating "there's too many unknowns" in the question posed. As an example of an "unknown," Miller stated that he did not know the definition of a mine as used in the question. Tr. 551. Significantly, Miller did concede that there was no training plan in existence for the Plumbago Mine at the time that the miners signed the training plans reflected in RX 6. *Id.* Miller agreed that the training record for Kevin George, per RX 6, was for newly employed experienced miner training on May 20, 2014. Tr. 552.

Continuing with regard to GX 20, relating to the first working in the face of an order received by Miller regarding this litigation, when Mr. Miller was asked if he was upset upon receiving the first 104(g)(1) withdrawal order on May 13th, he responded that he knew from his employees that the order had been issued and that he "probably got on the phone right away." Tr. 554. He believed that the only issue was the training, not the paperwork. *Id.* He admitted that when inspector Dan Boylan returned to the mine on May 13th, MSHA considered the miners at the Plumbago mine to not be properly trained. Tr. 555. However, Miller denied that he sent the miners back to work without the required training being received. *Id.* His support for that view is that those miners had the training, albeit for the Sixteen to One Mine, but that there was no difference in the training for those two mines, except, as noted, for a different communication system at the Plumbago. *Id.* He then suggested, imprecisely, that the next morning they got the "procedure" (possibly referring to the communication system or perhaps the whole paperwork for the Sixteen to One Mine) in writing and took it over to the Plumbago Mine. *Id.* However, he admitted that he had not submitted a plan to MSHA, but added that he didn't know he needed to do that. Tr. 556.

On further cross-examination, Miller agreed that following Inspector Boylan's issuance of a withdrawal order at the Plumbago Mine on May 17, 2014, the miners then came to the Sixteen to One Mine and met with him, informing him of the withdrawal order. Tr. 560. Miller then telephoned MSHA about the issue. However, he denied asking Boylan "what the hell" he was doing at the Sixteen to One Mine office. He could not recall if Boylan told him he had issued a 104(g) withdrawal order, or whether the inspector asked to see the mine's training records. Tr. 561. Miller agreed that he knew the issue was the training of his miners. Tr. 562.

On May 13, 2014, Boylan issued the working in the face of an order violation (GX 20a), but he had not delivered the 104(g)(1) order in person prior to that date. Tr. 570. Boylan saw what would become RX 6 on the first day he arrived at Plumbago in connection with the hazard complaint on May 6, 2014, but determined that it was insufficient because it related to the Sixteen to One Mine, not the Plumbago Mine. Tr. 572. Training is site specific. Tr. 572-73. This is because a training plan must address the geology, hazards, and conditions relevant to the particular mine site and these mines are at different sites. Tr. 573.

Mr. Miller attempted to show that the geology for the two mines was essentially the same, and by that, he was suggesting that one could have a single plan which applied simultaneously to both mines. Tr. 574. The inspector conceded that the geology was not different; rather the violation was based on the lack of a plan for the Plumbago Mine. Tr. 574-75. The Court then interjected that even if Mr. Miller could establish that in every regard the Sixteen to One and the Plumbago mines were identical, it still wouldn't affect the requirement to have a separate plan for each mine. Tr. 576. As noted, such a consideration could be considered in assessing a penalty. Mr. Miller noted that he had previously conceded that there was no separate plan for the Plumbago. *Id.*

Upon consideration of the evidence adduced, the Court imposes a civil penalty of $75.00. This takes into account the slight differences between the plans but still holds Respondent responsible for the compliance obligation.

Docket No. WEST 2015-78-M (Plumbago Mine)

Order No. 8698224
Proposed Penalty: $112.00. Penalty Assessed: $112.00.

Inspector Boylan testified regarding the section 104(g)(1) order, Order No. 8698224.[12] This matter arose in connection with a verbal hazard complaint received by MSHA on May 5, 2014. Tr. 386. The complaint was anonymous and made by telephone. Thereafter, it was assigned to Boylan. The allegation was that the Plumbago Mine had no telephone and no permit for explosives storage and use, and that there was drug and alcohol storage, production, and/or use at the mine. In addition, the complaint asserted that workers were concerned over news that a caretaker at the property had died.

Finding the Plumbago Mine took some research on the inspector's part, but three IDs came up using MSHA's data retrieval system. Those ID numbers are reflected in GX 18. Tr. 386-88. The IDs, however, do not provide GPS locations, so the inspector had to drive to the vicinity and then try to find the mine. Tr. 389. Since the information MSHA had listed the mines as "abandoned," there were no directions to the mine, nor to a mine office location. Tr. 390. Eventually, the inspector found the location, coming upon a gated entrance with an old mill and rail dumps. At that time he also saw yellow caution tape on the gate leading to the mine. He then walked past the gate, arriving at the portal, some 1,700 feet from that point. Along the way to the portal he saw signs that mining activity had been taking place, observing relatively new PVC pipe, a box for power lines, with the box in the "on" position, and an electric locomotive of the type used for underground mining. The tracks were also shiny, an indicator of use. New timber and tools were also present outside of a shop and tools were in front of the portal. Tr. 395. These observations led him to conclude that there was mining activity.

No one was presently at the site but he then came into contact with someone who lived on a hill near the mine site, who informed him that people were coming and going from the site location. He told the inspector that the Miller boys were going in there. Tr. 396. Soon after that exchange, the inspector related that people started to show up at the site; they were Britt McDaniel, Joseph Sauer, and Skyler Noble. Tr. 397. Those individuals informed him that they were rehabilitating the mine and had been working there for about six months and were presently about 1,000 feet into it. They also confirmed to the inspector that this was the Plumbago Mine. Tr. 398. Interviewing the men, they spoke of their activities at the site, such as removing poor timber and replacing it with new wood, and checking ground and roof control for safety. Tr. 399.

All of the information led the inspector to conclude that it was an active mine site. Checking with his MSHA office, the inspector received confirmation that no one had reported the mine as being active. Further, he confirmed that no training plan had been submitted for the mine. Tr. 400. The individuals he interviewed advised that they had some training a few months earlier, but as there was no training plan for the mine, such training was for a different mine. Tr.

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[12] As they are related, Order No. 8698224, Citation No. 8698225, and Citation No. 8698226 are discussed together.

401. He later learned that the training the men mentioned was annual refresher training, but for the Sixteen to One Mine. *Id.* Original Sixteen to One Mine, Inc., owns the Plumbago Mine. Tr. 402.

Based upon his investigation, as described above, Boylan issued Order No. 8698224, a section 104(g)(1) order, GX 21(a), invoking 30 C.F.R. § 48.6.[13] The order alleged that miners had not received the newly hired, but experienced, miner training. Tr. 402. The order withdrew the miners from the mine site, as untrained miners are deemed to be a hazard to themselves. A safety meeting was held the day after he issued the citation. Tr. 403. The order was marked as "reasonably likely" and "S&S." The inspector's issue was the miners not being trained under a training plan associated with the mine where they were working. Those miners had exposure for about six months, working in the formerly abandoned mine, as they made their efforts at the mine's rehabilitation. Training plans must take into account the specific hazards at the specific mine. Tr. 404-05. The inspector also marked the Order as "fatal" because the history of mine fatalities correlates with untrained miners. Tr. 405. Also, the inspector considered that the mine did not have a ventilation plan or a mine rescue plan. Tr. 406. The negligence was marked as "high" because training is "101" for mining (i.e., a basic requirement) and the operator, being a "blue card holder" is able to give the training. This means that the operator, Mr. Miller, as a blue card holder, was well aware of the training requirements. *Id.* Subsequently, changes were made to some of the order's designations, lowering them. Tr. 408.

In later testimony regarding this order, Inspector Boylan stated that he discussed the order with Mr. Miller in person. Tr. 566. This happened on the same date that Boylan came to the Sixteen to One Mine office after informing the miners of the withdrawal order. Boylan affirmed that, through his conversation, it was clear that Miller knew that he had issued a withdrawal order for failure to train the miners. Tr. 567. Boylan stated that in response Miller was upset and believed that the mine had been shut down. The mine was not shut down, but the miners had been withdrawn. *Id.* Because of the heated atmosphere, Boylan decided not to issue the order that day. Instead he returned to the MSHA office, typed out the order and delivered it via email, confirming by the software program that the order had been delivered. Tr. 569.

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[13] 30 C.F.R. § 48.6, titled "Experienced miner training," provides:

> (a) Except as provided in paragraph (e), this section applies to experienced miners who are —
>
> (1) Newly employed by the operator;
>
> (2) Transferred to the mine;
>
> (3) Experienced underground miners transferred from surface to underground; or
>
> (4) Returning to the mine after an absence of more than 12 months.
>
> (b) Experienced miners must complete the training prescribed in this section before beginning work duties. Each experienced miner returning to mining following an absence of 5 years or more, must receive at least 8 hours of training. The training must include the following instruction . . . [the standard then details the course of instruction in subsections (b)(1) through (b)(12) and (c) through (e)].

Respondent's post-hearing reply brief asserts that

> [t]he opening quote of the citation implies that the miners lacked the required training to act as trained miners. This is patently false. These miners have long standing employment with Respondent. At most this is paper dumbness. There could not be an allegation of fatal. Negligence was zero. The proof is in our history.

Resp't's Reply Br. 4. Respondent misses the point. The order alleged that miners had not received the newly hired, but experienced, miner training. This was established. Respondent's contention only serves to show that it could have easily complied with the requirement. Training, for experienced and new miners, is a recognized safety fundamental. Characterizing it as "paper dumbness" is a misguided view.

Order No. 8698224 is upheld and the findings of the inspector are affirmed. The Court imposes a penalty of $112.00.

Citation No. 8698225
Proposed Penalty: $100.00. Penalty Assessed: $100.00.

Citation No. 8698225, GX 22, citing 30 C.F.R. § 48.3(a)(3), was also written on the same day as GX 21. It was based on the lack of an approved Part 48 training plan prior to the reopening and reactivation of the Plumbago Mine. Tr. 408. For this citation, the inspector marked it as no likelihood, no lost workdays, and non-S&S. He so marked it because he regarded it as a recordkeeping violation. However, because Mr. Miller was well aware of the requirements, he designated it as "high negligence." Tr. 409.

The Court upholds the violation and agrees that "high negligence" is the appropriate characterization. This finding is also appropriate when the violation is viewed in the context of Order No. 8698224, GX 21, and Citation No. 8698226, GX 23, as they are related. A penalty of $100.00 is assessed.

Citation No. 8698226
Proposed Penalty: $100.00. Penalty Assessed: $100.00.

Inspector Boylan's testimony also addressed Citation No. 8698226, GX 23, for failing to notify MSHA before starting operations, per 30 C.F.R. § 57.1000. Tr. 409. Prior to the inspector's arrival at the mine, MSHA had not been notified of the mine's rehabilitation status. Tr. 410. For this violation too, the inspector marked it as no likelihood, no lost work days and non-S&S, because he viewed it as a paperwork violation. *Id.* The reasons for the notification requirement are obvious. With awareness of mining activity: MSHA can arrive for help if the situation calls for it; it can make sure there are training plans; and, more fundamentally, it enables the agency to perform within its jurisdiction to inspect mines. *Id.* In the six months of failing to notify MSHA of the activity, at least one inspection would have otherwise occurred. Tr. 411. As before, the negligence was listed as "high" because the operator has a long history of mining and was well aware of these requirements. *Id.* In addition, the inspector learned that

other agencies had been notified of the mine's new activity. Tr. 413. Employee Rae Bell allegedly told the inspector that OSHA had been notified, but that Mr. Miller deliberately did not notify MSHA. *Id.* Later the same day, the inspector was at the Sixteen to One Mine and he met Miller there. Miller stated MSHA had no jurisdiction at the Plumbago Mine and was upset that it had been shut down. Tr. 415-16. As noted, while the mine had not been shut down, effectively it had been, as its employees could not work there until their training had been completed.

Mr. Miller's cross-examination of the inspector began with inquiring about the basis for the inspector being on the Plumbago Mine property, which he characterized as "private." Tr. 418. Miller asserted that MSHA did not have jurisdiction over the mine. This, he stated, was based on Section 4 of the Mine Act, the text of which was read into the record. That section, titled "Mines Subject to Act," provides: "SEC. 4. Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." Tr. 421. From this, Miller asserted that no products entered into production from the operation, and therefore there was no impact on interstate commerce. *Id.* In addition, there was not any equipment there that would affect interstate commerce. Tr. 422. Mr. Miller then asked the inspector to distinguish between mining activity and tunneling. The inspector stated that mining is "producing, exploration and development and rehabilitation."[14] Tr. 425. This claim by Respondent, that jurisdiction was lacking, completely lacking in merit, has been discussed earlier.

Mr. Miller then testified about the foregoing, grouped matters, beginning with offering RX 3 for identification. The Secretary objected to the exhibit as not relevant, as it reflects an approved training plan *for the Sixteen to One Mine*. These matters all relate to the Plumbago Mine, and therefore the training plan for another mine was not material. However, the Court utilized its discretion and admitted the exhibit, while noting that the weight afforded the exhibit was a distinct matter. Tr. 432. Miller then moved for the admission of RX 4, the Plumbago Mine's MSHA-approved Part 48 underground mining plan, dated June 26, 2014. The Court noted and Miller affirmed that his point in offering the exhibit was to show that it is virtually identical to the plan for the Sixteen to One mine. Tr. 433. The Court noted that the exhibit also can be viewed from a different perspective, as it shows how easy it would have been for the mine to have been in compliance, in large measure by just changing the name of the mine on the title page. *Id.*

[14] Although Mr. Miller was then challenging the inspector's experience, the citations in issue at this point in the proceeding were Order No. 8698224 (GX 21), Citation No. 8698225 (GX 22), and Citation No. 8698226 (GX 23), involving, respectively, newly hired experienced miner training, no training plan, and no notification before starting operations. Tr. 429. The inspector stated that he has never worked in an underground mine. *Id.* The Court finds that Inspector Boylan was a well-qualified and knowledgeable inspector, who spoke with detail, both credibly and convincingly, regarding each of the citations/orders about which he testified.

The Court upholds the violation and agrees that “high negligence” is the appropriate characterization. This finding is also appropriate when the violation is viewed in the context of Order No. 8698224, GX 21, and Citation No. 8698225, GX 22, as they are related. A penalty of $100.00 is assessed.

Citation No. 8698228
Proposed Penalty: $243.00. Penalty Assessed: $243.00.

Inspector Boylan also testified regarding Citation No. 8698228, GX 25a, issued May 7, 2014, and citing 30 C.F.R. § 49.2[15] for the Plumbago Mine’s failure to “have at least two mine rescue teams available onsite, nor an alternative compliance under the small and remote mine rescue capabilities.” Tr. 437. Such an alternative plan has to be applied for and sent to the MSHA district office. That MSHA office had no such record on file. Tr. 438. Small mines are required to have their own mine rescue team or to have an agreement with another mine to provide mine rescue. The Plumbago mine had neither arrangement. Tr. 438-39. The inspector looked for documentation at the mine and the MSHA district office, but none was at either location. Tr. 439.

The inspector marked the citation as S&S and reasonably likely because, in context, there was no mine rescue, no ventilation plans, and no escape and evacuation plan, but there was exposure of miners. Miners had been working, untrained, and underground for six months in this formerly abandoned and now rehabilitated mine. Tr. 439. He added that the standard he cited is considered an “emergency standard.” This didn’t mean that there was an emergency underway, but rather that mine rescue comes into play when the event of a disaster has occurred to address

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[15] Section 49.2, titled “Availability of mine rescue teams,” provides:

> (a) Except where alternative compliance is permitted for small and remote mines (§ 49.3) or those mines operating under special mining conditions (§ 49.4), every operator of an underground mine shall:
>
> > (1) Establish at least two mine rescue teams which are available at all times when miners are underground; or
> >
> > (2) Enter into an arrangement for mine rescue services which assures that at least two mine rescue teams are available at all times when miners are underground.
>
> (b) Each mine rescue team shall consist of five members and one alternate, who are fully qualified, trained, and equipped for providing emergency mine rescue service.
>
> (c) To be considered for membership on a mine rescue team, each person must have been employed in an underground mine for a minimum of one year within the past five years. For the purpose of mine rescue work only, miners who are employed on the surface but work regularly underground shall meet the experience requirement. The underground experience requirement is waived for those miners on a mine rescue team on the effective date of this rule.
>
> (d) Each operator shall arrange, in advance, ground transportation for rescue teams and equipment to the mine or mines served.

the need of rescuing miners who are in danger underground or trapped. Tr. 439-40. For those reasons, he also marked the citation as fatal. The citation was issued under section 104(d)(1) because of his determination that elevated negligence was involved, that the mine operator knew of the requirement, and that the requirement for a mine rescue team is basic and fundamental, not to mention that mine operator Miller used to be involved with mine rescue teams. Tr. 440.

In his cross examination regarding the mine rescue citation, Mr. Miller began with proposed exhibit RX 5, a letter from "Barrick Goldstrike Mines" to Mr. Miller as the manager of the Sixteen to One Mine, dated April 1, 2014. The inspector acknowledged he had seen the letter before. Tr. 451. Mr. Miller asked no other questions of the inspector about the letter. Mr. Miller attempted to use the letter to show that Barrick Mines would help in the event of a mine emergency. Tr. 452. The problem with it is that it references only the Sixteen to One Mine, not the Plumbago Mine. Tr. 452. Miller agreed that the letter makes no reference to the Plumbago Mine. Tr. 453. The Court ruled that the letter was not material to the issue of whether there were two mine rescue teams available and committed to respond to an emergency at the Plumbago Mine and therefore proposed exhibit RX 5 was not admitted. Tr. 454.

Upon consideration of the evidence for this citation, the proposed penalty of $243.00 is adopted and imposed.

Citation No. 8698229
Proposed Penalty: $308.00. Penalty Assessed: $154.00.

For Citation No. 8698229, GX 26a, issued May 7, 2014, to the Plumbago Mine, and citing 30 C.F.R. § 57.11053, the inspector cited the lack of an escape and evacuation plan. A plan was not available for posting at the mine and therefore, in the event of a mine disaster, there were incomplete, non-existent, or inaccurate emergency plans. Tr. 441. Such a plan, obviously, is to address an emergency for miners as well as for rescue personnel or even mine visitors. Tr. 442. Mr. Miller stipulated that the mine did not have such a plan. Tr. 443, 458. Taking into account that the miners told him they had radios to call out in such an event, the inspector initially marked the citation as non-S&S and unlikely. However, after considering other deficiencies, involving the absence of a ventilation plan and mine rescue training, he then considered it to be reasonably likely. Tr. 444. He also marked the gravity as 'fatal' and high negligence. *Id.* Without such a plan, if an emergency arose, one would not have a specific escape and evacuation plan, which plan would facilitate rescues, too. With a plan, people would know the way in and out and where miners were working. It was also designated as high negligence because the operator was well aware of the standard. *Id.* With the inspector's reassessment, he then revised the citation to a section 104(d)(1) violation. Tr. 445. Subsequently, however, as reflected on the fourth continuation page and Exhibit A to the penalty petition, the inspector later re-evaluated the paper and reduced the violation to a section 104(a) moderate negligence citation.

Mr. Miller's cross-examination for GX 26 began by characterizing the citation as relating to a tunnel. The inspector stated that he did not go underground for this citation, as it involved the failure to have an escape and evacuation plan in the event of an emergency. Tr. 457. Apart from the claim that the mine was a tunnel, Respondent presented no defense to this citation.

The plan is obviously important, but given the small size of the mine, in terms of employees, and given the inspector's initial assessment that the gravity was unlikely, and that the miners had radios, a lesser penalty is appropriate. The Court imposes a civil penalty of $154.00 for this violation.

Citation No. 8698230
Proposed Penalty: $308.00. Penalty Assessed: $154.00.

Citation No. 8698230, GX 27, citing 30 C.F.R. § 57.8520,[16] was addressed. As originally issued, the violation was written as a section 104(a) citation. This involved the Plumbago Mine's failure to have a ventilation plan. Such a plan must be filed with the MSHA district office, but the inspector found none. Further, no plan was at the mine office and the miners did not know of such a plan either. Tr. 447. The inspector did know that the ventilation was natural, i.e. not accomplished through mechanical means. However, the miners didn't know where the ventilation was coming from. *Id.* As with Citation No. 8698229, GX 26a, the inspector revised his initial citation upward to S&S, likely, high negligence, and fatal, and converted it to a 104(d)(1) order after considering the other related violations for lack of mine rescue and escape plans. In the event of a fire, a ventilation plan is used to control it, by having knowledge of the airflow in the mine. The reasoning for those designations followed that cited by the inspector for Citation No. 8698229. Tr. 448. Just as with Citation No. 8698229, however, the inspector later reduced the negligence from high to moderate and re-evaluated the 104(d)(1) order to a 104(a) citation, as evidenced by the fourth continuation page of the citation. For GX 27, Mr. Miller stipulated that no plan of the mine ventilation system was set out by the mine operator in written form. Tr. 460. Mr. Miller's defense for Citation Nos. 8698228, 8698229, and 8698230 began by questioning his witness, Mr. Farrell, about mining law in 1872. Tr. 462.

The violation is upheld. Applying the same reasoning used for Citation No. 8698229, GX 26, the Court imposes a civil penalty of $154.00.

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[16] Section 57.8520, titled "Ventilation plan," provides:

> A plan of the mine ventilation system shall be set out by the operator in written form. Revisions of the system shall be noted and updated at least annually. The ventilation plan or revisions thereto shall be submitted to the District Manager for review and comments upon his written request.

The standard goes on to provide a detailed list of such plan's requirements, "where applicable." *See* § 57.8520(a)-(e).

Citation No. 8698231
Proposed Penalty: $100.00. Penalty Assessed: $100.00

Inspector Boylan testified about Citation No. 8698231, GX 28, issued to the Plumbago Mine on May 5, 2014, and citing standard 30 C.F.R. § 57.18009. [17] Tr. 465. The standard requires that a person be designated as the one in charge at a mine in the event of an emergency. When the inspector asked about who was so designated, no one was identified. Tr. 467. This was another violation for which the inspector changed his original designations upward to S&S and reasonably likely, high negligence and fatal. Here again, his more serious assessment was based upon the other violations he found during his inspection, such as the lack of a mine rescue team, and no escape and evacuation plan. Tr. 467-68. He later reduced the designations back to unlikely, no lost workdays, moderate negligence, and non-S&S, according to the second continuation sheet provided with the citation and the penalty petition.

Mr. Miller testified regarding Citation No. 8698231. Speaking to the competent person issue, Miller asserted that Britt McDaniels "has been a competent person working for our company . . . [and] Joseph Sauers is a competent person also." Tr. 484. He added that the mine had radio communications. *Id.* The Court noted that the standard requires a competent person, designated by the mine operator, is to be in attendance but the inspector testified that no such person was present. Tr. 485. Miller then stated that Britt McDaniels, Joseph Sauer, and Skyler Noble were all at the mine that day and that all were competent persons. Tr. 486. Miller then reiterated that he designated McDaniels as the competent person at the Plumbago Mine and if that person was not there at a given time, Sauers was there. Tr. 487. Miller stated that he so designated those people as competent persons at the mine, "[p]robably well before May." *Id.* While he could not give a precise date, Miller stated that it was approximately in January 2013. Tr. 488. Miller's position was that the miners there at the time of the citation's issuance simply didn't speak up, viewing the inspector as a "stranger." Tr. 491.

The Court noted that Miller's testimony about the date he designated those individuals had implications about his claim concerning when the Plumbago Mine became active. Tr. 489.

In light of the testimony from Respondent, Attorney Horn recalled Inspector Boylan. Boylan stated that when he was at the mine he identified himself as an MSHA Inspector to the miners at that site. Tr. 505-06. Boylan reaffirmed that when he spoke with Britt McDaniels, asking if he knew who the designated person in charge in case of an emergency was, he responded there was none. Tr. 506. On re-cross, Boylan was asked how he identified himself to "Britt [McDaniel] and Joseph [Sauer]." Tr. 510. The inspector stated he responded: "My name is Dan, I'm with the Mine Safety and Health Administration, and I'm here on [a] hazard complaint." *Id.* Mr. Miller had no questions of the inspector about the citation reflected in GX 28. Tr. 483.

The Court finds that this violation was established and imposes the penalty as proposed.

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[17] Section 57.18009, titled "Designation of person in charge," provides: "When persons are working at the mine, a competent person designated by the mine operator shall be in attendance to take charge in case of an emergency."

Citation No. 8698232
Proposed Penalty: $112.00 Penalty Assessed: $112.00

Citation No. 8698232, GX 29, citing 30 C.F.R. § 57.4533(a),[18] issued May 7, 2014, pertained to the mine shop, which was located right outside the portal, and asserts that the shop was not constructed of non-combustible materials. Mr. Miller then stipulated to the fact of violation. Tr. 469. However, Respondent did challenge the fatal and moderate negligence designations. The inspector stated that GX 29c accurately represented what he observed: the shop's proximity to the mine portal. A concern is that, with such combustible construction, smoke could enter the mine if the shop caught fire. Tr. 472. A fire, and smoke from it, could impede the ability to exit the mine. *Id.* At the time of the citation's issuance, there was only one portal, also as depicted in GX 29c. Moderate negligence was marked, on the basis that the inspector had no facts as to how often the mine operator had been on site and evaluated the mine property. Tr. 473.

Regarding Citation No. 8698232, Miller stated that his remarks applied to that citation and "the other one," apparently referring to Citation No. 8698233. He asserted there are two portals and that the second portal in fact is more than 100 feet from the building. He described the two portals as "like a Y." Tr. 492. Miller asserted that if the building did catch fire no danger would be presented. He based this on the statement that air was coming out of the portal, not going into it. Despite that assertion, the violation was abated by installing a sprinkler system, a fix Miller described as "very expensive." Tr. 493.

Mr. Miller had no questions of the inspector about the citation reflected in GX 29. Tr. 483. Upon consideration of the record evidence, the Court adopts the findings and proposed penalty derived therefrom. Therefore, the $112.00 penalty is imposed.

Citation No. 8698233
Proposed Penalty: $100.00. Penalty Assessed: $75.00.

Citation No. 8698233, GX 30, citing 30 C.F.R. § 57.9300(a)[19] and issued May 7, 2014, involved the lack of a berm on the roadway leading up to the mine. The roadway was elevated and miners used the road to travel to and from the mine. Tr. 473. Photos designated GX 30c were offered to show the cited road condition. Though he did not measure the elevation, the

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[18] Section 57.4533, titled "Mine opening vicinity," provides: "Surface buildings or other similar structures within 100 feet of mine openings used for intake air or within 100 feet of mine openings that are designated escapeways in exhaust air shall be — (a) Constructed of noncombustible materials."

[19] Section 57.9300, titled "Berms or guardrails," provides at subsection (a): "Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." As mid-axle height was mentioned in the testimony, subsection (b) of the standard is here noted. It states that such "[b]erms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway."

inspector estimated it to be about 38 feet in height. GX 30c, photo two, shows the edge of the elevated roadway. Also, clarifying the photo's depiction, the inspector affirmed that, in photo one of GX 30c, the roadway cited is to the left of the private property sign. Tr. 477. The inspector agreed that, per that photo, he believed a berm was needed from the private property sign up to the gate. *Id.* No berm was present along the cited part of the roadway. The road itself was 18 feet wide. The inspector designated the citation as non-S&S and unlikely because it was not a haulage road, but instead was used to enter or exit the mine. However, he did mark it as "fatal" because, if a vehicle did go over the roadway edge, one would receive fatal crush and impact injuries. Once again, the negligence was marked as moderate because the inspector had no evidence that the mine operator was aware of the condition. Tr. 476. Thus, quite favorably to the mine operator in the Court's view, the inspector viewed the absence of evidence that the operator knew of the issue as a mitigating factor. *Id.*

Miller agreed that photo one of GX 30c was a fair representation, but asserted that photo two was not. He maintained that the depth of the rock cannot be seen and that there was a berm that came up to the mid-axle of the pickup truck. Tr. 494. He contended that repeated grading of the road over the years had created a sufficient berm. Later, the berm height was increased when they brought in a loader. Miller's position was that the citation should be vacated. Tr. 496.

On redirect for GX 30c, photo 3, Boylan was asked if he saw a berm in that photo, and he responded that he did not and that the photo reflected the condition of the roadway on May 6, 2014. Tr. 507. Directed to the right side of the photo where PVC pipe is shown, the Inspector stated that he did not consider that area of the roadway to have a berm. While he agreed that there appeared to be a "bump" or a "little material raised up" there, it was not a berm, as it was not mid-axle height of the vehicle that used that road, which was a pickup truck. Tr. 507-08. He did not measure the mid-axle height of the truck because it was so obvious that the berm was not mid-axle height. Tr. 508. The inspector stated that he did consider the density of forest in that location but added that the majority of the trees were not up to the roadway's edge. It was his view that one who over-traveled the road would overturn before going into the trees. Tr. 509.

Mr. Miller had no questions of the inspector about the Citation reflected in GX 30. Tr. 483.

The violation was established. However, given the small size of this mine and the minimal traffic along the cited berm-less road, a penalty of $75.00 is imposed.

Citation No. 8698234
Proposed Penalty: $100.00. Penalty Assessed: $100.00.

Citation No. 8698234, GX 31, citing standard 30 C.F.R. § 57.4131(a), [20] was issued May 8, 2014. For this matter, at issue was timber being stored about ten feet from the portal. As

[20] The cited standard, § 57.4131, titled, "Surface fan installations and mine openings," provides:

mentioned earlier, the standard requires that no more than one day's supply of combustible material may be stored within 100 feet of the mine opening. Tr. 478-79. The condition was photographed. GX 31c, photo 2. The wood, the pieces of timber, which the inspector cited, were not related to the building shown in the bottom center of the photo. Tr. 479. Mr. Miller stipulated that the material cited was less than 25 feet from the portal. Tr. 480. The citation was marked as non-S&S and unlikely as the inspector did not see any ignition sources or other sources of combustion such as liquids or gases. Tr. 481. He concluded that there was more than a one-day supply of wood by speaking with the miners at the site and learning how long the wood had been there and upon being informed that the mining progress had been slow going. Tr. 481. He never learned how long the wood had been there, other than being told it was more than a day. *Id.* He marked the violation as fatal because of the combustible materials' closeness to the mine entrance and because of the adverse impact it would have with mine rescue and escape and evacuation if a fire were to occur. *Id.* For the same reasons he gave earlier, no information as to the operator's knowledge of the condition, he marked the negligence as moderate. Tr. 482. Mr. Miller had no questions of the inspector about the citation reflected in GX 31. Tr. 483.

Regarding the one-day supply of lumber issue, Miller repeated that there are two adits, forming a Y shape, with the second adit of the Y being 100 feet from the other. Miller also asserted that, as any experienced miner would know, the wood cited was less than a one day's supply, especially when one is renovating a tunnel. Tr. 497. Miller added that because the air exits from that portal, even if the material did catch on fire, no smoke could enter it. Tr. 498. He added that there were no sources of fire. Miller concluded by stating that his only defense regarding that citation is that there was not more than a day's supply of lumber. Tr. 499. Attorney Horn then asked Miller, regarding GX 31c, photo 2, whether one of more of the lines depicted in that photo were electrical. Tr. 501. Miller admitted that to be the case, but responded that the electrical line or lines had no bearing on the citation regarding the wood. Tr. 502. Miller then agreed that there was a compressor at the mine and that it was powered by electricity. Tr. 504.

On redirect for Citation No. 8698234, Attorney Horn asked Inspector Boylan how he determined that there was more than a one day's supply of lumber. The inspector advised that it was based on his interviewing the miners. Further, nothing else he learned contradicted that view. Tr. 509.

Upon consideration of the record evidence, the Court adopts the findings in the citation and the proposed penalty derived therefrom. Therefore, the modest $100.00 penalty is imposed.

(a) On the surface, no more than one day's supply of combustible materials shall be stored within 100 feet of mine openings or within 100 feet of fan installations used for underground ventilation.
(b) the one-day supply shall be kept at least 25 feet away from any mine opening except during transit into the mine.
(c) Dry vegetation shall not be permitted within 25 feet of mine openings.

Citation No. 8785247
Proposed Penalty: $100.00. Penalty Assessed: $75.00.

Inspector Nicholas Basich testified regarding Citation No. 8785247, which pertained to an alleged violation of a vehicle with no functioning brake or tail lights at the Plumbago Mine. The cited standard was 30 C.F.R. § 57.14100(b).[21] Respondent agreed to the conditions and practices section of the citation, conceding the vehicle did not have functioning brake and tail lights, per item 8. Tr. 204. That the lights were non-functioning does not fully describe the condition, because the vehicle had no such lights present at all. Tr. 205. Miller did challenge the claim that the condition had been that way for about two months. A photo of the vehicle appears in GX 32c. The inspector did acknowledge the presence of a bar with a red rectangle on the back of the cab, but he did not know if it was a functioning brake or warning light. However, he did not consider it to be a brake or warning light. Tr. 207. The hazard is, with non-functioning lights, persons might be unaware of the vehicle stopping. Tr. 208. In addition, miners were in the truck's seats. However, the inspector listed the violation as non-S&S and unlikely. Tr. 209. He believed the condition had existed for two months. The inspector acknowledged learning that the needed lights had been purchased but not yet installed. Tr. 210. The inspector listed the negligence as "high" because the condition had existed for some time and the operator was aware of it. *Id.* As such lights are warning devices, the inspector stated that their absence is plainly a safety defect. *Id.*

Mr. Miller objected only to the high negligence designation for Citation No. 8785247. To begin, he stated that the light on the top of the cab was a brake light. Tr. 213. Further, the truck was never used at night, and in Miller's view, it did not need tail lights. In addition, he took issue with the inspector's claim that people would not be able to see the truck stop without the presence of such lights. Though he ordered his workers to install the lights, they failed to do so. Tr. 214. Miller felt the negligence should be low or at least moderate.

The truck was used to transport miners to various mines. At that time he employed five miners. Tr. 216. The truck transported men over a seven mile stretch of county road. Tr. 217. Miller continued to object to calling the site a mining operation. Rather he called it a "rehabilitation of an abandoned piece of property." *Id.* As noted, Respondent's claims that Plumbago is not a mine have been rejected.

Considering Mr. Miller's credible testimony on this matter, the Court agrees that high negligence is inappropriate and that moderate negligence is more accurate. Accepting the other designations made by the inspector, including that the violation was properly determined to be non-S&S, the Court imposes a penalty of $75.00 for this violation.

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[21] 30 C.F.R. § 57.14100(b) requires that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

Citation No. 8793615
Proposed Penalty: $100.00. Penalty Assessed: $100.00.

Citation No. 8793615, GX 33, citing 30 C.F.R. § 57.12028,[22] was issued on September 4, 2014, for the Plumbago Mine. Tr. 579. That citation related to testing for continuity and resistance for electrical components, a requirement to be performed annually as well as after installation and changes to such electrical components. Tr. 580. The inspector could find no record of the test having been performed and he also learned, through interviewing the miners, that it had not been done. *Id.* The standard is important as a failsafe and to ensure that the electrical equipment is operating correctly and safely. *Id.* Such testing must be recorded. The inspector inquired at the Sixteen to One Mine office and at the Plumbago Mine site as to such records, but none were presented. Tr. 581. The inspector also inquired, apart from the lack of records, whether the testing had been done, and learned from mine employee Britt McDaniel that it had not and that he would have been the person to do that. Tr. 582. Mr. Miller then stated that, assuming the inspector was accurately testifying about Mr. McDaniel's conversation, the citation was "deserved." Tr. 583. Miller then stipulated that the gravity and negligence markings for the citation were as written (unlikely for gravity, restricted duty or lost workdays, non-S&S, and moderate negligence). *Id.*

Accordingly, based on the foregoing, the Court imposes the same $100.00 penalty as proposed by the Secretary.

Citation No. 8793617
Proposed Penalty: $100.00. Penalty Assessed: $50.00.

Citation No. 8793617, GX 35, issued September 4, 2014, involves standard 57.15030,[23] and the requirement for a weight test for self-rescuer devices. Those devices must be maintained in good condition and there is a requirement that they be inspected, with a weight test, within 90 days. Tr. 585. The weight test is not explicitly required in the standard. Rather, a program policy manual provides for such test. Mr. Miller then stipulated to the fact of violation for this citation as well. Tr. 586. He also agreed to each of the designations on the citation, save the marking that it would be fatal. Tr. 587. With that designation, the last item in dispute for that citation, the inspector explained that he marked it as fatal because it is a life-saving device, called into use in an emergency and that, if it did not work when needed for an escape, the consequences would be fatal. Tr. 588.

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[22] 30 C.F.R. § 57.12028, titled "Testing grounding systems," provides: "Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent test shall be made available on a request by the Secretary or his duly authorized representative."

[23] 30 C.F.R. § 57.15030, titled, "Provision and maintenance of self-rescue devices," provides: "A 1-hour self-rescue device approved by MSHA and NIOSH under 42 CFR part 84 shall be made available by the operator to all personnel underground. Each operator shall maintain self-rescue devices in good condition."

Mr. Miller, objecting to the fatal designation, stated that there were two or three devices out of compliance with the 90 day requirement and essentially asserted that his son, an employee at the mine, was behind in the paperwork, and at that, he was late by only two to four days. Tr. 589. As to the fatality designation, Mr. Miller stated that air rapidly exits from the mine and the tunnel itself is very short. Tr. 590.

The inspector was then recalled. He acknowledged that the weight tests were not many days overdue but that he still believed the fatal designation was appropriate. Though unlikely that the devices were in a non-maintained condition, he still asserted that if they did not function, the expected injury would be fatal. Tr. 591.

Given that not all the devices were out of compliance and that the period of non-compliance was only a few days, the Court assesses a civil penalty of $50.00 for this conceded violation.

Docket No. WEST 2015-158-M (Sixteen to One Mine)

Citation No. 8785248
Proposed Penalty: $100.00. Penalty Assessed: $25.00.

Inspector Nicholas Basich testified regarding this citation, which alleged a violation of 30 C.F.R. § 57.14207.[24] Miller stipulated to the "Condition or Practice" section of the citation — that the truck was parked without its parking brake being set — but he asserted that it was on level ground. He took issue with the moderate negligence designation. Tr. 220. Miller also disputed that the condition exposed miners to the hazard of contact by a slow moving vehicle. Inspector Basich stated that if the vehicle were bumped and it jumped out of park, it could have begun a slow roll, exposing miners to bumps or bruises. Tr. 221. However, the inspector conceded it was very unlikely that, if bumped, the truck would jump out of park. Tr. 223. The truck was not being used at the time he cited it. He marked it as moderate negligence because the standard is one within the "Rules to Live By," meaning many accidents have been associated with it. Tr. 222. MSHA wants mine operations to set the parking brake in all instances, not simply when a vehicle is on a grade. On cross-examination, referring to the photograph in GX 10c, the inspector agreed that there was a bank and a tree on the other side of the truck and it was his understanding that the truck had recently been brought to the location where he observed it. Tr. 226. There was no indication that the truck had been tagged out, nor did the miner accompanying him assert that. *Id.*

Mr. Miller then testified about the citation, stating that there was no way another vehicle could bump the truck in that location. Tr. 228. Further, he stated that the truck, a used vehicle, had been recently purchased and had not yet been put in service. Tr. 229. Miller also disputed that two people worked at that location. Tr. 230. Miller couldn't speak to whether it had been

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[24] Section 57.14207 requires that "[m]obile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank or rib."

tagged out, but he maintained it was at that location and not to be used until it had been checked out. *Id.* Therefore, he believed the citation should be vacated. Tr. 231. On cross-examination, he did acknowledge there was another vehicle near the cited one but contended that it was also there for repair work to be done. Tr. 233.

Upon consideration of the testimony, including the small size of the mine, the Court finds that the negligence was low and imposes a penalty of $25.00.

Citation No. 8785249
Proposed Penalty: $100.00. Penalty Assessed: $ 50.00.

Inspector Basich testified regarding Citation No. 8785249, GX 11a, citing 30 C.F.R. § 57.6132(a)(6)[25] and issued September 9, 2014, at the Sixteen to One Mine. While inspecting the area around a magazine, the inspector noticed there was no sign informing that explosives were present. Tr. 236. The standard requires posting signs so that one shooting at the signs would not accidentally hit the magazine. Tr. 237. Shooting at signs is apparently a common practice in rural areas. Tr. 250. GX 11c consists of photographs of the cited condition and its abatement, and the white box depicted in the center of photo one is the magazine. Tr. 237-38; GX 11c. Detonators were stored in the magazine. The posting requirement applies to all approaches. Tr. 239. There was one sign on an A frame but it had fallen and therefore was not readily visible upon approaching the magazine. *Id.* From two approaches to the magazine, signs were not readily visible. Photos six and seven of GX 11c show the abatement of the condition. Tr. 241-42. The citation was marked as non-S&S and unlikely. This was based on the fact that those who worked at the mine site knew of the magazines. Tr. 242. However, the inspector deemed the negligence as moderate because these standards are well known in the mining industry. Tr. 243. Also relevant to the negligence determination was that it was obvious that the signs were not present. Tr. 244. He marked the injury as "fatal" because an explosion at the magazine could produce such a result. *Id.* Two magazines were cited for the one violation; one was the detonator magazine and the other was the high explosive/blasting agent magazine. Their relative locations were about 100 to 150 feet apart. Tr. 245.

On cross-examination, the inspector stated that simply seeing the magazines and no readily visible signs prompted the citation's issuance. Tr. 246. For the other magazine, the "powder" magazine, a sign was visible, but only from one direction. Tr. 247. Thus, the inspector agreed that there was a sign at both magazines but they were not readily visible. *Id.* He also agreed that the miners knew of the magazines' locations.[26] Tr. 248. The inspector did

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[25] 30 C.F.R. § 57.6132(a)(6), titled "Magazine requirements," provides, in relevant part, "Magazines shall be . . . [p]osted with the appropriate United States Department of Transportation placards or other appropriate warning signs that indicate the contents and are visible from each approach, so located that a bullet passing through any of the signs will not strike the magazine."

[26] As a side note, relating to an earlier citation, and referring to GX 11c, photo 1, the inspector agreed green vegetation is depicted in that photo and that he did not write a citation regarding that, because the vegetation was green. Tr. 250.

sum up the issue with regard to both magazines. For photo one in GX 11c, depicting the detonator magazine, there were two approaches to it. Tr. 253. For that magazine, he saw only one sign and it had become loose so that it was not readily visible. However, two signs were needed. For the high explosives/blasting agent magazine, shown in GX 11c, photo 4, there were also two approaches. Tr. 256. Here, too, there was only one sign. Tr. 257.

Mr. Miller then testified about this citation involving the warning signs. He did not believe that any citation should have been issued. Other than the miners, anyone else on the property would be trespassers. However, he then volunteered that a creek passes through his property and that people are permitted to walk along it; they are not trespassing. Tr. 259. Miller viewed adding more signs as an invitation encouraging people to shoot at them. Tr. 260. Therefore, he wanted the signs to be in the least conspicuous location. Tr. 262. Miller also was of the opinion that there was only one approach, not two, to the magazines. Tr. 261. In addition, Miller did not think that a bullet would ignite the magazines, because the contents are non-detonating. Tr. 263.

This violation was established, but the Court takes into consideration that, while they were insufficient, there were signs present. Upon further factoring in the small nature of this mine and Mr. Miller's testimony (though his views were misplaced about whether more signs were ill-advised, as the standard requires appropriate warning signs from each approach), the Court views the negligence as less than moderate. A civil penalty of $50.00 is imposed.

Citation No. 8785250
Proposed Penalty: $100.00. Penalty Assessed: $75.00.

Inspector Basich also testified regarding Citation No. 8785250, GX 12, issued on September 10, 2014, and alleging a violation of 30 C.F.R. § 57.8520.[27] Tr. 265. This dealt with

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[27] A detailed standard, § 57.8520, titled "Ventilation plan," provides:

> A plan of the mine ventilation system shall be set out by the operator in written form. Revisions of the system shall be noted and updated at least annually. The ventilation plan or revisions thereto shall be submitted to the District Manager for review and comments upon his written request. The plan shall, where applicable, contain the following:
>
> (a) The mine name.
> (b) The current mine map or schematic or series of mine maps or schematics of an appropriate scale, not greater than five hundred feet to the inch, showing:
>> (1) Direction and quantity of principal air flows;
>> (2) Locations of seals used to isolate abandoned workings;
>> (3) Locations of areas withdrawn from the ventilation system;
>> (4) Locations of all main, booster and auxiliary fans not shown in paragraph (d) of this standard.
>> (5) Locations of air regulators and stoppings and ventilation doors not shown in paragraph (d) of this standard;

alleged deficiencies in the mine's ventilation plan. Such plans, while not needing MSHA's approval, still must be submitted to the agency. The inspector asserted that the deficiencies included a failure to indicate air flow direction on the plan. Tr. 267. Also, the plan did not indicate seals for a vent, though there was a vent and sealed workings. The plan needs to indicate abandoned workings and seals. Tr. 268. Areas withdrawn from the ventilation system need to be on the plan, too. For such areas, the plan has to inform if air is flowing through withdrawn areas. Also, locations of known underground openings adjacent to the mine must be indicated on the plan. Diagrams, descriptions, or sketches showing how ventilation is achieved in each typical working place and the approximate quantity of air and the size and type of auxiliary fans, as well as the ventilation quantity and direction of airflow for current working places at the time of an inspection, must be provided. Still, despite the deficiencies alleged, the citation was marked as unlikely and non-S&S because the inspector found that the air was good. Tr. 270. However, because of the importance of the information in a mine emergency, the citation was marked as fatal, in terms of expected injury. *Id.* The lack of such information would hinder a mine rescue operation. Negligence was deemed "moderate" because the mine had submitted a plan, and the inspector's review of the mine's records reflected that some of the deficiencies had been raised to the mine at a prior time.

During cross-examination, the inspector stated that he did not believe that the plan's deficiencies were made knowingly. The inspector confirmed that he had been told by a mine employee that there were abandoned areas that had been sealed off. However, the inspector did not dispute that if it were asserted there were no seals at the mine, he could not contradict such a claim, except for the one employee who told him there were seals. Tr. 276. The inspector agreed that he did find a drawing in the records about the seven existing openings. *Id.* Asked if such a drawing would aid a mine rescue effort, the inspector's response was that this information

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> > (6) Locations of overcasts, undercasts and other airway crossover devices not shown in paragraph (d) of this standard;
> > (7) Locations of known oil or gas wells;
> > (8) Locations of known underground mine openings adjacent to the mine;
> > (9) Locations of permanent underground shops, diesel fuel storage depots, oil fuel storage depots, hoist rooms, compressors, battery charging stations and explosive storage facilities. Permanent facilities are those intended to exist for one year or more; and
> > (10) Significant changes in the ventilation system projected for one year.
>
> (c) Mine fan data for all active main and booster fans including manufacturer's name, type, size, fan speed, blade setting, approximate pressure at present operating point, and motor brake horsepower rating.
> (d) Diagrams, descriptions or sketches showing how ventilation is accomplished in each typical type of working place including the approximate quantity of air provided, and typical size and type of auxiliary fans used.
> (e) The number and type of internal combustion engine units used underground, including make and model of unit, type of engine, make and model of engine, brake horsepower rating of engine, and approval number.

30 C.F.R. § 57.8520.

would need to be part of the ventilation plan, not merely among the mine's records. Tr. 276-77. As noted, the inspector agreed that if the mine had no seals, the ventilation plan need not reflect the absence of seals.

In the course of cross-examination, the Secretary's Counsel stipulated that the ventilation plan does not reference mine rescue operations. Tr. 279. Respondent offered for identification an escape and evacuation plan, proposed exhibit RX 2, and the Secretary raised an issue about its materiality to the alleged violation. Tr. 280. Mr. Miller described it as "an Exploration and Operation Nonspecific Escape and Evacuation Plan." Tr. 278. Some confusion developed about the nature of the exhibit and its materiality to the citation. The inspector could not recall if the proposed exhibit was among the papers presented to him when he asked to see the ventilation plan. Tr. 281. He viewed the proposed exhibit RX 2 as an escape and evacuation plan. Tr. 282. He acknowledged that RX 2 shows some information about air flow and quantity and direction but he could not recall if the mine's ventilation plan was more specific or not. The inspector could not identify whether the plan reflected in RX 2 was the plan submitted to MSHA. Tr. 283. Despite the momentary confusion, the inspector confirmed that whatever ventilation plan was presented to him on the day of his inspection, it had the deficiencies he described. Tr. 284. RX 2 was later admitted into evidence. Tr. 359.

The inspector considered the citation to be a recordkeeping violation. Tr. 300. Inspector Basich expressed the view that the accuracy of a mine's ventilation plan would be critical to mine rescue and recovery efforts, and it could impact how quickly such operations could proceed and such delays could create a fatal condition at the mine. He elaborated, using the example of a mine fire and knowing how oxygen would be supplied to that fire, that knowing the direction smoke moves in such an event would be important. Tr. 309.

Mr. Miller then spoke to Exhibit GX 12. He stated that his mine does not use seals. He asserted that the employee who referred to seals meant barricades, diversions, or tarps to direct air, but they are not seals. Tr. 314. He acknowledged that, based on what he learned from the inspector's testimony, the map had deficiencies. Tr. 315. He also admitted that, in order to terminate the citation, the map had to be updated. *Id.* RX 2 is the map that the mine had at the time of the citation. Tr. 315. It was Miller's testimony that the mine made good faith efforts to have the plan contain all the required information and this included working with an MSHA inspector some three or four years ago, all in an attempt to have the mine's paperwork be compliant. On that basis, Miller believed that no negligence should be assigned to the violation. Tr. 316. Low or moderate negligence would be unfair because the mine has worked hard with MSHA to be in compliance on its paperwork. Miller also believed that no lost workdays should have been marked because there was no likelihood for such an event to occur. This is because of the site specifics, because of ways to get out of the mine, and because of the lack of fuel for a fire, among other reasons. Tr. 318-21.

The violation is upheld. Miller essentially conceded the fact of violation. Upon consideration, taking into account testimony regarding Miller's prior efforts and that the record was not clear as to the presence, or the lack of, seals, the Court deems the negligence to be slightly less than moderate. As noted earlier, for *each* of the contested citations, at both mines,

these are very small mining operations, with size being a penalty factor to consider. Given these factors a civil penalty of $75.00 is imposed.

Citation No. 8793618
Proposed Penalty: $100.00. Penalty Assessed: $50.00.

Testimony was received with regard to Citation No. 8793618, GX 6a, issued on September 9, 2014. For this matter, citing 30 C.F.R. § 57.14100(b),[28] which was in the upper shop, the inspector observed a hook for a two-ton hoist with its safety clip incorrectly installed, as it was on the outside of the hook. Tr. 333-34. The hoist was not being used when the inspector observed the condition of the hook, but it was ready and available for use. Tr. 333. The clip, when on the inside of the hook, prevents material from sliding out of it. He considered the clip, in the condition observed, to be a safety defect. Tr. 334-35. GX 6c, a photo, displays the clip when correctly installed. Tr. 335. The inspector marked the violation as non-S&S and unlikely because the hook was rarely used. He determined that any injury would be lost workdays or restricted duty because the hook was being used within its capacity. It would be when positioning something that had been lifted when the risk of the item coming off the hook would be greater. Tr. 336. The negligence was marked as moderate because it had not been reported to management and the person who incorrectly installed the clip didn't recognize that it was incorrect. Tr. 337.

On cross-examination by Mr. Miller, he began by focusing on the words "in a timely manner" from the cited standard, § 57.14100(b). However, those words were not important to the violation in this instance. The standard is directed at safety defects, and when such defects are present, the standard directs that such defects be corrected in a timely manner. Tr. 338-39.

Jonathan Farrell testified for Respondent regarding the hoist citation and GX 6c, stating that he had used that hoist. He agreed that the purpose of the clip is to keep a chain or strap from sliding off the hook. However, he contended that, if one uses a chain or strap that uses the hook fully, the clip needs to be bypassed for such circumstances and then returned to its normal position. Clarifying his remarks, Farrell contended that the clip would then be repositioned so that it once again acts as a safety device. Tr. 364. While he conceded that the clip is meant to be moved back and forth, but not sideways (i.e., left or right), Farrell maintained that as a practical matter it was so moved to accommodate such larger chains or straps. Tr. 365. Farrell contended that the clip itself was fine; it was not replaced. Abatement was achieved by simply repositioning it on the hook. *Id.* However, Farrell agreed that if the clip for the hook had been used as depicted in GX 6c, its purpose would've been defeated. Tr. 366.

Mr. Miller then added his own testimony about the hook and clip citation, stating that his experience using the clip was the same as Farrell's. *Id.*

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[28] Section 57.14100, titled "Safety defects; examination, correction and records," provides, for the cited subsection: "(b) Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

As the Secretary noted in the post-hearing brief:

> Farrell [the mine's surface superintendent] agreed that the safety hook is intended to keep chains or straps from sliding off the hook when the hoist is in use. (Tr. 362-363). Farrell also testified that when the chains or ropes that are too large to fit through the hook opening with the safety clip attached, that the clip is bypassed by placing the clip outside the hook, as it was found by the inspector, and then replacing the clip inside the hook for [subsequent] use. (Tr. 363). On cross-examination, Mr. Farrell admitted that this is not how the safety clip is designed to be used; generally the clip moves frontwards and backwards within the bounds of the hook and [that it] is not designed to move around the tip of the hook to the outside. (Tr. 365). Farrell also admitted that if the hook were used in the condition in which it was found by the inspector, that the intended safety protections provided by the safety clip would have been defeated. (Tr. 365-366). That the safety latch "could" have been replaced prior to use does not mean that the latch "would" have been replaced prior to [its next] use. Respondent admit[ted] that had the hoist been used in the condition in which it was found by the inspector, it would have been a safety hazard. (*Id.*).

Sec'y Br. 16.

The violation was established. Given the small size of the mine, the infrequent use of the hoist, and the "unlikely" gravity designation, the Court assesses a civil penalty of $50.00 for this violation.

Citation No. 8793620
Proposed Penalty: $100.00. Penalty Assessed: $75.00.

Regarding Citation No. 8793620, GX 8, issued September 10, 2014, to the Sixteen to One Mine and citing 30 C.F.R. § 57.4131(a),[29] the issuing inspector observed combustible material stored about 15 feet from the mine opening at the 800 portal. Tr. 342. GX 8c is a photo of the condition observed by the inspector. His concern was with the wooden rails and the pallet, per that photo. *Id.* As the wood appeared to be weathered, the inspector believed that condition increased the chance of it being combustible. He concluded that the wood was more than a one day's supply because it was being stored there. In addition, he saw the same material there the day before he issued the citation. Tr. 345. The hazards associated with such storage, if it were to catch fire, are the risk of smoke entering the mine and impeding the ability to leave the mine portal. Tr. 345. He stated that the mine "probably [had] quite a few [portals]" but the 800 portal, which is in the photo GX 8c, is the main one. Tr. 346. Miners did work underground that day. As noted, the mine uses natural ventilation. Though he could not recall the weather on the day the inspector issued the citations, he remembered it "being fairly dry." Tr. 347. The citation was marked as unlikely and non-S&S, because he did not see any immediate ignition sources around. In addition, while it was more than a one day's supply, the amount was not very large. *Id.* Lost workdays and restricted duty was marked because he believed that could be the effect of smoke

[29] This text of this standard, § 57.4131, appears above. *See supra* note 20.

inhalation. *Id.* Negligence was marked as moderate because it had not been reported to management.

On cross-examination, the inspector repeated that he considered the material to be more than a one day supply, because he observed it the previous day. Tr. 349. Mr. Miller asked if the standard's concern was over the quantity of timber, not the time it remained at the location. The inspector expressed that the intent was to permit such material near the portal when it is intended to bring it into the mine, as opposed to storing it outside the portal. Tr. 350.

Regarding Citation No. 8793620, Mr. Miller stated that the amount of wood was very small. It was used as track ties to fix rails. He agreed with the inspector's designation of unlikely, as there was no possibility of smoke going into the mine at that location, as the air exits there. Tr. 370. Miller maintained that the wood the inspector saw was in transit to the mine and that it was impractical to store it elsewhere. Tr. 368-70. He also asserted that the amount of wood did not impede the entrance to or exit from the mine. Tr. 371. Mr. Farrell also testified about this citation. It was his position that the standard speaks to the quantity of wood, not the length of time it is so located. Tr. 373. He contended that the amount of wood depicted in the photo was less than a one day's supply, and as such he believed it could remain there indefinitely. *Id.*

In the Secretary's cross-examination of Miller, regarding the combustible material citation, Miller did not deny that the combustible material had been as depicted in GX 8c for more than one day. Tr. 381. He also agreed that a day's supply of lumber will vary from day to day, depending on the mine's particular needs. *Id.*

The citation, issued at unlikely, non-S&S, lost workdays or restricted duty, moderate negligence, and affecting one person, was assessed at $100.00. Given the inspector's remarks about the attendant circumstances,[30] and the small size of the mine, a civil penalty of $75.00 is imposed for this demonstrated violation.

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[30] In determining the civil penalty the Court also took into account the points and contentions referenced in the Secretary's post-hearing brief where it was noted:

> The operator claims that the amount of wood the inspector found was minimal and far less than a days' supply of wood [and that] [t]he operator also claims that air was exiting the 800 portal on the day of the citation and, accordingly, there was no danger to miners from the accumulated combustible material. (Tr. 370). However, even if, on that date of the citation, air was exiting the 800 portal, the mine utilizes natural ventilation, and the direction of mine air changes with temperature and barometric pressure would likely expose miners on a later date. (Tr. 187). See, *U.S. Steel Mining*, 7 FMSHRC 1125, 1130 (1985). (Courts should consider alleged violations in terms of continued mining operations.).

Sec'y Br. 18. Having considered those points and contentions, along with the factors noted above, the Court determines that $75.00 is the appropriate civil penalty.

Citation No. 8793621
Proposed Penalty: $100.00. Penalty Assessed: $100.00.

Inspector Boylan testified about Citation No. 8793621, GX 9, issued September 10, 2014, at the Sixteen to One Mine for an alleged violation of 30 C.F.R. § 57.11053,[31] pertaining to shortcomings with the mine's escape and evacuation plan. The plan did not illustrate escape routes available from the working area which was then at the end of the 800 level. Tr. 351-52. Thus, this violation was based on the escape routes not being indicated on the map. Tr. 352. The escape and evacuation plan was posted, albeit with the cited deficiency, throughout the mine. While at that location, the inspector asked the miners how they could get out if they needed to escape. The miners explained how they would escape but none of it was explained on the map. Tr. 353-54. In addition, the importance of the information is that such escape routes need to be inspected at regular intervals. Tr. 354. However, as the miner the inspector spoke

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[31] The cited standard, § 57.11053, titled "Escape and evacuation plans," provides:

> A specific escape and evacuation plan and revisions thereof suitable to the conditions and mining system of the mine and showing assigned responsibilities of all key personnel in the event of an emergency shall be developed by the operator and set out in written form. Within 45 calendar days after promulgation of this standard a copy of the plan and revisions thereof shall be available to the Secretary or his authorized representative. Also, copies of the plan and revisions thereof shall be posted at locations convenient to all persons on the surface and underground. Such a plan shall be updated as necessary and shall be reviewed jointly by the operator and the Secretary or his authorized representative at least once every six months from the date of the last review. The plan shall include:
>
>> (a) Mine maps or diagrams showing directions of principal air flow, location of escape routes and locations of existing telephones, primary fans, primary fan controls, fire doors, ventilation doors, and refuge chambers. Appropriate portions of such maps or diagrams shall be posted at all shaft stations and in underground shops, lunchrooms, and elsewhere in working areas where persons congregate;
>> (b) Procedures to show how the miners will be notified of emergency;
>> (c) An escape plan for each working area in the mine to include instructions showing how each working area should be evacuated. Each such plan shall be posted at appropriate shaft stations and elsewhere in working areas where persons congregate;
>> (d) A fire fighting plan;
>> (e) Surface procedure to follow in an emergency, including the notification of proper authorities, preparing rescue equipment, and other equipment which may be used in rescue and recovery operations; and
>> (f) A statement of the availability of emergency communication and transportation facilities, emergency power and ventilation and location of rescue personnel and equipment.

with, Reed Miller, Mr. Miller's son, indicated that he knew how to get out, the inspector marked the violation as "unlikely." Tr. 354, 357.

Still, the inspector marked the injury, if the event were to occur, as fatal. Tr. 355. Negligence was deemed as moderate because there were postings of the plan, but there was no update for the working area. *Id.* The inspector believed that RX 2 was the map he saw underground, and about which he believed was deficient, as noted in his citation. To be sufficient, the map needed to illustrate the paths for escape from the mine. Only the main travel way, marked in yellow, was indicated, but two evacuation routes also needed to be listed. Tr. 359; RX 2. A single escape route is permitted only at the very beginning of a mine's excavation, but in such circumstances there must be a rescue chamber. Tr. 360.

On cross-examination by Mr. Miller, the inspector was shown RX 2, which was still not an exhibit at that point in the hearing, and the inspector acknowledged seeing a pick and shovel depiction on it. Tr. 356. However, that concession did not undercut that the violation was clearly established. As the Secretary observed in the post-hearing brief:

> At the time of the inspection, there were miners working at the end of the 800 level who, when questioned by the inspector, could not indicate a designated escape route. . . . While there were escape routes available from the area where the miners were working, those routes were not clear to the miners nor were they reflected on the mine Escape and Evacuation Plan that was posted throughout the mine and which was given upon request by mine personnel to the inspector. (Tr. 352-354). . . . [B]ecause in the event of an emergency, there needs to be established escape routes so that mine rescue and emergency personnel know where to find miners, the inspector found that the failure to designate escape routes and mark them on the Escape and Evacuation Plan to reasonably be expected to cause fatal injuries. (Tr. 355). And, because there was an Escape and Evacuation Plan, but that plan had not been updated, the inspector found that the operator had engaged in moderate negligence. (*Id.*).

Sec'y Br. 19.

Mr. Miller testified about the escape and evacuation citation. He contended that one entry and exit is allowed at a mine in the "steering phases of exploration." He asserted that the mine was in such a phase, that is, this was an "exploration project." Tr. 374-75. They were not in production. He believed that RX 2 meets the standard's requirements. Tr. 376. He added that the location was less than 2,500 feet from the portal to the workplace. He also asserted that there are other ways to get out of the mine, but if the mine were to designate them, MSHA would then inspect them. Tr. 375. The government then cross-examined Mr. Miller. Referring to GX 9, Miller stated he was referring only to his son, Reed. Tr. 376. As for the other individuals Miller mentioned, he asserted they were not miners, but were task trained. Tr. 377. He asserted however that those individuals were very familiar with the mine and that they knew "all the ins and outs of it." *Id.* Again, Miller asserted that no secondary escapeway is required at the mine.

The Court asked questions pertaining to GX 9 and the escape and evaluation plan. Miller agreed that the plan did not illustrate the escape routes for the working area of the mine. He also agreed that, per RX 2, the map of the escape and evaluation plan is depicted by the yellow line. Tr. 382. He agreed that only a single route is shown, but maintained that only one route was required. *Id.*

Further, addressing Respondent's contentions in defense, the Secretary accurately observes that RX 2 was a deficient Escape and Evacuation plan, noting that the

> only escape route indicated on the map is the main travelway; the travelway is not especially designated as an escape route but is a generally accepted escape route. (Tr. 358-359). And, even though each mine is required to have two escape routes at all times, only one is reflected on the map. (Tr. 359, 382).

Sec'y Br. 19-20.[32]

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[32] Though the Secretary of necessity addressed Respondent's contention that the mine was in exploration mode and therefore only one escapeway was necessary, it challenged that assertion, noting:

> The Metal/Non-Metal Program Policy Manual, §57.11050, states that the phrase "'exploration or development' should be used in its narrowest sense, i.e., while an ore body is being initially developed, or development or exploration work is being conducted as an extension of a currently producing mine." (emphasis added). In addition, §57.11050(b) requires that a mine without two escapeways have, instead, a refuge chamber; the operator admits that it does not have a refuge chamber. (Tr. 380). *See also, Small Mine Development*, 37 FMSHRC 1892, 1898 (2015) ("Given the importance the standard places upon providing duplicative means of survival in an emergency, it makes sense that the same protections be extended to miners who are engaged in exploration or development work, which carries with it many of the same dangers as production mining."). [The] Original Sixteen to One Mine does not satisfy the definition of "exploration or development" as defined in the Program Policy Manual. This is an old mine with over 35 miles of tunnels. (Tr. 53). The individuals underground . . . were not in a newly developed portion of the mine or in an area of the mine that was being extended. (Tr. 375-376). They were working in worked-out area of the mine within 2500 feet of the portal (Tr. 374). The mine operator cannot, by improperly claiming exploration, deny these workers, and other miners entering the mine, two safe means of escape.

Sec'y Br. 20-21. The Court agrees with the Secretary's observations about the standard's requirements.

The violation was established. Upon consideration, given the importance of escape and evacuation plans for all mines, the Court imposes the same, modest penalty amount proposed by the Secretary in the amount of $100.00.

Docket No. WEST 2015-240-M (Plumbago Mine)

Citation No. 8793801
Proposed Penalty: $100.00. Penalty Assessed: $50.00.

Inspector Rogers spoke about Citation No. 8793801, citing 30 C.F.R. § 57.11012,[33] which the Court described as the "bulkhead violation." Tr. 127, 178; GX 36a. This occurred at Respondent's Plumbago Mine. Tr. 129. The citation stated:

> There was no bulkhead or any other form of protection, installed at the #1 raise to prevent material from sliding down the approx. 55 degree dip angle and contacting miners as they travel this area. This raise had been mined-out previously and an ore chute, ladderway and some stalls were installed. The old dilapidated timber and material build-up, posed a fall of material hazard to miners traveling the main haulage.

For this matter, Respondent agreed with the condition and practice cited, including sections 10 and 11, listing the gravity as unlikely and the negligence as moderate, except where the citation asserted that "[t]he old dilapidated timber material buildup posed a fall of material hazard to miners." Tr. 127. The area cited involved a chute and a ladder. Tr. 136. The inspector cited a mined out area where he found either a slick or a slide or a hanging wall that was on the primary travel way. That travelway was for ore cars or personnel on foot. There were no bulkheads[34] and therefore any materials, if they came out, would come at the hip or mid-torso level of a miner. Also the drift (i.e., tunnel) was not very wide, only about 8 feet or less, therefore there would be exposure every time one passed that area. Tr. 129.

Describing the area of the cited condition, the inspector stated that the travelway had a 55 degree angle and there was a ladder that went up that raise. *See* GX 36C. He asserted that "[t]here appeared to be some loose material that was on the right rib." Tr. 131. He conceded that the material he was concerned about wasn't probably all that loose, but if any did come down it would come into the drift. Tr. 132. Because the materials were not "all that loose," he marked the violation as unlikely and non-S&S. *Id.* Negligence was marked as moderate, because in his estimation there did not appear to be a high degree of hazard. *Id.* It was the

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[33] 30 C.F.R. § 57.11012, titled "Protection for openings around travelways" provides: "Openings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed."

[34] A bulkhead, typically, is used to barricade and block an area off for ventilation or to address some other potential hazard. Tr. 130. In this instance, its function would be to stop materials from going into the drift. Tr. 131.

failure to install a bulkhead that drove his conclusion that the negligence was moderate. Similarly, he marked the injury as lost workdays or restricted duty because the angle any material would take was not severe. This led him to conclude that no fatality would result. Tr. 132-33. Respondent was permitted to install a nine-wire type (i.e., material similar to a chain link fence) bulkhead to remedy the problem, as that means would also allow one to visualize the area above. This abatement satisfied the inspector because, again, his concern was that smaller materials could strike a miner. If larger items had been his concern that remedy would not have been acceptable. Tr. 134.

On cross-examination, the inspector stated that he saw other areas that had a raise, where bulkheads had been installed for support. He reaffirmed that he did not climb the ladder at that location. Tr. 135. He agreed the ladder was not recently installed and he found no troubling[35] amount of rock fall below or around it. The inspector did not know what the angle of repose was of the rock left in the chute or raise. Tr. 136.

The inspector believed that the Plumbago Mine had two to three employees. Tr. 137. In his opinion, they were decent hands, that is, fairly knowledgeable individuals. *Id.*

The Court had a few questions, beginning with GX 36c, the photograph associated with the citation. The inspector agreed that it was taken from the bottom, and directed upwards. His concern was material falling down, from the top area of the photo. Tr. 138. The bulkhead's function, being placed at the bottom, where the inspector was standing when taking the photo, would be to act as a barrier for anything which might fall down. Tr. 139. This area, within which things could fall down, was about 17 and a half feet wide. The opening from where he was standing was from left to right, and he was about in the centerline of that. *Id.* The raise in the photo goes up at an angle. Although the area cited had been mined out, it was along a primary travelway. Tr. 140. Without the bulkhead, material falling from above could potentially strike miners traveling by that area. Tr. 141. Again, abatement was achieved by installing a wire mesh bulkhead, not a wood bulkhead. The bulkhead would span the approximate 17 feet comprising the bottom length of the travel area. Tr. 142.

In his defense to the bulkhead citation, Respondent Miller testified that he believed Plumbago is not a mine, but rather an abandoned piece of property, that once was a mine.[36] Tr. 178. It was his view that no bulkhead was needed because there is no evidence of debris below. Tr. 179. Thus, he asserted that nothing could fall down from above. Respondent contended that the ground above was very competent and therefore nothing could fall out from above. As noted, Respondent took issue with calling Plumbago a mine. Rather, he asserted that it is a tunnel. There was no intention of mining. Tr. 180. Respondent asserted that there was only one stull present. It appears to the left side of the ladder. A stull is a single vertical pole. It is used instead of having caps or sets or rock bolts. *Id.* Respondent Miller, while admitting that he has

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[35] Respondent employed the word "troubling" in his question to the inspector. Tr. 136.

[36] All claims made by the Respondent that the Plumbago or the Original Sixteen to One Mine are not mines are without any merit. The acknowledged use and purpose of these is to mine gold ore.

not gone up the ladder, stated that someone else had done so. He also asserted that the scene captured in the photo exhibit has probably been that way for more than 30 years. Tr. 181. Thus, having assessed the situation, Respondent maintained that it would be frivolous to install a barricade. Tr. 182. Respondent asserted that generalities about other mines simply did not apply to this situation, noting that the inspector admitted that not every raise needs a bulkhead and that he saw no loose material. *Id.* Accordingly, he compromised with the inspector by installing the chain link fence, though that too, in his view, was completely unnecessary. Tr. 183.

On cross-examination, Mr. Miller again took issue with a question which included describing the cited area as part of a mine. The Court interjected that the inspector agreed that the cited location was not an active mine, but that miners traveled along the area to get to the mine. Miller agreed with that description. Tr. 184. The problem with that claim is that such locations are indisputably part of the mine and Respondent's contention is not worthy of additional comment. Miller, agreeing that the angle of the dip was 55 degrees and that the angle of repose was 35 to 37 degrees, still did not agree that anything that came loose from the rise would fall down it. However, his answer was not helpful to his position, as he asserted that "[t]here's a big 17 feet. We don't know what else is up [there] . . . [but he then agreed that] if you throw a ball up, it's going to come down." Tr. 185. Counsel for the Secretary then asked, "[I]f a rock would come loose or piece of wood would come loose or anything else that happens to be up in this old mined out section would come loose . . . there's nothing to stop it from coming out of the rise, correct?" Tr. 186. Critically, Miller acknowledged that it was "absolutely true. That is true." *Id.*

Upon consideration, the violation was clearly established, but given the small size of the mine, that the condition had been that way, and uncited, for a very long period of time, and in consideration of the inspector's evaluations of gravity and negligence, including that it was, properly, deemed non-S&S, a penalty of $50.00 is imposed.

Citation No. 8793802
Proposed Penalty: $100.00. Penalty Assessed: $50.00.

Citation No. 8793802, GX 37, was issued on October 22, 2014, also at the Plumbago Mine. Cited was standard 30 C.F.R. § 57.8527,[37] for a failure to conduct oxygen testing. Tr. 145. Upon speaking with the miners, including Ms. Rae Bell, Respondent's office manager, the inspector determined none of them were aware of any such testing being done. *Id.* The inspector stated that he would not enter any mine without an oxygen detector. Tr. 146. This mine utilizes "natural ventilation," meaning that its ventilation is non-mechanical. Tr. 147. Oxygen testing is done to make sure miners have a minimum of 19.5% oxygen. Using his oxygen detector, the inspector found the oxygen level to be 20.6%. While the frequency of testing depends upon the particular metal/nonmetal mine, he believed that, at a minimum, such testing should occur weekly. Natural ventilation, he stated, only increases the importance of such testing because old workings, such as in this instance, can produce gasses. Tr. 149. Here,

[37] Section 57.8527, "Oxygen-deficiency testing," provides: "Flame safety lamps or other suitable devices shall be used to test for acute oxygen deficiency."

he found no evidence that *any* such testing had been done. This included, as noted, asking about the issue. *Id.*

Upon cross-exam, Respondent asked about the types of devices that would satisfy the standard, and the inspector (Rogers) gave some examples of such devices, some of which were multi-gas detectors. A flame safety lamp would also suffice. Tr. 150. The Court pointed out that the standard commands that such devices *shall* be used. The Inspector agreed that the Plumbago Mine is a non-gassy mine. Tr. 152.

In his defense, Miller stated that the mine is non-gassy, that no blasting takes place, that there was only a very small crew (2 or 3 persons) working, and that the climate is "consistent and predictable." There are only occasional changes in the barometric pressures. For short periods there can be stagnant air. During winter, air is entering the mine, while in the summer it is coming out. Further, Miller stated that he has a flame safety gas lamp, which he has used often enough to inform himself that there is no oxygen problem at this site. In addition, some of those working in the mine, including Miller's son, wear a device that is set to alarm at 19.6% and that device has never been triggered. Tr. 187-88. Miller's overarching point was that, as there are millions of cubic feet of open space and the oxygen levels are always at 20.6%, testing the air is pointless. Tr. 188. On cross-examination by the Secretary, Miller affirmed that he has tested for oxygen at the Plumbago Mine. He stated that he usually tested once a week and that he had an oxygen tester until he purchased the small detector device he referred to during his direct testimony in defense. In response to further questions, Miller stated that he used a flame safety lamp to test for oxygen around May 2014, but now he relies upon the other, new, device.[38] Tr. 192. However, at the time of the citation's issuance, he only had the flame safety lamp to detect for oxygen. Tr. 193.

Asked about his practice of testing for oxygen when opening up new areas of the tunnels, Miller stated that they did not test for oxygen because there was no need to do such tests, as the mine has open stopes throughout, with raises going up every hundred feet or so. Tr. 194. In what may fairly be described as an afterthought, Mr. Miller brought up that the miners usually carry a BIC-type lighter, as may used by those who smoke cigarettes, and his belief that such lighters are "suitable" as detectors for bad air. Tr. 196-97.

Inspector Rogers was then recalled and asked about the use of BIC-type cigarette lighters as a suitable oxygen testing device. While such lighters can be *indicators* of oxygen, he stated that the flame on them will not illuminate when oxygen levels are around 16%, but the MSHA standard requires oxygen to be at 19.5%. Therefore, the device's use would not be sufficiently protective. In candor, the inspector admitted that back in the 1970s he used such cigarette lighters to check for oxygen. Tr. 200-01. The BIC lighter issue aside, the inspector stated that when he issued his citation, the miners told him they were unaware of such testing for oxygen being done, and neither the lead miner nor Mr. Miller later asserted to him that they were using suitable devices to test for oxygen. Tr. 201.

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[38] Miller did not precisely identify the detection device, being uncertain about its name. Instead, he described it as a "little yellow device" that he bought in 2015 that tests for oxygen and cost about $200.00. Tr. 192-93.

The violation was established but given the mine's small size, that the gravity was marked as unlikely, that it was non-S&S, and that the Court, based on Mr. Miller's testimony, considered the negligence to be low for this matter, a civil penalty of $50.00 is imposed.

Docket No. WEST 2015-251-M (Sixteen to One Mine)

Citation No. 8793805
Proposed Penalty: $243.00. Penalty Assessed: $150.00.

MSHA Inspector Stephen P. Rogers also testified for the Secretary. Rodgers has 18 years of employment with MSHA and significant mining experience apart from his years with MSHA. Tr. 85-89. Directed to Citation No. 8793805, issued November 4, 2014, Rodgers, citing 30 C.F.R. § 57.6101(a),[39] issued it upon finding combustible materials — grass, brush, wood, and rubbish — within 25 feet of a powder magazine. GX 13c; Tr. 89. The concern is that a fire could propagate to that area and create an explosive hazard to the magazine, which was a blasting cap magazine. The inspector took measurements of the proximity of the combustible materials to the magazine, and Respondent stipulated that the material was within 25 feet of the magazine. Tr. 92. Still, the inspector found the gravity to be unlikely and also non-S&S. This was due to the lack of an ignition source for the cited material, such as a forest fire or vehicles in the area. Further, he noted that a lot of the brush had been cut back, so he concluded that it was not reasonably likely. Tr. 93. As the matter involved explosives, he did not feel that he could legitimately rate it any lower, as the "no lost workdays" category is primarily reserved for paperwork type violations. If a fire were to occur around a magazine, the practice is to simply get away from the area. One does not try to fight such a fire when explosives are involved. Tr. 94. The inspector did mark the negligence as "high," explaining that a powderman, that is, one who is handling explosives, has great responsibility in such matters, which includes making sure that the magazine area is clean and clear. *Id.* On cross-examination, the inspector stated that the most likely source of a problem developing would be in connection with a forest fire occurring. While the inspector acknowledged that some work at cleaning up the area had been done, he did not view it as a "work in progress." Tr. 98. The inspector's notes also reflect that the condition was visible from the main road and therefore easily apparent to the mine operator. Tr. 101. The inspector did agree that his notes reflect that the mine operator had been making some efforts to clean up the area, but that the work had not been completed. Tr. 103.

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[39] Section 57.6101, titled "Areas around explosive material storage facilities," provides:

> (a) Areas surrounding storage facilities for explosive material shall be clear of rubbish, brush, dry grass, and trees for 25 feet in all directions, except that live trees 10 feet or taller need not be removed.
> (b) Other combustibles shall not be stored or allowed to accumulate within 50 feet of explosive material. Combustible liquids shall be stored in a manner that ensures drainage will occur away from the explosive material storage facility in case of tank rupture.

Respondent, in its defense to this citation, called Mr. Miller. Miller testified that this was "a work in progress." Tr. 154. He stated that the mine was aware of the issue. However, he stated that something must have interrupted the effort, and that something else took precedence. Also, he stated that the wooden spool was not within 25 feet, that the 55 gallon drum had some trash in it and was to be removed later, and that the 2x4's, in his opinion, could not have presented a significant fuel source. Tr. 155. He also stated that non-els (non-electric blasting caps) are not self-detonating and that his recollection was that the inspector expressed his main concern as a forest fire. He believed that there was "no possibility" that a fire could ignite this. *Id.* In fact, he added that a disposal method for old explosives is to burn them. Tr. 156. However, he acknowledged the importance of clearing brush from around a magazine. *Id.* He also stated that there was very little fuel near the magazine and that the photo exhibit, GX 13, does not accurately represent the conditions that were present. Tr. 157. Thus, as the miners are there every day and are therefore more familiar with the situation, he viewed the condition as very remote and highly unlikely to occur. In the Secretary's cross-examination of Mr. Miller, Miller acknowledged that the condition was visible every day from the road. Tr. 160. He reaffirmed his view that there was not sufficient brush to justify the citation's issuance. In his view, the only real trash was the 2x4's he mentioned earlier. As to the Secretary's claim of brush close to the magazine, Miller described it as "green" and added that, if it's green, it's not brush, and it need not be removed. Tr. 161. Thus, he believed that the issue was minimal, stating that the grass didn't appear as in the photo and that it was clipped very low with a Weedeater. Tr. 162. However, he admitted that CAL-OSHA had been out and told him that the area needed to be trimmed. Tr. 163. Again, he stated that the area had been considerably cleaned up since then and that CAL-OSHA did not issue a citation. He conceded that there had been a drought in the area for a long time. *Id.*

Following that, the Secretary recalled Inspector Rogers. Tr. 164. Redirected to GX 13c, he was asked about whether there was vegetation that he considered to be brush and therefore needed to be cleaned. He referred to his notes, and they reflected that he tested some of the brush to make sure that it was dry and crumply, not wet-type material. Tr. 165. Speaking to the material in the photo, GX 13c, to the right of the magazine, he concluded that none of that was acceptable. It had to be removed as in his view it could start a fire. Tr. 166.

Because this small mining operation was making some efforts at cleaning up the brush, coupled with the inspector's admission that there were no immediate ignition sources observed, the Court views the negligence to be moderate, not high. Considering that view of the negligence and the small size of the mine, the Court imposes a penalty of $150.00 for this violation.

Citation No. 8793806
Proposed Penalty: $100.00. Penalty Assessed: $75.00.

Inspector Rogers testified regarding Citation No. 8793806, issued November 4, 2014, and citing 30 C.F.R. § 57.6132(a)(3).[40] GX 14. The particular cited subsection requires that magazines are to be bullet resistant. The cited magazine is the same one cited in Citation No. 8793805, which contained blasting caps. Tr. 104-05. The inspector stated that the magazine was not bullet resistant as it had a steel exterior of about 1/8 of an inch with an interior lining of about 1/2 an inch of plywood. Tr. 105. In contrast, the ATF standard requires magazines to have a 1/4 of an inch of steel and 2 inches of hardwood. Tr. 106. Respondent stipulated that the cited magazine's exterior was 1/8 inch thick steel and it was lined with plywood. Tr. 121-22. The hazard is that if one were to shoot at the magazine, a bullet could penetrate it and detonate the explosives inside. The inspector acknowledged the scenario was unlikely as the mine's gate is locked and no hunting is permitted on the privately-owned land. Tr. 107. Negligence was also

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[40] 30 C.F.R. § 57.6132, titled "Magazine requirements," provides:

> (a) Magazines shall be—
> (1) Structurally sound;
> (2) Noncombustible or the exterior covered with fire-resistant material;
> (3) *Bullet resistant*;
> (4) Made of nonsparking material on the inside;
> (5) Ventilated to control dampness and excessive heating within the magazine;
> (6) Posted with the appropriate United States Department of Transportation placards or other appropriate warning signs that indicate the contents and are visible from each approach, so located that a bullet passing through any of the signs will not strike the magazine;
> (7) Kept clean and dry inside;
> (8) Unlighted or lighted by devices that are specifically designed for use in magazines and which do not create a fire or explosion hazard;
> (9) Unheated or heated only with devices that do not create a fire or explosion hazard;
> (10) Locked when unattended; and
> (11) Used exclusively for the storage of explosive material except for essential nonsparking equipment used for the operation of the magazine.
>
> (b) Metal magazines shall be equipped with electrical bonding connections between all conductive portions so the entire structure is at the same electrical potential. Suitable electrical bonding methods include welding, riveting, or the use of securely tightened bolts where individual metal portions are joined. Conductive portions of nonmetal magazines shall be grounded.
>
> (c) Electrical switches and outlets shall be located on the outside of the magazine.

30 C.F.R. § 57.6132 (emphasis added).

evaluated as low as the magazine had been there for years, yet was not cited in previous inspections.

On cross-examination, the inspector stated that the cited magazine was a Class 2, which refers to a surface portable. Tr. 109, 111. There was another Class 2 magazine on the property, but it met the ATF standard. Tr. 110. The Respondent apparently filed paperwork with the fire marshall which listed the magazine as a Class 3 or 4 magazine. Tr. 112. Although the Respondent attempted to show that blasting agents need only be stored in a Class 4 magazine, the MSHA standard requires that the magazine must be bullet resistant. Tr. 114. MSHA accepts only Class 1 and 2 magazines. The inspector opined that, because the detonators were stored only in Ziploc bags, they would mass detonate. Tr. 117. In determining that the cited magazine did not meet the MSHA standard for bullet resistance, the Inspector relied upon the ATF and IME (Institute of Makers of Explosives) standards. Tr. 106, 121. Asked about the inspector's view that the magazine provided less protection to mine personnel than a bullet resistant one would, the inspector stated that the bullet resistant magazine would reduce the likelihood of a projectile penetrating the magazine. Therefore, the inspector's concern was focused on the construction of the magazine, not its particular location. Tr. 125.

In his testimony related to this citation, involving the thickness of the metal and the wood, and referring to Ex. 14, Mr. Miller stated that these were non-el detonating caps, and it was his view that they were "legal" as ATF inspected this, that is the thickness, the type of lock, etc. Tr.168. Miller's perspective was that ATF's view overrides MSHA's requirements. *Id.* Miller then proposed to enter as an exhibit a three page email between Respondent's employee, Rae Bell Abrogast, and Inspector Rogers. This was admitted as RX 1. Tr. 173.[41] This was offered as mitigating evidence, with the purpose of showing that detonators that will not mass detonate may be stored in a Class 4 magazine. Miller maintained that this magazine had passed inspection for "years and years and years." Tr. 171-72. To abate the citation, Respondent had all of the explosives removed from it. Tr. 172.

This citation was assessed at $100.00. Upon consideration of the statutory criteria, the mine's small size, and Mr. Miller's testimony on this matter, including that the magazine had not been cited in previous inspections, the Court imposes a civil penalty in the amount of $75.00.

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[41] The Court raised an issue about the proposed exhibit, because the email is dated June 15, 2015, but the citation was issued November 14, 2014. Therefore it was unclear if the email related to Citation No. 8793806. Tr. 174. However, ultimately, the Court decided to admit the exhibit. That said, the Court expressed that it could be given little weight because OSHA's and ATF's views do not control. The Court did not decide then the impact of such information in evaluating gravity or negligence. Tr. 176.

Docket No. WEST 2015-381-M (Plumbago Mine)

Citation No. 8698267
Proposed Penalty: $2,000.00. Penalty Assessed: $2,000.00.

Inspector Daniel Boylan spoke to Citation No. 8698267, GX 38a, issued June 25, 2014, citing section 103(a) of the Mine Act.[42] This was issued because of the alleged denial of entry to conduct an inspection. The inspector was at the Plumbago Mine with Inspector Jason Jeno for a compliance follow-up visit. That related to miner training and the training plan and to make sure that the miners had been withdrawn per the previous order. Tr. 600. When they arrived, they found that miners were working at the mine. Tr. 601. Mr. Miller then arrived at the site. The inspectors talked with the miners to determine why they were present, and they also examined some documents to determine if there were records of training. Mr. Miller asked to speak with the inspectors.

According to Inspector Boylan's testimony, while Miller was initially cordial, the inspector stated that Miller's attitude changed after the inspectors asked if a miners' rep was available to be present for such conversation. Miller, the inspector stated, informed that he would do the talking, not the inspectors. Tr. 603. The ensuing conversation became heated and Mr. Miller was angry, again, according to the inspector. The inspector stated that Miller asserted that there was no jurisdiction for their presence, Tr. 604, a perpetual assertion of Miller, which, as noted, was reasserted in Respondent's post-hearing briefs.

The inspectors informed Miller that he should direct his jurisdiction contentions to the MSHA District Office, not to them. *Id.* Miller then walked away and told his employees not to talk with the inspectors and for them to go home. Miller told the inspectors he was not talking with them anymore. With everyone leaving the mine site, the inspectors then left, too. Tr. 606. As all the employees had departed, the inspectors could not continue the inspection. The citation, reflected in GX 38, was issued as a violation of the Mine Act, and as such no safety standard was invoked. It was marked as non-S&S, no likelihood, and no lost workdays. However, it was also marked as high negligence, because Miller was well aware of MSHA's right to inspect. Tr. 607.

Citation Nos. 8698267 and 8698268 were each issued on June 25th, and for both, the inspector recommended a special assessment. This was because the inspector viewed the negligence involved for these two as "elevated." Elaborating, the inspector stated that Citation No. 8698268, involving *the second* instance of miners working in the face of an order, was associated with the need for withdrawal for the training to be conducted. The negligence for Citation No. 8698267 was elevated, the inspector maintained, because it is common knowledge that one may not impede MSHA inspections. Tr. 609.

The Court noted that, in making penalty determinations, it does not make "special assessments," but instead looks to the statutory penalty criteria only. In that regard it asked the inspector to further explain the basis of his "high negligence" designation. The inspector stated

[42] Citation Nos. 8698267 and 8698268 were discussed together at the hearing and are so presented here.

that he found no mitigating factors and that Miller knew of MSHA's right to inspect. Tr. 610-11. On further cross-examination, the inspector stated that he had to leave the mine site to get the approval for the "impeding" citation. This required traveling some distance away from the mine, as the cell phone coverage was poor at the mine site.[43] Tr. 613.

Denial of entry to conduct an inspection, as occurred here, is a very serious violation. Upon consideration of the record evidence for this matter, the Court finds that the proposed penalty of $2,000.00 remains appropriate and is so imposed.

Citation No. 8698268
Proposed Penalty: $2,000.00. Penalty Assessed: $2,000.00.

Citation No. 8698268, GX 39, was issued June 25, 2014, at the Plumbago Mine. Tr. 526-27. Four miners were at the mine at that time, moving a locomotive and working in the shop. For this matter, too, the earlier mentioned 104(g)(1) order, *see* discussion *supra* pp. 16-17, was still in effect, and because of that no miners should have been working. The citation, issued as a violation of the Mine Act itself, as opposed to a specific safety standard, was marked as no lost workdays, no likelihood, and non-S&S. However it was also marked as "reckless disregard." That last designation was used because it was the second instance of the mine working in the face of an order. Tr. 528. The inspector viewed it as demonstrating no apparent care in terms of abating the original order. *Id.* Again, the Plumbago Mine had not submitted a training plan to MSHA. Upon inquiring about any training they may have received, the inspector found some documents, but no "5000" training forms. Instead there was only something "scribbled off" with "Plumbago" written on the top of the form. Tr. 529. The form that was presented to him did not indicate that the required training had been completed, nor did it demonstrate that newly hired experienced miner training had been done. A proper form needs to show various numbers of training categories and certification that they had been done. The form that was presented to him had none of those items. Tr. 530.

Mr. Miller did not ask any questions of the inspector about Citation No. 8698268. As noted, this citation involved the assertion of working in the face of an order. Tr. 546. Mr. Miller again asserted that the required training was in fact given.

In cross-examination about Citation No. 8698268, again, the second citation involving working in the face of a withdrawal order, Miller acknowledged that he had knowledge that his men were told to leave the mine and that they needed to be trained, but he added that they had been working for him for years. When pressed about whether at that time he knew of the withdrawal order, Miller stated he did not know, and that he did not know "when [he] was delivered these final orders." Tr. 563. The Court did not find this claim to be credible. When asked to acknowledge the state of his awareness about the order's issuance versus receipt of the order itself, he stated there was a "huge difference" between "having something written and something orally given." Tr. 564. He did admit that he knew MSHA had issues with the

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[43] Initially, Mr. Miller expressed concern about *the time* when the citation was issued, but the day it was issued, June 25th, was not in dispute. Tr. 615.

training of miners at the Plumbago Mine. *Id.* However, he stated that he did not know that he had received the first citation for working in the face of a withdrawal order. *Id.*

Mr. Miller then testified again about these matters. Tr. 620. He stated that he is well aware of MSHA's right to inspect but contended that he did not impede or deny their inspection. Tr. 624. He also stated that he is the president and director of the Sixteen to One Mine, and a shareholder, but not the owner. Tr. 621. When asked about his role at the Plumbago Mine, he stated that he is responsible for all operations, and the one who oversees, but that he is not the "day-to-day person" at the mine. Tr. 622. The latter tasks are done by competent, qualified, and lead miners under him. *Id.* He reiterated that he did not and has not ever told employees to leave mine property due to the presence of a mine inspector. Tr. 624. He also denied that he told the miners to leave and lock the mine entrance gate. Tr. 624-25. Instead, Miller stated that his miners told him that they did not want to stay at the mine with the inspectors present. Tr. 626. He told them they could stay or leave, as they preferred, because that is the mine's policy on such matters. Tr. 627. Elaborating, Miller stated that the mine's policy is that miners can leave "[f]or any reason that personally upsets them." Tr. 627. Yet, the miners were still paid for the day, even though they left the mine. Tr. 631. The policy, Miller contended, applies for any reason and is not just about mine inspectors. Tr. 627. Miller did not deny that he told the inspector that he was not going to talk about the issue any longer and that he then left in his truck. Tr. 628-29.

As noted, these events occurred at the Plumbago Mine. Tr. 631. Miller stated that he then drove back to the Sixteen to One mine office. Miller maintained that he could not recall if he was given the citation on June 25th. Tr. 632. Miller stated that, when he concluded that the conversation with the inspector would not "go anywhere," he decided that he would leave the mine, and left it to the miners as to whether they wished to remain or leave. Tr. 633. Miller admitted that he may have acted "a little bit excited," but he was not confrontational or threatening to the inspector. Tr. 635. Miller denied that he arrived at the mine on that day in order to challenge the jurisdiction of the inspectors. Tr. 638. However, once there, he admitted that he told the inspectors, politely, that they had no jurisdiction over the property. Tr. 638-39. He also admitted that, once they started talking, he knew the inspectors were there for the purpose of conducting an inspection. Tr. 639-40. It was Miller's statement that he chose to leave the mine property, but he agreed that he could have stayed and allowed the MSHA inspectors to finish their inspection. Tr. 643.

In light of Mr. Miller's testimony, Inspector Boylan was then recalled. He contradicted Miller's testimony, stating that the miners were instructed to leave the mine by Mr. Miller. Tr. 645. Further, he never heard Miller tell the miners they could stay or leave as they wished, nor did he hear any miners state that they didn't want to remain at the site. The inspector also took note that the Mine Act provides for miners to still receive their pay when a withdrawal order is issued and he so advised the miners of that. Thus, the inspector was firm that Miller told the miners to leave the site and to lock the gate behind them. Tr. 646.

The impeding order was subsequently lifted, upon the mine operator allowing the inspection to proceed. Tr. 647. Upon handing the citation for impeding to Miller, he relented, the inspection began, and the order was lifted. Tr. 648. On subsequent re-cross-examination, the

inspector agreed that he knew that all the paperwork for Plumbago was at the Sixteen to One office, so there was no need to return to the Plumbago Mine for that issue. Thus, the inspector admitted that the Plumbago Mine records were kept at the Sixteen to One Mine and that, as it was a matter of paperwork, he could obtain the records for the Plumbago there.

However, the inspector stated that he still elected to go to the Plumbago mine site first. Tr. 651. When asked why he chose to go to the Plumbago, the inspector stated that, while that mine tends to keep its records at the Sixteen to One mine office, he had a second reason for going to the Plumbago site, namely to determine if miners were working in defiance of the order issued at the Plumbago. Tr. 653. Thus, he had a valid, independent, reason to return to the site. The Court notes that this was certainly his legitimate prerogative. The inspector added that when they went to the Plumbago, he and the other inspector were presented with some documents but, as noted earlier, that those documents were "nowhere near [the] training documents required." Tr. 654.

After considering the credibility of the inspector and that of Mr. Miller, at least as to these two matters, Citation Nos. 8698267 and 8698268, the Court finds that the Inspector's version of the events is more credible. As noted in the discussion for Citation No. 8698267, denial of entry to conduct an inspection, as occurred here, is a very serious violation. Upon consideration of the record evidence for this matter and the statutory criteria, the Court finds that a civil penalty of $2,000.00 remains fully appropriate for Citation No. 8698268.

Settled and Vacated Citations

At the hearing, seven citations were settled or vacated. Respondent withdrew its contest of the following citations and agreed to pay the originally proposed penalty: Citation Nos. 8698193 (WEST 2014-527-M), 8783100 (WEST 2014-527-M), and 8793807 (WEST 2015-251-M).

For Citation No. 8793616 (WEST 2015-78-M), the Secretary agreed to modify the citation to reflect lost workdays or restricted duty from the original designation as fatal, with the penalty remaining as proposed. The Secretary also agreed to modify Citation No. 8698194 (WEST 2014-527-M) to no likelihood, no lost workdays, and low negligence and to reduce the penalty to $50.00.[44]

Citation No. 8698227 (WEST 2015-78-M) was accepted by Respondent, and the Secretary agreed to remove the following sentence from Section 8 of the citation: "This mine has been in operation in the past during times of favorable commodities prices, and the mine is having rehabilitation activity been [sic] performed."

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[44] For the record, this matter involved 30 C.F.R. § 57.16001, titled "Stacking and storage of materials," which provides that supplies shall not be stacked or stored in a manner which creates tripping or fall-of-material hazards. The inspector found, at the second level of the upper shop, an above-ground location, materials were stacked in front of shelves which he believed created a tripping hazard for those accessing the shelves. Tr. 328. It was appropriate to settle this matter.

Finally, in an exercise of his prosecutorial discretion as recognized in *RBK Construction, Inc.*, 15 FMSHRC 2099 (Oct. 1993), the Secretary vacated Citation No. 8793619 (WEST 2015-158-M) at hearing. Having been vacated by the Secretary, Citation No. 8793619 is hereby DISMISSED WITH PREJUDICE.

The Court has considered the representations submitted in these cases and concludes that the proffered settled citations are appropriate under the criteria set forth in section 110(i) of the Act.

Summary of Violations and Penalties Imposed by the Court

Docket No. WEST 2014-527-M

Citation/Order No.	**Assessment**	**Settlement Amount**
8698193	$100.00	$100.00
8783098	$100.00	$50.00
8783099	$100.00	DISMISSED
8783100	$100.00	$100.00
8698194	$100.00	$50.00
TOTAL:	**$500.00**	**$300.00**

Docket No. WEST 2015-77-M

Citation/Order No.	**Assessment**	**Settlement Amount**
8698235	$5,000.00	$500.00
8698236	$112.00	$75.00
TOTAL:	**$5,112.00**	**$575.00**

Docket No. WEST 2015-78-M

Citation/Order No.	**Assessment**	**Settlement Amount**
8698224	$112.00	$112.00
8698225	$100.00	$100.00
8698226	$100.00	$100.00
8698227	$100.00	$100.00
8698228	$243.00	$243.00
8698229	$308.00	$154.00
8698230	$308.00	$154.00
8698231	$100.00	$100.00
8698232	$112.00	$112.00
8698233	$100.00	$75.00
8698234	$100.00	$100.00
8785247	$100.00	$75.00
8793615	$100.00	$100.00
8793616	$100.00	$100.00

8793617	$100.00	$50.00
TOTAL:	**$2,083.00**	**$1,675.00**

Docket No. WEST 2015-158-M

Citation/Order No.	Assessment	Settlement Amount
8785248	$100.00	$25.00
8793618	$100.00	$50.00
8793619	$100.00	VACATED
8785249	$100.00	$50.00
8793620	$100.00	$75.00
8785250	$100.00	$75.00
8793621	$100.00	$100.00
TOTAL:	**$700.00**	**$375.00**

Docket No. WEST 2015-240-M

Citation/Order No.	Assessment	Settlement Amount
8793801	$100.00	$50.00
8793802	$100.00	$50.00
TOTAL:	**$200.00**	**$100.00**

Docket No. WEST 2015-251-M

Citation/Order No.	Assessment	Settlement Amount
8793805	$243.00	$150.00
8793806	$100.00	$75.00
8793807	$100.00	$100.00
TOTAL:	**$443.00**	**$325.00**

Docket No. WEST 2015-381-M

Citation/Order No.	Assessment	Settlement Amount
8698267	$2,000.00	$2,000.00
8698268	$2,000.00	$2,000.00
TOTAL:	**$4,000.00**	**$4,000.00**

TOTAL PENALTY ASSESSED BY THE COURT: $7,350.00

ORDER

It is **ORDERED** that Citation No. 8793616 be **MODIFIED** to reduce the reasonably expected injury from fatal to lost workdays or restricted duty.

It is **ORDERED** that Citation No. 8698194 be **MODIFIED** to reduce the likelihood of injury or illness to no likelihood, to reduce the reasonably expected injury to no lost workdays, and to reduce the level of negligence to low negligence.

It is **ORDERED** that Citation No. 8698227 be **MODIFIED** to remove the following sentence from Section 8 of the citation: "This mine has been in operation in the past during times of favorable commodities prices, and the mine is having rehabilitation activity been [sic] performed."

Respondent Original Sixteen to One Mine, Inc., is **ORDERED** to pay a total civil penalty of $7,350.00 within 30 days of the date of this decision.[45] Upon receipt of payment, this case is **DISMISSED**.

William B. Moran
William B. Moran
Administrative Law Judge

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[45] 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

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