FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2012-0871-M A.C. No. 11-03104-297716 Docket No. LAKE 2013-0173-M A.C. No. 11-03104-306429
v.	Mine: Portable # 2
NORTHERN ILLINOIS SERVICE COMPANY, Respondent.	Docket No. LAKE 2012-0746-M A.C. No. 11-02963-291992 Mine: Portable # 1

DECISION AND ORDER

Appearances: James M. Peck, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, Duluth, MN, for Petitioner;

Peter DeBruyne, Esq., Law Offices of Peter DeBruyne, Rockford, IL, for Respondent.

Before: Judge L. Zane Gill

This proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves eight section 104(a) citations, 30 U.S.C. § 814(a), issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Northern Illinois Service Company ("NISC" or "Respondent") at its Portable Mines # 1 and 2. The parties presented testimony on December 3 and 4, 2013, in Rockford, Illinois.

In the final pre-hearing report, the Secretary informed the court that Citation Nos. **8661786** and **8669849**, originally at issue in the case, had been vacated. The Secretary's discretion to vacate a citation or order is not subject to review. *RBK Constr. Inc.*, 15 FMSHRC 2099 (Oct. 1993). Therefore, the penalties proposed for Citation Nos. 8661786 and 8669849 are moot.

For Citation No. 8661787:

- NISC violated § 56.11027 of the Mine Act.
- NISC was moderately negligent.

- The injury was reasonably likely to result in lost workdays or restricted duty.
- The citation was properly designated as significant and substantial.
- I assess a penalty in the amount of $112.00.

For Citation No. 8661788:

- NISC violated § 56.4501 of the Mine Act.
- NISC was moderately negligent.
- The injury was unlikely to result in lost workdays or restricted duty.
- I assess a penalty in the amount of $112.00.

For Citation No. 8661789:

- NISC violated § 56.14207 of the Mine Act.
- NISC was highly negligent.
- The injury was unlikely to result in lost workdays or restricted duty.
- I assess a penalty in the amount of $100.00.

For Citation No. 8661790:

- NISC violated § 56.12028 of the Mine Act.
- NISC was moderately negligent.
- The injury was unlikely to result in lost workdays or restricted duty.
- I assess a penalty in the amount of $112.00.

For Citation No. 8669850:

- NISC violated § 56.4501 of the Mine Act.
- NISC was highly negligent.
- The injury was unlikely to result in lost workdays or restricted duty.
- I assess a penalty in the amount of $100.00.

For Citation No. 8669851:

- NISC violated § 56.4501 of the Mine Act.
- NISC was highly negligent.
- The injury was unlikely to result in lost workdays or restricted duty.
- I assess a penalty in the amount of $100.00.

For Citation No. 8669852:

- NISC violated § 56.4501 of the Mine Act.
- NISC was highly negligent.
- The injury was unlikely to result in lost workdays or restricted duty.
- I assess a penalty in the amount of $100.00.

For Citation No. 8669853:

- NISC did not violate § 56.14100(b) of the Mine Act.
- The citation is vacated.

Stipulations

Parties agreed to the following stipulations:

1. NISC is engaged in mining operations in the United States, and its mining operations affect interstate commerce. NISC is the operator of the mines Portable Mine #1 and Portable #2; MSHA I.D. Nos. 11-02963 and 11-03104.
2. NISC is an "operator" as defined in Section 802(d) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act), 30 U.S.C. 802(d).
3. NISC is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq.
4. The Administrative Law Judge has jurisdiction in this matter.
5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of NISC on the dates and places stated therein, and may admitted into evidence for the purpose of establishing their issuance.
6. The exhibits to be offered by NISC and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.
7. The assessed penalties, if affirmed, will not impair NISC's ability to remain in business.
8. MSHA Inspector Robert D. Stalder was acting in his official capacity and as authorized representative of the Secretary of Labor when aforesaid citations were issued.

Joint Prehearing Report at 2-3, MSHA v. Northern Illinois Service Company, (No. LAKE 11-03104-297716)

Basic Legal Principles

Significant and Substantial

The Secretary designated one of the citations as significant and substantial ("S&S"). An S&S designation is applied to violations which are hazardous to health. Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(d) (1994). S&S determinations are made based on the specific facts of the case. *See Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2369 (Oct. 2011) (citing *Rushton Mining Co*, 11 FMSHRC 1432, 1436 (Aug. 1989)). To establish a citation as S&S, 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).

The Commission has provided guidance for applying the *Mathies* test. In reference to the "hazard" in the second element, an S&S violation must contribute to a specific danger. *Id.* This requirement prohibits S&S citations for non-dangerous infractions. *U.S. Steel Mining Co, Inc.*, 6 FMSHRC 1834, 1836, (Aug. 1984) (citing *National Gypsum Co.*, 3 FMSHRC 822, 827 (Apr. 1981)). However, a hazard unlikely to reach fruition can still be S&S. *Musser Eng'g, Inc., and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280 (Oct. 2010). Hazards are assessed according to mine conditions at time of citation, and as they would have progressed during normal operations. *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1130 (Aug. 1985). Non-violation conditions at the mine are irrelevant in terms of S&S. *MSHA v. FMSHRC*, 111 F.3d 913, 917 (D.C. Cir. 1997).

The third *Mathies* element examines if the hazard is "reasonably likely to result in injury." *Peabody Midwest Min., LLC v. FMSHRC*, 762 F.3d 611, 616, (7th Cir. 2014). The hazard, rather than the specific violation, is the measure of S&S. *Musser*, 32 FMSHRC at 1281. If the hazard is unlikely to result in injury, then the violation is not S&S. *See Texasgulf Inc.*, 10 FMSHRC 498, 503 (Apr. 1988). It may be appropriate to predict how the danger would impact a disaster situation, for instance if the hazard is related to emergency equipment. *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2366 (Oct. 2011) (citing *Florence Mining Co.*, 11 FMSHRC 747, 756 (May 1989)).

The fourth element focuses on the likely gravity of an accident. *See Elk Run Coal Co, Inc.*, 27 FMSHRC 899, 907 (Dec. 2005) (citation omitted). Numerous types of injuries, including "muscle strains, sprained ligaments, and fractured bones" meet the reasonably serious requirement. *S&S Dredging Co.*, 35 FMSHRC 1979, 1982 (July 2013) (citations omitted). It is not required that a similar type of accident have actually happened. *See Elk Run Coal Co.*, 27 FMSHRC at 906. The Secretary must prove all the S&S elements by the preponderance of the evidence. *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

Negligence

The Mine Act is a strict liability statute, so negligence plays no role in citation issuance. 30 U.S.C. § 814(a). Inspectors must issue citations, regardless of operator negligence, whenever a mandatory safety standard is violated. *Musser Eng'g, Inc., and PBS Coals, Inc.*, 32 FMSHRC 1257, 1272 (Oct. 2010) (citing *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008)). But negligence does factor into the assessment of civil penalties. *Asarco, Inc.*, 8 FMSHRC 1632, 1636 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989).

Negligence is "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). Mine operators are "required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* No negligence exists when "[t]he operator exercised diligence and could not have known of the violative condition or practice." *Id.* Low negligence

means "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* The moderate negligence categorization is appropriate if operators "knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* High negligence indicates "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* Lastly, reckless disregard requires that "[t]he operator displayed conduct which exhibits the absence of the slightest degree of care." *Id.*

Factors used to determine 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 13, 15 (Jan. 1983) (citations omitted). In addition, mitigating circumstances such as "actions taken by the operator to prevent or correct hazardous conditions or practices" are also weighed. 30 C.F.R. § 100.3(d).

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.

Gravity

FMSHRC is obligated to consider "the gravity of the violation" in assessing civil penalties. 30 U.S.C. § 820(i). This is usually "viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); and *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987). The Commission specified the standard is the seriousness of "the effect of the hazard if it occurs." *Id.* at 1550 (citing *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (Sept. 1987)). Important factors include the importance of the violated standard, and case specific circumstances like mine operator defiance. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140-1 (Jan. 1990)(ALJ Fauver). All considerations are encompassed within the overriding goal of encouraging compliance with the Mine Act and protecting Miners. *Id.* The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The likelihood of injury is calculated assuming continuation of normal mining operations without the violation's abatement. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130.

Penalty

Commission judges have authority to set civil penalties, so long as they remain within the boundaries of their statutory obligations and advance the Mine Act's deterrent goals. *Cantera Greene*, 22 FMSHRC 616, 620 (May 2000) (citations omitted). The Commission is not bound by the Secretary's penalty proposal, all determinations on a *de novo* basis. *Sellersburg Stone Co.*, 736 F.2d 1147, 1151 (7th Cir. 1984). Judges are obligated to provide an explanation if the assigned penalty differs substantially from the Secretary's proposal. *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983).

The Mine Act sets out six criteria for judges to weigh in civil penalty assessment: (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). The Secretary uses the same criteria in proposing penalties, which is embodied in MSHA's penalty point scoring system. *Sellersburg,* 736 F.2d at 1151. All six criterions must be address in a judge's decision. *Sellersburg*, 5 FMSHRC at 293.

While judges must consider all of the statutory criteria, there is no requirement that each criterion receive equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997) (citations omitted). Judges are free to give greater importance to considerations of the operator's negligence and the violation's gravity. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001). Furthermore, it is "appropriate for a judge to raise a penalty "significantly" based on his findings of extreme gravity and unwarrantable failure." *Musser Eng'g, Inc., and PBS Coals, Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010) (citing *Spartan Mining Co. Inc.*, 30 FMSHRC 699, 725 (Aug. 2008)).

Judges must weigh the record, make findings, and explain the reasoning behind the final penalty order. *Hubb Corp.*, 22 FMSHRC 606, 612 (May, 2000) (citing *Mid-Continent Res., Inc.,* 16 FMSHRC 1218, 1222 (June 1994)). This serves the duel purposes of giving notice and explanation to the mining community while creating a record for further review by the Commission. *Id.* Lastly, as the Commission held in in *Sellersburg Stone Co.*:

> [I]t behooves the Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission. If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

5 FMSHRC at 293.

Citation No. 8661787

On April 25, 2012, at 11:30 a.m., MSHA Inspector Robert D. Stalder[1] ("Stalder" or "Inspector Stalder") issued Citation No. 8661787 to NISC's Mine #1, alleging a violation of 30 C.F.R. § 56.11027, pursuant to Section 104(a) of the Mine Act. The regulation requires that "[s]caffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition." 30 C.F.R. § 56.11027. Section 56.11027 is a mandatory safety standard. The citation alleges:

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[1] Inspector Stalder's mining career began in 1981, working in an underground coal mine in Colorado. (Tr. 11:14-7) From 1994 through 2006, Stalder was employed as a safety director and safety supervisor at a number of private mining companies including, U.S. Silica and Vulcan Materials. (Tr. 11:18-12:2) In 2006 he joined MSHA, where he works as a safety inspector. *Id.* Stalder is a member of the National Mine Rescue Group and has served on the coal mine examiner boards in both Colorado and Wyoming. (Tr. 13:21-4; Tr. 14:12-6) At the time of hearing, Stalder had worked at MSHA for seven years. (Tr. 11:12)

> An opening of 24 inches exists on the deck of the Secondary Crusher deck where the ladder access is. There are no chains to cover the opening when miners must be on the crushers deck. This exposes miners to a potential fall of 78 inches to the ground. Should a miner fall it could result in fractures and sprains leading to lost work days. Miners are on this deck to start and stop the engine that runs the crusher and when making adjustments and repairs on the crusher. The opening is on the side in direct line where work is done. Other raised decks on site have chains that act as rail for when miners are required to work on the deck. There was no indication that chains had ever been on these rails.

Ex. S-1-A.

The Secretary's Interpretation of Section 56.11027 is Entitled to Deference

Respondent argued Section 56.11027 does not mandate handrails across work platform entrances. (Tr. 54:22–55:1) This view is based on the regulation not explicitly requiring handrails to "completely enclose a working platform." *Id.* Inspector Stalder countered that totally surrounding the work platform's perimeter is necessary to fulfill Section 56.11027 purpose in mitigating falling hazards. (Tr. 55:4-6)

The Commission has found that when interpreting the Secretary's Regulations:

> Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1990); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation of its own regulation is of 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The Secretary's interpretation of her regulations is reasonable where it is "logically consistent with the language of the regulation[s] and ... serves a permissible regulatory function." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted).

Lodestar Energy, Inc., 24 FMSHRC 689, 692 (July 2002); *Consolidation Coal Co.*, 18 FMSHRC 1541, 1545 (Sept. 1996). "It is only when the plain meaning is doubtful or ambiguous that the issue of deference to the Secretary's interpretation arises." *Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984); *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1028 (June 1997). Furthermore, "the statutory provision underlying the regulation, as well as any related statements

accompanying the regulation's publication in the *Federal Register*, may illuminate the regulation's meaning." *Lehigh Southwest Cement*, 2011 WL 7463296, at *5 (Dec. 2011)(ALJ Paez) (quoting *Lodestar Energy*, 24 FMSHRC at 693). Additionally, "[i]n the absence of a statutory or regulatory definition of a term, or a technical usage, we look to the ordinary meaning of the terms used in a regulation." *Bluestone Coal Corp.*, 19 FMSHRC at 1029; *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996).

The Supreme Court established that when interpretation of regulatory language is challenged, the Secretary's interpretation of her own regulation is "controlling unless plainly erroneous or inconsistent with the regulation." *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). However, "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris Cnty.*, 529 U.S. 576, 588, (2000). Courts determine the plainness or ambiguity of a regulation by referring to "the language itself, the specific context in which that language is used, and the broader context as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

I find the Secretary's reading of Section 56.11027 that the entire work platform should be surrounded by hand rails, is the regulation's plain meaning. (Tr. 55:2-6) Nothing in Section 56.11027 indicates an exemption for work platforms entrances from the railing requirement. Even if it were possible to claim some ambiguity remains in the statute, I find the deference accorded to reasonable interpretations by the Secretary outweighs the Respondent's argument that only some of the work platform should be covered.

There is No Conflict Between Regulations

Respondent also argued placing chains across the platform entrance violated 30 C.F.R. § 56.4530. (Resp. Br. at 11) This regulation requires that "[b]uildings or structures in which persons work shall have a sufficient number of exits to permit prompt escape in case of fire." 30 C.F.R. § 56.4530. Respondent claims the act of unclipping the chains could so hinder escaping miners that it violates the prompt escape requirement. (Resp. Br. at 11; Tr. 57:5-11) This argument was culminated with a hypothetical emergency, in which a burning or scalded miner was trapped on the crusher deck, "pawing helplessly at the chained exit." (Resp. Reply Br. at 2) This scenario is difficult to credit, since in normal circumstances unclipping the chains only takes 10 seconds. (Tr. 213:1-3) In his testimony, Brian Russell[2] ("Russell") compared the chain's attachment to a dog leash clip. (Tr. 212:16-22) I conclude an exit with a ten-second delay still permits prompt escape. Given the mechanism's simplicity, and the speed with which it can be opened in normal circumstances, I find no conflict with Section 56.4530.

Even if I found a conflict between the two standards, the appropriate forum in which to make a diminution in safety claim is an MSHA modification proceeding. *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2130 (Nov. 1989). If the proposed modification is granted, this is grounds for not issuing a civil penalty for the citation. *Sewell Coal Co.*, 5 FMSHRC 2026, 2029 (Dec. 1983). However, if these steps are not taken, then safety diminution claims are not a defense in enforcement proceedings. *Clinchfield*, 11 FMSHRC at 2130. I find no indication in the record that NISC petitioned for a modification from MSHA.

[2] Brian Russell is quarry superintendent at NISC, and at time of litigation had worked there for ten years. (Tr. 189:1-5)

The Violation[3]

The citation alleges reasonably likely injury that could be reasonably expected to result in lost workdays or restricted duty, the violation was significant and substantial, one person could be affected, and the operator's negligence was moderate. (Ex. S-1-A) The number of persons likely to be affected by an accident was not contested.

Inspector Stalder was conducting an E01 inspection at Mine #1. (Tr. 17:8-9; Tr. 18:5-7) The plant was not in operation at time of inspection, but customer trucks were being loaded on site. (Tr. 18:15-19) The secondary crusher platform was identified as a work platform because it is used to adjust crusher plate tension, maintain the engine, and grease the shaft and rotor bearings (Tr. 21:6-14; Tr. 207:2-4) Russell testified the platform is also used to start/stop the engine, and adjust the bolts on the crusher's impactor. (Tr. 197:5-21) Based on this testimony, I find the secondary crusher's deck is a work platform. Stalder issued Citation No. 8661787 as a violation of 30 C.F.R. § 56.11027, based on a 24 inch opening in the platform's railing at the entrance. (Ex. S-1-A; Ex. S-2-A) A fall from the platform would be approximately 6.5 feet. *Id.*

This citation is placed in context by two relevant cases regarding Section 56.11027, both of which found the absence of railing around the whole work platform to be a violation. First, in *Granite Rock Co.*, failure to cover an eighteen inch gap over the platform entrance violated Section 56.11027. 32 FMSHRC 1792, 1794 (Nov. 2010)(ALJ Weisberger). Second, in *Palmer Coking Coal Co.* the violation was held not to be S&S because only a small percentage of the deck's perimeter remained open. 26 FMSHRC 504, 508 (June 2004)(ALJ Barbour). The MSHA inspector's S&S designation was wrong because the odds of injury were too remote to be considered "reasonably likely." *Id.* However, the omission was still viewed as serious. *Id.*

The record is clear that no railing covered the secondary crusher entrance. Therefore, the work platform was not provided with sufficient handrails around the whole perimeter to prevent falls. I find there was a violation of Section 56.11027.

Negligence

Inspector Stalder cited negligence as moderate because other onsite work platforms had chains across the entrances, indicating the operator knew about the requirement. (Tr. 26:13-21) Stalder noted two mitigating circumstances in favor of NISC. First, the manufacturer built the crusher without railing across the entrance. *Id.* This defense, which was also mentioned in

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[3] The findings of fact here and below are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into account the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies in each witness's testimony and between the testimonies of other witnesses. In evaluating the testimony of each witness, I have also taken into account his or her demeanor. Any perceived failure to provide detail about any witness's testimony is not a failure on my part to consider it. The fact that some evidence is not discussed does not mean it was not considered. *See Craig v. Apfel,* 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered). I have also fully considered the contents of the official file, including the pre- and post-hearing submissions of the parties, and the exhibits admitted into evidence.

regard to the other citations, is irrelevant because the manufacturer's omission does not excuse the mining company from maintaining its equipment according to MSHA regulations. Second, previous inspectors omitted to cite the violation, lowering operator culpability. (Tr. 27:7-9; Tr. 202:6-9)

Moderate negligence means the operator "knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d). I find NISC should have known handrails must encompass work platforms, and thereby understood the secondary crusher's violative condition. However, because there is a mitigating circumstance, the violation was correctly cited as moderately negligence.

Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, its severity, and the number of miners potentially injured. Inspector Stalder testified the probable injuries of a miner who fell through the gap could be reasonably expected to result in lost work days or restricted duty. (Tr. 24:18-24) Specifically, a 6.5 foot fall is likely to result in sprained, twisted, or fractured limbs. *Id.* However, falls from lesser heights are sometimes fatal. *Id.* Based on past experience, and the large number of falling incidents reported to MSHA, Stalder considered this type of serious accident to be reasonably likely. (Tr. 61:19-22) The citation alleges only one person would be affected, which is reasonable given NISC's small size. (Ex. S-1-A) I find an injury was reasonably likely and would be serious in nature, possibly resulting in lost work days or restricted duty.

Significant and Substantial

There was a mandatory safety standard violation. (Ex. S-1-A) This violation contributed to the discrete safety hazard of falling through the secondary crusher's entrance. (Tr. 20:16-20) It is reasonably likely a fall would result in an injury of a reasonably serious nature. (Tr. 24:18-24) The remaining factor in an S&S designation, the third *Mathies* element, is whether there is a reasonable likelihood that the hazard contributed to will result in an injury.

Inspector Stalder testified an injury was reasonably likely because the opening was near the work area. (Tr. 21:17-23) Stalder had seen similar railing openings cause accidents. (Tr. 22:8-11) Lastly, variograms studied by Stalder indicated a work platform fall was likely. (Tr. 25:23–26:4) Russell testified the work platform was only used once in the previous year for crusher adjustment. (Tr. 198:23–199:2) But the platform is used in a variety of other tasks, including crusher plate tension adjustment, repairs, shaft and rotor bearing greasing, impacter bolt adjustment, and to start/stop the engine. (Tr. 21:11-14; Tr. 207:2-4; Tr. 197:5-21) Respondent also argued the entrance gap was relatively small in proportion to the platform's overall perimeter, two feet out of fifty feet. (Resp. Reply Br. at 2; Tr. 196:5-10) Lastly, Russell testified miner positioning while working on the platform would cause a slip to throw them into the railing. (Tr. 201:4-6)

Respondent cited ALJ Barbour's reasoning in *Palmer Coking Coal Co.*, to argue injury was not reasonably likely to result from the hazard. 26 FMSHRC 504, 508 (June 2004) (*See also* Resp. Reply Br. at 2). In this case, an even a smaller percentage of the perimeter was unguarded than in the *Palmer* work platform. *Id.* However, as detailed above, the platform is used in a

number of routine tasks. At a minimum, the platform is used twice daily to turn the engine on and off. (Tr. 197:5-8) I find the platform's frequent usage during crusher operations creates a reasonable likelihood that the falling hazard would result in an injury. Furthermore, an MSHA "inspector's judgment is an important element in an S&S determination." *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-9 (Dec. 1998) (citations omitted). I credit Inspector Stalder's judgment that the violation was reasonably likely to result in injury. Since all the *Mathies* elements are proven, I find the violation is S&S.

Penalty

The Secretary assessed the penalty for Citation No. 8661787 at $112.00. NISC is a small operator, owning and leasing five quarries in 2012. (Tr. 268:12-15) According to Stipulation No. 8, the respondent's business would not be significantly affected if the full penalty is imposed. The operator was moderately negligent and the violation is S&S. NISC did not promptly correct the violation, causing Order No. 8661798 to be issued twenty-one days after the mandated termination date. (Tr. 35:20–36:7; Ex. S-3-A) The reason NISC offered for this failure was that the pit had not been in use, and the operator's intent to install entrance chains before using the crusher. (Tr. 45:1-3) Russell did not recall whether he informed his employer of the violation's required completion date. (Tr. 215:4-9) Given the compliance delay, NISC did not engage in good faith abatement. I agree with the Secretary's calculus and assess a penalty of $112.00.

Citation No. 8661788

On April 25, 2012 at 11:40 a.m., Inspector Stalder issued Citation No. 8661788 alleging a violation of 30 C.F.R. § 56.4501 pursuant to Section 104(a) of the Mine Act. The regulation requires that "[f]uel lines shall be equipped with valves capable of stopping the flow of fuel at the source and shall be located and maintained to minimize fire hazards. This standard does not apply to fuel lines on self-propelled equipment." 30 C.F.R. § 56.4501. Section 56.4501 is a mandatory safety standard. The citation alleges:

> The secondary crusher did not have a fuel shutoff valve between the tank and the engine. Should a leak in the lines occur it could result in a fire exposing miners to burn and smoke inhalation type injuries. Since the tank is under the engine, fuel would go to the ground away from ignition sources. The crusher has been on site for a long time and the operator was unaware there was no fuel shut off.

Ex. S-5-A.

Section 56.4501 Applies to Fuel Tank Hoses

Respondent argued 30 C.F.R. § 56.4501 only applies to very large fuel lines, such as gas pipelines. (Tr. 91:18–92:3) The claim is that the regulation targets major fuel lines because leaks from them are more dangerous than spills from relatively small fuel tanks. (Tr. 90:19–91:6) Respondent's interpretation contradicts the text of the regulation, which includes no exception for smaller fuel lines. 30 C.F.R. § 56.4501. Not applying Section 56.4501 to engine tank fuel lines would undermine the Mine Act's goal of improving miner safety. Furthermore, this court

has previously applied Section 56.4501 to engine tank fuel lines. *See Nelson Quarries, Inc.*, 30 FMSHRC 254, 278 (Apr. 2008)(ALJ Manning); *Nelson Quarries, Inc.*, 30 FMSHRC 443, 451 (May 2008)(ALJ Manning). For these reasons, I find Section 56.4501 was correctly cited.

The Violation

The citation alleges unlikely injury that could reasonably be expected to result in lost work days or restricted duty, one person could be affected, and the operator's negligence was moderate. (Ex. S-5-A) It is uncontested that no fuel valve was installed on the secondary crusher at time of inspection. Neither party contests that the secondary crusher is not self-propelled mobile equipment. (Tr. 70:1-6) This classification is accurate because the crusher can only be moved if attached to another vehicle, such as a tractor. *Id.*

During Stalder's inspection of the secondary crusher, he observed the fuel hoses connecting the two tanks to the engine were not equipped with shutoff valves. (Tr. 65:10-15; S-6-C) Each fuel tank holds approximately 100 gallons. (Tr. 221:17-19) Stalder wrote a citation for violation of 30 C.F.R. § 56.4501, which is a fire prevention regulation. (Tr. 65:21-23) In the event of a fuel hose leak, the shutoff valve can prevent additional fuel from escaping by keeping it in the tank. (Tr. 66:22–67:4) The hazard Stalder envisioned was that in the absence of a shutoff valve, fuel would continue to leak and form a highly flammable pool under the crusher. (Tr. 68:24–69:3) Spilled fuel can be ignited in numerous ways, including engine heat, maintenance activities such as welding, and sparks from electric cables. (Tr. 72:24–73:10) However, leaked fuel would tend to flow away from ignition sources. (Ex. S-5-A)

The absence of fuel shutoff valves on the engine hoses is uncontested in the record. I find there was a violation of Section 56.4501.

Safety Diminution Argument is Not a Valid Defense

Respondent argued against a violation of 30 C.F.R. § 56.4501, claiming the regulation diminishes miner safety by increasing the probability of leak formation. (Tr. 224:9–225:2; Resp. Br. at 17) The argument is that installing a fuel shutoff valve doubles the number of places where leaks are likely to develop. *Id.* Secondly, Respondent interpreted Section 56.4501 as a fire fighting, rather than fire prevention, regulation. (Tr. 84:6-9; Tr. 65:21-23) Stalder agreed attempting to fight a fire by shutting off the fuel valve would be unwise. (Tr. 89:17-21) Respondent views the shutoff valve as imperiling miners by encouraging them to enter "into a danger zone." (Resp. Br. at 17) This is not a valid defense in this civil penalty proceeding.

As outlined by the Commission in *Sewell Coal Co.*, "where adherence to a standard would reduce miner safety -- logic dictates and Congress provided the modification procedures." 5 FMSHRC 2026, 2028 (Dec. 1983). MSHA, rather than the Commission, is the body responsible for these modification procedures. *Id.* The determination whether the mandatory standard would be counterproductive is solely made by MSHA. *Id.* at 2029 (*citing Penn Allegh Coal Co. Inc.*, 3 FMSHRC 1392, 1398 (June 1981)). Mine operators should exhaust the mechanisms provided by MSHA in seeking modification of a citation they believe is harmful. *Id.* at 2030. Only after the Secretary recognizes the claim and grants a modification, is safety

diminution a valid defense in FMSHRC enforcement proceedings. *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2130 (Nov. 1989).

I find no evidence that NISC attempted to secure a modification from the Secretary based on the concern that implementing Section 56.4501 diminished miner safety. This argument is not relevant to this proceeding.

Negligence

Inspector Stalder cited NISC's failure to equip the fuel hoses with shutoff valves as moderately negligent. (Ex. S-5-A) Other fuel lines onsite were outfitted with shutoff valves, indicating NISC understood the requirement. (Tr. 68:16-21) There was no history of previous injuries or citations related to missing fuel valves. (Tr. 218:11-18) Stalder viewed the Respondent's unawareness of the shutoff valve's absence as mitigating. (Tr. 68:16-21) I disagree, because a company's ignorance of its own equipment is not an excuse. Stalder argued penalizing operators for high negligence is unjust when numerous MSHA inspections overlooked a violation, failing to bring it to the operator's attention. (Tr. 164:13–165:23) Russell testified, in regard to this citation and the all others, about his evaluation that the equipment was reasonably safe without meeting the mandatory safety requirements. (Tr. 218:5-10) However, this belief has no effect in mitigating NISC's negligence.

I find NISC was moderately negligent. The company "knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d). NISC should have known about Section 56.4501 because mine operators are held to a "high standard of care," and they ought to maintain their equipment according to MSHA regulations. 30 C.F.R. § 100.3(d). But the failure of previous inspectors to cite the infraction is somewhat mitigating. I uphold moderate negligence designation.

Gravity

Inspector Stalder cited the possibility for injury as unlikely. (Ex. S-5-A) First, it was improbable that maintenance activities would start a fire in the event of a leak. (Tr. 89:8-16) While there are potential ignition sources near the crusher, such as welders and cutting torches, NISC has never had a fuel leak. (Tr. 226:12-14; Tr. 228:10-20) Furthermore, miners do not smoke onsite, making dropped cigarettes a remote possibility. (Tr. 251:17-18) Second, any spilled fuel would flow away from potential ignition sources and thereby diminish the fire hazard. (Ex. S-5-A) Third, Respondent believes significant fuel leaks would be spotted, also supporting the estimate that the chance for injury was unlikely. (Tr. 221:20-23) I find the risk of injury was unlikely.

However, if a fire occurred it could result in serious injury causing lost days or restricted duty. Stalder considered smoke inhalation and burns the most likely injuries of an accidental fire. (Tr. 68:7-9) Given the operation's small size, it is reasonable to estimate only one person would be affected. (Tr. 68:10-13) I find an injury from a fuel leak fire is serious in nature and could result in lost work days or restricted duty.

Penalty

The Secretary assessed the penalty for Citation No. 8661788 at $112.00. NISC is a small operator, owning and leasing five quarries in 2012. (Tr. 268:12-14) According to Stipulation No. 8, the respondent's business would not be significantly affected if the full penalty is imposed. The operator was moderately negligent and the violation, while potentially serious, was unlikely to cause injury. The operator did not comply with the order to install shutoff valves by May 9, 2012, causing Order No. 8661799 to be issued on May 16, 2012. (Tr. 73:18-22; Ex. S-7-A) The respondent's defense was that the quarry had not been used, and NISC would install the fuel valves before resuming work. (Tr. 74:13-17) The delay in compliance shows NISC did not engage in good faith abatement. I assess a penalty of $112.00.

Citation No. 8661789

On April 25, 2012, at 2:35 p.m., Inspector Stalder issued Citation No. 8661789 alleging a violation of 30 C.F.R. § 56.14207 pursuant to Section 104(a) of the Mine Act. The regulation requires that "[m]obile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set." 30 C.F.R. § 56.14207. Section 56.14207 is a mandatory safety standard. The citation alleges:

> The Dodge Ram Pickup truck (License Plate 4584 HS exp. 06-12) was left unattended without the parking brake set. This exposes miners to hazard of being struck by this pickup should another piece of equipment hit the vehicle and cause it to move. This area has very little mobile equipment movement and little foot traffic. The truck was in the park position. The pickup had been parked for a long time and management was unaware the brake was not set.

Ex. S-9-A.

The Violation

The citation alleges unlikely injury that could reasonably be expected to result in lost work days or restricted duty, one person could be affected, and the operator's negligence was moderate. *Id.*

Inspector Stalder noticed the parking brake on the Dodge Ram pickup truck was not set. (Tr. 99:23–100:5; Ex. S-10-A) Failure to set the parking brake on unattended vehicles, in addition to breaking Section 56.14207, is a violation of the "Rules to Live By." (Tr. 100:10-17) MSHA considers these rules to be especially important, and accordingly has increased efforts to educate miners about them. *Id.* The truck was situated in the mine's shop, on level ground, with gears set in the park position. (Tr. 101:3-8) Its battery cables were also disconnected. (Tr. 109:4-5) The truck was placed off to the side of the shop, and away from the areas trafficked by other vehicles stored there. (Tr. 234:10-16) The shop's dimensions are approximately 60 feet by 80 feet, and no other vehicles were in the building at time of inspection. (Tr. 110:4-17) Stalder considered the truck unattended because no miners were in the shop. (Tr. 102:12-15)

It is disputed whether the truck was tagged out of service during the inspection on April 25, 2012. The truck was tagged out by the following morning on April 26, 2012, when the documentary picture was taken, but there is no indication on the tag itself as to when it was placed. (Tr. 235:21-24; Ex. S-10-D) Russell testified the truck was first tagged out in 2010. (Tr. 230:15-17) The truck was later used in 2011, but due to battery problems was again decommissioned. (Tr. 230:18–231:3) Furthermore, Russell claimed to have disconnected the battery and chocked the wheels. (Tr. 231:16-18) However, Russell could not positively state in cross examination whether the tag was affixed during Stalder's inspection. (Tr. 235:16-20) In contrast, Inspector Stalder was certain the vehicle was not tagged out when the citation was issued on April 25, 2012. (Tr. 102:23–103: 8) Based on Inspector Stalder's confident testimony, and Russell's admitted uncertainty, I find the vehicle was not tagged out of service at the time of the inspection.

I find the Dodge Ram pickup truck's brakes were not set at time of citation, and that NISC violated 30 C.F.R. § 56.14207.

Negligence

Inspector Stalder cited NISC for moderate negligence. (Ex. S-9-A) Both miners and management understood the parking brake requirement from company training. (Tr. 101:23-102:11) It is possible management was unaware of the truck's violative condition, but this would not mitigate NISC's negligence. *Id.* Both Russell and Stalder agree the parking brake should have been set, even if the truck was tagged out of service. (Tr. 109:15-21; Tr. 237:14-20) Some steps were taken to immobilize the truck, like unplugging the battery and choking the wheels. (Tr. 231:4-8; Tr. 232:9-17) Respondent argued these measures were the functional equivalent of setting the parking brake. (Resp. Reply Br. at 4) However, Russell admitted some uncertainty on whether the wheels were choked at time of inspection. (Tr. 236:16-18) I find the wheels were choked since no contrary evidence was presented.

I find NISC was highly negligent. The "operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3(d). NISC understood the parking brake should be set, but neglected to do so it in this instance. (Tr. 101:23–102:11) While some appropriate steps were taken to decommission the truck, no mitigating factors have been presented.

Gravity

It is undisputed an accident involving the pickup truck could cause serious injuries, resulting in lost work days or restricted duty. (Ex. S-9-A) However, accidents caused by failures to set brakes are sometimes fatal. (Tr. 100:10-17) Only one miner was estimated to be affected in an accident, which is reasonable given the operation's small size. *Id.* Inspector Stalder rated the chance for injury as unlikely. *Id.* This is because for the truck could only move if hit into motion by another object. (Tr. 112:15-17) Other vehicles could be safely moved within the shop. (Tr. 112:5-8) Russell argued the truck's placement made it very difficult to hit with the loading vehicles also stored in the area. (Tr. 234:2-9) Furthermore, the wheels were choked, decreasing the truck's likely movement. (Tr. 231:4-8) I find than an injury was unlikely because the truck was placed off to the side, its wheels were choked, and the shop could be navigated safely.

However, an injury involving the truck would be serious in nature and could result in lost work days or restricted duty.

Penalty

The Secretary assessed the penalty for Citation No. 8661789 at $100.00, deducting $12.00 for good faith abatement. NISC is a small operator, owning and leasing five quarries in 2012. (Tr. 268:12-14) According to Stipulation No. 8, the respondent's business would not be significantly affected if the full penalty is imposed. The operator was highly negligent and the violation, while potentially serious, was unlikely to cause injury. Despite finding NISC's negligence to be higher than assessed by the Secretary, a larger penalty is unwarranted because overall this is a minor violation. The operator demonstrated good faith abatement, terminating the violation by 7:30 am the following morning. (Tr. 105:15-20) I assess a penalty of $100.00.

Citation No. 8661790

On May 2, 2012, at 8:00 a.m., Inspector Stalder issued Citation No. 8661790 alleging a violation of 30 C.F.R. § 56.12028 pursuant to Section 104(a) of the Mine Act. The regulation requires that "[c]ontinuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative." 30 C.F.R. § 56.12028. Section 56.12028 is a mandatory safety standard. The citation alleges:

> The operator did not do a continuity and resistance test on the ground rod next to the transformer and electrical control panel for the sump pump. The grounding rod attached conductor and all controls appeared in good condition. Failure to ensure proper grounding puts miners at risk of electrical related injuries. This rod has never been tested and the operator was unaware of the requirement to test it or the hazards related to it.

Ex. S-11-A

The Violation

The citation alleges unlikely injury that could reasonably be expected to result in lost workdays or restricted duty, one person could be affected, and the operator's negligence was low. *Id.* Inspector Stalder discovered this violation while reviewing NISC's test records. (Tr. 113:19–114:1) Respondent failed to conduct a continuity and resistance test on the cited grounding rod. *Id.* The test's purpose is to check whether the grounding rod functions, and if miners are at risk of electrocution. (Tr. 118:7-17) One of the quarry's sump pump control panels was attached to the grounding rod. (Tr. 120:1-6; Ex. S-12-A) The electricity running through the equipment was 110 volts, equivalent to standard household voltage. (Tr. 131:3-8)

I find no dispute in the record over NISC's failure to perform a continuity and resistance test on the grounding rod. As such, I find NISC violated 30 C.F.R. § 56.12028.

Negligence

Inspector Stalder cited operator negligence as low, because previous inspections did not identify the violation. (Tr. 118:23–119:4) Stalder argued it can be unjust to penalize operators for high negligence when numerous MSHA inspections overlook a violation and fail to bring it to the operator's attention. (Tr. 164:13–165:23) NISC appeared to be unaware of the testing requirement, despite being legally obligated to inform itself of MSHA regulations. (Tr. 119:3-11) However, a prior testing omission citation from Blacks quarry went to trial in 2011. (Tr. 239:7-20) This citation was very similar to the current violation, because it also dealt with a sump pump's grounding system. *Id.*

Aside from NISC's duty to inform itself of mandatory testing requirements, the prior citation provided notice and outweighs any omissions by prior MSHA inspections. High negligence means NISC "knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3(d). The primary excuse offered by the company is that the testing requirement was forgotten, which is not a mitigating circumstance. Furthermore, the prior citation gave NISC notice about Section 56.12028. Based on the above, I find NISC was highly negligent.

Gravity

The violation's gravity is evaluated in light of the possibility that an untested grounding rod could be ineffective and expose miners to electrocution. (Tr. 117:2-12) Inspector Stalder, based on his holistic analysis of the electrical system, evaluated the potential injuries as lost work days or restricted duty. *Id.* However, the system contains sufficient voltage to cause a fatality. *Id.* The number of miners estimated to be affected by an accident was one, which is reasonable given the few miners employed by NISC. (Tr. 118:18-22) The injury probability was cited as unlikely, since there was a fair possibility that the grounding rod was safe. (Ex. S-11-A) Indeed, later testing confirmed the grounding rod worked effectively. (Tr. 123:21-24) I find that while an injury was unlikely, it would be serious in nature and could result in lost work days or restricted duty.

Penalty

The Secretary assessed the penalty for Citation No. 8661790 at $112.00. NISC is a small operator, owning and leasing five quarries in 2012. (Tr. 268:12-14) According to Stipulation No. 8, the respondent's business would not be significantly affected if the full penalty is imposed. The operator was highly negligent, but the violation, while potentially serious, was unlikely to cause injury. Despite finding NISC's negligence to be higher than cited by the Secretary, a larger penalty is unwarranted because overall this is a minor violation. The operator did not comply with the order to perform the continuity and resistance test by May 16, 2012 causing Order No. 8669850 to be issued on May 17, 2012. (Tr. 73:18-22) Inspector Stalder recorded the test results several weeks later on June 11, 2012. (Tr. 74:13-17) The compliance delay shows NISC did not engage in good faith abatement. I assess a penalty of $112.00.

Citation No. 8669850

On July 11, 2012, at 8:10 a.m., Inspector Stalder issued Citation No. 8669850 to Northern Illinois Service Company's Mine #2 alleging a violation of 30 C.F.R. § 56.4501 pursuant to Section 104(a) of the Mine Act. The regulation requires that "[f]uel lines shall be equipped with valves capable of stopping the flow of fuel at the source and shall be located and maintained to minimize fire hazards. This standard does not apply to fuel lines on self-propelled equipment." 30 C.F.R. § 56.4501. Section 56.4501 is a mandatory safety standard. The citation alleges:

> There was no fuel shut off on the connecting hose between 2 fuel tanks located on the Inertia Crusher. This exposes miners to the hazards of a fire should a leak or break in the line develop. Miners fighting fires are exposed to burn and smoke inhalation type injuries. Miners are in loaders and are usually not near the crusher. A leak in the fuel line would likely flow onto the ground away from an ignition source. A similar citation was written previously to the operator at another mine site on the same type of equipment.

Ex. S-22-A

The Violation

The citation alleges unlikely injury that could reasonably be expected to result in lost workdays or restricted duty, one person could be affected, and the operator's negligence was high. *Id.*

Inspector Stalder discovered that the hose connecting two fuel tanks on the inertia crusher lacked a shutoff valve. (Tr. 134:21–135:2) The hose was positioned beneath both tanks, approximately 7.5 feet from the ground. (Ex. S-23-B; Ex. S-23-C; Tr. 241:19-21) If a leak developed, there was no way to prevent the fuel from both tanks from spilling onto the ground. *Id.* The machine is very similar to the inertia impactor crusher in Citation No. 8661788, which was issued on April 25, 2012. (Tr. 137:16-24) However, the fuel tanks' setup was different. (Tr. 138:1-4) Stalder estimated the tanks held about 200 gallons of fuel. (Tr. 138:5-8) The crusher is non-mobile equipment because it can only be moved by attachment to another piece of machinery. (Tr. 138:14-19)

In cross examination, Stalder admitted a person shorter than 5 feet and 11 inches, might not be able to reach the fuel valve. (Tr. 141:14-21) Respondent suggested a ladder would be needed to turn the valve off. (Tr. 142:2-12) Lastly, Respondent argued turning the valve would be unsafe, since it would necessitate removing at least one point of contact from the ladder. (Tr. 242:18–243:5) Stalder added in recross that at least one of the shutoff valves could be reached from the crusher's work platform. (Tr. 151:15-19) As noted above, a diminution in safety defense is only valid after the Secretary recognizes the claim and grants a modification. *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2130 (Nov. 1989).

Respondent reiterated the argument that fuel shutoff valves increase the likelihood for leak formation. (Tr. 147:11–148:11) Furthermore, Respondent again argued in case of a fire, it would be unsafe to turn off the valve. (Tr. 150:8-14) As detailed above, these arguments are

inappropriate and unwarranted here. Both parties referred to the potential ignition sources discussed in Citation No. 8661788 as well.

Based on the undisputed evidence that no fuel shutoff valve was installed on the hose connecting the crusher's fuel tanks, I find NISC violated Section 56.4501.

Negligence

Inspector Stalder cited NISC for high negligence, because the company was given notice through Citation No. 8661788 on April 25, 2012. (Ex. S-22-A; Tr. 135:18–136:8) NISC had over two months to install fuel valves before Citation No. 8669850's issuance on July 11, 2012. Both citations deal with fuel shutoff valves on inertia crushers, and the engine configurations were only slightly different. (Tr. 137:16-138:4) Respondent argued valve installation was unnecessary, since the crusher had not been operated since the initial April 25, 2012 citation. (Resp. Br. at 24-25) This is not a mitigating circumstance since MSHA inspections only occur several times per year. It would undermine the Mine Act's deterrent capability if operators could escape liability by claiming equipment was unused without taking any further steps to address the violation.

I find NISC was highly negligent. High negligence means "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3(d). The prior citation, No. 8661788, placed NISC on notice, and there are no mitigating circumstances.

Gravity

Stalder cited the probable injuries from a fuel leak fire as lost work days or restricted duty. (Tr. 135:7-13) The expected injury types include burns and smoke inhalation. *Id.* The injury risk would be especially severe if a miner chose to fight the fire. (Tr. 150:11-19) But, it is unlikely more than one miner would be injured. (Tr. 135:14-17) Respondent argued the accident probability was low because a large fuel leak would be easily visible. (Tr. 144:4-6) However, factors ranging from weather conditions to miner alertness might cause a spill to be undetected. (Tr. 145:12–146:1) Stalder evaluated the injury probability as unlikely, identical to the risk analysis in Citation No. 8661788. (Ex. S-22-A; Tr. 135:3-13) In the event of a leak, fuel would tend to flow away from potential ignition sources. *Id.* I find while an injury was unlikely, it would be serious in nature and could result in lost work days or restricted duty.

Penalty

The Secretary assessed the penalty for Citation No. 8669850 at $100.00, deducting $12.00 for good faith abatement. NISC is a small operator, owning and leasing five quarries in 2012. (Tr. 268:12-14) According to Stipulation No. 8, the respondent's business would not be significantly affected if the full penalty is imposed. The operator was highly negligent, and in the unlikely event of an accident, it could lead to serious injury. NISC abated the violation in good faith. I assess a penalty of $100.00.

Citation No. 8669851

On July 11, 2012, at 8:55 a.m., Inspector Stalder issued Citation No. 8669851 alleging a violation of 30 C.F.R. § 56.4501 pursuant to Section 104(a) of the Mine Act. The regulation requires that "[f]uel lines shall be equipped with valves capable of stopping the flow of fuel at the source and shall be located and maintained to minimize fire hazards. This standard does not apply to fuel lines on self-propelled equipment." 30 C.F.R. § 56.4501. Section 56.4501 is a mandatory safety standard. The citation alleges:

> There was no fuel shut off on the Secondary Crusher. This exposes miners to the hazards of a fire should a leak or break in the line develop. Miners fighting fires are exposed to burn and smoke inhalation type injuries. Miners are in loaders and are usually not near the crusher. A leak in the fuel line would likely flow onto the ground away from an ignition source. The operator was unaware this equipment did not have a fuel shut off on it.

Ex. S-24-A

The Violation

The citation alleges unlikely injury that could reasonably be expected to result in lost workdays or restricted duty, one person could be affected, and the operator's negligence was moderate. *Id.*

While inspecting a secondary crusher, Stalder noted fuel shutoff valves were not installed onto the hoses. (Tr. 153:15-20) These hoses, respectively a feed hose and return line, were attached to the tank's roof. *Id.* A greater chance for leakage existed because the hoses had deteriorated due to weathering. (Tr. 157:2-10; Ex. S-25-B) However, the area shown in the exhibit would spill little fuel if a leak developed. (Tr. 160:2-7) The secondary crusher is not a separate piece of mobile equipment. (Tr. 155:10-16) The fuel tank had capacity for a couple hundred gallons. (Tr. 160:8-13) Both parties referred back to the ignition sources discussed in Citation No. 8661788, and their comparative potentialities for starting a fire.

Respondent reiterates the arguments about fuel shutoff valve safety and effectiveness made in Citation No. 8661788. (Resp. Br. at 27) As I found above, these arguments are inappropriate here.

There is no dispute that a fuel shutoff valves were not installed onto the hoses. I find NISC violated 30 C.F.R. § 56.4501.

Negligence

Inspector Stalder cited NISC's negligence as moderate. (Ex. S-24-A) Stalder argued the negligence in this citation should be distinguished from that in No. 8669850. First, the hose configuration was different from those on the previously cited secondary crusher. (Tr. 154:18–155:1) Specifically, the fuel hose was attached to the roof of a single fuel tank. *Id.* Second, Stalder felt NISC did not have fair warning because previous MSHA inspections did not cite this particular machine. *Id.* However, this consideration would make high negligence inapplicable to most citations, since they often have not been previously cited.

I find NISC was highly negligent. High negligence means "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3(d). The prior citation, No. 8661788, placed NISC on notice that shutoff valves needed to installed on all fuel lines. The difference in fuel line configuration is comparatively minor and is not a mitigating circumstance.

Gravity

The gravity assessment made is identical to that in Citation No. 8669850. (Tr. 154:13-15) Probable injuries were burns or smoke inhalation, and could reasonably be expected to result in lost work days or restricted duty. (Tr. 135:7-13) It is unlikely more than one miner would be injured in a fire. (Tr. 135:14-17) Friction from the conveyer belt rollers beneath the crusher increased the ignition chances, but they remained unlikely overall. (Tr. 161:16-19; Ex. S-24-A) Respondent supported this evaluation by testifying the hoses had never leaked. (Tr. 246:1-5) Furthermore, no fuel would be siphoned from the hose if it broke above the bottom of the tank. (Tr. 245:20-23) I find an injury from a fuel leak fire was unlikely, but would be serious in nature and could result in lost work days or restricted duty.

Penalty

The Secretary assessed the penalty for Citation No. 8669851 at $100.00, deducting $12.00 for good faith abatement. NISC is a small operator, owning and leasing five quarries in 2012. (Tr. 268:12-14) According to Stipulation No. 8, the respondent's business would not be significantly affected if the full penalty is imposed. The operator was highly negligent but the violation, while potentially resulting in serious injury, was unlikely to materialize. The operator abated the violation in good faith. I assess a penalty of $100.00.

Citation No. 8669852

On July 11, 2012, at 10:05 a.m., Inspector Stalder issued Citation No. 8669852 alleging a violation of 30 C.F.R. § 56.4501 pursuant to Section 104(a) of the Mine Act. The regulation requires that "[f]uel lines shall be equipped with valves capable of stopping the flow of fuel at the source and shall be located and maintained to minimize fire hazards. This standard does not apply to fuel lines on self-propelled equipment." 30 C.F.R. § 56.4501. Section 56.4501 is a mandatory safety standard. The citation alleges:

> There was no fuel shut off on the Main GenSet. This exposes miners to the hazards of a fire should a leak or break in the line develop. Miners fighting fires are exposed to burn and smoke inhalation type injuries. Miners are in loaders and are usually not near the GenSet. A leak in the fuel line would likely flow onto the ground away from an ignition source. The operator believed that since both lines went in the top of the fuel tank a shut off was not required and this condition has existed for a long time and had not been seen as a hazard or a violation.

Ex. S-26-A

The Violation

The citation alleges unlikely injury that could reasonably be expected to result in lost workdays or restricted duty, one person could be affected, and the operator's negligence was low. *Id.*

Stalder issued this citation while inspecting the GenSet's C-container, which is a metal enclosure similar to a semi-truck trailer. (Tr. 167:14-20; Tr. 174:21-22) Within the trailer, there was a fuel tank for the generator's diesel engine. (Tr. 163:4-9; Ex. S-27-A) No shutoff valve was installed on the hose connecting the tank and engine. *Id.* The fuel tank holds between 300-500 gallons and was placed adjacent to the double doors, near the back of the container. (Tr. 164:7-9; Tr. 247:20–248:1) The trailer's floor is composed of metal and wood with numerous, intentional, small holes. (Tr. 176:6-14) An electric control box lay on the C-container's floor. (Tr. 168:8-11) Approximately a dozen other electrical boxes were also stored there. (Tr. 252:18-20) The setup is not a piece of self-propelled mobile equipment. (Tr. 168:19–169:2)

Respondent reiterates the arguments about fuel shutoff valve safety and effectiveness in Citation No. 8661788. (Resp. Br. at 28) As I found above, these arguments are inappropriate here.

There is no dispute in the record that the fuel line from the tank to the generator lacked a shutoff valve. I find NISC violated 30 C.F.R. § 56.4501.

Negligence

Inspector Stalder cited NISC's negligence as low. (Ex. S-26-A) Stalder justified this designation by arguing the number of years in which MSHA inspectors overlooked the infraction mitigated NISC's culpability. (Tr. 163:24–164:4) However, Stalder may have given a lower negligence rating simply because of fatigue. (Tr. 165:12-23) Stalder distinguished the negligence in this citation from the crusher violations, because the GenSet was in place longer and uncited for a greater time period. (Tr. 166:16–167:1)

I find NISC was highly negligent. This means "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3(d). NISC should have known about the violation, because Citation No. 8661788 gave the company notice and Section 56.4501 applies to fuel lines generally. NISC had sufficient time to install fuel valves on their equipment after the initial April 25, 2012 citation for this type of violation.

Gravity

Inspector Stalder's gravity assessment is identical to Citation No. 8669850. (Tr. 163:12-20) The probable injuries were burns or smoke inhalation, and found reasonably likely to result in lost work days or restricted duty. (Tr. 135:7-13) It is unlikely more than one miner would be injured in a fire. (Tr. 135:14-17) Arc flashes from the electric boxes and switches throughout the C-container are additional potential fire starters. (Tr. 252:18–253:4) The close proximity to the engine is another potential ignition source. (Tr. 167:21–168:4) But overall, the odds of an accident remain unlikely. (Ex. S-26-A) Stalder admitted a leak would probably be observable

because of the holes in the C-container's floor. (Tr. 176:11-14) Respondent believes a fire would be trapped within in the C-container's confines, lowering potential for injury. (Res. Br. at 27-28) I find that injury from a fuel leak fire was unlikely, but serious in nature and could result in lost work days or restricted duty.

Penalty

The Secretary assessed the penalty for Citation No. 8669852 at $100.00, deducting $12.00 for good faith abatement. NISC is a small operator, owning and leasing five quarries in 2012. (Tr. 268:12-14) According to Stipulation No. 8, the respondent's business would not be significantly affected if the full penalty is imposed. The operator was highly negligent but an accident, while capable of leading to serious injury, was unlikely to occur. Despite finding NISC's negligence was higher than cited by the Secretary, a larger penalty is unwarranted because overall this is a minor violation. The operator abated the violation in good faith. I assess a penalty of $100.00.

Citation No. 8669853

On July 11, 2012, at 2:57 p.m., Inspector Stalder issued Citation No. 8669853 alleging a violation of 30 C.F.R. § 56.14100(b) pursuant to Section 104(a) of the Mine Act. The regulation requires that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." 30 C.F.R. § 56.14100(b). Section 56.14100(b) is a mandatory safety standard. The citation alleges:

> The brake lights on the Cat 980 Front End Loader failed to function when tested. Should another piece of equipment fail to see the loader is stopping and collide with it miners could receive jarring type of injuries. This equipment is only operated in daylight hours making an accident unlikely. The operator stated the brake lights were working when the pre-operational examination was conducted.

Ex. S-29-A

The Violation

The citation alleges unlikely injury that could reasonably be expected to result in lost workdays or restricted duty, one person could be affected, and the operator's negligence was low. *Id.*

While examining the Cat 980 front-end loader, Inspector Stalder noticed the brake lights were nonfunctional. (Tr. 178:16-19) Stalder could not estimate how long the brake lights had been broken. (Tr. 180:20–181:4) A fuse short out might have simultaneously rendered both lights inoperable. *Id.* But in Stalder's experience, both lights not working usually indicates the operator permitted both bulbs to go out over time and failed to replace them. (Tr. 187:15-23) At time of inspection, the CAT 980 was in operation and other vehicles were being driven in the area. (Tr. 181:5-10) Nothing on the Cat 980 pre-operational exam form suggests the brake light problem existed before Stalder's inspection. (Tr. 184:17-20)

Respondent challenges the citation, claiming to be in compliance by having corrected the defect in a "timely manner." 30 C.F.R. § 56.14100(b). Russell testified NISC conducts daily pre-operational checks. (Tr. 255:12-18) The pre-operational exam records were dated, initialed, and kept in the scale house. (Tr. 255:23–256:14) However, Russell did not witness the exam on the day of inspection. (Tr. 258:22–259:2) Russell was unsure how the brake lights were checked, but could think of several ways in which one person might perform the test. (Tr. 258:10-13) Stalder agreed the malfunction would have been corrected in a timely manner if it was only discovered during his inspection, and was speedily corrected thereafter. (Tr. 185:7–186:7) Lastly, Stalder did not challenge NISC's claim the brake lights worked during the pre-operational exam conducted that day before his inspection. (Tr. 186:8-11)

Whether a defect is repaired in a timely manner depends on "when the defect occurred and when the operator knew or should have known of its existence." *Lopke Quarries, Inc.*, 23 FMSHRC 705, 715 (July 2001). The Commission held that the Secretary failed to prove a violation of the timely manner requirement, because there was "no evidence in the record indicating when the device became defective." *Id.* The preponderance of the evidence standard requires the fact finder "to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence." *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citations omitted). The Secretary's inability to show when defects occurred has prevented the court from finding violations of Section 56.14100(b) in several cases. *E.g. Barrett Paving Materials, Inc.*, 15 FMSHRC 1999, 2008 (Sept. 1993)(ALJ Weisberger); *Good Constr.*, 22 FMSHRC 1081, 1088 (Sept. 2000)(ALJ Melick); *Martin Marietta Materials, Inc.*, 36 FMSHRC 411, 413 (Feb. 2014)(ALJ Rae); *N. Aggregate, Inc.*, 37 FMSHRC 562, 594 (Mar. 2015)(ALJ Rae).

I find the Secretary did not prove a violation of Section 56.14100(b) by the preponderance of the evidence. While the brake lights' malfunction is undisputed, the Secretary offered no evidence showing how long they were broken. As noted by Inspector Stalder, it is possible both brake lights were simultaneously rendered inoperable by a fuse short out. (Tr. 180:22–181:4) The Secretary presented insufficient evidence to prove the brake lights were not fixed in a timely manner as required by Section 56.14100(b). Thus, I vacate Citation No. 8669853.

WHEREFORE, it is **ORDERED** that Northern Illinois Service Company pay a penalty of $736.00 within thirty (30) days of the filing of this decision.

It is further **ORDERED** that Citation No. 8669853 be **VACATED.**

L. Zane Gill
Administrative Law Judge

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