FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th St. Suite 443
Denver, CO 80202-2500
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

May 3, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. NALC, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2018-0020 A.C. No. 12-02409-448333 Mine: 243 Quarry

DECISION

Appearances: Dan Venier, Conference & Litigation Representative, and Suzanne Dunne, Esq., Office of the Solicitor, U.S. Department of Labor, MSHA, Chicago, Illinois, for Petitioner

Dana Boyd and Sonja Cowles, NALC, LLC, Cloverdale, Indiana, for Respondent

Before: Judge Simonton

I. INTRODUCTION

This Simplified Proceedings docket is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, pursuant to the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. §801.[1] This case involves two section 104(a) citations issued to NALC, LLC ("NALC" or "Respondent"), on July 24, 2017.

A hearing was held on March 15, 2018, in Indianapolis, Indiana. MSHA Inspector Jeffery L. Cook testified for the Secretary. Dana Boyd presented the case and testified for NALC.[2] At hearing, the parties agreed to the following stipulations of fact included in their prehearing statements:

[1] In this decision, the transcript, the Secretary's exhibits, and Respondent's exhibits are abbreviated as "Tr.," "Ex. S–#," and "Ex. R–#," respectively.

[2] NALC did not present any formal witnesses at hearing. The court swore in Mr. Boyd as Respondent's pro se representative in order to ensure that he would be under oath should his presentation of the case include personal testimony. *See* Tr. 7–8. The court allowed Dan Venier, the representative for MSHA, to cross-examine Mr. Boyd when appropriate. Tr. 8.

1. NALC, LLC is engaged in mining operations in the United States, and its mining operations affect interstate commerce.

2. NALC, LLC is the operator of the 243 Quarry, MSHA I.D. No. 12-02409.

3. NALC, LLC is an "operator" as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act), 30 U.S.C. § 803(d).

4. NALC, LLC is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et. seq.*

5. The Administrative Law Judge has jurisdiction in this matter.

6. The subject citations and orders were properly served by a duly authorized representative of the Secretary upon an agent of NALC, LLC on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance.

7. The exhibits to be offered by NALC, LLC and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

8. The assessed penalties, if affirmed, will not impair NALC, LLC's ability to remain in business.[3]

9. Mine Safety and Health Administration (MSHA) Inspector Jeffery L. Cook was acting in his official capacity as an authorized representative of the Secretary of Labor when aforesaid citations were issued.

See Tr. 8–12; Secretary's Prehearing Report at 2. At hearing, the Secretary argued that the citations should be upheld as written. NALC contested the fact of violation and the Secretary's S&S and negligence designations for both citations. The parties agreed to make closing arguments at the hearing in lieu of submitting post-hearing briefs. Based upon the parties' stipulations and my review of the witness testimony and of the entire record, I make the following findings.

[3] At hearing, Respondent expressed its concern that, while the Secretary's proposed penalties would not impair its ability to remain in business, potential future issues may arise from a finding of liability. Tr. 9. Specifically, Respondent noted that if it were to accept liability for Citation No. 8954275, the excessive history criteria in potential future assessments may impact its operations due to its widespread use of the particular model of scalping screen at issue. *See* Tr. 9–11. At hearing, the court accepted the stipulation as written and noted that its language was applicable only to the proposed penalty amounts and not to findings of negligence or gravity. Tr. 10–11.

II. LEGAL PRINCIPLES

A. Establishing a Violation

The Commission has long held that, "In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation." *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992). The Commission has described the Secretary's burden as:

> The burden of showing something by a "preponderance of the evidence," the most common standard in the civil law, simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence."

RAG Cumberland Res. Corp., 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

The Secretary may establish a violation by inference in certain situations. *Garden Creek Pocahontas Co.*, 11 FMSRC at 2153. Any such inference, however, must be inherently reasonable, and there must be a rational connection between the evidentiary facts and the ultimate fact inferred. *Mid-Continent Res.*, 6 FMSHRC 1132, 1138 (May 1984).

If the Secretary has established facts supporting the citation, the burden shifts to the Respondent to rebut the Secretary's prima facie case. *Construction Materials*, 23 FMSHRC 321, 327 (March 2001) (ALJ).

B. Significant and Substantial

A violation is significant and substantial (S&S), "if based upon 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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In order to uphold a citation as S&S, the Commission has held that 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. *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984).

The Commission has held that the second element of the *Mathies* test addresses the extent to which a violation contributes to a particular hazard. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016). Analysis under the second step should thus include the identification of the hazard created by the violation and a determination of the likelihood of the occurrence of the hazard that the cited standard is intended to prevent. *Id.* at 2038. At the third step, the Secretary must prove there was a reasonable likelihood that the hazard contributed to by the violation will cause an injury, not a reasonable likelihood that the violation, itself, will cause injury. *West*

Ridge Resources, Inc., 37 FMSHRC 1061, 1067 (May 2015) (ALJ), citing *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280–81 (Oct. 2010. Evaluation of the four factors is made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

C. Negligence

Under the Mine Act, operators are held to a high standard of care, and "must be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." 30 C.F.R. § 100.3(d). The Mine Act defines reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 CFR § 100.3: Table X.

The Commission and its judges are not bound to apply the part 100 regulations that govern MSHA's determinations addressing the proposal of civil penalties. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2048 (Aug. 2016), citing *Brody Mining, LLC*, 37 FMSHRC 1687, 1701–03 (Aug. 2015). The Commission instead employs a traditional negligence analysis, assessing negligence based on whether an operator failed to meet the requisite standard of care. *Brody*, 37 FMSHRC at 1702. In doing so the Commission considers what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation, would have taken under the same circumstances. *Id.* Commission judges are thus not limited to an evaluation of mitigating circumstances but may instead consider the totality of the circumstances holistically." *Id.*; *see also Mach Mining*, 809 F.3d 1259, 1264 (D.C. Cir. 2016).

D. Penalty

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (March 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

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

30 U.S.C. 820(i).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

NALC operates the 243 Quarry, a surface limestone operation located in Putnam County, Indiana. On July 24, 2017, MSHA Inspector Jeffery L. Cook visited the 243 Quarry to perform a routine inspection.[4] He was accompanied by NALC lead man Chad Dunham ("Dunham"). Cook issued the two section 104(a) citations at issue in this case. Citation No. 8954273 as modified alleges a violation of 30 C.F.R. § 56.20003(a) for the failure to keep the stairway leading to the north screen deck clean and orderly. Citation No. 8954275 alleges a violation of 30 C.F.R § 56.14110 for the failure to provide adequate side shields or similar devices on the scalping screen to prevent a fall of material hazard.

A. Citation No. 8954273

Inspector Cook began his inspection prior to the start of mine operations on the morning of July 24, 2018. Approximately one hour into the inspection, Cook approached the stairway to the north screen deck. Though NALC had performed some maintenance in the general area, Cook observed loose material covering the bottom two steps of the stairway. Tr. 20–21, 28–30. The material's top layer was granular and unconsolidated with a slick, clay-like substance underneath. Tr. 25. Cook also observed three footprints in the loose material. Tr. 22. He determined that one footprint faced toward the stairway while the other two faced away, indicating that at least one individual walked through the material on the way up and on the way down the stairway. Tr. 45; Exs. S–5, S–6. Cook believed that the material posed a slip and fall hazard to miners walking up or down the stairs. Tr. 20.

Later that day, Mine Foreman Dwayne Foster told Cook that he "told those guys when they go up there and clean that around the screen deck, they're supposed to clean that up before they go up there." Tr. 25. Inspector Cook assumed that Foster's statement referred to the cited loose material covering the bottom steps. *Id.* He issued Citation No. 8954273, which alleged:

> Safe access was not maintained to the ladder for the walkway up to the North screen. There was loose and hard material covering above the second step that measured 29 inches long. The condition exposes miners to lost work day/restricted duty type hazards. There were foot prints in the material and miners are in the area daily. This condition had not been reported on the last area exam.

Ex. S–1.

The Secretary subsequently modified the citation to allege a violation of 30 C.F.R. § 56.20003(a), alleging that NALC failed to keep the stairway clean and orderly. Ex. S–4. Inspector Cook designated the citation S&S, reasonably likely to result in lost workdays or restricted duty, and the result of Respondent's moderate negligence. NALC terminated the

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[4] Inspector Cook has served as an MSHA Inspector for approximately 2 and one half years. Tr. 17. He worked in the mining industry for 11 years as a mechanic, driller, shooter, and electrician. *Id.* He has an associate's degree in engineering. *Id.*

citation by clearing the material from the stairway. Ex. S–3. The Secretary assessed a penalty of $116.00.

NALC challenges the fact of violation and the Secretary's S&S and negligence designations. NALC argues that its miners were not exposed to the material and that they would have cleared the stairway before using it. Tr. 33–34. NALC also contends that the negligence designation should be reduced to low because it performed some maintenance in the area and the condition existed for a brief period of time. Tr. 33–34, 39–40.

1. The Violation

30 C.F.R. § 56.20003(a) requires that "[w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly" at all mining operations. The Secretary must establish that (1) the cited area is a "workplace," "passageway," "storeroom," or "service room," and (2) the area is not being kept clean and orderly. *See Tim M. Ball, employed by Mountain Materials, Inc.*, 38 FMSHRC 1799, 1808 (July 2016) (ALJ); *Ames Construction*, 37 FMSHRC 536, 540 (Mar. 2015) (ALJ).

The stairway was undisputedly a passageway leading to the north screen deck. Miners worked in the area and used the stairway regularly to access the screen. Tr. 26. The photographs clearly show that the stairway was not kept clean and orderly. Exs. S–5, S–6, S–7. The bottom two steps of the stairway were covered in loose material to the extent that a miner would be unable to climb the stairway without stepping through the material. Exs. S–5, S–7. Three footprints are visible in the loose material and appear to be facing both toward and away from the stairway, indicating that one or more individuals walked through the material on the way up and down the steps. Exs. S–5, S–6.

NALC contends that no miners were exposed to the condition because the mine was closed from the end of the last shift on Saturday until the Monday morning inspection, and that miners would have cleaned up the material before using the stairway. Tr. 27–30, 34. Though NALC did not state as much at hearing, I interpret this argument to challenge the fact of violation in that the mine's maintenance procedures would have cleared the buildup before miners traveled through the area. In support of this argument, NALC asserts that the footprints in the Secretary's photographs cannot be proven to belong to a miner. Tr. 31. Boyd testified at hearing that the footprints could reasonably belong to a trespasser. *Id.* He noted that trespassing and theft are recurrent problems at the mine due to a neighboring gun range and correctional facility. *Id.*

I find that the footprints can be reasonably inferred to have belonged to a miner. I credit Cook's testimony that Foreman Foster reportedly instructed the miners to clean up the material before using the stairway. Tr. 25. Foster's comments were not disputed at hearing and credibly suggest that he was aware of the buildup and that the miners ignored his instructions and used the stairway without first clearing the steps. *See* Tr. 35. NALC performed maintenance in the area surrounding the stairway at the end of the previous shift, and it is reasonable to infer that a miner walked up the stairs to perform maintenance on the screen deck itself without stopping to clean the steps first.

While I do not doubt Boyd's assertion that trespassing is an issue at the 243 Quarry, NALC provided no additional information to support its claim that it was a trespasser who left the footprints over the weekend prior to the inspection. Cook testified that he normally asks the operator about instances of theft during his inspection, and that no NALC employee notified him of any trespassing or theft issues on the property. Tr. 46. Absent any verifiable evidence regarding trespassing in this particular area of the mine, I find that the footprints likely belonged to a miner and NALC therefore failed to keep the stairway clean and orderly.

Accordingly, I affirm the violation of § 56.20003(a).

2. Significant & Substantial

Inspector Cook designated the citation as S&S and reasonably likely to result in lost workdays or restricted duty. I have already determined that NALC violated section 56.20003(a), thereby satisfying the first element of the *Mathies* test for an S&S violation.

To prove the second *Mathies* element, the Secretary must demonstrate the reasonable likelihood of the occurrence of the hazard that section 56.20003(a) is designed to prevent. *Newtown Energy, Inc.*, 38 FMSHRC at 2037. Section 56.20003(a) requires that all workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly. 30 C.F.R. § 56.20003(a). The purpose of section 56.20003(a) is to prevent the hazard of miners slipping, falling, or tripping on loose materials in areas where they work or travel. NALC contends that the violation was not likely to contribute to a hazard because miners would have cleared the material before using the stairs. Tr. 33–35. As determined above, however, at least one miner stepped through the material to access the stairway. The material was loose and slick, and covered the bottom two steps of the stairway. Tr. 25; Exs. S–6, S–7. NALC's failure to keep the steps clean therefore contributed to the reasonable likelihood of a trip, slip, or fall hazard. The Secretary has proven the second element of the *Mathies* test.

To prove the third *Mathies* element, the Secretary must show that the hazard was reasonably likely to result in an injury. *Newtown*, 38 FMSHRC at 2038. Here, the built up material was both loose and slick and therefore conducive to slips or falls. The buildup covered two entire steps and miners would have to walk through the material in order to climb the stairway. Tr. 25–26; Exs. S–6, S–7. Assuming the hazard has been realized, if a miner were to slip or trip on the material, they could fall backwards from a height of the steps to the ground or stumble forward and make contact with the stairway itself. Given the consistency and location of the material on the steps, the Secretary has shown that the slip and fall hazard was reasonably likely to result in injury.

Finally, to prove the fourth *Mathies* element the Secretary must show that the injury resulting from the hazard was reasonably likely to be serious. *Newtown*, 38 FMSHRC at 2038. Inspector Cook testified that slips and falls from stairway steps can result in serious injuries such as a ligament or muscle strain or possibly a broken bone that could result in lost workdays or restricted duty. Tr. 26. I credit Cook's assessment and conclude that the resulting injury would reasonably likely be serious.

I affirm the Secretary's S&S designation for this violation, and for the same reasons I affirm the gravity designation of reasonably likely to result in lost work days or restricted duty.

3. Negligence

The Secretary attributes the violation to NALC's moderate negligence. The Secretary contends that the condition was in plain view and miners should have seen the buildup and known to clean the steps. Tr. 26. NALC contends that it performed general maintenance in the area using a skid steer. Tr. 41–42. It posits that the material may have been back dragged by the skid steer during previous maintenance efforts or blown from the conveyor on to the steps. *See* Tr. 41–43. Respondent also contends that it was not aware of the condition over the weekend while the mine was closed and that the miners intended to clear the material before resuming mining operations that day. Tr. 34, 36–37.

Respondent clearly performed general maintenance in the area at the end of the previous shift on Saturday. Exs. S–5, S–7. However, the photographs suggest that the skid steer created the condition. The wind could not have blown that much material on to the steps without disturbing the footprints present in the buildup. *See* Exs. S–5, S–6. Furthermore, the defined edges of material surrounding the stairway indicate that the steer likely pushed the material onto the steps. *See* Exs. S–5, S–6, S–7. The condition was obvious, and NALC offered no credible explanation for why it cleaned the area near the stairway during Saturday's shift but failed to notice or clear the stairway. Tr. 30; Ex. S–7. As discussed above, the footprints indicate that at least one miner walked through the material without cleaning it up.

The condition was not extensive, however, and I credit NALC's assertion that it intended to clear the material that morning. Foreman Foster's comments to Cook imply that management instructed the miners to clean up the material and that they had not yet done so. Tr. 25, 34–35. Cook agreed that he did not see any miners beginning active work in the area when he inspected the area, suggesting they may not yet have had the opportunity to clear the steps. Tr. 33. Based upon NALC's maintenance efforts in the area, management's intent to clean the steps, and the brief time that miners were exposed to the condition, I modify the Secretary's negligence designation from moderate to low.

4. Penalty

The Secretary proposed a penalty of $116.00. NALC's history of previous violations is minimal, and the parties stipulated that the Secretary's proposed penalty amount is consistent with the violation and would not affect NALC's ability to remain in business. *See* Ex. S–17; Jt. Stip. 8. As discussed in detail above, I affirmed the Secretary's S&S and gravity determinations and reduced the operator's negligence from moderate to low. NALC promptly took steps to terminate the citation and clear the stairs. Ex. S–8. Accordingly, I assess a reduced penalty of $75.00.

B. Citation No. 8954275

Inspector Cook next inspected NALC's scalping screen deck. Cook and Dunham approached the screen from the electrical room to the right and ascended the stairway to inspect the screen while it ran. Tr. 51, 63–64. As they were observing the deck, the screen ejected a large rock. Tr. 51. The rock missed striking Dunham by about six inches, hit the hand rail midway up the stairway, and broke into two pieces before falling 30 feet to the ground below. Tr. 51; Ex. S–9. The rock measured 9 inches by 16 inches by 8 inches and landed approximately 14 feet from the side of the screen deck. *Id.* Cook issued Citation No. 8954275, which alleged:

> The side shields on the scalping screen were not extended far enough to prevent a fall of material hazard. A rock was observed falling from the screen deck striking the handrail falling to the ground during the inspection. The rock measured 9 inches x 16 inches x 8 inches. Employees working in and around the area were exposed to the possible injury from rocks falling approximately (30) thirty feet. Employees work in this area on a daily basis.

Ex. S–9. Inspector Cook designated the citation S&S, reasonably likely to be permanently disabling, and the result of NALC's moderate negligence. The Secretary later modified the negligence designation to low. Ex. S–12. NALC terminated the citation by adding an additional 18 inches of guarding to the screen's side shields. Ex. S–16. The Secretary assessed a penalty of $116.00.

NALC challenges the fact of violation and the Secretary's S&S and negligence designations. NALC contends that no miners were exposed to rocks falling from the screen because the plant's various safety measures prevented miners from approaching the screen while it was running. Tr. 61–62. NALC also contends that it took various steps to mitigate any potential hazard generated by the screen. Tr. 59–61.

1. The Violation

30 C.F.R. § 56.14110 provides that "[i]n areas where flying or falling materials generated from the operation of screens, crushers, or conveyors present a hazard, guards, shields, or other devices that provide protection against such flying or falling materials shall be provided to protect persons." Any installed guard or shield must provide actual protection against the danger of falling rocks. *See Northern Aggregate Inc.*, 37 FMSHRC 562, 579 (Mar. 2015) (ALJ) (affirming violation where signs on the crusher warning of ejecting rocks were not readily observable or obvious enough to keep employees out of the area).

The screen at issue presented a hazard of flying or falling materials. NALC does not dispute that the screen ejected a large rock during the inspection. Tr. 55. The rock was large and posed a hazard to Cook and Dunham, and would have posed to a hazard to any miner working or traveling within 14 feet of the screen. Tr. 51–52.

NALC did not provide actual protection against the falling material hazard posed by the screen. While Respondent installed additional guards on the scalping screen prior to the

inspection, the guards did not prevent the ejection or protect Cook or Dunham from the falling rock. There is no evidence of barriers or barricades that would ensure miners maintained a safe distance from screen, and Cook testified that neither Dunham nor any other miner notified him of the plant's policy that miners should not approach the screen while in operation. Tr. 71.

NALC provided evidence of signage warning of the hazard posed by the screen. *See* Tr. 57; Ex. R–F. However, the signage was not prominent enough to warn individuals of the danger from all directions. *See* Ex. R–F. The photographs show that the sign was posted on the side of the stairway's top platform, and one could walk up the steps to the screen deck without seeing it at all. *Id.* Furthermore, NALC provided no further evidence of signage on other sides of the screen. I therefore find that NALC did not provide actual protection from the hazard of falling rocks as required by the standard. Accordingly, I affirm the violation of section 56.14110.

2. Significant and Substantial

Inspector Cook designated the violation S&S because the rock fell and nearly struck Dunham, which could have resulted in serious injuries. I have already found that NALC violated section 56.14110, thereby satisfying the first element of the *Mathies* test.

In regards to the second *Mathies* element, the Secretary must demonstrate the reasonable likelihood of the occurrence of the hazard that section 56.14110 is designed to prevent. Section 56.14110 requires that operators install guards, shields, or other devices in order to protect miners from flying or falling material hazards generated by operating screens, crushers, or conveyors. 30 C.F.R. §56.14110. The express language of the standard anticipates the discrete safety hazard of falling or flying materials contacting miners. *See Ash Grove Cement Co.*, 38 FMSHRC 2151, 2169 (Aug. 2016) (ALJ).

NALC contends that the violation did not contribute to the hazard because the plant's safety measures limit miners' exposure to falling material generated by the screen. Tr. 61–62. In addition to the installation of side guards and signs, NALC argues that its miners are trained to only approach the scalping screen to perform maintenance work and that all maintenance work is done when the plant is shut down. Tr. 58, 62. Any miners in the area would be operating equipment while the screen was running. Tr. 62. NALC thus argues that if it weren't for the inspection, no miner would have been in the area and the violation would not have contributed to the hazard. Tr. 78–79.

I have already held that NALC's signage and initial guarding installation did not provide actual protection against flying or falling rocks. Since NALC did not provide evidence of barricades or any other measures that prevent rocks flying or falling from the screen, NALC essentially posits that the violation did not contribute to the hazard because its miners would exercise caution near the screen. I am constrained from considering this argument in my S&S analysis.[5] The Commission has held that whether miners would exercise caution is not relevant

[5] Even if I were to consider NALC's safety measures, it is undisputed that the measures were not followed during the inspection. Cook and Dunham approached the screen on foot and while it was running, in contravention of two of NALC's safety policies. Tr. 55–56. Cook testified that

in determining whether a violation is S&S. *See Newtown*, 38 FMSHRC at 2044 (citations omitted) (Holding that mitigation by caution should not be considered in S&S analysis because the hazard will continue to exist regardless of whether caution is exercised).

The facts surrounding the inspection clearly indicate that NALC's failure to protect against flying or falling rocks contributed to the reasonable likelihood that a rock would strike a miner. Inspector Cook personally observed the rock eject over the screen's side guarding and come within six inches of striking Dunham. Tr. 54–55. NALC did not dispute this testimony. Tr. 55. The Secretary has met his burden of proof for the second *Mathies* element.

Regarding the third *Mathies* element, the Secretary argues that hazard of rock falling from a screen and striking a miner was reasonably likely to result in injury because Dunham would have been hurt if the ejected rock had struck him. Tr. 77. Assuming that the hazard has been realized, I find that a rock falling and striking a miner would be reasonably likely to result in an injury. Cook credibly testified that the rock would have injured Dunham had it made contact. Tr. 52. The rock was quite large and was ejected with enough force to break on the stairway and land 14 feet from the screen deck. Tr. 52; Ex. S–15. In the context of continued normal mining operations, if a rock of a comparable or even smaller size struck a miner on the deck, the steps, or the ground 30 feet below, it would almost certainly cause an injury. Tr. 52; Exs. S–9, S–15. The large rock also landed nearly 14 feet away from the screen, indicating that even miners attempting to maintain some distance from the screen could be struck and injured. Tr. 51. Given the size of the rock that was ejected from the screen and the height from which the rock fell, I find that the hazard would be reasonably likely to result in an injury. The Secretary has therefore met the minimum threshold for proving the third element of the *Mathies* test.

Regarding the fourth *Mathies* element, the Secretary must show that the injury resulting from the hazard is reasonably likely to be serious. The rock measured 9 inches by 16 inches by 8 inches and fell from a height of about 30 feet. Ex. S–9. Cook credibly testified that the rock would have seriously injured Dunham, who was standing relatively close to the screen at the time it was ejected. Tr. 52. If a rock of comparable size ejected and struck a miner on the stairway or on the ground, the injury could be even worse. *Id.* I find that any injury resulting from the hazard would undoubtedly result in permanently disabling injuries at the very least.

For the reasons above, I affirm the Secretary's S&S and gravity determinations.

3. Negligence

Inspector Cook originally designated NALC's negligence as moderate. Ex. S–9. The Secretary later modified the negligence designation to low at conference.[6] Tr. 68; Ex. S–11.

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neither Dunham nor any other miner informed him that miners were trained to only approach the screen when the plant was shut down. Tr. 71.

[6] Inspector Cook was not present at the informal conference and was unable to testify as to why the Secretary opted to modify the negligence designation from moderate to low. Tr. 69.

NALC contends that it went above and beyond the normal practice to protect its miners from dangers posed by the scalping screen. Tr. 61.

I find that NALC was not negligent in light of the facts surrounding this violation. As discussed above, NALC took a number of steps to ensure that its miners were not at risk of injury from rocks that may eject from the screen. NALC installed an additional 32 inches of guarding to the screen's sides at the request of its miners and posted a sign on the steps of the screen warning passerby of the danger of falling rocks. Tr. 68–69; Exs. R–A, R–C. Although Cook testified that NALC's decision to add the additional guarding demonstrates that NALC knew that the screen posed a danger, the Secretary failed to question the respondent on the frequency at which the screen ejected rocks or regarding any prior occurrences that may have induced NALC to do so. *See* Tr. 69–70. Absent this evidence, I credit NALC's assertion that it added the guards at the behest of its miners and decline to further penalize NALC for installing additional guarding, even if it proved insufficient.

NALC also trained its miners not to approach the general area while the scalping screen was operating. Tr. 58–61. Boyd testified that miners only approached the screen for maintenance purposes when the plant was shut down. Tr. 58. If miners did approach the screen while it was running, they did so in equipment that provided additional protection. Tr. 62. While NALC's employees did not adhere to the plant's safety policies during the inspection itself, I credit Boyd's testimony that Dunham was intimidated by Inspector Cook and the MSHA inspection process, and thus did not object to Cook's request to observe the running screen. Tr. 63–64. Cook testified he had no reason to dispute this testimony or to disbelieve that NALC generally enforced its safety policies, and the Secretary provided no evidence to the contrary. Tr. 71.

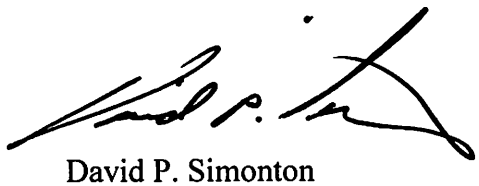
All of these factors indicate that NALC took significant steps to ensure that miners were both aware of and protected from any dangers that the scalping screen might pose while in operation. I therefore find that NALC's actions were commensurate with that of a reasonably prudent miner. Accordingly, I modify the Secretary's negligence designation from low to none.

4. Penalty

The Secretary proposed a penalty of $116.00. NALC's history of previous violations is quite low, and the parties stipulated above that the Secretary's proposed penalty amount is consistent with the violation and would not affect NALC's ability to remain in business. *See* Ex. S–17; Jt. Stip. 8. I found that the violation was S&S and reasonably likely to result in a permanently disabling injury. I reduced NALC's negligence from low to none. NALC took immediate steps to terminate the citation by adding 18 inches of guarding to the sides of the screen. Accordingly, I assess a penalty of $50.00.

IV. ORDER

The Respondent, NALC, LLC, is hereby **ORDERED** to pay the Secretary of Labor the total sum of **$125.00** within 30 days of this order.[7]



David P. Simonton
Administrative Law Judge

Distribution: (U.S. First Class Mail)

Dan L. Venier, Conference & Litigation Representative, U.S. Department of Labor, MSHA, 515 West 1st Street, #333, Duluth, MN 55802

Dana Boyd, NALC, LLC, 8090 South State Road 243, Cloverdale, IN 46120

[7] 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