FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19TH STREET, SUITE 443
DENVER, CO 80202-2500
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

May 31, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. ROCK PRODUCTS, INC., Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2017-0397 A.C. No. 29-02323-441046 Docket No. CENT 2017-0432 A.C. No. 29-02323-443333 Docket No. CENT 2017-0433 A.C. No. 29-02323-443333 Mine: Crusher #10

DECISION AND ORDER

Appearances: Felix R. Marquez, U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, for Petitioner;

Charles W. Newcom, Sherman & Howard LLC, Denver, Colorado, for Respondent.

Before: Judge Miller

These cases are before me upon petitions for assessment of civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act"). These dockets involve fourteen citations issued pursuant to Sections 104(a) and 104(d)(1) of the Act with originally proposed penalties totaling $30,934.00. Respondent withdrew its contest of Citations No. 8968775 and 8968780 at hearing. The parties presented testimony and evidence regarding the remaining citations at a hearing held in Albuquerque, New Mexico, on March 7, 2018. Based upon the parties' stipulations, my review of the entire record, my observation of the demeanors of the witnesses, and consideration of the parties' legal arguments, I make the following findings and order.

Crusher No. 10 is a sand and gravel mine located in Valencia County, New Mexico, and operated by Rock Products, Inc. The parties have stipulated that Rock Products is an "operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d), and is subject to the jurisdiction of the Commission. Jt. Stips. ¶¶ 2, 3, 4.

On May 2, 2017, MSHA Inspector John Lewis visited the mine to conduct a regular inspection. Inspector Lewis has been a mine inspector for two years and four months, and prior to that time worked in the mining industry. He has a bachelor's degree in business and is a certified MSHA trainer. He conducted three inspections of Crusher No. 10 that are discussed here. The first began on May 2, 2017, as a regular inspection. The second was a hazard

complaint investigation beginning on May 9, 2017. The third began on May 11, 2018, after a reported accident at the mine.

Lewis arrived at Crusher No. 10 on May 2, 2017, to conduct a regular inspection. He met with Rob Martinez, the safety manager for Crusher No. 10 as well as several other mines owned by the same company, and Mason Holman, the supervisor of Crusher No. 10 as well as Rock Products Crusher No. 6. Martinez and Holman both testified on behalf of the mine along with several other witnesses. Several of the violations were marked as high negligence, and a number were assessed as significant and substantial violations.

I. APPLICABLE PRINCIPLES OF LAW

A. Establishing a Violation

To prevail on a penalty petition, the Secretary bears the burden of proving an alleged violation by a preponderance of evidence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). The Secretary may establish a violation by inference in certain situations, but only if the inference is "inherently reasonable" and there is "a rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152-53 (Nov. 1989); *see also Eagle Energy Inc.*, 23 FMSRHC 1107, 1118 (Oct. 2001).

B. Negligence

The Commission has recognized that "[e]ach mandatory standard ... carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, the judge must consider "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2047 (Aug. 2016); *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984). While the Secretary's Part 100 regulations evaluate negligence based on the presence of mitigating factors, Commission judges are not limited to that analysis. *Brody,* 37 FMSHRC at 1702-03. Rather, Commission judges consider "the totality of the circumstances holistically." *Id.* at 1702. The Commission has recognized that "the gravamen of high negligence is that it 'suggests an aggravated lack of care that is more than ordinary negligence.'" *Id.* at 1703 (quoting *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

The Mine Act places primary responsibility for maintaining safe and healthful working conditions in mines on operators, and they are thus expected to set an example for miners working under their direction. *Newtown*, 38 FMSHRC at 2047; *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987); *see also* 30 U.S.C. § 801(e). "Such responsibility not only affirms management's commitment to safety but also, because of the authority of the manager, discourages other personnel from exercising less than reasonable care." *Wilmot*, 9 FMSHRC at

688. When a violation is committed by a non-supervisory employee, the conduct of the rank-and-file miner is not imputable to the operator for negligence purposes. *Ky. Fuel Corp.*, 40 FMSHRC 28, 31 (Feb. 2018). In such circumstances, Commission judges must analyze "whether the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct." *Id.*; *see also Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2369 (Sept. 2016). Relevant considerations include "the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard [at] issue." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15-16 (Jan. 1983).

The negligence of an operator's agent is imputable to the operator for penalty assessment and unwarrantable failure purposes. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328 (Mar. 2009); *Whayne Supply Co.*, 19 FMSHRC 447, 450 (Mar. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991). The Mine Act defines an "agent" as "any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine." 30 U.S.C. § 802(e). In analyzing whether an employee is an agent of an operator, the Commission has considered factors including "the ability of the employee to direct the workforce, whether the employee holds himself out as a person with supervisory responsibilities and is so regarded by other miners, and whether the actions of the employee in directing the workforce have an impact on health and safety at the mine." *Nelson Quarries*, 31 FMSHRC at 328.

C. Significant and Substantial

A "significant and substantial" ("S&S") violation is described in Section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(l). A violation is properly designated S&S "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

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

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

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

The second element of the *Mathies* test addresses the likelihood of the occurrence of the hazard the cited standard is designed to prevent. *Newtown Energy, Inc.*, 38 FMSHRC 2033,

2036 n.8 (Aug. 2016). The Commission has explained that "hazard" refers to the prospective danger the cited safety standard is intended to prevent. *Id.* at 2038. For example, *Newtown* involved a violation of a standard requiring that equipment be locked out and tagged out while electrical work is being performed. *Id.* The Commission determined that the hazard was a miner working on energized equipment. *Id.* The likelihood of the hazard occurring must be evaluated with respect to "the particular facts surrounding the violation." *Id.*; *see also McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991-92 (Aug. 2014); *Mathies*, 6 FMSHRC at 4. At the third step, the judge must assess whether the hazard, if it occurred, would be reasonably likely to result in injury. *Newtown*, 38 FMSHRC at 2037. The existence of the hazard is assumed at this step. *Id.*; *Knox Creek Coal Corp. v. Sec'y of Labor,* 811 F.3d 148, 161-62 (4th Cir. 2016). As with the likelihood of occurrence of the hazard, the likelihood of injury should be evaluated with respect to specific conditions in the mine. *Newtown,* 38 FMSHRC at 2038. Finally, the Commission has found that the S&S determination should be made assuming "continued normal mining operations." *McCoy*, 36 FMSHRC at 1990-91.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Citation No. 8968761.

As he entered the property to begin his inspection, Inspector Lewis observed a front-end loader idling unattended. The parking brake on the loader was set, but Lewis checked each of the wheels and found that they were not chocked. Lewis observed that the loader was parked on a grade and the transmission was in neutral. There was no foot traffic in the area. Lewis waited until the operator returned to the area and asked him to get into the loader and release the parking brake. The machine rolled a few feet. Lewis noted that the operator had left the bucket of the machine down, but the machine still rolled when tested. When asked, the operator of the loader informed Lewis that he did not have any wheel chocks.

Lewis issued a citation for a violation of 30 C.F.R. § 56.14207, which requires that "Mobile 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."

Respondent argues that there was no grade where the loader was parked. Martinez, the company safety director, testified that the grade in the area was minimal. The photograph of the violation introduced by the Secretary does not show an obvious grade. Ex. 6-1. On cross-examination, Lewis admitted that while he had estimated a seven percent grade, a similar seven percent grade on a road known to him was steeper than the one in the photograph. Nevertheless, I credit the inspector's testimony that there was a grade which caused the loader to roll. The loader was in neutral and the wheels were not chocked or turned into the bank. Therefore, I find that the Secretary has proven a violation.

Lewis found the negligence to be high because he believed that management was aware of the standard and that miners should be aware of it through training. Respondent argues that there were mitigating factors because the bucket was down, which prevented the loader from rolling far, and the loader was not parked in a hazardous area.

The Commission addressed the negligence of a similar violation in *Kentucky Fuel Corp.*, 40 FMSHRC 28 (Feb. 2018). That case involved an injury to a mechanic who was working on a vehicle. The mine was cited for a failure to block machinery against motion when conducting repairs, and the judge found that the violation resulted from high negligence. The Commission affirmed the judge's finding because the operator had failed to provide wheel chocks for use at the mine. *Id.* at 39. The Commission found that the failure to provide the materials necessary for compliance with the standard was a particularly significant breach of the operator's duty of care because it meant that a miner could not comply with the safety standard. *Id.* at 40. Thus, the operator's actions displayed the aggravated lack of care required for high negligence. *Id.* at 41.

In this case, the Secretary has demonstrated an "aggravated lack of care that is more than ordinary negligence" on the part of the mine operator. *Brody*, 37 FMSHRC at 1703. The operator of the loader was a rank-and-file miner who is required to be trained before he operates heavy equipment. He left the loader in neutral instead of in gear and he failed to turn the wheels and chock them. Although it is not clear whether chocks were available somewhere on the mine property, the loader operator admitted that he had no chocks to use. At the same time, I do not agree that the bucket being left down was a significant mitigating factor, given that it did not prevent the loader from rolling. I find that the violation resulted from high negligence.

The Secretary alleges that the violation was unlikely to result in injury, but that if an injury did occur, it would likely be fatal. The loader is a large piece of equipment that could cause fatal injury in the event of an accident. An accident was unlikely to occur, however, because there was no foot traffic in the area, the grade was minimal, and the parking brake was set. I affirm the finding that the violation was not S&S. I assess the $1,770.00 penalty as proposed.

Citation No. 8968762.

Lewis also observed that the bottom step on the same front-end loader was slightly bent. Exhibits 6-1 and 6-2 are photographs of the loader showing that the bottom step is bent several inches to one side. The step provided access to the loader cab. Lewis believed the bent step created a slip, trip, and fall hazard for a person entering or exiting the cab. He understood that the condition had existed for some time. He noted that the loader would have been used every shift and that the loader operator would have to fill out a pre-operational report before each use. Lewis cited the mine for a violation of 30 C.F.R. § 56.14100(b), which provides that "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." Martinez testified that he did not believe the step affected safety because a person could still get a three-point stand with hands and feet on the step and hand rails. On this point, I credit the inspector's testimony that the bent step made it easier for a person to misstep and fall, creating a slip, trip, and fall hazard.[1]

[1] The inspector determined that this citation and Citation No. 8968771 were unlikely to cause injury. Respondent argues that, based on this determination, neither defect "affected safety" within the meaning of the standard, and so both citations must be vacated. I am not persuaded by this argument, because whether a defect "affects safety" is a separate question from whether it is

The Commission has explained that whether a defect was corrected "in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of its existence." *Lopke Quarries, Inc.*, 23 FMSHRC 705, 715 (July 2001). Thus, to prove that a defect was not corrected in a timely manner, the Secretary must present evidence to show when the defect occurred and when the operator knew or should have known about it. *See Martin Marietta Materials, Inc.*, 36 FMSHRC 411, 412 (Feb. 2014) (ALJ) (vacating citation for timely correction of a defect where Secretary presented no evidence to show when the operator knew or should have known of the defect); *Giant Cement Co.*, 13 FMSHRC 286, 287 (Feb. 1991) (ALJ) (vacating citation for timely correction of a defect on a loader because there was no evidence that the defect existed when the loader was last operated, and an inspection would not be expected until it was operated again); *cf. Northshore Mining Co.*, 38 FMSHRC 753, 792 (Apr. 2016) (ALJ) (finding a violation occurred where there was evidence that management had known of the defect for a week prior to inspection); *Campbell Cty. Highway Dep't*, 36 FMSHRC 2579, 2582 (Sept. 2014) (ALJ) (finding a violation where a leak of hydraulic fluid had been noted in examination records prior to inspection). Given that the loader was examined and used every day, the operator should have known of and corrected the defect. The Secretary has proven a violation.

Lewis marked the violation as non-S&S and unlikely to cause injury because the step was not severely damaged. He stated that while the loader operator would use the step several times each shift, the operator would probably only sustain an injury if he was not paying attention. Lewis believed that an injury that did occur would most likely result in lost workdays or restricted duty. Martinez noted that someone entering the loader could grab onto the hand rails to avoid a fall, making injury unlikely. I affirm the Secretary's gravity determination.

The Secretary alleges that the violation was the result of high negligence. Lewis stated that the operator should have been aware of the violation because the loader is examined every day before it is operated. He also stated that, given what he observed, the step had been in that condition for some time. The Secretary did not introduce examination reports from the loader. Because there is no evidence that the step was noted on the examination reports, or that management believed it was a hazard that needed to be repaired, I find that there is insufficient evidence in the record to demonstrate an aggravated lack of care on the part of the operator. I find that the violation was the result of moderate negligence. I assess a penalty of $500.00.

---

likely to cause injury. *See, e.g., Apex Quarry, LLC*, 36 FMSHRC 211, 221 (Jan. 2014) (ALJ) (affirming two violations of 30 C.F.R. § 56.14100(b) and finding that both were unlikely to cause injury).

Citation No. 8968771.

Lewis next inspected the Caterpillar 988F front-end loader and observed that the main access steps to this loader were also damaged. The loader was being operated at the time of the inspection. The bottom step had been modified using a chain so that it was at a height of 30 inches. Lewis stated that a normal step height would be around 18 to 24 inches. Exhibit 6-4 shows the modified step. Lewis believed that having the step at an increased height created a slip, trip, and fall hazard for someone entering or exiting the loader cab. Martinez stated at hearing that the loader operator had modified the step because he was tall and wanted a bigger step. However, when asked, Martinez could not recall who the operator was or how tall he was. Lewis stated that the modification was the result of a repair when the original step had been damaged. The inspector cited the mine for a second violation of 30 C.F.R. § 56.14100(b), timely correction of a defect affecting safety. Given that the alleged defect was the result of an intentional modification to the step during a repair and the loader was examined regularly, the mine operator should have known of the defect. I credit the inspector's testimony that the tall step created a hazard and find that the Secretary has proven a violation.

Lewis indicated in the citation that the violation was unlikely to cause injury, and that if an injury did occur, it would most likely result in lost workdays or restricted duty. The violation was marked as non-S&S. At hearing, Lewis suggested that the violation could actually cause permanently disabling injury because of the significant fall distance. He stated that a person could break a leg or severely twist an ankle from that distance. The Secretary alleged an injury severity of lost workdays or restricted duty in his brief. Sec'y Br. at 21. I find that injury was unlikely, and that if an injury did occur, it would most likely be of the severity to cause lost workdays or restricted duty.

The Secretary alleges that the violation was the result of high negligence. Lewis stated that the defect was obvious and the loader operator would have done a pre-operational check on the equipment. I find that in this instance, because the step had intentionally been modified to this unsafe height, the high negligence assessment is appropriate. I assess a penalty of $533.00 as proposed.

Citation No. 8968772.

The following day, Lewis inspected the laydown conveyor located in the middle of the plant at Crusher No. 10. He observed that the tail pulley on the conveyor was exposed underneath. Exhibit 6-6 shows the exposed area, which was 30 inches above the ground. Lewis explained that miners work near the tail pulley to shovel material that spills off the conveyor. He believed the exposed tail pulley created a hazard because there was ample room for someone's hand to become entangled in the conveyor and pulley.

Lewis cited the mine for a violation of 30 C.F.R. § 56.14107(a), which provides that "Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." To prove a violation of § 56.14107(a), the Secretary must show that there was an unguarded moving machine part that "can cause injury." The

Commission has interpreted a similar guarding standard to require proof of "a reasonable possibility of contact and injury." *Thompson Bros. Coal Co., Inc.*, 6 FMSHRC 2094, 2096 (Sept. 1984); *see also Nelson Quarries, Inc.*, 36 FMSRHC 3143, 3146 (Feb. 2014) (ALJ) (interpreting § 56.14107(a) to require proof of reasonable possibility of injury). The analysis of a reasonable possibility of injury should account for "contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Thompson Bros.*, 6 FMSHRC at 2097. Relevant considerations include "all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct." *Id.*

The parties disagree as to whether there was a reasonable possibility of a person contacting the moving parts. The uncovered area was only 30 inches above the ground, and Lewis acknowledged that if a person walking by fell into the metal, he would be protected by the guarding that was already present. Lewis also did not believe that a person would have a reason to intentionally crawl under the conveyor. However, he stated that miners kneel down to shovel material out from under the conveyor, which puts them in close proximity to the exposed tail pulley.[2] He noted that miners would be in the area to clean on every shift. Martinez believed that a person would need to get on his hands and knees to access the pulley. He noted that there was an overhang of three or four inches around the conveyor, and thus he believed it would be difficult to hit the belt with a shovel. He believed the guard already present would protect someone who fell. I credit the testimony of the inspector regarding the exposure and work duties in the area, and I find that there was a reasonable possibility of injury. The Secretary has proven a violation.

The Secretary alleges that the violation was reasonably likely to result in a permanently disabling injury and was S&S. The Secretary has proven a violation, satisfying the first element of the *Mathies* test for S&S. The violation involves the hazard of a miner contacting the conveyor or tail pulley. I find that the hazard was reasonably likely to occur, given that miners worked in the area daily and their work duty of shoveling material from under the conveyor brought them in close proximity to the moving parts. The second *Mathies* element is satisfied. I credit Lewis's testimony that a person who contacted the pulley or conveyor could become entangled and would likely receive a permanently disabling injury. The third and fourth elements of *Mathies* are also shown, and I find that the violation is S&S.

The Secretary alleges that the violation involved high negligence on the part of the operator. I find that a moderate negligence designation is more appropriate. A reasonably prudent operator would have provided a guard in this location given the risk of serious injury. Nevertheless, the missing guard was not particularly obvious, and the Secretary has produced no other evidence to indicate that the negligence was more than moderate. Based upon the change in the negligence finding, I assess a penalty of $2,000.00.

---

[2] Respondent notes that the inspector agreed on cross-examination that "somebody wouldn't be kneeling down to get underneath this car." Tr. at 147; Resp. Br. at 4. I interpret that statement to mean that Lewis did not believe that a miner would intentionally climb under the conveyor. However, he did believe miners would kneel in close proximity to the conveyor in order to shovel under it. Tr. at 52.

Citation No. 8968773.

As part of his regular inspection, Lewis requested that the parking brake on a Caterpillar 980G front-end loader be tested. Lewis asked Mason Holman, a supervisor at the mine, to fill the loader bucket with dirt and back up onto a ramp. He then had Holman set the parking brake to test it. Lewis observed that when the service brake was released, the parking brake did not hold. The machine rolled down the grade with the parking brake set for a few feet. Lewis spoke with the operator of the loader, who told him he had noted the defective parking brake on his pre-operational report for the past two days. The loader was in use at the time of the inspection. Lewis cited the mine for a violation of 30 C.F.R. § 56.14101(a)(2), which provides that "If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels."

Respondent argues that the brake did in fact hold. Holman, the witness for Respondent, testified that while the loader rolled a foot or so during the test, it was only enough for the parking brake to lock in and then hold. However, the fact that the equipment operator had noted a problem with the brake in his pre-operational report supports Lewis's assessment that the brake was not functioning properly. Based upon my observation of both witnesses and their testimony as a whole, I found the inspector to be a more credible witness than Holman. I credit the inspector's testimony and find that the Secretary has proven a violation of the standard.

The Secretary alleges that the violation was the result of high negligence. Because the equipment operator noted the defective brake on his pre-operational report the previous day, management was or should have been aware of the problem. There was no evidence that management took any action to investigate or correct the problem. This constitutes an aggravated lack of care, and I find that the high negligence designation is appropriate.

The Secretary alleges that the violation was unlikely to cause injury, and that if an injury did occur, it would likely be fatal. The violation was marked as non-S&S. Lewis explained that the loader is a large piece of equipment that could cause a fatality if it struck someone. However, he believed that an accident was unlikely to occur because there was no one else working in the area and the service brakes on the loader were still functional. I affirm the gravity determination as issued and assess the proposed penalty of $1,770.00.

Citation No. 8968774.

Inspector Lewis also observed that in the cab of the Caterpillar 980G front-end loader, there were accumulations of oil and oily rags on the floor near the pedals. He observed a puddle of oil on the floorboard near the accelerator and brake pedals. Exhibit 6-10 is a photograph of oily rags on the floorboard of the loader cab and shows that a piece of cardboard had been taped to the brake pedal to make it less slippery. The loader operator told Lewis that the oil was from a leak in the steering column and that there was oil dripping onto the pedal and onto the floorboard. The operator of the equipment stated that he had been reporting the leak on his pre-operational reports since March 16, 2017, approximately six weeks prior to the inspection. Lewis reviewed the pre-operational reports and confirmed that the leak had been mentioned beginning in March 2017. Lewis believed the oil created a hazard because the operator's foot

could slip off the pedals, causing him to lose control of the loader. The loader could then hit another piece of equipment or a person on foot in the area.

Lewis cited the mine for a violation of 30 C.F.R. § 56.14103(c)(1), which requires that "The operator's stations of self-propelled mobile equipment shall [b]e free of materials that could create a hazard to persons by impairing the safe operation of the equipment." The Secretary alleges that the oil and rags created the danger that the operator's foot could slip and he could lose control of the loader. Respondent argues that the rag and oil in the operator compartment did not create a hazard. Martinez stated that the rags were there to wipe dust from the windshield. However, the testimony of Lewis and the photograph of the rags and cardboard show that there was a leak that created a slippery surface near the brake pedal. This is a clear hazard and the Secretary has proven a violation. I affirm the Secretary's high negligence designation, given that the condition had been noted in the pre-operational reports for six weeks and no repairs had been made.

I also find that the violation was S&S. The Secretary has proven a violation of a mandatory safety standard. The hazard addressed by the standard is that of the equipment operator losing control of the loader. I find that the hazard was reasonably likely to occur because the oil on and around the brake pedal could cause the operator's foot to slip. If the operator lost control of the loader, the loader could easily hit a person on foot or another piece of equipment. While there was no one else working around the loader at the time of the inspection, the condition had existed for some time, and there was nothing to prevent the use of the loader around other equipment or miners. An accident involving a person on foot would be fatal, and a collision with another piece of equipment would likely cause serious injury.

I assess the proposed penalty of $8,768.00.

Citation No. 8968776.

Lewis returned to the mine on May 9, 2017, to investigate a hazard complaint regarding safety defects on a skid steer loader. The skid steer was parked in the middle of the site at the adjacent Crusher No. 6. It was in front of a parts trailer and next to the diesel fuel storage in an area where other mobile equipment was available for use. Lewis was told that the skid steer was out of service because of a bad tire, but he observed that it did not have a tag and the key was still in the ignition. He was told it had been moved to that location from Crusher No. 10 with the defects, but he did not know whether it had been towed. He stated that because of the bad tire, the skid steer could not be used, but Lewis did not know how long it had been in that condition. The machine would normally be used on a daily basis to clean up material or haul material around the conveyors and the crusher. Lewis believed it had been moved to Crusher No. 6 so that it could be used for cleaning. In order to test the functions on the skid steer, Lewis asked the operator to get in, but told him he did not need to move the equipment. He had the operator test the horn and backup alarm on the skid steer without moving it and found that both were inoperable. He cited the mine for a violation of 30 C.F.R. § 56.14132(a).

Mason Holman, the plant supervisor, was present for the inspection. He testified at hearing that the skid steer was locked out and inoperable at the time. He stated that the hub on

the wheel had come off and the wheel bearing had gone out. The wheel had been repaired at least once but shortly thereafter developed that same problem. Holman believed that the skid steer had been parked where it was for about a month prior to the inspection. After the inspection, the skid steer was never put back into service, but rather was taken to the mine shop and used for parts. In response to a leading question from counsel for Respondent, Holman agreed that in addition to being locked out, the skid steer was also tagged out at the time of the inspection. Respondent introduced Exhibit H-1, a photograph of a lock and tag on the key of the skid steer. The tag reads "Out of Service. Do Not Use." It is signed by Holman but does not list any specific problem with the loader, and the date on the tag is illegible. In response to further leading questions, Holman stated that the lock and tag had been on the skid steer for a month prior to the inspection. He explained that at the time of the inspection, he informed Lewis that the skid steer was locked out, but Lewis asked him to get in and test it anyway. He moved the skid steer back about a foot so that Lewis could inspect it. Holman stated that he never removed the lock and tag during the inspection. When questioned by the court, however, he said he had locked the loader out but did not recall whether he had put a tag on it. He then stated that he believed he had put a tag on, but hadn't filled it out correctly. On redirect, he said he believed he had tags on the loader and had locked it out a month before. In response to further questions from counsel for the Secretary, Holman then said that he believed there was another tag that had just his name and the date on it, but he did not know what had happened to it.

Ralph Martinez, the safety officer, was also present during the inspection. He stated that all miners are trained in the company's lockout/tagout procedures, which were introduced as Exhibit D. He stated that when a piece of equipment is taken out of service, a lock is put on it, and whoever takes it out of service has the key and has to be the one to take the lock off. Before a piece of equipment is put back into service, an examination is done by the person who did the repairs. Martinez usually receives pre-operational reports from the foreman for equipment, but he had not received reports for the skid steer and was not aware of the defects on it. Martinez claims that on the day of the inspection, he informed Lewis that the skid steer was locked out. Martinez took the photo of the lock and tag introduced as Exhibit H-1, and testified that the tag was present before the inspection. He stated that he did not bring the tag to the attention of Lewis during the inspection because he believed Lewis would raise the penalty for the citation if he argued with him. He also stated that the wheel on the skid steer was so badly damaged that it could not have been put back into service. Exhibits H-2, H-3, and H-4 are photographs taken by Martinez showing the wheels of the skid steer and the tire tracks to show how far the machine moved during the inspection. The skid steer appears to have moved less than a foot.

There is opposing testimony regarding whether a tag was present on the skid steer prior to the inspection. Inspector Lewis testified that when he observed the skid steer, the key was in the ignition, and there was no tag to warn miners of defects affecting safety. On the other hand, Martinez testified that the tag shown in Exhibit H-1 was on the skid steer at the time of the inspection. He did not explain how the tag he photographed was different from the tag used to terminate the citation. Martinez's explanation for why he did not bring the tag to the attention of the inspector seemed disingenuous. While Martinez has many years' experience in the industry, he appeared confused in some of his answers. For example, when asked, he said that the photographs of the skid steer introduced by Respondent as exhibits were the only photographs he took during the inspection. His attorney later indicated that in fact Martinez took many

photographs during the course of the inspection. Martinez answered some questions well, although his answers seemed rehearsed. When he was asked other questions, he seemed confused but determined to say what would be most beneficial. I did not find him to be a credible witness and so discount his testimony as to the citations he discussed.

Holman also testified on direct examination that he believed the tag shown in Exhibit H-1 was on the skid steer prior to the inspection. Upon further questioning, however, it became clear that he was unsure. While I think Holman was sincere in most of his testimony, he contradicted himself regarding the tag and was not certain when it was placed on the machine. Holman was nervous and uncomfortable, especially when asked about things he could not remember clearly. The inspector, on the other hand, was alert, candid, and thoughtful in his responses. He sometimes referred to his notes when unable to recall, but took the time to review and respond. He was obviously more comfortable testifying than the other witnesses, and was also comfortable in his understanding of the citations and why they were issued. He had no reason to be untruthful, and I find him to be a credible witness. I thus find that while the skid steer was not in use at the time of the inspection, it was not tagged out, nor was it in a location where it would not be available for use.

The relevant standard provides that "Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition." 30 C.F.R. § 56.14132(a). The Commission has interpreted this standard to require that "horns or other audible warning devices must function at all times unless the equipment has been taken out of service for repair." *Wake Stone Corp.*, 36 FMSHRC 825, 827 (Apr. 2014). The Commission noted in *Wake Stone* that the standard "does not contain language limiting its application to equipment only 'to be used during a shift' or to equipment that has or has not been 'placed in operation.'" *Id.* at 828. Similarly, in *Alan Lee Good*, 23 FMSHRC 995, 997 (2001), the Commission held that a standard requiring that braking systems installed on equipment "shall be maintained in functional condition" was applicable "[a]s long as the cited equipment is not tagged out of operation and parked for repairs ... whether or not the equipment is to be used during the shift."

The issue in this case is whether the skid steer had been taken out of service. I find that it had not. MSHA regulations provide two methods for taking a piece of equipment out of service:

> When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and *placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use* until the defects are corrected.

30 C.F.R. § 56.14100(c) (emphasis added). In this case, the skid steer was parked in an area of the mine where mobile equipment was available for use. There was no tag marking it as defective. While a lock may have been present, the key was in the ignition, and Holman stated that he started the loader without removing the lock. Further, while Inspector Lewis testified that "Because of the tire, it couldn't be used," the skid steer was able to move a minimal distance

during the inspection. *See* Tr. at 64, 195; Ex. H-3. I therefore find that the skid steer had not been taken out of service.

The skid steer was "wheeled... equipment capable of moving or being moved" and thus constituted "mobile equipment" under the Secretary's definitions. *See* 30 C.F.R. § 56.2. I credit the inspector's testimony that the horn and backup alarm were not functional and find that the Secretary has proven a violation.

The Secretary alleges that the violation was the result of high negligence. The inspector based his negligence determination on the fact that the skid steer had been moved from another location in the mine with the defective tire. However, he did not know whether it had been towed. The mine's witnesses stated that they were unaware of the defective horn and backup alarm, and there was no mention of a pre-operational report that detailed the malfunctioning backup alarm or horn. Because there was no evidence that the skid steer was operated with the defective horn and backup alarm or that management had knowledge of them, I find that the negligence is more appropriately designated as moderate.

The Secretary alleges that the violation was reasonably likely to cause a permanently disabling injury and was S&S. The Secretary has proven a violation of a mandatory standard. The defective backup alarm and horn presented the hazard that a person or piece of equipment could be struck without warning by the skid steer when it was backing up. However, given the particular facts surrounding the violation, I find that the hazard was unlikely to occur. *See Newtown Energy, Inc.*, 38 FMSHRC 2033, 2036 n.8 (Aug. 2016); *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991-92 (Aug. 2014). It was unclear from the testimony whether the defective tire would have been obvious to a miner and prevented him from using the machine. It was also unclear whether anyone was working in the area and might be exposed to the machine backing up. The inspector stated that the skid steer "couldn't be used," suggesting it could not have moved far, and it appears that the skid steer may not have been used for several weeks. Additionally, Martinez stated that the loader would have been inspected before it was put back into service after repairs on the tire were completed. Thus, the backup alarm would most likely have been noted as defective when the tire was repaired. *See Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1138-39 (May 2014) (finding that a violation was not S&S when the equipment was under repair for a different defect because company policy required inspection after repair and the cited defect would have been found and corrected before the equipment was returned to service). I find that it was unlikely that a miner would have attempted to use the skid steer before the alarm and horn were repaired, and thus it was unlikely that the machine would have struck someone while backing up.

Given that I have lowered the gravity assessment, I do not assess the proposed penalty of $3,939.00, but instead assess a penalty of $2,000.00.

Citation No. 8968777.

During his inspection of the skid steer loader, Lewis also observed oil accumulated in the engine compartment. The oil was settled on top of the engine and the engine compartment. Lewis believed the oil presented a fire hazard. Because the engine compartment was right

behind the back seat, a person operating the skid steer could get burned if there was a fire. Lewis believed injury was unlikely, however, because it would be easy for the miner to get out of the cab. Martinez and Holman both told the inspector that they did not know how long the oil had been present. Lewis observed dust, dirt, and mud on the bottom of the compartment, which indicated to him that the oil had been present for several days. Martinez stated that he had not received a report for this loader, and if he had he would have taken it out of service.

Lewis cited the mine for a violation of 30 C.F.R. § 56.4102, which provides that "Flammable or combustible liquid spillage or leakage shall be removed in a timely manner or controlled to prevent a fire hazard." The Secretary defines "flammable liquid" as "a liquid that has a flash point below 100 °F (37.8 °C), a vapor pressure not exceeding 40 pounds per square inch (absolute) at 100 °F (37.8 °C), and is known as a Class I liquid." 30 C.F.R. § 56.2. A "combustible liquid" is defined as a liquid "having a flash point at or above 100 °F (37.8 °C)." 30 C.F.R. § 56.2. Thus, almost any liquid is covered except water. *Lehigh Sw. Cement Co.*, 33 FMSHRC 340, 353 (Feb. 2011) (ALJ). Lewis did not discuss the flash point of oil, but stated that it was a fire hazard. Respondent did not dispute the flammability or combustibility of the oil. *See* Resp. Br. at 6-7.

Here, Lewis believed the oil had been present for several days based on the dust and dirt in the compartment. Martinez admitted that had he observed the oil, he would have taken the equipment out of service. The oil was on the engine and easily observed by anyone. The Secretary has proven a violation.[3]

The Secretary alleges that the violation was the result of high negligence. Lewis based his negligence determination on the absence of mitigating circumstances. I find that a moderate negligence designation is more appropriate, given that the loader had not been operated for some time, and thus a pre-operational exam would not have been conducted recently. Although the oil was obvious, overall the violation did not rise to the level of high negligence.

The Secretary alleges that the violation was unlikely to cause injury, and that if an injury did occur, it would likely result in lost workdays or restricted duty. The violation was marked as non-S&S. I agree that injury was unlikely to occur because the loader had not been used for some time and would likely be examined before it was used again. If a fire did occur, injury including minor burns would be likely and would result in lost workdays.

The Secretary proposed a penalty of $533.00, but given the change in the negligence assessment, I assess a penalty of $400.00

Citation No. 8968778.

In addition to the above defects, Lewis observed that the safety bar on the Caterpillar 326 skid steer loader was not functioning properly. The safety bar typically has gas shocks that hold it in place while the machine is operating. On this loader, the gas shocks had been removed, so the bar was not held firmly up or down. When functioning properly, the bar is intended to hold

[3] As explained above, I reject the argument that the skid steer could not be inspected because it was "unavailable for use." *See* Resp. Br. at 2.

the operator in the seat while the loader is moving, and to stay raised when the operator is entering or exiting the cab. If the bar is lifted, it disables the machine. The cab of the skid steer with the safety bar down is shown in Exhibit 6-16. Lewis believed the defective safety bar presented a hazard because if the machine were to roll over, the operator would not be secure in his seat and could even be hit by the safety bar. Additionally, the safety bar could fall and hit the operator while he was entering the machine. Lewis did not believe that a fatality would result, because the operator would also be wearing a seatbelt. Lewis did not know when the shocks had been removed, and when asked, Martinez said that he did not know. Lewis said that in his experience, the shocks lose pressure over time and have to be replaced.

Lewis cited the mine for a violation of 30 C.F.R. § 56.14100(b), which provides that "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." The Commission has made clear that whether a defect was corrected "in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of its existence." *Lopke Quarries*, 23 FMSHRC at 715 (vacating citation when there was no evidence in the record indicating when the cited device became defective). Thus, in order to sustain his burden of proof for a violation of 30 C.F.R. § 56.14100(b), the Secretary must present evidence demonstrating when the alleged defect arose and when the operator knew or should have known of its existence. In this case, Lewis stated that he did not know when the safety bar became defective. However, Lewis also testified that the gas shocks holding the safety bar in place had been removed. I infer based on this fact that the operator was aware of the defect. The skid steer should have been tagged out of service for repairs at that point, which it was not. I find that the Secretary has proven a violation.

The Secretary alleges that the violation was S&S. The Secretary has proven a violation of a mandatory standard. The standard is intended to prevent the hazard of a person operating equipment with a safety defect. Here, however, it was unlikely that anyone would operate the skid steer with the broken safety bar. The inspector stated that the skid steer "couldn't be used," and no one had used it in approximately a month. The machine likely would have been inspected before it was used again, giving the operator an opportunity to correct the defect. I find that the violation was not S&S.

The Secretary alleges that the violation was the result of high negligence. The inspector did not explain the basis for his high negligence determination at hearing, other than to say that the shocks had been removed, yet the equipment was not tagged out or in a position where it would be repaired. Given that the shocks had been removed, it is reasonable to infer that a person with authority at the mine knew of the violation. I thus find that a high negligence determination is appropriate.

The Secretary has proposed a penalty of $2,640.00, but given that the gravity of the violation has been reduced, I find that a penalty of $1,800.00 is appropriate.

Citation No. 8968779.

Continuing with the items listed on the hazard complaint, Lewis inspected a Caterpillar 988 front-end loader. He observed that the left front tire had a large gash in the tread that exposed the inner rubber tire. The loader was not functional or capable of being operated. However, it was not tagged out. It was located behind the stockpile near Crusher No. 10. The damaged tire had been noted on a pre-operational report indicating that it had been left inside the machine. Lewis examined the pre-operational reports in the mine office and saw that the condition had been reported from March 20 through April 8. At the time of the inspection, Lewis asked Martinez if the loader was in service, and Martinez said that it was not. Martinez told Lewis that the loader had been parked because it had a bad transmission. Lewis asked Martinez if he had a tag, and Martinez said he didn't know. Lewis did not observe a tag on the loader or whether a key was in the ignition. Holman also testified at hearing that the transmission on the loader was out and inoperable. He did not recall whether there was a tag. Lewis did not start or try to move the loader or otherwise confirm that the transmission was bad. On cross examination, Lewis agreed that if the transmission was in fact not working, the loader could not have been moved to do any mining work. On redirect examination, he clarified that it would depend on what type of problem there was with the transmission. Martinez testified at hearing that there was no defect in the tire, but rather the gash observed by the inspector was part of a repair to the tire. Martinez stated that the loader was not locked out, but was parked where loaders were kept for parts and not in an area where equipment was available for use.

Lewis cited the mine for a violation of 30 C.F.R. § 56.14100(b), which provides that "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." Respondent argues that there was no violation because the loader was inoperable and not available for use. I am not persuaded by this argument, because the condition was noted on pre-operational reports for several weeks, indicating that the loader had been used with the defective tire before it became inoperable. However, I find that the Secretary has failed to demonstrate that the gash in the tire was a defect that affected safety as specified in the standard. *See Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990) (directing the judge to consider evidence as to whether a reasonably prudent person familiar with mining would recognize that the removal of a certain equipment part affected safety). The inspector stated that the gash left the inner tire exposed, but did not explain the consequence of the defect. He instead stated that the tire was unlikely to cause injury because there was no exposure. Therefore, the citation is vacated.

Citation No. 8968781.

During the course of the hazard complaint inspection on May 9, Lewis also observed that the switches for conveyor No. 12 and feeder conveyor No. 7 did not function when pushed. The condition had been part of the hazard complaint. The switches were located in the control panel. Lewis asked the control room operator to start all of the conveyors as he would when he starts the plant. Conveyor No. 12 and feeder conveyor No. 7 did not start. Lewis believed the switches created a hazard of electrical shock. However, he noted that the main power was locked out when he arrived, which meant that there was no power to those breakers either. The control room operator only energized the power at Lewis's request so that he could test the

switches. The individual breakers were not locked and tagged. Lewis stated that when he arrived for the inspection, Martinez was already aware of the condition and was waiting for an electrician to arrive to repair the switches.

Nate Stein was working as a laborer running the control panel at the time of the inspection. He stated that at the time of the inspection, the system was locked down while they were waiting on parts for the breaker. When Lewis arrived, he informed Stein that he needed to see the plant running. Stein told Lewis that they had electrical problems with the breakers and they were locked out. Lewis told him not to fire up the ones that were broken, but asked him to get everything else running. Stein stated that he took the lock off the main power breaker and proceeded to fire everything up. Stein's lock on the main breaker is shown in Exhibit J. The daily log-in sheets introduced by Respondent as Exhibit K show that the mine was waiting on the breaker parts on May 8, 2018, the day before the inspection. The plant restarted on May 9 around 5:30 p.m. after an electrician came out to check everything.

William Garrett, who worked on the electrical boxes at the crusher on May 9, testified at hearing that there was a problem with the conveyors starting and stopping on May 4, 2017. Someone at the mine tested the circuit breakers in boxes 7 and 12 and determined that they were bad. Garrett ordered parts and replaced the breakers on May 9. He testified that the system was locked out for four days until the parts arrived. Nate Stein had locked out the main power supply, and Garrett himself had also locked out box 7 and box 12 when he pulled the breakers out. While there would have been no power to any of the control panels with the main power disconnected, Garrett explained that it was still necessary to lock out the boxes because the breakers had been removed.

Lewis cited the mine for a violation of 30 C.F.R. § 56.12002, which provides that "Electric equipment and circuits shall be provided with switches or other controls. Such switches or controls shall be of approved design and construction and shall be properly installed." While the parties agree that the cited switches were not functioning, the operator was aware of the condition and had shut down the system and locked out the main power supply until the switches could be repaired.

The testimony of the witnesses for both the Secretary and the operator clearly established that the operator was aware of the defective switches prior to the inspection and repairs were already underway. While there was some dispute as to whether the individual breakers were locked out, the main power supply was locked out and there was no power to the defective switches. The Secretary did not present any evidence related to the elements of the standard cited and has not cited any decision in which a citation was upheld under similar circumstances. I find that in shutting down and locking out the affected area and initiating repairs, the operator complied with the requirements of the standard. The citation is vacated.

Citation No. 8968787.

Inspector Lewis returned to Crusher No. 10 again on May 11, 2018, to investigate a reported accident. He learned that the mine foreman, Chris Lucero, had received an injury to his finger while investigating an issue with the conveyor. The conveyor had stopped and Lucero, as

foreman, was responsible for directing repairs if any problems arose at the plant. Three other people were in the area at the time, including Nate Stein and Lance Richards. Lucero removed the guard to the 3/8" drive pulley and belt to see if there was a problem, then asked the control room operator, Stein, to start the conveyor. When Stein started the conveyor, Lucero had his finger on the drive pulley, and it was injured, resulting in the need for 40 stitches to his left middle finger. Stein was not in Lucero's line of sight when Stein started the conveyor, but the conveyor was equipped with an alarm, which the control room operator would have activated before starting the conveyor in order to warn people in the area. While there was testimony that the area was noisy and the alarm difficult to hear, a citation was not issued for the alarm. Lewis had inspected the alarm during the hazard complaint inspection two days earlier and found that it functioned.

Testimony from the mine's witnesses was largely consistent with Lewis's account of the incident. Nate Stein was present when Lucero injured his finger. He testified that he and Lucero were in the control room when an employee came running in and said that one of the belts had stopped. Lucero shut everything down and they walked out to the belt that had stopped. Lucero jumped onto a frame above the belt to look at it. He removed one of the guards and then asked Stein to try turning the power on because it looked like there was nothing wrong with it. Stein walked to the control room, sounded the alarm, and turned the power on. A few seconds later, another employee came running in to say that Lucero had badly cut his finger. Stein stated that, in his opinion, it was necessary to test the belt with the guard removed before it was locked out.

Martinez, the safety manager, was also on site in a different area of the mine when the injury to Lucero occurred. Stein came to tell him what had happened, and after reviewing what had happened, Martinez gave Lucero and Stein a written warning about lockout/tagout procedures. After the injury, Lucero did not return to work.

Inspector Lewis believed that the conveyor should have been locked out and tagged out before the guard was removed. If it was necessary to start the conveyor to troubleshoot, Lucero should have stood farther from the moving parts. Lewis cited the mine for a violation of 30 C.F.R. § 56.14105, which provides that "Repairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, *provided that persons are effectively protected from hazardous motion.*" (Emphasis added). In this instance, Lewis stressed that the primary concern was that Lucero was not far enough back from the moving belt as he was troubleshooting, and therefore was not protected from hazardous motion. Lewis believed it was reasonably likely that a more serious injury could have occurred, including an amputation if Lucero became entangled in the pulley and drive belt.

Respondent argues that the citation should be vacated because the standard allows for "machinery motion or activation" in situations where troubleshooting is being done. Resp. Br. at 9. Respondent notes that the conveyor was locked out once the problem was identified. However, the standard permits machinery activation only "provided that persons are effectively protected from hazardous motion." 30 C.F.R. § 56.14105; *see also Empire Iron Mining P'ship*, 29 FMSHRC 999, 1007 (Dec. 2007) (finding that warnings, training, and location of moving

parts did not provide adequate protection where a miner was killed by moving parts during repairs). It is clear that miners were not "effectively protected," given that Lucero was in close proximity to the moving machine parts and was injured. I find that the Secretary has proven a violation.

The Secretary alleges that the violation was the result of high negligence. Lewis stated that once the guard was removed, the exposed parts were an obvious hazard. He noted that Lucero was a foreman and was aware that Stein was about to start the belt. Lucero should have known to step back at that point. As a foreman, Lucero was an agent of the operator, and his negligence is attributed to the operator. In view of Lucero's status as a foreman and the obviousness of the hazard, I find that the high negligence designation is appropriate.

The inspector also designated the citation as an unwarrantable failure to comply with the standard. The "unwarrantable failure" terminology is taken from Section 104(d) of the Act, 30 U.S.C. § 814(d). The Commission has explained that unwarrantable failure is "aggravated conduct constituting more than ordinary negligence. [It] is characterized by conduct described as 'reckless disregard,' 'intentional misconduct,' 'indifference,' or a 'serious lack of reasonable care.'" *Consol. Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2007) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987)) (citations omitted). In determining whether a violation is an unwarrantable failure, the Commission has instructed its judges to consider all of the relevant facts and circumstances in the case and determine whether there are any aggravating or mitigating factors. *Id.* Aggravating factors to be considered include

> the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation.

IO Coal Co., 31 FMSHRC 1346, 1352 (Dec. 2009); *see also Consol.*, 22 FMSHRC at 353. The negligence of an operator's agent is imputable to the operator for penalty assessment and unwarrantable failure purposes. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328 (Mar. 2009). The Commission has long recognized that mine foremen are agents of the mine operator. *See, e.g., Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982). Based upon the following analysis of the factors enumerated by the Commission, I find that the Secretary has proven an unwarrantable failure in this case.

Duration. In *IO Coal Co.*, the Commission emphasized that the duration of time that the violative condition existed is a "necessary element" of the unwarrantable failure analysis. 31 FMSHRC at 1352. However, the brief duration of a violative condition is not a mitigating factor. *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2371 (Sept. 2016). In *Midwest Material Co.*, the Commission noted that the brief duration of a violation does not weigh against a finding of unwarrantable failure when the violation is highly dangerous and obvious. 19 FMSHRC 30, 36 (Jan. 1997) (finding that a brief, highly dangerous violation resulting in a fatality was "readily distinguishable from other types of violations . . . where the degree of danger and the operator's

responsibility for learning of and addressing the hazard may increase gradually over time"). In that case, the Commission noted that the condition existed for a short time only because it led to an accident causing a fatality. *Id.* Here, the violation existed for a short period of time while Lucero was troubleshooting the stopped conveyor. The conveyor was locked out after Lucero's injury occurred. However, the brief duration was enough time for injury to occur, and the condition might have persisted longer had it not resulted immediately in injury.

Extensiveness. The extent factor is intended to "account for the magnitude or scope of the violation" in the unwarrantable failure analysis. *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079 (Dec. 2014). Facts relevant to the extent of the condition include the size of the affected area and the number of persons affected. *Id.* at 3079-80. In *Dawes*, the Commission found that where one miner endangered himself by walking under a suspended load for a period of seconds, the violation was not extensive. *Id.* at 3080. Here, Lucero was the only miner affected. Richards testified that he was within arm's length of Lucero when the conveyor was turned on, but no one except Lucero was close enough to be injured by the moving parts. Extensiveness, therefore, does not weigh in favor of the unwarrantable finding.

Notice. A mine operator may be put on notice that it has a recurring safety problem in need of correction where there is a history of similar violations. *Black Beauty Coal Co. v. FMSHRC,* 703 F.3d 553, 561 (D.C. Cir. 2012); *IO Coal*, 31 FMSHRC at 1353; *Peabody Coal Co.,* 14 FMSHRC 1258, 1264 (Aug. 1992). Prior violations may be relevant even though they did not involve the same regulation or occur in the same area of the mine within a continuing time frame. *IO Coal*, 31 FMSHRC at 1354; *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007); *Peabody*, 14 FMSHRC at 1263. It is not required that the past violations were the result of unwarrantable failure. *IO Coal*, 31 FMSHRC at 1354; *Consolidation Coal Co.*, 23 FMSHRC 588, 595 (June 2001). Past discussions with MSHA can also serve to place the operator on notice that greater efforts were necessary to assure compliance with the safety standard. *Consolidation Coal Co.* 35 FMSHRC 2326, 2342 (Aug. 2013) (citing cases). The Secretary notes that the mine received a citation for an unguarded tail pulley less than two weeks earlier, Citation No. 8968772 discussed above. However, that citation involved a permanent guard and appeared to be an isolated problem. I do not find that the single guarding citation put the mine on notice of a problem with guarding in general at the mine. The real issue here was keeping away from a hazard when engaged in troubleshooting and repair. There is no evidence that the mine had been placed on notice in that regard, and hence, notice was not a substantial aggravating factor in this case.

Abatement. Abatement efforts prior to or at the time of the inspection may support a finding that the violation was not unwarrantable. *Utah Power & Light Co.*, 11 FMSHRC 1926, 1933-34 (Oct. 1989). Conversely, where the operator has notice of a condition, such as through previous violations or conversations with an inspector, a failure to remedy the problem weighs in favor of an unwarrantable failure finding. *Consol.*, 35 FMSHRC at 2343; *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). Abatement efforts relevant to the unwarrantable failure analysis are those made prior to the issuance of the citation or order. *Consol.*, 35 FMSHRC at 2342; *IO Coal*, 31 FMSHRC at 1356. Respondent introduced refresher training records for Lucero showing that he received training on guarding and prevention of accidents in January 2017. Nevertheless, it is clear that Lucero, who was a management employee, made no effort to

abate the violation by moving away from the machine or asking other employees to stand clear. Therefore, abatement is not a mitigating factor in this case.

Degree of danger. A high degree of danger posed by a violation can be an aggravating factor that supports an unwarrantable failure finding. *IO Coal*, 31 FMSHRC at 1355-56. In some cases, the degree of danger may be "so severe that, by itself, it warrants a finding of unwarrantable failure." *Manalapan Mining Co.*, 35 FMSHRC 289, 294 (Feb. 2013). The degree of danger was high in this instance. Lucero received a moderately serious injury, and the potential existed for a more serious injury if he had become entangled in the belt. I find that this factor weighs in favor of the unwarrantable finding.

Knowledge/Obviousness. The obviousness of the violative condition is an important factor in the unwarrantable failure analysis. *IO Coal*, 31 FMSHRC at 1356. An operator's knowledge of the existence of a violation may be established not only by demonstrating actual knowledge, but also by showing that the operator "reasonably should have known of the violative condition." *IO Coal Co.*, 31 FMSHRC 1346, 1356-1357 (Dec. 2009); *see also Drummond Co.*, 13 FMSHRC 1362, 1367-68 (Sept. 1991); *E. Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991); *Emery Mining Corp.*, 9 FMSHRC 1997, 2002-04 (Dec. 1987). Here, Lewis stated that the moving machine parts were obvious when the guard was removed. As a foreman, Lucero should have known how to troubleshoot without putting himself and others in danger, and certainly he should have known not to put his hand into an area with a moving belt. His knowledge is imputed to the operator.

The degree of danger and the obvious nature of the violation are the primary bases to support a finding of unwarrantable failure. In addition, there was no effort to abate. It is true that the mine had not been placed on notice, and the duration factor does not significantly weigh in either direction. The Commission addressed a similar case involving a dangerous and obvious violation by a supervisor in *Capitol Cement Corp.*, 21 FMSHRC 883 (Aug. 1999), *aff'd*, 229 F.3d 1141 (4th Cir. 2000). In that case, a shift supervisor was injured when he attempted to perform maintenance on a crane without wearing a safety belt or deenergizing the rail that provided electrical power to the crane. The supervisor contacted the energized rail and received severe burns to his forearm. Another miner was forced to run along a craneway and down a stairway to a circuit breaker to deenergize the crane. *Id.* at 884. The Commission upheld the judge's unwarrantable failure finding, citing the obviousness and high degree of danger of the violation. *Id.* at 892. The Commission also noted that supervisors are subject to a high standard of care under the Act, and that they are "entrusted with augmented safety responsibility and ... obligated to act as [] role model[s]" for their subordinates. *Id.* at 893. The Commission found that the supervisor's failure to meet that high standard of care, especially in the presence of a subordinate, supported the unwarrantable failure finding. *Id.*

Respondent argues that an unwarrantable failure finding is inappropriate in this case because Lucero was merely thoughtless and inattentive. Resp. Br. at 9. While Lucero's injury was certainly the result of carelessness, that carelessness is measured against the high standard of care demanded of a supervisor. Lucero had an obligation to follow safety procedures and exercise care to ensure the safety of himself and other miners, which included protecting them from moving machine parts during maintenance. His failure to do so in the presence of

subordinates was an aggravated breach of his duty of care. I find that the violation is properly designated as an unwarrantable failure.

The Secretary also alleges that the violation was S&S. The Secretary has proven a violation of a mandatory safety standard, satisfying the first *Mathies* element. The violation involved the hazard that a miner could become entangled in moving machine parts. Given Lucero's proximity to the conveyor when it was activated, the hazard was likely to occur. The hazard caused Lucero to receive a reasonably serious injury to his finger, satisfying the third and fourth elements. I assess the proposed penalty of $4,377.00.

III. PENALTY

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). The Secretary calculates penalties using the penalty regulations set forth in 30 C.F.R. § 100.3 or following the guidelines for special assessments in 30 C.F.R. § 100.5. When an operator notifies the Secretary that it intends to challenge a penalty, the Secretary then petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. Commission judges are not bound by the Secretary's penalty regulations or his special assessments. *Am. Coal Co.*, 38 FMSHRC 1987, 1990 (Aug. 2016). Rather, the Act requires that in assessing civil monetary penalties, the judge must consider six statutory penalty criteria: the operator's history of violations, its size, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission requires that its judges explain any substantial divergence from the penalty proposed by the Secretary. *Am. Coal*, 38 FMSHRC at 1990. However, the judge's assessment must be de novo based upon her review of the record, and the Secretary's proposal should not be used as a starting point or baseline. *Id.*

The history of assessed violations at Crusher No. 10 has been admitted into evidence and shows 27 violations that became final orders in the 15-month period prior to the inspection. Ex. 1. Four involve equipment hazards, and eight involve problems with guarding. The parties agree that the citations at issue were abated in good faith. The mine has not raised the defense of ability to pay. The negligence and gravity have been discussed above with respect to each citation. The penalties are assessed as follows:

Citation No.	Originally Proposed Assessment	Assessed Amount	Modification
Docket No. CENT 2017-0397			
8968772	$3,939.00	$2,000.00	Modify negligence from high to moderate.
8968774	$8,768.00	$8,768.00	None.
8968775	$533.00	$533.00	None.
8968776	$3,939.00	$2,000.00	Modify negligence from high to moderate. Modify likelihood of injury from reasonably likely to unlikely. Remove S&S designation.
8968777	$533.00	$400.00	Modify negligence from high to moderate.
8968780	$533.00	$533.00	None.
8968781	$533.00	$0.00	Vacate.
TOTAL	**$18,778.00**	**$14,234.00**	
Docket No. CENT 2017-0432			
8968787	$4,377.00	$4,377.00	None.
TOTAL	**$4,377.00**	**$4,377.00**	
Docket No. CENT 2017-0433			
8968761	$1,770.00	$1,770.00	None.
8968762	$533.00	$500.00	Modify negligence from high to moderate.
8968771	$533.00	$533.00	None.
8968773	$1,770.00	$1,770.00	None.
8968778	$2,640.00	$1,800.00	Modify likelihood of injury from reasonably likely to unlikely. Remove S&S designation.
8968779	$533.00	$0.00	Vacate.
TOTAL	**$7,779.00**	**$6,373.00**	

IV. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $24,984.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

Distribution: (U.S. First Class Mail)

Felix Marquez, U.S. Department of Labor, Office of the Solicitor, 525 S. Griffin Street, Suite 501, Dallas, TX 75202

Charles W. Newcom, Sherman & Howard LLC, 633 17th Street, Suite 3000, Denver, CO 80202