FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 13, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. ORIGINAL SIXTEEN TO ONE MINE, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2017-0119 A.C. No. 04-01299-423919 Sixteen to One Mine

DECISION AND ORDER[1]

Appearances: Isabella M. Finneman, Esq. ,Office of the Solicitor, U.S. Department of Labor, San Francisco, CA 94103, for Petitioner[2]

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

Before: Judge Moran

This docket is before the Court upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Two citations are in issue. A hearing was held in Nevada City, California commencing on August 9, 2017. For the reasons which follow, the Court finds that both the alleged violation of 30 C.F.R. § 57.4131(a), a matter involving a claim that more than a one day's supply of combustible materials was stored within 100 feet of a mine opening, and the alleged a violation of 30 C.F.R. § 57.11051(a), involving a claim that an escape route was not maintained in safe, travelable condition, were established.

[1] Originally, Docket No. WEST 2017-0173 was heard with WEST 2017-0119. Subsequently, the Secretary moved to dismiss all citations within Docket No. WEST 2017-0173. The Court issued its Dismissal Order for that docket on January 11, 2018.

[2] Ms. Laura Ilardi Pearson, Esq. appeared at the hearing for the Secretary. Subsequent to the hearing, Attorney Pearson left the Solicitor's Office for other employment. Attorney Isabella M. Finneman submitted the post-hearing briefs for this docket.

Violations at Issue

Introduction

At issue in Docket No. WEST 2017-0119 are two 104(a) citations, with a total proposed penalty of $392.00.

Citation No. 8879804:

Citation No. 8879804 alleged a violation of 30 C.F.R. § 57.4131(a). That standard, titled "Surface fan installations and mine openings," provides: "(a) On the surface, no more than one day's supply of combustible materials shall be stored within 100 feet of mine openings or within 100 feet of fan installations used for underground ventilation."

The condition or practice identified in the 104(a) citation alleged:

> Combustible materials were being stored within 100 feet of the entrance to Portal 2 located at the zero level at the mine. There was a pile of cut wooden 2 by 4s located about 15 feet to the right of the entrance of Portal 2. A pile of timbers were also located to the right of the portal entrance about 5 feet from the wooden 2 by 4s. Observed on the left side of the entrance of Portal 2 were two piles of combustible materials consisting of timbers of various sizes. Both piles were estimated to be less than 20 feet from the entrance of the mine. This condition creates a hazard of smoke inhalation into the mine in the event of a fire. A miner was working about 75 feet inside the mine at Portal 2. Standard 57.4131a was cited 3 times in two years at mine 0401299 (3 to the operator, 0 to a contractor).

GX 2.

The inspector assessed the gravity as unlikely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, not significant and substantial ("non-S&S"), with one person affected. The Secretary proposed a civil penalty of $157.00.

Citation No. 8879805:

Citation No. 8879805 alleged a violation of 30 C.F.R. § 57.11051(a). That standard, titled, "Escape routes" provides: "Escape routes shall be - (a) Inspected at regular intervals and maintained in safe, travelable condition."

The condition or practice identified in the 104(a) citation alleged:

> The designated secondary escape way located in 21 tunnel of the mine was not being maintained in a safe, travelable condition. There was an area in the escape way that had a buildup of silt and mud. The buildup was estimated to be about 20 feet long, and extended out about 53 inches from the wall of the tunnel. The buildup was about 3 feet high at its highest point located against the wall of the

tunnel and about 6 inches high at its lowest point which was located in the travel way. This condition impedes miners trying to escape through this route during the event of an emergency, hampers the safe evacuation of injured miners being assisted out, and has the potential of causing an injury to the miner. Standard 57.11051a was cited 2 times in two years at mine 0401299, to the operator.

GX 5.

The inspector assessed the gravity as reasonably likely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, significant and substantial ("S&S"), with one person affected.

As a subsequent action, the inspector modified the negligence alleged from high to moderate, based on mitigating information presented by the operator. *Id.* The operator also "removed a good portion of the buildup of silt and mud out of the travel way, thus terminating the citation." *Id.* The Secretary proposed a civil penalty of $235.00.

Findings of Fact

MSHA Inspector Julie Hooker, the issuing inspector, testified regarding the citations in this docket. Tr. 29. Inspector Hooker became an authorized inspector in October 2015. Tr. 30. The inspector has no prior mining experience. Tr. 32. On September 21, 2016, she inspected the Respondent's mine. Tr. 35. She was there in response to an EO4 anonymous hazard complaint. With her at that time was her field office supervisor, Troy Van Wey, who also testified about the citations. The hazard complaint alleged that the secondary escapeway was not safe. Tr. 36. A second issue involved a miner working at "the zero level," which term refers to where the upper shop and the number one and two portal locations, each of which are on the surface. Tr. 37.

Citation No. 8879804

Inspector Hooker identified Citation Number 8879804, which she issued for "combustible materials being stored within a hundred feet of the entrance to Portal Number 2, citing 30 C.F.R. §57.4131a." Tr. 38. She stated that the standard requires "that not more than one day's use of [combustible] material can be stored within a hundred feet of the mine opening." Tr. 38-39. She observed "a couple piles, to the left and to the right of the opening, and they were within the -- they were less than a hundred feet. There was timbers [sic] that the miner had been taking out, and there was new wood that he was installing. From what I understand, it had been there -- he had been working there in that area for about two and a half weeks ..." Tr. 39. The miner referred to by the inspector was working inside the portal at that time. *Id.* The inspector took photos of the material she observed. Tr. 39-40. In the photos, the Inspector identified old timber that had been removed from the mine, and new wood as well; two-by-fours. Tr. 40. A miner told her that the entry she observed was Portal Number 2, an entry into the mine where that miner was currently working. Tr. 41. The miner informed Hooker that he had been working at that location for two and a half weeks and that the wood had been placed there the previous Friday, with the following Tuesday being the day she was performing her inspection. *Id.* In determining that there was more than a one day supply of materials, she informed that

she asked a miner how long the material had been there and how long he had been working there. The miner's response was that he had been working there for "about two and a half weeks." *Id.*

Continuing to speak to Citation Number 8879804, GX 2, the Inspector stated that in her evaluation, she marked the citation, under gravity, as unlikely, the injury or illness reasonably expected as lost workdays or restricted duty, not S&S, and with one person affected. However, she marked the negligence as "high." In connection with those designations, the Inspector acknowledged that she saw no ignition sources, that is, nothing that could ignite the wood. Tr. 41-42. As for the lost workdays or restricted duty designation, it was based on her observing one miner working, but there was not a lot of wind that day. Therefore, she believed that, in the worst case, there would probably be some *mild* smoke inhalation. Tr. 42. The distance from the portal to the timbers was determined by the Inspector and her supervisor using a tape measure. *Id.* The timber furthest from the opening was 20 feet. Tr. 43. High negligence was marked because the mine had been cited for this condition "before in the same area." Tr. 43-44. Other photos were taken of the cited condition. These reflected some new lumber as well as lumber that had been removed from the mine. GX 4; Tr. 44-45.

Upon cross-examination, the Inspector stated that she became an AR in October 2105. Tr. 48. Asked for the basis for her conclusion that old timbers were being stored, the inspector stated that a miner informed they had been there since last Friday. Tr. 55. She did not know the hours for the work crew at the mine. *Id.* Asked the basis for concluding that the mine was storing the wood, and not, as the Respondent would later assert, that it was in transit, the Inspector stated that a miner told her the old wood came from inside the opening and the new wood was for laying track. Tr. 55. She again stated that she saw no signs of ignition sources and for that reason marked the citation as unlikely. Tr. 56. The Inspector defined combustible as "anything that can be ignited." *Id.* She admitted to no experience being "involved in an operation where people are repairing or renovating track, mine rail." Tr. 57.

In terms of marking the violation as high negligence, the Inspector was asked how her review of the mine's prior citations for storing combustible material impacted her decision to mark the violation as high negligence. Tr. 58. The Inspector stated that she had done a "thorough review" of those prior citations and that the review included pictures of those prior violations. Tr. 59. However she conceded that the scene she viewed for this citation did not resemble those prior violations. *Id.* The Inspector did not know if the air at the number 2 portal was exhausting or intaking. Tr. 61. She conceded such information could make a difference in assessing who could be harmed.

The Inspector was also asked if, from her background or training, she could distinguish between storing something and having it in transit. She responded that storage occurs if something is at a location for more than one day, while transit is using the material within that one day. Tr. 63. She was then asked about distinguishing supplies from waste and she answered that supplies are things one is going to use, while waste covers things that will not be used. Tr. 63-64.

On redirect, the Inspector stated that, for purposes of the standard she cited, the direction of air flow to the portal does not matter. Tr. 64. Except for some cinder blocks she observed, the remainder of the material was combustible and it was more than a one day's supply. Tr. 64-65. Her conclusion about the material being present for more than one day was based upon the miner who told her it had been there since the previous Friday and, as she was there on a Tuesday, four days had elapsed. Tr. 65.

Respondent's Mr. Miller then testified about this citation. Tr. 90. He stated that the "respondent has extensive policies and procedures for handling storage material, material in transit as well as the use and maintenance and repair of second exits. They are extensive, they're written, they're in our policy manual." *Id.* Respondent asserted that Inspector Hooker "did not have the background and actual practical experience to really understand what she was inspecting." Tr. 91. Part of the Respondent's position is that when MSHA comes to a mine, "they should honor and respect the specifics of this particular mine or operation that they are inspecting[,adding] [t]hat's also pretty clear in the language and intent of congress, site specific." Tr. 92.

Much of Mr. Miller's testimony was essentially an objection to the manner in which MSHA inspects. All of his contentions were reviewed, but not every comment deserves a response where the Court finds that such comments are not relevant to the citations in issue. Those issues are whether the standard was established as having been violated and, if so, the appropriate penalty upon consideration of the statutory factors.

Mr. Miller stated that the zero level has two adits. It was the first adit that was questionable and which was sealed according to prior inspectors. The mine was at that time rehabilitating the number two adit. Thus, he asserted that, in the process of rehabilitating the number two adit the inspectors viewed "a work in progress where they were taking, repairing track. They had their supply of track ties right there where they brought them out. They put them there where they come outside close to the portal. I would have stipulated that it was 20 feet." Tr. 94-95. Thus, he contended that the only place those "track ties could be would be right at the outside stored there so they can walk out and get the track ties and put them in when they're installing the rail." Tr. 95.

As for the rotten lumber, he asserted they could not be considered "in storage." Rather, "it was a waste pile that is hauled off as needed. It could be every day, it could be every week. It doesn't meet the language of that standard. It's not supplies as clearly Ms. Hooker stated. It wasn't supplies. It's waste." *Id.* Thus, he contended they were not stored. He expressed that the idea of the standard "is to eliminate long-term storage of the materials that could have the potential to ignite and then lead to an intake of air into the mine." As this citation was issued in September, the air is blowing out of the mine and therefore there was no possibility of any injury to the miner who was working there at that time. Tr. 95-96. Regarding the claim that the material had been there for four days, Miller contended that the small mine is only open from

Tuesday through Fridays. Therefore, the waste pile was there at 5 p.m. on that Friday and the small number of two-by-fours were there when the miner returned to work on Tuesday.[3] Tr. 96.

On cross-examination, Miller confirmed that waste from the mine could be hauled off every day or every week or just as needed, stating "[t]hat's our policy and procedure." Tr. 104. He agreed that the waste cited in Citation No. 8879804 was wood, describing it as "very, very old timber" that was being removed during the rehabbing process and that it was combustible. Tr. 105-109.

Citation No. 8879805

The other matter in issue, Citation No. 8879805, was issued by the same inspector on September 21, 2016. This was issued for an alleged violation of the designated secondary escapeway[4] not being in a safe, travelable condition. This conclusion was based upon finding a "huge buildup of silt and mud that blocked passageway." Tr. 66; GX 5; and GX 7 (photos). Referring to the photos, the Inspector stated they show a buildup of mud and silt along the sides of the escapeway. Tr. 67. That mud and silt was muddy and "sticky in certain parts" and she opined that one could not walk on it without getting stuck. *Id.* The depth of the material ranged from "probably six inches" near the water to "about three feet high" at its highest level. *Id.* The depths were determined by using a tape measure. Mr. Van Wey assisted her in taking the measurements. *Id.* Thus, the Inspector confirmed that she saw some portions of the escapeway with water and mud up to three feet in depth. Tr. 68. Asked if this covered the entire bottom surface of the escapeway, the Inspector answered by referring to one location to the right on a photo that had the most buildup, stating that they measured that "to be about 52 inches from the side of the tunnel there to where you see there the water. It was about 52 inches wide." Tr. 68.

The Court asked if "in the secondary escapeway, were there areas where one could walk away from the water and be in some small amount of water and still traverse." The Inspector answered, "[n]ot in that area that [she] took a picture." Tr. 69. Asked how extensive this condition was, that is, "[h]ow far did this water extend where you had an issue with its depth and the mud," the Inspector responded, "I believe it ran through the course of the whole escapeway,

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[3] Miller was perturbed that, to abate the citation, he "had to go and take those track ties and put them back over in the shop and just get them, you know, a hundred feet away." Tr. 97. He continued, "[t]here was a pile of cut wood in two-by-fours. Those are track ties. We can sometimes lay ten feet, we can sometimes lay hundred feet of rail. Depends on the circumstances of what we're doing at that time. We put track ties every three or four feet. We put track ties where we have a joint -- where the two tracks meet with fishplates. We have situations where we will put them closer together. We have situations where maybe we can extend them out. So a miner is going to have a supply that he thinks he can get through that day, and that varies. There is no standard like eight ties or ten. There was no storage of supplies, there was no long-term storage." Tr. 98. Thus, it was Miller's contention that the inspector's lack of any practical experience led to this issue.

[4] The escapeway was identified as the secondary escapeway by the miner who accompanied the inspector that day. Tr. 74.

but we did not travel past that area." She therefore conceded that she would have no way of knowing how far the condition existed, stating, "[c]orrect, Not at that time, no." Tr. 69. She then admitted that her "at that time" remark actually meant she did not later learn more about the extent of the condition. She therefore admitted that it was perhaps possible that the water she observed only continued for a few feet. Tr. 70. However, the Inspector stated that she didn't proceed further because she considered it to be unsafe. *Id.*

The second photograph she took in connection with this citation was described as "looking at the pipes that we saw laying in the water, and there's also the buildup there that you can see that comes close to those pipes." Tr. 70-71. When the Court inquired about the Inspector's location when she took photo three of four and whether that photo was taken from the same location as photo two of four, the Inspector stated she was not sure and did not know. Tr. 71. Then asked about photo four of four and the location where that was taken, the Inspector expressed that it was more "two of four," by which she meant both photos two and four of the four photos were taken from the same location. Tr. 71-72. Continuing, for photos two and three of the four, the Inspector stated that the pipe in those photos is normally there and that it is located in escapeway's walking area. Tr. 72. This also caused her concern because the pipe created a tripping hazard along with the water and the mud. Tr. 73. However, upon questioning by the Court, the Inspector stated that she would not have issued the citation based solely upon the pipe's presence. It was the combination of those factors, she explained, with the pipe contributing to the unsafe condition of the escapeway. *Id.*

The Inspector marked the citation as "reasonably likely" because the miner told her that he travelled that on a weekly basis. Tr. 74. Although she agreed that the condition had been that way for more than a week, she did not offer the basis for that opinion. *Id.* In marking the injury as "lost workdays or restricted duty as the type of injury or illness that could occur," she based that upon her view that "if they had to use that and running out of there in a hurried condition," then "they would probably get stuck in the mud," and therefore sustain a muscle strain or a twisted ankle producing lost workdays or restricted duty. Tr. 75. Regarding negligence, the Inspector, after initialing marking it as high, modified it to moderate. *Id.* This change came about because the miner told her they were working other projects, doing various things to try to improve safety in the mine overall. Tr. 76.

On cross-examination, Mr. Miller asked the Inspector to explain her reference to "emergencies." The Inspector responded that she meant a fire or some blockage in the mine that required miners to exit the mine via the secondary escapeway. The Inspector arrived at the secondary escapeway through the mine's main entrance. Tr. 80. There, she met Reed Miller who informed that they were working exclusively at the 800 level. At that point she asked him to identify the secondary escapeway for their use and was told it was the secondary tunnel. The Inspector then advised that the escapeway would have to be inspected, as a hazard complaint had been made. Tr. 81. Thus, her purpose, per the standard was to see if it was maintained in a safe and travelable condition. *Id.*

When the Respondent suggested that if the Inspector had examined the records, it would have revealed that there have been monthly inspections, each recorded by date and time and the person who conducted the inspection, he asked if that would have changed the Inspector's view

of the citation. The Inspector responded it would not have changed her conclusion. Tr. 82. Referencing that she was a new inspector, and had no underground mining experience, she was asked for her opinion as to how long the mud she observed had been there. She responded that it was present for more than a month. *Id.* She could not be more precise about how long the mud had been present. Tr. 83. The Court then inquired about the issue, asking if the Inspector in preparation for her inspection and reviewing the mine's prior violation history, found other citations that had been issued for not maintaining a secondary escapeway at this location. She answered, "yes." Tr. 84. In fact it was also in the 21 Tunnel. Tr. 85.

Miller then testified about the second citation, Citation No. 8879805. He began by asserting that the 21 Tunnel "is an issue for many inexperienced ... inspectors. This isn't the first time someone has made a similar mistake of saying that you cannot travel and it's impeded and with [the issuing inspector's] pure speculations about how it could be hazardous to the health and safety of a miner. It is inspected by MSHA rules once a month, and it has been ever since I've been involved in mining." Tr. 110-111. He then reviewed the history of the tunnel, adding that in the past it had "ten times as much mill way sand in that tunnel, ten times or maybe fifty times as much, it still passed inspection." Tr. 111. Miller asserted that this issue had arisen before and that those prior citations for that assertion were subsequently vacated. Tr. 112. Miller contended that it is inspected each month and while there may be a little slough in it, it doesn't impede travel. *Id.* Miller also contested the Inspector's claim that there was three feet of water and asserted that the pipe did not create a hazard. Tr. 114. Thus, while he did not challenge the standard itself, he did assert that it has been incorrectly interpreted by some inspectors and her claim that the passageway was blocked. Tr. 114-115. Last, he stated that this is an escapeway, not a travelway, with the latter being more restrictive. Tr. 117.

On cross-examination, Miller disagreed with the Inspector's claim that there was three feet of buildup in the walkway, where one travels, though he agreed there was buildup on the sides, adding that such buildup had been there for at least 20 years. Tr. 117. He also agreed there was water in the walkway, informing that it is the natural drain tunnel level, as it's "the lowest adit that comes out of the mine." Tr. 118. However, he maintained that water would never impede anyone from getting out of the mine. *Id.* As to the water depth there, Miller stated it was never over his 12 inch boots. *Id.* In this instance, he maintained that the boots he had on at that time just above his ankles. Tr. 119. As for the boots the Inspector wore that day, Miller agreed he did not see the Inspector that day. Tr.120. Regarding the claim that there was mud in the walkway, Miller disputed that, asserting that it was mill tailings. Tr. 123. Miller added that the pipe referenced in the Inspector's testimony sits on the floor of the cited tunnel and that it is not suspended or floating at that location. Tr. 124.

Troy Van Wey then testified about these two citations, Citation Nos. 8879804 and 8879805. Van Wey is a field office supervisor for MSHA's Vacaville, California office, a position he has held since February 2015. Tr. 127. Van Wey has significant mining experience as an MSHA inspector and as a miner in private industry. He has inspected the Respondent's mine about a dozen times. Tr. 130. He participated in Inspector Hooker's inspection of the Respondent's mine on September 21, 2016. Tr. 131. Regarding Citation No. 8879804, Van Wey stated that he saw the condition cited in that and that he agreed with Hooker's evaluation of it, including the gravity and negligence assessments. Tr. 132.

Van Wey was then asked for his definition of combustible material, which he stated is "[s]omething that will burn." Tr. 132. He then described the cited materials as "[m]ostly old timbers that they're using for support, I'm assuming, and then new timbers, new various sizes, two-by-fours, I believe, four-by-fours, maybe some two-by-eights if I remember correctly." Tr. 132.

Directed then to Citation No. 8879805, GX 5, Van Wey confirmed that he was present when Inspector Hooker found that condition as well. Tr. 133. As with the other citation, he agreed with all of Hooker's evaluations in this citation too. Asked if he felt the condition was unsafe, he responded, "Yes. It was perceived as maybe a slip/trip-type hazard." *Id.* Specifically, he stated "there was a bunch of fine material that had sloughed off one of the ribs and into the walkway." Tr. 133-134. He also did not attempt to walk through it, as he believed it to be unsafe. Tr. 134. Asked to estimate how long the condition had existed, he responded, "there's a lot of variables. It would depend upon the time of year. There's water that was running through the escapeway. There's fine material, so for the water to carry those fines, and it was buildup, again a guesstimate, maybe about three feet high at its highest point along the rib and sloped into the walkway. I would say months for it to get to that stage." *Id.* Thus, his estimate was in line with that of Hooker's. In terms of the water depth, Van Wey estimated it as "around ankle deep." *Id.* Referring to the photos associated with this citation, GX 7, he described it as showing "material that's sloughing off from the right rib as I'm looking at it, it slopes off into the walkway, the middle section that is the water that was running down the middle. There's also a pipe running through the middle of that as well." Tr. 135. Asked if one could traverse this safely, he answered, "[n]ot without the hazard of slipping, tripping or falling." *Id.* As the pipe was in the walkway, he also considered it to be a hazard. *Id.*

On cross-examination, Van Wey was asked about the cited standard and its provision that escape routes are to be "inspected at regular intervals and maintain safe, travelable conditions." To comply, the Inspector stated, the mine would need to inspect the escapeway on a regular basis to see if it's safe and travelable. Tr. 138. There is no paperwork requirement to document this however. *Id.* He admitted that Hooker was a "fairly new inspector" and felt it was appropriate for him to join her for the inspection, which arose from a hazard complaint. Tr. 139.

The Court noted that the abatement of the two citations is recorded on the same documents. Tr. 141. Van Wey stated that the same escapeway had been cited in the past. Tr. 143. As for the issue of Hooker's lack of mining experience, Van Wey defended his inspector, stating that all inspectors receive a "tremendous amount of training before they're given their authorized representative card." Tr. 144- 145.

Discussion

Citation No. 8879804

Regarding Citation No. 8879804, and the claim that the Respondent violated 30 C.F.R. § 57.4131(a), it is the Secretary's contention that the Respondent violated the cited standard because used and new timbers were stored within 100 feet of a mine opening. Secretary's Post-Hearing Brief ("Sec's Br.") at 4.

The applicable provision from the cited standard, section 57.4131(a), titled "Surface fan installations and mine openings," provides: "(a) On the surface, no more than one day's supply of combustible materials shall be stored within 100 feet of mine openings or within 100 feet of fan installations used for underground ventilation."[5]

The Secretary asserts that "[t]he old timbers and new 2 by 4's fall within the definition of combustible materials. These combustible materials had been left within 100 feet of Portal No. 2 for more than one day. The miner was exposed to the hazard while entering and exiting the Mine through Portal No. 2 on the day of the inspection. Therefore, a violation of 30 CFR 57.4131(a) has been established."[6] *Id.* at 5.

Speaking to the Respondent's defense, that it was not *storing* the timbers at the cited location, but was "transporting" them at the time that the citation was issued, the Secretary acknowledges that the final rule for the cited standard expressed that it does not prohibit the *actual transit* of combustible materials into the mine. *Id.* (citing 50 Fed. Reg. 4022-01, 4025 (Jan. 29, 1985)). However, the Secretary contends that the evidence demonstrated that the Respondent allowed timbers to be stockpiled by Portal No. 2 and that it was not cited for transit of timbers. *Id.*

The Secretary also notes the Respondent's contention that it didn't have more than a one day's supply of timbers at the cited portal location. While acknowledging the Respondent's argument that the phrase "more than one day" must mean more than 24 hours while the mine is in operation, the Secretary responds that he is not aware "of any provision in Section 57.4131(a) or the Secretary's interpretive guidance that requires the Secretary to show that the Mine was in

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[5] Because the Respondent raised a separate section for this standard, section 57.4131(b), the text of that provision is noted. It provides: "(b) the one-day supply shall be kept at least 25 feet away from any mine opening except during transit into the mine." However, the Court concludes that this subsection is not useful in resolving the cited provision.

[6] The Secretary notes that "'Combustible material' is defined in 30 CFR § 57.2 as "...a material that, in the form in which it is used and under the conditions anticipated, will ignite, burn, support combustion or release flammable vapors when subjected to fire or heat [] [and that] Section 57.2 also states: 'Wood, paper, rubber, and plastics are examples of combustible materials.' Secretary's Post-Hearing brief ("Sec's Br.") at 4. There is no genuine dispute about the materials' combustibility.

continuous operation in order to establish that the cited condition existed for more than one day." *Id.* Even if that were accepted, the Secretary asserts that the "Respondent did not address the stored timbers when the Mine resumed operation on the morning of the inspection." *Id.* It is the Secretary's position that the "Respondent could have, at a minimum, begun the process of moving the timbers further away from Portal No. 2 at the beginning of the shift prior to Inspector Hooker's arrival. Instead, Respondent continued the work of removing more timbers from the Mine." *Id.* at 6.

As to the Inspector's gravity and negligence evaluation for this citation, the Secretary acknowledges that the issuing Inspector determined that it was unlikely that the condition cited would result in an injury or illness to a miner, as there were no ignition sources near the timbers and it was unlikely for a fire to occur at the two timber stacks. *Id.* Further, in terms of the expected injury should the timbers ignite and burn, such "flames would not be fanned and the exposed miner would suffer from, at most, mild smoke inhalation," and, at most, result in lost workdays or restricted duty. *Id.*

However, the Secretary asserts that the Inspector correctly determined that the Respondent was highly negligent because the Respondent had been cited for violating this standard in the past.[7] *Id.* at 7. Citing 30 C.F.R. § 100.3(d), a "high negligence" designation is apt, the Secretary contends, where an operator "knows or should have known of the violative condition or practice, and there are no mitigating circumstances which explain the operator's conduct in minimizing or eliminating a hazardous condition." *Id.* Apart from its past violations of the standard theory to support the Secretary's high negligence claim, the Secretary also claims that "Miller admitted during his testimony that he knew that his miner(s) placed the timbers near to the portal and that the timbers are not always hauled away every day [by his testimony that] [t]hey put [the timbers] there where they come outside close to the portal [and that he admitted] [t]he rotten timber ... was a waste pile that is hauled off as needed. It could be every day, it could be every week." *Id.* at 8 (citing Tr. 95:3-4 and 95:12-15). Given these considerations, the Secretary "requests that a penalty of not less than $157 be assessed for Citation No. 8879804." *Id.*

Respondent's Post-Hearing Brief ("R's Br.") challenges the Inspector's assertion that the wood had been within 100 feet of the portal for multiple days, as she included the weekend in her calculation that the wood was present for four days. R's Br. at 4. Respondent contends that the Inspector's total absence of mining experience contributed to her inaccurate evaluation. Also, she did not know if the air at the portal was exhausting or intaking. *Id.* at 6.

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[7] The Secretary is correct in asserting that the operator had been cited for violating this standard in the past. He notes, "[i]n May 2011, and again in May 2014, the Secretary cited Respondent for storing timbers near a mine portal in violation of Section 57.4131(a). The ALJ decisions affirming these citations can be found at *Secretary of Labor v. Original Sixteen to One Mine, Inc.*, 36 FMSHRC 2224, 2235 (Bulluck, ALJ) (August 20, 2014) (affirming citation issued in May 2011 for "more than a day's supply" of timbers stored 30 to 90 feet from the mine portal), and *Secretary of Labor v. Original Sixteen to One Mine, Inc.*, 38 FMSHRC 1019, 1043 (Moran, ALJ) (May 3, 2016) (affirming citation issued in May 2014 for timbers stored for more than one day at a location that the parties stipulated was less than 25 feet from the mine portal)." *Id.* at 7.

The Court's Determinations regarding Citation No. 8879804

The Court finds that the Secretary established the violation in this instance. The chief reason for this conclusion it that the Mine Act is a remedial statute and therefore must be construed liberally. As the Commission has observed,

> The Federal Mine Safety and Health Act of 1977 is a remedial statute, the 'primary objective [of which] is to assure the maximum safety and health of miners." U.S. Senate, Committee on Human Resources, Subcommittee on Labor, Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong., 2d Sess. at 634 (1978). ... In interpreting remedial safety and health legislation, '[i]t is so obvious as to be beyond dispute that ... narrow or limited construction is to be eschewed ... [L]iberal construction in light of the prime purpose of the legislation is to be employed.' St. Mary's Sewer Pipe Co. v. Director, U.S. Bureau of Mines, 262 F.2d 378, 381 (3rd Cir. 1959); Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772, 782 (D.C. Cir. 1974), cert. denied, 420 U.S. 938." (1975).

UMWA v. Consolidation Coal Co. 1 FMSHRC 1300, 1302 (Sept. 1979).

This Court has noted,

> In enacting the Federal Mine Safety and Health Act of 1977, Congress intended to ensure safe working conditions for miners. The Commission and Courts of Appeal have construed the application of the Mine Act liberally. One Circuit Court held that '[s]ince the Act in question is a remedial and safety statute, with its primary concern being the preservation of human life, it is the type of enactment as to which a narrow or limited construction is to be eschewed.' The Commission, too, has held in multiple cases that the Mine Act, as a remedial statute, must be interpreted broadly to further the Act's remedial goals. Thus, close cases of interpretation of safety standards are to be resolved in favor of furthering the goals of the Mine Act.

Lavarge Building Materials, 34 FMSHRC 3297, 3300-3301 (Dec. 2012) (ALJ).

Although a violation is found, there are problems with the Secretary's position that, in the Court's estimation, bear upon the determination of the penalty, at least for this instance. The reasons for this determination are severalfold. First, the standard itself plainly addresses a one day's *supply* of combustible materials, requiring that no more than that amount may be stored within 100 feet of mine openings. The term "supply," as a noun, is defined as "an amount or quantity of something that is available to use."[8] Therefore, facially, it does not encompass waste material. The standard could have been easily written to expressly prohibit all types of

[8] https://www.macmillandictionary.com/us/dictionary/american/supply.

combustible materials located within 100 feet of mine openings, but that is not within the literal scope of the provision.

Further, fairly construed, the standard does not require that the one day's supply must be used up each day. Such language also could have been included within the standard's proscription but, as written, the standard allows the one day's supply to be stored indefinitely within 100 feet of a mine opening.[9] Accordingly, at least as promulgated, the plain objective of the standard is to allow a one day's supply of combustible materials within 100 feet of a mine opening, but not more than that amount. The one day's supply limit is therefore a compromise between allowing some combustible material but not more than that day's supply, so that any combustion would be limited to storage of that amount.

The question then becomes whether the Secretary established that there was more than a one day's supply of combustible material within 100 feet of the mine opening. In this regard, neither Inspector Hooker, nor field office supervisor Van Wey, drew any distinction between supply materials and waste materials; their focus was entirely upon the combustibility of the material, not its nature. The Inspector identified combustible material but did not distinguish between combustible new materials (i.e. supply materials) and old timber. The latter, as has been explained, is not addressed by the standard. Although Hooker opined about how long the material had been at that location, the Court has determined that the standard contains no requirement that the one day supply of material be used up each day.[10] As such there was no testimony that the *supply* materials themselves amounted to more than a one day's supply, nor was there any rationale to explain how it was determined that such supply material was more than a day's worth. Instead, implicitly, the inspectors wrote into the standard words that do not appear in it, to wit: that the supply materials must be used up each day.

Despite this, an examination of the rulemaking for this standard reveals a more expansive intent of coverage. The proposed rule, which revised a previous version of the standard, stated "The proposed standard would apply only to surface areas of underground mines. *It would restrict accumulation of combustible materials*, but not prohibit their presence in transit or when

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[9] Were it not for the remedial nature of the Mine Act, this construction of the standard's terms has a logical appeal. Consider this scenario: At the start of a day, a mine operator has a one day's supply of combustible materials which is within 100 feet of a mine opening. That material remains there during the entire day until the last hour of work, when it is brought into the mine for use the following day. During the time the material remained within 100 feet of the opening, it would potentially be subject to combustion, but the standard does not prohibit its presence during those hours nor does it require any anti-combustion steps to be employed while it remains at that mine opening location.

[10] Because the Court has determined that the one day's supply need not be used up each day, the issue of the number of days the material was there is not of consequence. However, even if one were to conclude that such material must be used each day, the number of days this material was stored is fairly subject to debate. This is because there was unrebutted testimony that the mine did not operate on Friday or the weekend, reducing the number of days to one.

used, in the construction of mine installations. In addition, it would retain the existing provision prohibiting dry vegetation within 25 feet of mine openings." 48 Fed. Reg. 45336, 45338 (Oct. 4, 1983) (emphasis added).

The Final Rule also reveals that the emphasis addressed storage of combustible materials,

> Section 57.4131 Surface fan installations and mine openings. This standard revises § 57.4-42 and applies to surface fan installations and mine openings at underground mines. *It restricts storage of combustible materials in these areas* and prohibits dry vegetation within 25 feet of mine openings. In response to commenters, the final rule clarifies that the standard addresses fan installations used for underground ventilation. In addition, the final rule clarifies that the standard does not prohibit the actual transit of combustible materials into the mine. Some commenters stated that the standard should exempt materials used in construction of mine installations. The standard addresses the storage of combustible materials and does not prohibit their use in construction.

50 Fed. Reg. 4022, 4025 (Jan. 29, 1985) (emphasis added).

Accordingly, on the basis of the foregoing, the citation is **AFFIRMED.**[11]

Penalty Determination for Citation No. 8879804

The section 104(a) citation was marked as unlikely for gravity, non-significant and substantial, with lost workdays or restricted workdays expected, and with one person affected. The negligence was marked as "high." The mine's violation history is part of the record and was considered by the Court. GX 1. The Secretary's post-hearing briefs did not refer to penalty factors other than the mine's violation history, negligence, and indirectly, gravity, through the Inspector's significant and substantial designation. The Respondent's mine is small. Good faith in attempting to achieve rapid compliance was ascribed to the operator. Per Exhibit A, the number of repeat violations for this standard is listed as two and there was no cognizable claim that these two proposed penalties, if assessed, would have an effect on the operator's ability to continue in business.

Given the facial ambiguity of the words employed in the standard, the Court concludes that the Respondent's contentions cannot be dismissed as meritless. Therefore, the negligence is determined to be low. Considering each of the statutory factors the Court concludes that a civil penalty of $75.00 (seventy-five dollars) is appropriate to impose.

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[11] No doubt, in reaction to this decision, when MSHA next inspects the Respondent's mine, it will be attentive to this decision. Given that, the Court hopes that the Respondent will avoid future litigation by taking the simple prophylactic step of ensuring that its supply material and, for that matter, any combustible material, be located more than 100 feet from any mine opening.

Citation No. 8879805

Regarding Citation No. 8879805, and the claim that the Respondent violated 30 C.F.R. § 57.11051(a), it is the Secretary's contention that the Respondent violated the standard by failing to maintain the designated secondary escapeway in a safe, travelable condition. Sec's Br. at 8. The applicable section from the cited standard provides: "Escape routes shall be - (a) Inspected at regular intervals and maintained in safe, travelable condition." 30 C.F.R. § 57.11051(a).

As with the other cited standard, this matter also arose in the wake of a hazard complaint. The Secretary maintains that Inspector Hooker's testimony establishes a violation of the cited standard. *Id.* at 9. The Secretary contends that Inspector Hooker believed in good faith that the muddy and wet conditions extended through the course of this entire secondary escapeway. *Id.* at 9 (citing Tr. 69:14-18). The Secretary also asserts that, per her evaluation of the gravity and negligence for this section 104(a) citation, it was reasonably likely that a miner traveling through the cited 21 Tunnel in a mine emergency would get stuck in the muddy conditions and that the expected injuries would be lost workdays or restricted duty. *Id.* at 10. The Secretary advises that determination was based on two considerations: the accompanying miner's statement that he travelled the 21 Tunnel on a weekly basis and the Inspector's good faith belief that the wet and muddy conditions had existed for more than a week. *Id.* The Inspector also expressed that "if a miner got stuck in the mud while hurrying through the 21 Tunnel in the event of a mine emergency, the miner would sustain injuries resulting in lost workdays/restricted duty." *Id.* This conclusion was based on "her knowledge, training and experience that a miner would sustain muscle strain or twisted ankle if he/she became stuck in the muddy conditions." *Id.*

The Inspector's negligence evaluation was initially deemed "high," but she reduced it to "moderate negligence" upon the exposed miner stating that the Respondent was working to improve safety at the mine. The Secretary also notes that field office supervisor Troy Van Wey testified that "Respondent had been cited numerous times prior to this inspection for a violation of the same standard (Section 57.11051(a)) due to conditions in the 21 Tunnel that made it impassable." *Id.* at 10-11.

The Secretary concludes that at least moderate negligence was involved and that, when considered with the significant and substantial characterization, the penalty assessed should at least be $235.00. *Id.* at 11.

Respondent's Post-Hearing Brief contends that Inspector Hooker's complete lack of any mining experience contributed to her erroneous conclusions about this citation. Respondent claims that the 21 Tunnel passed inspection for a number of years and it was until recently that MSHA started having issues with it. Respondent also challenged the Inspector's claim that there was up to three feet of water in that escapeway, asserting that he has never experienced water going over his boots and the Inspector's boots were only six inches deep, which he opined were inadequate boots to be wearing. R's Br. at 14. Respondent also contended that the two inspectors had differing views of the water depth. *Id.*

Discussion

Citation No. 8879805

The Court also finds that standard 30 C.F.R. § 57.11051(a) was established as violated. The Court notes that the requirement to inspect at regular intervals was not part of the alleged violation. Instead, it was the claim that the escape route was not being "maintained in safe, travelable condition." The testimony and the photographs, per GX 7, show some water in the escapeway, but apart from the Inspector's testimony, the photos themselves do not show a "huge buildup of silt and mud that blocked passageway." Even the Inspector was restrained in her description, stating that the mud and silt was muddy and sticky in certain parts. Further, when asked if the water and mud covered the entire bottom surface of the escapeway, Van Wey's response was that there was one location that had most of the buildup which was measured to be about 52 inches from the side of the tunnel. A more fundamental problem was, when asked if the condition ran the course of the whole escapeway, neither inspector could answer about the extent of the problem. This was because neither inspector traveled past the area they observed. In fact, Hooker admitted that the water she observed may only have continued for a few feet. The presence of the pipe is a non-issue, because the inspectors were not claiming that was part of the violation. Thus, the issue was about mud and water only, with the testimony placing emphasis on the mud. As noted, the water, according to Van Wey was only "around ankle deep." Tr. 134. Even the mud, Van Wey disclosed, sloughed off the right rib into the walkway with water running down the middle section of it.

The Court's Determinations regarding Citation No. 8879805

Based on the credible testimony of the inspectors, the Court finds that the violation was established. However, the Secretary's proof of the extent of the condition was quite limited. Accepting that the mud and water observed diminished safe and travelable conditions, the evidence does not support a conclusion that this existed over a significant length of the escape route. The burden of proof, including the extent of a violative condition is on the Secretary[12] and, as Hooker admitted, the condition may have extended only a few feet. Neither she nor Van Wey knew the extent of the problem, electing not to travel beyond the point they encountered the conditions.

Penalty Determination for Citation No. 8879805

The section 104(a) citation was marked as reasonably likely for gravity, and as significant and substantial, with lost workdays or restricted workdays expected and with one person affected. The negligence, first marked as "high" was later modified by the Inspector to "moderate." As noted above, the mine's violation history is part of the record and was

[12] The Secretary is required to prove all elements of the alleged violations by a preponderance of the evidence, which requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (internal citations omitted).

considered by the Court. Ex. GX 1. The Secretary's post-hearing briefs did not refer to penalty factors other than the mine's violation history, negligence, and indirectly, gravity, through the Inspector's significant and substantial designation. The Respondent's mine is small, good faith in attempting to achieve rapid compliance was ascribed to the operator. Per Exhibit A, the number of repeat violations for this standard is listed as zero[13] and there was no cognizable claim that these two proposed penalties, if assessed, would have an effect on the operator's ability to continue in business.

Although it is difficult to assess the gravity, given the limited evidence of the extent of the condition presented by the Secretary and taking into account Mr. Miller's testimony on the issue, the Court finds that the reasonable likelihood, and significant and substantial evaluation were established,[14] but in the context of a resulting lost workdays or restricted duty injury.

As for the moderate negligence designation, the Court notes that "[n]egligence is not defined in the Mine Act. The Commission has found that '[e] ach mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred.' *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) ... [and] [i]n determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Sims Crane*, 39 FMSHRC 116, 118 (Jan. 2017) (ALJ McCarthy).

Further, it is a given that "Commission judges are not required to apply the level-of-negligence definitions in Part 100 penalty regulations and may evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. ... Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances, but may consider the totality of the circumstances *holistically*." *Id.* (emphasis added).

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[13] Although the citation asserts that this standard was cited two times in the past two years and noting that inspector Van Wey asserted that the escapeway had been cited in the past, this is insufficient to establish as part of the violation history for this citation, given Exhibit A.

[14] The violation, as noted, was established. The discrete hazard is the risk of injury to a miner because the presence of the mud and water diminished safe and travelable conditions, whether during a regular inspection of the escape route, or during the need to use that escapeway in an emergency. The Inspector's testimony, which the Court accepts as credible, supports the conclusion that there is a reasonable likelihood that the violation will result in the hazard, that the hazard contributed to would result in an injury and, with the expected injury being lost workdays or restricted duty, such an injury is of a reasonably serious nature. *Newton Energy,* 38 FMSHRC 2033, 2036-39 (Aug. 2016).

The Court applies the holistic approach. Given the state of the evidence regarding the limited established extent of the condition, the Court finds that the level of negligence is fairly established as low.

Upon consideration of all of the penalty factors, the Court finds that a civil penalty of $68.00 (sixty-eight dollars) is the appropriate assessment.[15]

ORDER

For the reasons set forth above, Citation No. 8879804, which alleged a violation of 30 C.F.R. § 57.4131(a) is **AFFIRMED** and a civil penalty of $75.00 is imposed.

For the reasons set forth above, Citation No. 8879805, which alleged a violation of 30 C.F.R. § 57.11051(a) is **AFFIRMED,** and a civil penalty of $68.00 is imposed.

A total civil penalty of $143.00 is hereby imposed upon Respondent, Original Sixteen to One Mine, Inc., for this violation. Payment is to be made to the Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, the captioned civil penalty matters are DISMISSED.

William B. Moran

William B. Moran
Administrative Law Judge

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[15] As noted for the citation alleging combustible material storage, it is to be expected that if subsequent violations of this standard are alleged, the Secretary will likely overcome the evidentiary deficiencies identified in this decision and therefore the Court urges Mr. Miller to be vigilant in maintaining safe and travelable conditions in the mine's escape routes.