FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2012-1022-M AC No. 04-01299-289667 Docket No. WEST 2013-321-M AC No. 04-01299-306795-01 Docket No. WEST 2013-322-M AC No. 04-01299-306795-02
v.	Docket No. WEST 2013-323-M AC No. 04-01299-306795-03 Docket No. WEST 2013-365-M AC No. 04-01299-309234
ORIGINAL SIXTEEN TO ONE MINE, INCORPORATED, Respondent	Docket No. WEST 2013-486-M AC No. 04-01299-311898 Mine: Sixteen to One Mine

AMENDED DECISION

Appearances: Jan M. Coplick, Esq., Seema N. Patel, Esq., U.S. Department of Labor, Office of the Solicitor, San Francisco, California, for Petitioner;

Michael M. Miller, President, Original Sixteen to One Mine, Inc., Alleghany, California, for Respondent.

Before: Judge Bulluck

This Amended Decision **CORRECTS** the proposed penalty figures as follows: page 2 – the introductory paragraph, line 5 and footnote 1, line 3; page 34 – Penalties section, paragraph 1, line 1.

These cases are before me upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") on behalf of the Mine Safety and Health Administration ("MSHA") against Original Sixteen to One Mine, Incorporated ("Original Sixteen"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815(d). The Secretary seeks a total penalty of $10,141.00 for 29 alleged violations of his mandatory safety standards.[1]

A hearing was held in Nevada City, California.[2] The following issues are before me: (1) whether Original Sixteen violated the cited standards; (2) whether the violations were significant and substantial, where alleged; (3) whether the violations were attributable to the level of negligence alleged; and (4) whether the violations were attributable to unwarrantable failures to comply with the cited standards, where alleged.

I. STIPULATIONS

The parties stipulated as follows:

1. Original Sixteen to One Mine, Incorporated, is the owner and operator of the Sixteen to One Mine (hereafter "the mine"), MSHA I.D. No. 0401299.

2. The mine is an underground gold mine located near Alleghany, California.

3. The subject citations were properly served by a representative of the Secretary upon an agent of Respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy, if any, of the statements asserted therein.

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

5. Photocopies of the parties' exhibits are presumed to be accurate copies of the originals.

[1] The parties reached a settlement on 15 of the 29 contested citations/orders. The total civil penalty proposed for the 14 remaining citations/orders adjudicated in this proceeding is $7,843.00.

[2] By my direction, a complete set of MSHA Inspectors William Edminister's and Roshan Gulati's field notes were provided by the Secretary and received in evidence as exhibits P-16 and P-17, respectively, post-hearing. See Tr. 540-43.

6. Documents pertaining to violations and quarterly production that are downloaded from MSHA's on-line Data Retrieval System at MSHA.gov are presumed to contain accurate information.

7. Documents reflecting information downloaded from the Security and Exchange Commission's on-line data retrieval system at SEC.gov are presumed to contain accurate information.[3]

Tr. 7-8.

For the reasons set forth below, I **VACATE** two citations; **AFFIRM** 10 citations and 2 orders, as issued; and assess penalties against Respondent.

II. FACTUAL BACKGROUND

Original Sixteen operates the Sixteen to One mine, an underground gold mine in Alleghany, California. Jt. Stip. 1. Michael Miller is the President of Original Sixteen. Tr. 543-44. Michael Miller, his son Reid Miller, Joseph Sauer, and Aaron (Chico) Aguirre were working in the mine during the 2012 inspections at issue. Tr. 389, 475, 430-31.

On March 20, 2012, William Edminister, an MSHA inspector since early 2009, conducted a regular inspection of the mine. Tr. 16, 19. He issued a citation to Original Sixteen for loose ground in the main haulageway. Ex. P-1A. Two days later, he returned to the mine and issued a citation for failure to maintain the 600 and 1000 level secondary escapeway in safe and travelable condition. Ex. P-2A.

On September 18, 2012, Inspector Edminister, accompanied by MSHA Inspector David Blankenship, conducted another regular inspection of Sixteen to One and cited several conditions. Tr. 362-63. Edminister issued a citation for failure to maintain the 600 and 1000 level secondary escapeway in safe and travelable condition (Ex. P-4A); a withdrawal order concerning a miner working alone where hazardous ground conditions existed (Ex. P-5A); a withdrawal order for loose ground in the 21 Tunnel secondary escapeway (Ex. P-6A); and an order withdrawing miners from all underground areas of the mine for failure to maintain the 21 Tunnel secondary escapeway in safe and travelable condition (Ex. P-7A). He also issued citations for failure to barricade an unsafe area beyond the 800 station (Ex. P-8A); failure to take down hazardous material in an elevated ore chute (Ex. P-9A); failure to provide fire protection for timbered construction in the 21 Tunnel secondary escapeway portal (Ex. P-10A); failure to guard or insulate output terminals on a welder (Ex. P-11A); failure to clear dry vegetation in close proximity to the Upper Bench mine opening (Ex. P-12A); and failure to accurately depict mine openings on the mine map (Ex. P-14A).

[3] No SEC documents were offered or received in evidence, and the only testimony relating to Original Sixteen's filings with the SEC presumably bears on jurisdiction, which is not at issue in these proceedings. See Tr. 607-09.

On October 10-11, 2012, MSHA Inspectors Roshan Gulati and Blankenship conducted a regular inspection of the mine. Tr. 320. Gulati issued citations for working in the face of the September 18 withdrawal order pertaining to the 21 Tunnel (Ex. P-3), and failing to repair a defect affecting the safety of an electric hoist in a timely manner (Ex. P-13A).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8612839

Inspector Edminister issued 104(a) Citation No. 8612839 on March 20, 2012, alleging a violation of section 57.3200 that was "unlikely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Original Sixteen's "moderate" negligence.[4] The "Condition or Practice" is described as follows:

> Loose ground was found approximately 1800 ft from the 800 Level Mine Portal along the main haulage way. There is large fractured rock overhead along the slip plain that has come free from the plain and dropped down about ¼ inch. This rock is about 2 ft by 3 ft by about 6 inches thick and about 5-7 ft over the travel way which is about 6 ft wide. There was other unscaled or unsupported ground conditions around the slip plain in this area. This condition exposes miners traveling through the area to fatal type injuries had this condition been allowed to further exist.

Ex. P-1A.[5] The citation was terminated on March 22 after Original Sixteen barred down the fractured rock, and installed a wood sprag and two additional stalls. Ex. P-1B.

1. Fact of Violation

In order to establish a violation of one of his mandatory safety standards, the Secretary must prove that the violation occurred "by a preponderance of the credible evidence." *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152) (Nov. 1989)).

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[4] 30 C.F.R. § 57.3200 provides that "[g]round conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry."

[5] In the context of a previous, analogous standard, 30 C.F.R. § 57.3-22, the Commission interpreted loose ground to refer "generally to material in the roof (back), face, or ribs that is not rigidly fastened or securely attached and thus presents some danger of falling." *Amax Chem. Co.*, 8 FMSHRC 1146, 1148 (Aug. 1986).

The Secretary contends that the cited ground conditions were hazardous and unsafe. Sec'y Br. at 9-10. Original Sixteen argues that the ground conditions were not hazardous, and that Edminister lacks the qualifications to inspect the Sixteen to One mine. Resp't Br. at 6-7.

As a preliminary matter, I note that Original Sixteen stipulated to Gulati's and Blankenship's competence to inspect the Sixteen to One mine. Tr. 318; 361. However, it essentially raised a standing challenge to Edminister's qualifications to inspect the mine and make judgments respecting the cited hazards. Tr. 192-93.

Edminister came to MSHA with eight years experience as a safety representative at a surface mining operation, and six months of training in identification of loose ground and ground support systems; as an MSHA inspector, he had participated in several underground mine inspections. Tr. 13-18. Notably, when making determinations as to loose ground, he relied upon the array of techniques recognized by the Commission. Tr. 276-77; s*ee Asarco Inc.*, 14 FMSHRC 941, 952-53 (June 1992). Accordingly, I find that Edminister was qualified to inspect Sixteen to One and issue the citations and orders contested in this proceeding.

Edminister testified that section 57.3200 requires Original Sixteen to remove or support loose ground conditions in travel or work areas. Tr. 38-40. He stated that he observed a slip plane directly above the travelway, evidence of water seepage through it, and a 2′ by 3′ by 68″ rock slab that had dropped ¼ inch along the plane, indicating that it was loose.[6] Tr. 28, 30-31, 34; Exs. P-1C, P-1D, P-1E, P-1F, P-1G, P-1H; see P-16 at 3. It was his opinion that the slab had been scaled down by hand to terminate the citation, confirming his conclusion that it was, in fact, loose ground. Tr. 40; see Exs. P-1J, P-16 at 6. He also opined that, in the unlikely event that the slab were to fall on a miner from the height of five to seven feet, it could cause fatal injuries. Tr. 42-43.

Michael Miller testified that the roof was not loose, that there were ground supports near the cited slab, that experienced miners who pass through the travelway regularly and are trained to identify loose ground had not noticed the cited condition, and that the metamorphic geology of Sixteen to One makes it resistant to formation of loose ground. Tr. 545-46. Joseph Sauer testified similarly, that the roof was not unstable, and that there were ground supports near the slab. Tr. 502-03. He stated that he did not scale down the slab, that it was still in place, and that stalls were installed to support it. Tr. 487-88, 502-03.

The evidence indicates that the travelway was regularly used by the miners, and that the cited area of roof contained cracks or fractures. I credit Sauer's testimony that he did not scale down the slab. However, crediting Edminister's testimony that upon his return the next day, he observed fragments of the slab on the ground, it is clear that someone had scaled it down or that rock fragments had broken away from the roof. Furthermore, the loose ground created a hazard

[6] A slip plane is "[c]losely spaced surfaces along which differential movement takes place in a rock. Analogous to surfaces between playing cards." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 514 (2d ed. 1997) ("*DMMRT*").

since crushing injuries from a falling slab, while unlikely, would be reasonably expected to be fatal. Accordingly, I find that the Secretary has established a violation of section 57.3200.

2. Negligence

Edminister opined that Original Sixteen's negligence was moderate because the travelway was regularly used, but he considered as mitigating factors that the area was dimly lit and the unstable slab was not readily noticeable, and that Original Sixteen had no recent violation for loose ground. Tr. 43-44. Original Sixteen offered no rebuttal. I find the lack of obviousness of the roof condition and Original Sixteen's clean history to be mitigating factors. Therefore, I find that Original Sixteen was moderately negligent in violating the standard.

B. Citation No. 8612841

Inspector Edminister issued 104(a) Citation No. 8612841 on March 22, 2012, alleging a violation of section 57.11051 that was "unlikely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Original Sixteen's "moderate" negligence.[7] The "Condition or Practice" is described as follows:

> The Secondary escape way designated and posted on the mine map along the 600 and 1000 level is not being maintained in safe or travelable condition. There are several areas along the 600 level escape way where there is a 3 inch air line crossing the tracks about 6-10 inches above the ground level creating a tripping hazard. There is a 3 inch metal pipe line crossing the travel way 48 inches off the pass away level. There are areas where the lagging for the stopes have given way allowing loose unconsolidated material to enter the passage way creating additional hazards.[8] There is a section of the passageway that is under up to 14 inches of water and has a 2″ x 12″ x 7′ long piece of timber floating in the water. There are two large boulders ranging up to 44 inches wide, 45 inches long and 20 inches thick that have fallen from a slip plain and or old stope workings. There is a section of unconsolidated and unsupported material from an overhead stope that is resting directly above the passageway exposing the miners to a hazard of being struck by falling material. These conditions exposed the miners needing to access the secondary escape in the event of an emergency to serious to fatal type injuries

[7] 30 C.F.R. § 57.11051 provides that "[e]scape routes shall be (a) [i]nspected at regular intervals and maintained in safe, travelable condition; and (b) [m]arked with conspicuous and easily read direction signs that clearly indicate the ways of escape."

[8] A stope is "[a]n excavation from which ore has been removed in a series of steps." *DMMRT* at 541.

Lagging is "[material that] wedges and secures the roof and sides behind the main timber or steel supports in a mine and provides early resistance to pressure." *DMMRT* at 302.

in the event of an accident. The miners access many different areas at the mine depending on maintenance and repairs.

Ex. P-2A. The citation was terminated on March 27 when Original Sixteen barricaded the area from which the secondary escapeway is accessed. Ex. P-2B.

1. Fact of Violation

Original Sixteen argues that the 600 and 1000 level secondary escapeway was not required because miners had not worked in the area served by the escapeway for several years. Resp't Br. at 7.

Edminister testified that section 57.11051 requires Original Sixteen to keep escapeways clear of tripping hazards and loose ground. Tr. 55, 57, 65. He stated that he observed numerous tripping hazards impeding a miner's emergency exit through the travelway, including a three-inch air line crossing in front of a ladder used to reach the secondary escapeway (Tr. 47; Ex. P-2C); an air or water line zig-zagging three inches off the travelway floor (Tr. 54; Exs. P-2D; P-2L); multiple piles of old shot rock in the travelway (Tr. 60, 62; Exs. P-2E; P-2F; P-2I; P-2K); an unsupported ledge from a mined-out stope (Tr. 57; Exs. P-2G, P-2H); and a piece of timber floating in a twelve-inch deep water accumulation (Tr. 61; Ex. P-2J). Edminister opined that, in the context of a mine emergency requiring use of the secondary escapeway, a miner would be exposed to tripping hazards, fatal crushing injuries from groundfalls, and drowning from slips and falls in accumulated water. Tr. 64-65. He also testified to the unlikelihood of the occurrence of injury, having relied on Michael Miller's assertion that no miners had been working in the affected area. Tr. 64.

Michael Miller testified that miners had not worked in the area served by the 600 and 1000 level escapeway in 2012. Tr. 549. Sauer testified that the pipe crossing the ladder posed no tripping hazard to an experienced miner, that the piles of material only partially blocked the travelway, that the line crossing the travelway was not a tripping hazard because it was waist-high, and that the hazards associated with the cited condition were not as severe as cited by the inspector. Tr. 522, 524-25; Resp't Br. at 7.

An operator's duty to maintain escapeways free of hazards impeding safe exit is not, as Original Sixteen argues, contingent upon whether they are required. Rather, by its plain language, section 57.11051(a) requires an operator to maintain all active escapeways in "safe, travelable condition." *Original Sixteen to One Mine, Inc.*, 23 FMSHRC 1158, 1173-74 (Oct. 2001) (ALJ) (holding that even if Original Sixteen's secondary escapeway was not required, it was not relieved of its duty to maintain designated escapeways safe and travelable). In this case, the 600 and 1000 level travelway was designated as a secondary escapeway on the mine map, and no barricade or warning signage removed from service either the escapeway or the area it serves. Thus, the evidence indicates that miners were able to access the area from which the secondary escapeway is accessed and the escapeway, itself. Accordingly, I find that Michael Miller's testimony that the area served by the 600 and 1000 level secondary escapeway had not

been used in 2012, while unchallenged, fails to absolve Original Sixteen of its duty to maintain the escapeway in safe and travelable condition since it had not been taken out of service.

Original Sixteen presented no direct evidence that the conditions observed by Edminister did not exist, and I find no merit in contentions that the totality of the cited conditions was not as hazardous or serious as alleged by the Secretary. Even experienced miners would be faced with the "panic factor" where "it would be unrealistic to fail to take into consideration that miners may be hurrying, possibly with limited vision because of smoke." *Id.* at 1163. Therefore, I find that the combination of the hazards, each posing an obstacle to speedy exit in the event of an emergency, and risk of serious to fatal injury, amounted to failure to comply with the standard. Accordingly, the Secretary has established a violation of section 57.11051.

2. Negligence

Edminister opined that Original Sixteen's negligence was moderate because, although miners had not been working in the area served by the secondary escapeway, it was designated on the mine map as an active escapeway. Tr. 65. While Original Sixteen may have believed that the escapeway was not required, Michael Miller is an experienced miner and mine owner who should have known that where a designated escapeway is accessible and, therefore, active, there is an obligation to maintain it in safe, travelable condition. Furthermore, it is noteworthy that Original Sixteen had been cited for similar violations in 1999 and 2011. *See id.* at 1161; *Original Sixteen to One Mine, Inc.*, 36 FMSHRC 2224, 2227 (Aug. 2014) (ALJ). Accordingly, I find that Original Sixteen was moderately negligent in violating the standard.

C. Citation No. 8695844

Inspector Edminister issued 104(d)(1) Citation No. 8695844 on September 18, 2012, alleging a "significant and substantial" violation of section 57.11051 that was "reasonably likely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Original Sixteen's "high" negligence and "unwarrantable failure" to comply with the standard. The "Condition or Practice" is described as follows:

> The mine operator has removed the barricade put in place to impede access to the working and or travel areas where the secondary escape located on the 600 and 1000 Level would be needed in the event of an emergency. Miners travel this area as needed to metal detect for ore and get supplies as needed. The Mine President Mike Miller stated that there is no area in this mine that is abandoned and that they can travel and access any area of the mine. This secondary escape was under citation (8612841) issued on 03/22/2012 and was terminated based on the mine president's statement that the area has been abandoned and there was no need to access the area; therefore installed a barricade and warning sign. The cited condition along the secondary escape have not been corrected as required by the previous citations termination (8612841-01). Due to the actions and inactions

> of the mine operator, this condition/practice has been evaluated at higher than ordinary negligence.
>
> Standard 57.11051 was cited 1 time in two years at mine 0401299 (1 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. P-4A. The citation was terminated on October 17 when the mine operator reinstalled a barricade blocking access to the secondary escapeway. Ex. P-4E.

1. Fact of Violation

The Secretary argues that Sixteen to One was in a production rather than exploration mode, which requires the operator to have and maintain a secondary escapeway and, irrespective of whether it was producing or exploring, it was required to maintain its active secondary escapeways in safe, travelable condition.[9] Sec'y Br. at 8-9, 15.

Original Sixteen argues that no miners were working in the affected area at the time of the inspection, and that there were no workplaces or travelways on the 1000 level. Tr. 552-53; Resp't Br. at 12. It further contends that the mine was in an exploration mode, requiring no secondary escapeway and, therefore, access to the affected area was permitted. Resp't Br. at 12. In other words, Original Sixteen is essentially arguing that since no secondary escapeway was mandated, it was not required to either maintain the 600 and 1000 level escapeway or take it out of service.[10]

Edminister testified that upon returning to inspect the mine in September 2012, he observed that the barricade that Original Sixteen had installed to terminate Citation No. 8612841 had been removed, and that Reid and Michael Miller told him that the hazards cited in the 600 and 1000 level secondary escapeway in March had not been abated. Tr. 66; Exs. P-2, P-16 at 30. He testified that he was never told when or why the barricade had been taken down, or how frequently miners had been entering the area beyond the barricade. Tr. 72. He stated that Michael Miller told him that miners were free to travel anywhere in the mine, and that Original Sixteen was not required to have a secondary escapeway because the miners were engaged in exploration. Tr. 66; Ex. P-16 at 30. In his opinion, it would be reasonably likely that a miner attempting to exit the mine in an emergency situation would be unable to safely negotiate the

[9] Section 57.11050(a) provides that "[e]very mine shall have two or more separate, properly maintained escapeways to the surface . . . . [a] second escapeway is recommended, but not required, during the exploration or development of an ore body."

[10] There are two separate secondary escapeways identified in these proceedings; the 600 and 1000 level escapeway at issue in Citation Nos. 8612841 and 8695844, and the 21 Tunnel at issue in Order Nos. 8695848, 8695849, and 8695846.

unabated slipping, tripping, and crushing hazards in the travelway, thereby delaying timely escape. Tr. 81-82.

On cross-examination, Sauer testified that the secondary escapeway had not been cleaned up, that the barricade had been removed and, for approximately one week, the affected area had been open until a gate with a lock had been installed. Tr. 525-28, 535. He also stated that, to his knowledge, no miners had actually entered the affected area after Original Sixteen was cited in March. Tr. 525.

In each instance where Original Sixteen was cited for conditions relating to either the 600 and 1000 level secondary escapeway or the 21 Tunnel, the Secretary contends, and Original Sixteen contests, that Original Sixteen was in a production mode and, therefore, required by regulation to have a secondary escapeway. See Sec'y Br. at 8-9, 12-14. While I note that the evidence shows little, if any, material distinction between Original Sixteen's core mining methods for production and exploration, it is unnecessary to resolve this issue because, irrespective of the mine's operational mode, the standard clearly requires that active escape routes be maintained free of hazards impeding safe exit.

In this case, by Original Sixteen's own account, the hazards cited in the 600 and 1000 level secondary escapeway in March had not been cleaned up, and it had only been taken out of service temporarily. Without evidence to the contrary, by removal of the barricade and installation of the gate, it is reasonable to conclude that Original Sixteen intended that its miners have access to the area served by the secondary escapeway. Consequently, once the barricade was removed, miners were exposed to the hazardous conditions in the escapeway. Accordingly, I find that the Secretary has established a violation of section 57.11051(a).

2. Significant and Substantial

In *Mathies Coal Company*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is "significant and substantial" ("S&S") under *Nat'l Gypsum*, 3 FMSHRC 822 (Apr. 1981): 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); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'd* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Since the "need for adequate escapeways will only arise in the context of an emergency evacuation from the mine . . . the S&S nature of an escapeway violation must be considered in the context of an emergency." *Mill Branch Coal Corp.*, 37 FMSHRC 1383, 1395 (July 2015). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding that violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1998); *Youghiogheny & Ohio Coal Co.*,

9 FMSHRC 2007, 2001-12 (Dec. 1987). The Secretary need not prove a reasonable likelihood that the violation, itself, will cause injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010).

The fact of violation has been established. Miners using the secondary escapeway in the event of an emergency would be exposed to slip and trip, crushing, and drowning hazards, thereby impeding speedy exit from the mine. The focus then, is the third and fourth *Mathies* criteria, i.e., whether the hazard was reasonably likely to result in an injury, and whether the injury would be serious. Here, miners impeded in exiting the mine through the 600 to 1000 level secondary escapeway during an emergency would be reasonably likely to suffer serious to fatal injuries. Therefore, I find that the violation was S&S.

3. Negligence and Unwarrantable Failure

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Energy Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d at 136. The Commission has recognized the relevance of several factors in determining whether conduct is "aggravated" in the context of unwarrantable failure, such as the extensiveness of the violation, the length of time that the violation has existed, whether the violation posed a high degree of danger, whether the violation was obvious, the operator's knowledge of the existence of the violation, the operator's efforts in abating the violative condition, and whether the operator has been put on notice that greater efforts are necessary for compliance. *See Wolf Run Mining Co.*, 35 FMSHRC 3512, 3520 (Dec. 2013); *Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013); *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013). Each case must be examined on its own facts to determine whether an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Although some factors may be irrelevant to a particular scenario, all relevant factors must be examined. *ICG Hazard, LLC*, 36 FMSHRC 2635, 2637-38 (Oct. 2014) (citing *IO Coal*, 31 FMSHRC 1346, 1351 (Dec. 2009).

In arguing that Original Sixteen's conduct was characterized by high negligence that rose to the level of an unwarrantable failure to comply with section 57.11051(a), the Secretary contends that Original Sixteen deliberately left the affected area unbarricaded for, at least, a week, despite the fact that this secondary escapeway was cited in March for hazardous conditions that it had not cleaned up. Sec'y Br. at 16. Original Sixteen does not directly address the Secretary's contentions, but argues that no miners were working in the area at the time of the inspection, that there were no workplaces or travelways on the 1000 level, and that the mine was in an exploration mode. Resp't Br. at 12.

The hazardous conditions cited were obvious and existed in several locations throughout the escapeway. Furthermore, after Edminister cited the hazards in March, Original Sixteen was

on notice that further efforts for compliance were necessary. Original Sixteen's conduct was aggravated by its removal of the barricade, permitting access to the area served by the secondary escapeway. Original Sixteen's argument that the mine was in an exploration mode does not mitigate the seriousness of its conduct, given that the operator was on notice from a previous violation that it had a duty to maintain active designated escapeways safe and travelable, regardless of whether they are required, or take them out of service.

Despite the initial barricade, Original Sixteen's subsequent removal of the barrier then replacement with a locking gate, without addressing the hazards, was egregious. I find that the violation posed a high degree of danger because of the consequences of delayed escape. Regarding duration, it is undisputed that the area was unbarricaded for, at least, a week - - a sufficient period of time to sustain an unwarrantable failure finding given the seriousness of the violation. *See, e.g.*, *Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995) (upholding an unwarrantable failure designation where accumulations existed for more than one shift). Therefore, I find that the Secretary has established that Original Sixteen was highly negligent in violating the standard, and engaged in aggravated conduct that constitutes unwarrantable failure.

D. Order No. 8695848

Inspector Edminister issued 104(d)(1) Order No. 8695848 on September 18, 2012, alleging a "significant and substantial" violation of section 57.18025 that was "reasonably likely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Original Sixteen's "high" negligence and "unwarrantable failure" to comply with the standard.[11] The "Condition or Practice" is described as follows:

> No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless his cries for help can be heard or he can be seen. A miner was assigned to work alone in the secondary escape where the timbers and lagging had collapsed allowing material from the upper stope to fall into the travel way. There is unsupported and unstable ground conditions in the stope near the area the miner was performing his duties. It was stated that the miner was working in the area alone while clearing the fallen debris while the other two miners were working the heading near the 848 split where the miners cries for help would not be heard. This practice posses an imminent danger to the miners working alone where hazardous conditions exist.
>
> This violation is an unwarrantable failure to comply with a mandatory standard.

[11] 30 C.F.R. § 57.18025 provides that "[n]o employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless he can communicate with others, can be heard, or can be seen."

Ex. P-5A, P-5B, P-5D. Gulati terminated the order during his October 12 inspection upon confirmation that Original Sixteen would be enforcing its applicable work policy. Ex. P-5C. On October 22, 2012, MSHA modified the order by deleting the following wording from the "Condition or Practice" section:

> This condition was a factor that contributed to the issuance of Imminent Danger Order No. 8695845 dated 09/18/2012. Therefore, no abatement time was set.

Ex. P-5D.[12]

1. Fact of Violation

Original Sixteen argues that Edminister did not actually observe anyone working alone in hazardous conditions and, therefore, the order should never have been issued. Resp't Br. at 13.

Edminister testified that several hazardous conditions existed in the 21 Tunnel. He noted two instances where ground failures had occurred, timbers and lagging that had not been properly maintained, material that had collapsed into the travelway due to improperly maintained timbers and lagging, and a nearby ground support that was at risk of collapse. Tr. 83-85, 90, 306. He opined that section 57.18025 requires Original Sixteen to prevent its miners from working alone in an area with groundfall hazards, where a miner's call for help would not be heard. Tr. 83-84. According to Edminister, Reid Miller told him that approximately two weeks before the inspection, Michael Miller had assigned him to work by himself in the 21 Tunnel to clear timbers that had fallen two weeks before that, and Reid Miller agreed with Edminister's assessment that the 21 Tunnel was unsafe. Tr. 84, 302-06; Ex. P-16 at 32. He estimated the distance between Reid Miller and other miners to have been several hundred feet, explaining that the sound of distress cries would have had to have traveled around a ninety degree angle, and that the miners told him that they would not have been able to hear the lone miner's cries from where they were working. Tr. 84-85. Edminister also opined, in light of previous and impending groundfalls, that it was reasonably likely that a miner would suffer fatal injuries from head trauma and asphyxiation. Tr. 85-86, 309.

Michael Miller testified that Original Sixteen had never assigned or permitted any miner to work alone in hazardous conditions. Tr. 553; Ex. P-17 at 9. Reid Miller testified that he told Chico Aguirre to pick up old wood laying in the drift by the 849 Station, and that he would return to check on him. Tr. 392. Aguirre testified that it was he who was working alone in the 21 Tunnel, taking out and replacing old timbers laying on the rib. Tr. 431. Aguirre also testified that the old timbers had not fallen, but had been pulled out by the miners. Tr. 431. He stated that he did not notice any hazardous conditions when he began work, and that a landline phone is located some 200 feet from where he was working. Tr. 433-35.

[12] Imminent Danger Order No. 8695845 was vacated by the Secretary on November 21, 2012, and is not at issue in these proceedings. P-3D, P-3E, P-3F.

Notwithstanding the fact that Edminister may have been told by Reid Miller that it was he who had been working alone, I credit Reid Miller's and Aguirre's testimony that Aguirre was the solitary miner. I also credit Edminister's testimony that there had been previous ground failures, and that another was imminent, absent any credible challenges by Original Sixteen. Indeed, Aguirre's testimony that there had not been a ground failure, and that he had not noticed any hazardous conditions while he was working is unconvincing, given his overall nervousness and unwillingness to answer questions directly. Likewise, Original Sixteen failed to rebut Edminister's contention that other miners would not have been able to hear Aguirre's calls for help, and the presence of the landline telephone does not negate the violation, given the likelihood that a miner in distress would be in no condition to access the landline, much less use it. According to Gulati's field notes respecting termination of the order, miners told him that they check on each other every 20 minutes. Ex. P-17 at 9. However, there is no evidence of Reid Miller's oversight beyond his assurance to Aguirre that he would check on him - - evidence that falls short of the structured monitoring necessary to satisfy the standard. *See Cotter Corp.*, 8 FMSHRC 1135, 1139 (1986) (holding that while contact with the solitary miner need not be continual, it must be regular and dependable, and commensurate with the hazard presented). Accordingly, I find that the Secretary has established a violation of section 57.18025.

2. Significant and Substantial

The fact of violation has been established, and I find that the lone miner was exposed to impending groundfalls, without benefit of being heard by nearby workers. The focus then, is the third and fourth *Mathies* criteria, i.e., whether the hazard was reasonably likely to result in an injury, and whether the injury would be serious.

I find, in the context of continued normal mining operations and the impeding threat of groundfall, that the lone miner was reasonably likely to sustain serious to fatal crush injuries, suffocation, and/or head trauma. Therefore, I find that the violation was S&S.

3. Negligence and Unwarrantable Failure

In arguing that Original Sixteen's conduct was characterized by high negligence that rose to the level of an unwarrantable failure, the Secretary contends that the hazardous ground conditions were open and obvious, that Reid Miller, as lead miner, had knowledge of them and, by permitting work under such conditions, set an unsafe example for other miners. Tr. 86; Sec'y Br. at 16-17. Original Sixteen only addresses the Secretary's contentions by arguing that the conditions in the 21 Tunnel were not hazardous. Resp't Br. at 13.

The record indicates that the ground conditions were obvious and extensive, as there was more than one area where a groundfall had already occurred, and loose ground in the area was likely to fail. Reid Miller, as lead miner, had assigned Aguirre to work alone in an area with obvious hazards. Since the task involved replacing old timbers where a ground failure had occurred, I find that Reid Miller knew or should have known that working alone under these

conditions would be perilous. The relatively short duration of this violation, having occurred during one shift, and the absence of any violation history, is counterbalanced by the seriousness of the hazard posed by the miner working alone in an area of loose ground, and by Original Sixteen's lack of any effort to comply with the standard. Accordingly, I find that the Secretary has established that Original Sixteen displayed a high degree of negligence in violating the standard, and aggravated conduct that constitutes unwarrantable failure.

E. Order No. 8695849

Inspector Edminister issued 104(d)(1) Order No. 8695849 on September 18, 2012, alleging a "significant and substantial" violation of section 57.3360 that was "reasonably likely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Original Sixteen's "high" negligence and "unwarrantable failure" to comply with the standard.[13] The "Condition or Practice" is described as follows:

> The ground supports used at the secondary escape along the 800-21 tunnel are not being maintained to support the ground. There is a section near the entrance about 60 feet in that has collapsed due to old deteriorated timbers. The old stalls and lagging was not being maintained in good condition which allowed the material from the old upper stope above the escape way to collapse into the travel way. There is loose unsupported ground along the back (roof) of the old stope which would enter into the escape way that is not immediately obvious to persons accessing the area. The unsupported ground in the stope area ranges up to about 3 x 2 feet thick. The miner felt the area was too unsafe to continue through the area and stated that other work along the secondary escape was done about 2 weeks ago by accessing through the secondary escape portal. The affected area at this point is about 15 feet long. There is another stall and lagging along the rib just beyond this point that is on the erg [sic] of failing. There is another section further down the escape way that has unsupported ground directly over head in the escape way. There is material that had previously fallen from the back (roof) at this location. The loose deteriorating material ("serpentine slip," steeply dipping vertically above the travel way) is not supported nor miners protected from the falling material. The miners stated that they did not want to scale down the loose material due to it may cause additional roof fall, nor would barring be an option due to the vibration could also cause the slip to give way. This area affected by the slip is about 40 ft in length.

[13] 30 C.F.R. § 57.3360 provides that "[g]round support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks. Damaged, loosened, or dislodged timber use[d] for ground support which creates a hazard to persons shall be repaired or replaced prior to any work or travel in the affected area."

> Standard 57.3360 was cited 1 time in two years at mine 0401299 (1 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Exs. P-6A, P-6B, P-6G. The order was terminated when Original Sixteen scaled down the loose material, installed additional lagging and stalls, and conducted a safety talk with the miners. Ex. P-6H. On October 17, 2012, MSHA modified the order by deleting the following wording from the "Condition or Practice" section:

> There is another stall and lagging for another old stope just beyond this point that is on the erg of failing. This condition was a factor that contributed to the issuance of Imminent Danger Order No. 8695845 dated 09/18/2012. Therefore no abatement time was set.

Ex. P-6G.

1. Fact of Violation

Original Sixteen argues that if the ground support conditions in the 21 Tunnel existed, as cited, they would have been noted in Original Sixteen's monthly examinations, and during previous MSHA inspections. Resp't Br. at 11-12, 14-15.

Edminister opined that section 57.3360 requires Original Sixteen to maintain ground support in proper condition, and to support loose ground before miners can perform work in the vicinity of inadequate support. Tr. 86-87. Upon entering the 21 Tunnel secondary escapeway during the September inspection, Edminister observed two sections of ground support that had collapsed, and noted another section that was on the verge of collapse. Tr. 87, 90, 285; Exs. P-6I, P-6J, P-6O. He opined that one of the sections had failed because ground support stalls were not being properly maintained. Tr. 91, 93; Ex. P-16 at 17. He testified that Reid Miller was working where a rib had collapsed, and that he issued an imminent danger order and discontinued the inspection out of concern for his own safety and that of the miners. Tr. 87-89; Ex. P-16 at 33. According to him, Reid Miller stated that he, too, felt the 21 Tunnel to be too unsafe for the inspection to continue. Tr. 88, 285; Ex. P-16 at 33. Edminister noted that a month later the hazardous conditions had been abated and he continued farther into the 21 Tunnel, where he observed a "seam of serpentine" overhead, indicating that the roof was unstable. Tr. 91-92; Exs. P-6K, P-6L, P-16 at 58-60. He testified that the miners abated the condition by scaling down some of it, and installing stalls and lagging over the travelway to protect passers-by from falling ground. Tr. 92-93; Exs. P-6M, P-6N. Edminister explained that based on these observations, he surmised that Original Sixteen was in the habit of waiting until its ground supports fail before maintaining or replacing them. Tr. 87.

Joseph Sauer testified that he accompanied Edminister during the inspection, that the 21 Tunnel is designated for use in an emergency, and that he participated in abating the hazards cited by Edminister in the travelway. Tr. 484, 506. He explained that, in identifying loose

ground, he looks for evidence of stalls taking on weight, or splitting or rotting from age. Tr. 520. He testified that he never saw the potential for a hazard in the 21 Tunnel, but noted that there was a lot of material on the floor that he estimated to have had been there for 50 or 60 years. Tr. 486. He also stated that miners clear a path through the travelway, as needed, by throwing material off to the side. Tr. 519. In his opinion, the material in the travelway was "not necessarily something that has collapsed due to bad ground," but appeared to be lagging that "gave out." Tr. 530-31.

Reid Miller testified with great difficulty, clearly carrying the weight of being questioned by his father while under the expectation of being truthful and, in any event, supportive of his father and the family business. Despite his apparent nervousness and conflicted responses, however, Miller's testimony essentially corroborated Edminister's account of the hazards in the 21 Tunnel, and lent credence to Edminister's contention that Miller had agreed that it was unsafe to proceed with the inspection. See Tr. 393-94.

In crediting Edminister's contention that he had observed two sections of failed ground support and another close to collapsing, I find that Sauer's and Reid Miller's accounts of the 21 Tunnel's condition fall short of mounting a successful challenge to the charges levied by the Secretary. Furthermore, Original Sixteen's own witness, Sauer, described old timber in the escapeway that he estimated to be extremely old, as well as the mine's common practice of pitching material to the side to clear a pathway. The evidence lends some credence to the suggestion that Original Sixteen maintains its ground support only after it fails, although that conclusion remains in the realm of speculation. However, the record amply supports a conclusion that the ground supports cited in the 21 Tunnel were deteriorated or otherwise damaged and in need of maintenance or replacement. Accordingly, I find that Original Sixteen violated the standard.

2. Significant and Substantial

The fact of violation has been established, and I find that inadequately maintained ground supports exposed miners to potential groundfalls. The focus then, is the third and fourth *Mathies* criteria, i.e., whether the hazard was reasonably likely to result in an injury, and whether the injury would be serious.

Since the 21 Tunnel is a secondary escapeway, I find that miners requiring access to the travelway in an emergency situation, exposed to the impending threat of groundfalls, would be reasonably likely to sustain crushing injuries and head trauma. Therefore, I find that the violation was S&S.

3. Negligence and Unwarrantable Failure

In arguing that Original Sixteen's conduct was characterized by high negligence that rose to the level of an unwarrantable failure, the Secretary asserts that the deteriorated condition of the ground supports in the 21 Tunnel was open and obvious, that Original Sixteen had knowledge of the hazard, and that no action was taken to address it over a period of four weeks.

Sec'y Br. at 17-20. Original Sixteen argues the contrary, that the ground supports were not hazardous, and that MSHA had not cited these conditions previously. Resp't Br. at 8-12, 14-15.

The evidence indicates that this violation was extensive and obvious because there were two areas where a groundfall had occurred, and another where a groundfall was at risk of occurring. Regarding notice and duration, I fully credit Edminister's testimony that Reid Miller told him that one of the ground failures had occurred four weeks prior to the inspection. While Original Sixteen points out that MSHA had not identified or cited these ground support deficiencies in the 21 Tunnel previously, the operator was fully aware of the age of the timbers used in this secondary escapeway, and the previous groundfalls coupled with the miners' practice of pitching aside fallen material put Original Sixteen on notice that greater efforts were necessary for compliance. As previously stated, the violation was very serious, in that it exposed miners to head trauma and fatal crushing injuries. Furthermore, while Aguirre had been replacing old timbers in the 21 Tunnel two weeks before the inspection, Original Sixteen failed to taken any further remedial measures. Accordingly, I find that the Secretary has established that Original Sixteen displayed a high degree of negligence in violating the standard, and aggravated conduct that constitutes unwarrantable failure.

F. Citation No. 8695846

Inspector Edminister issued 104(a) Citation No. 8695846 on September 18, 2012, alleging a "significant and substantial" violation of section 57.11051 that was "reasonably likely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Original Sixteen's "high" negligence.[14] The "Condition or Practice" is described as follows:

> The designated secondary escape at the 800-21 tunnel is not being maintained in safe travelable condition. There is a section near the entrance about 60 feet in that has collapsed. The old stalls and lagging was not being maintained in good condition allowing the material from the old upper stope above the escape way to collapse into the travel way. There is lose unsupported ground along the back

[14] This citation was originally issued as a 104(d)(1) order withdrawing miners from all underground areas of the Sixteen to One mine. By subsequent action on October 22, 2012, MSHA modified the order to a 104(a) citation, and deleted the following wording from the "Condition or Practice" section:

> There is another stall and lagging for another old stope just beyond this point that is on the erg of failing. This condition was a factor that contributed to the issuance of Imminent Danger Order No. 8695845 dated 09/18/2012. Therefore no abatement time was set. Standard 57.11051 was cited 2 times in two years at mine 0401299 (2 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. P-7D.

> (roof) of the old stope. The unsupported ground in the stope area ranges up to about 3 x 2 feet thick. The miner felt the area was too unsafe to continue through the area and stated that other work along the secondary escape was done about 2 weeks ago by accessing through the secondary escape portal. The affected area at this point is about 15 feet long. There is another stall and lagging along the rib just beyond this point that is on the erg [sic] of failing. The entrance to the secondary escape at the 800-21 tunnel is not barricaded or posted with a warning sign. The tunnel is not being maintained in a safe travelable condition. There are numerous locations throughout the secondary escape tunnel that present a tripping hazard due to numerous hoses ranging up to about 3 inches in diameter crossing the travel way. There are locations where timbers protrude across the travel way with pot holes on each side that are covered with water creating additional tripping hazards. Heading towards the exit of the secondary escape tunnel there are even more tripping hazards due to the travel way not being maintained and washed out from the mines drainage. There are large rocks and 2 x 12 planking crossing the escapeway with about a 12 inch clearing for the mines drainage. This secondary escapeway is used for emergencies in the event of an accident.

Exs. P-7A, P-7B, P-7D, P-7E. The citation was terminated on October 18, 2012, when Original Sixteen cleared the tripping hazards from the travelway, and a safety talk was conducted with the miners. Ex. P-7C.

1. Fact of Violation

The Secretary asserts that at the time of the inspection, Original Sixteen was in a production mode and, therefore, required to have and maintain the 21 Tunnel secondary escapeway; furthermore, he argues, Original Sixteen was required to maintain its secondary escapeways in safe and travelable condition, regardless of whether the mine was engaged in exploration.[15] Sec'y Br. at 8-9. In response, Original Sixteen argues that the conditions cited were not hazardous, and that the mine was in an exploration mode. Resp't Br. at 12, 15.

Edminister testified that the 21 Tunnel was identified on the mine map and referred to by the miners as a secondary escapeway. Tr. 281. He stated that he observed several tripping hazards in the escapeway, including a 2′ to 3′ thick rock located in the middle of the travelway (Ex. P-7G); an unsecured ladder resting against the rib (Ex. P-7H); uneven ground covered in slippery, wet clay-like sediment (Exs. P-7H, P-7I, P-7K); old hoses or pipes laying in the travelway (Ex. P-7H); at least two holes in the middle of the walking lane that were obscured by standing water (Exs. P-7I, P-7K); uneven ground due to timber and channels that had been created by running water (Ex. P-7L); and a pinch point in the walking lane that restricted miners' passage to a narrow path between the rails and a pipe (Ex. P-7J). Tr. 94-101; Ex. P-16 at 58-60.

[15] The Secretary's arguments in their entirety were based on MSHA originally charging Original Sixteen with an unwarrantable failure under a withdrawal order, and make no reference, whatsoever, to MSHA's modification of the order to a 104(a) citation.

He also testified that he based this violation on the same ground conditions that he had cited earlier, i.e., two sections of loose ground support that had already collapsed, and another section that was on the verge of collapse. Tr. 94-95; see Exs. P-7M, P-7N, P-7O, P-16 at 32-33. According to him, Michael Miller slipped while walking along the travelway during the inspection. Tr. 293-94; Ex. P-16 at 56.

Michael Miller testified that he did not remember slipping in the 21 Tunnel during the inspection. Tr. 555-56. Sauer testified that he did not find any of the conditions cited by Edminister to be hazardous to an experienced miner. Tr. 480, 486-87. He also opined that the significant amount of material strewn along the 21 Tunnel was from collapsed lagging along the side of the travelway, not from an overhead groundfall. Tr. 486, 493. Sauer explained that the mining process consists of rounds of drilling and blasting and that, in general, gold is not found in every round, but tends to appear randomly in large pockets; if gold is found in sufficiently large quantities, the miners notify Michael Miller, who then develops an extraction plan. Tr. 507, 510-11. He stated that the last time Original Sixteen found gold was two years prior to the 2012 inspections. Tr. 489-90.

I credit Edminister's observations as to the hazardous conditions in the 21 Tunnel, and that such conditions posed tripping hazards to passing miners. For the same reasons stated earlier, I find that the ground supports in the 21 Tunnel were deteriorated or otherwise damaged and in need of maintenance or replacement. Obviously, any miner requiring use of the 21 Tunnel to exit the mine in an emergency situation, experienced or not, should not be subjected to navigating an obstacle course. As noted earlier, irrespective of whether Original Sixteen was in a production mode, it was required to maintain its active secondary escapeways safe and travelable. Accordingly, I find that the Secretary has established a violation of section 57.11051.

2. Significant and Substantial

The fact of violation has been established, and I find that inadequately maintained ground supports in the 21 Tunnel secondary escapeway exposed miners to impending groundfalls, and the debris in the walkway would likely result in slips, trips, and falls. The focus then, is the third and fourth *Mathies* criteria, i.e., whether the hazards were reasonably likely to result in an injury, and whether the injury would be serious.

Edminister opined that the risk of a groundfall, combined with the tripping hazard posed by the large rock in the center of the escapeway, would likely subject miners to fatal crushing injuries. Tr. 95. Additionally, he testified that miners travel the 21 Tunnel, at least, monthly in order to perform examinations. Tr. 95. Original Sixteen confirmed that miners examine the 21 Tunnel, but argues that the cited conditions could not contribute to injury or death. Resp't Br. at 15-16.

The record indicates that the 21 Tunnel secondary escapeway was used, at least, monthly for examination purposes. I find that miners subjected to the impending threat of groundfalls, whether from the roof or the lagging, combined with the slip, trip, and fall hazards in the

walkway, would be reasonably likely to sustain serious to fatal musculoskeletal and crushing injuries. Therefore, I find that the violation was S&S.

3. Negligence

The Secretary contends that the deteriorated condition of the ground supports and slip, trip, and fall hazards were open and obvious. Sec'y Br. at 20-21. Conversely, Original Sixteen argues that the ground supports were adequate, and that the 21 Tunnel escapeway did not pose slip, trip, and fall hazards. Resp't Br. at 15-16.

As noted earlier respecting Order No. 8695849, the record indicates that this violation was extensive and obvious, given that loose, unsupported ground and fallen timber existed in several locations, in addition to other slip, trip, and fall hazards that were dispersed throughout the 21 Tunnel. I find that Original Sixteen had been aware of the ground failures for, at least, four weeks, and while it had not been cited previously for these ground support and tripping hazards in this travelway, the threat of groundfalls and the variety of slip and fall hazards throughout it put the operator on notice that greater efforts were necessary for compliance. Accordingly, I find that Original Sixteen was highly negligent in violating the standard.

G. Citation No. 8695857

Inspector Edminister issued 104(a) Citation No. 8695857 on September 18, 2012, alleging a violation of section 57.20011 that was "unlikely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Original Sixteen's "moderate" negligence.[16] The "Condition or Practice" is described as follows:

> The area beyond the 800 Station is not barricaded or posted with a warning sign to impede access. The area was deemed unsafe to enter by the miner due to the area not being examined and may pose a danger. The area was open for travel and was being used as a storage area. This condition exposed the miners entering into the area to fatal type injuries in the unlikely event of an accident.
>
> Standard 57.20011 was cited 1 time in two years at mine 0401299 (1 to the operator, 0 to a contractor).

Ex. P-8A. The affected area was barricaded and a warning sign was posted. Ex. P-17 at 6, 8.

[16] 30 C.F.R. § 57.20011 provides that "[a]reas where health and safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, and display the nature of the hazard and any protective action required."

1. Fact of Violation

Original Sixteen argues that ore cars stored in the area created a barrier, that a barricade or warning sign was unnecessary and would only desensitize miners to legitimate safety concerns, and that Edminister was wrong to have requested that Reid Miller examine the ground in the cited area. Resp't Br. at 17.

Edminister testified credibly that in response to questioning Reid Miller as to what activities, if any, were conducted in a cut-out where ore cars were parked, Miller stated that the area was out of service, that it was unsafe to enter because the ground had not been examined, and that he, himself, refused to examine the area. Tr. 102-03, 265-66; Exs. P-8C, P-16 at 31. Edminister stated that he did not see any hazards or evidence of previous groundfalls. Tr. 103, 268. Therefore, finding no reason for miners to be in the cited area, and observing no obvious hazards, he opined that a groundfall would be unlikely to result in fatal crushing injuries. Tr. 126, 267.

Michael Miller testified that there were no hidden hazards in the cited area, and that the only way to have determined whether hazards existed would have been to conduct an examination. Tr. 556-57. I credit Edminister's uncontradicted testimony that Reid Miller alerted him to the danger of entering the unexamined area, and that were a groundfall to occur, it would be unlikely to result in serious injuries, given the unlikelihood of miners entering the area. The record establishes that the area was open to access, and that the mine cars did not create an effective barrier or explicit warning to miners of the hazards posed by unexamined ground. Accordingly, I find that the Secretary has established a violation section 57.20011.

2. Negligence

Edminister opined that Original Sixteen's negligence was moderate based on lack of any open and obvious hazards in the cited area, and because Reid Miller was aware that the area had not been examined. Tr. 126. Original Sixteen argues that experienced miners would know not to enter this or other out-of-service areas without first examining them. Resp't Br. at 17. Since Reid Miller was a lead miner who knew that this area was unexamined, and because Original Sixteen had not taken the area out of service by placing a barricade or posting warning signage, I find that Original Sixteen was moderately negligent in violating the standard.

H. Citation No. 8695859

Inspector Edminister issued 104(a) Citation No. 8695859 on September 18, 2012, alleging a "significant and substantial" violation of section 57.3200 that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Original Sixteen's "moderate" negligence.

The "Condition or Practice" is described as follows:

> Safe means of access is not being maintained at the 2nd Ore Chute along the 800 S[p]lit leading to the 848 Split. This is due to the Ore Chute being wedged open with timbers and has loose unconsolidated material over head. There is a large rock ranging about 8″ by 10″ by 12″ resting on top of the unconsolidated material that would fall into the travel way. The large rock is about 9 ft up along the 7 ft wide travel way. Miners access this area daily to the work heading. This condition exposed the miner traveling in the area to serious type injuries in the event of an accident.

Exs. P-9A, P-9B (October 22, 2012 modification charging a violation of section 57.3200). The condition was abated by removing the rock and installing boards to keep unsecured material from falling onto the travelway. Tr. 493-94; Ex. P-17 at 7.

1. Fact of Violation

Original Sixteen contends that the rock situated in the chute was not hazardous because if it were, it would have been noted by miners who regularly use the travelway, or cited by MSHA during previous inspections. Resp't Br. at 18.

Edminister testified that he observed an old ore chute elevated over a travelway, wedged open by two timbers, containing a large rock resting on unconsolidated material. Tr. 127-28, 130; Exs. P-9C, P-9D, P-16 at 32. He opined that the loose material and rock were angled directly toward the center of the travelway. Tr. 134.

Michael Miller testified that the chute had been out of service, and that the rock posed no danger of striking a miner because the design of the chute had been altered to prevent loose ground from falling into the travelway where people walked. Tr. 558. Sauer testified that the rock had been lodged in the chute for at least 10 years, and had never fallen. Tr. 493-94.

The record establishes that the travelway was regularly used by miners, that the ore chute door was wedged open, and that the rock, resting on unconsolidated material, created a groundfall hazard. Accordingly, I find that the Secretary has established a violation of section 57.3200.

2. Significant and Substantial

The fact of violation has been established. The second criterion of the *Mathies* test has been met, in that the large rock, resting on loose material, contributed to the danger of a groundfall. Respecting the third and fourth *Mathies* criteria, the evidence establishes that, while the chute had been out of service for several years, there was a reasonable likelihood that a groundfall would result in musculoskeletal injuries, and those injuries, including lacerations,

contusions, and fractures were reasonably likely to be serious. Tr. 135. Therefore, I find that the violation was S&S.

3. Negligence

Original Sixteen argues that the hazard had not been cited previously by MSHA, and Edminister opined that the miners may not have had actual knowledge that the condition posed a hazard. Resp't Br. at 18; Tr. 134. However, because the rock was situated on unconsolidated material, and this condition had existed for at least 10 years without any action by Original Sixteen to correct it, I find that Original Sixteen should have known that the condition was hazardous and required attention. Therefore, I find that Original Sixteen was moderately negligent in violating section 57.3200.

I. Citation No. 8695860

Inspector Edminister issued 104(a) Citation No. 8695860 on September 19, 2012, alleging a violation of section 57.4560(c) that was "unlikely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Original Sixteen's "low" negligence.[17] The "Condition or Practice" is described as follows:

> The area within 200 feet inside the mine 21 Tunnel Secondary escape portal is not provided with a fire suppression system, other than fire extinguishers and water hoses, capable of controlling a fire in its early stages; or covered with shotcrete, gunite, or other material with equivalent fire protection characteristics; or coated with fire-retardant paint or other material to reduce its flame spread rating to 25 or less and maintained in that condition. The portal is constructed with timber stalls and 2″ x 12″ lagging. This condition exposed the miners underground to fatal type injuries in the unlikely event of a fire.
>
> Standard 57.4560(c) was cited 1 time in two years at mine 0401299 (1 to the operator, 0 to a contractor).

Ex. P-10A.

[17] 30 C.F.R. § 57.4560(c) provides that the area "at least 200 feet inside the mine portal or collar timber used for ground support in intake openings and in exhaust openings that are designated as escapeways shall be . . . (c) [c]oated with fire-retardant paint or other material to reduce its flame spread rating to 25 or less and maintained in that condition."

1. Fact of Violation

At hearing, Original Sixteen stipulated to the fact of violation, and limited its contest to the fatality allegation. Tr. 261. Original Sixteen's arguments, however, relate to the fact of violation, rather than the gravity designation. See Resp't Br. at 18-19.

2. Gravity

Edminister testified that section 57.4560(c) requires Original Sixteen to apply fire resistant coatings to timber stalls and lagging in intake or exhaust openings that are designated secondary escapeways and lack fire suppression systems. Tr. 136. Addressing the gravity of the violation, he opined that the timbers in the 21 Tunnel secondary escapeway were very dry, and that if a fire were to occur and smoke entered the mine, miners could suffocate from smoke inhalation, but could escape if they overcame panic and were wearing self-rescuers. Tr. 136, 138, 220-21.

Michael Miller testified that even if the secondary escapeway were filled with smoke, the primary escapeway would be available for use. Tr. 558-59. Specifically, he testified that the primary escapeway is comprised of very hard rock and contains an insubstantial amount of timbers; therefore, he opined, miners would be able to exit the mine through the primary escapeway in the event of an emergency in the secondary escapeway. Tr. 558-59.

The evidence makes clear that Original Sixteen was required to maintain in safe and travelable condition its active secondary escapeways. In the event of a fire, smoke inhalation would reasonably be expected to be fatal, were miners to access the 21 Tunnel to exit the mine without benefit of self-rescuers. Accordingly, I find that the Secretary has proven the gravity designation that the violation could result in a fatality, as charged by the citation.

J. Citation No. 8695861

Inspector Edminister issued 104(a) Citation No. 8695861 on September 19, 2012, alleging a violation of section 57.12023 that was "unlikely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Original Sixteen's "moderate" negligence.[18] The "Condition or Practice" is described as follows:

> The welding lead terminals on the Miller Bobcat 225G welder located behind the lower shop was not provided with either a guard or insulating covers. The welder is not in a regular travel way, and no other items were stored in the immediate area. The welder is used as a back up as needed for welding repairs. The welder was not in use at the time of the inspection. This exposes miners to serious shock

[18] 30 C.F.R. § 57.12023 provides that "[e]lectrical connections and resistor grids that are difficult or impractical to insulate shall be guarded, unless protection is provided by location."

and burn related injuries if contacting the unprotected terminals in the event of an accident.

Ex. P-11A. The citation was terminated after the lead terminals were guarded.

1. Fact of Violation

Original Sixteen contends that this condition should have been cited, if at all, as a failure to tag-out equipment, so that it would not have been forced to spend time and money repairing equipment that it does not use, and that miners were protected from the terminals by the location of the welder. Resp't Br. at 19.

Edminister testified that section 57.12023 requires Original Sixteen to guard or insulate welding lead terminals that are not otherwise protected from contact by being situated out of reach of persons traveling or working around the equipment. Tr. 140-41. He explained that the welding lead terminals are electrical connections between the stinger and the lug nuts on the welder, that the terminals were not insulated or guarded, that the welder was not tagged out of service, and that he could reach the terminals from his position in the travelway. Tr. 142-144; Exs. P-11B, P-16 at 36. He opined that the welder had been used since the leads were attached to the welder, and that it was designated as a back-up unit. Tr. 144-45; Ex. P-11B. Furthermore, Edminister testified that contact with the terminals could be reasonably expected to result in injuries including shocks and burns. Tr. 147. He also stated that in determining that the risk of injury was unlikely, he relied on statements by Reid Miller or Michael Miller that the welder was designated for back-up use only, and his observation that miners only infrequently entered the storage area. Tr. 144-47.

Michael Miller testified credibly that the battery had been removed from the welder, and that the welder was located in a heavy-duty, long-term storage area with very limited space. Tr. 560-61.

I find that the welder was in service as a back-up unit and, although the unguarded and uninsulated terminals were within reach of passing miners, they posed no shock or burn hazard because the battery had been removed. However, replacement of the battery, no matter how infrequently, subjected miners to the exposed terminals and, therefore, electrical shock and burn injuries. While the citation could have been issued for failure to lock- and tag-out the equipment, the Secretary has broad discretion in identifying the standard by which he charges a violation. Moreover, Original Sixteen had the option of removing the welder from service rather than repairing it. *See E. Assoc. Coal Corp.*, 1 FMSHRC 1473-74 (Oct. 1979) (holding that cited equipment may either be repaired or withdrawn from service). Accordingly, I find that the Secretary has established a violation of section 57.12023.

2. Negligence

Edminister testified that Original Sixteen had not been cited previously for failure to guard or insulate the welder under section 57.12023, that there was no evidence that a guard had ever been in place, and that the welder was being used infrequently for back-up. Tr. 147-48. I credit Michael Miller's testimony that he had a good-faith belief that he had complied with the standard by removing the battery. However, given that the welder was in service for back-up use, it posed a safety hazard. Therefore, I find that Original Sixteen was moderately negligent in violating the standard.

K. Citation No. 8695863

Inspector Edminister issued 104(a) Citation No. 8695863 on September 19, 2012, alleging a violation of section 57.4131(c) that was "unlikely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Original Sixteen's "moderate" negligence.[19] The "Condition or Practice" is described as follows:

> The area around the Upper Bench mine opening used for ventilation is not being kept clear of dry vegetation within 25 feet of the opening. The area within 25 ft of the opening has tall dry vegetation ranging up to 4 ft tall. This area is accessed annually for the required fan maintenance inspections. This condition exposes miners working underground to smoke related injuries in the unlikely event of a fire.

Ex. P-12A.

1. Fact of Violation

In support of affirming the violation, the Secretary argues that there is no evidence that the blockage of the Upper Bench opening was air- or smoke-tight. Sec'y Br. at 26-27, 30. Original Sixteen counters that section 57.4131(c) applies only to openings that affect ventilation. Resp't Br. at 19-20.

Edminister testified that he observed dry vegetation within 25 feet of the Upper Bench mine opening, and that an electrical box was located near the opening. Tr. 149; Exs. P-12B, P-12C, P-16 at 43, R-1, R-2, R-3. He opined that the standard does not require that the opening affect ventilation. Tr. 199. Despite the location of the electrical box, he stated that he did not find an ignition or heat source in the vicinity of the Upper Bench opening. Tr. 212.

Michael Miller testified that the Upper Bench area had one of seven mine openings listed in Original Sixteen's Compliance Book. Tr. 599; Exs. P-14C, P-14D. According to him, the

[19] 30 C.F.R. § 57.4131(c) provides that "[d]ry vegetation shall not be permitted within 25 feet of mine openings."

Upper Bench opening has been completely blocked off by a natural cave-in since 1978 or 1979, and there was "no possibility of air to get from the outside through the cave-in." Tr. 601. He stated that in the 1970s the lessee of the Upper Bench had tried to get air into the opening by installing a fan, but failed, because it was totally blocked. Tr. 602. He further stated that the Upper Bench opening had never been used for ventilation, and that he had informed Edminister of this fact. Tr. 564-65, 600. He also stated that he offered to perform a diagnostic test to determine whether air was flowing into or out of the opening, but Edminister declined, responding that the only relevant question was whether there was an opening. Tr. 564-65.

I fully credit Michael Miller's testimony that there had been a cave-in which completely sealed-off what once had been an opening into the mine. Aside from Edminister's conclusory testimony that the Upper Bench has an opening, the Secretary merely relies upon Original Sixteen's Compliance Book to support this allegation. However, as discussed more fully below, the Compliance Book is demonstrably inaccurate. For lack of supporting evidence, I find that the Secretary has not carried his burden of demonstrating that there was, in fact, a mine opening at the Upper Bench requiring a 25 foot clearance, and proving a violation of section 57.4131(c). Therefore, I vacate the citation.

L. Citation No. 8613455

Inspector Gulati issued 104(a) Citation No. 8613455 on October 11, 2012, alleging a violation of section 104(d)(1) of the Act that had "no likelihood" of causing an injury that could reasonably be expected to result in "no lost workdays," and was caused by Original Sixteen's "high" negligence.[20] The "Condition or Practice" is described as follows:

> The mine operator is continuing to operate the mine underground even though a 104(d)(1) order No. 8695849 for non compliance was issued was on September

[20] Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), provides, in pertinent part, that:

> If . . . an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that . . . such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation . . . . If . . . an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

> 18, 2012. The order required the mine operator or his agent to withdraw all persons from all underground areas of the mine, except those persons required for elimination of the conditions described in the order. The mine was engaged in production and other unrelated activities in areas outside the area cited in the order. The President of the company said that they have been mining a heading on the 816 level and had blasted five times (each round about 4 feet). The condition has not been designated "significant and substantial," because the conduct violated a provision of the Mine Act, rather than a mandatory safety or health standard.

Ex. P-3A.

1. Fact of Violation

According to the Secretary, because Original Sixteen was in a production mode and required by section 57.11050 to have a secondary escapeway, Order No. 8695849, though restricted to the 21 Tunnel, effectively withdrew miners from all underground areas. Sec'y Br. at 9, 13, 14. The Secretary also contends that withdrawal orders can only be lifted by inspection confirming that underlying conditions have been abated. Sec'y Br. at 14.

Original Sixteen argues, conversely, that the mine was in an exploration mode, requiring no secondary escapeway, and that it was not working while under a withdrawal order because Randy Cardwell, a conference and litigation representative in MSHA's Vacaville field office, had advised Original Sixteen by phone that the withdrawal order was lifted. Resp't Br. at 8-12.

Gulati testified that section 104(d)(1) of the Act required Original Sixteen to withdraw all miners from all underground areas of the mine, except for those required to abate the conditions identified in the order. Tr. 332-33, 339. He stated that Michael Miller had told him during the pre-inspection conference that they had been mining at the 816 heading, that they had blasted one round the day before, and four rounds the week before inspection. Tr. 329-30; Ex. P-17 at 3, 6. He testified that each blast advanced the face of the tunnel four feet and, in his opinion, there was no possibility that the blasting was related to abatement of any outstanding withdrawal order. Tr. 330-33. Gulati stated that Michael Miller told him that he had called MSHA's Vacaville field office, and been advised that the withdrawal order had been lifted. Tr. 349; Ex. P-17 at 6-7. Gulati also testified that there was no written indication of Miller's contention, and that MSHA's policy is to lift withdrawal orders in writing, rather than over the telephone. Tr. 355, 358. Inspector David Blankenship testified that he was also present for the pre-inspection conference, and that he heard Miller state that they had been blasting during the preceding week. Tr. 363-64.

Edminister opined that while Order No. 8695849, on its face, withdrew miners from the 21 Tunnel only, it had the effect of withdrawing them from all underground areas of Sixteen to One because the mine was in a production mode, requiring a secondary escapeway. Tr. 89-90.

Aguirre testified that the last time he had engaged in blasting was approximately 2010, that he imagined that there was blasting in 2012 but he did not know by whom, that he did not know whether any blasting had been performed to advance the face, and that he did not remember being told that the mine was under a withdrawal order. Tr. 455, 461, 463. Sauer testified that sometime in October 2012, Michael Miller directed him to drill and blast in the 16-1 shaft in order to explore for gold. Tr. 489. He also stated that he did not recall being put on notice that the mine was under withdrawal orders or what the miners were required to do in light of them. Tr. 528-29. Michael Miller testified that he received a phone call from CLR Cardwell stating that "Order 8613455 was lifted." Tr. 550.

At the time of Gulati's inspection, the mine's only two secondary escapeways, the 600 and 1000 level travelway and the 21 Tunnel, had been taken out of service. The 600 and 1000 level escapeway was taken out of service to terminate Citation No. 8612841; the 21 Tunnel was, apparently, under two withdrawal orders: Order No. 8695849 withdrew miners from the 21 Tunnel only; Order No. 8695846 withdrew miners from all underground areas of the mine based on a determination that Original Sixteen was operating in a production mode without a mandatory secondary escapeway in service. During the pre-inspection conference, Gulati was advised that mining had been taking place in the 816 heading. Interestingly, following the Secretary's theory that Original Sixteen was producing rather than exploring, it is curious that Gulati did not cite the operator for failure to have a secondary escapeway in service under section 57.11050. Even more puzzling is Gulati's failure to cite Original Sixteen for working in the face of withdrawal Order No. 8695846, the order affecting the entire underground mine. Here, the Secretary is advancing an expansive construction of 21 Tunnel-specific Order No. 8695849 to cover a scenario where work was being performed elsewhere underground. Evidently, however, there was activity going on behind the scenes at MSHA respecting Order No. 8695846, which provides, at least, one plausible explanation for Gulati's election not to cite that order.

Michael Miller contends that Cardwell had advised him that a withdrawal order had been lifted. Gulati's testimony, intended to cast doubt on this contention, was that MSHA lifts withdrawal orders in writing, rather than telephonically. Less than two weeks after Gulati's inspection, however, MSHA modified withdrawal Order No. 8695846 to a 104(a) citation. When considering that action, in conjunction with Gulati's election to cite Original Sixteen for violating the withdrawal order that was restricted to an area other than where the miners were actually working, Miller's contention rings true. Miller's obvious misidentification of the order number, as 8613455, in no way diminishes the credibility of his testimony. The evidence as a whole makes it likely that MSHA had already decided to lift withdrawal Order No. 8695846 at the time of Gulati's inspection on October 11, that Gulati was aware of this fact, and that the paperwork, completed on October 22, was a mere formality. Therefore, having found that no mining was taking place in the 21 Tunnel, as prohibited by cited withdrawal Order No. 8695849, I find that the Secretary has not established that Original Sixteen was operating in the face of that withdrawal order in violation of section 104(d)(1) of the Act.

M. Citation No. 8613452

Inspector Gulati issued 104(a) Citation No. 8613452 on October 10, 2012, alleging a violation of section 57.14100(b) that was "unlikely" to cause an injury that could reasonably be expected to result in "permanently disabling" injuries, and was caused by Original Sixteen's "moderate" negligence.[21] The "Condition or Practice" is described as follows:

> It is mandatory 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. This was not done for the 2 ton electric hoist (located in the 800 station), in that the safety latch was missing from the hook. The purpose of the latch is that it retains slings or chains under slack conditions. This defect affected safety, in that, an inadvertent detachment of slack sling or a load from the hook could result in serious injuries to the miners in the vicinity. According to President and miner, the hoist had not been used for about 7 years. This was neither taken out of service, nor tagged to prohibit further use and was connected to power supply. The miner said that he did not notice it, because the hoist was not in operation.
>
> Standard 57.14100b was cited 1 time in two years at mine 0401299 (1 to the operator, 0 to a contractor).

Ex. P-13A. The citation was terminated on October 15 after a safety clip was installed. Ex. P-13C.

1. Fact of Violation

Original Sixteen argues that its window of opportunity to correct the defect in a "timely manner" had not elapsed at the time of inspection, and that it should have been cited, if at all, for a failure to lock- and tag-out the hoist, because compliance with section 57.14100(b) required it to undergo costly repairs to abate the citation. Resp't Br. at 20. It further argues that the hoist was tied behind a wooden barrier until the inspector entered the area, and that the barrier to entry into the abandoned workings extended into the "hoisting area." Resp't Br. at 20.

Gulati testified that the standard requires Original Sixteen to repair equipment defects or withdraw defective equipment from service through lock- and tag-out procedures. Tr. 320-21. Gulati stated that in a workstation adjacent to an inclined shaft that had been barricaded for several years, he observed a hook connected to a two-ton hoist, which was plugged into a power supply. Tr. 320-23, 343; Ex. P-13D. He stated that he did not observe evidence that the hoist was barricaded or tagged out of service, or that it had been recently operated, but he observed that the hook lacked a safety clasp, i.e., a latch bridging the hook's opening. Tr. 321-23. The absence of the clasp, he explained, rendered the hook defective, because a rope or sling gone

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

slack during lifting would be at risk of inadvertent slippage from the hook. Tr. 321. If a two-ton load were to detach from the hook, he testified, such weight would be reasonably expected to cause serious musculoskeletal crushing injury to a nearby miner's feet. Tr. 324-25. Such injury would be unlikely to occur, he concluded, because Michael Miller had represented to him, and Gulati agreed based on the condition of the hoist's chain, that the hoist had not been used for a long period of time. Tr. 323-24.

Michael Miller testified that he did not challenge Gulati's observations, and agreed that the hook lacked a safety clasp. Tr. 578-80. However, he opined, Original Sixteen should have been cited for failing to lock- and tag-out the hoist, if at all, since section 57.14100(b) allows for repair of defects before equipment is put back in service. Tr. 578-80. Miller stated that the safety clasp had been missing for "a while," and contended that there was no electric power in the hoist area, and that the hoist was off to the side of the travelway. Tr. 577, 579-80.

The record establishes that the missing safety clasp was a defect affecting safety, that the hoist was not barricaded or tagged out of service, and that the absence of the safety clasp posed a risk of inadvertent detachment of a heavy load, creating a crushing hazard to nearby miners. Regarding whether Original Sixteen failed to correct the safety defect in a timely manner, the evidence supports a finding that the incline shaft had not been used for several years, and that the hoist had been used to perform work related to the shaft. Therefore, I find that the safety defect had existed, at least, for several years before the 2012 inspection. As stated previously, the Secretary cited Original Sixteen within its discretion, and nothing prevented the operator from abating the violation by removing the hoist from service, rather than repairing it. Accordingly, I find that the safety defect was not corrected in a timely manner, and that the Secretary has established a violation of section 57.14100(b).

2. Negligence

Gulati opined that Original Sixteen's negligence was moderate because the hoist was in an open and obvious location, although not in an active heading. Tr. 325, 346. Original Sixteen offered no countervailing evidence regarding negligence. In light of the evidence that the violation had existed for several years and was open and obvious, I conclude that Original Sixteen was moderately negligent in violating the standard.

N. Citation No. 8695892

Inspector Edminister issued 104(a) Citation No. 8695892 on October 18, 2012, alleging a violation of section 57.8520(b)(8) that had "no likelihood" of causing an injury that could reasonably be expected to result in "no lost workdays," and was caused by Original Sixteen's

"moderate" negligence.[22] The "Condition or Practice" is described as follows:

> The provided plan of the mine ventilation system did not include the location of known openings adjacent to the mine. Revisions of the system shall be noted and updated at least annually. The Ventilation Plan/Mine Map and revisions thereto shall be submitted to the District Manager for review and comments.

Ex. P-14A. The citation was terminated on November 2 based upon submission of a revised Ventilation Plan showing changes to the mine's ventilation network. Ex. P-14B.

1. Fact of Violation

The Secretary argues that the list of mine openings in the Compliance Book did not satisfy the standard, and that there is no evidence that the blockage in the Upper Bench opening was air- or smoke-tight. Sec'y Br. at 30. Original Sixteen contends that the standard only requires openings affecting ventilation to be depicted on the mine map and, therefore, only the primary escapeway and the 21 Tunnel were needed in the Ventilation Plan. Resp't Br. at 21.

Edminister testified that the standard requires that mine openings be identified on the mine map, or depicted through a schematic or series of schematics that are correlated to the map. Tr. 196, 200. He asserted that Michael Miller told him that there were seven openings to the mine that provided ventilation, each of which were listed as mine openings in a hand-written addendum to Original Sixteen's Compliance Book and that, depending on barometric pressure, the air flow through those openings changes. Tr. 152, 198-99; Exs. P-14C, P-14D, P-14E, P-14F, P-16 at 67. He explained that even if an opening does not affect ventilation, it is required to be depicted on the map so that mine openings are easily identifiable in the event of an emergency. Tr. 199. Edminister also contended that only the primary portal and the 21 Tunnel secondary escapeway were depicted on the mine map, and that he cited Original Sixteen for a paperwork violation only, because those locations were not depicted on the map as mine openings. Tr. 156-57; Exs. P-14H, P-14I. He also testified that, in hindsight, the gravity of the violation was more accurately "unlikely" to cause an injury that could reasonably be expected to be "fatal," because inadequately documented mine openings would not be inspected for evidence of collapse, and pose some likelihood of exposing miners working underground to asphyxiation. Tr. 157-58.

Michael Miller testified, in essence, that rather than cluttering the mine map with all seven openings, Original Sixteen diagrammed the openings, which satisfied section 57.8520(b)(8). Tr. 583, 589-90. He also explained that those seven openings had been used for

[22] 30 C.F.R. § 57.8520(b)(8) provides that "[a] plan of the mine ventilation system shall be set out by the operator in written form . . . . The plan shall, where applicable, contain the following: . . . (b) The current mine map or schematic or series of mine maps or schematics of an appropriate scale, not greater than five hundred feet to the inch, showing: (8) Locations of known underground mine openings adjacent to the mine."

ventilation at various times up until 2000, when the primary escapeway and the 21 Tunnel secondary escapeway, exclusively, became Sixteen to One's ventilation system. Tr. 588-89. Miller did acknowledge, however, that the openings listed in the Compliance Book were not accurate, and identified one of them as the Upper Bench opening at issue in Citation No. 8695863; he also conceded that the schematics were not drawn to scale. Tr. 600-03.

By Original Sixteen's own account, the mine openings listed in the Compliance Book were inaccurate and the schematics were not to scale; at least one opening, at the Upper Bench, was completely sealed and, thus, no longer an "opening." In accordance with the plain language of the standard, I find that neither the mine map nor the Compliance Book satisfied the requirements of the standard. Despite these inaccuracies, I find no reason to escalate the level of gravity charged by the citation beyond a paperwork violation because Original Sixteen's Compliance Book, at the very least, included, and put MSHA on notice of, all operative mine openings. Accordingly, the Secretary has established a violation of section 57.8520(b)(8).

2. Negligence

Edminister opined that Original Sixteen's negligence was moderate because the deficiencies in the mine map had not been cited previously by MSHA. Tr. 159. Michael Miller testified credibly that Original Sixteen did not knowingly violate this standard or omit the openings from the mine map in order to avoid inspection requirements. Tr. 582. Notwithstanding Original Sixteen's intent, I find that it was moderately negligent in violating the standard because it knew or should have known the requirements for a compliant ventilation plan, that the mine map entries were incomplete, and that the schematics in the Compliance Book were inaccurate and not to scale.

IV. PENALTIES

While the Secretary has proposed civil penalties totaling $7,843.00, the Judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, and based upon a review of MSHA's online records, I find that Original Sixteen is a very small operator, only employing a skeletal crew of three miners in addition to the owner/operator, with an overall history of violations that is not an aggravating factor in assessing appropriate penalties. I also find that Original Sixteen generally demonstrated good faith in achieving rapid compliance after notice of the violations. Original Sixteen asserts that it is "broke." Resp't Br. at 10. The Commission has held that the mine operator has the burden of proving that the proposed penalty will affect its ability to continue in business. *Sellersburg*, 5 FMSHRC at 294 (citing *Buffalo Mining Co.*, 2 IMBA 226, 247-48 (Sept. 1973)). As has been noted in an earlier *Original Sixteen* decision, the operator's failure to submit an audited financial report to substantiate its contention provides an insufficient basis for an inability-to-pay defense. 36 FMSHRC at 2251. Without proof of Original Sixteen's financial

status, I find that the proposed penalties will not affect Original Sixteen's ability to continue in business.

The remaining criteria involve consideration of the gravity of the violations, and Original Sixteen's negligence in committing them. These factors have been discussed fully, respecting each violation. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

A. Citation No. 8612839

It has been established that this violation of section 57.3200 was unlikely to cause an injury that could reasonably be expected to be fatal, that Original Sixteen was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of $100.00, as proposed by the Secretary, is appropriate.

B. Citation No. 8612841

It has been established that this violation of section 57.11051 was unlikely to cause an injury that could reasonably be expected to be fatal, that Original Sixteen was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of $100.00, as proposed by the Secretary, is appropriate.

C. Citation No. 8695844

It has been established that this S&S violation of section 57.11051 was reasonably likely to cause an injury that could reasonably be expected to be fatal, that it was caused by Original Sixteen's high negligence and unwarrantable failure to comply with the standard, and that it was timely abated. Therefore, I find that a penalty of $2,000.00, as proposed by the Secretary as the statutory minimum, is appropriate.

D. Order No. 8695848

It has been established that this S&S violation of section 57.18025 was reasonably likely to cause an injury that could reasonably be expected to be fatal, that it was caused by Original Sixteen's high negligence and unwarrantable failure to comply with the standard, and that it was timely abated. Therefore, I find that a penalty of $2,000.00, as proposed by the Secretary as the statutory minimum, is appropriate.

E. Order No. 8695849

It has been established that this S&S violation of section 57.3360 was reasonably likely to cause an injury that could reasonably be expected to be fatal, that it was caused by Original Sixteen's high negligence and unwarrantable failure to comply with the standard, and that it was timely abated. Therefore, I find that a penalty of $2,000.00, as proposed by the Secretary as the statutory minimum, is appropriate.

F. Citation No. 8695846

It has been established that this S&S violation of section 57.11051 was reasonably likely to cause an injury that could reasonably be expected to be fatal, that it was caused by Original Sixteen's high negligence, and that it was timely abated. Based on these factors, and considering the operator's small size, I find that a penalty of $500.00 is appropriate.

G. Citation No. 8695857

It has been established that this violation of section 57.20011 was unlikely to cause an injury that could reasonably be expected to be fatal, that it was caused by Original Sixteen's moderate negligence, and that it was timely abated. Therefore, I find that a penalty of $100.00, as proposed by the Secretary, is appropriate.

H. Citation No. 8695859

It has been established that this S&S violation of section 57.3200 was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that it was caused by Original Sixteen's moderate negligence, and that it was timely abated. Therefore, I find that a penalty of $100.00, as proposed by the Secretary, is appropriate.

I. Citation No. 8695860

It has been established that this violation of section 57.4560(c) was unlikely to cause an injury that could reasonably be expected to be fatal, that it was caused by Original Sixteen's low negligence, and that it was timely abated. Based on these factors, and considering the operator's small size, I find that a penalty of $100.00 is appropriate.

J. Citation No. 8695861

It has been established that this violation of section 57.12023 was unlikely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that it was caused by Original Sixteen's moderate negligence, and that it was timely abated. Therefore, I find that a penalty of $100.00, as proposed by the Secretary, is appropriate.

K. Citation No. 8695863

The Secretary has failed to establish a violation of section 57.4131(c). Therefore, I **VACATE** this citation.

L. Citation No. 8613455

The Secretary has failed to establish a violation of section 104(d)(1) of the Act. Therefore, I **VACATE** this citation.

M. Citation No. 8613452

It has been established that this violation of section 57.14100(b) was unlikely to cause an injury that could reasonably be expected to result in permanently disabling injuries, that it was caused by Original Sixteen's moderate negligence, and that it was timely abated. Based on these factors, and considering the operator's small size, I find that a penalty of $100.00 is appropriate.

N. Citation No. 8695892

It has been established that this violation of section 57.8520(b)(8) had no likelihood of causing an injury that could reasonably be expected to result in no lost workdays, that it was caused by Original Sixteen's moderate negligence, and that it was timely abated. Therefore, I find that a penalty of $100.00, as proposed by the Secretary, is appropriate.

V. APPROVAL OF SETTLEMENT

The parties have filed an Unopposed Motion to Approve Partial Settlement respecting 15 of the 29 citations/orders involved in these dockets. A reduction in penalty from $2,298.00 to $1,199.00 is proposed.[23] The citations and orders, initial assessments, and proposed settlement amounts are as follows:

Docket No.	Citation/Order No.	Initial Assessment	Proposed Settlement
WEST 2013-323-M	8613451	$100.00	$60.00
	8695841	$100.00	$0.00
	8695850	$100.00	$60.00
	8695851	$243.00	$200.00
	8695852	$243.00	$200.00
	8695853	$100.00	$100.00
	8695854	$100.00	$0.00
	8695855	$243.00	$0.00
	8695856	$100.00	$100.00
	8695858	$243.00	$100.00
	8695862	$112.00	$112.00
	SUBTOTAL:	**$1,684.00**	**$932.00**

[23] Corrections made to the Motion for the Initial Assessment and Proposed Settlement amounts for Citation No. 8695856 have adjusted the subtotals for Docket No. WEST 2013-323-M, and the grand totals for all three dockets. See Penalty Petition.

WEST 2013-365-M	8695896	$207.00	$207.00
	8695897	$100.00	$0.00
	8695898	$100.00	$60.00
	SUBTOTAL:	**$407.00**	**$267.00**
WEST 2013-486-M	8695895	$207.00	$0.00
	SUBTOTAL:	**$207.00**	**$0.00**
	TOTAL:	**$2,298.00**	**$1,199.00**

I have considered the representations and documentation submitted in these matters under section 110(k) of the Act, and I conclude that the proffered settlement is appropriate under section 110(i) of the Act.

ORDER

WHEREFORE, it is **ORDERED** that Citation Nos. 8613455, 8695841, 8695854, 8695855, 8695897, 8695895 and 8695863 are **VACATED**.

It is further **ORDERED** that Citation Nos. 8612839, 8612841, 8613452, 8695844, 8695846, 8695853, 8695856, 8695857, 8695859, 8695860, 8695861, 8695862 and 8695892; and Order Nos. 8695848 and 8695849 are **AFFIRMED**, as issued.

It is further **ORDERED** that the Secretary **MODIFY** the following citations as follows: the degree of negligence in Citation No. 8695850 to "none" and Citation Nos. 8695851 and 8695852 to "low;" the level of gravity in Citation Nos. 8613451 and 8695858 to remove the "significant and substantial" designation, and Citation No. 8695898 to "lost workdays or restricted duty;" and Citation No. 8695896 to incorporate the "Condition or Practice" language of Citation No. 8695897; and that these citation are **AFFIRMED**, as modified.

It is further **ORDERED** that Original Sixteen to One Mine, Incorporated, **PAY** a civil penalty of $8,499.00 within thirty (30) days of the date of this Decision.[24] **ACCORDINGLY**, these cases are **DISMISSED**.

Jacqueline R. Bulluck

Jacqueline R. Bulluck
Administrative Law Judge

[24] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket number and A.C. number.

Distribution:

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Michael Miller, President, Original Sixteen to One Mine, Inc., P.O. Box 909, 527 Miners St., Alleghany, CA 95910

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