

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 30, 2024

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner,

v.

SAIIA CONSTRUCTION CO., LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. SE 2023-0002
A.C. No. 01-00028-563327 1KJ

Mine: Fort Payne Quarry

DECISION AND ORDER

Appearances: Colleen E. Howard, Esq., & Jean C. Abreu, Esq., Office of the Solicitor,
U.S. Department of Labor, Atlanta, Georgia, for the Secretary of Labor

Travis W. Vance, Esq., & Lucy M. Anderson, Esq., Fisher and Phillips,
LLP, Charlotte, North Carolina, for the Respondent

Before: Judge Lewis

STATEMENT OF THE CASE

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (The “Act” or “Mine Act”). A hearing was held via Zoom Government on Thursday, March 21, 2024. The parties subsequently submitted briefs. The within Decision has been reached after careful consideration of the evidence presented at hearing and arguments advanced by the parties.

LAW AND REGULATIONS

30 C.F.R. § 56.17001 provides, in pertinent part:

Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas.

CREDIBILITY ASSESSMENT

The findings of fact are based on the record as a whole and the undersigned’s careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the undersigned has taken into consideration the interests of the witnesses, or lack thereof, and

consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the undersigned has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the undersigned's part to have fully considered it. The fact that some evidence is not discussed does not indicate that 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).

JOINT STIPULATIONS

1. During all times relevant to this matter, Respondent was the operator of the Fort Payne Quarry Mine (Mine ID 01-00028) located in Fort Payne, Alabama.
2. Fort Payne Quarry is a "mine" as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802 (h).
3. At all material times involved in this case, the products of the subject mine entered commerce or the operations or products thereof affected commerce within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.
4. The proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act, 30 U.S.C. §§ 815 and 823.
5. When MSHA Inspector Randall Dickerson issued Citation No. 9336782, he was acting in his official capacities as an authorized representative of the Secretary of Labor.
6. The citation contained in this docket was served on Fort Payne Quarry or its agent as required by the Mine Act.
7. The assessed penalty, if affirmed, will not impair Saiia Construction Company, LLC's ability to remain in business.
8. The alleged violation was abated in good faith.

Tr. 7; Jt. Ex. 1.¹

STATEMENT OF FACTS AND SUMMARY OF TESTIMONY

Saiia Construction Company, LLC, ("Saiia") is a commercial contractor that was providing services at Fort Payne Quarry, a mine site owned by Vulcan Materials, at the time of the citation. Tr. 13. Fort Payne Quarry is located in the eastern time zone, near the threshold between the eastern and the central time zone. Tr. 77.

¹ Hereafter, the joint stipulations, transcript, the petition, the Secretary's exhibits, Respondent's exhibits, the Secretary's post-hearing brief, and Respondent's post-hearing brief are abbreviated as "Jt. Stip.," "Tr.," "Pet.," "Ex. S-#," "Ex. R-#," "S. Br.," and "R. Br.," respectively.

WITNESSES

Victor Johnson

At hearing, former Saiia employee Victor Johnson, who worked for the Respondent from April 2022 until July 2022 as a dump truck operator, testified on behalf of the Secretary. Tr. 17-18. He was certified as a dump truck operator in 2020 and holds other certifications to operate other heavy machinery such as forklifts, sky lifts, excavators, and bulldozers, as well as a mining certificate. Tr. 19. Saiia terminated his employment in July 2022, after the complaint at issue was made, for allegedly using a cell phone while operating a dump truck. Tr. 44. The conditions surrounding his termination are not at issue here.

When Johnson first began his employment at Saiia, his shift was scheduled to start at 6:00/6:30 am. Tr. 19. A few weeks into his employment, Saiia adjusted the shift time to begin instead at 4:30 am. Tr. 19-20. This change in shift start time led Johnson to file a complaint with MSHA on July 21, 2022, alleging inadequate illumination at the worksite. Tr. 17-18, 24. As a dump truck operator, Johnson's job duties entailed dumping material over a ledge with a 1100-foot drop. Tr. 18. The only lights present at the site when the workday began were the lights on the vehicle, which Johnson testified was equivalent to a porch light. Tr. 22. If he were to make a mistake, the truck would fall over the 1100-foot drop and there would be no time to get out of the vehicle because the door was located in the back. Tr. 24. Johnson did not take any photographs or make any video recordings of the lighting conditions at the work site. Tr. 45.

Johnson had brought the illumination issue to Saiia supervisor Mike Dunaway two times prior to filing the complaint with MSHA. Tr. 23. While Dunaway eventually brought an excavator to the area to provide additional light, it was not until two or three weeks after Johnson had complained the second time to Dunaway, and the excavator was not present at the work site all the time. Tr. 23. When the excavator was not there, Johnson stated that safety was left to the operator and that it was difficult to determine if the truck was backing up over the berm or over a bad spot. Tr. 23-24. He had never complained about the lighting conditions at the work site before the start time was changed from 6:00/6:30 am to 4:30 am. Tr. 42.

While the shift would begin at 4:30 am, Johnson did not begin to operate machinery until Saiia's pre-shift requirements were completed. Before traveling to the worksite, Saiia required employees to sign in, fill out paperwork and pick up personal protective equipment. Tr. 20, 29, 32. According to Johnson's testimony, this process would take a couple of minutes, before employees got into a company truck to travel to the worksite, Tr. 29-30. Employees were also required to attend a Job Safety Analysis ("JSA") meeting, which reviewed safety issues, production targets, and other objectives before beginning their shift. Tr. 31, 35-36. Typically, this meeting would take approximately five minutes. Tr. 35.

After the JSA meeting, employees would then conduct inspections of the equipment and complete the pre-shift checklist. Tr. 20. The equipment was located about 45 feet away from the utility trailer where the JSA meetings are held. Tr. 37. The pre-shift inspection included a full analysis of the safety features of the vehicle and would take five minutes to complete. Tr. 37, 91. Several items on the inspection checklist, such as the engine coolant and the vehicle's tires,

would require visual tests. Tr. 38-39. Employees would use a flashlight or a cellphone to perform these tests. Tr. 39. The vehicle's lights would be checked with the assistance of another employee, who would confirm to the operator that the lights were functional. Tr. 39. Any problems were brought to the attention of Saiia's management. Tr. 40. The first load of the day was usually collected between 10 and 30 minutes after the pre-shift inspection was conducted. Tr. 42.

Randall Dickerson

Inspector Randall Dickerson has worked for MSHA since 2008 and has conducted approximately 12 inspections per year related to illumination. Tr. 47, 49. Prior to his employment at MSHA, he worked in the mining industry as an underground electrician. Tr. 48. The inspector did not have specific training or certifications regarding industrial hygiene, but he had been certified by MSHA to do noise and dust sampling which is routinely performed to protect miners from these hazards. Tr. 67-68.

Inspector Dickerson visited the mine on July 26, 2022, to observe the lighting conditions in response to the hazard complaint MSHA received on July 21, 2022. Tr. 51. The inspector arrived at the mine around 4:45 am on the day of the inspection. Tr. 51. He presented a copy of the hazard complaint to the mine supervisor. Tr. 52. No one from Saiia's management was present. Tr. 53. The inspector did not meet with Saiia's representative, supervisor Mike Dunaway, until some point between 5:20 and 5:30. Tr. 54. Dunaway accompanied the inspector on his visit. Tr. 94. Prior to entering Saiia's part of the facility, he observed lights moving about the area. Tr. 56, 58. Operations were halted, however, to allow the inspector to conduct his inspection. Tr. 58.

At the dumping area, the inspector noted that it was downhill and a short distance away from the stripping area. Tr. 58. Operators would come, back up, and dump over the edge or short dump and have a bulldozer push the material over the edge. Tr. 58. At twilight, the inspector observed that the dump site had no additional illumination, aside from the headlights and backup lights on the vehicles. Tr. 59. Based on these conditions, trucks may not be able to clearly see the edge of the dump, which is extremely important to ascertain the condition of the berm and see where cracks may be forming or material sloughing off. Tr. 59, 62. The inspector did not believe the illumination was sufficient to see these changing conditions. Tr. 60. He did not witness an operator dump over the edge while he was visiting the site. Tr. 57-58, 72, 74.

The inspector also traveled the haul road when he arrived at the site between 5:20 and 5:30 am. Tr. 60. There was no auxiliary or additional lighting on the road and no clear signs, markers, or reflectors to indicate turns. Tr. 60, 75. Operators would need to navigate a downhill 90-degree turn on this road to proceed to the dump site, using only their headlights and backup lights. Tr. 60-61. The inspector testified that headlights alone were insufficient because it would be difficult to gauge distance and dimensions on the berm, and the berm itself would not be sufficient to stop a truck should it miss the turn. Tr. 61. Even the headlights on the pickup truck used during the inspection were not enough to see the turns. Tr. 75.

The final area the inspector visited was the stripping site, where miners were gathering material from the strip in a pile to load onto the trucks. Tr. 62. The only light in the area was from the headlights on the excavator and a light located on the top joint on the arm of the excavator. Tr. 63. The light was sufficient for loading, but the inspector noted there was no area illumination and it may be difficult for the excavator operator to see others walking in the area and that the operator could injure or kill them with the excavator. Tr. 63. Illumination is needed to operate the equipment, travel safely on the roads, and to see hazards such as people or other equipment coming towards operators unannounced. Tr. 63-64. He did not see other equipment at the stripping site, but Saiia had stopped operations to allow the inspector to examine the various areas. Tr. 63.

The inspector testified that JSA meetings may last anywhere from 30 seconds to 20 minutes. Tr. 70. He did not know the length of the JSA meeting on July 26, 2022. Tr. 71. Miners need to sign a certificate after the meeting to confirm their attendance. Tr. 70. In his estimation, a prudent pre-shift examination may take five to seven minutes. Tr. 71. Completing pre-shift documentation would then take approximately a minute. Tr. 71.

The inspector issued Citation No. 9336782 to Saiia for inadequate illumination of their work area at 5:30 a.m. on July 26, 2022. Tr. 54, 56; Ex. E. In his testimony, the inspector stated that this was the time he issued the citation or verbally told Mike Dunaway that there was a violative condition, but that the actual violative condition may have occurred a few minutes before. Tr. 55. He did not test or take samples of the lighting conditions leading to the citation; while he had used a light illumination meter before, he did not have a meter issued by MSHA. Tr. 72-74, 76. The inspector also did not take photographs, citing concerns that the cameras issued to inspectors would not capture low-light conditions as the human eye would. Tr. 78-79.

The citation was marked as reasonably likely, lost workdays or restricted duty, and significant and substantial. Tr. 55; Ex. R-E. The inspector testified that it would be reasonably likely that going over the edge of a drop more than 100 feet at the dump site would lead to serious injuries or death. Tr. 64. Flipping over the loaded truck could also cause impact injuries, whiplash, head concussions, contusions, and broken bones. Tr. 64-65. This violation would affect one person, the operator of the equipment, because drivers are typically by themselves in the vehicle. Tr. 64. At the stripping site, the inspector determined that it would be reasonably likely that an excavator could spin around and make contact with a person approaching unannounced in low-light conditions. Tr. 65. The negligence was assessed as moderate, because the inspector determined that this condition should have been seen during the daily pre-shift examinations by a reasonable person and work was allowed to continue without correcting the hazardous condition. Tr. 65-66.

Mike Dunaway

Mike Dunaway, a supervisor at Saiia with 17 years of mining experience, testified for the Respondent. Tr. 81-82. He is responsible for the safety and management of employees at the work site, and his job duties involve conducting the daily JSA meeting. Tr. 81, 83. In addition to the JSA meetings, Dunaway also performs a daily work safety audit to ensure that safety

standards are met and that there are enough first aid supplies, safety information, and personal protective equipment available at the work site. Tr. 88; Ex. R-G.

Prior to the JSA meeting, Dunaway inspects the site to look for hazards that may have been caused by weather conditions. Tr. 83. This inspection typically begins at 4:00 am and helps guide the JSA meeting that occurs with the employees. Tr. 83, 93. Dunaway testified that employees did not typically arrive at the work site until 5:00 am, because they need to be transported from the parking lot in a company vehicle and sign in at the maintenance shop prior to beginning their shift. Tr. 92. The JSA meeting typically began at 5:00 am. Tr. 93.

In the meeting, he discusses the jobs that need to be accomplished that day, the types of equipment that will be operated, and any safety procedures that need to be addressed or noted prior to beginning the shift. Tr. 83-84. These general topics were covered in the JSA meeting on July 26, 2022. Tr. 85-87; Ex. R-H. Depending on the topics that need to be reviewed, the JSA meeting may last 15 minutes to one hour. Tr. 87, 93.

After the JSA, the employees conduct the pre-shift examinations on equipment that will be operated that day. Tr. 90-91; Ex. R-F. If there is an issue, including with the equipment's lights, that piece of equipment is tagged out. Tr. 84, 90, 94. Dunaway has never seen an employee operating a vehicle that did not have working lights and testified that disciplinary action would be taken if an employee was found operating a vehicle without lights. Tr. 94. In Dunaway's experience, a prudent pre-shift examination would take between 15 and 20 minutes. Tr. 91.

Saiia changed the shift start time because the days were getting longer and it would allow miners to complete more loads on each shift. Tr. 96. According to Dunaway's testimony, the time change would not have been made if it would impact miner safety. Tr. 97. Dunaway did not believe a light plant needed to be required at the site because there was sufficient light. Tr. 89, 90. He testified that no one had ever complained to him about the lighting conditions and did not recall Johnson's complaint. Tr. 96.²

James Childers

James Childers, a former Saiia employee who had worked as a heavy equipment operator running haul trucks, excavators, and dozers, testified for the Respondent. Tr. 99-100. As part of the onboarding training at Saiia, Childers had been instructed to make sure that equipment lights were working and to report any malfunctioning lights to the foreman. Tr. 101. He testified that he never operated a piece of equipment at night that did not have working lights and that he would ensure the lights were working as part of his pre-shift inspection. Tr. 101-103. He further believed that the work site was very well lit and did not observe or hear anyone make a complaint about the lighting conditions during his tenure. Tr. 106.

² This Court found Dunaway to be somewhat evasive in his testimony.

Courtney Enderle

Courtney Enderle, a senior industrial hygienist with over 12 years of experience at the environmental and safety industrial hygiene consulting firm EI Group, testified regarding an illumination assessment she conducted of the conditions at Fort Payne. Tr. 109-110, 115; Ex. R-K, R-M. Enderle was retained in January 2023 to perform this assessment for the Respondent, which was performed on January 20, 2023, between 5:00 and 7:30 am. Tr. 115, 118; Ex. R-L.

As part of the methodology of her assessment, Enderle referenced the MSHA standard, which states that there only needed to be sufficient lighting within the workspace. Tr. 120, 134. Because she determined the MSHA standard to be subjective with no numbers or measurements assigned, Enderle used other agencies' standards and the best practices with ranges associated with the tasks to determine what the appropriate illumination should be for the tasks performed at Fort Payne. Tr. 121, 134, 159. Specifically, she looked at the National Institute for Occupational Safety and Health ("NIOSH"), the Illuminating Engineering Society ("IES"), and the Handbook for Human Factors to find recommendations for the best practices. Tr. 121. From these recommendations, Enderle generated a table that reflected the illumination a work area should have based on the tasks to be performed there and its surroundings. Tr. 122-123, 138-139. She compared the parking areas and public areas with dark surroundings, because she concluded that those areas had the lowest recommendations for light. Tr. 146. She further considered operating machinery and vehicles to be a visual task. Tr. 150. She did not factor operators pushing or dumping material over a substantial drop when she did her analysis because she did not see those activities occurring during her visit to the site. Tr. 153-154. Further, her assessment focused on the light necessary for specific activities and not on preventing hazards. Tr. 160.

To measure the light conditions at the site, Enderle used a field-calibrated Extech SDL 400 series light meter Tr. 132, 133. The readings were measured in lux, the amount of illumination produced by one candle of one meter surface area away from that distance, which provided an objective observation of the light conditions. Tr. 133. The readings from the light meter include both the ambient and the local light. Tr. 156-157, 161.

Enderle arrived at the dump area at 5:12 am and found that the equipment had yet to begin operating. Tr. 124-125, 149. At the site, Enderle began her sampling by collecting background samples for a base. Tr. 131. She then continued to collect area samples by moving up and down the haul road between the parking area and the stripping area. Tr. 131-132, 156. Equipment did not move until 6:29 am, when the illumination was determined to be sufficient based on the guidelines she had developed. Tr. 125. Enderle found sufficient lighting based on the ranges she developed in the parking area, the dump area, and the stripping area at twilight, the time when differences in light conditions are noticeable. Tr. 125-126, 129.

To account for the differences in lighting based on the time of year and weather conditions, Enderle examined the historical data to determine if there were any factors that may have affected the illumination on July 26, 2022, when the citation was issued. Tr. 126-127. She found that the sunrise and twilight times on July 26, 2022, and January 20, 2023, produced

similar light conditions and that the light would have been sufficient in July 2022. Tr. 127-128, 129.³

Robert Massengale

Robert Massengale, the mining division safety manager with 18 years' experience working for Saiia, testified for the Respondent. Tr. 163-164. In 2022, he visited the Fort Payne site once per week to tour the area, drive around, and ensure that safety measures were met. Tr. 165. He also provided new hires with the necessary training, which includes how to conduct a proper vehicle equipment inspection. Tr. 165-167. To properly check the lights on a vehicle, the operator would need the assistance of another person to ensure that the lights are functional. Tr. 167-168. If a light on a piece of equipment is not working, the operator should inform the supervisor, and that equipment is not allowed to be operated until the light is fixed. Tr. 169.

He testified that Saiia holds JSA meetings every day to review the specific requirements and tasks to be accomplished daily and to inform employees of any hazards that they may encounter at the site. Tr. 168-169. While the length of the JSA meetings varies from 20 minutes to close to an hour, typically a JSA meeting will last 30 minutes. Tr. 169.⁴ A thorough safety inspection would take 15 to 20 minutes. Tr. 167. Massengale had not received a complaint regarding illumination at For Payne and was unaware of any issues regarding illumination at the site. Tr. 171-172.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Burden of Persuasion and Standard of Proof

The Commission has long held that “[i]n an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation.” *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992). The burden of showing something by a “preponderance of the evidence,” the most common standard in the civil law and the standard applicable here, simply requires the trier of fact “to believe that the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

II. The Respondent violated 30 C.F.R. § 56.17001

Section 56.17001 provides, in pertinent part, “[i]llumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas.” 30 C.F.R. § 56.17001. The Commission has stated that the issue of what constitutes “illumination sufficient to provide safe

³ This Court found this witness’s testimony to be unpersuasive for the reasons outlined in the Secretary’s post hearing brief. S. Br. at 8-9.

⁴ This Court found that the witness was exaggerating the length of JSA meetings in order to diminish the time period during which vehicle drivers would be operating in darkness.

working conditions” requires the judge to make a factual determination based on the working conditions in the cited area and the nature of the illumination provided. *Capitol Aggregates, Inc.*, 3 FMSHRC 1388, 1388 (June 1981), *aff’d*, 671 F.2d 1377 (5th Cir. 1982) (unpublished table decision).

It is undisputed that on July 26, 2022, employees began their shift before the sun had risen at 4:30 am. Aside from the lights of the vehicles operating at the site, there was no lighting provided at the work site.

“Between the motion and the act falls the shadow.” This Court recognizes that period of time at issue, which comprised darkness and early twilight, was relatively brief in duration. Nonetheless, it was of sufficient length so as to create a reasonable likelihood of the occurrence of the hazards testified to by the inspector.

This Court credits Victor Johnson’s testimony that it was too dark to see the edge of the dump site when the miners began to operate vehicles. Further, an administrative law judge may credit the opinions and judgment of an experienced MSHA inspector. See *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-1279 (Dec. 1998) and *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-136 (7th Cir. 1995). As such, this Court also credits the testimony of Inspector Dickerson regarding the insufficiency of the lighting for the type of work that is performed at the site, as an inspector with considerable experience both in the mining industry and in conducting inspections. When the inspector visited the site, he observed indications that the work shift had started, from the headlights visible at the site and gathered piles of material to load trucks. Based on the lighting conditions present, he did not believe that the lighting was sufficient to operate safely. In addition to seeing the berm itself, it is important for equipment operators to be able to see the condition of the berm to determine if it is safe to approach. The headlights would provide only two-dimensional lighting, which can make it difficult to determine the distance and dimensions of a berm that is the same color as a roadway. It is also difficult to identify other employees who may be approaching a piece of equipment in the absence of additional lights. This Court finds that the amount of light emitted only from vehicle headlights was not sufficient to provide safe working conditions before the sun rises.

Respondent argues that the lighting conditions at the site were sufficient based on the assessment performed by Courtney Enderle. However, the cited standard does not require that light measurements be taken to ascertain if the lighting is sufficient. Further, the assessment only considered whether the lighting was sufficient, and did not consider the types of tasks miners were performing. While it may be true that Respondent never permitted an employee to operate a vehicle that did not have working lights and trained their employees on conducting prudent pre-shift inspections of equipment, it does not detract from the fact that vehicle headlights alone were not sufficient to light the area where work was being performed prior to sunrise.

Accordingly, this Court finds that Respondent violated 30 C.F.R. § 56.17001.

III. The likelihood of injury was properly classified as “reasonably likely”, and the resulting injury would result in “lost workdays or restricted duty”

Dickerson designated the citation as reasonably likely to cause an injury that could be reasonably expected to result in an injury causing lost workdays or restricted duty. Ex. S-1. This Court affirms the “reasonably likely” and the “lost workdays or restricted duty” designations.

The citation was also designated as significant and substantial. To establish that a violation is significant and substantial, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature. *Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383 (June 2020). The Commission has explained that “the proper focus of the second step of the [S&S] test [is] the likelihood of the occurrence of the hazard the cited standard is designed to prevent.” *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 n.8 (Aug. 2016).⁵

The Secretary has already established that there has been a violation of a mandatory safety standard. Concerning step 2 of the analysis, the identified hazard the standard aims to avoid depends on the type of work that is being performed in the area. Here, the hazards include trucks falling over a steep edge, driving through a berm, or an operator striking another employee who may be approaching a vehicle unannounced. It is reasonably likely that in an inadequately lit environment, these hazards would occur, satisfying step 2 of the analysis. In his testimony, the inspector stated that a person would experience severe injuries, such as broken bones, concussions, severe whiplash, or even death as a result of the occurrence of these hazards. As these types of injuries are of a reasonably serious nature and would be reasonably likely to occur from the hazards described above, all four elements of the S&S analysis have been met and the violation was appropriately determined to be significant and substantial.

⁵ This Court notes the mounting criticism of the Commission’s *Newtown/Peabody* reformulation of the second step of the Mathies test. See inter alia ALJ Moran’s observations in *Sec’y of Labor v. Carmeuse Lime*, 45 FMSHRC 500, 517 n.12 (June 2023), that said reformulation is inconsistent with the Mine Act’s definition of S&S which focuses on violations that *could* contribute to the hazard and the legislative history of the Mine Act that suggests that Congress intended all, except technical violations of mandatory standards, to be considered significant and substantial.

In this case, if the hazards identified by the inspector had occurred, regardless of likelihood, it would be reasonably likely that a reasonably serious injury could result, satisfying the elements of the *Mathies* test. Further considering the surrounding circumstances during continuing mining operations, including hilly terrain, sharp curves, and poor lighting, the violation was reasonably likely to result in an injury, thereby also satisfying the *Newtown/Peabody* reformulation.

In light of such, this Court finds no need to resolve any conflict between the two tests.

IV. The negligence was properly classified as “moderate”

Under the Mine Act, operators are held to a high standard of care, and “must 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.” 30 C.F.R. § 100.3(d). MSHA’s regulations define reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 C.F.R. § 100.3: Table X.⁶

Inspector Dickerson marked the violation as moderate negligence because the violation should have been identified during the pre-shift examination by a reasonable person, yet work was allowed to continue without correcting the hazard. Tr. 65-66. The testimony establishes the dangers of operating equipment in insufficient lighting conditions. The Court affirms the inspector’s negligence determination.

V. The originally assessed penalty of \$481.00 for the violation is appropriate.

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). In assessing civil monetary penalties, an ALJ shall consider the six statutory penalty criteria:

[T]he operator’s history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator’s ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. 820(i).

In *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997), the Commission held that all of the statutory criteria in § 110(i) should be considered in the court’s *de novo* penalty assessment, but not necessarily assigned equal weight. In *Musser Engineering, Inc.*, 32 FMSHRC at 1289, the Commission held that, generally speaking, the magnitude of the gravity of the violation and the degree of operator negligence are important factors, especially for more

⁶ This Court notes that, in *Secretary of Labor v. Brody Mining, LLC.*, 37 FMSHRC 1687, 1701 (Aug. 2015), the Commission affirmed that, in making a negligence determination, Commission judges are not required to apply the definitions of Part 100 and may evaluate negligence from the starting point of a traditional negligence analysis, and are not limited to an evaluation of allegedly mitigating circumstances and can consider “the totality of the circumstances holistically.” Further considering the totality of the circumstances holistically in this matter, this Court finds that the Respondent’s conduct was moderately negligent in nature.

serious violations for which substantial penalties may be imposed. Here, the gravity of the violation as to injury was designated as fatal.

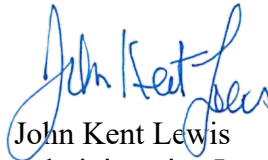
The Secretary has proposed a penalty of \$481.00 for the violation cited in Citation No. 9336782. The Court has considered and applied the six penalty criteria found in § 110(i) of the Act. Considering all the circumstances, the Secretary's original proposed penalty assessment appears appropriate.

The operator is considered large in size under 30 C.F.R. § 100.3. The parties stipulated that payment of the proposed total penalty would not affect Respondent's ability to continue in business. Jt. Stip. 7. The history of assessed violations, submitted in the penalty petition, showed three violations of mandatory health and safety standards by this operator in the 15-month period prior to the issuance of this citation. Pet. at 9. The negligence and gravity factors have been addressed in the discussion above. The parties have also stipulated that this violation was abated in good faith, but this Court accords more weight to the gravity of the violation in determining an appropriate penalty. Jt. Stip. 8.

Based on the foregoing, the Court finds that the assessed penalty of \$481.00 is appropriate.

ORDER

The Respondent, Saiia Construction Company, is **ORDERED** to pay the Secretary of Labor the sum of \$481.00 within 30 days of this order.⁷


John Kent Lewis
Administrative Law Judge

Distribution:

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