FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., NW, SUITE 520N
WASHINGTON, DC 20004-1710
Telephone: (202) 434-9950 FAX: (202) 434-9954

June 29, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. OIL-DRI PRODUCTION COMPANY, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. SE 2015-0285 A.C. No. 22-00035-380097 Docket No. SE 2015-0418 A.C. No. 22-00035-387993 Mine: Ripley Mine and Mill

DECISION AND ORDER

Appearances: Daniel T. Brechbuhl, U.S. Department of Labor, Office of the Solicitor, Denver, CO, for the Petitioner;

Douglas A. Graham, Oil-Dri Corporation of America, Chicago, IL, for the Respondent.

Before: Judge L. Zane Gill

These proceedings under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994), involve 14 citations issued by Inspectors Michael LaRue and John Howerton during their MSHA E01 inspections in March and June 2015, at the Ripley Mine and Mill near Ripley, Tippah County, Mississippi. SE 2015-0285 comprises 11 citations written by Inspector LaRue on March 18, 23, and 24, 2015: Citation Nos. 8820563, 8820564, 8820565, 8820567, 8820568, 8820569, 8820571, 8820573, 8820574, 8820575, and 8820576. SE 2015-0418 comprises the remaining three citations issued by Inspector Howerton on June 22 and 23, 2015: Citation Nos. 8818317, 8818319, and 8818320. The Ripley mine processes clay material. The trial was held in Memphis, Tennessee, on March 8 and 9, 2016.

I. PROCEDURAL HISTORY

Of the 14 citations issued by Inspectors LaRue and Howerton, 12 were presented for decision. Citation No. 8818317 (Howerton), involving a dispute over fire extinguisher inspection records, was vacated during the hearing on motion by Respondent. (Tr.164:16-19) In addition, Respondent agreed to accept and pay a penalty of $100.00 for Citation No. 8820576 (LaRue), involving a missing accident report. (Tr.18:18-19:7)

The 12 remaining citations were grouped for presentation and discussion into a collection of seven housekeeping violations,[1] two dust truck violations,[2] and three stand-alone violations: the first alleging that an over-the-road driver tarped his load without fall protection (Citation No. 8818320); the second alleging inadequate lighting in the verge storage tank area (Citation No. 8820571); and, the third alleging that a pre-use inspection of a work area had not been done (Citation No. 8820575).

The housekeeping citations allege violations of 30 C.F.R. § 56.20003(a). Citation No. 8820571 (inadequate lighting) alleges a violation of 30 C.F.R. § 56.17001. The first dust truck citation, No. 8820573, alleges a violation of 30 C.F.R. § 56.14100(c), and the second, No. 8820574, alleges a violation of 30 C.F.R. § 56.14101(a)(3). The examination of working places citation, No. 8820575, alleges a violation of 30 C.F.R. § 56.18002(a). Finally, the fall protection citation, No. 8818320, alleges a violation of 30 C.F.R. § 56.15005.

II. STIPULATIONS

The parties read the following stipulations into the record:

1. Oil-Dri Production Company ("ODPC") was at all times relevant to these proceedings engaged in mining activities at the Ripley Mine and Mill in or near Ripley, Mississippi.

2. ODPC's mining operations affect interstate commerce.

3. ODPC is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (The "Mine Act" or "Act").

4. ODPC is an "operator" as that word is defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Ripley Mine and Mill (Federal Mine I.D. No. 22-00035) where the contested citations in these proceedings were issued.

---

[1] Inspector Howerton wrote one housekeeping violation, Citation No. 8818319, and Inspector LaRue wrote the other six: Citation Nos. 8820563, 8820564, 8820565, 8820567, 8820568, and 8820569.

[2] Citation Nos. 8820573 and 8820574.

5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to section 105 of the Act.

6. On or about March 18, 2015, through June 23, 2015, Mine Safety and Health Administration ("MSHA") Inspectors Michael LaRue and John Howerton were acting as duly authorized representatives of the United States Secretary of Labor, assigned to MSHA, and were acting in their official capacity when conducting the inspection and issuing the citations from dockets SE 2015-0285 and 0418, at issue in these proceedings.

7. The citations at issue in these proceedings were properly served upon ODPC as required by the Act and were properly contested by ODPC.

8. The citations at issue in these proceedings may be admitted into evidence by stipulation for the purpose of establishing their issuance. Materials published on MSHA's website or otherwise published by MSHA may also be admitted into evidence by stipulation for the purpose of establishing their issuance and availability. The truthfulness or relevancy of any statements asserted therein is not stipulated to by the parties.

9. ODPC demonstrated good faith in abating the violations.

10. Without ODPC admitting the propriety or reasonableness of the penalties proposed herein, the penalties proposed by the Secretary in this case will not affect the ability of ODPC to continue in business.

III. DECISION SUMMARY

A. Docket No. SE 2015-0418

1. Citation No. 8818317 – Fire Extinguisher Annual Inspection

Respondent did not violate 30 C.F.R. § 56.4201(a)(2). The citation is vacated.

2. Citation No. 8818319 – Old Clay Shed

Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the old clay shed clean and orderly. The disarray described in the violation narrative created a slip–trip–fall hazard to miners. The violation was unlikely to result in a lost-workday or restricted-duty injury for one person. The violation was the result of moderate negligence. The assessed penalty is $100.00.

3. Citation No. 8818320 – Flat Bed Truck (#456)

Respondent violated 30 C.F.R. § 56.15005 when an over-the-road truck driver failed to use safety belts and lines where there was a fall danger. The irregular surface on the top of the truck bed created a slip–trip–fall hazard to the driver. The violation was reasonably likely to result in a permanently disabling injury for one person. The violation was significant and

substantial ("S&S"). The violation was the result of no negligence. The assessed penalty is $130.00.

B. Docket No. SE 2015-0285

1. Citation No. 8820563 – New Agg Discharge Cooler

Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the new Agg discharge cooler clean and orderly. The material accumulation described in the violation narrative created a slip–trip–fall hazard to miners. The violation was reasonably likely to result in a lost-workdays or restricted-duty type injury for one person. The violation was S&S. The violation was the result of moderate negligence. The assessed penalty is $634.00.

2. Citation No. 8820564 – RVM Discharge End Platform

Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the RVM discharge end platform clean and orderly. Accumulated material, tools, and spray cans in the work area created a slip–trip–fall hazard to miners. The violation was unlikely to result in a lost-workdays or restricted-duty injury for one person. The violation was the result of moderate negligence. The assessed penalty is $127.00.

3. Citation No. 8820565 – Ground Level of the Old Agg Scrubber

Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the ground level of the old agg scrubber clean and orderly. An accumulation of material on the ground level of the old agg scrubber created a slip–trip–fall hazard to miners. The violation was reasonably likely to result in a lost-workdays-or-restricted-duty-type injury for one person. The violation was S&S. The violation was the result of moderate negligence. The assessed penalty is $634.00.

4. Citation No. 8820567 – Third Floor of the Mill Building

Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the third floor of the mill building clean and orderly. Deep material accumulation and a chair in a passageway on the third floor of the mill building created a slip–trip–fall hazard to miners. The violation was unlikely to result in a lost-workdays or restricted-duty injury to one miner. The violation was the result of moderate negligence. The assessed penalty is $127.00.

5. Citation No. 8820568 – Walkway Around the 4 & 5 Pre-Grind Mills

Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the walkway around the 4 & 5 pre-grind mills clean and orderly. Deep accumulations covering floor irregularities on the walkway around the 4 & 5 pre-grind mills created a slip–trip–fall hazard to miners. The violation was reasonably likely to result in a lost-workdays or restricted-duty injury to one miner. The violation was S&S. The violation was the result of high negligence. The assessed penalty is $2,107.00.

6. Citation No. 8820569 – Ground Level of the Mill Building

Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the ground level of the mill building clean and orderly. Significant material accumulations created a slip–trip–fall hazard to miners. The violation was reasonably likely to result in a lost-workdays or restricted-duty injury to one miner. The violation was S&S. The violation was the result of high negligence. The assessed penalty is $2,107.00.

7. Citation No. 8820573 – Dust Truck Tagging

Respondent violated 30 C.F.R. § 56.14100(c) by failing to remove a Ford L9000 dust truck from service after defects affecting safety were observed during a pre-operational examination. Significant clay dust on the truck's windshield created a visibility hazard. The violation was reasonably likely to result in a fatal injury to one miner. The violation was S&S. The violation was the result of moderate negligence. The assessed penalty is $1,944.00.

8. Citation No. 8820574 – Dust Truck Air Brakes

Respondent violated 30 C.F.R. § 56.14101(a)(3) by failing to maintain functional air brakes on the Ford L9000 dust truck. The leak in the air brakes created a loss-of-control hazard. The violation was reasonably likely to result in a fatal injury to one miner. The violation was S&S. The violation was the result of moderate negligence. The assessed penalty is $1,944.00.

9. Citation No. 8820571 – Illumination of Verge Storage Tank Area

Respondent violated 30 C.F.R. § 56.17001 by failing to provide sufficient lighting around the verge storage tanks. Deep mud accumulations and low visibility created a slip–trip–fall hazard. The violation was reasonably likely to result in a lost-workdays or restricted-duty injury to one miner. The violation was S&S. The violation was the result of moderate negligence. The assessed penalty is $585.00.

10. Citation No. 8820575 – Working Place Examination of Verge Storage Tank Area

Respondent violated 30 C.F.R. § 56.18002(a) by failing to inspect and conduct a pre-shift working place examination of the verge storage tank area. Deep mud accumulations under and around the verge storage tanks created a slip–trip–fall hazard. The violation was reasonably likely to result in a lost-workdays or restricted-duty injury to one miner. The violation was S&S. This violation was the result of high negligence. The assessed penalty is $1,944.00.

11. Citation No. 8820576 – MSHA Injury Report Form 7000-1

Respondent withdrew contest of the penalty at hearing. The assessed penalty is $100.00.

IV. GENERAL LEGAL PRINCIPLES

A. Burden of Proof

The Secretary bears the burden of proving all elements of a citation by a preponderance of the credible evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Res., Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ) ("The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence."); *see also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1976-77 (Aug. 2014) (holding that to prove his imputed negligence is proper, the Secretary must describe the specific action an operator did not take to meet the requisite standard of care). In general, this preponderance standard "means proof that something is more likely so than not so." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC at 1838.

B. Negligence

The Mine Act creates a strict liability enforcement model,[3] and, as a result, negligence is not an essential part of the calculus to determine an operator's liability. When an MSHA inspector observes conditions that create mine hazards or otherwise fall short of the Act's requirements, a citation is required, irrespective of fault. Negligence, however, is central to the assessment of civil penalties[4] and to the evaluation of unwarrantable failure and flagrant violations.[5]

---

[3] "If [. . .] the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter [. . .], he shall [. . .] issue a citation to the operator." 30 U.S.C. § 814(a). This court has held that "[t]he Mine Act is a strict liability statute, and an operator is liable for a violation of a mandatory safety standard regardless of its level of fault." *Brody Mining, LLC*, 33 FMSHRC 1329, 1335 (May 2011) (ALJ) (citing *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989)); *see also A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (holding that each mandatory standard has an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet that duty can lead to a finding of negligence if a violation occurs).

[4] Section 110(i) of the Mine Act requires that in assessing penalties, one criterion that must be taken into account is "whether the operator was negligent." 30 U.S.C. § 820(i); *see also Asarco*, 8 FMSHRC at 1636, *aff'd*, 868 F.2d 1195 (10th Cir. 1989) ("[T]he operator's fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty.").

[5] Although the same or similar factual circumstances may be included in the Commission's consideration of an operator's misconduct with regard to an unwarrantable failure finding and the Commission's evaluation of an operator's negligence for purposes of assessing a

Negligence is considered in light of the action that would have been taken under the same circumstances by a "reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purposes of the regulation." *Brody Mining LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). An operator is negligent if it should have known that its actions (or failure to act) would cause a violation. *Id.* at 1704. Considerations regarding negligence include "the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue." *A. H. Smith Stone Co.*, 5 FMSHRC at 15.

The operator may be charged with varying degrees or levels of negligence, which becomes an important consideration during the penalty assessment. The Commission has described that ordinary negligence may be characterized by "inadvertent," "thoughtless," or "inattentive" conduct. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). A finding of high negligence, however, "suggests an aggravated lack of care that is more than ordinary negligence." *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998); *E. Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991). In particular, the Commission has held that an operator's intentional violation constitutes high negligence for penalty purposes. *Consolidation Coal Co.*, 14 FMSHRC 956, 969-70 (June 1992). Also, actual knowledge of violative conditions and the failure to act in light of that knowledge amount to high negligence. *Deshetty, employed by Island Creek Coal Co.*, 16 FMSHRC 1046, 1053 (May 1994). Moreover, mine management is held to a higher standard of care because they are tasked with the safety of their miners and must also set an example for miners under their direction. *Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997); *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987).[6]

Negligence is defined in Part 100 as "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d).[7] MSHA's Part 100 also takes into account mitigation, stating that "MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices." *Id.* Accordingly, reckless negligence is present if "[t]he operator displayed conduct which exhibits the absence of the slightest degree of care." *Id.* High negligence is when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating

---

civil penalty, the concepts are distinct and subject to separate analysis. *See Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1122 (Aug. 1985).

[6] There is an exception to this principle that applies in limited circumstances. The Commission has held that where an operator takes reasonable steps to prevent accidents and the "erring supervisor unforeseeably exposes only himself to risk," a finding of no negligence will be upheld, but if an operator was blameworthy in respect to hiring, training, safety procedures or the accident itself, there may be a negligence finding. *NACCO Mining Co.*, 3 FMSHRC 848, 850-51 (Apr. 1981). Notably, the Commission has never applied the *NACCO* exception to preclude a finding of unwarrantable failure or to mitigate the civil penalty assessment for an unwarrantable failure violation.

[7] "A mine operator is required [. . .] to take steps necessary to correct or prevent hazardous conditions or practices." 30 C.F.R. § 100.3(d).

circumstances." *Id.* Moderate negligence is properly attributed to the operator if "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* Low negligence is appropriate when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* No negligence is appropriate if "[t]he operator exercised diligence and could not have known of the violative condition or practice." *Id.* MSHA's definitions of negligence and corresponding degrees in part 100 are not binding on Commission judges but are helpful in evaluating culpability. *Brody Mining*, 37 FMSHRC at 1701-03 (holding that Commission judges are not bound to apply MSHA's negligence definitions in 30 C.F.R. Part 100).

Mitigation becomes an important consideration when analyzing the level of negligence attributable to the operator. Essentially, mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions. While mitigation is an important consideration, an ALJ is not constrained to an evaluation of "mitigating" circumstances but is charged to consider the "totality of the circumstances holistically." *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citing *Brody Mining*, 37 FMSHRC at 1702).

C. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), is most often viewed in terms of the seriousness of the violation. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). The seriousness of a violation can be evaluated by comparing the violated standard and the operator's conduct with respect to that standard in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ). The Commission has recognized that the determination of the likelihood of injury should be made assuming continued normal mining operations without abatement of the violation. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

However, the gravity of a violation and its S&S nature are not the same. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). The gravity analysis can include the likelihood of an injury but should focus more on the potential severity of an injury and the number of miners potentially injured. The analysis should not equate gravity, which is an element that must be assessed in every citation or order, with "significant and substantial," which is only relevant in the context of enhanced enforcement under Section 104(d). *See Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (Sept. 1987).

D. Significant and Substantial

A violation is S&S "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a

reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135-36 (7th Cir. 1995) (affirming ALJ's application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission has recently explained that in analyzing the second *Mathies* element, Commission Judges must determine "whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016). In evaluating the third *Mathies* element, the Commission assumes the hazard identified in the second *Mathies* element has been realized and determines whether that hazard is reasonably likely to cause injury. *Id.* at 2045 (citing *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 161-62 (4th Cir. 2016); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal*, 52 F.3d at 135).

The Commission has further found that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010) (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). The Commission has also specified that evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining*, 7 FMSHRC at 1130 (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)). Finally, it is well settled that redundant safety measures are not to be considered in determining whether a violation is S&S. *Knox Creek Coal*, 811 F.3d at 162; *Cumberland Coal Res., LP*, 717 F.3d 1020, 1029 (D.C. Cir. 2013); *Buck Creek Coal*, 52 F.3d at 136; *Brody Mining*, 37 FMSHRC at 1691; *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2369 (Oct. 2011).

E. Penalty

A mine operator is subject to a civil penalty for a violation of a standard promulgated by MSHA at its mine. 30 U.S.C. § 820. The purpose of imposing penalties is to provide a "strong incentive for compliance with the mandatory health and safety standards." *Nat'l Indep. Coal Operators' Ass'n v. Kleppe*, 423 U.S. 388, 401 (1976).

Congress' purpose in enacting the penalty component of the Act was to create deterrence, stating, "[t]o be successful in the objective of including [sic] effective and meaningful compliance, a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance." S. Rep. No. 95-181, at 90 (1977).

Part 100 establishes two types of proposed penalties: (1) regular formula assessments and (2) special assessments. The Secretary is seeking regular formula assessments for all of the

citations in these two dockets. Regular formula assessments are governed by 30 C.F.R. § 100.3. Pursuant to this section, the Secretary assigns a point value for each of the six criteria based on the designations associated with the particular violation. The points are then added together and the penalty is proposed based on the point total according to the point table contained in section 100.3. When this procedure for assessment is used, the operator is provided an "Exhibit A," which lists the points for each criterion and shows how the proposed penalty was calculated.

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess said penalty. 29 C.F.R. § 2700.28.

Under section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and, (6) the demonstrated good faith in abatement of the violative condition. 30 U.S.C. § 820(i). Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co.*, 736 F.2d at 1151-52 ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties [. . .] we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."); *see also Am. Coal Co.*, 35 FMSHRC 1774, 1819 (June 2013) (ALJ).

The Commission has repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g.*, *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000) (citations omitted); *Sellersburg Stone Co.*, 5 FMSHRC at 293. A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 621.

F. Regulatory Interpretation and Fair Notice[8]

Where the language of a regulatory provision is clear, the provision must be enforced as written unless the regulator clearly intended the words to have a different meaning or enforcement would produce absurd results. *Hecla Ltd.*, 38 FMSHRC 2117, 2122 (Aug. 2016); *Austin Powder Co.*, 29 FMSHRC 909, 913 (Nov. 2007); *see Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984) ("Under settled principles of statutory and rule construction, a court may defer to administrative interpretations of a statute or regulation only when the plain meaning of the rule itself is doubtful or ambiguous.").

[8] Much of this section is "borrowed" nearly intact from Judge McCarthy's excellent summary in *Cemex Southeast, LLC*, 38 FMSHRC 2806, 2814-16 (Nov. 2016) (ALJ).

To the extent a regulation is silent or ambiguous on a particular point, the Commission follows the doctrine of deference established in *Bowles v. Seminole Rock and Sand Company*, 325 U.S. 410 (1945), and reaffirmed in *Auer v. Robbins*, 519 U.S. 452 (1997). *See, e.g.*, *Hecla*, 38 FMSHRC at 2122; *Tilden Mining Co.*, 36 FMSHRC 1965, 1967 (Aug. 2014), *aff'd*, 832 F.3d 317 (D.C. Cir. 2016). Under this doctrine, the promulgating agency's interpretation of the regulation is entitled to full deference (referred to as *Auer* deference) unless the interpretation is unreasonable, plainly erroneous, or inconsistent with the regulation, or there is reason to suspect it does not reflect the agency's fair and considered judgment on the matter. *See, e.g.*, *Drilling & Blasting Sys., Inc.*, 38 FMSHRC 190, 194-97 (Feb. 2016) (declining to defer to plainly erroneous interpretation); *Hecla*, 38 FMSHRC at 2122-25 (deferring to reasonable interpretation); *Tilden Mining*, 36 FMSHRC at 1967-68 (same); *Twentymile Coal Co.*, 36 FMSHRC 2009, 2012-13 (Aug. 2014) (declining to defer to unreasonable interpretation).

If there is reason to suspect that an agency's interpretation does not reflect its fair and considered judgment, the interpretation is not entitled to full *Auer* deference but is still entitled to a measure of deference proportional to the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012) (citing *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) and *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

In evaluating the merits of a proposed regulatory interpretation, the Commission has considered factors such as whether the interpretation is consistent with the language and ordinary usage of the cited standard, whether it harmonizes with the purpose and structure of the regulations, and whether it furthers the policy goals of the Mine Act, particularly the Act's safety-promoting purposes. *See, e.g.*, *Hecla*, 38 FMSHRC at 2122-25 (analyzing the language of the regulation, the regulation's specific purpose, and the general policy goals of the Mine Act, particularly the goal of promoting safety); *Natty & Hamilton Enters.*, 38 FMSHRC 1644, 1648-51 (July 2016) (adopting an interpretation that was consistent with the language of the regulation, as determined by reliance on dictionary definitions and prior case law that harmonized with the regulatory scheme and furthered the goals of the Mine Act); *Twentymile*, 36 FMSHRC at 2012-13 (rejecting an interpretation that was not suggested by the language of the standard or its regulatory history and that did not advance mine safety); *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1681-82, 1685-86 (Dec. 2010) (analyzing one ambiguous term with reference to the broader regulatory context, including analogous regulations, and adhering to another ambiguous term's customary technical usage, as demonstrated by a mining dictionary and the testimony of knowledgeable witnesses); *Daanen & Janssen, Inc.*, 20 FMSHRC 189, 193-94 (Mar. 1998) (analyzing regulatory language with reference to ordinary dictionary meanings, the Mine Act's safety-promoting goals, the PPM, the Secretary's past application of the regulation, and the regulatory structure); *Island Creek Coal Co.*, 20 FMSHRC 14, 19-24 (Jan. 1998) (evaluating the ordinary meaning of the regulatory language, "contextual indications," including the meaning of similar language in other regulations, and the Mine Act's purposes).

Even if an agency's interpretation of a regulation is reasonable, fundamental due process considerations preclude adoption of that interpretation without fair notice. *See Hecla*, 38 FMSHRC at 2125; *Am. Coal Co.*, 38 FMSHRC 2062, 2075 (Aug. 2016); *Energy W. Mining Co.*,

17 FMSHRC 1313, 1317-18 (Aug. 1995). In Mine Act proceedings, this means that before the Secretary can penalize a mine operator for a violation of a safety standard, the operator must be placed on notice of what conduct the standard forbids or requires such that it has an opportunity to act accordingly. *See Hecla*, 38 FMSHRC at 2125 ("To comport with due process, laws must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'") (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)); *Energy W.*, 17 FMSHRC at 1318 (same); *Mathies Coal Co.*, 5 FMSHRC 300, 303 (Mar. 1983) ("[E]ven a broad standard cannot be applied in a manner that fails to inform a reasonably prudent person that the condition or conduct at issue was prohibited by the standard.").

To resolve issues of notice, the Commission applies an objective standard, the "reasonably prudent person" test. *Hecla*, 38 FMSHRC at 2125; *Sunbelt Rentals, Inc.*, 38 FMSHRC 1619, 1627 (July 2016); *Energy W.*, 17 FMSHRC at 1318. The test is "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). In determining whether a party had adequate notice of regulatory requirements, a wide variety of factors may be relevant to the inquiry, including the text of the regulation, its placement in the overall regulatory scheme, its regulatory history and purpose, the consistency of the agency's enforcement, whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation, and whether the operator would have been aware of the requirement of the standard because of past case precedent. *See Sunbelt Rentals*, 38 FMSHRC at 1627; *Wolf Run Mining*, 32 FMSHRC at 1682; *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694-95 (July 2002); *Island Creek Coal*, 20 FMSHRC at 25.

V. OTHER PRELIMINARY CONSIDERATIONS

A. The Housekeeping Violations

1. The Meaning of "At All Mining Operations"

The Respondent makes an umbrella argument directed at all housekeeping citations issued in these two dockets: "The language 'at all mining operations' has substantive meaning, and restricts application of the standard to areas of the mine where actual 'mining operations' take place." (Resp't Br. 43)

Respondent argues that prior Courts have failed to appreciate the significant limitation that the clause "At all mining operations" creates in the housekeeping standard, 30 C.F.R. § 56.20003(a). (*Id.*) Respondent argues that, consistent with earlier regulation covering housekeeping, the clause actually limits MSHA to citing this standard "in" and "around" the pit where mining occurs. (*Id.*) As all of the citations in these dockets occurred outside of "mining operations," by Respondent's definition, they all must be vacated. (*Id.*)

Respondent attempts to misdirect by claiming to raise an issue of first impression and by kludging together an argument based on an apparent language change in a section of the Congressional Record. The language change, which is unexplained in the Congressional Record, seems to shift the focus of the housekeeping standard from areas "in and around the mine and

plants" to only "in and around the mine." Another way Respondent expresses it is that the change in the language signifies an intended change in the focus of the standard, one that excludes any areas not considered engaged in a "mining" activity as opposed to milling or anything arguably not "mining." (*Id.* at 43-44)

I reject this argument. First, the case cited in support of the change simply does not say what Respondent claims it says. Respondent cites to *Madison Granite Company*, 1 FMSHRC 1906 (Nov. 1979) (ALJ), as "recognizing that the phrase 'in and around the mine' restricted coverage to the mine itself and did not cover a crusher, which was not in the mine pit itself." (Resp't Br. 44) In *Madison Granite*, the inspector issued a citation after observing a crusher operator not wearing his hard hat in the crusher area. 1 FMSHRC at 1911. The cited standard was 30 C.F.R. § 55.15-2, which read, "[a]ll persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard." *Id.* The ALJ in that case vacated the citation after concluding that MSHA had not shown by a preponderance of the evidence that "the employee was in an area where falling objects may create a hazard." *Id.* at 1912. Nowhere in that decision did the Judge state or imply what Respondent claims: that the crusher was not "in and around the mine." Respondent's interpretation of this case is either misdirection or an error in research and drafting.

Second, the changed language seems more likely to be an attempt to conform the new statement of the standard to the interpretation given to the term "mining" as stated in the definitional section of the Act and which is used routinely in determining MSHA's jurisdictional reach. In other words, the change in language reflects an understanding that "mining" is defined in the Act to include ancillary functions, such as milling. Contrary to Respondent's argument, it is meant to clear up any interpretation that would limit the standard to only "mining" areas. What is intended is clarification that the focus of the standard is on functions and not areas. Any function that is covered by the definition of "mining" in the Act is covered by the housekeeping standard. It is an error to focus on physical areas and to argue that because a violation is found in an area that is not considered a place where the act of mining is done, e.g., a plant or other workplace, it is not covered by the housekeeping standard. The proper interpretation is to look to whether the violation occurred as part of an activity that falls within the Act's definition of "mining." Inasmuch as the functions performed at the Respondent's Ripley facility fall under a proper interpretation of "mining," a housekeeping violation occurring during the performance of such a "mining" function is covered, irrespective of the area where it is carried out.

2. The March 18, 2015 Housekeeping Violations are Not Duplicative

Prior to the hearing, Respondent filed a motion for summary decision asking the court to rule that the six housekeeping citations in SE 2015-0285 were duplicative and should be subsumed under a single violation.[9] The motion was denied on February 22, 2016.

At and after the hearing, Respondent again argued that the six housekeeping citations in SE 2015-0285 should be collapsed into a single citation because they were written by Inspector LaRue in a two-hour period during his inspection on March 18, 2015, in an area loosely referred

[9] Citation Nos. 8820563, 8820564, 8820565, 8820567, 8820568, and 8820569.

to as the "mill plant area." (Resp't Br. 45) Respondent contended that the cited areas were not distinct enough to warrant separate violations, and that the inspector could not increase the negligence level of later-cited violations of the standard based on his decision to write multiple citations. (*Id.* at 45-47) I reject Respondent's multiple violation argument again.

In its briefing, Respondent identified only two distinct areas at the Ripley mine site: the "mill plant area" and the "pit area." (*Id.* at 38, *citing* Tr.346:4-6) It argued that the entire area covered by LaRue's housekeeping citations should be taken as a single location because it was the work area of a single miner per shift (*Id.*, *citing* Tr.398:15-23; 399:7-10) and was covered by a single workplace inspection. (*Id.*, *citing* Tr.402:7-9) In essence, Respondent argued that because it considered the mill plant area a discrete work area, LaRue should have known and recognized this operational characteristic and limited his housekeeping enforcement accordingly. In the context of this case, this view is too opportunistic and arbitrary to be convincing. How LaRue approached this enforcement is more relevant than Respondent's operational definition.

Inspector LaRue testified that the source of the clay accumulations described in his housekeeping violations was from significant equipment leakage (Tr.236:5-16), and he did not believe he had the authority to "force [ODPC] to [. . .] plug [the] holes." (Tr.257:4-6) Instead, he cited the plant for housekeeping violations. He issued separate citations because the violating areas were either geographically separate, e.g., part of a different building, or were in the vicinity of a separate piece of equipment, although in the same building. (Tr.228:22-229:16) He also understood that MSHA's directives only justified combining separate violations into a single citation when they were associated with a single piece of machinery. (Tr.229:9-11)

According to Inspector LaRue, the six housekeeping citations he wrote were in separate locations. (Tr.260:6-262:1) Citation Nos. 8820563 and 8820564 (Exhibits S–2 and S–3) describe conditions in separate buildings (Tr.212:2-12), and Citation Nos. 8820564 and 8820565 describe conditions in areas about 150–200 feet apart. (Tr.218:7-11) LaRue was not able to see the other cited areas from the location of Citation No. 8820567 (Tr.228:22-229:11) or Citation No. 8820568. (Tr.241:21-242:11) Citation No. 8820569 was at the ground floor level underneath the mill buildings. (Tr.248:8-10) He opted against writing all the housekeeping violations as one citation because, to him, they happened in different areas of the plant. (Tr.261:2-262:1)[10]

The authority Respondent relies on to support its argument that LaRue's housekeeping citations should be compressed into a single event is inapposite. That case, *Western Fuels-Utah, Inc.*, 19 FMSHRC 994 (June 1997), applies to a single violating condition that could have been cited under more than one standard. The Commission stated:

> [O]ur determination that the two citations are duplicative is not based on our premise that every violation of 15(d) is also a

[10] The remaining housekeeping violation, Citation No. 8818319 (SE 2015-0418), was written by Inspector Howerton on June 22, 2015, during an E01 regular inspection of the Ripley Mine. Howerton observed pallets of equipment and maintenance debris covering the floor of the Old Clay Shed. (Tr.55:12-24; Ex. S–17) Respondent does not contend that this citation should be grouped with the others.

> violation of 14(a). Our inquiry does not stop there. Rather, we ask whether MSHA is citing the operator on the basis of more than one specific act or omission. Had MSHA put on evidence of additional deficiencies that violated the general regulation, instead of relying on the identical evidence (lack of sufficient reservoirs) used to support the violation of the specific standard, we would not have found them duplicative.

Id. at 1004 n.12.

Western Fuels does not apply to the facts of this case. Here, instead of there being two citations under different standards for the same violating condition, there are multiple citations under the same standard for different violating conditions. Moreover, there is differing evidence relating to the location and nature of the accumulated material instead of identical evidence supporting more than one citation.

Port Costa Materials, Inc., 16 FMSHRC 1516 (July 1994) (ALJ), also cited by Respondent in support of its single citation argument, pays respect to the guidance regarding multiple violations found in Section 104(a) of the Mine Act:

> [W]here there are multiple violations of the same standard which are observed in the course of an inspection and which are all related to the same piece of equipment or to the same area of the mine, such multiple violations should be treated as one violation, and one citation should be issued.

Id. at 1518 (emphasis added).

The judge in *Port Costa* found value in the citation "grouping" done by the Secretary, which he considered a valid exercise of prosecutorial discretion. *Id.* at 1519. His focus in resolving the grouping issue was whether multiple violations could be abated by a single remediation. *Id.* at 1520. Aside from being only advisory for this court, this is merely an ad hoc means of referencing the need to pay attention to the provision in Section 110(a) of the Mine Act that "[e]ach occurrence of a violation of a mandatory health or safety standard may constitute a separate offense." 30 U.S.C. § 820(a); *see also Tazco, Inc.*, 3 FMSHRC 1895, 1897 (Aug. 1981); *Spurlock Mining Co.*, 16 FMSHRC 697, 699 (Apr. 1994). It does not require nor convince me to adopt a "single abatement" test.

The single abatement approach suffers from the same conceptual confusion as Respondent's contention here. Respondent argues that because it defined the work area at the Ripley facility as a single location—despite its size, its layout, and the fact that it housed multiple milling functions—any number or nature of violations found in that arbitrarily designated area should be considered a single event. It is an extension of this notion to consider the abatement of any number of separate violations in an arbitrarily-defined area as a single event since it occurs in a "single location." This approach may fit certain fact patterns, but it is not a principled way to approach the issue. It is too facile to be of more than occasional use. When the facts of a case lend themselves to the "single abatement" approach, it appears to be

useful. But, when, as in this case, the single abatement approach depends on the operator's self-serving definition of what constitutes a working area, it is of little analytical use. Whether multiple violations can be abated in a single pass can be a factor to consider but is not dispositive.

MSHA's obligation to write a separate citation or order for each distinct violating condition found during an inspection originates from 30 U.S.C. § 820 (a)(1): "Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offence." The use of the word "may" allows for some discretion on the part of the issuing inspector, as was discussed in *Port Costa* above. However, *Port Costa* is not enough to convince me that abatement efforts are the best criterion on which to base a decision whether a group of citations should be deemed duplicative. Additional guidance comes from MSHA's Program Policy Manual ("PPM"), which deals with an inspector's discretion and provides guidance as to when related violations may be combined into a single citation. Abatement is but one factor, in addition to those illustrated in the PPM, that an MSHA inspector can use to guide him- or herself in issuing grouped or individual citations. Ultimately, the decision whether to issue individual citations for multiple violations of the same standard is within the ambit of the inspector's discretion. As for situations whose fact scenarios deviate from those illustrated in the PPM, the inspector's discretion carries much weight.

Making the operator's definition of what constitutes a separate "area" of a mine the decisive factor in determining whether an individual or grouped citation should be issued, as Respondent urges, shifts too much weight to the operator's side of things and away from the Mine Act's mandate that the Secretary's designated inspectors must make that call. As a result, the authority cited in support of Respondent's single-location/single-event argument is not persuasive.

As before, I reject Respondent's contention that LaRue's housekeeping citations are duplicative. There is sufficient difference in the location of each violation and in the impact of the material accumulations on discrete equipment, work areas, walkways, and facilities to support LaRue's decision to cite each discrete condition as a separate violation.

B. Universal Penalty Adjustment

Inspector LaRue referenced Respondent's previous housekeeping violations on March 18, 2015, as one of the reasons he ascribed "high negligence" to Citation Nos. 8820568 and 8820569. (Tr.243:21-244:10; 255:12-13) Respondent argues that this resulted in an impermissible "pyramiding" of penalties. (Resp't Br. 47) Respondent incorrectly conflates "repeat" assessments and enhancement of negligence for Citation Nos. 8820568 and 8820569 in its argument when it accused LaRue of using the prior citations from the same inspection "to enhance the 'repeat' assessment." (*Id.*) Exhibit A of the petition for the assessment of civil penalty for Docket No. SE 2015-0285 shows that no penalty points were given for repeat assessments ("RPID") for Citation Nos. 8820563, 8820564, 8820565, 8820567, 8820568, and 8820569. Additionally, although LaRue mentioned the housekeeping violations he cited earlier in the day, as discussed fully in the sections below, they were just one of a confluence of factors

he used to justify the increase of negligence from moderate to high for Citation Nos. 8820568 and 8820569. (Tr.243:21-245:9; 255:10-257:12)

While I do not find any problems with Inspector LaRue's negligence determinations or the RPID score, I do note that the Violations Per Inspection Day ("VPID") calculation on March 18, 2015, was noticeably and significantly high, which may have factored into Respondent's claim that penalties for the housekeeping violations were "pyramided."

The VPID is calculated by first dividing the number of violations that have been paid, finally adjudicated, or have become final orders during the Violation History Period[11] by the number of inspection days.[12] Once that number is calculated, it is applied to Table VI of 30 C.F.R. § 100.3(c)(1) and converted into a penalty point scale ranging from 0 to 25.

Here, the VPID on March 18, 2015, was 2.14, resulting in a maximum 25 points. *See History of Previous Violations; Violations Per Inspection Day (VPID); Repeat Violations Per Inspection Day (RPID) for Oil Dri Production Company Mine ID 2200035*, MSHA (last visited Oct. 2, 2017), https://arlweb.msha.gov/drs/ASP/MineInspectionDay.asp [hereinafter *Oil Dri VPID Scores*]. This score differed significantly from the VPID of either of the days immediately surrounding it: The VPID on March 17 was 1.43 (14 points); the VPID on March 19 was 1.67 (16 points). *Id.* This is not an immaterial consideration. With a VPID of 25 points, the six housekeeping citations issued on March 18, 2015, resulted in a proposed penalty of $12,772.00, after good faith discounts. By contrast, applying the VPID score on March 17, 2015, only a day earlier, would have amounted to penalties totaling $5,292.00, after good faith discounts.

The reason for this discrepancy has to do with the timing of a series of five final orders[13] that were added to the violation history table on March 17, 2015, the day immediately preceding the March 18th inspection. *Mine Citations, Orders, and Safeguards for Mine ID: 2200035*, MSHA (last visited Oct. 2, 2017), https://arlweb.msha.gov/drs/ASP/MineAction.asp. Although all five of the newly added orders were issued ten months earlier in May 2014 and terminated in May/June 2014, the fact that they became final for history calculation purposes on March 17, 2015, affected the March 18th VPID calculations. *Id.* They caused the VPID ratio numerator to increase from 10 to 15 violations. Had Inspector LaRue conducted the very same inspection one day earlier, on March 17, the VPID would have been 1.43 (14 points). Instead, because the inspection took place on March 18, the VPID changed, due to circumstances outside the control of the mine operator, and resulted in a 141% increase in the penalty.

---

[11] The "Violation History Period" covers the preceding 15 months. 30 C.F.R. § 100.3(c).

[12] "Inspection Days" are calculated by dividing the total MSHA on-site inspection hours for Authorized Representatives of the Secretary for certain types of inspection activities by five. *History of Previous Violations: Violations Per Inspection Day (VPID); Repeat Violations Per Inspection Day (RPID)*, MSHA (last visited Oct. 2, 2017), https://arlweb.msha.gov/drs/ASP/MineAction.asp. Any remainder amount increases the number of inspection days by one. *Id.*

[13] Citation Nos. 8810931, 8810927, 8810929, 8810934, and 8810928.

The following day, March 19, 2015, the VPID dropped to 16 points. *See Oil Dri VPID Scores*. This happened because Inspector LaRue's March 18, 2015, inspection, although only one day earlier in real time, accounted for two inspection days under the formula. As such, although the numerator for the VPID calculation on March 19 was the same as that on March 18 (i.e., 15 violations), the denominator (i.e., nine inspection days) was larger, resulting in a lower VPID score of 1.67.

These conditions created a "perfect storm" scenario for a short-lived spike in the VPID on March 18, 2015. While the MSHA formula for calculating the VPID is generally fair and equitable, the process cannot be deemed fair in the rare instance where the mere order of operations or the random timing of an investigation—issues completely outside the control of the mine operator—yields vastly different results.

For these reasons, I find that the VPID algorithm on March 18, 2015, resulted in an unpredictable and unfair outcome. Accordingly, I hold that a lower VPID of 15 penalty points—a figure between March 17th's 14 points and March 19th's 16 points—is more appropriate and shall be applied to the six housekeeping citations issued on March 18, 2015.

VI. THE CITATIONS

A. Citation No. 8818319 – Old Clay Shed

Docket No. SE 2015-0418

Exhibit S–17 (Tr.50:25-51:23)

The Secretary alleges that Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the ground floor at the Old Clay Shed clean and orderly. The standard requires that all mining operation workplaces, passageways, storerooms, and service rooms be kept clean and orderly.

1. Violation

Inspector Howerton issued housekeeping Citation No. 8818319 during his June 22, 2015 E01 inspection. (Ex. S–17) He documented pallets of maintenance and production equipment and debris covering the floor of the old clay shed, which was being used for maintenance storage at the time. (Tr.54:8-15; Ex. S–17) He concluded that floor obstructions blocked access to shelves used to store parts and created a slip–trip–fall hazard for anyone using the area.[14] (Tr.56:3-6) The supporting photos taken by Howerton at the time of the inspection (Ex. S–17, at 4-6) show the extent of the disarray in the building and support his assessment that there were hazards. This is particularly salient in comparison with the post-abatement photo, which shows the area in an obviously cleaned and orderly condition. (Ex. S–17, at 7; Tr.62:1-20)

[14] Howerton noted that this area was a "limited use area" that was "only used to store spare parts." (Ex. S–17, at 3) However, he concluded that it was used regularly as a workplace and a storage area. (Tr.53:12-54:3)

Respondent offered the following explanation why the old clay shed area was in such disarray and why it should not be considered a working area: (1) The materials located in this area were obtained from a closed plant in Florida and were being kept in this area until it could be decided what was worth salvaging (Resp't Br. 42, *citing* Tr.60:18-19; 171:14-172:2); (2) the decision could not be made because the maintenance supervisor position was unfilled (*Id.*, *citing* Tr.61:14-25); (3) the only "storeroom" operated at the Ripley mine and mill was overseen by Delaney and was not in this area (*Id.*, *citing* Tr.170:19-171:7); (4) if this area were ever accessed, a miner must use a forklift (*Id.*, *citing* Tr.174:18-175:8); and, (5) before someone actually worked in the area to sort through the salvaged materials, they would conduct a safety inspection and "make the scene safe before they would start working." (*Id.* at 42-43, *citing* Tr.176:1-13)

The old clay shed is a large building (Tr.100:1-22; 169:19-25; Ex. R–1), which Respondent approximates at 16,000 square feet. (Resp't Br. 42) Exhibit S–17, page 5 shows storage racks approximately 80 to 100 feet long where maintenance items were stored. Howerton considered this area a working area because of the need to go there to obtain items used in normal milling operations. (Tr.53:12-54:3) Howerton also considered it a storeroom because there were stored maintenance items there. (Tr.54:8-15)

According to Howerton, miners had to walk over (Tr.56:7-13) or drive a forklift around pallets to access the dry goods, super sacks,[15] and maintenance items stored in the shed. (Tr.53:20-25; 54:19-56:16; 59:1-16; Ex. S–17, at 4-6) Howerton concluded that miners could not get to the racks without walking on and over items strewn on the floor (Tr.55:16-24), which subjected them to a slip–trip–fall hazard. (Tr.55:25-56:6; 59:24-60:15)

I find Howerton's rationale for considering this area a working area and storeroom more convincing than the Respondent's explanation why it was not. I conclude that the old clay shed was a working area and storeroom, and the disarray described in the violation narrative and shown in the photos in Exhibit S–17 constitutes a violation of 30 C.F.R. § 56.20003(a).

2. Gravity

Howerton designated the gravity of this violation as "unlikely" because miners accessed the area infrequently. (Tr.60:16-25; Ex. S–17, at 1, 3) Howerton did not see anybody working in this area at the time. (Tr.60:21-25; 100:6-7) He believed that the most likely injury would be an ankle or limb sprain injury, which would involve lost workdays or restricted duty (Tr.61:1-5), and that only one person would be involved. (Tr.61:6-13) I concur and conclude that an injury was unlikely to occur, could reasonably be expected to result in lost workdays or restricted duty, and was limited to only one person.

3. Negligence

Howerton rated the negligence at "moderate" because only maintenance personnel went into the building and the mine was operating one maintenance supervisor short at the time.

---

[15] A "super sack" is a large capacity plastic bulk storage bag. *Flexible Intermediate Bulk Container*, WIKIPEDIA (last visited Oct. 3, 2017), https://en.wikipedia.org/wiki/Flexible_intermediate_bulk_container.

(Tr.61:14-21) If the staffing level had been at the normal count, Howerton would have assessed the negligence at "high" since the condition was obvious. (Tr.61:21-25) I concur and conclude that "moderate" is the appropriate negligence designation for this violation.

4. Penalty

The Secretary proposed a penalty of $100.00 for this violation. I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected, the negligence points, the likelihood points, and the good faith point reductions. Based on my gravity and negligence findings, and considering but not relying on the point calculation in 30 C.F.R. § 100.3, the Secretary's proposed penalty of $100.00 is supported and reasonable. I assess a penalty in that amount.

B. Citation No. 8818320 – Flatbed Truck (#456)

Docket No. SE 2015-0418

Exhibit S–18 (Tr.62:21-63:16)

The Secretary alleges that Respondent violated 30 C.F.R. § 56.15005 when a contract driver failed to use safety belts and lines while attempting to tarp his flatbed truck where there was a danger of falling. The standard requires that safety belts and lines be worn when persons work where there is a danger of falling.

1. Violation

On June 23, 2015, Inspector Howerton observed a contract driver of a flatbed truck standing on his loaded trailer without fall protection. (Tr.64:1-65:5) Howerton testified that the driver was standing on an irregular surface and could have slipped while attempting to pull a tarp over the load. (Tr.70:22-25) Howerton estimated that, had he slipped, the driver would have fallen over ten feet to the ground from the position he was standing in. (Tr.71:9-16) Gibens was with Howerton at this time and also observed the contract driver. (Tr.63:22-64:5) Upon seeing the driver standing on the loaded truck without fall protection, Gibens immediately ran towards the driver and told him to get down off of the truck. (Tr.64:6-7) Howerton testified that Gibens rushed over to the truck driver to request that he get down from the truck "quicker than [Howerton] did." (Tr.64:13-14) During an interview with the driver of the truck, it was confirmed that he was not an ODPC employee and did not work at the mine. (Tr.65:6-23; 65:21-23) Howerton confirmed through plant records that the driver had been given appropriate site-specific training, as well as express instructions about how he could safely tarp his truck using company-provided fall protection. (Tr.85:16-21; 120:21-24) This was corroborated by the driver himself upon questioning by Gibens. (Tr.65:14; 182:9-20) Written material provided to the truck driver stated that the plant expressly prohibited tarping without use of such fall

protection. (Ex. R-3, at 2) Additionally, the available fall protection gear was operational and clearly visible to truckers entering or exiting the facility. (Tr.72:5-14; 123:19-124:24; 125:2-10)

Respondent does not dispute Howerton's account that the flatbed truck driver was standing on his loaded trailer without tie-off protection. It states in its brief that there are no significant credibility determinations required as Howerton and Gibens both testified consistently concerning the key aspects of the event in question. (Resp't Br. 23) Instead, Respondent argues that the citation should be vacated because the safety belts and lines standard cited does not apply here. (*Id.*) First, Respondent argues the truck driver was not a "miner," citing to the definition of "miner" found in 30 C.F.R. § 46.2(g)(2), which explicitly excludes commercial over-the-road truck drivers. (Resp't Br. 28) Respondent also cites to the 2012 and 2014 Safety Belts and Lines Program Policy Letters ("PPL"), which both state that the purpose is to "enhance consistency and protection of miners" and that the provisions are in place "to protect miners from fall hazards." (*Id.* at 29-31, *citing* Exs. R-19, 20) (emphasis in original) Respondent argues that such language "exclude[s] coverage of the Standard to non-miners and those doing tasks outside of normal mining activities." (Resp't Br. 31) (emphasis in original) While examining the PPL at hearing, Howerton maintained that section 56.15005 deals with any personnel that come onto mining property, which includes anybody working on the mine site. (Tr.109:3-15) The Secretary did not brief any of these issues.

I am unpersuaded by Respondent's arguments. First, Respondent attempts to misdirect by citing to the definition of a "miner" used in section 46, which sets forth training and retraining requirements of miners and other persons at shell dredging, sand, gravel, surface stone, surface clay, colloidal phosphate, and surface limestone mines. 30 C.F.R. § 46.1. Here, however, the cited standard was under part 56 subpart N – Personal Protection. 30 C.F.R. § 56.15005. Part 56's purpose and scope section states in part, "[t]he purpose of these standards is the protection of life, the promotion of health and safety, and the prevention of accidents." 30 C.F.R. § 56.1. There is no indication that the part 56 standards only concern the protection of miners' lives or miners' health and safety. Likewise, the definition section in part 56 does not define "miner," nor does it contain any exclusion for commercial over-the-road truck drivers similar to that cited by Respondent. *See* 30 C.F.R. § 56.2.

Second, the Commission has long held that enforcement guidelines, such as PPM or PPL, are not binding on the Secretary or the Commission. *See Warrior Coal, LLC*, 38 FMSHRC 913, 921 (May 2016) ("we note that it is well established that policy manuals are not officially promulgated and do not prescribe rules of law that are binding on the Commission or its Judges."); *D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (Sept. 1996) ("As the judge correctly pointed out, the Enforcement Guidelines and the PPM are not binding on the Secretary or the Commission."); *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981), *citing Old Ben Coal Co.*, 2 FMSHRC 2806, 2809 (Oct. 1980) ("[T]he Manual's 'instructions are not officially promulgated and do not prescribe rules of law binding upon [this Commission].'") Where there is a discrepancy between a regulation and an interpretative document, the "express language of a statute or regulation 'unquestionably controls' over material like a field manual." *King Knob Coal Co.*, 3 FMSHRC at 1420, *citing H.B. Zachry Co. v. OSHRC*, 638 F.2d 812, 817 (5th Cir. 1981). While it is true that these PPLs use the word "miners," the plain language of the regulation states that "persons," not "miners," are to wear safety belts and lines when they work

where there is a danger of falling. In addition to the part 56 purpose and scope section discussed above, I note that the other sections of subpart N also explicitly refer to "persons." For example, section 56.15002 states that "[a]ll persons shall wear suitable hard hats [. . .]." 30 C.F.R. § 56.15002 (emphasis added). Section 56.15003 states that "[a]ll persons shall wear suitable protective footwear [. . .]." 30 C.F.R. § 56.15003 (emphasis added). Section 56.15004 states that "[a]ll persons shall wear safety glasses, goggles, or face shields or other suitable protective devices [. . .]." 30 C.F.R. § 56.15004 (emphasis added). In fact, the word "miner" does not appear anywhere in subpart N. *See* 30 C.F.R. §§ 56.15001-15020. As there is no dispute that the contract driver is a "person," this ends this line of inquiry.

Respondent alternatively argues that the citation should be vacated because MSHA's policy failed to provide fair notice that it was required to provide safety belts and harnesses for non-employees. (Resp't Br. 32-33) Here, the plain language of the regulation is clear: Safety belts and lines shall be worn when persons work where there is danger of falling. 30 C.F.R. § 56.15005. Accordingly, I determine that the operator was provided with adequate notice of its requirements. *See Austin Powder Co.*, 29 FMSHRC at 919 (operator had adequate notice of the regulation because the meaning of the regulation was clear based on its plain language); *Jim Walter Res., Inc.*, 28 FMSHRC 983, 988 n.6 (Dec. 2006) ("Because we conclude that the meaning of the standard is clear from the regulation's plain language, it follows that the standard provided the operator with adequate notice of its requirements.").

Additionally, ODPC's contention that it did not have fair notice that the safety belts and lines regulation applied to over-the-road truckers is at odds with the available evidence. As ODPC described in its brief, it had created an "extensive program to prevent falls at the mine by non-employees such as the over-the-road trucker." (Resp't Br. 24) This included site specific training on fall protection for each new trucker who arrived at the plant (*Id.*, *citing* Tr.183:24-187:3), written instructions provided to each trucker (*Id.*, *citing* Ex. R–3), a large sign that drivers drove by upon entering the plant, which included tarping restrictions (*Id.* at 24-25), and a tarping station with all of the necessary fall protection materials, instructions, and another sign reinforcing the tarping protection requirements. (*Id.* at 25, *citing* Ex. R–4; Tr.72:5-73:8; 122:4-14; 123:19-124:12) It is incongruous to think that ODPC went through such exacting safety standards to ensure that visiting truck drivers were safe from falling only to now argue that it did not have notice that the safety standard actually applied to these very drivers.

I conclude that the contract driver standing on the loaded trailer of his flatbed truck without fall protection constituted a violation of 30 C.F.R. § 56.15005.

2. Gravity and S&S

Howerton designated the gravity of this violation as "Reasonably Likely" because the driver was attempting to pull a tarp over the load while standing on bags of Oil-Dri product, which created an irregular surface. (Tr.70:19-71:1) He believed that this could reasonably result in a slip if the driver lost his balance. (Tr.70:25-71:4) Howerton believed that, in the event of a slip, the driver could face an approximate ten-foot fall from the top of the truck (Tr.71:18-25; Ex. S–18, at 2-3), which could reasonably be expected to result in a permanently disabling injury. (Tr.71:9-16) Such a fall and subsequent injury would affect one person, in this case the contract

driver. (Tr.72:3-4) I concur that the injury was reasonably likely to occur, could reasonably be expected to result in a permanently disabling injury, and was limited to only one person.

I have found an underlying violation of 30 C.F.R. § 56.15005. The driver was not wearing proper fall protection. This contributed to a slip–trip–fall hazard, which I find was reasonably likely to occur given the irregular surface he was standing on. Assuming the occurrence of the hazard, I find a ten-foot fall from the top of the truck would reasonably likely result in an injury. The injury would be of a reasonably serious nature, likely resulting in a permanently disabling injury. Accordingly, I conclude this violation was S&S.

3. Negligence

The Secretary alleges that ODPC exhibited low negligence. In his brief, the Secretary states that "the evidence established that Respondent knew or should have known of the cited condition because the contract driver had just loaded and climbed on top of the truck's load." (Sec'y Br. 56) The sole justification for low negligence cited by the Secretary is a transcript page, which contains a large quote from Howerton:

> But [the driver] was not in that area. [The driver] was in the area where they're loading other trucks and putting it on. And normally I think the procedure is to, you know, to drive around to the area where you're going out the gate around the plant or however they get around to that—that area. But [the driver] wasn't in that area. He was right up close to where they were getting loaded. They were, you know, company guys loading trucks with forklifts and stuff in the area and a couple of maintenance guys over in the corner when we saw it.

(Tr.72:14-25)

However, the Secretary fails to explain exactly how Respondent could have better prevented this incident in his brief. The Secretary does not deny that Respondent had precautions in place. ODPC's precautions included the following: (1) site specific training on fall protection requirements for new truckers (Tr.183:24-187:3); (2) written instructions given to each trucker (Ex. R–3); (3) a tie-off poster (Tr.72:11); and, (4) a tarping station with the necessary fall protection materials, instructions on how to use the fall protection materials, and another sign referring to the fall protection requirements located next to the area where all trucks are weighed upon arrival and departure from the plant. (Ex. R–4; Tr.72:5-25; 122:4-14; 123:19-124:12) Notably, Howerton testified that he did not see any defects in the harness or cable systems (Tr.125:5-7), he did not see any problems with the location of the tarping area (Tr.125:8-10), and even went as far as to say that ODPC did a "fairly good job" on their site specific training. (Tr.125:13-17) Further, Howerton testified that Gibens ran to stop the driver before he did (Tr.125:18-22) and did exactly what he was expected to do in that situation. (Tr.126:14-17)

While the Secretary's brief is conclusory and lacking specifics, I note that Howerton provided three reasons at hearing why he thought ODPC was negligent. First, Howerton testified that the driver was not proficient at English, suggesting that ODPC's safeguards were

insufficient in this case. (Tr.65:12-14; 127:12-15) Second, on cross examination, Howerton stated, "[i]t was also brought to my attention that you have the area around the other side of the building where [the truck driver] should have been told to go [. . .] this is the reason I made [the negligence] low." (Tr.122:9-14) Finally, Howerton justified the low negligence designation because it was a "fairly busy area" with "other trucks in the area" and "[s]omebody should have said something to [the truck driver] before he even got up there." (Tr.127:19-24) For the reasons outlined below, I am not convinced that ODPC exhibited any negligence.

First, the mere fact that the driver's proficiency in English was questionable does not establish whether the truck driver was unaware of the rules or understood the rules but simply chose to disregard them. Further, Gibens testified that the truck driver was able to respond to his questions and was subsequently retrained (Tr.182:12-20), which suggests the driver was at least minimally proficient in English. Given all of the safeguards that were in place at the time, including what appear to be visual instructions (Ex. R–4), I am unconvinced that ODPC would have enough cause to believe that more needed to be done to ensure that this particular driver understood the safety belt rules.

Second, the fact that the truck driver was about to tarp his truck in the wrong area is not automatically attributable to ODPC's negligence. Again, in full consideration of the record before me, there is simply no way to determine whether the truck driver failed to follow the rules because ODPC was negligent, because the driver did not understand, or because the driver disregarded the rules.

Finally, I am not convinced by Howerton's contention that workers in the area could have acted to prevent the driver from standing on his truck. Howerton stated that "company guys" were loading trucks with forklifts in the area (Tr.72:22-25), but he also testified that there was nobody in the immediate area helping the driver. (Tr.126:19-127:2) (emphasis added) Even if I assume that ODPC workers were generally in the area and close enough to see, the Secretary has failed to establish that the driver at issue was standing on his truck long enough for a non-negligent worker to notice. At the time Howerton and Gibens spotted the driver standing on top of the truck, the tarp was still folded up in front of the vehicle (Ex. S–18, at 3; Tr.84:1-3) and the driver had not lifted the tarp up or started to unfurl it. (Tr.128:2-14) A viewing of the credible evidence, particularly the photo taken at the time of the citation, leads me to conclude that the driver had just climbed up on his trailer when Howerton and Gibens spotted him. ODPC would be negligent if workers had seen or had an opportunity to see the driver standing on his truck without the appropriate safety belts and lines and done nothing. That does not appear to be the case here.

Even though attempting to tarp a truck bed while standing on an uneven surface without fall protection certainly was a display of negligent and risky behavior on the part of the driver, the Secretary failed to sufficiently establish that Respondent could have done more to prevent the violation from occurring. The burden is on the Secretary to prove by a preponderance of the evidence all of the claims he brings. He has failed to do so here. For these reasons, I determine that Respondent exhibited no negligence in this instance.

4. Penalty

I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected, the negligence points, the likelihood points, and the good faith point reductions. Based on my gravity and negligence findings, and considering but not relying on the point calculation in 30 C.F.R. § 100.3, the Secretary's proposed penalty of $285.00 is decreased to $130.00. I assess a penalty in that amount.

C. Citation No. 8820563 – New Agg Discharge Cooler

Docket No. SE 2015-0285

Exhibit S–2 (Tr.194:20-195:9)

The Secretary alleges that Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the ground floor at the "new agg" discharge cooler clean and orderly. The standard requires that all mining operation workplaces, passageways, storerooms, and service rooms be kept clean and orderly.

1. Violation

During a regular E01 inspection of the Ripley facility on March 18, 2015, Inspector LaRue observed accumulated material on the ground floor at the new agg discharge cooler. (Tr.194:7-10; 197:21-22; Ex. S–2) LaRue observed footprints where miners had used the area as a walkway to get from one point to another and determined that this area was a passageway, subject to the housekeeping standard. (Tr.204:15-205:11) LaRue could not recall the type of work performed in this area. (Tr.205:4-6) The accumulated material was about six inches deep and covered an area of about 12 feet by 20 feet. (Tr.198:9-20) LaRue observed that the material was damp and retained distinct footprints. (Tr.198:14-16) He concluded from the large amount of material, that the accumulation had existed for more than one shift. (Tr.200:18-201:2)

The citation was terminated the same day. (Tr.207:3-5) Respondent removed the accumulated material with a skid loader and shovels. (Tr.207:7-12) The before and after photos (Ex. S–2, at 4-5) show the extent of the material accumulation (with footprints) before clean-up and the tidy condition of the area after the abatement cleanup.

LaRue testified that he considered the cited condition to be an S&S violation. (Tr.206:2-9) Specifically, LaRue determined that the area was covered by wet, slippery material, which concealed the underlying uneven floor surface with anchor bolts and cement pillars at the base of the columns. (Tr.202:6-15; 204:5-11; Ex. S–2, at 5) Footprints in the accumulated material indicated that miners had transited the area, creating an inference that serious injuries were reasonably likely to occur had the condition been allowed to continue. (Tr.204:15-19). Inspector LaRue concluded that a miner could fall and catch a knee or hand on a bolt, or simply trip and fall (a foot-level fall) and suffer a twisted ankle or knee, or possibly tear an ACL, which

would result in lost workdays or restricted duty. (Tr.205:21-206:1) LaRue determined that one person would be exposed to the cited condition because only one person would likely be hurt before the condition was identified and corrected. (Tr.206:10-16)

LaRue classified the negligence level as moderate because, even though the violation was obvious and extensive, there had only been one housekeeping violation prior to this inspection and the operator did not offer any mitigating evidence or argument to justify a lower negligence classification. (Tr.206:17-207:2; 208:15-16) The Secretary proposed a penalty of $1,412.00. (Ex. S–1)

The Respondent countered that although LaRue claimed the clay was near a ladder (Tr.199:21-23), the picture of the location (Resp't Br. 40, *citing* Ex. S–2, at 4-5) shows that the ladder could be accessed without walking through the accumulated material. Respondent argues the picture shows there is a drive-thru roadway nearby, which eliminates any need to access this area as a passageway. (*Id.*, *citing* Ex. S–2, at 4) Additionally, Respondent argues the picture shows angled steel supports in the top, right corner, which deter anyone from walking through this area. (*Id.*, *citing* Ex. S–2, at 5)

I cannot agree with the Respondent's characterization of what the photos show. The mere presence of numerous footprints, apparent in the photo at Exhibit S–2, page 4, undercuts the argument that the area need not be transited on foot at all or that no one would walk through the area because of the steel support beams in the way. I find that the material accumulation created a hazardous violation of the cited standard. I credit the evidence presented by the Secretary substantially more than that from the Respondent because it accords more closely with the evidence as a whole.

Based on the above, I find the accumulation of material described above constituted a violation of 30 C.F.R. § 56.20003(a).

2. Gravity and S&S

The elements of gravity at the level of reasonable likelihood are satisfied. The accumulated material created a slip–trip–fall hazard. The accumulations were extensive, deep, and damp in some places. Additional trip hazards were concealed by the accumulations. As discussed above, the accumulations were located on a passageway. At least one miner was subjected to this hazard as shown by the footprints in the material. I conclude that this violation created a hazard that was reasonably likely to result in an injury, which could reasonably be expected to result in lost workdays or restricted duty for one miner.

I have found an underlying violation of 30 C.F.R. § 56.20003(a), a mandatory safety standard. The accumulation of material, its extent, location, and slippery state contributed to a slip–trip–fall hazard. (Tr.204:5-11) It was reasonably likely that this hazard would occur given the extensiveness of the accumulations, the uneven flooring, and the existence of concealed anchor bolts and cement pillars at the base of the columns. Assuming the occurrence of the foot-level fall hazard, I find it would reasonably likely result in a joint injury of the type LaRue outlined in his testimony. (Tr.204:9-11) The injury would be of a reasonably serious nature,

likely resulting in lost workdays or restricted duty. Accordingly, I conclude this violation was S&S.

3. Negligence

The violation was the result of moderate negligence. The violating condition was extensive, 12 by 20 feet and some six inches deep (Tr.198:9-20; Ex. S–2, at 3), and obvious, as evidenced by the existence of multiple footprints in the material. The condition had existed at least one shift before being cited and was in an area where a pre-work examination had been performed. (Tr.200:18-201:2; 208:9-13) Given the obviousness and extensiveness of the accumulations, Respondent's management either knew or should have known it existed and should have taken remedial measures on their own. However, ODPC only had one housekeeping violation prior to this inspection. In consideration of the totality of circumstances, I conclude that ODPC exhibited only moderate negligence.

4. Penalty

I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected, the negligence points, the likelihood points, and the good faith point reductions. Based on my gravity and negligence findings, and considering but not relying on the point calculation in 30 C.F.R. § 100.3, as adjusted to account for the VPID distortion discussed above, the Secretary's proposed penalty of $1,412.00 is decreased to $634.00. I impose a penalty in that amount.

D. Citation No. 8820564 – RVM Discharge End Platform

Docket No. SE 2015-0285

Exhibit S–3 (Tr.208:20-209:16)

The Secretary alleges that Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the RVM discharge end platform clean and orderly. (Ex. S–3; Tr.210:4-12) The standard requires that all mining operation workplaces, passageways, storerooms, and service rooms be kept clean and orderly.

1. Violation

During the mine inspection on March 18, 2015, LaRue climbed up a ladder onto the RVM discharge end platform and observed accumulated material, two cans of spray foam, and some tools, situated so as to partially block the way onto the platform. (Tr.210:16-23; 218:18-23; Ex. S–3) He entered this area from a separate building where the "new agg" discharge cooler discussed in Citation No. 8820563 was located. (Tr.210:7-9; 212:6-22) LaRue determined that the area was a working place because the tools, other items, and the footprints in the material indicated to him that miners had been working in the area. (Tr.210:24-211:14; Ex. S–3, at 4)

The citation was terminated on March 19, 2015, after Respondent removed the material and other items. (Tr.216:19-217:3) Exhibit S–3, pages 4 and 5 show the significant difference between the clean and orderly condition in the termination photo and the violating condition photo. (Tr.428:17-429:1) Inspector LaRue determined the following: (1) The cited condition created a slip–trip–fall hazard (Tr.214:24-25); (2) the hazard was unlikely to occur because a person would have to climb up the ladder to reach the violating area, there was a clear walkway around the material, and a miner would most likely have three points of contact after climbing to the platform (Tr.214:18-215:11); (3) assuming the foot-level-fall hazard, a possible joint or muscle injury would follow, which would result in at least lost workdays or restricted duty (Tr.215:12-14); and, (4) an injury would likely affect only one person. (Tr.215:17-20) LaRue found moderate negligence, citing the fact that the condition was not obvious from ground level as a mitigating circumstance. (Tr.214:8-10; 215:22-25) However, the footprints in the material in conjunction with the tools and spray cans showed that people had been there, supporting the conclusion that it was a working area. (Tr.215:25-216:6) The Secretary proposed a penalty of $285.00. (Ex. S–1)

I find the accumulation of material, tools, and spray cans described above constituted a violation of 30 C.F.R. § 56.20003(a).

2. Gravity

Inspector LaRue determined that the cited condition created a slip–trip–fall hazard. (Tr.214:24-25) He determined, however, that the foot-level fall hazard was unlikely to occur because a person would have to climb up the ladder to reach the violating area, there was a clear walkway around the material, and a miner would most likely have three points of contact after climbing to the platform. (Tr.214:18-215:11; Ex. S–3, at 4) Additionally, LaRue's notes mention the area at issue was only accessed for maintenance as needed. (Ex. S–3, at 3) Respondent adds that an injury would be unlikely because access is blocked by a bolted panel directly across from the ladder, the spray cans and tools were left by the panel to open and reseal it, and the tools and materials are not directly at the top of the access ladder. (Resp't Br. 40, *citing* Ex. S–3, at 4) I agree with LaRue and Respondent that the hazard was unlikely to result in injury. If a foot-level fall were to occur, however, it would likely result in a joint or muscle injury, which could reasonably be expected to result in at least lost workdays or restricted duty. (Tr.215:13-14) The injury would likely only affect one person. (Tr.215:17-20)

3. Negligence

LaRue found moderate negligence, citing the extensive amount of trash and material on the floor and the fact that there was evidence that workers were up in the area after the spill. (Tr.215:22-216:6; Ex. S–3, at 3) LaRue noted the fact that the condition was not obvious from ground level as a mitigating circumstance. (Tr.214:8-10; 215:22-25)

I consider as evidence of mitigation the counter points raised. Considering the totality of the circumstances, I concur with LaRue that ODPC exhibited moderate negligence here.

4. Penalty

I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected, the negligence points, the likelihood points, and the good faith point reductions. Based on my gravity and negligence findings, and considering but not relying on the point calculation in 30 C.F.R. § 100.3, as adjusted to account for the VPID distortion discussed above, the Secretary's proposed penalty of $285.00 is decreased to $127.00. I impose a penalty in that amount.

E. Citation No. 8820565 – Ground Level of the Old Agg Scrubber

Docket No. SE 2015-0285

Exhibit S–4 (Tr.217:14-21)

The Secretary alleges that Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the ground level of the old agg scrubber area clean and orderly. (Ex. S–4) The standard requires that all mining operation workplaces, passageways, storerooms, and service rooms be kept clean and orderly.

1. Violation

During the E01 inspection on March 18, 2015, Inspector LaRue observed accumulated material on the ground level of the old agg scrubber (Tr.219:7-9), an area adjacent to the RVM discharge area, covered by the previous citation, Citation No. 8820564 (Ex. S–3), but approximately 150–200 feet away. (Tr.217:24-218:11) The area was part of a separate structure. (Tr.218:10-11)

LaRue testified that on approach the accumulated material was obvious and extensive in size. (Tr.221:2-9) At first glance he did not recognize a hazard, but when he put the toe of his boot into the material, he found it was "extremely slick." (Tr.219:6-9) He noted in his field notes that the facility's site hazard awareness sheet recognized that the material could be slippery when wet. (Ex. S–4, at 3; Tr.197:3-14; 222:16-23; 433:11-434:2) He also noted footprint tracks and drag marks as though someone had dragged something through the material. (Tr.219:15-220:7; Ex. S–4, at 4-5)[16] He concluded that miners had passed through the area to get from one point to another. (Tr.220:12-13) He understood that miners used the area as a passageway to access a drain valve for an adjacent containment. (Tr.220:8-22) He could not say how long the condition had existed by looking at the area or from talking to Superintendent Gibens who accompanied him on the inspection (Tr.220:23-221:1), but he believed that management was aware of this condition and considered it a recurring problem. (Tr.222:10-223:17)

[16] LaRue testified about seeing two sets of footprint tracks at one point (Tr.219:15-24), but only a single set of tracks at another. (Tr.224:20) This apparent contradiction does not change my analysis.

The citation was terminated on March 19, 2015, after Respondent removed the material. (Tr.225:4-18; Ex. S–4, at 2) Inspector LaRue noted the difference between the condition in the violation photo and the orderly condition in the termination photo. (Tr.225:8-12; Ex. S–4, at 4-6) LaRue determined that the cited condition created a safety hazard that was reasonably likely to result in serious injury involving lost workdays or restricted duty and that it potentially affected one person. (Ex. S–4, at 1) LaRue testified that the accumulation of wet, slippery mud on the uneven ground created a slip–trip–fall hazard. (Tr.223:20-25; Ex. S–4, at 3) LaRue determined that an injury was reasonably likely to occur based on miner exposure to the slippery surface, evidenced by footprints in the material. (Tr.223:18-224:1; Ex. S–4, at 5) LaRue testified that the lost workdays or restricted duty designation was appropriate because a miner could fall and catch a knee or hand on a bolt or simply trip and fall at foot-level, suffering a twisted ankle or knee joint, or perhaps a torn ACL. (Tr.224:4-5) LaRue determined that one person was affected by the cited condition because only one person would likely be hurt before the condition was identified and corrected. (Tr.224:13-16) LaRue concluded that this violation was S&S. (Tr.224:8-10) LaRue found moderate negligence due to factors he considered mitigating, e.g., the material was not very thick, he could not tell how long it had been on the ground, and there was no history of similar violations. (Tr.224:17-225:3) The proposed penalty for this violation is $1,412.00. (Ex. S–1)

Respondent argues that the citation should be vacated based on the following: (1) The area where this condition was found is less than 200 feet from the prior citation (Resp't Br. 41, *citing* Tr.218:7-11); (2) LaRue did not see any miners working in the area; he merely saw footprints that showed someone had been there at some prior time (*Id.*, *citing* Tr.219:15-24 and Ex. S–4); (3) LaRue said he determined the material was slick by dipping his boot tip in it, but he did not testify that access to the area occurred while the material was wet (*Id.*, *citing* Tr.221:22-25); and, (4) the slickness of the material was contradicted by Gibens, who testified that the product would not be slick unless it was a very thin layer, which this was not. (*Id.*, *citing* Tr.433:11-434:14)

I have already determined that this citation will not be vacated on the basis that it cited a condition in an area that Respondent believes should be considered part of another area. In full view of Respondent's contentions, I find that the material was slippery as tested by LaRue and recognized to be so by Respondent in its site awareness documentation. I find that the accumulation of material described above constituted a slip–trip–fall hazard to miners and violated 30 C.F.R. § 56.20003(a).

2. Gravity and S&S

LaRue determined that the hazard underlying this violation was reasonably likely to result in injury to a single miner that would involve lost workdays or restricted duty. I concur in his assessment. I am aware that Respondent contests the slickness of the material, but on balance I am convinced by the weight of the evidence that the accumulated material was slick and reasonably likely to cause a miner traversing it to slip and fall and incur an injury to his joints. I conclude that LaRue's gravity determination of "reasonably likely" to result in lost workdays or restricted duty for a single miner is appropriate.

I have found an underlying violation of 30 C.F.R. § 56.20003(a), a mandatory safety standard. The material accumulation, its extent, location, and slippery state contributed to a slip–trip–fall hazard. (Tr.223:20-224:1) It was reasonably likely that this hazard would occur given the fact that miners traversed the area. Assuming the occurrence of the foot-level-fall hazard, I find that it would reasonably likely result in a foot-level fall causing a joint injury of the type LaRue outlined in his testimony. (Tr.224:2-5) The injury would be of a reasonably serious nature, possibly resulting in lost workdays or restricted duty. I conclude this violation was S&S.

3. Negligence

Management is deemed to have been aware of this violation. The accumulation was conspicuous and large. (Tr.221:4-9) According to statements attributed to Gibens and Larry Gurley, the second shift supervisor, management was not able to maintain consistent housekeeping compliance due to a staff shortage. (Tr.397:13-17; 443:5-7; 476:2-15) LaRue based his "moderate" negligence allegation on what he considered to be mitigating circumstances, including the following: (1) The accumulated material was not very thick; (2) there was only one set of footprints in the material (*see supra* text accompanying note 16); he could not tell how long the material had been in place; (3) Gibens had claimed another point of mitigation which LaRue could not recall, but took into consideration; and, (4) there were relatively few housekeeping violations in Respondent's violation history. (Tr.224:18-225:3) I concur with the inspector's evaluation of negligence and find that this violation involved moderate negligence.

4. Penalty

I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected, the negligence points, the likelihood points, and the good faith point reductions. Based on my gravity and negligence findings, and considering but not relying on the point calculation in 30 C.F.R. § 100.3, as adjusted to account for the VPID distortion discussed above, the Secretary's proposed penalty of $1,412.00 is decreased to $634.00. I impose a penalty in that amount.

F. Citation No. 8820567 – Third Floor of the Mill Building

Docket No. SE 2015-0285

Exhibit S–5 (Tr.227:5-7)

The Secretary alleges that Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the third floor of the mill building clean and orderly. (Tr.227:24-228:2; Ex. S–5) The standard requires that all mining operation workplaces, passageways, storerooms, and service rooms be kept clean and orderly.

1. Violation

During his E01 inspection on March 18, 2015, Inspector LaRue observed material on the third floor walkway of the mill building. (Tr.228:5-15; Ex. S–5) Gibens accompanied LaRue on this portion of the inspection. (Tr.228:9-10; 435:9-12) Inspector LaRue entered the mill building from the old agg scrubber, a separate building, as discussed in relation to Citation No. 8820564. (Tr.228:5-8) On the third floor of the mill building, near the screen room, he saw deep accumulated material on the floor with footprints and a chair in the middle. (Tr.228:10-21) It appeared to him that the chair had been placed there so a person could take a break. (Tr.228:13-15; 231:21-232:1) The material ranged from three to six inches deep. (Tr.228:19-21; Ex. S–5, at 3) LaRue considered this an obvious and extensive slip–trip–fall hazard. (Tr.229:25-230:11; Ex. S–5, at 3-5) He testified about the difference between the violation photos and those showing the area after it was cleaned. (Tr.234:4-9; Ex. S–5, at 4-7) The citation was terminated on March 19, 2015, when Respondent removed the material. (Tr.234:13-17; Ex. S–5, at 2)

LaRue appropriately characterized the area in question as a workplace and passageway. According to LaRue, Gibens had indicated to him at the time that Respondent stored screens used in support of the mining operation in this area and miners traveled this area to get from one point to another and to gather the screens. (Tr.232:2-14) I find that the combination of the deep material accumulation and a chair in the passageway created a slip–trip–fall hazard. This condition was a violation of 30 C.F.R. § 56.20003(a).

2. Gravity

LaRue determined that the cited condition created a slip–trip–fall hazard that was unlikely to result in injury. (Tr.232:15-233:2)[17] He felt that an injury resulting from this hazard would probably involve a muscle or joint injury (Tr.233:3-6), would likely result in at least lost workdays or restricted duty (Tr.233:3-6), and would affect one person because only one person would be hurt before the condition was identified and corrected. (Tr.233:7-9) The inspector testified that even though miners were exposed to this hazard, as shown by the footprints, an injury was unlikely because of how infrequently anyone went into the area—one person every eight to ten weeks (Tr.228:20-21; 232:18-20)—and because the material was light silt. (Tr.232:20-21) LaRue did not consider this violation S&S.

I concur with LaRue's gravity determination. This violation was unlikely to result in a lost-workdays or restricted-duty injury to a miner.

3. Negligence

LaRue felt this violation resulted from "moderate" negligence. Once a person climbed to the area in question, the accumulations were very obvious and covered an extensive area. (Tr.233:11-12; Ex. S–5, at 3) He factored in the mitigating effect of the out-of-the-way location of the accumulations to reach moderate negligence. (Tr.233:12-16) I concur.

---

[17] LaRue mentioned in his field notes that this was a low visibility area because his glasses fogged while he was there. (Ex. S–5, at 3) He did not mention this in his testimony.

4. Penalty

I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected, the negligence points, the likelihood points, and the good faith point reductions. Based on my gravity and negligence findings, and considering but not relying on the point calculation in 30 C.F.R. § 100.3, as adjusted to account for the VPID distortion discussed above, the Secretary's proposed penalty of $285.00 is decreased to $127.00. I impose a penalty in that amount.

G. Citation No. 8820568 – Walkway Around the 4 & 5 Pre-Grind Mills

Docket No. SE 2015-0285

Exhibit S–6 (Tr.236:20-237:2)

The Secretary alleges that Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the walkway around the 4 & 5 pre-grind mills clean and orderly. (Ex. S–6; Tr.237:4-6) The standard requires that all mining operation workplaces, passageways, storerooms, and service rooms be kept clean and orderly.

1. Violation

During his inspection of the mine on March 18, 2015, Inspector LaRue observed material with footprints on the walkway around the 4 & 5 pre-grind mills. (Tr.237:8-20; Ex. S–6) Gibens accompanied Inspector LaRue on this portion of the inspection. (Tr.237:24-25; 244:14-17) The pre-grind mills area is separate from the mill building discussed in Citation No. 8820567. (Tr.242:3-15) This area is close to the control room—the nerve center of the mine—where mine management spends significant time. (Tr.238:21-240:4) LaRue observed a sizeable buildup of material with heavy foot traffic, as evidenced by the multiple footprints. (Tr.237:15-20; Ex. S–6, at 4-5) The accumulated material covered and hid angle iron motor floor supports and floor plate height differences, both of which created a trip hazard. (Tr.238:11-20; Ex. S–6, at 4-6)

LaRue considered this area both a passageway and a working place because miners not only used it to come and go to check motors, instrumentation, or a heat lamp nearby, but also conducted inspections, maintenance, and other types of work in the area. (Tr.241:4-18)

The citation was terminated on March 19, 2015, after the accumulations were removed. (Tr.246:3-9; Ex. S–6, at 2) Inspector LaRue testified to the difference between the pre- and post-abatement photos showing the extent of the violating condition. (Tr.245:13-25; Ex. S–6, at 4-6) The photos also show the depth of the accumulated material. The material was deep enough to nearly cover a set of handrails about forty-two inches in height. (Tr.240:16-20; Ex. S–6, at 4)

The Respondent argues that LaRue did not see anyone working in the area, and the "walkway" was not used to access the nearby control room. (Resp't Br. 42, *citing* Ex. S–6)

I find that the deep accumulations covering floor irregularities created a trip hazard as alleged by Inspector LaRue. This was a violation of 30 C.F.R. § 56.20003(a).

2. Gravity and S&S

LaRue determined that the cited condition created a safety hazard that was reasonably likely to result in serious injury because of the significant buildup of silt material concealing uneven ground with trip hazards. (Tr.238:10-20; 239:16-19; 240:13-20; 242:18-22) The miners who left the footprints were exposed to the hazard. (Tr.242:20-22) LaRue confirmed that a trip or fall could result in a twisted ankle, twisted knee joint, or a torn ACL and result in lost workdays or restricted duty. (Tr.243:9-11) LaRue also determined that one person would be affected by the violation because he believed the condition would be identified and corrected before anyone else was injured. (Tr.243:17-20) I concur with LaRue that this violation was reasonably likely to result in a lost-workday or restricted-duty injury to one miner.

I have found an underlying violation of 30 C.F.R. § 56.20003(a), a mandatory safety standard. The extent and location of the material accumulation greatly contributed to a slip–trip–fall hazard. (Tr.238:10-20; 239:16-19; 240:13-20; 242:18-22; Ex. S–6, at 4-5) It was reasonably likely that this hazard would occur given the number of personnel exposed to the area and the size of the material accumulation. Assuming the occurrence of a foot-level-fall hazard, I find that it would reasonably likely result in a joint injury of the type LaRue outlined in his testimony. (Tr.243:9-11) The injury would be of a reasonably serious nature, likely resulting in lost workdays or restricted duty. I conclude this violation was S&S.

3. Negligence

Inspector LaRue rated the negligence for this violation as "high" because mine management was aware of and had multiple opportunities to correct this hazard considering its proximity to the control room, how it grew in size over multiple shifts, and its obvious nature. (Tr.238:23-239:19; 240:5-9; 244:5-6; 440:7-10) Inspector LaRue testified that the extensiveness of the accumulation suggested a "callous attitude" by Respondent. (Tr.245:23-25)

Respondent contends that the "high" negligence designation was based on the frequency of housekeeping citations, which, except for a single prior event, reflected only the other housekeeping citations written during this inspection. (Resp't Br. 42, *citing* Tr.243:21-244:10) I note there is partial support in the record that Inspector LaRue considered the previous housekeeping citations in issuing the high negligence designation for Citation No. 8820568. For example, in his notes under the justification section for his high negligence determination, Inspector LaRue wrote, "repeated violations of same regulation." (Ex. S–6, at 3) Inspector LaRue also testified that his frustration level was increasing by the time he issued Citation No. 8820567, having previously issued four housekeeping citations earlier that day. (Tr.233:20-234:4) Nevertheless, I find there is sufficient justification, notably the obviousness given the extensiveness of the material accumulations and proximity to the control room, to warrant a high negligence determination for Citation No. 8820568 without reference to any other housekeeping violations.

4. Penalty

I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected, the negligence points, the likelihood points, and the good faith point reductions. Based on my gravity and negligence findings, and considering but not relying on the point calculation in 30 C.F.R. § 100.3, as adjusted to account for the VPID distortion discussed above, the Secretary's proposed penalty of $4,689.00 is decreased to $2,107.00. I impose a penalty in that amount.

H. Citation No. 8820569 – Ground Level of the Mill Building

Docket No. SE 2015-0285

Exhibit S–7 (Tr.247:10-19)

The Secretary alleges that Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the ground level of the mill building clean and orderly. (Ex. S–7) The standard requires that all mining operation workplaces, passageways, storerooms, and service rooms be kept clean and orderly.

1. Violation

During his inspection on March 18, 2015, Inspector LaRue observed material with footprints on the ground floor level of the mill building. (Tr.248:8-10; 249:4-5; Ex. S–7) Gibens accompanied LaRue on this portion of the Inspection. (*See* Tr.452:22-455:14) This area was on the ground level underneath the mill building, separate from the pre-grind milling area discussed in Citation No. 8820568. (Tr.248:3-10)

As he was approaching the mine prior to starting the inspection, LaRue observed a dust cloud emanating from this area of the milling facility. (Tr.250:23-251:3) When he entered the mill building, he noted that the material completely covered the concrete floor.[18] (Tr.252:4-7) The buildup area was so large that LaRue could not capture it in a single photo; rather, three photos were required to show the extent of material accumulation in the area. (Tr.248:18-24) It was deep enough—12 to 18 inches—to create a trip hazard. (Tr.252:23-25; 258:1-15; Ex. S–7, at 4) The area in question was on the ground floor of the main milling portion of the mine; miners would often be in and around it. (Tr.252:10-20) It was very close to the break room, thus obvious in LaRue's opinion. (Tr.253:3-10) LaRue was certain the material had built up over

[18] LaRue's handwritten notes on MSHA Form 4000-49E state, "[r]aw mill ground floor [. . .] housekeeping not maintained on approx 50% of the ground floor." (Ex. S–7, at 4) At hearing, however, he testified that "it was a hundred percent coverage. When I say a hundred percent coverage, at no point in that field of view could I see the concrete underneath it." (Tr.252:5-7) I have reviewed the photographic evidence and conclude that this discrepancy—whether there was fifty percent or one hundred percent coverage—does not affect my ultimate analysis.

more than one shift; he suspected it had been forming for days, weeks, or possibly months. (Tr.253:13-23) From this, he concluded that mine management had numerous opportunities to find and correct this hazard given how close it was to the break room, its large size, and its obvious nature, but they made no apparent effort to address the condition. (Tr.253:3-254:2)

LaRue considered the cited area a passageway—miners used it to get from one point to another, including the nearby break room and other areas of the main mill building. (Tr.249:6-8; 252:12-20) Although there was a ladder in the area, which typically denotes an access point to another work platform or workplace, LaRue found it to be inconsequential, and he did not give it much weight. (Tr.250:13-15)

The citation was terminated on March 23, 2015, when Respondent removed the material. (Tr.259:21-22; Ex. S–7, at 3) LaRue testified that he had to extend the termination period multiple times because of the extensiveness of the material accumulation. (Tr.259:3-22) The pre- and post-abatement photos show the extent of the violation and corroborate LaRue's testimony. (Tr.256:19-257:3; Ex. S–7, at 5-8)

LaRue determined that the cited condition contributed to a safety hazard that was reasonably likely to result in injury resulting in lost workdays or restricted duty for one person. (Ex. S–7, at 1) LaRue determined that ODPC exhibited high negligence. (*Id.*) The Secretary recommended a penalty of $4,689.00. (Ex. S–1)

Respondent pointed out that LaRue did not identify any miners working in the area during the inspection (Resp't Br. 42, *citing* Tr.252:13-14), and that he rated the negligence element as "high" due to the multiple violations of housekeeping cited during this inspection. (*Id.*, *citing* Ex. S–7, at 4) Larue's evidence of the nature and extent of the material accumulation is uncontested. (Tr.453:1-10, 20-23; 454:3-7)

I find that the accumulation was as described above by LaRue, it created a slip–trip–fall hazard, and it constituted a violation of 30 C.F.R. § 56.20003(a).

2. Gravity and S&S

LaRue determined that the cited condition contributed to a safety hazard that was reasonably likely to result in injury for the following reasons: (1) deep footprints indicated that miners had walked through the material (Tr.252:12-14; 254:21-22); (2) the 12- to 18-inch accumulated material would stop a miner's normal forward motion, causing them to fall (Tr.258:1-12); and, (3) the material was extensive, covering uneven ground and concealing trip hazards. (Tr.254:20-21; 258:9-15; Ex. S–7, at 4) LaRue determined that any injury resulting from this hazard was reasonably likely to result in lost workdays or restricted duty because miners could fall and catch a knee or hand on a bolt or simply trip and fall at foot level, suffering a twisted ankle, twisted knee joint, or a torn ACL. (Tr.205:21-206:1; 255:1; Ex. S–7, at 4) LaRue determined that only one person would be affected because he assumed the condition would be identified and corrected before anyone else was injured. (Tr.255:6-9)

On cross-examination, Gibens agreed there was extensive material coverage on the ground, footprints were observed throughout the spilled material, and the material was 12 to 18 inches deep. (Tr.453:1-7, 20-23)

I find that the Secretary has proved that the hazard created by the cited conditions was reasonably likely to cause an injury to at least one miner, and that the resulting injury would most likely be serious enough in nature to lead to lost workdays or restricted duty.

I have found an underlying violation of 30 C.F.R. § 56.20003(a), a mandatory safety standard. The material accumulation's extent, depth, and location contributed to a slip–trip–fall hazard. It was reasonably likely that this hazard would occur because miners were walking through the extensive and thick material accumulation, as evidenced by numerous footprints. Assuming the occurrence of the foot-level fall hazard, it would reasonably likely result in a joint injury of the type LaRue outlined in his testimony. Such an injury would be of a reasonably serious nature, possibly resulting in lost workdays or restricted duty. I conclude this violation was S&S.

3. Negligence

The entire floor area on the ground level of the mill building was covered by 12 to 18 inches of accumulated material. (Tr.252:2-25; *see* Ex. S–7, at 4-7) There was no vantage point from which LaRue could see any of the floor through or around the material. (Tr.252:5-7) This area was in the main milling portion of the mine, frequented by miners. (Tr.252:17-20) The proximity to the break room and the presence of traffic footprints support LaRue's conclusion that the condition was obvious and had been ignored long enough for material to accumulate to this depth. (Tr.253:1-254:17)

On cross-examination, Gibens stated that he disagreed with LaRue's notes that the area is accessed daily by plant personnel. (Tr.453:11-13) Gibens agreed, however, that 50% of the ground floor was covered by the accumulated material, there were footprints throughout the spilled material, the material was 12 to 18 inches deep, and the condition was very obvious. (Tr.453:1-23) Gibens also disagreed with LaRue's notes that the company made no effort to correct or mitigate the hazard. (Tr.453:17-19) Gibens stated that the company made efforts to clean this specific area as they had more manpower and time. (Tr.454:13-455:1) In stating that the company was making efforts to correct the situation, Gibens admitted that the company knew about this problematic area for quite a while. (Tr.455:4-9)

As it did with Citation No. 8820568, Respondent contends that the "high" negligence designation was impermissibly based on the frequency of housekeeping citations written during this inspection. (Resp't Br. 42, 47) I again note that there is partial support in the record that Inspector LaRue factored the previous housekeeping citations that day in issuing the high negligence designation for Citation No. 8820569. For example, in his notes under the justification section for his high negligence determination, Inspector LaRue wrote, "multiple violations for housekeeping this inspection." (Ex. S–7, at 4) Nevertheless, the exhibit picture is indeed worth a thousand words. Upon viewing the photographic evidence, I find there is sufficient justification—notably the obviousness and extensiveness of the material accumulations, which required three photographs to capture its panoramic enormity—to justify a

high negligence determination for Citation No. 8820569 without reference to any other housekeeping violations. What is more alarming to me is that Gibens admitted that the company knew about the problematic area for "quite a while" (Tr.455:4-6) but did not take preventative steps to limit access to the area. (Tr.254:4-10; 455:10-14) Viewing the totality of the circumstances, I agree with the Secretary and conclude that ODPC exhibited high negligence in this instance.

4. Penalty

I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected, the negligence points, the likelihood points, and the good faith point reductions. Based on my gravity and negligence findings, and considering the point calculation in 30 C.F.R. § 100.3, as adjusted to account for the VPID distortion discussed above, the Secretary's proposed penalty of $4,689.00 is decreased to $2,107.00. I impose a penalty in that amount.

I. Citation No. 8820573 – Dust Truck Tagging

Docket No. SE 2015-0285

Exhibit S–10 (Tr.277:14-279:20)

The Secretary alleges that Respondent violated 30 C.F.R. § 56.14100(c) by failing to remove the Ford L9000 dust truck from service after safety defects were observed during pre-operational examinations. The standard requires that "[w]hen defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective methods of marking the defective items shall be used to prohibit further use until the defects are corrected." 30 C.F.R. § 56.14100(c).

1. Violation

During the inspection on March 24, 2015, Inspector LaRue cited Respondent for failing to remove the Ford L9000 dust truck from service after safety defects (dirty windshield and inoperable wipers) were observed during pre-operational examinations. (Ex. S–10) Gibens accompanied Inspector LaRue on this portion of the inspection. (Tr.455:21-24)

During the previous night's inspection on March 23, 2015, LaRue saw the Ford L9000 dust truck when he issued the inadequate lighting violation citation, No. 8820571, in the verge storage tank area. (Tr.282:4-22; *see* discussion *infra* Section VI. K.) He made a video recording, which shows the dust truck parked up at the top of the ramp near the mine entrance. (Tr.282:23-283:9; Ex. S–9, at 1:30; *see also* Ex. R–1)

During the morning inspection on March 24, 2015, LaRue noticed the dust truck had been moved from its previous place on the ramp. (Tr.282:5-14) LaRue found the truck parked

under the dust chute[19] in front of the verge storage tank area next to the main building. (Tr.279:22-25) At the hearing, I estimated, based on my observation of the video recording and the mine map, that the distance the dust truck traveled was 100 yards or less.[20] (Tr.328:8-11; Exs. S–9, R–1) LaRue responded that the estimate was a fair assessment. (Tr.328:12-13)

LaRue noticed a significant[21] amount of clay dust on the windshield, which was observable even from a distance. (Tr.289:13-20; Ex. S–10, at 3-5) LaRue interviewed Teddy Hall, a kiln operator, who explained that he had driven the truck to the dust chute at about 7:30 a.m. (Tr.282:10-12; 286:6-8; 314:22-315:5; 406:23-407:1; Ex. S–10, at 2) Hall said that he tried unsuccessfully to run the wipers to clear the dust off the windshield before moving it into the position shown in the photographs on pages 3, 4, and 5 of Exhibit S–10. (Tr.282:12-14; *see* Ex. S–10, at 3-5) Other miners were operating a Bobcat in the verge storage tank area directly behind the dust chute as Hall backed the truck into place. (Tr.287:11-18)

Two days earlier, on March 22, 2015, a pre-operational examination was conducted for the dust truck (Ex. S–10, at 7), which identified the truck's lights, the truck's windshield wipers, and "obvious damage or leaks" as problems. (*Id.*) The following notes were written in the description section: (1) "head light [sic] busted"; (2) "windshield wipers don't work"; and, (3) the truck was to be "tagged out after dark." (Tr.285:10-16; Ex. S–10, at 7) The pre-operational examination appears to have been signed by Teddy Hall. (Ex. S–10, at 7)

Instead of removing the truck from service, Respondent placed a tag on the steering wheel, which stated, "DANGER—DO NOT OPERATE." (Tr.285:20; Ex. S–10, at 6) The tag did not specify, however, why the truck should not be operated. (Tr.285:7-9; 287:1-9; Ex. S–10, at 6) Hall confirmed that he was aware of the tag on the steering wheel but had driven the truck nonetheless. (Tr.286:3-9)

LaRue concluded that the truck had been operated, i.e., moved to the dust chute location (Tr.282:4-22), with the windshield so dirty from accumulated dust as to obscure driver visibility (Tr.280:6; 289:15-20; Ex. S–10, at 4-5), without the headlights being repaired (Tr.285:11-16), and contrary to the admonition on the tag not to operate the truck. (Tr.285:5-287:9; Ex. S–10, at 6-7) LaRue testified that the company explained to him that dust and material commonly impedes normal operation of the wipers. (Tr.281:10-12) Often times, the dust gets into the

---

[19] Gibens explained at hearing that the Ford L9000 dust truck is backed under the dust chute whenever ODPC changes products. (Tr.403:4-5) The clay wastes in the tanks are flushed out into the dust truck to ensure there is no cross-product contamination. (Tr.403:5-8) However, because the dock is also used for the loading of bulk trucks, the Ford L9000 is normally pulled out from the loading dock and positioned up the ramp. (Tr.403:17-404:6)

[20] Upon closer review of Exhibit S–9 in relation to Exhibit R–1, it appears that I misspoke at hearing. Although I said "100 yards," which Inspector LaRue agreed with, given Inspector LaRue's walking speed in the video, the truck appears to be closer to 100 "feet" away from the dust chute. This correction does not materially alter any part of my analysis.

[21] LaRue noted that 90% of the windshield was covered by clay dust. (Ex. S–10, at 2) Gibens agreed with this assessment at hearing. (Tr.456:22-24)

windshield wiper motor itself. (Tr.281:12-13) Typically, ODPC remedies this by either blowing it out with air or washing it down with water. (Tr.281:13-15; 404:13-14; 405:7-13; *see also* Resp't Br. 9) In this instance, however, ODPC tried the normal method to no avail (Tr.281:6-16); instead, according to LaRue, they had to "get in there and actually work on it" before the wipers were functional again. (Tr.281:16-18)

The first clause of section 56.14100(c) states, "[w]hen defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose [. . .]." 30 C.F.R. § 56.14100(c) (emphasis added). Here, Respondent did not take the truck out of service.

The second clause of the standard provides an alternative: "[A] tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected." *Id.* (emphasis added). Two issues are raised by this: (1) Was there a defect?; and, if so, (2) did Respondent properly tag or mark the defect to prevent further use until the defect was corrected?

Respondent argues in its brief that "neither the headlight nor the wipers were defects that made continuous operation of the truck hazardous." (Resp't Br. 12) Respondent did not consider the windshield wipers defective because, in its view, the wiper motor was never broken—it was just unable to overcome the friction created by the clay material without water. (Resp't Br. 9 n.2) According to Gibens, even a brand new wiper motor could not wipe away the clay dust without having the windshield first sprayed with water. (Tr.405:14-19) Gibens also testified that the windshield on the day of this citation was cleaned by simply adding water and turning on the wipers. (Tr.407:9-12)

LaRue considered the windshield wiper problem sufficient in itself to justify tagging the truck out of service. (*See* Tr.285:13-16; 288:10-18) I agree. From the moment the pre-operation examination noted "wipers don't work" on March 22, 2015, until they were actually working properly again on March 24, 2015, the wipers were, for all relevant purposes, "defective." During this window of time, both Hall and LaRue had attempted to get the wipers to work to no avail (Tr.282:12-14; 374:23-25), and, critically, Hall had operated the truck. (Tr.282:10-12; 290:1-3) Moreover, Gibens' recollection of how the wipers were fixed was contradicted by LaRue's testimony that the normal method of washing the windshield with water was ineffective that day. (Tr.281:12-16) According to LaRue, they had to "get in there and actually work on it to get it going again." (Tr.281:16-18) I credit LaRue's recollection that more effort than normal was required to get the wipers functioning. Accordingly, I find the wipers on the truck were defective.

Irrespective of the condition of the windshield wipers, it is important to note that the dirty windshield itself can be considered a defect, as its existence made continued operation of the truck hazardous to miners. (Tr.280:15-20) LaRue testified that the obscured visibility on the windshield was a defect in this particular scenario. (Tr.280:2-6) Indeed, LaRue responded on cross-examination that as long as the windshield was clean before the truck was operated, even if it was cleaned with a squeegee, he would not have cited it. (Tr.375:11-14) The fact that the

truck was operated with a dirty windshield remains uncontested. Accordingly, I find the dirty windshield itself to be a defect.

Next, Respondent argues that affixing the tag to the steering wheel and noting the issues elsewhere was a sufficient response to the truck's defects (Resp't Br. 13), and, in any event, the tag on the steering wheel was conditional: It was only intended to address the broken headlight and only applied after dark. (Tr.408:3-9; Resp't Br. 9) Respondent did not tag the truck out for the windshield wipers or the dirty windshield because, as discussed above, it did not think they were defective.

In order for a miner to be adequately informed about the limited conditions under which the truck could or could not be driven given the cryptic notation on the tag itself—"Do Not Operate"—he or she would have to refer to the examination records to get a fuller view of the limitations. This is not an effective means of dealing with equipment defects as serious as these.

Respondent was aware of the intent of the regulation and its duty to appropriately tag this truck out of service, as evidenced by the tag found on the steering wheel. However, Respondent's failure to effectively remove the truck from service shows that it did not take its duty to conduct an effective pre-operational examination seriously. Respondent tried to create an appearance of compliance by noting the defects in its examination records and hanging a tag on the steering wheel, but it failed to actually take the truck out of service, clearly because it wanted to defer correcting the problems while it continued to make the truck available to use for this dust collection function. This half measure would allow Respondent to operate the truck indefinitely, leaving the defects unaddressed. This is not the intent of the regulation. Indeed, the insufficiency of Respondent's actions is evident given that the truck was driven despite having the "Do Not Operate" tag affixed to the steering wheel and a significant amount of clay dust plastered onto its windshield.

This is not to say there is anything per se improper about a conditional tag. Indeed, LaRue testified that he would not have had a problem with the conditional tag if it were properly marked—clearly demarcating that the truck was not to be used from dusk till dawn due to a broken headlight—and if the broken headlight was the only defect on the truck. (Tr.287:25-288:18) The error here was Respondent's failure to appropriately recognize the hazard presented by the dirty windshield and remove the dust truck from service until the defect could be remedied. This constitutes a violation of the standard.

The Secretary has proved by preponderant evidence the existence of a defect that made continued operation of the truck hazardous to miners and the Respondent's failure to take the machine out of service. *Cemex De P.R.*, 36 FMSHRC 1386, 1417 (May 2014) (ALJ) (citing *Dix River Stone, Inc.*, 32 FMSHRC 1779, 1784 (Nov. 2010) (ALJ)). Accordingly, I conclude Respondent violated 30 C.F.R. § 56.14100(c).

2. Gravity and S&S

I agree with Inspector LaRue that this violation was reasonably likely to result in injury to a miner. The dust truck was operated in the defective condition in an area where other miners were working, including those who were operating the Bobcat outside the verge storage tank

area. (Tr.287:11-18) The dirty windshield compromised Hall's ability to see optimally either to the front or back. (*See* Ex. S–10, at 3-5)[22] In this case, Hall backed the truck from where it had been on the ramp the night before into its position under the dust chute (Tr.282:10-12; 286:6-8; 314:22-315:5; 406:23-407:3; Ex. S–10, at 2), a distance of approximately 100 feet. (Tr.328:8-14; *see supra* text accompanying note 20)

Respondent argues that an injury would be unlikely because the truck had a dirty front windshield, which did not affect its ability to safely reverse under the dust chute (Resp't Br. 12), and, in any event, its windshield would have been cleaned before moving forward. (*Id.* at 13) I do not find this argument compelling for two reasons.

First, Respondent's argument that the truck only traveled in reverse while it had a dirty front windshield requires that I draw the inference that the extensive accumulation of clay dust on the windshield occurred while the dust truck was on the ramp. While that is certainly possible, given how much dust was already on the windshield when Hall backed the truck down the ramp (Tr.282:15-22), I find it is more reasonable to infer that much of the buildup of clay dust on the windshield occurred while the dust truck was under the dust chute at some point prior to being parked on the ramp on March 23, 2015.[23] Indeed, Respondent echoes my sentiments that the dust chute, not the ramp, was the likely cause of the dusty windshield: "Nor is it surprising that a truck literally gathering dust in a loading dock would quickly develop a dusty windshield." (Resp't Br. 13) If that is the case, somebody necessarily drove the dust truck forward from the dust chute with an obscured, dusty windshield before parking it on the ramp on or before March 23, 2015. Although only a short distance of 100 feet, it was in close to proximity to foot traffic from the nearby verge storage tank area, the main building, and the parking lot. (Tr.279:24-280:1; 290:7-18; *see also* Exs. S–9 & S–10; Ex. R–1)

Second, the dust truck was operated with a significant amount of clay dust obscuring the windshield so there is no guarantee miners would have actually cleaned the windshield before operating the truck again. (*See* Tr.282:5-20; 289:25-290:3) Although Teddy Hall was not the normal operator of the truck (Tr.407:1-3), the fact that he was unaware of how to clean the windshield and was also the employee apparently in charge of conducting the pre-operation examination on March 22, 2015 (*see* Ex. S–10, at 7), leaves open the distinct possibility that the dust truck would be operated again before having its windshield cleaned. The truck's normal path took it from the dust chute through the mine's plant area where there was often foot traffic

---

[22] Although LaRue did not specifically cite the Respondent for the rearview mirrors being obscured by the same dust found on the windshield, he recalled they were dirty. (Tr.376:5) I infer from several tangential references to the mirrors made by the parties as they discussed that Hall had to look through the windshield or used the mirrors instead, and the fact that the Respondent indicated that its practice was to use a water hose to clean off the windshield and the mirrors before the truck was moved, that the mirrors were equally as dirty as the windshield. (Tr.375:15-376:4; 404:11-14; 406:9-15)

[23] I suppose there is a non-zero possibility of a third alternative: The truck could have developed the significant coat of dust on its windshield at some other location at the mine and reversed all the way back to the top of the ramp. This seems not only highly unlikely but would also constitute incredibly reckless behavior.

because of the proximity to a parking lot, the administration building, and the break room in the administration building. (Tr.289:21-290:18; 319:17-320:1) Gibens agreed that the dust truck was operated around foot traffic at the loading point and is normally driven to the other side of the plant to dump. (Tr.457:13-16) If the windshield were not cleaned prior to a dump run, miners on foot would have reasonably likely been exposed to danger.

LaRue concluded that if a miner were struck by the truck as it moved on the work site, the injury could reasonably be expected to be fatal. (Tr.290:25-291:4) Again, I agree. Another citation, No. 8820574, addresses the issue of the condition of the brakes on this truck. *See* discussion *infra* Section VI. J. Without deciding for the moment whether the Secretary has proved that the dust truck brakes were defective, I find that even if the dust truck's brakes were operating optimally, any contact between the dust truck and a miner on foot or even on a piece of equipment smaller than the dust truck carries a high likelihood of fatal injury. I agree with LaRue that even if the truck were being driven no more than five to ten miles per hour, an impact with a pedestrian could cause death. (Tr.291:2-4; 320:2-15) I also agree that any injury arising from this violation would affect only one miner. (Tr.291:10-14)

I have found an underlying violation of 30 C.F.R. § 56.14100(c), a mandatory safety standard. The operator's failure to properly remove the Ford L9000 dust truck from service after defects affecting safety were observed contributed to a discrete safety hazard that the driver would be unable to see while driving. Based on the extensiveness of the clay dust on the windshield, as evidenced by the photos and testimony at hearing, I find the hazard was reasonably likely to occur.

Assuming the occurrence of the hazard that the driver would have limited visibility, I find it reasonably likely that an injury of a serious nature, possibly resulting in death, would occur because the dust truck was operated near areas with heavy foot traffic and working miners. Accordingly, I conclude this violation was S&S.

3. Negligence

LaRue designated the negligence for this violation as "moderate." (Tr.291:15-292:13) The March 22, 2015 pre-operation examination and "Do Not Operate" tag affixed to the truck's steering wheel demonstrate that ODPC's management was fully aware of the defects on this dust truck. (Tr.285:5-24; Ex. S–10, at 7) Further, any reasonably prudent person familiar with the mining industry, the facts of this case, and the protective purpose of 30 C.F.R. § 56.14100l would have followed the clear directive of the regulation and taken the truck out of service rather than attempt to excuse the half measure of a "conditional" tag out for only one of the truck's defects as Respondent did here. LaRue gave an unconvincing explanation of why he considered the negligence in this situation to be no more than "moderate." He listed many of the things that would support a finding of "high" negligence (Tr.289:13-20; 291:16; 292:1-8), but he ultimately concluded that the negligence rating should be reduced to "moderate" because the violating condition had not lasted more than four hours before he cited it. (Tr.291:15-24) I am not in full agreement with this evaluation, but I will not alter his official negligence rating of "moderate."

4. Penalty

I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected, the negligence points, the likelihood points, and the good faith point reductions. Based on my gravity and negligence findings, and considering but not relying on the point calculation in 30 C.F.R. § 100.3, the Secretary's proposed penalty of $1,944.00 is appropriate. I impose a penalty in that amount.[24]

J. Citation No. 8820574 – Dust Truck Air Brakes

Docket No. SE 2015-0285

Exhibits S–11 and S–14 (Tr.312:22-313:11) and Exhibit R–21 (Tr.315:18-316:12)

The Secretary argues that Respondent violated 30 C.F.R. § 56.14101(a)(3) by failing to properly maintain all braking systems on the Ford L9000 dust truck. The standard applies to self-propelled mobile equipment and requires that all such equipment have a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. The pertinent section of the regulation simply requires that all mobile equipment braking systems be maintained in functional condition.

1. Violation

LaRue issued Citation No. 8820574 on March 24, 2015, alleging that Respondent failed to properly maintain the air pressure on the service brakes of the Ford L9000 dust truck, which allegedly affected the operator's ability to stop the vehicle when activated. (Tr.317:8-13; Ex. S–11) This is the same dust truck mentioned in Citation No. 8820573. (Tr.312:10-15) Gibens accompanied Inspector LaRue on this portion of the inspection. (Tr.455:21-24)

LaRue opted to do a thorough inspection of the dust truck after dealing with the obstructed windshield and ODPC's failure to properly take the truck out of service. (Tr.313:18-22) LaRue wanted to test the truck's air brake system,[25] but the truck could not be moved to

---

[24] There is no need to adjust this penalty for the VPID distortion identified in relation to the housekeeping violations. The VPID calculation for this violation does not have the same defect.

[25] Air brakes use compressed air and are comprised of three different braking components: the service brake, the parking brake, and the emergency brake. (Ex. R–21, at 5-1) An air compressor adds air into the system by pumping air into air storage tanks. (*Id.*) The air compressor governor instructs the air compressor to pump more air into the system if the tank pressure falls to the "cut-in" pressure level (around 100 psi) and to stop pumping if the tank pressure rises to the "cut-out" pressure level (around 125 psi). (*Id.*) The service brake system "applies and releases the brakes when you use the brake pedal during normal driving." (*Id.*) The "foundation brakes" include the brake chamber, the pushrod, the slack adjuster, camshaft, s-cam,

perform for the test prescribed in the regulation because it was tagged out. (Tr.372:13-14; *see* 30 C.F.R. § 56.14101(b)) Accordingly, LaRue deemed it appropriate to use an alternative test method—a "stomp" test[26]—under the authority of 30 C.F.R. § 56.14101(b)(5), which allows an inspector to rely on "other available evidence to determine whether the service brake system meets the performance requirement of this standard." (Tr.313:21-314:2; 371:2-372:21)

LaRue enlisted the truck's driver to assist in performing the brake test. The driver started the engine and allowed air pressure to build up. (Tr.313:20-22) LaRue testified that he preferred to run the test with the engine on to simulate a more natural condition with the air compressor pumping air into the system. (Tr.318:17-25) The driver then stomped on and held the service brake pedal while LaRue checked for pressure drop-off on the pressure gauge on the truck's dashboard. (Tr.313:23-314:8; 409:8-10) LaRue testified that from his experience, he expected any system checked in this manner to have an initial pressure drop of between 10 and 15 psi from the normal operating value of 110 to 120 psi. (Tr.314:1-4; *see also* Ex. R–21, at 5-7 (noting expected normal pressure drops during testing)) LaRue waited until after the initial 10 to 15 psi pressure drop to start his measurement. (Tr.314:5-6) LaRue testified that, to his knowledge, a drop in pressure of six psi within a 60 second period would qualify as a failure. (Tr.319:1-5) He observed the air pressure drop nearly 30 psi—from 90 psi to near 60 psi—in less than a minute (Tr.314:6-8), but stopped the test before discovering whether the truck's air pressure alarm would sound. (Tr.410:11-16) Additionally, LaRue also heard an audible air leak while standing in the doorway of the operator's cab. (Tr.314:9-11; Ex. S–11, at 2) From this, he concluded that a component of the brake system was not functioning properly in violation of the regulation. (Tr.314:15-17; 368:13-21) The citation was terminated by replacing the defective brake chamber. (Tr.321:20-322:2)

This truck had a manufacturer-installed air pressure alarm system, which, according to LaRue, was calibrated to activate if air pressure dropped below 60 psi. (Tr.317:21-318:2) According to the Mississippi Professional Driver's Manual for Commercial Driver Licenses, there is a possibility that an air pressure warning signal might not work, causing a pressure drop without the operator knowing it. (Tr.316:14-25; Ex. R–21, at 5-6) At this point, whether the alarm system sounds or not, "uncontrolled actuation" of the air brakes occurs. (Tr.317:7-20) If this occurs, the air brakes become less effective, but it is still possible to drive the truck long enough to stop it safely. (Tr.316:23-317:13; 322:10-23; 369:19-21; 411:14-19; Ex. R–21, at 5-3) As pressure continues to drop below the trigger point, typically 20 to 30 psi, the emergency

---

brake shoes, and drum brakes. (*Id.* at 5-2) When a driver presses down on the service brake, i.e., the brake pedal, compressed air is forced into the service brake side of the brake chamber. (*Id.*) This air pressure initiates a sequential chain reaction—involving the pushrod, slack adjuster, camshaft, s-cam, brake shoes, and brake drum—which causes the vehicle to stop. (*Id.*) When the brake pedal is released, the compressed air is exhausted out of the system, thereby reducing the air pressure in the tanks. (*Id.*) This lost air pressure is restored by the air compressor. (*Id.*) Pressing and releasing the pedal unnecessarily can let air out faster than the compressor can replace it. (*Id.*) The service brake component is the primary concern in this citation.

[26] With the "stomp" test, the driver holds his foot on the brake pedal while watching the pressure gauge to see if the pressure drops faster than is permissible. (Tr.409:6-10)

spring brake system is designed to "pop out" and engage, which stops the truck.[27] (Tr.318:3-6; *see* Ex. R–21, at 5-3)

As a preliminary matter, I conclude LaRue's stomp test was an acceptable methodology of "determin[ing] whether the service brake system meets the performance requirement of the standard" given that a "Do Not Operate" tag was affixed to the steering wheel. *See* 30 C.F.R. § 56.14101(b)(5) (stating other available evidence may be used by an inspector if the equipment is not capable of traveling at least 10 miles an hour). The test produced reliable, relevant data and detected a significant air leak in a component of the brake system, which required replacement to restore the brakes to full function.

Section 56.14101(a)(3) requires that "all braking systems [. . .] shall be maintained in functional condition." The Commission established a definition of "functional condition" in *Nally & Hamilton Enterprises, Inc.*, noting that "functional" means "'capable of performing; operative.'" 33 FMSHRC 1759, 1763 (Aug. 2011) (citing *The American Heritage Dictionary of the English Language* 711 (4th ed. 2009)); *see also Wake Stone Corp.*, 36 FMSHRC 825, 827 (Apr. 2014) (using the *Nally & Hamilton Enterprises, Inc.* definition of "functional" for section 56.14132(a)). Applied directly to section 56.14101(a)(3), an ALJ colleague stated, "[t]he adjective 'functional' connotes something being able to perform its regular function, that is, it [connotes] something being able to work as intended (see *Webster's Third New International Dictionary* 921 (1986) (*Webster's*)." *Daanen & Janssen, Inc.*, 18 FMSHRC 1796, 1807 (Oct. 1996) (ALJ).

Respondent argues there was an insufficient basis for LaRue to conclude the truck's brakes were not maintained in "functional condition" and that LaRue's conclusion was arbitrary and incorrect. (Resp't Br. 10-11) I am unpersuaded. In *Grace Pacific Corporation*, a case cited to by both parties, a water truck at an aggregate mine had an air leak in its brake system that dropped system pressure by 28 psi when tested for one minute with the engine off.[28] 35 FMSHRC 3722, 3723 (Dec. 2013) (ALJ). The judge agreed with the Secretary and concluded that a psi "lower than the acceptable level, leaving the brakes ineffective" to be indicative that brakes were not maintained in "functional condition" and, therefore, in violation of section 56.14101(a)(3). *Id.* at 3724. Here, the drop in air pressure in one minute, 30 psi, was even greater than that in *Grace Pacific Corporation*. Furthermore, the brake test in this case was conducted with the engine on, allowing the air compressor to add more air into the system. (Tr.318:17-25) Had LaRue opted to test the air brakes with the engine off like in *Grace Pacific Corporation*, the air pressure could have dropped even more.

---

[27] Air brakes actually use air pressure to release the vehicle's parking brake (i.e., the mechanical spring brake), allowing the vehicle to move. (Ex. R–21, at 5-3) If there is an air pressure failure, the failsafe condition is for the spring brakes to engage and stop the truck. (Tr.367:24-369:9; Ex. R–21, at 5-3)

[28] Although the *Grace Pacific* decision did not specify whether the brakes were tested with the engine running or not, Citation No. 8691005 reads, "[t]he water truck brake system had an air leak that dropped system pressure about 28 psi when tested for one minute with the engine not running." Government Ex. 1, at 1, 35 FMSHRC 3722 (Dec. 2013) (ALJ) (Docket No. WEST 2013-0162) (emphasis added).

Respondent next cites to various failsafe and alarm systems on the truck that would alert the driver that the air pressure in the brakes was too low and argues that the integrated system was functional. (Resp't Br. 6-7, 11) Had LaRue determined that the defect did not rise to the level of rendering the brakes non-functional and therefore not a violation of the regulation, he would have had to ignore the intent of the regulation and the Commission's precedent on this point. In *Secretary of Labor v. Daanen & Janssen, Inc.*, the Commission was faced with the question of how to interpret the language of 30 C.F.R. § 56.14101(a)(3) given "at least two plausible and divergent interpretations." 20 FMSHRC 189, 192 (Mar. 1998). The Secretary argued that "the plain language of the standard mandates a finding of violation when a component of the braking system is not maintained in functional condition, regardless of whether the braking system is capable of stopping and holding the vehicle." *Id.* at 192. The Commission found the Secretary's interpretation reasonable for four reasons.

First, because the term "system" entails an "interrelationship of component parts, it follows that for the system to be considered functional, each of its component parts must be functional." *Id.* at 193 (emphasis added).

Second, the Secretary's interpretation was preventative and sought to cure equipment defects before serious accidents occurred, in line with the Mine Act's goal of protecting the safety of miners. *Id.*

Third, the Secretary's interpretation was consistently applied through the implementation of the PPM. Notably, the PPM provided, "[s]tandard [56].14101(a)(3) should be cited if a component or portion of any braking system on the equipment is not maintained in functional condition even though the braking system is in compliance with (1) and (2) above." *Id.* at 194 (citations omitted).

Fourth and finally, the Secretary's interpretation gave meaning to all subsections of the standard. *Id.* Under the Secretary's interpretation, subsection (a)(1) is a performance standard, while subsection (a)(3) is a maintenance standard. *Id.* (emphasis added).

The Commission's ruling in *Daanen & Janssen* makes it clear that subsection (a)(3) is different than subsections (a)(1) and (a)(2) and that a braking system may violate (a)(3) even though it passes the performance tests in (a)(1) and (a)(2). Thus, I conclude that the air leak that LaRue's stomp test detected in one of the dust truck's pressure canisters rendered the truck's braking system non-functional and constituted a violation of 30 C.F.R. § 56.14101(a)(3).

2. Gravity and S&S

The Secretary argues that it is reasonably likely that an injury would occur, that the injury could reasonably be expected to be fatal, and that one miner would be affected. The Secretary also alleges this citation was S&S. The Secretary describes two possible situations that could result in injury to a miner: (1) an increase in the truck's stopping distance; or (2) the emergency spring brake activating. (Sec'y Br. 44-45, *citing* Ex. R–21, at 5-6, 5-9) In the event that the emergency spring brake were activated, the Secretary depicts a worst-case scenario where "such a loss of air pressure is going to result in the driver losing full control of the vehicle." (*Id.* at 45) (emphasis added) Additionally, the Secretary argues the condition would not have been found or

corrected before an accident occurred. (*Id.*, *citing* Tr.319) Finally, the Secretary alleges the dust truck was regularly used to haul dust and operated around foot traffic with poor visibility, which would have contributed to serious injuries had normal practices been continued. (*Id.*)

Respondent does not dispute there was a leak in the right front rear brake chamber or that the air pressure dropped from 90 psi to 60 psi during LaRue's test; rather, Respondent argues that an injury would be unlikely because the truck had only been backed up a short distance to the loading dock, the truck traveled at a low rate of speed, and there was no evidence of foot traffic in the area when the truck was moved. (Resp't Br. 11, *citing* Tr.459:15-18) Respondent also argues injury would be unlikely because the brake system had an integral, dual-level failsafe mechanism: (1) a low-pressure alarm that would alert the driver, giving the him or her sufficient time to bring the truck to a controlled stop; and (2) the automatic emergency spring brake to lock the truck down. (Resp't Br. 7, 11-12).

On this point, I find serious inadequacies with both the Respondent and Secretary's briefs and the arguments in them. The Respondent focuses nearly exclusively on the facts at the time of the citation and relies heavily on redundant safety measures, both contrary to Commission precedent. The Commission has long held that an evaluation of the likelihood of injury should be made "in terms of continued normal mining operations," not just the snapshot at the moment of the citation. *U.S. Steel Mining*, 7 FMSHRC at 1130. The Circuit Courts and Commission have also held that redundant safety measures are irrelevant to all elements of the S&S analysis, including the likelihood of an injury. *Cumberland Coal*, 717 F.3d at 1029; *Knox Creek Coal*, 811 F.3d at 162; *Buck Creek Coal*, 52 F.3d at 136; *ICG Ill., LLC*, 38 FMSHRC 2473, 2481 (Oct. 2016); *Brody Mining*, 37 FMSHRC at 1691; *Cumberland Coal*, 33 FMSHRC at 2369.

The Secretary's brief, on the other hand, reaches conclusions with only a trivial consideration of the context and particular facts in this case. Both of the injury-producing scenarios the Secretary describes—an increase in the stopping distance or the emergency spring brake activating—require the air pressure in the system to drop below 60 psi. In contemplating the likelihood of injury here, it is important to consider that the brakes were "double chambered," which means the air leak only occurred when the driver put his foot on the brake pedal. (Tr.409:18-20; 411:12-13) It is also imperative to acknowledge the role the air compressor and governor play in regulating and restoring air pressure. Indeed, the reason that Inspector LaRue ran the "stomp" test with the dust truck engine on, despite the Mississippi Professional Driver's Manual instruction to "turn off the engine" (Ex. R–21, at 5-7), was that it simulates "more of a natural condition" because "[t]he compressor is constantly building [air pressure] up." (Tr.318:21-23) The Secretary did not mention either of these points in his brief.

The Secretary also failed to discuss with any specificity how the truck's speed, distance traveled, and frequency of use affect the likelihood of injury. At hearing, Gibens testified the maximum on-site speed allowed was 15 miles per hour (Tr.412:5-6), but the average speed driven was estimated at 10 to 12 miles per hour. (Tr.412:10) Additionally, Gibens testified that, depending on the season, the truck was driven as much as two times per day and as infrequently as once a week or less. (Tr.403:12-14) On days when the truck was operated, it was driven less

than 500 yards a day. (Tr.411:18) The Secretary did not discuss any of these factors but simply concluded, "[t]he vehicle was used regularly [. . .]." (Sec'y Br. 45)

The Secretary also failed to discuss factors that would bolster his argument. For example, the Secretary did not discuss the terrain of the Ripley Mine and Mill, a consideration that is often relevant in brake citation cases, despite discussion of it in the record. *See, e.g., Grace Pacific*, 35 FMSHRC at 3724 (mentioning the water truck operated on a grade of five to 10 percent); *Freeport McMoran Morenci, Inc.*, 35 FMSHRC 172 (Jan. 2013) (ALJ) (finding an accident was likely given the truck had non-functional brakes and traveled at 35 miles per hour on dirt and gravel haul roads with 10 percent grade and a continuum of hills); *Dix River Stone Inc.*, 29 FMSHRC 186, 197 (Mar. 2007) (ALJ) (stating "the road's grades must be kept in mind" where the haul truck was parked on a slope with a grade range of four to six percent but would travel in areas with a 10 percent grade and several turns, including a sweeping, long U-turn); *Tide Creek Rock Inc.*, 24 FMSHRC 201, 211 (Feb. 2002) (ALJ) (stating that even if a front-end loader with non-functioning brakes only traveled down a hill one percent of the time, it establishes the seriousness of violation). Although LaRue did not measure the grade since it did not seem relevant to him at the time (Tr.325:23-24; 326:2-5), a noticeable slope leading out from the dust chute is clearly visible in the video. (Ex. S–9, at 1:25) Gibens confirmed at hearing that the truck traveled uphill and around the plant from the dust chute to the dump area. (Tr.413:6-12)

Nor did the Secretary discuss in any detail how the load would affect the truck's ability to brake; instead, the Secretary's brief merely states the vehicle was used "to haul dust." (Sec'y Br. 45) Other judges have factored the effect a heavy load has on the ability of a vehicle to brake, especially when traveling on a grade. *See, e.g., Knife River Constr.*, 36 FMSHRC 2176, 2178-79 (Aug. 2014) (ALJ) (concluding that a truck with partially defective brakes "carrying a heavy load upon a steep grade" could reasonably likely cause a serious injury to miners); *Freeport McMoran Morenci*, 35 FMSHRC at 175 (discussing possibility of "brake fade" when trucks operate on a grade, particularly when carrying a heavy load); *Nelson Quarries, Inc.*, 30 FMSHRC 254, 283-84 (Apr. 2008) (ALJ) (finding S&S where truck with defective parking brake traveled over grades of up to twelve percent and often traveled with a load of rocks). Here, the citation indicates the truck was used to remove residual material during switchovers, and LaRue's notes state that the truck was "observed full." (Ex. S–11, at 1-2)

Lastly, the Secretary thrice notes the truck was "operated around foot traffic" (Sec'y Br. 40, 45-46), but he leaves out important details, which provide context and substance. LaRue testified at hearing that he was told by management that the dust truck was driven from the dust chute near the verge storage tank area, through the plant by the parking lot, down a road between the main administration building and the break room building, and ultimately dumped the dust on the other side of the plant. (Tr.319:17-25) The dust truck's path brought it in close proximity to both foot and equipment traffic. (Tr.319:25-320:1) Gibens on cross examination agreed that the dust truck was operated around foot traffic at the loading point and was normally driven to the other side of the plant. (Tr.457:13-16; 459:2-4)

This is a close call. Taking the facts and arguments as outlined in the Secretary's brief, I would be inclined to believe that "uncontrolled actuation," i.e., air pressure of 60 psi or lower,

was unlikely to occur and, accordingly, an injury would be unlikely. However, upon consideration of the entirety of the record before me—notably the fact that the truck carried a heavy load, traveled uphill from the dust chute to the dump point on the opposite side of the mine, and traveled in close proximity to foot traffic—I can understand how a driver of the dust truck could step on his brake pedal frequently enough to reduce air pressure in the system to dangerous levels. Assuming continued normal operation without abatement of the air leak, I find it reasonably likely that an injury would occur. My conclusion is strengthened by the fact that the front windshield of the truck was covered by a significant amount of clay dust, obscuring visibility for the truck driver. *See* discussion *supra* Section VI. I. 1.

With regard to the Secretary's contention that an injury could reasonably be expected to be fatal for one miner, I concur for the same reasons discussed above in Citation No. 8820573. *See* discussion *supra* Section VI. I. 2.

I have found an underlying violation of 30 C.F.R. § 56.14101(a)(3), a mandatory safety standard. The leak in the air brake system on the Ford L9000 contributed to a discrete safety hazard that the driver would lose control of the vehicle. For the reasons stated above, particularly because the truck traveled while carrying a heavy load uphill, I find it reasonably likely the air pressure in the system would drop to levels where the hazard would occur. Assuming the occurrence of the hazard, I conclude it is reasonably likely an injury would follow, especially given that the truck was operated in close proximity to foot and equipment traffic. Because of the size of the Ford L9000 dust truck, I find the injury would be of a reasonably serious nature, possibly resulting in a fatality. Accordingly, I conclude this violation was S&S.

3. Negligence

The Secretary maintains that this violation arose from moderate negligence. LaRue testified the air leak was audible even with the engine running. (Tr.314:10-11; Ex. S–11, at 2) He also testified the leak was extensive: dropping 30 psi in 60 seconds. (Tr.314:6-8; Ex. S–11, at 2) However, he testified that he could not show that Respondent had knowledge of the brake defect or that it had reason or occasion to have such knowledge. (Tr.321:8-17) Additionally, LaRue could not show exactly how long the leak existed. (Tr.321:10-16; Ex. S–11, at 2) For him, this mitigated the negligence designation to the moderate level.

Respondent argues that moderate negligence is not appropriate because the brake deficiency was not previously known. (Resp't Br. 6, 9) In support of Respondent's argument, I note there is no indication in the record before me that the failsafe low-air-pressure alarm system had ever sounded, and, as LaRue confirmed, the air pressure level had not yet dropped low enough to trigger the alarm during his stomp test. Additionally, the pre-operation examination for the dust truck from March 22, 2015, did not mark "Brakes" or "Parking Brake" as being problematic, despite noting other problems with the truck. (Ex. S–10, at 7) Nevertheless, considering the totality of the circumstances and for the reasons stated below, I find sufficient support in the record to establish that the citation was the result of moderate negligence.

First, the citation notes that standard 56.14101(a)(3) was previously cited two times in two years at the mine. (Ex. S–11, at 1) Previous repeated violations and warnings from MSHA should place an operator on "heightened alert" that more is needed to rectify the problem. *IO*

Coal Co., 31 FMSHRC 1346, 1356 (Dec. 2009), *citing New Warwick Mining Co.*, 18 FMSHRC 1568, 1574 (Sept. 1996). However, both of these previous citations were issued to a contractor, thus reducing any actual notice given to ODPC.

Next, although the checkboxes for "Brakes" and "Parking Brake" were not marked as problematic, I note that "Obvious Damage or Leaks" was marked on the dust truck's pre-operation examination. (Ex. S-10, at 7) Curiously, neither party discussed this at the hearing nor was it covered in the briefs. It is not clear from the limited reference—a single photo taken by LaRue of the pre-operation examination—whether Hall was referencing the damaged headlight, the leak in the air brake, or something else. Accordingly, this fact neither helps nor hinders a finding of negligence.

The most convincing factors in support of a moderate negligence determination are the extent and obviousness of the leak. Gibens agreed with LaRue that the air pressure bled down from 90 psi to 60 psi in one minute with the engine running. (Tr.458:21-459:1) Gibens also testified they measured the drop in air pressure while watching the air gauge on the truck's dashboard. (Tr.409:8-9) Given how quickly air left the system while pressing the brake pedal, a reasonably prudent driver would have recognized that something was wrong had he or she checked the air gauge while driving.

LaRue's testimony also indicates the leak should have been obvious. LaRue testified that he was standing in the doorway of the operator's cab while the driver was conducting the stomp test. (Tr.313:21-314:10) From that position, LaRue could hear the audible leaking of the air. (Tr.314:10-11; Ex. S-11, at 2) With no direct refutation by Gibens at hearing, Respondent attempts to undermine LaRue's testimony in its reply brief:

> [T]he Secretary outrageously claims that an air leak in the right rear brake chamber could be heard from the left doorway of the cab. Sec'y Br. at 44 (citing Tr. 313). There is simply no testimony on page 313 about hearing an air leak. Even if such testimony existed, it is questionable whether any weight should be given to this testimony given that LaRue did not record this key finding in his field notes (S. 14, at 14), and it requires this Court to believe that someone standing outside the front left side of a <u>running</u> truck would be able to hear a leak on the opposite side of the truck. Sec'y Br. at 46 (stating that the citation was terminated by replacing the right rear brake chamber). S. 11, at 1.

(Resp't Reply Br. 20) (emphasis in original)

I find multiple errors with Respondent's argument. First, Respondent is correct that there is no testimony regarding an audible air leak on page 313 of the transcript; however, had Respondent checked the next page, it would have seen that LaRue testified that he could "hear the audible leaking of air." (Tr.314:10-11) Second, contrary to Respondent's claim, LaRue <u>did</u> record this key finding in his notes. In the negligence section of his Citation/Order Documentation worksheet (MSHA Form 4000-49E) under "Justification," LaRue wrote, "Audible air leak." (Ex. S-11, at 2) Finally, although Respondent frames the broken chamber as

the "right rear brake chamber," the record states the leak came from the "right rear, front brake chamber" (Ex. S–11, at 1) and "right front rear brake chamber." (Tr.321:20-322:2) Respondent's choice to remove the word "front" comes across as a semantic attempt to distance LaRue from the leaking brake chamber. In any event, I am convinced that LaRue could hear an air leak over the roar of the engine, especially given how extensive the leak was. Accordingly, I credit LaRue's testimony that the air leak was audible from the driver's position with the engine running.

Viewing the totality of the circumstances, especially given the leak was audible and extensive, I conclude the respondent exhibited moderate negligence.

4. Penalty

I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected, the negligence points, the likelihood points, and the good faith point reductions. Based on my gravity and negligence findings, and considering but not relying on the point calculation in 30 C.F.R. § 100.3, the Secretary's proposed penalty of $1,944.00 is appropriate. I impose a penalty in that amount.[29]

K. Citation No. 8820571 – Illumination of Verge Storage Tank Area

Docket No. SE 2015-0285

Exhibits S–8 and S–9 (Tr.301:24-302:7)

The Secretary alleges that Respondent violated 30 C.F.R. § 56.17001 by failing to provide sufficient lighting around the verge storage tanks.[30] (Tr.301:1-5; Exs. S–8, S–9) The standard states, "[i]llumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas." 30 C.F.R. § 56.17001.

1. Violation

Inspector LaRue issued Citation No. 8820571 on March 23, 2015, alleging that three lights were not working at and around the verge storage tanks. (Ex. S–8, at 1) Specifically, the Tank 10 light was out, the Tank 9 light shone up but would not shine down,[31] and the light on the

---

[29] There is no need to adjust this penalty for the VPID distortion identified in relation to the housekeeping violations. The VPID calculation for this violation does not have the same defect.

[30] For a discussion about the "verge" product, see discussion *infra* Section VI. L. 1.

[31] While the written citation states, "tank 9 light would not shine down only up," I note that the video evidence only shows a non-lit light in Tank 9. (Ex. S–9, at 3:20) While observing

south side of the verge building was out. (*Id.*) Exhibit S–9 is a video LaRue made of the area after dark, showing the conditions described in the citation and in his testimony. (Tr.301:6-17) The Secretary argues that the scenes captured in the video accurately show (1) the relative lack of illumination in the area; (2) the accumulated material on the floor with miner footprints; and, (3) the general location, dimensions, and arrangement of structures relevant to LaRue's determination that what he saw and filmed created a slip–trip–fall hazard, which was compounded by the lack of adequate lighting. (Sec'y Br. 34-36; Tr.301:14-17; Ex. S–9)

LaRue testified about the layout of the area and the condition of the floor. (Tr.303:3-304:12) The floor surface was part concrete, part plate steel. (Tr.300:3-12) It was ramped up in places and down in others. (Tr.303:10-11) The floor was covered by wet material showing footprints from traffic through the area. (Tr.303:3-7) LaRue testified that miners periodically transited the area to perform maintenance and to access the Main Control Center ("MCC").[32] (Tr.303:18-24)

LaRue determined the verge storage tank area was a working area because maintenance work was done there on a periodic but regular basis. (Tr.309:25-310:14) He also determined that the area included surface structures, a path, and a walkway. (Tr.309:4-16) No measures had been taken to restrict access to the area to daytime only. (Tr.305:12-14; 310:2-4) Under normal and continuing mining conditions, miners could travel through or work in that area day or night, without restriction, to get parts, use the elevator, or to access the MCC room. (Tr.309:23-310:14)

By interviewing Respondent's management and hourly employees, LaRue determined that of the five employees in the verge storage tank area at the time of the citation, two supervisors and one hourly employee did not have flashlights as a back-up measure; the other two (hourly employees) did. (Tr.304:21-305:11)

Based on his familiarity with an earlier and, in his opinion, similar fatality case in Georgia and his knowledge about safe and acceptable light levels in similar work installations, LaRue concluded there was insufficient illumination in the verge tank area to provide safe working conditions. (Tr.308:8-309:3) He did not have or use a light measuring meter to back up his assessment (Tr.364:13-18); however, he was generally aware that a light intensity level of 30 lumens was accepted as a safe illumination level for manufacturing and warehouse facilities. (Tr.308:18-20) LaRue testified that from his experience dealing with issues of adequate illumination, he had a sense of when the illumination level was below 30 lumens. (Tr.308:11-17) He believed that the light level in the verge storage tank area was below 30 lumens in the cited area. (Tr.308:18-22)

Tank 9 in the video, Inspector LaRue commented, "[t]his light was not working. The electrician is currently working on it." (*Id.* at 3:20-3:23) During the filming, no further comment was made regarding the specific defect with the light in Tank 9.

[32] The MCC is the main electrical control room, which houses breakers and control switches for various parts of the plant. (Tr.267:4-6; 303:18-22; 362:25-363:7)

The following summarizes my impressions when viewing the video, Exhibit S–9. Starting at 2:21, the video shows how dark the stairway is that leads down to the verge loadout area. The stairway is an access way for the MCC. LaRue uses his flashlight to point out features in the area; the lighting is so poor that nothing would be visible without the flashlight. The distance in linear feet that is in the dark is not very great—it appears to be less than 20 feet. (Ex. S–9, at 2:59) Tanks 7 and 8 have sufficient lighting to navigate safely. (*Id.* at 3:00) Exiting Tank 8, there is a slick walkway and accumulated mud. (*Id.* at 3:09) The lighting is too dark to see any detail. LaRue uses his flashlight again in this area to show the floor and the accumulations. (*Id.* at 3:12) The entire distance from Tank 8 to Tank 9 is in darkness. (*Id.* at 3:16) LaRue shows a non-functioning ceiling light in Tank 9 with his flashlight. (*Id.* at 3:22) The area under Tank 10 is too dark to see without a flashlight. (*Id.* at 3:30) Multiple footprints are visible. The area leading to Tank 10 is too dark to transit safely. A light is burned out in Tank 10. (*Id.* at 3:35) With the exception of Tanks 7 and 8, the entire area shown in the video is too dark to walk through safely without a flashlight. It appears to be a maze of passageways comprising tens of yards of distance. Without the flashlight, it would not be possible to see any detail on the floor. (*Id.* at 3:45) Outside the tank area, looking away from the verge tanks, it is too dark to see the floor safely. (*Id.* at 4:00) LaRue points out another non-functioning light in the distance. (*Id.* at 4:04) There is another green light off to the right side, but it does not provide enough light to make it safe to walk in the area where he is taking the video.

Respondent asserts there was sufficient lighting in the verge area based on Gurley's testimony. (Resp't Br. 35, *citing* Tr.471:18-19; 473:9-18; 474:9-14) Though Respondent concedes that the light in Tank 10 was out and another light in Tank 9 was directed up and away from the floor area (*Id.*), Gurley testified that the MCC's internal lights were working (Tr.471:20-24), there was enough light for him to see where the steps were in the staircase going down to the verge area (Tr.471:15-19), and there was more than enough lighting to provide sufficient illumination outside the verge tanks. (Tr.473:12-18; 474:9-14; 475:2-4) Respondent attempts to discredit Inspector LaRue's lumen assessment by arguing "[t]he subjective opinion of an MSHA inspector is insufficient to establish a violation." (Resp't Br. 37, *citing Lehigh Sw. Cement Co.*, 33 FMSHRC 340, 342 (Feb. 2011) (ALJ) (vacating illumination citation where inspector failed to use a light meter)). Contrary to Respondent's argument, an experienced inspector can give opinion estimates of a technical nature based on his experience. *See, e.g., Centre Crown Mining, LLC*, 33 FMSHRC 428, 435 (Feb. 2011) (ALJ) (where the court credited an Inspector's expert opinion that the volume of air flow fell below the required minimum based on his unmeasured observation). It is important to note here that *Lehigh Southwest*, which Respondent has cited to, does not stand for the proposition that an MSHA inspector must use a light meter to determine the sufficiency of light in a room. The judge held in that case that "one must take into consideration the work being performed in the cited area" to determine "whether the illumination was sufficient to 'provide safe working conditions.'" *Lehigh Sw. Cement Co.*, 33 FMSHRC at 343. There, the cited area functioned primarily as a breakroom for miners rather than as a traditional working area. *Id.* Additionally, based on the photographic evidence and testimony, the judge found that natural light entered the room from a doorway and windows and there was ambient light from a television in the room. *Id.* The judge concluded after looking at the photographs that the room was "not so dark that it presented a significant hazard to miners, especially considering the purpose of the room." *Id.*

I have viewed the video evidence and, especially considering the purpose of the area, hold that LaRue's unmeasured assessment of light levels is admissible and convincing. Furthermore, after viewing the video, I conclude there was insufficient lighting to provide safe working conditions everywhere in the verge area at night except at Tank 7 and Tank 8. My conclusion is bolstered by the fact that but for the flashlight Inspector LaRue used to light his path in the video, it would have been nearly impossible to see.

Respondent next contends that, even if the area was too dark to provide safe working conditions, supplemental lighting was easily available, whether in the form of portable lights, flashlights, or personal cellphones. (Resp't Br. 35-36). I am not persuaded. Although the record indicates that portable, temporary lights were obtained and used in the verge area to terminate the citation (Tr.310:18-21; 365:23-366:14; Ex. S–8, at 2), nothing in the record suggests they would have been used in the area but for LaRue's citation. Respondent's assertion that flashlights would be used by miners in the area at night is also unsupported by the record: Only two of five night-shift employees questioned by LaRue were carrying flashlights. (Tr.305:7-11; Ex. S–8, at 4) Notably, two of the three employees who did not have flashlights were supervisors. (Tr.305:10; Ex. S–8, at 4) Finally, Respondent's suggestion that workers could use personal cellphones to illuminate the area (Resp't Br. 36, *citing* Tr.365:13-15) is similarly unconvincing. While cellphone usage is now ubiquitous, I note the standard's language instructs that illumination sufficient to provide safe working conditions "shall be provided." Presumably, the operator, not the individual miner, shall do the providing. I hesitate to believe that the drafters of the regulation intended for operators to pass this significant responsibility to its workers.

Respondent also claims that the verge storage tank area is not a work area because verge storage and loading are not usually done during evening hours. (Resp't Br. 34) Additionally, Respondent states the area is rarely accessed and the only reason to access the area is for greasing of a bulk loading bucket conveyor for the verge product that ran through the area. (*Id.*, *citing* Tr.303:13-21; 418:18-419:16) Respondent argues this work was done by a contractor during daytime hours, when natural light provided sufficient illumination in all areas. (*Id.*, *citing* Tr.363:17-19; 470:4-19)[33]

Key to the resolution of this issue is the nature and location of the MCC. Previous Commission decisions require that analysis of a sufficient lighting controversy focuses on the specific facts of the case. It is significant whether work is actually or likely done at night in a given area, and whether there are alternatives or work-arounds that would give miners the option to work and move about without accessing the contested area. For example, in *Capitol Aggregates, Inc.*, 3 FMSHRC 1388 (June 1981) (cited by Respondent), the Commission's ruling focused on whether there was an available alternative to miners that would allow them to perform a needed function without having to transit a poorly lit area. The Commission held that the existence of a work-around possibility undercut the inspector's determination that the work

[33] However, the record shows that although the maintenance work was done by contractors, the bulk loading of the verge product was done by regular plant employees. (Tr.419:6-9)

place in question was not safely lit. *Id.* at 1390. Miners could, but did not have to, access the cited area to do essential functions at night. *Id.*

Here, there is little doubt that the MCC is an area where "work" is or may be performed any time the plant is in operation.[34] Although the Respondent downplayed the significance of the total-plant switching and monitoring functions done from the MCC (Tr.471:25-472:5), there is no evidence to support nor argument proffered that access to the MCC through the verge area was not essential to the safe operation and control of the entire plant facility. (*See* Tr.267:1-6) The MCC contains alarms and read-outs for material depths and production speed which, in LaRue's opinion, would need to be checked frequently. (Tr.239:7-13) It is beyond peradventure that any time the plant operates, it is essential that the switching circuits in the MCC must be accessible because of the crucial need to be able to use them to perform lock-out/tag-out and reset overloads. (Tr.303:18-22; 309:19-20; 472:2-3)

The MCC was the only place where essential plant operations could be done, e.g., switching off electrical equipment for safety purposes. (Tr.267:3-6; 303:18-24; 309:17-20; 471:25-472:5) If it were necessary to switch off equipment at night, the only place to do it was at the MCC. (Tr.310:7-11) The MCC could only be accessed through the verge storage tank area (Tr.471:20-22; Ex. S–9, at 1:14, 2:46), where Inspector LaRue determined the lighting was insufficient and the floor conditions created a slip–trip–fall hazard.[35] The evidence also confirms that personnel working in the verge storage tank area accessed the MCC area as needed. (Tr.362:25-363:7) In addition to the contract personnel who performed periodic maintenance there, regular employees who loaded bulk verge also transited the verge storage tank area as needed. (Tr.269:18-270:4; 418:18-419:9) Notably, contrary to Respondent's assertion that nobody worked in the area at night, Gurley testified that the maintenance person who worked in the verge area worked the second shift, 5:00 p.m. to 1:00 a.m., a period during which it would be dark for at least half of the time. (Tr.470:15-471:4)

In this case, the existence of substantial material accumulations and the footprints in them suggests that either there was no workable means of avoiding the cited area, or, as a matter of practice, miners chose to and were allowed to move through the area. This, combined with the presence of the MCC in the area, makes it convincingly likely that such traffic occurred at night when the lighting was such as seen in the video. (Ex. S–9) Admittedly, based on the record before me, there is no way to determine with certainty that the footprints visible in the accumulated material were made at night. Nevertheless, even assuming that all of the foot traffic that made the prints occurred during daylight hours, there is sufficient evidence that people could transit or access the verge storage tank area at night—whether to merely go from one point to another, to do maintenance work, or to access the MCC room—to establish that the passageways and work areas in the vicinity of the verge tanks at night were not sufficiently lit or cordoned off to make it safe for a person to move through or work in the area.

---

[34] The plant was operating twenty-four hours a day, seven days a week at the time of this citation. (Tr.464:19-21)

[35] LaRue testified that he did not see anyone going into or out of the MCC during his inspection. (Tr.362:21-24)

Based on the above, I find there was insufficient illumination provided to provide safe working conditions in the cited area at night. This constituted a violation of 30 C.F.R. § 56.17001.

2. Gravity and S&S

Inspector LaRue determined that an injury was reasonably likely to occur. (Tr.306:4-18; Ex. S–8, at 1, 4) I concur. Despite Respondent's arguments to the contrary, I find it reasonably likely that personnel would transit the cited area at night given the essential nature of the functions controlled by the adjacently located MCC. Additionally, Gurley testified that the maintenance person who worked in the verge area worked the second shift, between 5:00 p.m. and 1:00 a.m. (Tr.470:15-471:4) I also note that no barricades or other means of preventing access and exposure at night were in place at the time the citation was issued. (Tr.305:12-21) The area was dark and had wet, slippery mud on uneven ground with tripping hazards, which would have likely contributed to an injury had normal practices been continued. (Tr.306:4-20; Ex. S–9, at 2:38-3:12) I also concur with LaRue's conclusion that the resulting injury—a muscle or joint injury—could reasonably be expected to result in lost workdays or restricted duty for one person. (Tr.306:18-307:14; Ex. S–8, at 1, 4)

I have found an underlying violation of 30 C.F.R. § 56.17001, a mandatory safety standard. The lack of adequate lighting in the verge tank area created a discrete safety hazard that a miner could slip, trip, or fall as a result of the poor lighting. It is reasonably likely that personnel would transit the area at night given the location of the MCC and the essential nature of the functions it controlled. It is also reasonably likely that the poor lighting conditions would result in a slip, trip, or fall hazard, especially given the obscured and uneven floor surface and the accumulation of verge material on the floor. Assuming the occurrence of the hazard, it is reasonably likely that an injury would result. The injury would be of a reasonably serious nature, possibly a muscle or joint injury resulting in lost workdays or restricted duty. I conclude this violation was S&S.

3. Negligence

Inspector LaRue evaluated the negligence for this violation as "moderate" because the darkened area was obvious, observable from multiple points, and the number of non-functioning lights was extensive. (Tr.307:23-308:3; Ex. S–8, at 1, 4) Although LaRue did not note any mitigating circumstances, he nonetheless felt the citation did not warrant a high negligence designation. (Tr.307:17-22) In his brief, the Secretary argues that the Court should consider high negligence and at least affirm the moderate negligence designation. (Sec'y Br. 38)

The numerous footprints in the accumulated material on the work area floor are evidence that Respondent's management had reason to be aware of actual or potential foot traffic through this area. Notably, the essential plant-wide functions controlled from the MCC made it likely that personnel would transit the area at all times, including nighttime hours. Additionally, the violation was extensive: three lights were not functioning. The fact that remedial action was required should have been obvious, especially when juxtaposing the lighting in Tanks 7 and 8 and the darkness in Tanks 9 and 10. (*See* Ex. S–9, at 2:55-3:40) I note that the Secretary did not establish how long the violation lasted. LaRue's field notes state "unknown existence." (Ex. S–

8, at 4) Considering the totality of the circumstances, I agree with Inspector LaRue and conclude that this violation was the result of moderate negligence.

4. Penalty

I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected, the negligence points, the likelihood points, and the good faith point reductions. Based on my gravity and negligence findings, and considering but not relying on the point calculation in 30 C.F.R. § 100.3, I find the Secretary's proposed penalty of $585.00 is appropriate. I impose a penalty in that amount.[36]

L. Citation No. 8820575 – Working Place Examination of Verge Storage Tank Area

Docket No. SE 2015-0285

Exhibits S–12 and S–9 (Tr.276:3-9; 301:24-302:7)

The Secretary alleges that Respondent violated 30 C.F.R. § 56.18002(a) by failing to designate a competent person to examine the verge storage tank area for safety or health hazards. (Tr.264:22-265:5; Ex. S–12) The standard requires that a "competent person designated by the operator [ ] examine each working place at least once each shift before miners begin work in that place, for conditions that may adversely affect safety or health." 30 C.F.R. § 56.18002(a).

1. Violation

Inspector LaRue issued Citation No. 8820575 on March 24, 2015. He was accompanied by Gibens during this portion of his inspection. (Tr.459:22-25)

The verge storage tanks[37] are used to store "verge," a "finished good" produced by the plant. (Tr.418:17) The product is a refined granule made from clay fines that is extruded and spheronized to be perfectly round. (Tr.416:14-417:21) After the product is made, it is stored in bulk at the verge tanks until it is loaded on trucks and in railcars for shipment. (Tr.417:22-418:4) The tanks are essentially large bins made of solid material. (Tr.473:4-8) The tanks are not used in the making of this product, only its post-production storage. (Tr.418:5-7)

While observing the verge storage tank area the night before on March 23, 2015, LaRue noted almost one hundred percent coverage of footprints in wet mud/clay. (Tr.266:23-267:15; 268:3-12; *see* Ex. S–9, at 2:50) After questioning management and rank-and-file personnel, LaRue realized that no workplace examination occurred in the area over the past year because

[36] There is no need to adjust this penalty for the VPID distortion identified in relation to the housekeeping violations. The VPID calculation for this violation does not have the same defect.

[37] For a visual image of the verge storage tank area, see Exhibit S–9 starting at 2:50.

nobody was able to produce records of the examination and nobody claimed that such records existed. (Tr.267:16-22; 269:3-4; 273:7-9) The various groups—verge personnel, maintenance personnel, and bagging personnel—each deflected the responsibility when asked. (Tr.269:5-270:4)

The next morning on March 24, 2015, LaRue continued to attempt to determine who was responsible for conducting workplace examinations in the verge storage tank area. (Tr.270:14-16) LaRue met with Mr. Cox, Superintendent Gibens, and Billy Albertson, a supervisor. (Tr.270:23-271:10; Ex. S–12, at 2) None of these individuals disputed that the verge storage tank area was a working place, which indicated to LaRue that they understood the regulation the same way he did. (Tr.361:4-9) LaRue recalls that Cox of the production department was eventually deemed to be responsible for the area. (Tr.270:16-18) Cox thought the verge department was in charge of conducting workplace examinations in the area. (Tr.270:23-25) After the citation was terminated, management decided that the verge department would be responsible for working place examinations in the area going forward. (Tr.275:18-23; Ex. S–12)

Inspector LaRue testified that he thought Citation No. 8820575 was appropriate because people were working in and traveling through the verge storage tank area, justifying its being classified as a working place. (Tr.272:10-15) Albertson told LaRue that maintenance contractors were assigned to do lubrication work on the elevator and equipment in the verge area at least once a week. (Tr.271:8-21; 356:20-357:4) In addition to these independent contractors (Tr.469:19-470:8), Gibens testified that plant employees would occasionally go in for the purpose of "loading the bulk." (Tr.419:6-9) Although Gibens was specifically responsible for the processing department (Tr.181:8-10), he estimated that fifty to sixty percent of verge business involved bulk bags, which did not require the storage tanks. (Tr.417:24-418:2) Gibens testified he agreed with LaRue's notes that Respondent failed to ensure examinations were being done in violation of section 56.18002(a). (Tr.461:5-8) Additionally, he agreed with the statement that the verge group thought that maintenance was doing the inspection and vice versa. (Tr.460:23-461:4)

Respondent argues that this citation should be vacated for the following reasons: (1) 30 C.F.R. § 56.18002(a) limits the requirement to perform workplace exams to "mining or milling" areas, and the verge area was neither (Resp't Br. 14); (2) the verge storage tank area is a post-production storage location merely waiting for bulk shipment off premises and, therefore, not a "working place" (*Id.*); (3) it had in place an SOP that determined, in reference to MSHA's then-relevant PPL, the verge area was not covered by the regulation (*Id.* at 15-16); (4) the maintenance workers who worked in the verge storage tank area were non-miner contractors (*Id.* at 17); (5) only maintenance and repair activities took place there, and these activities are not covered by the requirement (*Id.* at 20); and, (6) even if the verge storage tank area were a working place, ODPC did not have fair notice. (*Id.* at 19-20) I shall address each of these arguments below.

(a) The Verge Storage Tank Area is in the "Mining or Milling" Process

First, the regulation can only apply if the verge tank area is determined to be part of a mine. The Mine Act at 30 U.S.C. § 803 states, "Each coal or other mine [. . .] shall be subject to

provisions of this [Act]." At 30 U.S.C. § 802(h)(1)(C), Congress defined the term "other mine" as "lands, [. . .] structures, facilities, equipment, machines, tools, or other property [. . .] used in, or to be used in, the milling of [. . .] minerals, or the work of preparing [. . .] minerals [. . .]." (emphasis added). For this purpose and paraphrasing somewhat, the area must be a location where milling or preparing of minerals is done, or comprise structures, facilities, or equipment used in the work of preparing or milling minerals.

Second, the preparation and storage of the verge product must come under the definition of milling. Milling operations are covered by Section 3(h)(1) of the Mine Act, but not defined there. The definition is found in the MSHA–OSHA Interagency Agreement[38] in Appendix A:

> Milling is the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated.

MSHA–OSHA IA, 44 Fed. Reg. at 22,829. The types of milling processes over which MSHA has jurisdiction under the Interagency Agreement include crushing, grinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing, sintering, evaporating, calcining, kiln treatment, sawing and cutting stone, heat expansion, retorting (mercury), leaching, and briquetting. *Id.*

These authorities provide some contour to the definition of "milling," but it is still ambiguous. Section 802(h)(1) of the Mine Act provides helpful guidance in this situation. 30 U.S.C. § 802(h)(1). In making a "determination of what constitutes mineral milling [. . .], the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to health and safety of miners employed at one physical establishment." *Id.* The legislative history of the Mine Act reveals a congressional intent to interpret what is considered to be a mine broadly and resolve jurisdictional doubts in favor of coverage under the Mine Act. S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978); *see Dicaperl Minerals Corp.*, 28 FMSHRC 720, 726 (July 2006) (ALJ).

Further analysis is required to determine whether the Secretary's interpretation of "milling" deserves deference. If it does, it takes us one step closer to interpreting whether the verge storage tank area should be considered a "working place" for enforcement purposes. Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy W. Mining Co. v. FMSHRC*, 40

---

[38] The Interagency Agreement is an agreement entered into between MSHA and OSHA to "delineate certain areas of authority, set forth factors regarding determinations relating to convenience of administration, provide a procedure for determining general jurisdictional questions, and provide for coordination between MSHA and OSHA in all areas of mutual interest." MSHA & OSHA, Interagency Agreement, 44 Fed. Reg. 22,827 (Apr. 17, 1979), *amended by* 48 Fed. Reg. 7,521 (Feb. 22, 1983) [hereinafter *MSHA–OSHA IA*].

F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 844 (1984)); *see also Sec'y of Labor v. Cranesville Aggregate Co.*, 878 F.3d 25 (2d. Cir. 2017) (noting that Secretary's reasonable determination regarding which conditions are to be regulated by MSHA and which by OSHA is entitled to "substantial deference"). The agency's interpretation of the statute is entitled to affirmance "as long as that interpretation is one of the permissible interpretations the agency could have selected." *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 673 (July 2002) (citations omitted). When an agency "fills in a space" in a statute it is charged with administering, its interpretation is given *Chevron* deference. *Id.*

LaRue concluded that the verge tanks were being used in a milling process when he cited the plant for a violation. (Tr.360:3-5) His point of reference was the then-relevant PPL. (Ex. R-18)[39] LaRue conceded that he had no idea why the area was called "verge" or what was in the tanks. (Tr.265:14-22) But at the hearing, he explained that, to his understanding, the verge area was the final part of the milling process. (Tr.360:19-20)

Jurisdictional cases provide a starting point for my analysis. The decision in *Donoho Clay Company*, 3 FMSHRC 2381 (Oct. 1981) (ALJ), departed significantly from what had seemed to be a core characteristic of a milling operation under the Interagency Agreement, i.e., separating more valuable constituents of the crude material. As such, *Donoho* provides guidance as to whether verge storage can constitute "milling." The production of Meltzona, a product made at a similar point in the preparation cycle and very similar in composition to verge pellets, was determined to be a milling operation. Meltzona was made from a naturally occurring refractory clay that required principally milling processes to produce a marketable product, very similar to the verge product in this case. The issue in *Donoho* was whether the operator's plant was a milling operation, and therefore part of a "mine" under section 3(h)(1) of the Act and subject to MSHA's jurisdiction, or whether it was a refining operation, and therefore subject to OSHA's jurisdiction under the MSHA–OSHA Interagency Agreement.

Donoho's mixing and blending of clay with other products was not seen strictly as an "essential operation," a defining characteristic of a milling process as mentioned in the Interagency Agreement. It did not increase the purity of the clay—but simply changed its nature and level of refractoriness. Similarly, Respondent's production of verge from waste clay fines, which had already been refined to produce other clay products, did not increase the purity of the clay but simply formed it into a size and shape that was necessary for its use in various products or processes.

The *Donoho* decision focused more on the continuity of process and less on the apparent arbitrariness such a narrow "essential operation" analysis would impose. The "essential operation" test was distinguished as contrary to the language in the Act's legislative history that

---

[39] MSHA's PPL in place at the time of the inspection states that "working places" must be inspected. (Ex. R-18) It uses the definition of "working place" found at 30 C.F.R. § 56.2: "any place in or about a mine where work is being performed." This is broad enough on its face to encompass milling activities, but there is no specific reference to milling.

encouraged MSHA to assert jurisdictional authority over facilities and processes where convenience and ease of enforcement were served.

It is not apparent from the *Donoho* decision whether the Meltzona product was ultimately packaged or kept in bulk for shipment to customers, but it is clear that the process of making the products, Meltzona in *Donoho* and verge here, can be considered a milling operation, and therefore part of a "mine" under section 3(h)(1) of the Act and subject to MSHA's jurisdiction. The processing of the two products is identical for analytical purposes. I conclude that the production of verge is a milling operation and is covered by the Mine Act.

The next step is to determine whether storage of the verge product is also covered under the Mine Act as a milling activity. The Interagency Agreement expands the scope of what can be considered a milling process "to apply to mineral product manufacturing processes where those processes are related, technologically or geographically, to milling." *MSHA–OSHA IA*, 44 Fed. Reg. at 22,828. The Secretary has also recognized that "[n]otwithstanding the clarification of authority provided by Appendix A, there will remain areas of uncertainty regarding the application of the Mine Act, especially in operations near the termination of the milling cycle and beginning of the manufacturing cycle." *Id.*[40]

In *Austin Powder Company*, 37 FMSHRC 1337, 1355 (June 2015) (ALJ), a broad reading of the Act supported the inclusion of a storage area under MSHA's jurisdiction. The storage facility contained explosives used both at the subject quarry and at other sites. It was within one-tenth of a mile of the rest of the mine, and was geographically close enough to the area where minerals were actually extracted to be included in the definition of a mine.

Respondent's production of verge spheres from waste clay material that has been "milled" is in the grey area between milling and manufacturing. Nonetheless, the Mine Act and related documents provide sufficient clarity about what to do in this situation. The technical difference between milling and manufacturing does not stand in the way of ease of application, particularly where, as here (and in *Austin Powder*), the storage is done in the same physical area where the milling is done. The argument that storage is not part of milling is inconsequential in light of the Act's preference for unified MSHA coverage of processes related to mining and milling activities. *See VenBlack, Inc.*, 7 FMSHRC 520, 534 (Apr. 1985) (ALJ). I conclude that verge storage is sufficiently related to milling to satisfy the Mine Act's preference for unitary MSHA coverage.

(b) The Verge Storage Tank Area Conforms to the Definition of a "Working Place"

Per the authorities cited above, MSHA's interpretation of what constitutes a "working place" is entitled to full deference unless the interpretation is unreasonable, plainly erroneous, or

---

[40] The Commission has also observed that "'milling' and 'preparation' can be perceived as words used, in a loose sense, interchangeably to describe the entire process of treating mined minerals for market." *Kerneos, Inc.*, 37 FMSHRC 719, 721 (Apr. 2015) (ALJ) (internal citations omitted).

inconsistent with the regulation, or there is reason to suspect it does not reflect the agency's fair and considered judgment on the matter. *See* discussion *supra* Section IV. F. The working place examination standard was "drafted in general terms in order to be broadly adaptable to the varying circumstances of a mine" and, therefore, is appropriate for application of the reasonably prudent person standard. *Sunbelt Rentals, Inc.*, 38 FMSHRC 1619, 1627 (July 2016) (quoting *FMC Wyo. Corp.*, 11 FMSHRC 1622, 1629 (Sept. 1989)).

Respondent reiterated the position in its briefs that the verge storage tank area is a "storage tank," (Resp't Br. 14, 16, 18-19; Resp't Reply Br. 21, 23-24), or "storage area," (Resp't Reply Br. 23), but not a "working place." Within the definition section for surface metal and nonmetal mines, the verge storage tanks only appear to fit into five possible categories: (1) storage facility; (2) storage tank; (3) magazine; (4) travelway; or, (5) working place. I will consider each in turn.

A storage facility is defined as "the entire class of structures used to store explosive materials. A 'storage facility' used to store blasting agents corresponds to a BATF Type 4 or 5 storage facility." 30 C.F.R. § 56.2. A storage tank is defined as "a container exceeding 60 gallons in capacity used for the storage of flammable or combustible liquids." *Id.* A magazine is defined as "a facility for the storage of explosives, blasting agents, or detonators." *Id.* As mentioned previously, verge is a spheronized "finished good" made from extruded clay fines. (Tr.416:14-417:21) It is not a blasting agent. It is not a liquid. It is not an explosive. Therefore, the verge storage tank area conforms to none of these storage-based definitions.

Similarly, the verge storage tank area does not meet the criteria to be categorized as a "travelway." A travelway is defined in the regulation as a "passage, walk or way regularly used and designated for persons to go from one place to another." 30 C.F.R. § 56.2 (emphasis added). While the existence of numerous footprints in wet mud suggests that the area was frequented, there is no indication in the record that the area was designated for persons "to go from one place to another." Thus, the verge storage tank area is not properly characterized as a travelway.

A working place is defined as "any place in or about a mine where work is being performed." *Id.* Independent contractors performed maintenance duties and Respondent's plant employees loaded bulk product at the verge storage tank area. (Tr.419:6-9; 469:19-470:8) Here, given the options listed above, the verge storage tank area is best described by the "working place" definition. Accordingly, I conclude that the Secretary's interpretation of "working place," as applied by Inspector LaRue when he issued this citation, is reasonable and entitled to deference. The verge storage tank area was appropriately considered a "working place."

(c) Respondent's SOP is not Dispositive in Determining Whether the Verge Area is a "Working Place"

The Respondent published and followed an internal workplace examination SOP for the Ripley plant. (Ex. R–2; Tr.399:16-400:21) Respondent argues that under the SOP, all areas where miners worked "in the mining and milling processes" were required to be inspected each shift. (Resp't Br. 15-16, *citing* Ex. R–2) Respondent additionally states in its brief that ODPC policy specifically referenced the MSHA PPL on workplace inspections in effect at the time this

citation was issued. (*Id.* at 16, *citing* Tr.400:4-13) Respondent argues it derived an interpretation of what constituted a mining or milling process from the PPL and determined, based on that definition, that verge storage was excluded, which relieved it of any obligation to perform pre-use examinations in that part of its operation. (*Id.* at 16, 23)

The Respondent's SOP does not change the focus of this analysis.[41] Its identification of areas that were subject to working place examinations is not binding and is less reasonable than the Secretary's, particularly inasmuch as it is clearly self-serving, at least under these facts. Defining the verge storage tank area so as to exclude it from the working place examination requirement relieves the Respondent of the expense and administrative bother of having to staff and execute this function and is further afield from the "reasonable miner" test customarily applied to these disputes than is the Secretary's conclusion that the verge storage tank area was a working place.

(d) The Independent Contractors who did Weekly Maintenance Work were Miners Subject to the Mine Act

Respondent emphasizes that only contracted maintenance workers worked in the verge storage tank area. (Resp't Br. 15, 17; Resp't Reply Br. 23) Respondent refers to the contracted maintenance workers as "non-miners." (Resp't Br. 20) However, the fact that the maintenance workers at the verge storage tanks were independent contractors does not negate their status as miners. Section 3(g) of the Mine Act states that a "miner" is "any individual working in a coal or other mine." 30 U.S.C. § 802(g) (emphasis added). *See also Nat'l Indus. Sand Assoc. v. Marshall*, 601 F.2d 689, 704 (3d Cir. 1979) ("As its standard, the statute looks to whether one works in a mine, not whether one is an employee or nonemployee or whether one is involved in extraction or nonextraction operations."); *Cyprus Empire Corp.*, 15 FMSHRC 10, 14 (Jan. 1993) ("In the Mine Act, [. . .] Congress chose to define miners as individuals who work in a mine, rather than as employees of an operator.") While there are exceptions for contracted workers who perform maintenance work in other areas of the regulations,[42] no similar exception to the definition of "miner" exists for Part 56. Since the verge storage tanks are an extension of the milling facilities as discussed above, and since the contracted maintenance workers worked there, it follows that the maintenance workers are miners under the Mine Act.

In any event, the operative word in the definition of a "working place" is the word "work." I note that the definition of a "working place" does not include a requirement that the work is performed by a "miner." 30 C.F.R. § 56.2. Similarly, the PPL in effect at the time of the

---

[41] Based on a thorough review of Respondent's Workplace Examinations SOP, Exhibit R–2, I am doubtful of Respondent's sincerity that it relied on the 2014 PPL in believing the verge storage tank area was not a working place. A full discussion can be found below. *See* discussion *infra* Section VI. L. 3.

[42] For example, Part 46 makes an exception to the definition of "miner," stating that maintenance or service workers who do not work at a mine site for a frequent or extended period are not "miners" for the purposes of the mandatory training/retraining requirements. 30 C.F.R. § 46.2(g)(2).

citation explains that the phrase "working place" applies to those locations at a mine site "where persons work in the mining or milling processes." (Ex. R–18) The contracted maintenance workers undoubtedly fit this description.

(e) The Definition of "Working Place" used at the Time of the Citation was Broad Enough to Include Areas Where Maintenance Work was Performed

Respondent next argues the verge storage tank area is not a "working place" because the area was only accessed weekly for routine greasing by contractors (Resp't Br. 15, *citing* Tr.356:20-25) and maintenance activities do not constitute "work."[43] (Resp't Br. 14, 17, 20) As authority to bolster its claim, Respondent cites to MSHA's evolving policy regarding the enforcement of section 56.18002(a), as outlined in MSHA's PPLs. *See* (Ex. R–17 (Program Policy Letter No. P15-IV-01, "Examination of Working Places" (effective date July 22, 2015))); (Ex. R–18 (Program Policy Letter No. P14-IV-01, "Examination of Working Places" (effective date March 25, 2014))); MSHA, Final Policy on Examination of Working Places, 61 Fed. Reg. 42,787 (Aug. 19, 1996) [hereinafter *1996 PPL*]; MSHA, Examination of Working Places, 60 Fed. Reg. 9,987 (Feb. 22, 1995) [hereinafter *1995 Proposal*].

In 1995, MSHA issued a public notice for a change in the definition of a "working place." Respondent highlights the following sentence in the proposed draft definition: "The working place for an individual assigned to perform maintenance or repair duties, for example, is the area where the individual performs the maintenance or repair work." *1995 Proposal*, 60 Fed. Reg. at 9,988. Respondent notes that the 1996 PPL deleted the references to maintenance and repair work from the 1995 proposed draft language. (Resp't Br. 20) Respondent argues that based on this omission, which was carried forward to the 2014 PPL that was in effect at the time of the citation, it is appropriate to assume that maintenance and repair activities were not intended to be included as "work" for purposes of section 56.18002(a). (*Id.*) Respondent also notes that MSHA updated its working place inspection PPL, effective July 22, 2015, to specifically include areas where work is performed on an infrequent basis, such as areas accessed primarily during periods of maintenance or clean-up. (*Id.* at 21; *see* Ex. R–17, at 2) Respondent argues that the explicit addition of "maintenance" work in the 2015 PPL further evidences that the scope of "working place" did not include maintenance work at the time Citation No. 8820575 was issued on March 24, 2015. (*Id.*) I disagree.

---

[43] Respondent is careful in its briefs to frame the tasks that were done in the verge area as maintenance and cleanup "activities" and not "work." (Resp't Br. 14, 20-21; Resp't Reply Br. 21, 23-24) However, it appears Respondent had a momentary lapse of memory when describing those same activities a few pages later for Citation No. 8820571, the illumination violation. There, Respondent wrote, "[t]o the extent that the [verge storage tank area] was accessed, that access was for greasing of a bulk loading conveyor for the Verge product that ran through the area. Tr.303:13-21; 418:18-419:16. This work was done by a contractor during daytime hours [. . .]." (Resp't Br. 34) (emphasis added)

First, Respondent's contention that the 1995 draft language reference to maintenance and repair duties delineates the scope of what constitutes "work" misreads the purpose of the sentence. The 1995 draft language stated, "[t]he working place for an individual assigned to perform maintenance or repair duties, for example, is the area where the individual performs the maintenance or repair work." *1995 Proposal*, 60 Fed. Reg. at 9,988 (emphasis added). The following sentence in the draft language clarifies this focus by stating, "[f]or an operator to be in compliance, that area would need to be examined by a competent individual for hazardous conditions and any hazardous conditions would need to be promptly corrected." *Id.* (emphasis added). The focus of this example sentence is not to describe the scope of what constitutes "work"; rather, the focus is to explain that the working place inspection must take place in the area where the work is performed.

Next, because the 1996 PPL and subsequent 2014 PPL did not explicitly list maintenance or repair duties as "work," Respondent concludes it is appropriate to assume there was no intention to include them. (Resp't Br. 20) Based on the totality of the 1995 draft language, however, I find that it is more appropriate to interpret "work" broadly. In the paragraphs that precede the "maintenance or repair duties" proposed draft language, MSHA stated its reason for proposing new language for standard 56.18002:

> However, in a 5-year period, MSHA has investigated 17 serious and fatal accidents where working place examinations were not conducted or were inadequately conducted. In a significant number of these accidents, failure to conduct working place examinations was a contributing cause. Therefore, rigorous working place examinations are a fundamental accident prevention tool for the mining industry.

1995 Proposal, 60 Fed. Reg. at 9,988. Notably, a similar variant of this language was ultimately kept in the 1996 PPL.[44] Respondent's narrow interpretation of the 1996 and 2014 PPLs disregards the history of accidents that served as the impetus for MSHA's 1995 proposed language. Additionally, the 2014 PPL that was in effect at the time this citation was issued defined "working place" as "any place in or about a mine where work is being performed." (Ex. R–18, at 2) (emphasis added). Given the broad language used here, had MSHA intended

---

[44] The 1996 PPL stated the following in its background section:

> Failure to conduct working place examinations has been a contributing cause of a significant number of recent accidents. In the 5-year period from 1988–1992, MSHA has investigated 17 serious and fatal accidents where working place examinations were not conducted or were inadequately conducted and were found to have contributed to the cause of the accident.

1996 PPL, 61 Fed. Reg. at 42,788.

maintenance or repair work to not constitute "work" for the purposes of section 56.18002, they would have listed it. Instead, no specific exceptions are mentioned.

Finally, the explicit inclusion of new language referencing maintenance work in the 2015 PPL does not mean, as Respondent argues, that the 2014 PPL necessarily excluded areas accessed primarily during periods of maintenance or cleanup. The inclusion of the phrase "maintenance or cleanup" in 2015 did not expand the scope of "work"; it merely clarified an already broad standard.[45] For these reasons, I find that the phrase "working place," as used in the 2014 PPL, was broad enough to include those areas where maintenance work was performed, despite not being explicitly listed.

(f) Respondent's Employees Conducted Non-Maintenance Work Activities in the Verge Storage Tank Area

Even assuming Respondent is correct regarding MSHA's intention at the time this citation was issued to not include maintenance and repair activities as conduct triggering workplace inspection requirements, Respondent's argument fails because it improperly characterizes the work that mine employees conducted at the verge storage tanks. Respondent states in its brief that only maintenance and cleanup activities took place in the verge storage tank area (Resp't Br. 14) and that only contractors doing greasing maintenance for a non-mining-related function ever entered the area. (*Id.* at 17) Notably, Respondent argues that "no miners" worked in the verge storage tank area. (*Id.*) This is untrue. Superintendent Gibens stated at the hearing that, in addition to the maintenance personnel, plant employees would go into the verge storage tank area for the purpose of "loading the bulk." (Tr.419:6-9) "Loading the Bulk" is properly characterized as work. Further, the record suggests that this amount of work was not trivial. Superintendent Gibens, although stating that he is responsible for processing and does not specifically work in the verge group, estimated that fifty to sixty percent of verge sales were in the form of bulk bags. (Tr.417:24-418:2) The storage tanks, however, were for bulk product. (Tr.418:3-4) Presumably, based on the testimony at hearing, the remaining verge product that was not sold as "bulk bags" was sold as "bulk." Thus, up to fifty percent of verge was bulk product stored in the verge storage tanks. As mentioned before, this bulk product was loaded into trucks and railcars by plant employees. (Tr.419:6-9) Albeit not constantly or consistently, Respondent's witness' own statement indicates that employees worked in the verge storage tank area.[46] Since work was performed at the verge storage tank area, it is properly characterized as a working place. For the reasons stated, the verge storage tanks were an appropriate site requiring a workplace examination.

---

[45] As a more relatable example, if my local dog park has a sign that says, "dogs allowed between 8 a.m. and 8 p.m." and then later amends the sign to read, "dogs, including Irish Wolfhounds and Rhodesian Ridgebacks, allowed between 8 a.m. and 8 p.m.," the addition of the phrase "including Irish Wolfhounds and Rhodesian Ridgebacks" did not expand the scope. Irish Wolfhounds and Rhodesian Ridgebacks were always welcome in the park because they are, by all reputable accounts, dogs.

[46] For additional testimony by Gibens regarding the bulk loading process, see Tr.403:17-404:6.

(g) Respondent had Fair Notice

Respondent argues that MSHA failed to give fair notice that the verge storage tanks required working place inspections. Respondent states that at least 14 inspections over seven years failed to express concern that working place inspections were not taking place at the verge storage tank area. (Resp't Br. 19)

The mere fact that the verge storage tank area was not cited for workplace inspection violations in the previous seven years does not negate the fact that Respondent should have realized that MSHA had jurisdiction and that a workplace inspection was required. Furthermore, MSHA cannot be estopped from enforcing its regulations simply because it did not previously cite the mine operator. *See Mainline Rock & Ballast, Inc. v. Sec'y of Labor*, 693 F.3d 1181, 1187 (10th Cir. 2012) (citing *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1416-17 (10th Cir. 1984)). The Mine Act is a strict liability statute. As long as a regulation is sufficiently specific that a reasonably prudent person, familiar with the conditions the regulation is meant to address and the objective the regulation is meant to achieve, would have fair warning of what the regulation requires, then the due process requirements for notice are satisfied. *Id.* at 1187 (citing *Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1083-84 (10th Cir. 1998)).

LaRue credibly testified that Gibens, Cox, and Albertson did not contest that the verge storage tank area was not part of the working place inspection area when he issued the citation. (Tr.361:4-9) Moreover, Respondent's own witness' statements contradict Respondent's argument that it did not have fair notice that the verge storage tank area was subject to section 56.18002(a). Superintendent Gibens agreed at hearing that management failed to ensure examinations were being done in the verge storage tank area (Tr.461:5-8) and should have been aware that examinations were not being done if they reviewed current work exam areas. (Tr.462:1-7)

For the reasons stated above, I conclude a reasonably prudent person would have recognized that the verge storage tank area was subject to the working place inspection requirements of section 56.18002(a). Accordingly, Respondent's fair notice argument fails.

Based on the above, I conclude the verge storage tank area was a working place as contemplated by 30 C.F.R. § 56.18002(a) and the failure to conduct a working place examination constituted a violation of the standard.

2. Gravity and S&S

Inspector LaRue determined that an injury was reasonably likely to occur. (Tr.273:10-19; Ex. S–12, at 1-2) I concur. Contrary to Respondent's contention that the area was rarely accessed or worked in, Inspector LaRue testified that there was almost one hundred percent coverage of footprints in wet mud throughout the verge storage tank area. (Tr.267:11-15; 268:3-4) This is corroborated by video evidence taken the night before. (Ex. S–9, at 2:38-3:12) LaRue testified that although the wet mud in the verge storage tank area was comprised of "more of a coarse material," it was still on a smooth steel plate, which would create a slipping, tripping, or falling hazard. (Tr.268:13-15)

I find it reasonably likely that personnel working in the area—whether loading the bulk or conducting maintenance work—could slip, trip, or fall and sustain an injury. I also concur with LaRue's conclusion that the resulting injury—a muscle or joint injury—could reasonably be expected to result in lost workdays or restricted duty for one person.

I have found an underlying violation of 30 C.F.R. § 56.18002(a), a mandatory safety standard. The Commission has instructed that "the starting point for determining the hazard is the actual cited section" and is found "in terms of the prospective danger the cited safety standard is intended to prevent." *Newtown*, 38 FMSHRC at 2038. Unlike most safety standards, section 56.18002(a) does not have a particular hazard associated with it. Rather, the purpose of section 56.18002(a) is to detect and prevent "conditions which may adversely affect safety or health." In this instance, the discrete safety hazard was the possibility of a miner slipping, tripping, or falling on wet mud in the verge storage tank area.

The operator's failure to conduct a proper workplace examination contributed to the risk of a slip–trip–fall hazard. Such a hazard would reasonably likely occur, particularly in light of the fact that the area was often frequented as evidenced by the abundance of footprints. Assuming the occurrence of the foot-level-fall hazard, I find it reasonably likely that an injury of a reasonably serious nature, possibly resulting in muscle or joint injuries leading to lost workdays or restricted duty, would occur. I conclude this violation was S&S.

3. Negligence

The Secretary alleges that the violation was the result of high negligence. The "high" negligence designation "suggests an aggravated lack of care that is more than ordinary negligence." *Brody Mining*, 37 FMSHRC at 1703 (quoting *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)). ODPC had been cited for the same standard twice before in two years, which signaled to LaRue that Respondent was placed on notice. (Tr.277:2-9; Ex. S–12, at 1) Additionally, LaRue thought the extensive footprints in the wet mud in the area made it obvious that a workplace exam should have been conducted. (Tr.267:11-15; 275:10-13) LaRue detailed in his notes that there was an "on going [sic] practice of not inspecting" the verge storage tank area based on the fact that nobody was able to produce a workplace examination from the previous 12 months. (Tr.273:7-9; Ex. S–12, at 2) Inspector LaRue also testified that he provided multiple opportunities for supervisory staff to disclose mitigating circumstances as good reasons for Respondent's failure to complete workplace examinations in the area, but none were presented. (Tr.274:14-275:9) Superintendent Gibens agreed at hearing that management should have been aware that examinations were not being done in the verge storage tank area if they had reviewed current work exam areas (Tr.462:1-7), but he disagreed that there was an ongoing practice of not inspecting the area. (Tr.461:18-21)

Respondent argues that it was not aware that the verge storage tank area needed to be inspected. (Resp't Br. 23) As support, Respondent points to the fact that although the verge tanks have been in existence for seven years, at least 14 inspections failed to express concern that working place inspections were not taking place there. (*Id.* at 19) Additionally, Respondent argues that it had an "elaborate" working place SOP, which referenced MSHA guidance. (*Id.* at 21, 23) Respondent states this constituted a "significant mitigating circumstance." (*Id.* at 23)

For these reasons, Respondent contends that the negligence should be lowered to low or no negligence. (*Id.* at 21)

Although Inspectors' previous representations about compliance with a regulation do not estop MSHA from issuing future citations, detrimental reliance on an inconsistent interpretation is properly considered in mitigating the penalty. *See Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1063-64 (Sept. 2000); *U.S. Steel Mining Co.*, 6 FMSHRC 2305, 2310 (Oct. 1984) (noting that detrimental reliance may be considered in mitigation of penalty). Similarly, if the operator was misled—either with inconsistent enforcement of the regulatory provision or with ambiguous interpretations in the agency manual—that circumstance may reduce the level of negligence. *Mach Mining*, 809 F.3d at 1266, *citing Mettiki Coal Corp.*, 13 FMSHRC 760, 770-71 (May 1991).

As belabored in the sections above, Respondent's claim that it did not have actual knowledge that the verge storage tank area was a working place is inconsequential as a reasonably prudent person familiar with the mining industry, relevant facts, and protective purpose of the regulations would have recognized that section 56.18002(a) applied.

I am also not persuaded that Respondent detrimentally relied on previous inspector representations. Except for the fact that the verge storage tank area was not previously cited under section 56.18002, nothing in the record evidences that an MSHA inspector intimated the area was not part of the "mining or milling processes," the activities conducted there did not constitute "work," or the area was exempted in some other way.

Similarly, I am not persuaded that Respondent detrimentally relied on the 2014 PPL in its understanding of the working place examination standard. Respondent suggests a reliance on the 2014 PPL when it stated in its brief that the "Ripley Policy specifically referenced the MSHA PPL on workplace inspections that was in effect at the time of the inspection [. . .]." (Resp't Br. 16) (emphasis added) Respondent then dedicated the next five pages delving into the history of the PPL and its linguistic nuances. (*See Id.* at 16-21) However, contrary to Respondent's claim in its brief, the SOP never actually referenced the 2014 PPL. Section 12 of the SOP ("References") lists three sources: (1) MSHA Part 46 Training Plan at Location; (2) MSHA Standard, 30 C.F.R. § 56.18002, Examination of Working Places; and, (3) MSHA's Program Policy Manual. (Ex. R–2, at 7) There is no mention of the 2014 PPL, let alone any PPL, anywhere in the SOP.

I also note other oddities that undermine Respondent's claim that it had a genuine belief the verge storage tank area was not a "working place" based on MSHA materials at the time the citation was issued. In its post-hearing brief, Respondent states, "under [the workplace examination SOP], all areas where miners work 'in the mining and milling processes' were expected to be inspected each shift." (Resp't Br. 15-16) However, the phrase "in the mining or milling processes" only appears in Appendix D of the SOP, which provides a sample record form that examiners and auditors need to fill out. Respondent's SOP does not define "mining" or "milling." It does not carve out any exceptions. It does not, for example, delineate the point at which milling ends nor does it reflect Respondent's currently-held view that not all centrally-located areas in a milling facility are considered part of the milling process. Similarly, the SOP

did not use qualifying language to suggest a nuanced understanding of "work"—with maintenance and repair activities being considered "non-work." Section 2.1 of the SOP states the scope of "workplace examinations" is "where work is being performed during scheduled work hours." (Ex. R–2, at 1) Section 6.2.1, in the "Instructions and Procedures" section, broadly states that "Oil-Dri expects workplace examinations to be conducted in all '*working places.*'" (*Id.* at 3) (emphasis in original) Unfortunately, the definitions for "working places" or "work" were not included in the exhibit that was admitted.[47]

Based on a plain reading of Respondent's working place examination SOP, I am unable to find convincing support that Respondent held a belief about working places consistent with that espoused at and after hearing. Put bluntly, there is nothing more than a scintilla of evidence in the SOP to suggest that Respondent relied on MSHA representations and interpreted the working place examination standard to exempt the verge storage tank area. My deduction is strengthened by the fact that Gibens, Cox, and Albertson did not contest that the area was a working place at the time the citation was issued (Tr.361:4-9) and the fact that Gibens agreed at hearing that management should have been aware that examinations were not being done there if they reviewed current work exam areas. (Tr.462:1-7)

Given the above, I agree with the Secretary that the violation was the result of high negligence.

4. Penalty

I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected, the negligence points, the likelihood points, and the good faith point reductions. Based on my gravity and negligence findings, and considering but not relying on the point calculation in 30 C.F.R. § 100.3, I find the Secretary's proposed penalty of $1,944.00 is appropriate. I impose a penalty in that amount.[48]

---

[47] Of the 13 pages in the Workplace Examination SOP, only pages 1, 3, 5, 7, 9, 11, and 13 were submitted. The definition section, which started on the bottom-half of page 1, presumably continued on to page 2 and contained a definition for "working place." I find it strange given the centrality of the "working place" definition in this citation that Respondent would choose to omit its standardized version.

[48] There is no need to adjust this penalty for the VPID distortion identified in relation to the housekeeping violations. The VPID calculation for this violation does not have the same defect.

VII. ORDER

It is **ORDERED** that Citation No. 8818320 be **MODIFIED** to reduce the negligence from "Low" to "None."

It is further **ORDERED** that Citation No. 8818317 be **VACATED.**

WHEREFORE, it is further **ORDERED** that Oil-Dri Production Company **PAY** a total penalty of $12,483.00 within forty (40) days of the date of this Decision.[49]

L. Zane Gill
Administrative Law Judge

Distribution:

Daniel Brechbuhl, Esq., Office of the Solicitor, U.S. Department of Labor, Cesar E. Chavez Memorial Building, 1244 Speer Boulevard, Suite 216, Denver, CO 80204-3598
brechbuhl.daniel.t@dol.gov

Douglas A. Graham, Esq., Laura G. Scheland, Esq., Oil-Dri Corporation of America, 410 N. Michigan Avenue, Suite 400, Chicago, IL 60611-4293
douglas.graham@oildri.com

[49] Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.