FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9900 / FAX: 202-434-9949

June 3, 2022

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. IMI AGGREGATES, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2021-0122 A.C. No. 12-02430-533325 Mine: Fall Creek Sand & Gravel

DECISION AND ORDER

Appearances: Lydia J. Faklis, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner,

Brad Wales, Safety Manager, IMI Aggregates, LLC, Greenfield, Indiana, for the Respondent,

Donna V. Pryor, Esq., Husch Blackwell LLP, Denver, Colorado, for the Respondent.[1]

Before: Judge Sullivan

I. INTRODUCTION

This case is before me upon a Petition for the Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary"), on behalf of the Mine Safety and Health Administration ("MSHA"), against IMI Aggregates, LLC ("IMI" or "Respondent"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). The Secretary seeks civil penalties totaling $298.00 for two alleged violations of mandatory safety standards.

The parties presented testimony and documentary evidence during a virtual hearing via Zoom for Government on February 23, 2022. MSHA Inspector Jeffrey Cook testified on behalf of the Secretary and IMI maintenance employee Evan Young testified on behalf of the Respondent. Both parties subsequently filed post-hearing briefs on April 6, 2022.[2]

[1] Mr. Wales conducted direct and cross-examination of witnesses on the Respondent's behalf during the hearing in this case, while Ms. Pryor submitted Respondent's post-hearing brief.

[2] In this decision, the joint stipulations, transcript, Secretary's exhibits, and Respondent's exhibits are abbreviated as "Jt. Stip.," "Tr.," "Sec'y Ex. #," and "Resp't Ex. #" respectively.

II. GENERAL FACTUAL AND PROCEDURAL BACKGROUND

IMI owns and operates crushed stone, sand, and gravel mines throughout Indiana, including the Fall Creek Sand & Gravel Mine ("Fall Creek") in Fortville. On March 3, 2021, MSHA Inspector Jeffrey Cook conducted an EO-1 regular inspection of Fall Creek. He had previously inspected Fall Creek, though it had been several years since it was part of his assigned rotation of mines. Tr. 20, 60-61.

Inspector Cook began his inspection at Fall Creek's meeting shop area and continued to the haul roads, conveyors, plant, mobile equipment, and review of the mine's paperwork. During his inspection, Inspector Cook issued two citations. Tr. 20-22. The first, Citation No. 9443972, was issued because a stretch of roadway lacked a berm of at least mid-axle height of the largest vehicle that traveled on it. This alleged violation of 30 C.F.R. § 56.9300(b) was designated as significant and substantial (S&S). To abate the citation, IMI built a berm approximately 125 feet long on the edge of the relevant roadway before the end of the day. Tr. 33-34; Sec'y Ex. 3, 5.

The other issued citation, No. 9443973, was for inadequate guarding of a tail pulley and feed drive chain, in violation of 30 C.F.R. § 56.14107(a). Tr. 21-22, Sec'y Ex. 11, at 1. During his follow-up inspection on March 15, 2021, Inspector Cook issued Order No. 9443990 for IMI's failure to abate the original citation, in violation of section 104(b) of the Mine Act, 30 U.S.C. § 814(b). On March 29, MSHA Inspector Barry Hayes terminated both the citation and order after concluding that IMI had abated the violation by placing appropriate guards on the tail pulley and feed drive chain. Tr. 59.

IMI contested the two penalties that MSHA assessed in connection with the violations, $159.00 and $139.00 respectively, and this case was docketed before the Commission. At issue are the two alleged violations and the associated findings, including whether the first violation was S&S, and if one or more of the violations is upheld, the penalty or penalties to be assessed.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 9443972 for Alleged Violation of Section 56.9300

1. Fact of Violation

At Fall Creek, mobile equipment travels between the mine shop and either the plant or hopper on a particular roadway. At hearing, Inspector Cook testified that on the day of inspection, he saw pickup trucks, service trucks, and a Caterpillar 980G wheel loader travel on the roadway. The Caterpillar 980G wheel loader, the largest vehicle to utilize the roadway, was described as a "rubber-tired piece of equipment . . . used to move sand and dirt and rock . . . to load into the hopper to process." Tr. 22, 24-25. Inspector Cook also noted that the Caterpillar 980G was not carrying a load and was, in his estimation, moving five to ten miles per hour. Tr. 61-62.

While on the roadway, Inspector Cook noticed a section that he suspected should have a berm at its edge, given his view of the drop-off from the edge. Tr. 22; Sec'y Ex. 1 (providing a photo of section's edge taken by inspector). At hearing, Inspector Cook defined a "berm" as "an earthen structure that helps redirect equipment away from an overturn hazard." Tr. 23. He subsequently issued Citation No. 9443972, alleging that IMI violated section 56.9300(b), in that:

> The Main Shop elevated roadway was not bermed to mid-axle height of the mobile equipment (Caterpillar 980G) that travels the roadway. The area not adequately bermed was approximately 125 feet long with a drop[-]off of approximately 32 inches. This condition exposes miners to lost workday type injuries. There were several tire tracks along the edge of the unbermed roadway at the time of the inspection. Mine and [m]ine management have continuous access to this condition daily under continued mining operations.

Sec'y Ex. 5.

In designating the citation as S&S, Inspector Cook indicated that the Caterpillar 980G's travel along the edge of the unbermed roadway was reasonably likely to cause an injury that could be reasonably expected to result in lost workdays or restricted duty of one miner, the equipment's operator. Sec'y Ex. 11, at 1. Moreover, Inspector Cook categorized the violation as resulting from IMI's moderate negligence. *Id.*

2. Analysis

Section 56.9300 provides in relevant part:

> (a) Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.
> (b) Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.

30 C.F.R. § 56.9300. "Berm" is defined to "mean[] a pile or mound of material along an elevated roadway capable of moderating or limiting the force of a vehicle in order to impede the vehicle's passage over the bank of the roadway." 30 C.F.R. § 56.2.

It is undisputed that the cited section of roadway did not have a berm, and, therefore, it logically follows that a berm greater than or equal to the 34-inch mid-axle height of the Caterpillar 980G was not present either.[3] Tr. 82; Sec'y Ex. 1.

The Secretary contends that the drop-off from the roadway was of a sufficient depth or grade under section 56.9300(a) for the requirements of section 56.9300(b) to apply. Sec'y Br.

[3] It is also undisputed that the largest vehicle that utilizes the cited section of roadway is the Caterpillar 980G, and that it has a mid-axle height of 34 inches. Jt. Stip. 16; Tr. 28; Sec'y Ex. 2.1. This measurement provided the basis under section 56.9300(b) for the height of the berm that IMI built to abate the citation. Tr. 90; Sec'y Ex. 3.

14-15. In contrast, IMI maintains that a berm was *not* required along the section of roadway in question because, from its edge, there was not "a drop-off of sufficient grade or depth to cause" any vehicle that traveled over it, including the Caterpillar 980G, "to overturn or endanger persons in equipment." In its post-hearing brief, IMI further argued that the Secretary's evidence submitted at hearing supporting the citation was insufficient to establish that a berm was required under section 56.9300(a). Resp't Br. 5.

In *Lakeview Rock Prod., Inc.*, 33 FMSHRC 2885, 2989 (Dec. 2011), the Commission held that an evidentiary hearing should decide any unresolved dispute over whether "a drop-off exist[ed] of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." *Id.* Further, the Commission has long held that "[i]n 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 defined the Secretary's burden as a preponderance of the evidence, "which 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 evidence presented on the cited section of roadway's depth and grade of the drop-off, and the danger it posed to vehicles operating on the roadway, is as follows. At hearing, Inspector Cook described the slope away from the edge as being "steep," and the drop-off to be "fairly abrupt" before it "smooth[ed] out into a ditch" three to four feet away. Tr. 30-31, 68-69; Sec'y Ex. 1 (providing a picture of the edge, including the ditch). Inspector Cook explained that he positioned himself over the edge of the road and, holding a tape measure vertically, "eyeballed" the depth of the ditch to be 32 inches at that point along the road. He attributed his reluctance to go farther down the side due to the brush, muddy conditions, and his consequential inability to know what was in the ditch. Tr. 30-32, 62; Sec'y Ex. 1.1 & Resp't Ex. 3.1 (including annotations to show where the inspector stood along the edge). To measure the length of the roadway, that he believed was subject to the drop-off, he "stepped off" 125 feet. Tr. 29-32, 62.

Inspector Cook also testified to evidence of tire tracks in the mud along the edge (clearly shown in Sec'y Ex. 1), and how driving close to the edge of an inadequately bermed road could cause a vehicle to fall off the road either in whole or in part. He explained that, once one or more of its wheels goes over the edge of the cited road and onto a muddy slope of the observed depth and grade, a truck the size and design of the Caterpillar 980G may overturn. Tr. 36-39, 62-63.

Evan Young, a maintenance mechanic who has worked at Fall Creek for four years, accompanied Inspector Cook during the inspection. Tr. 81, 86. In his testimony, Young estimated that only 40 to 50 feet of the roadway at issue had a drop-off from its edge. Tr. 88-89. While Young confirmed that the inspector had attempted to measure the drop-off, he did not agree that it was 32 inches in depth. Tr. 82. Not having measured the drop-off himself, Young stated "if I had to guess, it was roughly two feet." He also described the area beyond the roadway's edge as "not straight up and down," but rather "a slope." Tr. 82-83. Additionally, Young testified that while it was possible for a Caterpillar 980G to overtravel the edge of the roadway, in his opinion, the vehicle would not "roll" over once on the slope. Tr. 79, 87.

I credit Inspector Cook over Young on the question of whether a Caterpillar 980G would overturn in this instance if it overtraveled the bermless side of IMI's roadway, for a few reasons. First, the inspector is significantly more experienced in these matters than Young. At the time of hearing, Inspector Cook had approximately seven years of experience as a MSHA metal and nonmetal mine inspector in addition to having worked 11 years for a coal mine operator earlier in his career. Along with initial MSHA authorized representative training, Inspector Cook has partaken in annual trainings as well. He testified to conducting approximately 80 mine inspections per year, including regular inspections, spot inspections, health inspections, hazard inspections, among others. Tr. 18-20, 60. With his background, Inspector Cook made at least some effort to measure the drop-off alongside the cited section of IMI's roadway. In contrast, Young disputed the measurement based strictly on his forced "guess" regarding the depth of the drop-off. Tr. 30-32, 62, 82-83.

As far as the grade and slope of the drop-off, the two witnesses' accounts did not appreciably differ. While Young described the drop-off as not "straight up and down by any means," there is no record evidence that only such drop-offs could result in a vehicle overturning off a roadway's edge. MSHA updated its safety standards pertaining to loading, hauling, dumping, machinery, and equipment in 1988, after an increase in machinery and equipment-related injuries. *See* Safety Standards for Loading, Hauling, and Dumping and Machinery and Equipment at Metal and Nonmetal Mines, 53 Fed. Reg. 32496, 32500 (Aug. 25, 1988). Included in the revised standards was an update to then-section 56/57.9022, now section 56/57.9300, titled "Berms or guardrails." By MSHA's calculation, 90 fatalities had occurred across a 15-year period in instances in which a berm could have minimized the seriousness of mine roadway accidents. The rule adopted imposed berm or guardrail requirements when the drop-off is "of a *sufficient* grade *or* depth" to result in a vehicle overturning or otherwise endangering persons in the vehicle. 30 C.F.R. § 56.9300(a) (emphases added).

Young's opinion that no vehicle, including the Caterpillar 980G, would roll over after overtraveling the cited roadway section was based on his experience as both a mechanic and a miner. Tr. 83. However, he did not reference any specific experience of a vehicle remaining upright in such an overtraveling scenario. In contrast, Inspector Cook testified to witnessing the aftermath of a vehicle overtraveling a road's edge that lacked a berm. In that instance, he recounted that a truck with an estimated 16-inch mid-axle height had overturned when it went off a roadway with a nine-inch drop-off. Tr. 37-38.

In arguing that the citation should be vacated, IMI cites *Knife River Corp., N.W.*, 32 FMSHRC 912, 915-16 (July 2010) (ALJ), where a Commission Judge found that the Secretary did not prove that the drop-off at issue was of sufficient depth or grade to lead to a vehicle overturning. Resp't Br. at 6. Significantly, that case did not involve a standard mine roadway missing an adequate berm or guardrail, but rather an elevated scale on which vehicles would stop to be weighed. The question was whether, on the far side of the 9-inch high "rubrail" built into the scale at its edge, there was a drop-off of sufficient depth or grade to result in a vehicle overturning in the event of overtravel.

In *Knife River*, the Judge vacated the citation because the Secretary failed to provide a sufficient explanation of what would occur in such an event—finding the Secretary's testifying

authority in the case to be "silent on information regarding how the height or grade of the scales considering all relevant factors such as their width, size of the trucks and the like would trigger" section 56.9300(a). *Id.* at 915. Given the lack of evidence of what would occur to a truck had the rubrail not prevented it from going over the edge of the scale, the Judge refused to draw inferences on her own from the photographs of the scales that the Secretary introduced. *Id.* at 915-16.

Here, I have reviewed the photograph Inspector Cook took of the roadway section at issue. Sec'y Ex. 1. As the inspector admitted, the photograph is not nearly as clear and accurate as one would wish. Tr. 66. Shadows and brush somewhat obscure the details of the depth and grade of the drop-off. However, under the circumstances, the photograph provides sufficient additional support for Inspector Cook's conclusion that there was a distinct risk that once a Caterpillar 980G's wheel or wheels overtraveled the muddy edge of the roadway, the vehicle would overturn. The grade and depth of the roadside drop-off shown in the photograph is generally consistent with the inspector's testimony on the subject. Tr. 38-39.

Accordingly, I do not find that *Knife River*, a case involving an elevated scale, rubrail, and drop-off, anywhere near analogous to the muddy roadway and drop-off presented in this case. The Secretary has carried his burden of proof with respect to the violation of section 56.9300 and the citation is affirmed.[4]

3. S&S and Gravity of the Violation

A violation is 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." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (citing *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)). In *Mathies*, the four elements or steps required for an S&S finding were expressed as follows:

> (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted).

[4] Throughout the proceeding, IMI mentioned the undisputed fact that the section of relevant roadway did not have a berm during previous MSHA inspections, including prior ones conducted by Inspector Cook, and yet no citation had ever been issued. Jt. Stip. 15; Tr. 82; Resp't Br. at 3. However, by this point it is axiomatic that the Secretary cannot be estopped from enforcing a regulation against an operator simply because the operator had not been cited for violating the regulation in the past. *See, e.g.*, *Cactus Canyon Quarries, Inc. v. Sec'y of Labor*, 953 F.3d 790, 793 (D.C. Cir. 2020). This of course includes the authority to enforce section 56.9300. *See Palmer Coking Coal Co.*, 22 FMSHRC 887, 890 (July 2000) (ALJ) ("[o]perator is in no worse position than if MSHA had cited the condition five years ago. It simply would have had to correct the condition and pay the civil penalty at that time.").

More recently, the Commission restated *Mathies* Step 2 in terms of finding that "the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016).[5] Notably, an S&S determination is based on the facts existing at the time of citation issuance and assumes normal mining operations will continue. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (Jan. 1984); *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012) ("[t]he [S&S] evaluation is made in consideration of the length of time that the violative [berm] condition existed prior to the citation and the time it would have existed if normal mining operations had continued.").

In its post-hearing brief, IMI did not take separate issue with the S&S designation. However, because IMI's evidence was relevant to some of the *Mathies* elements, I will analyze whether the Secretary met his burden of proving that the section 56.9300 violation is S&S.

a. *Mathies* Step 1 & Step 2

Step 1 of the Commission's S&S analysis is satisfied above, as noted in my conclusion that the bermless section of IMI roadway constituted a violation. As for Step 2, the hazard posed by IMI's failure to provide the berm—as required by the standard—is that a vehicle will overtravel the edge of the road, and become, in whole or part, subject to the 32-inch drop-off and slope down into the immediately adjacent ditch. *See Black Beauty*, 34 FMSHRC at 1741 (noting that MSHA berm standards anticipate danger of "loss of vehicle control near the edge of" an elevated roadway). As Inspector Cook explained, a berm maintains safety by redirecting equipment back into the roadway in the event of the equipment operator "hav[ing] a health issue, [being] distracted, lots of things can happen." Tr. 38.[6]

At hearing, IMI hardly disputed that, absent an adequate berm on the pertinent roadway section, a vehicle, including the Caterpillar 980G, could go off the road. For example, Young admitted that any vehicle using that section of roadway "can drive off there, they could have drove off it . . . ." Furthermore, he specifically agreed with the "possibility" that a Caterpillar 980G could overtravel. Tr. 87.

In fact, the Secretary's evidence raised the likelihood of vehicular overtravel beyond a "possibility" to a "reasonable likelihood." Here, IMI's operations included numerous vehicles using the road in question for two-way traffic each day, including the Caterpillar 980G, which Young estimated travels on the roadway four times a day. Tr. 24, 87-88. Significantly, this two-

[5] As shown herein it makes no difference which version of Step 2 is applied in this case. *See Consol Pa. Coal Co.*, 43 FMSHRC 145, 148-49 & n.6 (Apr. 2021).

[6] In its Safety Standards for Loading, Hauling, and Dumping and Machinery and Equipment at Metal and Nonmetal Mines, MSHA explains that, when a roadway berm is required, it must be of at least the greatest mid-axle height of the equipment using the road to "(1) ensure under-carriage contact with the restraint, (2) alert the equipment operator of the hazardous situation, (3) moderate the force of the equipment, (4) provide corrective action, and (5) assist the operator in regaining control of the equipment." 53 Fed. Reg. at 32501.

way traffic pattern apparently necessitated vehicular travel up to the very edge of the unbermed section of roadway, as evidenced by Inspector Cook's photograph of tire tracks. Tr. 36; Sec'y Ex. 1. Given this evidence, I conclude that over time, without a berm to prevent vehicular overtravel, such was bound to occur. *See LRock Indus.*, 39 FMSHRC 1429, 1434 (July 2017) (ALJ) (finding that absent a berm, "overtravelling . . . was reasonably likely to occur, given that there was frequent traffic in the area and tire tracks relatively close to the dropoff.").

As for the consequences of a Caterpillar 980G falling off the roadway in such a fashion, the berm standard, by its terms, goes much of the way towards establishing Step 2 of the *Mathies* analysis. A berm is only required under section 56.9300(a) when overtravel could take a vehicle into a "drop-off . . . of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." I have already credited Inspector Cook over maintenance mechanic Young on the question of whether an IMI vehicle overtraveling the edge of the pertinent roadway would result in a rollover, given the established slope and drop-off. Thus, Step 2 is satisfied as well.

b. *Mathies* Step 3 & Step 4

At hearing, there was a dispute over what injuries would likely occur in the event of a rollover as well as the nature of the injuries. I thus examine whether Steps 3 and 4 of the S&S test have been established.

Inspector Cook testified that if a Caterpillar 980G were to overturn off a roadway, the miner-operator could expect to suffer cuts, contusions, sprains, and strains which may result in lost workdays. Moreover, Inspector Cook categorized those injuries as serious in nature. Tr. 39. In contrast, Young disputed that overtravel would result in a rollover and further contested that a rollover of "[Caterpillar 980G] loader or haul truck or that sort of stuff" would result in any injury to the equipment operator. He based his opinion on the "safety belts and all the rollover protection" in the vehicle, as well as the roadway's height. Tr. 89.

Inspector Cook was not as expansive in his explanation as he could have been regarding the consequences of a vehicular rollover in this instance. *Cf. Acha Const.*, *LLC*, 38 FMSHRC 3025, 3032-33 (Dec. 2016) (ALJ) (detailing testimony on injuries reasonably likely to result from lack of required berm). However, based on his much greater experience in these matters, including his familiarity with the consequences of vehicular rollover, I credit him over Young and find that there was both a reasonable likelihood that equipment rollover would result in an injury and that there was a reasonable likelihood that an injury suffered would be of a reasonably serious nature. *See Wolf Run Mining Co.*, 36 FMSHRC 1951, 1958-59 (Aug. 2014) ("not[ing] that an inspector's judgment is an important element in an S&S determination" as part of *Mathies* Step 3 and under Step 4 crediting inspector's testimony regarding the severity of injuries that had resulted to miner in a similar situation); *see also Consol Pa. Coal Co.*, 43 FMSHRC at 149.

Moreover, even though a Caterpillar 980G may be equipped with rollover protection and seatbelts, redundant safety measures are not to be considered in determining whether a violation is S&S. *See Cumberland Coal Res. v. FMSHRC*, 717 F.3d 1020, 1029 (D.C. Cir. 2013); *Knox*

Creek Coal Corp. v. Sec'y of Labor, 811 F.3d 148, 162 (4th Cir. 2016); *Buck Creek, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015); *see, e.g.*, *Acha*, 38 FMSHRC at 3032 (determining berm standard violation to be S&S after refusing to consider equipment's rollover protection and seatbelts because they were redundant safety measures).

Accordingly, the Secretary has satisfied all four elements of the *Mathies* test. Therefore, I conclude that Citation No. 9443972 was appropriately designated as S&S. For the same reasons, I affirm Inspector Cook's gravity designation as reasonably likely to result in lost workdays/restricted duty for the equipment operator.

4. Negligence

The Commission "may evaluate negligence from the starting point of a traditional negligence analysis." *Brody Mining*, 37 FMSHRC at 1702. This analysis asks whether an operator has met "the requisite standard of care—a standard of care that is high under the Mine Act." *Id.* Considerations include "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 regulations." *Id.*; *see also A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). The Commission has explained that an ALJ "is not limited to an evaluation of allegedly 'mitigating' circumstances" and should consider the "totality of the circumstances holistically." *Id.; see also* 30 C.F.R. § 100.3(d) (stating that operators 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.").

As previously mentioned, various types of equipment traveled the roadway multiple times a day, every day at Fall Creek. Tr. 40, 88. The Caterpillar 980G, specifically, traveled the roadway at least four times a day. Tr. 88. Moreover, the lack of a berm was obvious, as seen in Inspector Cook's photographs of the roadway. *See* Sec'y Ex. 1, 1.1. Inspector Cook also documented in his notes that Brad Wales, IMI's safety manager, stated that Young oversaw the area and should have recognized the hazard associated with not having a berm. Sec'y Ex. 6 ("Safety mgr. stated Evan was in charge of the area and should have recognized the hazard."); *see also* Tr. 40 ("[Wales] said that [foreman] should have recognized the hazard."). Given that the roadway lacked a berm for at least 45 feet and IMI's own acknowledgement that it should have recognized the hazard, I affirm the level of negligence as moderate.

B. <u>Citation No. 9443973 for Alleged Violation of Section 56.14107(a)</u>

1. Fact of Violation

Continuing his inspection, Cook observed a hopper discharge conveyor (*hereinafter* "conveyor"), which he described is used to take "material from the hopper . . . to another part of the mine, to the plant." Tr. 42. Inspector Cook noted that the conveyor beneath the hopper was surrounded by cattle gates, one on the left-hand side, one on the right-hand side, and one on the front side. On one of the gates was a sign that said, "Danger Falling Material" and a padlock. Tr. 41, 52-53; Sec'y Ex. 7, 7.1; Jt. Stip. 18.

Below the conveyor was a feed drive chain and tail pulley. It is undisputed that neither was individually guarded. Tr. 44, 91; Sec'y Ex. 7.1, 9.1, 10.1. At hearing, Young testified that there are 20 to 30 other tail pulleys and like machinery components at Fall Creek, all of which were individually guarded, and had been since he started working there. Tr. 92-94.

Due to the lack of individual guarding, Inspector Cook issued another 104(a) Citation, No. 9443973, which alleged:

> The tail pulley on the Hopper Discharge conveyor under the feed hopper was not guarded to prevent contact. The drive chain for the feed conveyor under the hopper was not guarded to prevent contact. There were cattle gates placed around the base of the hopper structure indicating area guarding but did not prevent access to the rotating machine parts. This condition exposes miners to permanently disabling injury hazards.

Sec'y Ex. 11.

Inspector Cook designated the citation as a non-S&S violation of 30 C.F.R. § 56.14107(a) that was unlikely to cause an injury but could be reasonably expected to result in a permanently disabling injury had one occurred, which would affect one miner, and was a result of IMI's moderate negligence. Sec'y Ex. 11.

2. Analysis

Section 56.14017(a) provides that "[m]oving 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." 30 C.F.R. § 56.14017(a). It is undisputed that both the feed drive chain and tail pulley constitute "moving machine parts" under section 56.14107(a). *See Moline Consumers Co.*, 15 FMSHRC 1954, 1959-60 (Sept. 1993) (ALJ) ("standard is obviously intended to protect individuals from moving component parts rather than the machine itself.").

In adopting section 56.14107(a), MSHA explained that it revised existing standards to "clarif[y] that the objective is to prevent contact with [hazardous moving] machine parts[,]" and that "[t]he guard must enclose the moving parts to the extent necessary to achieve this objective." Safety Standards for Loading, Hauling, and Dumping and Machinery and Equipment at Metal and Nonmetal Mines, 53 Fed. Reg. 32496, 32509 (Aug. 25, 1988). Consequently, a Court interpreting the standard has held that "[b]oth the regulation and [this] explanation clearly require guards around moving parts," and "[w]hen the meaning of a regulatory provision is clear on its face, the regulation must be enforced in accordance with its plain meaning." *Mainline Rock & Ballast, Inc., v. Sec'y of Labor*, 693 F.3d 1181, 1185 (10th Cir. 2012) (quoting *Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1080 (10th Cir. 1998)).

To prove a violation of section 56.14107(a), the Secretary must show that an unguarded moving machine part "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.*, 6 FMSHRC 2094, 2096 (Sept. 1984); *see also Nelson Quarries, Inc.*, 36 FMSRHC 3143, 3146 (Dec. 2014) (ALJ) (interpreting section 56.14107(a) to require proof of reasonable possibility of injury). Here, there is no dispute that contact with either the tail pulley or the drive chain while in motion can cause injury.[7]

At issue is whether the feed drive chain and tail pulley were properly guarded to prevent injury as required by section 56.14107(a). The Secretary contends that both the feed drive chain and tail pulley were not properly guarded because, even with the cattle gates and padlock, the moving machine parts were still accessible to miners who may need to enter the hazardous area near the exposed moving machine parts. Sec'y Prehrg. Rep. 5; Sec'y Br. 24-27. IMI, on the other hand, argues that it did not violate section 56.14107(a) because the tail pulley was sufficiently guarded by location, miners were unable to access the area without permission, and would not do so when the machinery was operating. Resp't Prehrg. Rep. 4; Resp't Br. 7-9.

In deciding whether to affirm or vacate the citation, I must first address whether IMI miners could complete their duties while remaining outside the cattle gates, thus establishing the cattle gates as adequate guarding, or whether there was any need for miners to get inside the gates and closer to the conveyor and its otherwise unguarded feed drive chain and tail pulley. Regarding a miner's need to enter the enclosure to conduct maintenance, neither Inspector Cook nor Young were clear in their testimony. In response to my question on how often a miner would go inside the cattle gates, Young stated flatly "[n]ever." However, he then qualified that answer with his explanation that "[a]ll of our grease lines and everything . . . they're routed and attached to the cattle panel on the left-hand side. . . . [T]hat you can access by the cattle gate." Tr. 94.

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[7] After observing the unguarded components, Inspector Cook concluded that a permanently disabling injury could have occurred if a miner encountered the machine parts while in motion. The inspector specified that permanently disabling entanglements, which cause amputations, cuts, and contusions, could occur because of the unguarded moving machine parts. He reiterated how dangerous such hazards can be and referenced a fatality that occurred two months prior because of an unguarded tail pulley. Tr. 44, 54-55; Sec'y Ex. 11. Young agreed with this assessment of the type of injuries that may result if a miner were to contact the unguarded moving machinery. Tr. 91.

Moreover, the application of safety standards does not require proof that the equipment at issue was operating at the time of the inspection. Here, both witnesses testified as to whether, in their opinion, the conveyor had been in use recently. Inspector Cook determined that the conveyor was recently used when he inspected the machinery based on the condition of the conveyor belt, describing it as clean and without rust on the rollers. Conversely, Young did not say that the conveyor ran recently, but rather that IMI was not running the machine at the time of inspection. Tr. 54, 94. I need not decide between these partially conflicting accounts. *See Mid-Continent Coal & Coke Co.*, 3 FMSHRC 2502, 2504 (1981) (holding that a temporary interruption in mining activities in preparation for further mining and production did not suspend regulatory requirements); *Crimson Stone v. FMSHRC*, 198 F. Appx. 846, 850 (11th Cir. 2006) (finding that the inspector did not have to catch the dry plant conveyor operating with its guard torn off to justify a citation for the violation).

Inspector Cook initially testified that a miner would need to enter the cattle gates to be close to the tail pulley and feed drive chain to grease and otherwise maintain them. Tr. 46-49; Sec'y Ex. 8.1, 9.1. He later stated, however, that contact with the moving machine parts was unlikely, "[b]cause of the extended grease lines and the cattle gates being there," and that he had seen no footprint evidence of miners having been there. Tr. 55. He nevertheless continued to maintain that a miner could enter the enclosure to conduct maintenance on the moving machine parts. Tr. 56.

However, I need not resolve the issue of whether maintaining the machinery would ever necessitate entry into the enclosure, because Young conceded that miners would at a minimum need to enter it for another maintenance responsibility—to clean up falling debris from the conveyor. Tr. 95; Sec'y Ex. 7.1 (providing photo of cattle gates that includes "Danger Falling Material" signage). Contact with unguarded moving machine parts while cleaning around the machinery has been recognized as a danger that guarding standards are designed to protect against. *See, e.g.*, *Dix River Stone Inc.*, 29 FMSHRC 186, 202 (Sept. 2016) (ALJ). Significantly, Inspector Cook explicitly testified to his familiarity with a fatality that resulted from a miner shoveling around an unguarded tail pulley as part of his maintenance duties. Tr. 65.

IMI maintains that, under applicable MSHA guidance, the cattle gates nevertheless provided sufficient "area" guarding of conveyor components when miners were cleaning up debris. Resp't Br. at 7-8; Resp't Ex. 5, at 28 (U.S. Dep't of Labor, MSHA, MSHA's Guide to Equipment Guarding (Rev. 2004)). IMI relies on the gates, padlock, and testimony that miners were trained to follow IMI's policy of not entering the gates without (1) prior permission; and (2) before doing so, locking and tagging out the power supply to the conveyor, located nearby, so that the conveyor and its components could not run. Resp't Br. at 8-9; Tr. 64, 85, 90, 95.

The Secretary contends that such facts and operator policies are insufficient to establish compliance with section 56.14107(a). Drawing on his experience, Inspector Cook explained how a miner might not take the time to shut down the plant, but rather could run into the area without doing so to quickly perform an assigned task. Tr. 55-56. The inspector opined that, as of the date of his inspection, a miner could have easily climbed over the cattle gates and been in position to contact the unguarded tail pulley and drive chain. Specifically, Inspector Cook stated that a miner could climb over the cattle gates on the left side and front side of the conveyor and could also crawl under the cattle gate on the right side. Tr. 52-53; Sec'y Ex. 7, 7.1. While Young disagreed that a miner would be able to fit under the right-side cattle gate, he agreed that a miner could climb over one of the gates, albeit in violation of IMI rules and the training it provides its miners. Tr. 90-91.

I find the foregoing evidence sufficient to establish a violation of section 56.14107(a) under reviewing court and Commission precedent. When analyzing the reasonable possibility of injury from unguarded moving parts, the Commission has long considered "*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." *Thompson Bros.*, 6 FMSHRC at 2096-97 (emphasis added). While the scenario outlined by the inspector here may be one that would be out of the ordinary, it is by no means so inconceivable as to take it out of the purview of the

standard. *See id.* at 2096 (holding the guarding standard to protect against "contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness."); *see also Mainline*, 693 F.3d at 1186 (ratifying Commission's approach in *Thompson* and using it to interpret section 56.14107(a)).

Acknowledging the Commission's stated concern regarding all possible "vagaries of human conduct" and that "momentary inattention or ordinary human carelessness" must be protected against, Commission Judges, in deciding whether a guarding standard has been violated, have refused to presume that miners will always follow operator rules and protocols, including lock and tag out policies. *See, e.g.*, *Climax Molybdenum Co.*, 38 FMSHRC 2453, 2460 (Sept. 2016) (ALJ) (rejecting lock and tag out policy as relevant consideration because "'[e]ven a skilled employee may suffer a lapse of inattentiveness, either from fatigue or environmental distractions,' and enter the area without first shutting down" equipment) (quoting *Great W. Elec. Co.*, 5 FMSHRC 840, 842 (May 1983)); *Dix River Stone Inc.*, 29 FMSHRC at 203 (rejecting evidence on miners always following lock and tag out policy because "the history of mining is replete with injuries and fatalities which occurred when previous practices that 'always' were implemented, were not."); *Teichert Aggregates*, 39 FMSHRC 1098, 1101 (May 2017) (ALJ) ("pulley guarding needed to account for the unlikely event of a miner entering the area without following [lock and tag] out policy.").[8]

While not binding Commission precedent, I find the reasoning in these cases persuasive and apply it to this case and its similar facts. Consequently, despite the evidence on miner adherence to IMI's policies, such as on locking and tagging out power supplies and keeping the cattle gates locked, I conclude that there is a possibility that those policies would not prevent a miner from entering the enclosure and contacting moving machine parts.

Similarly, the cattle gates were not a sufficient physical deterrent under the standard. *See Yaple Creek Sand & Gravel*, 11 FMSHRC 1471 (Aug. 1989) (ALJ) (holding that a gate four to five feet from an unguarded drive chain assembly on a hopper feeder conveyor belt did not satisfy section 56.14107). Young conceded that, even when the gates were padlocked, a miner could enter the enclosure by climbing over one of them, given its height. Tr. 90-91. Thus, his testimony contradicts Respondent's post-hearing brief that characterizes the area in question as "inaccessible." *See* Resp't Br. at 9 (citing *Melgaard Constr. Co.*, 26 FMSHRC 720, 726 (Aug. 2004) (ALJ)).

Commission Judges have held that applicable standards require moving machine parts to be guarded in locations that are climbing-accessible. *See, e.g.*, *Brown Bros. Sand Co.*, 17 FMSHRC 578, 581 (Apr. 1985) (ALJ). Consequently, a barrier that can be easily defeated by climbing over it is not recognized as sufficient guarding under MSHA standards. *See Teichert*, 39 FMSHRC at 1101 (finding a guarding violation where climbing over or through handrail would expose miner to moving machine parts). According to the MSHA guidance document

[8] *See also Calco Inc.*, 15 FMSHRC 480, 484 (Mar. 1993) (ALJ) (refusing to consider lock and tag out policy, even though it was "uncontrovert[ibly] . . . always follow[ed]" because guarding standard does not recognize any such policy as an exception); *Nelson Quarries*, 36 FMSRHC at 3146 (taking lock and tag out policy into account only in finding section 56.14107(a) violation not to be S&S).

IMI submitted at hearing and relied heavily upon in its brief, barriers must be "difficult to defeat" and "prevent entry of a miner into an area containing moving machine parts" to be considered adequate "area guarding." Resp't Ex. 5, at 28. I find that was not the case with the cattle gates around the conveyor at the time IMI was cited for violating section 56.14107(a) and affirm the citation.[9]

3. Gravity

Inspector Cook designated the citation as "unlikely" to cause an injury, given the extended grease lines, positioning of cattle gates, and lack of footprints near the conveyor. Tr. 55. If an injury did occur, Inspector Cook found that it could result in "one" miner suffering a "permanently disabling" injury. Sec'y Ex. 11; Tr. 54-55. Because the citation is marked as "unlikely," it is not considered an S&S violation.

Inspector Cook, given his experience, provided credible testimony that contact with an unguarded feed drive chain and tail pulley could result in entanglement hazards and result in amputations, cuts, and appendages. Tr. 18, 44. Inspector Cook specifically recalled a fatality two months prior during another inspection of an unguarded tail pulley. Tr. 18, 44. He noted that if an injury were to occur, it would likely impact one miner who would be performing maintenance. Tr. 65. Moreover, Young testified that there was no guard directly over the tail pulley or feed drive and admitted that if a miner were to get caught in either of the moving machine parts while conducting maintenance, he or she could experience a permanently disabling injury including amputated fingers, serious lacerations, and broken bones. Tr. 92.

Given the facts above, I affirm the assessed likelihood, severity, and number of persons affected.

4. Negligence

In his determination, Inspector Cook found that IMI was moderately negligent because other tail pulleys around the mine were adequately guarded and that this particular tail pulley could have been readily guarded as well. Tr. 56. He also explained that while IMI took efforts to put up cattle gates, a padlock, and a sign, such efforts were insufficient. Tr. 56. During the testimony of IMI's only witness, Young stated that, aside from the tail pulley and drive chain at issue, a lot of other pulleys at the mine *were* properly guarded, estimating the number to be about 20 to 30. Tr. 93.

It is plausible that a reasonably prudent person familiar with the mining industry under the same circumstances, would have placed individual guards on the tail pulley and drive chain

[9] As with the berm violation, IMI argues that the citation should be vacated because previous MSHA inspections had not resulted in a citation for a guarding violation with respect to the conveyor. Tr. 86; Resp't Br. at 8. The court in *Mainline* disposed of this contention, stating "MSHA cannot be estopped from enforcing its regulations simply because it did not previously cite the mine operator. . . . . 'Those who deal with the [g]overnment are expected to know the law and may not rely on the conduct of government agents contrary to the law.'" 693 F.3d at 1187 (quoting *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984)).

to protect miners from the moving machine parts, just as IMI did on approximately 20-30 other tail pulleys and drive chains elsewhere at the plant. Moreover, because the tail pulley and drive chain at issue were visibly unguarded, as noted by both Inspector Cook and Young, it is evident that IMI was aware that the components at issue were not guarded separately.

Considering the totality of the circumstances, I find that the inspector was correct in finding that IMI was moderately negligent.

IV. PENALTY

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

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

30 U.S.C. § 820(i).

In the fifteen months preceding the issuance of Citation Nos. 9443972 and 9443973, MSHA issued seven violations to Fall Creek. *See* MSHA, *Mine Data Retrieval System*, https://www.msha.gov/mine-data-retrieval-system (last visited June 1, 2022). IMI, a relatively small operator, agreed in conjunction with the Secretary that the proposed penalty would not affect its ability to continue in business. Jt. Stip. 8.

A. Citation No. 9443972

For Citation No. 9443972, the Secretary proposed a penalty of $159.00. I determined IMI's negligence to be moderate. *See* discussion *supra* Part III.A.4. I also determined the gravity of the violation to be S&S, to affect one person, and to be reasonably likely to cause a lost workdays/restricted duty-type injury. *See* discussion *supra* Part III.A.3. Moreover, IMI demonstrated good faith by building a berm that was higher than 34 inches on the same day that it was cited. *See* Sec'y Ex. 3; Tr. 33, 90. Considering the six criteria set forth under section 110(i) of the Mine Act in conjunction with the relevant facts, I hereby assess a penalty of $159.00 for Citation No. 9443972.

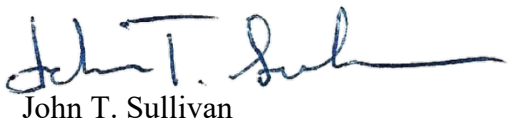
B. Citation No. 9443973

For Citation No. 9443973, the Secretary proposed a penalty of $139.00. I determined IMI's negligence was moderate. *See* discussion *supra* Part III.B.4. I also determined the gravity of the violation to be non-S&S, to affect one person, to have an unlikely likelihood of injury, and if occurred, to result in a permanently disabling injury. *See* discussion *supra* Part III.B.3. After

receiving the citation, IMI maintained that the cattle gates constituted sufficient guarding and did *not* remedy the issue, neither on the day as the initial inspection nor by the time of the subsequent inspection on March 15, 2021. This prompted MSHA to issue a 104(b) order for IMI's failure to timely abate the alleged violation. Consequently, credit is not due to the Respondent for its abatement efforts with respect to the guarding violation. Tr. 56-57. Considering the six criteria set forth under section 110(i) of the Mine Act in conjunction with the relevant facts, I hereby assess a penalty of $139.00 for Citation No. 9443973.

V. CONCLUSION AND ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation Nos. 9443972 and 9443973 are **AFFIRMED**. Respondent IMI Aggregates, LLC, is hereby **ORDERED** to pay a penalty of **$298.00** within 30 days of the date of this decision.[10] Accordingly, this case is **DISMISSED.**



John T. Sullivan
Administrative Law Judge

Distribution (First Class Mail and E-mail):

Lydia J. Faklis, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., Room 844, Chicago, IL 60604 (faklis.lydia.j@dol.gov)

Brad Wales, Safety Manager, IMI Aggregates, LLC, 8032 N. SR 9, Greenfield, IN 46140 (brad.wales@irvmat.com)

Donna V. Pryor, Esq., Husch Blackwell LLP, 1801 Wewatta St., Suite 1000, Denver, CO 80202 (donna.pryor@huschblackwell.com)

[10] Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.