FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004
Telephone No.: (202) 434-9900 / Fax No.: (202) 434-9949

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS: Docket No. WEST 2014-963 A.C. No. 45-00359-356120
v.	Docket No. WEST 2015-503 A.C. No. 45-00359-375229
ASH GROVE CEMENT COMPANY, Respondent	Docket No. WEST 2015-523 A.C. No. 45-00359-377531
	Mine: Seattle Plant

DECISION

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

John Nelson, Esq., Ash Grove Cement Company, Overland Park, Kansas, for Respondent

Before: Judge Barbour

These cases are before me upon three Petitions for the Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") on behalf of his Mine Safety and Health Administration ("MSHA") under section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act" or "the Act"). 30 U.S.C. § 815(d). Between May and August 2014, the Secretary issued four citations to Respondent, Ash Grove Cement Company ("Ash Grove"), for alleged violations of 30 C.F.R. §§ 56.18002(a), 56.14110, 50.10, and 50.12 at its cement plant (the "Seattle Plant"), which is located in King County, Washington. [1] Ash Grove filed an answer denying the violations occurred, or if they did, challenging the Secretary's gravity and negligence findings and his proposed civil penalties.

[1] Citation Nos. 8780591 (30 C.F.R. § 56.18002(a)) and 8611830 (30 C.F.R. § 56.14110) were assigned Civil Penalty Docket No. WEST 2014-963. Citation No. 8780422 (30 C.F.R. § 50.10) was assigned Civil Penalty Docket No. WEST 2015-503. Citation No. 8780423 (30 C.F.R. § 50.12) was assigned Civil Penalty Docket No. WEST 2015-523. Subsequently, the cases were consolidated for hearing and decision.

Despite their good faith efforts the parties were unable to settle any of the citations and the cases were tried in Seattle, Washington. The parties presented testamentary and documentary evidence and filed post hearing briefs.

I. Stipulations

1. During all times relevant in this matter, Ash Grove was the "operator" as defined in Section 3(d) of the Mine Act, at the Seattle Plant.

2. Between May 22, 2014, and August 4, 2014, MSHA inspected the [plant].

3. The individuals whose signatures appear on Block 22 of the citations were acting in their official capacities and as authorized representatives of the Secretary when the citations were issued.

4. True copies of the citations were served on Ash Grove as required by the Mine Act.

5. The certified copy of the MSHA Assessed Violations' History reflects the history of the citation issuances at the Mine for the 15 months preceding the citations at issue and may be admitted into evidence without objection by Ash Grove.

6. Ash Grove demonstrated good faith in the abatement of the citations.

7. Payment of the proposed penalties will not affect Ash Grove's ability to remain in business.

Tr. 248-249, 250.

II. The Mine and Citations

Ash Grove has nine manufacturing locations in the Midwest, West and Northwest. Tr. 106. Ash Grove's Seattle Plant is primarily used to process limestone and other components used to make cement. Tr. 22. Limestone is a rocky and sometimes powdery material that is milled and mixed with other products in a kiln as part of the cement making process. Tr. 23. The plant operates 24 hours a day, every day of the year, in two, twelve hour shifts. Tr. 22. The plant is an extensive operation with a barge for loading and unloading, a kiln, various milling processes, maintenance and repair shops, and roads for both vendor and company trucks to access various parts of the plant. Tr. 23.

Citation Nos. 8780591 and 8611830 were served upon Ash Grove on May 22, 2014, and May 28, 2014, respectively, as a result of a regular MSHA inspection of the plant. Citation Nos. 8780422 and 8780423 were served upon Ash Grove on August 4, 2014, as a result of MSHA's investigation of an accident that injured an employee of a plant customer. The citations involve different standards and distinct factual circumstances and as such will be addressed in turn.

III. Factual and Legal Analysis

A. Citation No. 8780591, Docket No. WEST 2014-963

On May 22, 2014, MSHA Inspector Michael Nelson arrived at the plant to conduct a regular inspection.[2] Tr. 21. Nelson maintained that during the inspection he observed various hazardous conditions including, "unprotected openings," unlabeled electrical panels, insufficiently illuminated areas, several "housekeeping issues," and "slip/trip" hazards. Tr. 38. Many of the alleged hazards were located at or near elevators and hoisting equipment.[3] Tr. 38

When Nelson asked a company representative for examination records of the areas where he observed the alleged hazards, he received records that he described as "extremely vague."[4] Tr. 38-39. Also, according to Nelson, there were several days and shifts with no workplace examination records, which indicated to Nelson that no workplace examinations had been conducted on those days and shifts. Tr. 36.

Nelson spoke to Gerry Brown, Ash Grove's Health and Safety Manager, regarding the workplace examinations, or lack thereof.[5] Tr. 31. Brown indicated that there was no procedure in place for workplace examinations on elevators or adjacent areas because Ash Grove relied solely on inspections conducted by its contractor, Otis Elevator. Tr. 31.

Because of the hazards noted and the lack of consistent workplace examinations, Nelson issued Citation No. 8780591 to the company for an alleged violation of 30 C.F.R. § 56.18002(a),

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[2] At the time of the hearing, Nelson had been an MSHA inspector for seven and one half years. Tr. 19. Nelson estimates that he has completed several hundred inspections during his MSHA career. Tr. 20. Prior to working for MSHA, Nelson was an Environmental Health Specialist for 16 years. Tr. 20. Nelson earned a bachelor's degree in biology at Gonzaga University in Spokane, Washington. Tr. 20. Before college he served eight years in the United States Navy. Tr. 20.

[3] Nelson testified that the plant has two types of elevators. The elevators in the administrative building are used to transport passengers, while the elevators in the plant serve to move both freight and miners. There are five elevators in total. Tr. 25-26. According to Nelson, the "hoisting equipment" is compromised of the mechanical parts that lift and lower the elevators. Tr. 26

[4] Nelson understood that when a workplace examination is completed a written record is required which details the exact workplace that was examined and describes the safety defects that were identified. Tr. 39. These examination records must be kept for at least twelve months. Tr. 36.

[5] Gerry Brown retired on May 24, 2014. Tr. 35. From that point forward, Nelson discussed citation and safety issues at the plant with Craig Becker, who replaced Brown as health and safety manager. Tr. 35.

a regulation requiring the examination of a working place at least once per shift.[6] The citation states:

> Complete workplace exams had not been conducted and hazards [were] noted in several areas of the mine. The operator presented records of some workplace exams being conducted but there were many obvious hazards evident at the mine during the inspection. Hazards identified had existed for more than one shift. Were miners to have accidents due to unabated hazards at the mine, serious injuries would occur.

G. Ex. 3.

Nelson found that the alleged violation was "reasonably likely" to result in "lost workdays or restricted duty," that one person was affected, and that the violation was the result of Ash Grove's "high negligence." He also found that the alleged violation was a significant and substantial contribution to a mine safety hazard (an "S&S" violation).[7] G. Ex. 3.

Inspector Richard Dreyer[8] modified the citation on June 16, 2014, to add the following statement:

> Additionally, the operator did not have an established procedure or requirement for conducting workplace exams, or daily operational inspection and testing of hoisting equipment of the five elevators in use at this site.

The citation, as amended, further reads:

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[6] 30 C.F.R. § 56.18002(a) requires 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."

30 C.F.R. § 56.2 defines a "competent person" as "a person having abilities and experience that fully qualify him to perform the duty to which he is assigned."

"Working place" is defined as "any place in or about a mine where work is being performed." 30 C.F.R. § 56.2.

[7] An S&S violation is a violation "of such a nature as could significantly contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d).

[8] Richard Dreyer presently is a Health Specialist in MSHA's Dallas, Texas District Office, but at the time of the inspection, Dreyer was an inspector in MSHA's Kent, Washington Field Office. Tr. 78. Dreyer has five years of experience working for MSHA and has completed hundreds of inspections. Tr. 79. Before joining MSHA, he worked at a sand and gravel operation in Washington state for seven or eight years. Tr. 79.

> The purpose of this modification is to include the elevator exams as additional areas cited for failure to complete workplace exams.

G. Ex. 3.[9]

Ash Grove terminated the citation by retraining miners and shift supervisors on workplace exams including elevator checks. G. Ex. 3.

1. **Fact of The Violation**

As written, Citation No. 8780591 is a two-part citation. Tr. 35-36; G. Ex. 3; R. Br. 4. The Secretary originally cited Ash Grove for incomplete workplace examinations, and the modification to the citation more specifically alleges inadequate examinations of the plant's hoisting equipment. G. Ex. 3. Essentially, the citation is grounded on: 1) allegedly incomplete workplace exams in various parts of the mine, and 2) the failure to examine the plant elevators' hoisting equipment. The citation will be analyzed accordingly.

a. The First Prong of 8780591

In charging Ash Grove with a violation of Section 56.18002(a), the citation alleges that Ash Grove failed to conduct complete workplace examinations as evidenced by the hazards that Nelson identified in his inspection. The citation states that although Ash Grove presented some examination records there were still "obvious hazards" evident. G. Ex. 3.

Section 56.18002 requires that a competent person designated by the operator examine each working place once per shift for hazardous conditions and that the operator initiate "appropriate action" to remedy those conditions. 30 C.F.R. § 56.18002. The Commission has held that "[t]he pertinent requirements of 30 C.F.R. § 57.18002 are three-fold: (1) daily workplace examinations are mandated for the purpose of identifying workplace safety or health hazards; (2) the examinations must be made by a competent person; and (3) a record of the examinations must be kept by the operator. *FMC Wyoming Corp.*, 11 FMSHRC 1622, 1628 (Sept. 1989).[10] Additionally, in a recent case, the court has set forth its understanding of Section 56.18002(a) and what the Secretary must do to prove a violation.

> [A]s the court understands the standard, it applies to places where work is being performed during a shift, where work is assigned to be performed during a shift, or where work can reasonably be expected to be performed during a shift . . . . To prove a violation

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[9] Nelson testified that he initially issued a citation to Ash Grove for its alleged failure to have a procedure for inspecting and testing hoisting equipment, but that citation was vacated, and the condition or practice cited was incorporated into Citation No. 8780591. Tr. 32-33; G. Ex. 3 p. 6. Dreyer modified the citation because Nelson had been called to do an inspection in Alaska. Tr. 32-34.

[10] Section 57.18002 applies to the nation's underground metal and non-metal mines, whereas Section 56.18002 applies to the nation's surface metal and non-metal mines. The standards are identically worded and the principals set forth by the Commission in *FMC Wyoming* pertain to both.

> the Secretary must show that a designated competent person did not conduct any such examinations either on the shift during which the inspection was conducted or did not perform any such examinations during a specifically identified prior shift.
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> *Cemex Construction Materials, Atlantic, LLC,* 38 FMSHRC ___, slip op. at 13, No. SE 2014-328-M (Apr. 29, 2016).

Here, the court finds that the Secretary has not met his burden of proof. The Secretary's allegations as to the incomplete examinations are so vague they fail for lack of specificity. Section 56.18002(a) requires specificity in that it applies to "each working place." As discussed above, the court has held that in order to prove a violation, the Secretary much show that a designated competent person did not conduct a workplace examination on 1) the shift during which the inspection occurred, or 2) during a specifically identified prior shift. *Cemex Construction Materials, Atlantic, LLC,* 38 FMSHRC ___, slip op. at 13, No. SE 2014-328-M (Apr. 29, 2016).

Nelson did not describe the hazards observed during his inspection, and he did not link a hazard observed in a specific area with a failure to designate a competent person to perform an examination of the area. Nor did the Secretary establish through direct and circumstantial evidence that required examinations were not done, or if they were done, that a competent person did not conduct them. In fact, Nelson conceded that inspections were done, albeit not well recorded. Tr. 36. As Ash Grove notes in its brief, Nelson himself agreed he did not give any specific testimony as to specific areas that were *not* examined. Tr. 67; R. Br. 3. Nor did Nelson offer testimony as to the precise hazards observed, and what should have been written in an examination record had Ash Grove complied with the standard. *See e.g.,* Tr. 38-40.

In sum, the court concludes there is insufficient evidence to prove that Ash Grove performed incomplete workplace examinations as alleged in the first prong of Citation No. 8780591. This leaves the later amended portion of the citation to be addressed.

b. The Second Prong of Citation No. 8780591

The second prong of Citation No. 8780591 alleges that Ash Grove did not have an established procedure or requirement for conducting workplace exams or inspections and testing of the hoisting equipment on the mine's elevators. G. Ex. 3, p. 2. The Secretary argues elevators are "working places," requiring examinations, as anticipated by § 56.18002(a), and that Ash Grove's admitted failure to inspect elevators constitutes a violation of the standard. G. Br. 6-11. The Secretary also argues that the operator had fair notice of the standard's requirements as applied to elevators. G. Br. 10-11. The Respondent counters that elevators are not "working places," and further that it did not have notice that regular inspections of elevators were required under § 56.18002(a). There are two relevant issues that must be analyzed when addressing the second prong of 8780591. They are whether the Secretary has proven that hoisting equipment of each of the five elevators is a Section 56.18002(a) "working place," and whether Ash Grove had fair notice of MSHA's interpretation of the standard. The court finds that the second prong of the citation fails because the Secretary did not prove that the hoisting equipment is a working place and also because affirming the citation would deprive the operator of due process.

A précis of the background of the Secretary's "elevator examination" requirement is helpful before addressing the alleged violation. In February 2014 a fatality involving an elevator occurred at a cement plant located in the eastern United States. Tr. 30, 47. An employee working at the plant called an elevator. The doors opened, although the elevator car was not at the landing. Tr. 30. The employee stepped into the empty shaft and fell about 50 feet down the shaft. The employee died from his injuries. Tr. 30. In response, MSHA gave specific training regarding elevator inspections to all of MSHA's non-metal inspectors. Tr. 30, 47. Later that month, MSHA also issued a "fatalgram" regarding this incident.[11] Tr. 47, 109; Jt. Ex. 3. Nelson testified that after the incident MSHA emphasized checking elevators during inspections. Tr. 47.

c. The Secretary Failed to Prove that the Cited Elevator Hoisting Equipment is a Section 18002(a) "Working Place"

Whether § 56.18002(a) applies to elevators depends on the definition of "working place" in the standard, and whether the definition subsumes mine elevator hoisting equipment. Working place" is defined in the standard as "any place in or about a mine where work is being performed." 30 C.F.R. § 56.2. MSHA's Program Policy Manual regarding workplace examination states:

> The phrase "working place" is defined in 30 C.F.R. §§ 56/57.18002(b) as: "any place in or about a mine where work is being performed." As used in the standard, the phrase applies to those locations at a mine site where persons work during a shift in the mining or milling processes.
>
> Jt. Ex. 1

Ash Grove contends that the elevators involved in the inspection were not "working places" because work was not being done at the time of the MSHA inspection. R. Br. 9-10. Ash Grove asserts that the plain language of "working place" as defined in § 56.2 clearly exempts the elevators mentioned from the standard because there was no evidence that work was being done on the elevators at the time the citation was issued and that the hoisting equipment mentioned by Nelson was in a room near the elevator, a room that is not considered a "public place." R. Br. 10.

The Secretary argues that the standard applies to the landing area, the inside of an elevator car, and in a limited capacity to the hoisting area and pit areas that are generally used only by licensed contractors. G. Br. 6-7. [12] The Secretary argues that the term "working places"

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[11] A "fatalgram" is a summary of an accident by MSHA that is disseminated to the mining industry; it lists recommended best practices for operators to avoid similar occurrences.

[12] In support of the citation, Nelson stated that the areas immediately adjacent to work areas and landings and hoisting rooms that miners might work on or travel through in the performance of their work would be "working spaces," because these areas directly affect the safety of miners in a given location. Tr. 29. Nelson testified that if "elevators are being used to transport persons or material then that is work being performed," and the elevators are an integral part of the mining and milling process. Tr. 67, 73. He further testified that because these areas were "working

applies to Ash Grove's elevators "because miners perform work [on the elevator] by moving equipment, supplies, and themselves throughout the floors of the buildings." G. Br. 10. The Secretary states that his interpretation and MSHA's application of the standard are "reasonably clear." G. Br. 6.

As the court stated in *Cemex*, there is no duty to "examine all elevators simply because they are elevators." *Cemex,* 32 FMSHRC at 13 (ALJ). Here, Ash Grove was charged with failing to examine the "hoisting equipment of the five elevators . . . at [the plant]." Gov. Exh.3. Therefore, the Secretary must show that the cited parts, in this case, the hoisting equipment of each of the five elevators, and the adjacent areas are working places, i.e., places "where "work-related task[s]" involving the hoisting equipment "[were] being performed, [were] assigned to be performed but not yet started, or where such . . . task[s] reasonably could be expected to be performed." *Id.* at 14.

The Secretary's evidence does not meet this test with regard to the hoisting equipment and the adjacent areas on any of the five elevators. Nelson did not testify as to the specific elevator hoisting equipment where he observed safety hazards, nor did he testify what work was being performed (or expected to be performed) in the areas where the equipment was housed to bring any of them under the ambit of a "workplace." Since he failed to meet the first step of identifying a working place, Nelson's subsequent failure to identify a specific shift where a failure to examine occurred is inconsequential.

Curiously, Nelson himself vacillated in regards to which of Ash Grove's elevators are working places. The narrative portion of Citation No. 8780591 alleges that "[t]he operator did not have an established procedure or requirement for conducting workplace exams, or daily operational inspection of the *five* elevators in use at this site." G. Ex. 3, p. 2 (emphasis added). Nelson testified that he considered landings, hoisting rooms, and places that miners would travel or work on an elevator to be working places. Tr. 29. The court asked if there were such areas involved with *all* five of Ash Grove's elevators. Tr. 29. Nelson testified that the passenger elevators in the administrative building would be an exception. Tr. 29. If so, then apparently only the three elevators in the plant area that transported both miners and freight should have been included in the citation. The court continues to be of the opinion that rather than try to make Section 56.18002(a) fit all elevators, the Secretary would be "well advised" to promulgate a mandatory standard "specifically directed to the . . . examination of . . .elevators." *Cemex Inc.*, 32 FMSHRC __, slip op. at 14, n. 14.

The court theretofore concludes the Secretary has not established a violation with regard to the second prong of the citation, because he has not met the burden of proving that the cited

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spaces," the workplace examination standard would require an inspection of the landings adjacent to the elevator, the mechanical room, inoperable lights in the hoisting room (adjacent to the elevator), communication devices in elevators, and call buttons. Tr. 27, 71-72. Nelson explained that a lay person would not have expertise in the minute, inner workings of an elevator, but should be able to observe broken wire, loose connections, or frayed ropes, but the inner workings should be inspected by whoever is contracted to maintain the elevator. Tr. 26-27.

elevators and their hoisting equipment were "working places" as anticipated by Section 18002(a). However, even if the court held otherwise, it would still vacate the citation on due process grounds.

2. **Fair Notice Analysis**

Due process considerations require that the court analyze whether Ash Grove had notice of MSHA's interpretation of Section 56.18002(a). Ash Grove posits that it lacked fair notice of the Secretary's interpretation of the standard as applied to elevators. R. Br. 12. The Secretary, anticipating a fair notice argument, states that Ash Grove had fair notice in that it should have known to complete basic visual inspections on elevators, that the term "working place" applies to the elevators because miners use them to move themselves and equipment and supplies, and that MSHA put the mining industry on notice by publishing a "fatalgram." G. Br. 10-11.

The Commission has held that "before a civil penalty may be imposed, due process considerations preclude the adoption of an agency's interpretation which 'fails to give fair warning of the conduct it prohibits or requires.'" *LaFarge North America,* 35 FMSHRC 3497, 3500 (Dec. 2013), *quoting Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986). This fair notice requirement is deemed satisfied when a party has received actual notice of MSHA's interpretation of a regulation prior to enforcement of the standard. *LaFarge North America,* 35 FMSHRC 3497, 3500 (Dec. 2013); *Consolidation Coal Co.*, 18 FMSHRC 1903, 1907 (Nov. 1996). In the absence of receiving actual notice of the Secretary's interpretation, a respondent may be held to have fair notice if "a reasonably prudent person familiar with the mining industry and protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990).

A respondent has fair notice of the Secretary's interpretation of a standard, justifying its enforcement, when either: (1) the plain language of the cited standard is clear and unambiguous; (2) the Secretary has issued guidance regarding its interpretation of the standard; (3) the company was given pre-enforcement warning; (4) previous citations were issued to the mine; or (5) a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the standard's specific prohibition or requirement. *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1682 (2010); *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694-95 (July 2002); *Island Creek.*, 20 FMSHRC at 24-25; *Morton Int'l, Inc.*, 18 FMSHRC 533, 539 (Apr. 1996); *General Elec. Co. v. EPA,* 53 F.3d 1324, 129 (D.C. Cir. 1995); *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). These five fair notice facets will be reviewed in turn.

a. **Whether the Language of the Standard is Clear**

The fair notice analysis begins with the language of the standard, and whether this language is clear enough to provide the regulated entity, Ash Grove, with notice of the Secretary's interpretation. When the plain language of a standard is clear and unambiguous, the Commission has held that the standard provides operators with fair notice. *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1172 (Sept. 2010); *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1031 (June 1997).

Neither the Secretary nor Ash Grove asserts that the language of Section 56.18002(a) is ambiguous. However, they each offer diverging interpretations of the term "working place." *Cf.* G. Br. 10; R. Br. 10. The Secretary asserts that Ash Grove had notice that workplace examinations were required on elevators, because they were "working places," by virtue of miners using elevators for "moving equipment, supplies, and themselves throughout the floors of the building." G. Br. 10. Conversely, Ash Grove avers that the definition of "working place in Section 56.2 indicates that the cited elevators were not working places, that there is no evidence that work was being performed in elevators at the time of the MSHA inspection, and that the hoisting equipment at issue was in a room that was not considered a "public place."
The Commission has held that competing reasonable interpretations of the plain language of a regulation indicate that its language may be ambiguous. *Walker Stone Co. v. Secretary of Labor,* 156 F.3d 1076, 1081 (10th Cir. 1998). *See also Alco Alumina & Chemicals, L.L.C.*, 23 FSMRHC 911 (Sept. 2001). The court finds this to be the case.

When the meaning of a standard is ambiguous, the Secretary's interpretation of his own regulation is sometimes accorded deference. *See Auer v. Robbins*, 519 U.S. 452 (1997); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must "look to the administrative construction of the regulation if the meaning of the words used is in doubt"); *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1171-72 (2010). However, deference is inappropriate if the agency's interpretation is not reasonable or when it is "plainly erroneous or inconsistent with the regulation" or "when there is reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter." *Christopher v. SmithKline Beecham Corp.*, __ U.S. __, __, 132 S. Ct. 2156, 2166 (2012) (internal quotations omitted) (citing *Auer,* 519 U.S at 462). This occurs when, for example, the agency's interpretation conflicts with a prior interpretation. *See, e.g., Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 515 (1994).[13] Deference to an agency's interpretation in some circumstances is not required, if doing so could create "unfair surprise" or "seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" *Christopher v. SmithKline Beecham Corp.*, __ U.S. __, __, 132 S. Ct. 2156, 2167 (2012) *citing Gates & Fox Co. v. Occupational Safety and Health Review Comm'n,* 790 F.2d 154, 156 (D.C. Ct. App. 1986).

The Secretary's interpretation that some elevators, their hoisting equipment and areas adjacent thereto are working places is a plausible reading of the standard, but not the only such reading. Moreover, an agency's interpretation may be reasonable or permissible, but still fail to provide the operator fair notice. *General Electric Co. v. EPA*, 53 F.3d 1324, 1333-34 (D.C. Cir. 1995); *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982). Due process requires that regulations be sufficiently specific to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972).

[13] The parties submitted MSHA Program Policy Letter No. P15-IV-01 as Jt. Ex. 2. Tr. 68; Jt. Ex. 2. The Program Policy Letter ("PPL") was issued on July 22, 2015, months after the citation was issued. The PPL adds that a working place "includes areas where work is performed on an infrequent basis." The PPL thus expands the definition of working place to include not just actual working places, but potential places that may be utilized less frequently. Tr. 58-59.

The court concludes that the language of Section 56.18002(a) did not give Ash Grove actual notice of the Secretary's interpretation. Deference will not be accorded because doing so would result in an "unfair surprise" to Ash Grove, in an affront to due process requirements.

b. **The Agency's Guidance Regarding Work Place Examinations**

Having found that the standard is ambiguous and that deference to the Secretary's interpretation is inappropriate, another step in the fair notice analysis is necessary. An agency may also put a party on notice by issuing public statements and guidance regarding a regulation. When an agency gives no pre-enforcement warning, and instead uses a citation to announce its interpretation of a regulation, "[i]f, by reviewing the regulation and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation." *General Electric Co. v. U.S. EPA,* 53 F.3d 1324, 1329 (Ct. App. D.C. 1995).

The Secretary contends in the instant case the fatalgram regarding the injury and death caused by a malfunctioning elevator was sufficient to charge Ash Grove with actual notice of the Secretary's interpretation of the workplace examination standard. G. Br. 10; Jt. Ex. 3. According to Nelson, fatalgrams are "disseminated to the public" when MSHA posts them on its website, and they put operators on notice of a standard. Tr. 48. The onus is on an operator to monitor fatalgrams and incorporate proposed changes applicable to its mining operation. Tr. 48. The fatalgram issued shortly after the elevator fatality at another cement operation, lists the following "Best Practices:"

> Immediately report any elevator problems to management.
>
> Ensure that any problems affecting the safety of an elevator are repaired promptly.
>
> Ensure that elevator door interlocks, that prevent the door from being opened unless the elevator car is present, are functional.
>
> Ensure the elevator doors will not open unless an elevator car is at the floor landing.
>
> Install audible signals that sound when the elevator car is at the landing prior to the doors opening.
>
> Train all persons to be aware of their surroundings when entering or exiting an elevator car.

Jt. Ex. 3.

In the court's opinion the fatalgram does not fairly notify the non-metal industry of workplace examination requirements because it does not describe elevators or their hoisting equipment as "working places," nor does it discuss § 56.18002(a)'s requirements, and it fails to set out a best practice for systematic examinations of elevators and hoisting equipment. The fatalgram is laudable for bringing attention to a safety concern, but standing alone does not

constitute adequate notice of the Secretary's interpretation of elevators and associated areas as "working places" under the relevant standard.

MSHA's Program Policy Manual ("PPM") regarding 30 C.F.R. §§ 56/57.18002 addresses working place examination requirements. Jt. Ex. 1. The PPM states that MSHA intends to use the definition of "working place" found in Section 56.2 to define the "working place" in Section 56.18002(a). *Id.* The PPM further explains, "[a]s used in the standard, the phrase applies to those locations at a mine site where persons work during a shift in the mining or milling process." *Id.* This implies that to be considered a working place, actual work is being performed at that location, not that the area is simply used as a travelway, or could be a potential working place. Ash Grove's position that the cited hoisting equipment was not a working place actually comports with the PPM's description of a "working place," and the court finds it reasonable that Ash Grove would consider elevators and associated areas generally exempt under the standard unless work was being performed on them at a given time. The court concludes that the PPM, like the fatalgram, did not put Ash Grove on notice of the Secretary's interpretation of the standard.

c. **The Agency's Pre-Enforcement Warning, or Lack Thereof**

In the absence of a clear standard or official guidance regarding a standard, an agency's "pre-enforcement efforts" or "pre-violation" contact to achieve regulatory compliance may provide adequate notice. *Gen. Elec. Co. v. U.S. E.P.A.*, 53 F.3d 1324, 1329 (D.C. Cir. 1995). The Secretary presented no evidence that he notified Ash Grove that examinations of elevators and hoisting equipment would be required or that a citation would be issued for the failure to perform them.

d. **Prior Citations Issued to Ash Grove**

The lack of actual notice is compounded by the fact that Ash Grove was never before cited for a failure to examine any of its elevators and/or the elevators' hoisting equipment. Tr. 103-104; G. Ex. 1. The emphasis on applying Section 56.18002(a) to elevators was a relatively new phenomenon, borne out of the agency's response to a recent fatal elevator accident.

e. **The Commission's Reasonably Prudent Person Test**

Having found that the company did not have actual notice of MSHA's interpretation of the workplace examination standard based on the plain language of the standard, or guidance from the agency, the next question is whether a reasonably prudent person, familiar with the Mine Act and its protective purposes would have considered elevators and their hoisting equipment "working places" subject to Section 56.18002(a)'s inspection requirements.

As stated, the Commission does not require that the operator be given *actual* notice of the Secretary's interpretation of a standard in every circumstance, but rather uses an objective test, which asks, "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC 3083, 3087-88 (Dec. 2014) (*citing Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990).)

Steve Minshall, Ash Grove's Corporate Director of Safety and Health, testified that he is involved in setting company policy and giving guidance on conducting workplace examinations.[14] Tr. 92. Minshall conducts plant-wide training on workplace examinations. Tr. 93. He bases his training largely on the Program Policy Manual, the regulations, and related standards. Tr. 93-94. Minshall testified that his understanding of the workplace examination standard is that it requires a record of the examination, the name of the person doing the examination, a list of the areas inspected, and the date of the exam. Tr. 94. He understands a working place to be one where individuals are conducting work, not necessarily the plant's elevators. Tr. 94. Minshall testified that Ash Grove has a systemic elevator maintenance program. The company's elevator contractors are licensed and perform state inspections and maintenance that conforms to the state's requirements. Minshall believes the contractor's inspections and maintenance keep the plant in compliance with the Mine Act examination standard. Tr. 104.

As evidenced by his position and experience, Minshall is familiar with the mining industry and the Act, as he often trains employees on the Act's regulations. He gives no indication that he is anything other than reasonable. His belief that examinations by elevator contractors is in compliance with the Mine Act supports the contention that a reasonably prudent person in the mining industry would not think § 56.18002(a)'s requirements are applicable to all elevators.

In addition, the testimony reveals that operators are not the only concerned entity that considers elevators to be something other than "working places." Around the time the citation was issued, Minshall had a conversation with Harvey Kirk, a Health and Safety specialist at MSHA's Headquarters in Arlington, Virginia, regarding the workplace examination requirements in light of the February 2014 elevator fatality. Tr. 102-103. Minshall credibly testified that Kirk has a background in the cement industry and that at the time Kirk was MSHA's de facto "liaison" to the cement industry. Operators often consulted Kirk for guidance. Tr. 107. Kirk told Minshall that elevators were not considered "working places" under the standard requiring examinations every shift. Tr. 102-103. Ash Grove does not argue that it relied on Kirk's guidance in shaping its workplace examination policy, and Minshall could not pinpoint an exact date of his conversation with Kirk. However, the court finds it telling that even an MSHA employee believed that the term "working places" did not include elevators. The opinion of these two individuals with vast experience in the non-metal industry, that elevators do not constitute "working places," suggests that a reasonably prudent person familiar with the industry and purposes of the Act would not have considered an elevator and its associated hoisting equipment to be a "working place."

[14] Steve Minshall has been the Corporate Director of Health and Safety for Ash Grove since 2008. Tr. 90. Before 2008 he was Ash Grove's Corporate Health and Safety Manager. Tr. 90. In total, Minshall has been involved in industrial safety for 37 years. Tr. 90. Presently he serves as the co-chair of the Portland Cement Association's Occupational Health and Safety Committee. Tr. 91. Minshall has an undergraduate degree in biology and master's degrees in public health, industrial hygiene, and communication studies. Tr. 91. Minshall earned a Certified Safety Professional Designation and is a Certified Industrial Hygienist. Tr. 91.

Additionally, hoisting equipment examinations are governed by § 56.19120.[15] 30 C.F.R. § 56.19120; R. Br. 10. In fact, Nelson initially cited Ash Grove for a violation of this standard.[16] Tr. 32; G. Ex. 3, p.6. This standard requires a systematic procedure to inspect, test and maintain hoisting equipment and shafts. 30 C.F.R. § 56.19120. Ash Grove had a system in place whereby its elevator contractor, Otis, inspected and maintained the elevators, and was called to repair any defects. Tr. 43, 51-52. Nelson testified that he reviewed the records and Ash Grove was up to date and in compliance with state and local elevator inspections. Tr. 52. The court finds it reasonable for an operator to believe elevator hoisting equipment examinations fell under the purview of Section 56.19120, specifically aimed at hoisting equipment and shafts, rather than the broader workplace examination standard.

For all of these reasons it is evident to the court that it was not at all clear to a "reasonably prudent person" that Section 56.18002(a) applied to a cement plant's elevators and areas adjacent thereto, including the elevators' hoisting equipment. Therefore, the court concludes that Ash Grove did not receive fair notice of the Secretary's interpretation of § 56.18002(a) and that enforcing the citation would be an affront to due process. Accordingly, Citation Number 8780591 will be **VACATED**.

B. Citation No. 8611830, Docket No. WEST 2014-963

On May 28, 2014, MSHA Inspector Richard Dreyer issued Citation No. 8611830 to Ash Grove for an alleged violation of 30 § 56.14110.[17] The citation states:

> Material falling during the operation of the conveyor exposed persons in the passageway below to hazards that would be expected to result in serious injury. The typical feed material on this conveyor is a 4" minus limestone product. The distance of the fall from the 331-190 conveyor to the travelway below was approximately 45'. This falling material presented a hazard to persons working in and around the raw mill lube room regardless of point of entry. No guards, shields, or other mechanisms were provided to protect persons from this hazard. The condition

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[15] 30 C.F.R. § 56.19120 requires:

> [a] systematic procedure of inspection, testing, and maintenance of shafts and hoisting equipment shall be developed and followed. If it is found or suspected that any part is not functioning properly, the hoist shall not be used until the malfunction has been located and repaired or adjustments have been made.

[16] As discussed previously, Nelson issued Citation Number 8780586 to Ash Grove for failing to inspect and test hoisting equipment on the five mine elevators, in violation of 30 C.F.R. § 56.19120. G. Ex. 3 p. 6. This citation was terminated and incorporated in the modified Citation Number 8780591. G. Ex. 3 p. 2; Tr. 32.

[17] As discussed above, Dreyer took over the regular inspection of the Seattle Plant after Nelson was called to another assignment. Tr. 112.

existed for more than one shift and the operator failed to identify or correct it.

G. Ex. 5.

Dreyer found the alleged violation was S&S, "reasonably likely" to fatally injure one person, and the result of Ash Grove's moderate negligence. G. Ex. 5.

1. The Background and Testimony

On May 28, 2014, as he traveled the stairs and approached the top of Ash Grove's 331-190 conveyor, Dreyer observed a buildup of four inch minus crushed rock material on the conveyor's I-beams.[18] Dreyer did not see material falling from the conveyor during his inspection, but he testified that the material would have been carried by the conveyor belt and that, "[i]t was pretty evident that material had been falling off this conveyor."[19] Tr. 113-14. Dreyer also testified that impact damage on a vertical beam indicated that a skid steer was put in place near the raw mill lube room doors, presumably to clean up falling material from the conveyor.[20] Tr. 163, 165-66. The floor in the area was dirty, indicating that material had fallen from the conveyor to the ground. Tr. 165. There were tire tread marks near the accumulations. Tr. 166.

Dreyer did not take a sample, but stated that the four inch minus material included limestone, which usually is powdery. Tr. 114, 129. However, limestone can harden over time into solid rock if, for example, the powder is introduced to moisture (likely from ambient humidity). Tr. 114. Dreyer testified that the solid rock formed from the normally fine material can do significant damage. He has seen such hardened rock dent a vehicle after falling from a conveyor. Tr. 114-15.

Dreyer described the conveyor belt as one that ran over trough rollers, idler rollers, head pulleys, and tail pulleys. Tr. 169. Dreyer explained that:

> "[e]very time that conveyor goes over a trough roller it flexes the belt and de-flexes the belt and that's going to cause movements to

[18] "Four inch minus" designates the approximate size of the material based on how it would fall through a screen. Tr. 113. If rocks fall through a screen with holes that are four inches in diameter, the rocks are classified as four inch. Tr. 113. The "minus" indicates that there is additional smaller material included with the four inch rock, including powdery material, like limestone. Tr. 114. I-beams are structural supports, in this case structural supports beneath the conveyor. Tr. 122.

[19] The conveyor was not running at the time Dreyer observed the material, but would have been running during continued normal mining operations. Tr. 131.

[20] A skid steer is a four wheeled small machine with a bucket on the front to "move earth or crushed rock." Tr. 163. The machine steers by skidding. Tr. 163. It is akin to a front end loader, but smaller in size. It is used to clean up more restricted areas. Tr. 163.

> the material being transported. Any conveyor can have a tracking issue. I mean, there's a number of maintenance things that would also contribute to movement and material being transported."

Tr. 170.

Dreyer maintained that the material built up on the conveyor's I-beams at an angle. Tr. 171. As more material fell on the beams the material would continue to build up or it would fall off the beams to the floor below. Tr. 171. Material on the I-beams could consolidate and be impacted. Tr. 171. Dreyer said that on the day of the inspection the beams could not hold any more material. Additional material would simply fall. Tr. 171. The beams did not negate the hazard of falling materials; in fact, Dreyer noted that material could hit a beam and be deflected or redirected, enlarging the area of concern. Tr. 172-173

Dreyer measured the conveyer or belt's height at around 45 feet. Tr. 115-16. At the bottom of the conveyor there is a travelway leading into the raw mill lube room.[21] Tr. 116. Dreyer testified that material falling from the conveyor could fall down and hit a miner on the travelway below. Tr. 116-17. The material could fall directly from the conveyor to the travelway in some spots, and in other spots it could fall onto the roof of the raw mill lube room. Tr. 118-119. One area of particular concern below the conveyor was the area in front of the lube room mandoors. Tr. 121. The material had built up on the roof, and this buildup was in line with the mandoors. Tr. 118.

Dreyer testified that the company terminated the citation by fabricating and installing protective structures over areas below the conveyor where miners were in danger of being hit by falling material. Tr. 134; G. Ex. 5 p. 3.

2. The Violation

To establish a violation of Section 56.14110, the Secretary must prove, by a preponderance of the credible evidence, that a guard or shield was not installed in an area or in areas where material falling from or flying from screens, crushers or conveyors, presented a hazard.[22] *In re: Contest of Respirable Dust Sample Citations,* 17 FMSHRC 1819, 1838 (Nov.

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[21] A raw mill is the equipment used to grind raw materials in the cement manufacturing process. TEXAS COMPTROLLER, AUDIT PROCEDURES FOR CEMENT PRODUCTION TAX, (2005), http://comptroller.texas.gov/taxinfo/audit/cement/ch1.htm; PHILIP ALSOP ET AL., THE CEMENT PLANT OPERATIONS HANDBOOK 31, (5th Ed. 2007). The raw mill's lube room is an area that can be accessed to store the lubricants necessary to maintain components such as gears and bearings, and other supplies and equipment. Tr. 121. *See generally Lube Room Best Practices,* MACHINERY LUBRICATION, http://www.machinerylubrication.com/Read/29008/lube-room-essentials. Dreyer testified that the travelway leading to the lube room's mandoors is used multiple times per shift. Tr. 116-117.

[22] The cited standard requires that, "[i]n areas where flying or falling materials generated from the operation of screens, crushers, or conveyors present a hazard, guards, shields, or other devices that provide protection against such flying or falling materials shall be provided to protect persons." 30 C.F.R. § 56.14110.

1995). *See generally Northern Aggregate, Inc.*, 37 FMSHRC 562, 579 (Mar. 2015)(ALJ) (holding that Section 56.14110 requires actual protection against the danger of falling rocks, "by use of a guard, shield or other device.").

Ash Grove maintains that the material Dreyer observed did not fall from the overhead conveyor, as the conveyor belt was not operating at the time of the inspection. R. Br. 15. Craig Becker, presently the maintenance supervisor for Ash Grove, testified that the material that Dreyer observed on the ground was actually rejected material from the cleanup process, rather than material that fell from the conveyor belt.[23] Tr. 141. The rejected rock area, where Becker believes the material originated, is on the north side of the raw mill, in the same area of the conveyor belt.[24] Tr. 141. Becker testified that the transfer point where rock material may have shifted and fallen is too far from the area where the fallen rock material was found to be the source of the observed material. Tr. 150-51. Further, Ash Grove emphasizes that Dreyer did not test the material's composition to confirm that it matched the material on the conveyor. *Id.*

The court finds the lack of testing to be inconsequential. Dreyer testified that in his opinion the material found on the belt was consistent with the observed fallen material. Tr. 174-75. Violations of accumulations standards have been established by inspector observations, particularly where the standard does not require testing. *See, e.g., Amax Coal Co.*, 19 FMSHRC 846, 847, 849 (May 1997); *Jim Walter Resources, Inc.*, 19 FMSHRC 480, 483 (Mar. 1997); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 20 & n.2, 21 (Jan. 1997). The Commission has held that an inspector's testimony regarding the composition of an accumulated material by observation alone may be credited, especially in the absence of rebuttal evidence. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1290 (Dec. 1998) (upholding a coal accumulation violation based on an inspector's observation when the operator did not present any evidence to rebut the inspector's testimony that float coal dust was present or establish that float coal dust could not be identified by observation). Dreyer's testimony, given his experience in the industry, was creditable. Further, Ash Grove did not offer any evidence that the fallen material was not the same as the limestone on the conveyor belt.

The court concludes that the Secretary proved by a preponderance of evidence that Ash Grove violated Section 56.14110. Dreyer credibly testified that the floor under the conveyor was dirty, consistent with material falling from the conveyor. Tr. 165. Dreyer also credibly testified

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[23] Craig Becker was first hired at Ash Grove as a Manufacturing Development Engineer. Tr. 139. On the day of the inspection he acted as a safety manager because the previous safety manager had just retired. Tr. 139.

[24] Becker explained that the rejected rock areas are locations where the rocks accumulate that are not properly ground and are rejected by the raw mill. Tr. 142. There are two such areas, one on the north side, and one on the south side of the mill. Tr. 142. Once the rejected material accumulates to a certain extent, it is cleaned up with a Bobcat or skid steer and reentered into the limestone pile used in the manufacturing process. Tr. 142.

that a skid steer appeared to have been placed in the area to clean up flying or falling material.[25] Tr. 165-166. The material that accumulated on the beams of the platforms used to access the conveyor, indicates that material regularly fell from the conveyor. R. Ex. 9, p. 6. Finally, Dreyer's credible explanation that incline conveyors, like the one used by Ash Grove, would move and shift limestone causing it to fall, supports the allegation. Tr. 169-70. Dwyer's testimony that falling material could have hit a miner on the travelway below was not refuted. Tr.16-17 Further, as both sides agree, a guard or shield was not installed in the area.

Ash Grove argues alternatively, that there was no violation because the language of the standard "states that not all flying or falling material is a violation. Instead this standard states that only flying or falling material that presents a hazard is a violation." R. Br. 16. The company asserts that the anticipated falling material from a conveyor would be soft like a puff of snow, and thus not capable of causing injury or damage, and thus not hazardous. R. Br. 17. The court rejects this argument, as Dreyer testified that while some material could fall in this form, other material could fall in the form of solid rock, which would obviously injure a miner. Tr. 173.

For the reasons discussed, the court finds that Ash Grove violated Section 56.14110.

3. The Gravity of the Violation and its S&S Nature

The Secretary contends that Citation Number 8611830 was properly designated S&S. G. Br. 19. Ash Grove argues that the testimony "establishes any hazard to be insignificant and unlikely." R. Br. 17.

Under the Mine Act a violation may be designated S&S if the issuing inspector finds that the alleged violation is "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). The Commission has held that an S&S categorization is proper "if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.* 3 FMSHRC 822, 825 (Apr. 1981).

To establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury;[26] and (4) a reasonable likelihood that the injury will be of a

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[25] Ash Grove states that a Bobcat or skid steer used in the cleanup process accesses this particular area to turn around, so the tire tracks could have been caused by that vehicle for another reason. Tr. 141-42. The court finds this assertion unsupported by evidence or testimony, and instead credits Dreyer's assertion that a skid steer was in place under an impacted area to clean up falling material.

[26] With respect to the "reasonable likelihood of injury" element, the analysis must be made assuming "continued normal mining operations." *U.S. Steel Mining Co. (U.S. Steel III)*, 7 FMSHRC 1125, 1130 (Aug. 1985) (*quoting U.S. Steel Mining Co. (U.S. Steel I)*, 6 FMSHRC 1573, 1574 (July 1984). A proper S&S inquiry considers "the violative conditions as they

reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.* 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria). This four part analysis, otherwise referred to as the *Mathies* test, will be discussed *in seriatim.*

As a threshold matter, the court has found that the Secretary established a violation of 30 C.F.R. § 56.14110, thus satisfying the first prong of the *Mathies* analysis.

The next step in the S&S inquiry requires that the Secretary identify a safety hazard caused by the alleged violative condition(s). *Highland Mining Co.*, 34 FMSHRC 3434, n. 5 (Dec. 2012) ("For each violation alleged to be 'significant and substantial,' the relevant hazard associated with the violation must be identified). A safety hazard, as defined by the Commission is "the dangerous situation that the mandatory safety standard anticipates." *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1741 (Aug. 2012) (citing *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2366 (Oct. 2011), *aff'd* 717 F.3d 1020 (D.C. Cir. 2013).

Here, the Secretary alleges that the violative condition was the lack of a shield or guard on the conveyor to prevent injury from falling material, in contravention of the standard. G. Br. 19; Tr. 125. The particular hazard identified by the Secretary is falling or flying rock that could hit and injure a miner traveling or standing below the conveyor. Tr. 116-117, 118, 119. The standard anticipates this hazard, as evidenced by its express language. Section 56.14110 requires a guard or shield where falling materials are generated, to protect individuals from materials falling from a conveyor. *See* 30 C.F.R. § 56.14110.

Ash Grove argues that material was not falling from the conveyor, but if it fell, the falling material would be powdery and soft and would be incapable of injuring anyone. R. Br. 16; Tr. 158-160. Dreyer credibly testified while some material may be powdery and soft limestone, some can also accumulate and consolidate into solid rock, and fall 45 feet, hitting a miner below the unprotected conveyor.[27] The Secretary thus identified a discrete hazard (falling rock) caused by the violative condition (the failure to install a shield or guard as required by the standard) in satisfaction of the second *Mathies* requirement.

As applied to the present case, the appropriate test under the third step of the *Mathies* analysis, is whether there was a reasonable likelihood that the hazard (i.e., the danger of a rock falling 45 feet from the conveyor and hitting a miner below) contributed to by the violation (i.e., absence of a shield on the conveyor) would cause an injury. *Musser Eng'g., Inc.*, 32 FMSHRC 1257, 1281. The Secretary is not required to prove that the cited violation itself would cause an

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existed both prior to and at the time of the violation and as they would have existed had normal operations continued." *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016), *quoting Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1132 (2014); *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991 (2014).

[27] The Commission has held that an inspector's judgment is an important element in an S&S determination and may be relied upon as part of the analysis. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278 (Dec. 1998).

injury, but that the hazard would be reasonably likely to cause an injury. *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1742-43 (Aug. 2012), *aff'd sub nom. Peabody Midwest Mining, LLC*, 762 F.3d 611 (7th Cir. 2014). The Commission has explained that "reasonable likelihood" is less stringent than "more probable than not." *Amax Coal Co.*,19 FMSHRC 846, 848 (May 1997); *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). Again, the likelihood must be examined in the context of continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

Dreyer reasoned that an injury was reasonably likely because significant material had built up above a travelway, and had accumulated "for a while." Tr. 122. Fallen material was present on the conveyor's support structure, as well as on the floor below the conveyor. Tr. 122. Dreyer credibly testified that on the conveyor structure the material had accumulated to the point where additional material was likely to sluff off and fall. *Id.* The material was exposed to ambient moisture and it could consolidate and form solid rock. Tr. 114-115. The resulting rock was capable of producing significant damage if it fell and hit a miner. Tr. 115. There was a travelway 45 feet under the conveyor that was accessed multiple times per shift by several individuals; Dreyer estimated 10 to 12 exposures per day. Tr. 116-117, 118. Moreover, material also had built up on the roof of the raw mill lube room, directly in line with the entrance to the room. Tr. 118.

Ash Grove claims that the hazard of a rock fall is mitigated because Ash Grove's miners are required to wear hard hats, and the evidence shows that they were doing so.[28] R. Br. 17, Tr. 126. While commendable, this safety measure will not be considered by the court in its "reasonable likelihood" evaluation. The Commission has held that miners' exercise of caution should not be considered in an S&S analysis, because the alleged "hazard continues to exist

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[28] When asked whether the hard hat policy at Ash Grove, which requires all miners to wear hard hats, would change his fatal designation, Dreyer stated:

> Not at all. You know, if you consider the impact that a rock or any hard object falling that distance is going to have, by the time it gets to the ground it's likely moving—in that 45-foot span it's likely moving in excess of 30 miles an hour. So picture a rock or something hitting you at the speed. Imagine the force and ask yourself, what's that hard hat going to do[?] If the shell of the hard hat actually keeps its integrity and does its job then it's going to distribute that load to the suspension, and that suspension delivers the load to your neck. So even if the hard hat is not physically destroyed and that rock is pushed in to you, it's going to take all of that pressure, all of that load and all that velocity coming down and it's going to destroy your neck. You're still going to reasonably have a fatal injury.

Tr. 131.

regardless of whether caution is exercised." *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992).

Ash Grove also maintains that the likelihood of injury is reduced because accumulated material would be air lanced to prevent build up.[29] R. Br. 17, Tr. 181-183. The court finds that the assertion has no bearing on its S&S determination. Commission judges may not infer that a violative condition will cease. *Gatliff Coal Company*, 14 FMSHRC 1982, 1986 (Dec. 1992). Dreyer testified that he observed significant buildup during his inspection. Tr. 113, 167. In the Commission's S&S paradigm, violative conditions prior to and at the time of the violation are relevant (*Mach Mining, LLC v. SOL*, 809 F.3d 1259 (D.C. Cir. 2016)) and assumptions as to abatement measures are not considered. *Id.*; *Paramont Coal Co. VA LLC*, 37 FMSHRC 981, 985 (May 2015).

Minshall testified that there had never been an injury at Ash Grove caused by falling material in the cited area (Tr. 161), but it is well settled that the absence of an injury-producing event when a cited condition has existed for some time does not preclude a finding of S&S. *See Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996).

Based on the foregoing, the court finds that it is reasonably likely that without a guard or shield in place, a falling rock (made up of consolidated accumulated material) could fall from the conveyor, its structure or the lube room roof and strike and injure one of the several miners who accessed the areas under the accumulated material a dozen or so times a shift.

The fourth and final prong of the *Mathies* test requires the Secretary to prove there is a reasonable likelihood that the injury in question will be reasonably serious. The Secretary has satisfied this element of the S&S test because the evidence supports a finding that the injury would be fatal, or at the very least would result in lost workdays. In support of the fatal designation, Dreyer testified that rock falling 45 feet could "have serious negative consequences on anybody impacted." Tr. 122-23. The record fully supports finding that the impact of a rock falling and hitting a miner would likely result in death or in significant neck or spinal injuries. Tr. 123, 131, 160-61.

For the reasons set forth above, the court affirms the inspector's S&S finding.

Next, the gravity, or seriousness, of the violation must be addressed. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)("The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), is often viewed in terms of the seriousness of the violation."). The gravity of a violation is distinct from the S&S nature of a violation, as "the focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). Thus, the gravity analysis focuses on factors such as the likelihood of an injury, the severity of

[29] An air lance is a wand with a pipe that is attached by a hose to a high pressure air compressor. When engaged, the wand directs compressed air to a particular area. An air lance can be used to blow accumulated material away and clean a particular area. The process is akin to a power washer, but uses air instead of water. Tr. 182-83.

an injury, and the number of miners potentially injured. *American Coal Co.*, 36 FMSHRC 2456, 2460 (Sept. 2014)(ALJ). The two concepts are often discussed in close succession because, "[a]lthough the gravity penalty criterion and a finding of S&S are not identical, they are frequently based upon the same factual circumstances." *Enlow Fork Mining Co.*, 19 FMSHRC 5, 10-11 (Jan. 1997) *citing* Quinland Coals, Inc., 9 FMSHRC 1614, 1622 n.11 (Sept. 1987). *See also Elk Run Coal Co., Inc.*, 27 FMSHRC 899, 907 (Dec. 2005).

It is clear the area affected by the violation was regularly visited by miners. Mike Begley, Ash Grove's maintenance manager, informed Dreyer that the area below the conveyor was used at least twice daily by several different miners. Tr. 121. Dreyer estimated that only one person at a time would be injured if a rock fell from above, and indeed this is the most likely scenario. Therefore, there is no reason to disturb Dreyer's designation that one person would be affected by the cited hazard. G. Ex. 5. Tr. 123. Based on the fatal or very serious injury that could result to a miner as discussed previously, and the reasonable likelihood that a rock could fall from an unguarded conveyor and strike a miner, the court finds the violation was serious.

4. Ash Grove's Negligence

Section 110(i) of the Mine Act requires that in assessing penalties, the court also considers "whether the operator was negligent." 30 U.S.C. § 820(i). The Commission has held that each mandatory standard "carries with it an accompanying duty of care to avoid violations of the standard," and the failure to meet this duty will result in a finding of negligence. *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether the operator met its requisite duty of care imposed by a particular standard, the court must take account of the relevant facts, the protective purposes of the cited regulation, and what actions a "reasonably prudent person familiar with the mining industry," would take under the circumstances. *Jim Walter Resources, Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014). An operator is negligent if it should have known that its actions (or failure to act) would cause a violation. *Brody Mining, LLC*, 37 FMSHRC 1687, 1703-04 (Aug. 2015). In addition, the Secretary must describe the specific action an operator did not take to meet the requisite standard of care. *Jim Walter Resources, Inc.*, 36 FMSHRC 1972, 1976-1977 (Aug. 2014).

Initially, Dreyer determined that the violation occurred as a result of Ash Grove's "moderate" negligence. G. Ex. 5; Tr. 123-24. Dreyer noted that he did so because at the time he did not find anyone in management had specific knowledge of the condition. Tr. 124. However, Dreyer also testified that "high" might have been more appropriate, as the company had extensive discussions with MSHA regarding falling material during a previous inspection.[30] Tr. 124. After the hearing, the Secretary urged the court to consider modifying the level of negligence to "high." G. Br. 21.

The Commission has described ordinary negligence as characterized by "inadvertent," "thoughtless," or "inattentive" conduct. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2004 (Dec. 1987) citing *Black's Law Dictionary* 930–31 (5th ed. 1979). A finding of high negligence,

[30] Dreyer testified that before starting his inspection he reviewed the report for the prior inspection at the plant and discussed the report and findings with Mike Nelson, the MSHA inspector who conducted it. Tr. 124.

however, "suggests an aggravated lack of care that is more than ordinary negligence." *Topper Coal Co., Inc.*, 20 FMSHRC 344, 350 (1998); *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991). In particular, the Commission has held that an operator's intentional violation constitutes high negligence for penalty purposes. *Consolidation Coal Co.*, 14 FMSHRC 956, 969-70 (June 1992).

There is sufficient evidence to conclude that Ash Grove was inattentive regarding the accumulation conditions and the attendant hazard of falling material. Dreyer testified that there was significant material build up on the roof, indicating the falling material had accumulated for some time. This indicates that Ash Grove should have been on notice that material had reached a point where it was falling or was in danger of falling from the conveyor. Further, Ash Grove's use of a skid steer to presumably clean up falling material indicates that Ash Grove was aware that material was falling from the conveyor, but neglected to adopt a permanent solution. While Ash Grove's inattention to a solution did not meet the standard of care required, there is no indication the resulting violation was intentional. Therefore, the court agrees with Inspector Dreyer's original conclusion and finds that moderate negligence is the appropriate designation and declines the Secretary's invitation to increase the negligence attribution to "high."

C. Citation Numbers 8780422 and 8780423, Docket Nos. WEST 2015-503 and WEST 2015-523

The citations were issued to Ash Grove as a result of its response to an August 4, 2014, accident at the plant. The accident occurred when a person (a trainee truck driver) riding in a customer's truck got out of the truck's cab while the truck was parked and fell while climbing a ladder on the side of the truck. Inspector Thomas Rasmussen was assigned by MSHA to investigate the accident.[31] As a result of his investigation, including interviews with witnesses, Rasmussen issued Citation Numbers 8780422 and 8780423 to Ash Grove for its response to the accident. Citation No. 8780422 concerns Ash Grove's reporting of the accident to MSHA, and Citation No. 8780423 concerns the treatment of the accident scene.

Citation No. 8780422 charges Ash Grove with a violation of 30 C.F.R. § 50.10(b).[32] The citation states:

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[31] Inspector Rasmussen works at MSHA's Kent, Washington Field Office. At the time of the hearing he had worked for MSHA for three and a half years. Tr. 185. Rasmussen completed required MSHA training. He also completed an advanced accident investigation course. Tr. 185. Rasmussen testified that he has conducted hundreds of accident investigations on behalf of MSHA. Tr. 185. Prior to working for MSHA, Rasmussen was a contractor at OSHA and MSHA regulated sites, where he was primarily responsible for supervising crews and for training employees in safety and health standards. Tr. 186. Rasmussen spent ten years in this capacity. He also served in the United States Marine Corps. Tr. 186-87.

[32] 30 C.F.R. § 50.10, titled "Immediate Notification," states:

> The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1–800–746–

> The mine operator did not notify MSHA within 15 minutes after becoming aware of a serious injury of an individual. On July 23, 2014 [,] one truck driver fell while climbing a ladder on a bulk trailer in the Group 2 Loadout and landed on an uneven steel platform at the base of the ladder. The individual was transported to the Hospital with serious and life threatening injuries. The mine [o]perator was aware of the immediate notification requirements, was informed of the accident at approximately 14:00 hours and did not notify MSHA until 14:43 hours on July 23, 2014.

G. Ex. 8.

Rasmussen found that the alleged violation was unlikely to cause an injury, but if an injury occurred, that it was likely to result in a fatality. He also found that the violation was the result of Ash Grove's high negligence. G. Ex. 8.

Further, Rasmussen issued Citation No. 8780423 to Ash Grove for a violation of 30 C.F.R. § 50.12.[33] Citation No. 8780423 states:

> The mine operator failed to preserve the accident scene where one truck driver fell while climbing a ladder on a bulk trailer in the Group 2 Loadout and landed on an uneven metal platform at the base of the ladder at approximately 14:00 hours on July 23, 2014. Upon arrival at the mine site, at approximately 17:00 hours on July 23, 2014, it was found that the accident scene was altered. After the injured individual was removed, the truck and trailer were

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> 1553, once the operator knows or should know that an accident has occurred involving:
>
> (a) A death of an individual at the mine;
>
> (b) An injury of an individual at the mine which has a reasonable potential to cause death;
>
> (c) An entrapment of an individual at the mine which has a reasonable potential to cause death; or
>
> (d) Any other accident.

[33] Section 50.12 states:

> Unless granted permission by a MSHA District Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

> taken from the scene, washed then parked in the Group 2 Rail Side Loadout. Removal of evidence from the accident scene hinders the investigation into the cause of the accident. The Mine Operator was aware the accident had occurred and did not preserve the accident scene.

G. Ex. 12.

Rasmussen found that although the violation was neither serious nor S&S it was the result of Ash Grove's "high" negligence. G. Ex. 12.

1. The Background and Testimony

On July 23, 2014, Ronald Cory, an employee of Gresham Transfer ("Gresham"), a customer that bought product from Ash Grove, was injured at the Seattle Plant. Tr. 194.[34] Cory, a Gresham trainee, was being trained by Jamie Goad, who was driving Gresham's truck. Tr. 198. Goad had pulled up to the Group 2 Loadout and parked the truck while it was loaded. *Id.* During the loading process Cory left the truck, but as the process neared its end, Cory returned to the cab. At around 2:00 p.m., after the truck was loaded, Cory could not find his cell phone. He thought he might have left it on the roof of the cab. Tr. 193, 210. Cory again left the truck and climbed up the ladder of the outside of the truck to retrieve his phone. Tr. 210. When Cory approached the top of the ladder he struck his head on the cement loading spout of Loadout Number 2. He lost his grip on the ladder, and he fell about eight feet. Tr. 193,197. Cory hit his head on the way down and landed on the steel tongue of the truck's trailer and on an uneven concrete platform. Tr. 193. Cory was not wearing fall protection. Tr. 223. Paramedics were called to the scene and arrived around five minutes after the fall. Tr. 256-57. Subsequently, Cory was transported to the trauma ICU center at Seattle's Harborview Hospital. Tr. 209. MSHA was called, and Rasmussen arrived at the plant and interviewed numerous people. Tr. 224, 227. Rasmussen also went to the hospital, but he was unable to speak to Cory on the day of the incident because Corey was incoherent. Tr. 209. However, Rasmussen spoke to a trauma center nurse about Cory's injuries, and she emphasized that Cory was lucky to be alive. Tr. 209. Cory suffered blunt force trauma to the head, a cut on the head requiring three staples, broken vertebrae, and a broken sternum and clavicle. Tr. 193, 209; G. Ex. 13. When Cory was finally able to speak to Rasmussen several days later, Cory indicated that he did not remember many details about what happened, other than waking up in a "bunch of blood" and that during the fall he thought he was going to die. Tr. 210-11.

Witnesses to the accident and those who observed the scene immediately after the fall painted a gruesome picture. Goad, the truck driver and a Gresham supervisor described how Cory had left the cab of the truck and how Goad then heard a thump after which the loader operator who worked for Ash Grove yelled that Cory had fallen. Tr. 200-01. Goad got out of the cab. He told Rasmussen that he saw Cory lying motionless face up after the fall. Tr. 203-04.

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[34] Gresham Transfer ("Gresham") purchases bulk product from Ash Grove. Gresham's trucks come to the plant to pick up the material and then haul it off site. Tr. 194. Gresham's trucks park at one of several "loadouts," in this case Loadout Number 2, where the product is loaded. Tr. 255.

The paramedics soon arrived to help Cory and after they removed him from where he was lying and took him to the hospital, Goad told Rasmussen he saw blood everywhere. Goad took pictures of the blood on the steel tongue and concrete before moving his truck. He later sent the photographs to Rasmussen. Tr. 201.

Romeo Semo, an Ash Grove employee, was working at the loadout and witnessed Cory's fall. He told Rasmussen he thought Cory was dead. Tr. 205. A customer present at the time of the accident, Reggie Soloman, told Rasmussen that he too believed Cory was dead, and that Corey was lucky that he survived the fall. Tr. 205-07.

Ash Grove's witnesses described a less grim scene. Carey Austell, the plant manager, was at the plant when the injury occurred.[35] Tr. 252-254. Austell was informed of the injury and arrived at the scene of the accident after the paramedics had been called and were enroute. Tr. 255. Austell testified that when he got to the scene Cory was conscious, alert, and moaning. Tr. 256. Austell opined that once they arrived, the paramedics were methodical, but not acting with great urgency. Tr. 258. Austell testified that he did not believe that Cory had a reasonable chance of dying since his breathing and bleeding were controlled, and he was alert. Tr. 259-260. Austell decided not to call MSHA to report the accident based on this belief. Tr. 261.

Craig Becker, who was filling in for the safety manager on July 23, arrived at the scene within five minutes of being notified of the accident. Tr. 263-64. Becker said the paramedics arrived about two or three minutes after he did. Tr. 264. Becker testified that when he first saw Cory, Cory was alert and responsive to pain. Tr. 265. The paramedics, according to Becker, were not administering CPR; rather they were checking for broken bones and injuries and they were reassuring Corey. Tr. 265-66. Becker discussed with Austell whether to call MSHA. Becker believed that there was not a reasonable chance of death requiring MSHA's immediate notification. As it turned out, Ash Grove called to notify MSHA of the event at approximately 2:43 p.m. Tr. 193-94; G. Ex. 5.

Later that day, when Rasmussen arrived at the scene of the accident, Rasmussen discovered that Goad had moved the truck and washed it. Tr. 202, 304. Ash Grove never asked Rasmussen or any other MSHA official for permission to move the truck. Tr. 191-92. Goad told Rasmussen that he moved the truck because he wanted to wash away the blood. Tr. 200. Goad took pictures of the blood before washing the truck. He sent the photographs to Rasmussen to use in the investigation. Tr. 201. After the truck was cleaned, it was moved back to where the accident occurred, and it was taped off to prevent future use. Tr. 312-15.

2. The Immediate Notification Violation, Citation Number 8780422

Rasmussen testified that he issued Citation No. 8780422 because, in accordance with 30 C.F.R. § 50.10(b), an operator is required to call MSHA within 15 minutes of becoming aware

[35] Carey Austell has been the plant manager since September 2013. Tr. 253. Before working at the Seattle Plant Austell was a foreman at Ash Grove's Arkansas Facility for three years. Tr. 253. Austell has worked in the cement industry since 1992. Tr. 253. He also served in the United States Marine Corps for 26 years as an infantryman in which capacity he received a significant amount of first aid training. Tr. 253-54.

that an accident has occurred resulting in an injury which has a reasonable potential to cause death, and that Ash Grove waited longer than the allotted time to notify MSHA of the accident. Tr. 194. Ash Grove's safety director was aware of the accident at around 2:05 p.m.[36] and called MSHA's notification hotline to notify MSHA of the event at 2:43 p.m. Tr. 193-94; G. Ex. 8, p.5.

The Commission has explained that the immediate notification standard requires a mine operator to report to MSHA, within 15 minutes, an accident that has resulted in an injury which has a reasonable potential to cause death. *Rex Coal Co.*, 38 FMSHRC 208, 212 (Feb. 2016) ("Section 50.10 imposes an affirmative duty on the operator to report accidents immediately within 15 minutes."); *Mainline Rock & Ballast v. Sec'y of Labor*, 693 F.3d 1181, 1188 (10th Cir. 2012). Essentially, to prove a violation of 50.10(b) the Secretary must show that an accident occurred, that the accident resulted in an injury or injuries having the reasonable potential to cause death, and that the mine operator failed to notify MSHA within the 15 minute time frame anticipated by the standard.

Here, it is undisputed that an accident occurred when Cory fell from the truck. R. Br. 17; G. Br. 23; Tr. 193. It is also undisputed that the call to MSHA was made after the allotted 15 minutes, as the operator made the call 38 minutes or more after being notified of the incident. R. Ex. 1; G. Ex. 8; Tr. 196, 201. The disputed aspect of this case is whether the accident resulted in an injury or injuries having the reasonable potential to cause death, relieving Ash Grove of its duty to report the accident immediately. Ash Grove defends its 38 minute or more delay in calling the MSHA accident hotline by stating that mine officials did not believe Cory's injuries were likely to result in death. R. Br. 19. The Secretary states that numerous circumstances were present that "would lead a reasonably prudent mine operator to conclude that Cory's life may have been in jeopardy." G. Br. 24. To determine whether the accident triggered an affirmative duty for Ash Grove to notify MSHA in 15 minutes the court must analyze whether, based on the evidence presented, the Secretary is right.

Rasmussen concluded the accident resulted in injuries that had a reasonable potential to cause death after considering the extent of the injuries Cory sustained, including his head injury, his fall onto a hard surface, Cory's period of unconsciousness after the fall, his trouble breathing when the ambulance arrived, and various eye witness statements. Tr. 193-94, 237. Rasmussen testified that "people die frequently from falls from a height." Tr. 237. The Commission has held an MSHA inspector's opinion as to the seriousness of an injury, alone, may be relied upon, absent any other evidence of the record. *Cougar Coal Co.*, 25 FMSHRC 513, 521 (Sept. 2003); *Power Operating*, 18 FMSHRC 303, 306-07 (Mar. 1996); *Zeigler Coal Co.*, 15 FMSHRC 949, 954 (June 1993). Based on the eight foot fall onto an uneven and hard surface, the fact that

[36] According to Ash Grove's accident report, an Ash Grove employee reported Cory's fall to the plant control room at 2:01 p.m. R. Ex. 1. The control room operator immediately dialed 911. R. Ex. 1. Becker, the acting safety manager, found out about the accident and arrived on the scene at 2:05 p.m. R. Ex. 1; Tr. 192-93. Austell, the production manager who had the final authority whether to make the call to MSHA, arrived to the scene of the accident at 2:07 p.m. R. Ex. 1; Tr. 261. Regardless of whether Becker and Austell knew about the accident at 2:01, 2:05, or 2:07 p.m., there was still a more than 15 minute delay in calling the MSHA hotline.

Cory's head was injured, and Rasmussen's opinion as to the trauma and injuries Cory suffered, the court finds that Rasmussen's decision to cite Ash Grove was correct.

Ash Grove emphasizes that Becker overheard paramedics stating that Cory would be "okay," and as such the injuries did not have the potential to cause death. R. Br. 20. The court rejects this argument, as the opinions of first responders as to a victim's present condition do not render an accident any less serious. In fact, the Commission has held that requiring a medical or clinical opinion of the potential of death before an accident is determined to be reportable under Section 50.10 would frustrate the immediate reporting of near fatal accidents and thwart the purpose of the standard. *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). Moreover, Cory's good fortune in surviving the fall does not negate the seriousness of the accident.

The severity of Cory's injuries, coupled with the circumstances of the fall, and the majority of the witnesses' opinions that Cory seemed dead and was lucky to be alive, indicate to the court that there was a reasonable likelihood the injuries could have resulted in death, triggering the affirmative duty to alert MSHA within 15 minutes of the accident. Ash Grove personnel had the opportunity to make a call within the allotted time, and they did not. Ash Grove violated section 50.10(b) as alleged.

3. Ash Grove's Negligence

Ash Grove contends that its "reasonable belief that there was no immediately reportable accident lowers its negligence." R. Br. 19. Ash Grove asserts that management personnel reasonably deemed Cory's injuries to be nonlife-threatening and that the plant's proximity to a hospital and the paramedics' rapid response make it unlikely that any injury would have been fatal.

The focus of the operator's reasonableness in notifying MSHA of an accident is made considering a totality of the circumstances. *Signal Peak Energy, LLC*, 37 FMSHRC 470, 474 (Mar. 2015). The operator must err on the side of caution and "in determining whether it is required to notify MSHA under 30 C.F.R. § 50.10, must resolve any reasonable doubt in favor of notification." *Signal Peak Energy, LLC*, 37 FMSHRC 470, 476 (Mar. 2015). Additionally, while Section 50.10 accords operators a reasonable opportunity to investigate an incident, the investigation "must be carried out by operators in good faith without delay and in light of the regulation's command of prompt, vigorous action." *Consolidation Coal Co.*, 11 FMSHRC 1935, 1938 (Oct. 1989). In sum, Ash Grove had the duty to make a good faith, but prompt, examination of the incident to determine whether it warranted a Section 50.10(b) call to MSHA, and was required to err in favor of notification.

Austell testified that he did not believe Cory had a reasonable chance of dying because when Austell arrived at the scene of the fall Cory was alert, breathing, and not bleeding uncontrollably. Tr. 259-260. Becker testified that he believed that although Cory indicated he was in pain, Cory's symptoms would not be associated with a fatal injury because Cory was alert and responding to pain. Tr. 267-68. An individual's consciousness when paramedics are present is an inadequate basis to assume an accident is not potentially deadly. In *Cougar Coal,* the Commission rejected an operator's assertion that because an accident victim was conscious and

alert when management arrived at the scene, they reasonably surmised that his injuries lacked the potential to cause death. *Cougar Coal Company*, 25 FMSHRC 513, 520 (Sept. 2003).

Ash Grove also emphasizes Becker's testimony that he overheard paramedics make a reassuring statement regarding Cory's condition to support the contention that management reasonably believed the accident was not serious enough to fall under the Section 50.10(b) notification timeframe. R. Br. 19-20. Relying on a reassuring statement made by a first responder does not make an operator any less culpable in failing to call the MSHA hotline in a timely manner. The statement made to Cory that he would be "okay" cannot be presumed to be an assurance to Cory that he would survive and recover. It is equally likely to be a statement made to all victims, whatever the extent of their injuries, to lessen their anxieties and fear. Becker should have erred on the side of caution and reported the incident more expeditiously. The Commission has held that, "[i]n the field, the decision to call MSHA cannot be made upon the basis of clinical or hypertechnical opinions as to a miner's chance of survival. The decision to call MSHA must be made in a matter of minutes after a serious accident." *Cougar Coal Co.*, 25 FMSHRC 513, 521 (Sept. 2003).

Austell and Becker arrived minutes after the incident, and based their opinions regarding the severity of Cory's injuries largely on the paramedics' responses and demeanors. R. Br. 19-20; Tr. 267-68. The paramedics' calm dispositions are an inadequate basis to conclude an injury is not serious enough to report an accident to MSHA within the fifteen minute timeframe. The Court assumes paramedics are trained to exhibit such an appearance. Relying on a lack of urgency on the part of medical personnel and the absence of any express indication that Cory's injuries were life threatening was unreasonable. Ignorance of the severity of an accident, whether willful or careless, does not excuse an operator's failure to timely report an accident. *Mainline Rock & Ballast, Inc. v. Sec'y of Labor*, 693 F.3d 1181, 1189 (10th Cir. 2012).

Ash Grove further asserts that paramedics were on scene within minutes of Cory's fall, and that a hospital is nearby, presumably to indicate that Becker and Austell did not believe Cory's injuries would be life threatening. R. Br. 19; Tr. 256-57. The promptness of first responders and the proximity to a hospital do not weigh in favor of reducing Ash Grove's negligence. If anything, the circumstances indicate that Becker and/or Austell were not needed to administer first aid and could have made a call to MSHA.

Finally, Ash Grove contends that it was not aware of the accident until 2:05 p.m. Tr. 192-193; R. Br. 17; *cf.* discussion *supra* note 36. However, even if this time frame is accurate, the five minutes do not bring Ash Grove into compliance with the 15 minute requirement and will not be considered a mitigating factor in determining negligence. As discussed, management personnel were not needed to administer first aid, and either Austell or Becker could have placed a timely call to MSHA. Rasmussen asked Austell why Ash Grove did not call within the fifteen minute time frame, and instead waited until 38 minutes after the accident occurred, to which Austell responded, "no reason" (Tr. 216), and Craig Becker testified that the only reason MSHA was called was as a "courtesy" to inform them of the accident. Tr. 270-71.

Ash Grove's negligence is compounded by the fact that it had constant notice of the reporting requirement, as shown by evidence that establishes the presence at the time of at least two posters at the mine displaying MSHA's telephone number for reporting accidents. Rasmussen photographed a poster showing the number that was posted on the wall of the control

room, the location from where Ash Grove called 911. Tr. 195; G. Ex. 8, p. 3. He also photographed a similar poster that was posted in the break room of the main office. Tr. 195; G. Ex. 8 p. 4.

For the reasons set forth above, and especially for the purposeful nature of the violation, the inspector's high negligence finding is affirmed.

4. Gravity

The failure to notify MSHA in a timely manner when a miner suffers an accident reasonably likely to result in his or her death is a serious violation. Contacting MSHA without delay and within fifteen minutes is one of the critical keys to an effective investigation and an effective investigation is a vital element of the agency's mission to prevent replication.

5. Failure to Preserve Accident Scene, Citation No. 8780423

Section 50.12 requires that after an accident, an operator refrain from altering the site where the incident occurred and preserve the evidence until MSHA's accident investigation is complete. When an injury occurs at a mine with the reasonable potential to cause death, the site of the incident is an "accident site," and the requirements of Section 50.12 are triggered. *Black Beauty Coal Co.*, 37 FMSHRC 687, 691 (April 2015). To establish a violation of Section 50.12, the Secretary must demonstrate that an accident occurred and that the operator altered the site or evidence in some way, without MSHA's permission, and with no compelling justification (as anticipated by the standard). It is undisputed that Gresham's employee moved the truck from the scene of Cory's fall and washed it and that this was done before Rasmussen completed his investigation. G. Br. 28; R. Br. 19; Tr. 304. The Secretary asserts that none of the acceptable reasons to alter the accident scene existed. The Secretary argues that:

> 1) MSHA's Western District Manager did not grant express consent, 2) the truck did not need to be moved in order to recover or rescue a person, 3) there was no immediate danger present, [and] 4) the truck did not need to be moved in order to prevent the destruction of mining equipment.
>
> G. Br. 28; Tr. 304-306.

Ash Grove relies on its assertions that Cory's injuries did not have the "reasonable potential to cause death," as contended in its challenge to Citation Number 8780423. R. Br.19 Because Cory's injuries do not rise to the level of seriousness to be categorized "an accident," the prohibitions under Section 50.12 were not triggered. *Id.* Ash Grove does not contend that an exception to 50.12 existed justifying the move of Gresham's truck, or that it sought MSHA's permission to move the truck. Therefore, the sole issue is whether the truck qualified as an "accident site," which in turn hinges on whether Cory's injuries had the "reasonable potential to cause death." As discussed above, Cory's eight foot fall and the resulting injuries had a reasonable potential to cause death.[37] The event was an accident, and the situs (i.e., the truck

[37] When an injury occurs at a mine with the reasonable potential to cause death, the site of the incident is an "accident site" and the requirements of Section 50.12 are triggered. *Black Beauty Coal Co.*, 37 FMSHRC 687, 691 (April 2015)

parked at the loadout) became the "accident site." Ash Grove had an affirmative duty to preserve the site so MSHA could investigate. When Goad moved and washed the vehicle, the site was fundamentally altered in violation of Section 50.12.

Goad, an Ash Grove customer, rather than its employee, was never told to wash the truck; he did it on his own. Tr. 304. With that said, the accident site was still within Ash Grove's control and a mine operator is held strictly liable for violations that occur at its mine. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). The strict liability regime may be relaxed in limited situations, such as when something occurs outside of an operator's control. *See Sec'y of Labor v. Nat'l Cement of Cal., Inc.*, 573 F. 3d 788, 795 (D.C. Cir. 2009) (stating that strict liability means liability without fault, but does not necessarily mean liability for things that occur outside one's control or supervision.). In this case, Ash Grove had control of the situation, as the truck was washed on its property, using its wash bay. Goad was never told by Ash Grove management to keep the truck at the loadout. Tr. 304, 323. Ash Grove had the ability to intervene and direct its customer to leave the truck at the accident site. It did not do so.

For the reasons set forth, the court finds the company violated Section 50.12 as charged.

6. Gravity

The failure to ensure preservation of an accident scene is a serious violation. Investigation of the unaltered scene with its evidence of an accident's cause and consequences is critical to the agency if it is to prevent similar accidents. Here, where Ash Grove failed to prevent its customers from significantly changing "the facts on the ground" following the accident, the company potentially undermined the effectiveness of the agency's preventative efforts and this in and of itself was a serious failure on the company's part.

7. Ash Grove's Negligence

Rasmussen testified that he charged Ash Grove with "high" negligence because the operator did not offer any mitigating factors or explain its actions in allowing Goad to wash his truck before the MSHA investigation was complete. Tr. 318-19. Rasmussen reasoned that the mine operator has the ultimate responsibility for what happens on its site, and should have directed Goad not to move the truck. Tr. 319.

Because the alteration of the accident scene was the result of a customer's independent action, the court finds the negligence attributable to Ash Grove for the violation of § 50.12 to be moderate, rather than high. Tr. 304, 323. Ash Grove could and should have been more diligent in notifying its customer that the truck needed to remain unchanged and at the loadout pending MSHA's investigation. Ash Grove's later action of taping off the vehicle evidences the ability to control the movement of the truck on its property. Tr. 314. However, Ash Grove had no reason to anticipate Goad's intentional decision to alter the scene.

IV. Other Civil Penalty Criteria and the Assessment of Penalties

The court's assessment of civil penalties must reflect consideration of the six penalty criteria listed in the Mine Act. 30 U.S.C. § 820(i); *Rex Coal Co.*, 38 FMSHRC 208, 214 (Feb. 2016). The criteria are: (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business; (3) the operator's negligence; (4) the operator's ability

to stay in business; (5) the gravity of the violation; and (6) any good-faith compliance after notice of the violation. 30 U.S.C. § 820(i); *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000).

As a preface to the analysis, it is important to emphasize that when conducting a penalty assessment, weighing one factor more heavily than others is not an abuse of discretion, provided that all six are considered. *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1979-80 (Aug. 2014); *Thunder Basin Coal. Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Any substantial divergence of the court from a penalty proposed by the Secretary must be explained in light of the criteria. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

A significant portion of the evidence presented is common to the operation as a whole, and relevant to the civil penalty discussion for all of the violations. Four of the criteria will be approached comprehensively, save for gravity and negligence, because the facts relevant to those components are distinct to each citation. The seriousness of each violation, and the operator's culpability were discussed in the analysis of each violation, and in this case, the gravity and negligence of the violations are the crux of the court's civil penalty determinations. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (holding that a Commission judge did not abuse his discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria); *Musser Eng'g Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010).

A. History of Previous Violations

Generally, the operator's past violations of all safety and health standards are considered for this criteria. *Jim Walter Res., Inc.*, 28 FMSHRC 983, 995 (Dec. 2006); *Peabody Coal Co.*, 14 FMSHRC 1258, 1264 (Aug. 1992). One way of gauging all past violations is to consider an operator's rate of violations per inspection day. At the time of the inspection Ash Grove's violation per inspection date rate was .91, lower than the non-metal industry average of 1.11 to 1.14. G. Ex. 1; Tr. 101. There were also no lost time injuries or accidents reported in the fifteen month period at the time of the inspection. Tr. 101. Generally bare information, such as the number of violations, would not be relevant, but when coupled with a qualitative assessment, the violation history becomes more important. *Cantera Green,* 22 FMSHRC 616, 624 (May 2000); *Secretary of Labor on behalf of Hannah v. Consolidation Coal Co.,* 20 FMSHRC 1293, 1305 n.14 (Dec. 1998). Inspector Nelson conceded that "[o]verall Ash Grove runs a pretty good operation." Tr. 62. Nelson's concession that Ash Grove is not a prolific violator, coupled with the relatively lower violation rate than comparable mines, militates in favor of lowering the proposed penalties.

B. Size

The court must determine whether the proposed penalties are appropriate in relation to Ash Grove's size. Ash Grove runs a large operation, including numerous mines in various areas of the country. Tr. 106. No testimony or evidence to the contrary was introduced. Ash Grove's size does not warrant a reduction in the proposed penalties.

C. Ability to Continue in Business

Ash Grove did not aver that the Secretary's proposed penalties, if assessed, will affect its ability to remain in operation. The ability to pay is not in dispute. The Commission has held that, "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur." *Sellersburg,* 5 FMSHRC at 294 (citing *Buffalo Mining Co.,* 2 IBMA 226, 247-48 (September 1973)); *accord Spurlock Mining Co.,* 16 FMSHRC 697, 700 (April 1994). *See also Broken Hill Mining Co.,* 19 FMSHRC 673, 677 (1997). Ash Grove's ability to pay the proposed penalties does not warrant their reduction.

D. Good Faith

The operator's good-faith compliance after receiving notice of the violation must also be considered. The parties stipulated that Ash Grove abated the citations in good faith. Tr. 248-250. Good faith is assumed, and Ash Grove's timely compliance does not warrant reduced penalties.

WEST 2014-963

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
8780591	05/22/2014	18002(a)	$1,530.00	$0.00 (VACATED)

The court will vacate Citation Number 8780591. As such, no civil penalty is assessed.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
8611830	05/28/2014	14110	$1,530.00	$1,250.00

The court finds that the violation was serious, and attributable to the company's moderate negligence. Given these findings, and the other civil penalty criteria, the court assesses a civil penalty of $1,250 for the violation. The reduction is based on Ash Grove's commendable overall history of previous violations.

WEST 2015-503

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
8780422	08/04/2014	50.10(b)	$5,000.00	$5,000.00

The Secretary proposed a $5,000 civil penalty for Citation No. 8780422. G. Ex. 8. This civil penalty represents the statutory minimum that the Secretary must assess for a violation of an immediate notification violation. 30 C.F.R. § 100.4(c).

Although section 110(a)(2) of the Act, 30 U.S.C. § 820(a)(2), speaks to the Secretary, not to the Commission, the Commission has held that assessment of a non-flagrant violation of Section 50.10(b) is governed by Section 110(a)(2) of the Act and that the Commission's judges must adhere to the minimum and maximum statutory penalties set forth therein. *Signal Peak*

Energy, LLC, 37 FMSHRC 470, 483-84 (Mar. 2015). Accordingly, the court has no choice but to assess the $5,000.00 penalty proposed by the Secretary.

WEST 2015-523

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
8780423	08/04/2014	50.12	$2,000.00	$1,250.00

The court finds that the violation was serious and attributable to the company's moderate negligence. The Secretary proposed a $2,000.00 special assessment for Citation No. 8780423. G. Ex. 9; G. Ex. 10. The court finds that a penalty of $1,250 is appropriate. The reduction is based on Ash Grove's commendable overall history or previous violations.

ORDER

For the reasons set forth above, Citation No. 8780591 is **VACATED**. Citation No. 8611830 and 8780422 are **AFFIRMED** as written. Citation No. 8780423 is **MODIFIED** to reduce the level of negligence from "high" to "moderate." Within 30 days of the date of this decision, Ash Grove **SHALL PAY** a civil penalty of $7,500.[38]

David F. Barbour
Administrative Law Judge

Distribution: (Certified Mail)

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

John Nelson, Esq., Ash Grove Cement Company, 11011 Cody Street, Overland Park, Kansas 66210

/md

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