FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. LROCK INDUSTRIES, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2016-0705 A.C. No. 45-03710-416172 Mine: LRock Pit

DECISION AND ORDER

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

John Bredfield, LRock Industries, Toledo, Washington, *pro se* for Respondent.

Before: Judge Miller

This case is before me upon a petition for assessment of civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act"). This docket involves nineteen citations issued pursuant to Section 104(a) of the Act with originally proposed penalties totaling $32,256.00. The parties presented testimony and evidence regarding the citations at a hearing held in Portland, Oregon, on May 25, 2017. Based upon my review of the record, my observation of the demeanors of the witnesses, and consideration of the parties' legal arguments, I make the following findings and order.

I. APPLICABLE PRINCIPLES OF LAW

A. Establishing a Violation

To prevail on a penalty petition, the Secretary bears the burden of proving an alleged violation by a preponderance of evidence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd* 272 F.3d 590 (D.C. Cir. 2001); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). The Secretary may establish a violation by inference in certain situations, but only if the inference is "inherently reasonable" and there is "a rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152-53 (Nov. 1989).

B. Significant and Substantial

A "significant and substantial" ("S&S") violation is described in Section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(l). A violation is properly designated S&S "if based upon 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).

In *Mathies Coal Co.*, the Commission established the standard for determining whether a violation is S&S:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum,* the Secretary of Labor 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.

6 FMSHRC 1, 3-4 (Jan. 1984).

The Commission has explained that the term "hazard" refers to the prospective danger the cited safety standard is intended to prevent. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016). In *Newtown*, for instance, the mine was cited for a violation of a standard requiring that equipment be locked out and tagged out while electrical work is being performed, and the Commission identified the relevant hazard to be that of a miner working on energized equipment. *Id.* The Commission has clarified that the second element of the *Mathies* test addresses the likelihood of the occurrence of the hazard the cited standard is designed to prevent. *Id.* at 2037-38. The judge must determine whether there is a "reasonable likelihood" that the hazard will occur based on "the particular facts surrounding the violation." *Id.*; *see also McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991-92 (Aug. 2014); *Mathies*, 6 FMSHRC at 4. At the third step, the judge must determine whether the hazard, if it occurred, would be reasonably likely to result in injury. *Newtown*, 38 FMSHRC at 2037. The existence of the hazard is assumed at this step. *Id.*; *Knox Creek Coal Corp. v. Sec'y of Labor,* 811 F.3d 148, 161-62 (4th Cir. 2016). The likelihood of injury is evaluated with respect to specific conditions in the mine. *Newtown,* 38 FMSHRC at 2038. Finally, the Commission has held that the S&S determination should be made assuming "continued normal mining operations." *McCoy*, 36 FMSHRC at 1990-91.

C. Negligence

The Commission has recognized that "[e]ach mandatory standard ... carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs."

A.H. Smith Stone Co., 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, the judge must consider "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2047 (Aug. 2016); *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

The standard of care is higher for mine management. *Newtown*, 38 FMSHRC at 2047. The Mine Act places primary responsibility for maintaining safe and healthful working conditions in mines on operators, and they are thus expected to set an example for miners working under their direction. *Id.*; *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987); *see also* 30 U.S.C. § 801(e).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The LRock pit is a surface sand and gravel mine located in Lewis County, Washington. LRock is an "operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d), and the mine is subject to the provisions of the Mine Act and the jurisdiction of the Commission.

All citations except one included in this docket were issued by Inspector Benjamin Burns during regular inspections. Burns has been an inspector for nine years and is familiar with sand and gravel mines, although the LRock pit is not in his usual inspection area. He began the inspection of the LRock pit on June 1, 2016. Upon arriving at the mine, he met John Bredfield, the plant manager. Bredfield informed Burns that he was too busy to accompany him on the inspection, and so Burns inspected the mine on his own.

Citation No. 8872971

In the course of his inspection, Burns observed a roadway going to the top of the stockpile at the mine. He noticed that there was no berm at the end of the stockpile, leaving a drop-off of approximately 20 feet. The Secretary's Exhibit 2, page 4, shows the saddle-shaped area where there is no berm at the end of the roadway. A loader operator onsite informed Burns that the miners had not been accessing the pile for a long time. However, Burns did observe tire tracks in the area. He noted that the tire tracks were 25 feet from the edge. To terminate the citation, the operator added a barricade to prevent access. Sec'y Ex. 2, p. 5.

Bredfield, the representative and sole witness for the company, testified that the roadway had been bermed when it was in daily use, but that the area was not active. He explained that the pile was a stockpile that had been loaded out and was no longer used. He also stated that the surface was sand that therefore was too soft to travel.

Burns cited the mine for a violation of 30 C.F.R. § 56.9300(a), which states in pertinent part that "Berms or guardrails shall be provided and maintained on the banks of roadways where

a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. . . ."[1]

LRock argues that the area was not a "roadway" within the meaning of the standard because it was no longer in use at the time of the inspection, and therefore no berms were required. The term "roadway" is not defined in the regulations, but the Commission has found that an area is a roadway "where a vehicle commonly travels its surface during the normal mining routine." *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1735 (Aug. 2012), *aff'd*, 762 F.3d 611 (7th Cir. 2014) (interpreting a similar standard applicable to surface coal mines); *see also Capitol Aggregates, Inc.*, 4 FMSHRC 846, 847 (May 1982). The evidence at hearing, including Burn's observations of the tire tracks and his conversation with the loader operator, demonstrated that the cited area was the primary means of access to the pile. While Bredfield claimed that vehicles no longer traveled there, nothing had been done to prevent access, such as posting signs or erecting barricades. I therefore find that the area was still a roadway within the meaning of the standard. The drop-off of 20 feet was "of sufficient grade or depth to cause a vehicle to overturn." Because no berm was provided at the drop-off, the standard was violated. I agree with the inspector that the citation was the result of moderate negligence, was unlikely to cause injury, and was not S&S, given that the area was infrequently used and there were no tire tracks close to the edge. A penalty of $484.00 is assessed as proposed by the Secretary.

Citation No. 8872972

Burns next inspected a CAT 980 H front-end loader. He noticed a fire extinguisher on the loader and saw that the tag on the fire extinguisher indicated that it had last been inspected in December 2014. A photo of the tag was introduced as the Secretary's Exhibit 3, page 3. Burns issued a citation for a violation of 30 C.F.R. § 56.4201(a)(2), which requires that

> Firefighting equipment shall be inspected according to the following schedules: ... At least once every twelve months, maintenance checks shall be made of mechanical parts, the amount and condition of extinguishing agent and expellant, and the condition of the hose, nozzle, and vessel to determine that the fire extinguishers will operate effectively.

The Secretary argues that the fire extinguisher should have been inspected in December 2015, 12 months after the previous inspection.

Bredfield testified that the CAT 980 H has its own automatic fire prevention system and does not require a fire extinguisher. LRock argues that yearly inspections of the fire extinguisher were therefore not required. However, the language of the standard does not limit the inspection requirement only to mandatory fire extinguishers. Even if other fire extinguishing equipment was available, a miner might rely on the available fire extinguisher in an emergency. If the

1. Section (d) of the same standard permits compliance on infrequently used roadways by providing locked gates and specific warning signs. LRock did not provide evidence of any barriers or signs in the area.

extinguisher had not been inspected and was not in operable condition, it would present a hazard to miners.

Because the fire extinguisher had not been inspected within the past 12 months, a violation is proven. I uphold the inspector's finding of moderate negligence, since the mine had had violations of this standard in the past. The violation was non-S&S and unlikely to cause injury. A penalty of $145.00 is assessed as proposed.

Citation No. 8872973

Continuing his inspection of the CAT 980 H loader, Burns asked the loader operator to pick up a typical load in the bucket and then test the parking brake while on the crusher feed ramp. The brake failed to hold, and the loader moved approximately 20 inches before the operator stopped it with the service brake. Burns issued a citation for a violation of 30 C.F.R. § 56.14101(a)(2), which requires that "If equipped on self-propelled equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it reaches."

Bredfield testified that past inspectors had not tested the brake with gravel in the bucket. The operator had tested the brake that morning without gravel and it had held. Bredfield also stated that it is common practice to put the loader bucket down before applying the brake. However, the standard states that the brake must hold the equipment "with its typical load on the maximum grade it reaches." 30 C.F.R. § 56.14101(a)(2). The bucket would be lifted when the loader was carrying the load. I find that a violation occurred. The violation was unlikely to cause injury and non-S&S because there was still some resistance in the brake, and the loader moved slowly, only a short distance. The negligence was moderate because the operator had tested the brake that day. I assess a penalty of $216.00.

Citation No. 8872974

Burns next inspected a roadway on the south side of the bank of the yard, where the stockpile is located. He estimated that the roadway was 40 to 45 feet wide. It had a steep angle drop-off of approximately 10 feet, but there was no berm in place. Burns observed haul trucks using the area to turn around and coming within 30 feet of the drop-off. The Secretary's Exhibit 5, page 4, shows a partially constructed berm, but the berm does not extend to the end of the yard. Burns believed the berm had been removed as the stockpile was loaded out.

Burns issued a citation for a violation of 30 C.F.R. § 56.9300(a), which requires that "Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." He designated the violation as S&S because he observed multiple trucks close to the edge, and therefore there was potential for a rollover accident. The Secretary alleges high negligence because Bredfield, the plant manager, was in the area, and because the partially constructed berm indicates that management knew of the berm requirement.

Bredfield agreed that there was no berm in the cited area, but testified that workers were in the process of constructing the berm when Burns inspected the area. Bredfield also denied that there were trucks in the area, producing overhead photographs showing no truck activity. Resp. Exs. A & B. However, the photographs are undated and therefore of little probative value. Further, Bredfield stated that the roadway was not 40 feet wide as observed by the inspector, but rather 160 feet, leaving sufficient room for the trucks to maneuver in the absence of a berm. On cross-examination, Bredfield was asked how long the stockpile had been in place prior to the inspection, but his responses were evasive. Bredfield stated that at the time of the inspection, miners were in the process of cleaning up the area and loading out the berm in order to terminate a project. This testimony conflicts with Bredfield's earlier statement that the berm was under construction. Accordingly, I do not credit his testimony.

Based on the testimony of the inspector, I find that the area was frequently travelled and had a drop-off, and a berm was therefore required. The Secretary has proven a violation. In view of Bredfield's knowledge of the requirement, the negligence is high as assessed. I also find that the violation was significant and substantial. Applying the *Mathies* factors, the Secretary has proven a violation of a standard as discussed. The cited standard is intended to prevent an over-travelling accident. Here, such an accident was reasonably likely to occur, given that there was frequent traffic in the area and tire tracks relatively close to the drop-off. Such an accident would be reasonably likely to result in serious injury to the driver. The Secretary proposed a penalty of $7,964.00 which I find appropriate in this circumstance.

Citation No. 8872975

On the second day of the inspection, Burns examined a mobile excavator that was being operated by Bredfield. Burns observed that one of the front mirrors on the excavator was broken, and another was missing. Burns stated that the mirrors would aid the driver in safe operation of the machine because they would allow him to see out the back, left or right side.

Bredfield explained that the machine had been brought in a day or two prior to the inspection to clear material located on a steep edge. The excavator was normally stored at a shop offsite and belonged to LRock's rental division. Bredfield stated that the mirrors were useless and got in the way of entering and operating the excavator. The machine had a cab that could rotate 360 degrees and thus there was no need to operate it in reverse. He stated that no other vehicles would come around the excavator while it was operating.

The Secretary alleges a violation of 30 C.F.R. § 56.14100(b), which provides that "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." I find that the mirrors affect the safety of the excavator. While I credit Bredfield's testimony that the machine is typically operated in forward motion, I also credit Burn's statement that the machine could be operated in reverse. Burns also stated that the mirrors could be used to check a blind spot, which would be aid in safely operating the machine in forward motion. While the Secretary did not address the "timely" element of the standard, Bredfield was operating the machine at the time and should have discovered and corrected the broken mirrors in a pre-operational check. I agree with the Secretary that the violation was the result of high negligence, given that Bredfield, a supervisor,

was aware of the condition. The violation was unlikely to cause injury and was not S&S, since the excavator was operated primarily with the cab facing forwards. The Secretary's proposed penalty of $722.00 is affirmed.

Citation No. 8872977

Burns next inspected a storage area, where he observed a seven-inch angle grinder located on the bottom shelf under some other tools. The disk on the grinder did not have a guard. *See* Sec'y Ex. 13, p. 3. The edges of the disk showed some wear, from which Burns inferred that the grinder had been used. He also inferred that the grinder had been in that condition for some time, based on the fact that there were other tools piled on top of it. Burns explained that the disk on the grinder rotates at high speed and the miner operating the tool would have his hand within eight and a half inches of the disk.

Bredfield acknowledged that a guard was necessary for safe operation of the grinder, but stated that the grinder was not used except for spare parts. He noted that the grinder disk had been put on upside down, and stated that this would be a signal to miners that the grinder was not in service. He explained that the mine has many of the same grinders and this one was buried under tools because it had not been used for some time.

Burns cited the mine for a violation of 30 C.F.R. § 56.14100(b), which provides that "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The Secretary alleges that the violation was the result of low negligence and was S&S.

LRock argues that the standard should not apply because the grinder had been taken out of service. Section (c) of the same standard provides that defective equipment may be taken out of service to prevent hazardous use, including by "marking the defective items ... to prohibit further use until the defects are corrected." 30 C.F.R. § 56.14100(c). LRock argues that the upside down disc on the grinder effectively marked it as out of service. I reject this argument. A miner could easily turn the disc over and use the grinder or use it without noticing that the disc was upside down.

I find that the Secretary has proven a violation. The absence of a guard on the grinder exposed the user to the sharp spinning edge of the disc, which was close to the trigger and thus would be close to the user's hand. The condition had most likely been present for some time, given that the grinder was buried under other tools. Because the grinder was difficult to see buried under the tools, I find that the violation was the result of low negligence as alleged.

The Secretary alleges that the violation was S&S, and I agree. The Secretary has proven a violation of a mandatory standard, satisfying the first *Mathies* element. The standard at issue guards against the hazard of a miner using a tool with a safety defect. I find that the hazard was reasonably likely to occur, because the grinder was not tagged out and was available for use. A miner could easily have flipped the disk on the grinder over and used it without the guard. The second *Mathies* element is proven. A miner using the grinder without the guard would be reasonably likely to incur an injury. The miner's hand would come within inches of the disk,

which is sharp and would be rotating at high speed. The resulting injury would most likely lead to lost workdays or be permanently disabling. The third and fourth *Mathies* elements are satisfied, and the violation is S&S. The Secretary proposed a penalty of $324.00 which is assessed.

Citation No. 8872978

Burns next examined a sand screw used to dewater sand during processing. The screw was covered by a screen, and a working deck surrounded the screen. Burns observed that there was a gap between the screen and the working deck, leaving approximately 10 inches where the screw was exposed. *See* Sec'y Ex. 3, p. 4. The working deck was approximately 10 feet above ground and was accessible via a vertical ladder. Burns explained that miners would access the area to conduct fluid level checks or to clean material off of the deck. He was concerned that a miner could reach or fall into the area and become entangled with the screw.

Burns testified that an entanglement accident with the screw fins could cause a fatal injury. While Bredfield stated that the screw moves slowly, he did not dispute that an injury could occur if someone were to come into contact with it.

Burns cited the mine for a violation of 30 C.F.R. § 56.14107(a), which provides that "Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take-up pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." I find that the screw fins were "moving machine parts" within the meaning of the standard because they were capable of causing injury.

LRock argues that the guarding recommended by the inspector was not necessary because the mine has a lock-out/tag-out policy that would require the screw to be de-energized before anyone performed maintenance on it. However, the Commission has found that guarding standards should be interpreted to account for "all relevant exposure and injury variables" including "the vagaries of human contact." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). Consistent with this, Commission judges have interpreted guarding standards to require that guarding be adequate to prevent injury in the event that an employee carelessly disregards a lock-out/tag-out policy. *See, e.g., Climax Molybdenum Co.*, 38 FMSHRC 2453, 2460 (Sept. 2016) (ALJ); *Dix River Stone Inc.*, 29 FMSHRC 186, 203 (Mar. 2007) (ALJ); *Calco Inc.*, 15 FMSHRC 480, 484 (Mar. 1993) (ALJ). LRock's lock-out/tag-out policy is no defense to a guarding violation and therefore I find that the Secretary has proven a violation.

The Secretary alleges that the violation was S&S, and I affirm that finding. I have found that a violation of a mandatory standard occurred, satisfying the first element of the *Mathies* test. Regarding the second element, the question is whether it was reasonably likely that the inadequate guarding on the screw would lead to a miner coming into contact with the moving screw. *See Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016). Based on the close proximity of the walkway to the exposed screw, I find that such an accident was reasonably likely to occur. The inspector testified that such an accident would lead to a fatal injury, and LRock produced no evidence to the contrary. I thus find that the hazard was reasonably likely to lead to a fatal injury, satisfying the third and fourth *Mathies* elements. Because the condition had

been present for three years and had been examined by other inspectors, I find that the negligence was low. The Secretary's proposed penalty of $1,078.00 is assessed.

Citation No. 8872979

Burns next inspected a concrete rock screw that is used to clean rock before it is sent to the conveyor belt. The screw had a water manifold system mounted on one side that prevented contact with the auger from that side. However, Burns noted that there were gaps in the guarding on the top and side of the screw. The screw paddles were within 13 to 20 inches from the unguarded spots. Burns stated that miners would sometimes work in the area to adjust the valves on the water manifold. He believed it was possible for a miner to be pulled into the screw, causing a fatal injury. He cited the mine for a violation of 30 C.F.R. § 56.14107(a), the guarding standard discussed above with regard to Citation No. 8872978. The Secretary produced photographs of the screw, but it is difficult to see the moving machine parts in the photographs. Sec'y Ex. 7, p. 3-4.

Bredfield testified that miners do not work in the area because the valves on the manifold are never adjusted. He stated that the manifold was a modification he had added to the screw, and that the manifold provides more guarding on the screw than would be present in other plants. He believed that in order for someone to come in contact with the auger, the person would have to climb onto the manifold. The screw had been at the plant for three years at the time of the inspection, and no other inspectors had found a problem.

I credit the inspector's finding that the moving machine parts were within reach and that additional guarding was necessary. It would be possible for a miner to be pulled into the screw and receive a fatal injury. However, because the plastic tub above the manifold provided partial guarding, the violation was unlikely to cause injury. The negligence was low, given that previous inspectors had accepted the guarding. I assess a penalty of $216.00 as proposed by the Secretary.

Citation No. 8872980

Burns also inspected a portable rolling pressure valve. The machine had been brought in to the mine three weeks earlier for use on a specific project. Burns observed that there were two openings on the walkway on the unit, one 20 inches wide and a second 24 inches wide. The openings were located 52 and 67 inches above ground, respectively, and provided access to the unit from the ground. Burns believed there should have been chains across the openings, as there were on other equipment in the mine. He noted that injury was unlikely because of the side railings by the openings.

Burns cited the mine for a violation of 30 C.F.R. § 56.11012, which requires that "Openings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed."

LRock argues that the chains detract from safety, because a miner entering the unit would be forced to let go of the hand rails in order to lift the chain. The standard provides that where it is impractical to install a chain, the operator may instead install warning signals. However, the mine has not provided evidence that it installed warning signals. In any event, I do not find that the chains were impractical, since the inspector observed similar chains on other equipment at the mine.

I find that the Secretary has proven a violation of the standard. There was a danger of a miner falling through the openings from the travelway, and a barrier was therefore necessary. I agree that injury was unlikely, because there were handrails in the area to provide stability. The negligence is moderate because management had provided chains on other equipment. I assess a penalty of $216.00

Citation No. 8872982

Burns next observed a lube truck that was used to transport tools around the site for maintenance. He observed a Miller 250 welder on the truck and determined that the terminals on the welder were not adequately guarded. The Secretary's Exhibit 9, page 3, shows that metal is exposed on the terminals. The welder is gas-powered, and the terminals are used to connect to the welding leads. Burns testified that if a miner were to contact the terminals with something metal, he would be shocked. He observed that while the welder was high on the truck, it was next to a handrail. To terminate the violation, the operator installed rubber guards around the terminals.

Burns cited the mine for a violation of 30 C.F.R. § 56.12023, which provides that "Electrical connections and resistor grids that are difficult or impractical to insulate shall be guarded, unless protection is provided by location."

Bredfield stated that the welder was equipped with the factory insulation. However, Burns believed that the cited part needed to be insulated because there was metal exposed. LRock also argues that the welder was located eight feet off the ground, and thus "protection is provided by location." However, because there was a handrail next to the welder, I find that contact with the part was possible. I find that the Secretary has proven a violation of the standard. Because of the welder's location high off the ground, I find that the violation was unlikely to cause injury. I affirm the moderate negligence designation because the welder was used regularly. I assess the Secretary's proposed penalty of $145.00.

Citation No. 8872983

Burns also observed that there was no protective cover over the end of the positive electrode on the welder. Without the protective cover, Burns stated that there would be "arcing," creating a potential for shock. He described seeing "burrs" on exposed metal, which indicated to him that arcing had occurred in previous uses of the welder. He was unsure of the voltage on the welder but estimated that it was at least 120 volts.

Burns issued a citation for a violation of 30 C.F.R. § 56.14100(b), which provides that "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The Secretary alleges that the violation was the result of moderate negligence and was S&S.

Bredfield acknowledged that the protective cover was missing, saying that the covers were flimsy and broke easily. However, he did not believe that the missing guard created a safety hazard. He stated that arcing and shock hazards are normal parts of welding and that miners wear gloves as protection. He believed that the important guards were where the miner's hands would be, and those were present.

I affirm the citation as issued. The missing cover was a "defect[ ] on any equipment ... that affect[s] safety" because it created "arcing," lessened the miner's control of the welder, and increased the risk of shock. Burn's observation of burrs on exposed metal indicates that the condition had existed for some time, and therefore was not "corrected in a timely manner." I find that the violation was the result of moderate negligence, because it had existed for some time and the welder was available for use.

Applying the Commission's *Mathies* test, I also find that the violation was S&S. A violation of a mandatory standard occurred. The hazard of a miner using the welder in its defective condition was reasonably likely to occur because the welder was available for use, and Burns saw evidence of arcing. Regarding the third and fourth steps, a miner using the welder would be reasonably likely to be shocked, and a shock to a miner would likely result in burns or other injuries of a reasonably serious nature. I assess the Secretary's proposed penalty of $722.00.

Citation No. 8872984

In addition to the welder, the lube truck also carried an angle grinder. Burns noticed that there was a split in the outer jacket of the conductor feeding the grinder. The split was approximately one and a half inches long and one quarter inch wide and there was bare copper exposed through the split. Burns testified that the split could cause a miner to be electrocuted if he put his hand on the plug to plug in the grinder.

Bredfield admitted that the outer jacket was damaged, speculating that someone may have pinched the cord in the heavy door of the lube truck. He stated that no one was aware of the defect and that no one would have tried to use the grinder in that condition.

The Secretary alleges a violation of 30 C.F.R. § 56.12004, which provides in relevant part that "Electrical conductors exposed to mechanical damage shall be protected." A "conductor" is defined as "a material, usually in the form of a wire, cable, or bus bar, capable of carrying an electric current." 30 C.F.R. § 56.2. Other Commission ALJs to address this standard have found that it is violated when "exposed cable or wiring that is capable of carrying an electrical current, thus creating a shock hazard, lacks an outer protective jacket or structure of some sort." *Recon Refractory & Constr.*, 36 FMSHRC 2265, 2274 (Aug. 2014) (ALJ); *see also*

Northshore Mining Co., 35 FMSHRC 1889, 1893 (June 2013) (ALJ); *Baker Rock Crushing Co.*, 32 FMSHRC 968, 977 (Aug. 2010) (ALJ).

I find that the Secretary has proven a violation of the standard. The cited cord was capable of carrying an electric current and had exposed wires that were unprotected. The Secretary alleges that the violation was S&S and the result of moderate negligence. I affirm the negligence designation, but find that the violation was not S&S. Bredfield testified that the grinder had not been used in its current condition. At the time of the inspection, the tool was stored in the truck and not currently in use. Bredfield stated that a miner would have noticed the split on the cord as soon as he took the machine out and would not have tried to use it in that condition. The Secretary produced no evidence to the contrary. I thus find that the hazard of a miner contacting energized wires was unlikely to occur. *cf. Baker Rock*, 32 FMSHRC at 977-78 (finding that no violation of § 56.12004 occurred because miners were unlikely to connect a damaged cable to power without first noticing the exposed inner conductors). The second element of the *Mathies* test is therefore not proven. The Secretary proposed a penalty of $2,398.00, but because the violation was not significant and substantial, I assess a penalty of $300.00.

Citation No. 8872985

Burns continued the inspection of the mine on June 7, 2016. He inspected a roadway in the southeast section of the yard near a pond. Burns noticed that there was a drop-off of approximately 10 to 15 feet, but there were no berms on approximately 300 feet of the road. Burns observed a Volvo haul truck in the area, which he learned had been operated in the area the weekend prior to the inspection. *See* Sec'y Ex. 17, p. 5. He also observed tracks on the road, which he believed were from haulage vehicles and mobile excavators. *See* Sec'y Ex. 17, p. 8. He measured that the tracks were between five inches and five feet from the drop-off. The tire tracks so close to the water concerned Burns because a vehicle could over-travel into the water. He predicted that this type of accident could cause the vehicle's driver to drown.

Burns issued this citation for a violation of 30 C.F.R. § 56.9300(a), which requires that "Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment."

LRock makes several arguments disputing the berm requirements. First, Bredfield testified at hearing that the roadway was not on mine property and so is outside MSHA jurisdiction. However, Burns testified that the area was on mine property. I accept the inspector's finding on this issue and find that the roadway was subject to MSHA jurisdiction. Bredfield also stated that the unbermed area shown in Exhibit 17, page 11, had only a 20-inch drop-off. Bredfield argued that berms are only required for drop-offs greater than mid-axle height of the mine's tallest wheeled vehicles, and that the Volvo truck used in the area had a mid-axle height of 31 inches. In fact, the standard requires that the "*berm or guardrail* shall be at least mid-axle height." 30 C.F.R. § 56.9300(b) (emphasis added). A berm is required wherever there is a drop-off "of sufficient grade or depth to cause a vehicle to overturn or

endanger persons in equipment." Burns found that there was a rollover hazard even in some areas with a small drop-off, and I accept his findings.

I find that the Secretary has proven a violation of the standard. The cited roadway had a steep drop-off of 10 to 15 feet in some places creating a rollover hazard. Berms were therefore required. However, I assess the negligence as moderate rather than high as alleged, because Bredfield testified that his understanding of the height requirement was different than that of the inspector for this area of the mine. I also find that the violation was significant and substantial as alleged by the Secretary. The Secretary has proven that a violation occurred, which satisfies the first step in the *Mathies* test. The relevant hazard is that of a rollover accident from over-traveling, and I find that such an accident was reasonably likely to occur. While Bredfield stated that the road was used only once per year by excavating vehicles, I do not credit his statement, given that Burns observed a haul truck and vehicle tracks in the area. Moreover, the area lacking berms was large, creating multiple sites for a potential accident. The second element of the *Mathies* test is satisfied. A rollover accident in this area would be likely to result in a crushing or drowning injury, satisfying the third and fourth elements. I assess a penalty of $3,000.00, as I have found that the negligence was less than that assessed by the Secretary.

Citation No. 8872986

During his inspection, Burns asked Bredfield for the results of the mine's grounding systems tests. He learned that while Bredfield had completed a test of the equipment grounding conductors, he had not tested the grounding electrodes or the grounding electrode conductors. The mine had a system of ground rods that Burns believed should have been tested. However, Burns did not encounter any defects in the system. Bredfield did not believe it was necessary to test the ground rods because the mine already has more rods than are required.

Burns cited LRock for violating 30 C.F.R. § 56.12028, which requires that "Continuity 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."

The Secretary has interpreted the term "grounding systems" to include three components, each of which must be tested: equipment grounding conductors, grounding electrode conductors, and grounding electrodes. IV MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 21, at 44–45 (2003). The Secretary's interpretation is reasonable and is therefore entitled to deference. *See Tilden Mining Co.*, 36 FMSHRC 1965, 1967; *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1678-79 (Dec. 2010) (citing *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994)). I find that the Secretary has proven a violation. Tests of all three components described by the Secretary were required, but only the equipment grounding conductors were tested. I also uphold the inspector's finding of low negligence because Bredfield was unaware that the two other tests were required, and he testified that they would conduct those tests from now on. I find that the violation was non-S&S and unlikely to cause injury, because the inspector testified that during his inspection he did not see any electrical hazards that could lead to a shock. I assess a penalty of $114.00.

Citation No. 8872987

Burns issued the next three citations for violations regarding a Ford F7000 fuel truck at the mine. Burns observed that the truck's tank did not have a label indicating that it contained diesel fuel. He was concerned that a miner who was not aware that the tank held diesel fuel could accidentally come into contact with the fuel. Burns testified that diesel fuel can be hazardous if the fuel touches a person's eyes or skin. However, all the miners he spoke to knew that the tank contained diesel fuel.

LRock disputes that the tank was not labeled. Bredfield explained that there was a placard on the tank with the label "1203," which he stated would be recognizable to any miner or emergency personnel as a sign for diesel fuel. Burns disagreed, stating that the 1203 placard on the tank did not mean anything to him. Bredfield stated that the truck had been at four different rock pits with only the 1203 placard on the tank, and there had been no previous questions as to the tank's contents.

Burns issued a citation for a violation of 30 C.F.R. § 47.41, which requires that "The operator must ensure that each container of a hazardous chemical has a label. If a container is tagged or marked with the appropriate information, it is labeled." A "hazardous chemical" is defined in the regulations as "Any chemical that can present a physical or health hazard." 30 C.F.R. § 47.11. A "label" is defined as "Any written, printed, or graphic material displayed on or affixed to a container to identify its contents and convey other relevant information." *Id.*

I reject LRock's argument that the 1203 placard was an adequate label for the tank. Burns, an inspector with over nine years of experience, was unfamiliar with the label. The miners onsite also made no reference to the placard when Burns was explaining the citation to them. I thus find that the placard did not "convey the relevant information" as required by the standard. The violation was the result of moderate negligence because management had attempted to comply by using the "1203" placard, but the label was not clear. This violation was non-S&S and unlikely to cause injury because all of the miners the inspector talked to knew the tank contained diesel fuel. A penalty of $145.00 is assessed as proposed.

Citation No. 8872988

Continuing his inspection of the fuel truck, Burns asked the operator to back up the truck to test the back-up alarm. He testified that he could not hear an alarm when the operator backed up the fuel truck. The miner on site informed Burns that the fuel truck was primarily stationary, and that the only time it moved was to refuel the roll crusher machine. The crusher was located roughly 200 feet from the truck. Burns estimated that the crusher would need to be refueled daily, but workers at the inspection told him it had been at least two weeks since anyone had moved the truck. The Secretary's photograph of the truck shows that it had a restricted rear view. Sec'y Ex. 14 pg. 3.

Bredfield testified at hearing that the truck was stationary 99 percent of the time. Miners frequently used pickup trucks to fuel the crusher instead of the fuel truck. If the truck did go

through the pit, it would drive very slowly. He stated that the truck never had a back-up alarm installed because other inspectors told the company that it was not necessary so long as they used a spotter when moving the truck.

Burns cited the mine for a violation of 30 C.F.R. § 56.14132(a), which requires that "manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition." This standard applies to audible warning devices already existing on vehicles, but does not require the installation of a horn if one is not present. *See Nelson Bros. Quarries, Inc.*, 21 FMSHRC 1100, 1109 (Oct. 1999) (ALJ). However, a back-up alarm or similar safety measure is required by § 56.14132(b), which applies "when the operator has an obstructed view to the rear." 30 C.F.R. § 56.14132(b). If no alarm is present, the operator may also comply with § 56.14132(b) by using "An observer to signal when it is safe to back up." *Id.*

Because there was no alarm installed on the truck, I find that the Secretary should have cited the truck under § 56.14132(b) instead of § 56.14132(a). I therefore amend the citation to conform to the evidence, as is permitted under Federal Rule of Civil Procedure 15(b)(2). The amendment is appropriate because both parties discussed the use of spotters at hearing, indicating that they understood that a violation of § 56.14132(b) was being litigated. *See Faith Coal Co.*, 19 FMSHRC 1357, 1361 (Aug. 1997).

I find that the Secretary has proven a violation of § 56.14132(b). The truck had an obstructed rear view and no working back-up alarm. While Bredfield mentioned the use of spotters at hearing, no one told Burns that spotters were used at the time of the inspection. I conclude that spotters were not used consistently enough to satisfy the standard. The Secretary alleges that the violation was unlikely to cause injury and was not S&S. Because the truck was moved only occasionally, I agree that injury was unlikely. The negligence was moderate because the operator had alarms on other vehicles and thus should have been aware of the requirement. The Secretary proposed a penalty of $216.00, which is assessed.

Citation No. 8872989

Burns next tested the brake lights on the same fuel truck. He asked the operator to apply the service brake pedal, and observed that the brake lights did not come on. The Secretary's Exhibit 16, page 3, shows the brake lights unlit. As previously mentioned, this truck was mostly stationary, but the operator did move it to refuel the crusher, which had been at the mine for approximately two weeks. Burns also testified that the operator had not run the truck in two or three weeks. The inspector believed based on the frequency of use of the truck that the brake lights had not been fixed in a timely manner.

Burns issued a citation for a violation of 30 C.F.R. § 56.14100(b), which requires that "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The Secretary alleges that the violation was non-S&S and that it resulted from moderate negligence.

With respect to the standard at issue, the Commission has held that the timeliness of a correction depends on when the defect occurred and when the operator knew or should have known about the defect. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 715 (July 2001). In *Lopke*, the Commission found that a violation of § 56.14100(b) had not been proven because the Secretary had not provided any evidence as to when the defect on the cited equipment arose. *Id.*

Here, Burns assumed that LRock had not repaired the truck's brake lights in a timely manner based on how often the crushing machine needed to be refueled. He believed the machine would need to be fueled daily, but was told that the fuel truck had not been moved in two or three weeks. I am not convinced that these facts prove that the brake lights had been broken for any length of time, or that the operator should have known of the defect. I find that the Secretary has failed to prove the timeliness element of the standard, and therefore vacate the citation.

Citation No. 8872990

Finally, Burns concluded based on the large number of violations he encountered at the mine that adequate inspections were not being conducted. He issued a citation for a violation of 30 C.F.R. § 56.18002(a), which provides that "A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions." The Commission has held that in order to comply with the standard, a workplace examination "must be adequate in the sense that it identifies conditions which may adversely affect safety and health that a reasonably prudent competent examiner would recognize." *Sunbelt Rentals, Inc.*, 38 FMSHRC 1619, 1627 (July 2016).

I find that the Secretary has proven a violation. Burns specifically noted the citations for missing berms, missing guards, and damaged electrical conductors. A reasonably prudent competent examiner would have detected those violations in an inspection. Further, I find that the violation was S&S. The failure to identify numerous hazardous conditions, especially the missing berms and the guards on the welder, was likely to result in a miner working in unsafe conditions, and this would be likely to result in an accident. Such an accident would be reasonably likely to cause a serious injury, such as a crushing injury or electrocution in the case of the berms and electrical guarding. The *Mathies* elements are satisfied. However, I do not find the Secretary has presented sufficient evidence to demonstrate that the negligence was high. While Bredfield may have been the person responsible for conducting the examinations, there is no evidence in the record to support that supposition. It is not clear if he is the only management employee at the mine, or if he designated another individual to conduct an examination. Therefore, I find the negligence to be moderate and assess a penalty of $3,500.00.

Citation No. 8881854

The final citation was issued by Inspector Brent Oxier during a hazard complaint inspection. Oxier observed a miner standing on top of the shaker platform removing rock from the screens. The miner was not wearing fall protection. Oxier measured that the platform was 11 feet, 9 inches above ground. *See* Sec'y Ex. 1, p. 7. A walkway below the cited area had a

handrail, but the miner was working above the handrail, and the walkway was narrow. *See* Sec'y Ex. 1, p. 5. Oxier believed the miner was in danger of falling, because his back was close to the screen wall edge and he was bent over striking the screen with a hammer to dislodge a rock. If the miner were to step back, he could fall backwards to the walkway below or to the ground. Oxier believed that the miner's actions were common practice at the mine, because the miner was aware that Oxier was on site for an inspection. Miners told Oxier that they removed rock from the screens twice per week.

Bredfield believed that the handrail surrounding the screen provided sufficient protection. He stated that the walkway with the handrail was wider than Oxier believed, 22 inches instead of 9 inches. Bredfield also stated that a miner working to dislodge rocks from the screen would be working on his hands and knees and so not in danger of falling, and a 12 inch sideboard around the screen would prevent anyone from falling.

Oxier cited the mine for a violation of 30 C.F.R. § 56.15005, which provides that "Safety belts and lines shall be worn when persons work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered." I find that the Secretary has proven a violation. Because the miners were working to dislodge rocks on a platform with no hand rail, there was a danger of falling. There is no dispute that the miner observed was not wearing fall protection. Because a 12 inch barrier was present, I find that the violation was the result of moderate negligence.

The Secretary alleges that the violation was S&S. Applying the *Mathies* criteria, the Secretary has proven a violation of a mandatory standard. I find that the hazard of a miner falling from the top of the screen was reasonably likely to occur, given that the work was performed several times per month, and the miner was likely to be in an unstable position while working to dislodge rocks from the screen. While Bredfield stated that the miner would be on his hands and knees, Oxier observed someone standing. The second *Mathies* element is satisfied. Oxier believed that a miner would be more likely to fall to the catwalk below than to the ground, but he believed that such a fall would likely cause permanently disabling injury. I credit these findings and find that the third and fourth *Mathies* elements are satisfied. The violation is S&S. The Secretary proposed a penalty of $1,078.00, which I find appropriate.

III. PENALTY

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 "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). The Secretary calculates penalties using the penalty regulations set forth in 30 C.F.R. § 100.3 or following the guidelines for special assessments in 30 C.F.R. § 100.5. When an operator notifies the Secretary that it intends to challenge a penalty, the Secretary then petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. Commission Judges are not bound by the Secretary's penalty regulations or his special assessments. *Am. Coal Co.*, 38 FMSHRC 1987, 1990 (Aug. 2016). Rather, the Act requires that

in assessing civil monetary penalties, the judge must consider six statutory penalty criteria: the operator's history of violations, its size, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission requires that its judges explain any substantial divergence from the penalty proposed by the Secretary. *Am. Coal*, 38 FMSHRC at 1990. However, the judge's assessment must be de novo based upon her review of the record, and the Secretary's proposal should not be used as a starting point or baseline. *Id.*

With regard to the criterion of ability to continue in business, the Commission has held that the burden rests on the operator to produce evidence that the proposed penalty will affect its ability to continue in business. *Mize Granite Quarries, Inc.*, 36 FMSHRC 2801, 2804 (Nov. 2014); *Broken Hill Mining*, 19 FMSHRC 673, 677-78 (Apr. 1997). In the absence of such evidence, it is presumed that no such adverse effect would occur. *Mize*, 36 FMSRHC at 2804; *Sellersburg*, 5 FMSHRC at 294. Thus, the judge may only adjust a penalty based on an operator's inability to pay when there is evidence in the record relevant to that point. *Mize*, 36 FMSHRC at 2804.

The history of assessed violations has been admitted into evidence and shows 16 violations in the 15-month period prior to the inspection. This includes two citations for missing berms or guardrails, two for inadequate guarding on moving machine parts, one for an exposed electrical conductor, and three for failure to inspect a fire extinguisher. The parties agree that the citations in this docket were abated in good faith, and the mine has raised no defense of ability to pay. LRock is a small operator. The negligence and the gravity have been discussed above with respect to each citation.

Based on these factors, I assess the penalties as follows:

Citation No.	**Originally Proposed Penalty**	**Penalty Assessed**	**Modification**
Docket No. WEST 2016-0705			
8872971	$484.00	$484.00	None.
8872972	$145.00	$145.00	None.
8872973	$216.00	$216.00	None.
8872974	$7,964.00	$7,964.00	None.
8872975	$722.00	$722.00	None.
8872977	$324.00	$324.00	None.
8872978	$1,078.00	$1,078.00	None.

8872979	$216.00	$216.00	None.
8872980	$216.00	$216.00	None.
8872982	$145.00	$145.00	None.
8872983	$722.00	$722.00	None.
8872984	$2,398.00	$300.00	Remove S&S designation.
8872985	$7,964.00	$3,000.00	Modify negligence from high to moderate.
8872986	$114.00	$114.00	None.
8872987	$145.00	$145.00	None.
8872988	$216.00	$216.00	Modify citation, no penalty change
8872989	$145.00	$0.00	Vacate.
8872990	$7,964.00	$3,500.00	Modify negligence from high to moderate.
8881854	$1,078.00	$1,078.00	None.
TOTAL	**$32,256.00**	**$20,585.00**	

IV. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $20,585.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

Distribution: (U.S. First Class Certified Mail)

Daniel Brechbuhl, Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd, Suite 216, Denver, CO 80204

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