FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 13, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING
v.	Docket No. WEST 2017-0546 A.C. No. 04-01299-437883
	Docket No. WEST 2017-0685 A.C. No. 04-01299-445257
	Docket No. WEST 2018-0100 A.C. No. 04-01299-450097
ORIGINAL SIXTEEN TO ONE MINE INC, Respondent	Docket No. WEST 2018-0224 A.C. No. 04-01299-456276
	Mine: Sixteen to One Mine

Appearances: Isabella M. Finneman, Esq. Office of the Solicitor, U.S. Department of Labor, San Francisco, California for the Petitioner

Michael Miller, for the Respondent

Randy Cardwell, CLR, U.S. Department of Labor, MSHA, Vacaville, California

Before: Judge William Moran

DECISION AND ORDER

A hearing involving these dockets was heard on April 17 and 18, 2018 in Nevada City, California. The Sixteen to One Mine is an underground gold mine. Tr. 18. Eight citations were in issue. All testimony for the Respondent was from Mr. Michael Miller. Post-hearing briefs were submitted and the Court considered them fully. The citations are discussed in the order presented.

A Preliminary Matter of Concern

In Respondent's Post-Hearing Brief,[1] submitted on July 12, 2018, by Michael Miller, Respondent first makes a responsible and fair comment invoking Section 505 of the Mine Act[2] which provides

> The Secretary may, subject to the civil service laws, appoint such employees as he deems requisite for the administration of this Act and prescribe their duties. Persons appointed as authorized of the Secretary shall be qualified by practical experience in mining or by experience as a practical mining engineer or by education: Provided, however, that to the maximum extent feasible, in the selection of persons for appointment as mine inspectors, no person shall be so selected unless he has the basic qualifications of at least five years practical mining experience and in assigning mine inspectors to the inspection and investigation of individual mines. Due consideration shall be given to the extent possible to their previous experience in the particular type of mining operation where such inspections are to be made.

R's Br. at 2 (underscoring in Respondent's brief).

> AR Basich and AR Hulsey have limited work experience in a surface operation. AR Hooker never worked in any type of mine. To litigate that actual work experience in an underground mine as an underground miner is irrelevant as a qualification for an AR is nonsense. Objective observations of health and safety conditions at Sixteen to One without underground experience are nonsense. Punitive decisions towards Respondent and its miners is nonsense! Sixteen to One miners and management must receive deferential treatment towards safety if any is to be given. Background, hands on experience and actual on-site training are the intentions of Congress and demanded in An ACT.

Id.

Respondent then continues with his expression that an inspector is to conduct an inspection "consistent with specific conditions at a mine. AR Hooker has shown her inability to perform according to this procedure. No exceptions." *Id.* at 4.

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[1] The submission was titled as "BRIEF OF THE REPSONDENT, ORIGINAL SIXTEEN TO ONE MINE, INC., TO CIVIL PENATLY [sic] PROCEEDINGS HELD BEFORE ADMINISTRATIVE LAW JUDGE WILLIAM MORAN ON April 17, 2018 IN NEVADA CITY, CALIFORNIA."

[2] While the Court fully considered the entirety of the Respondent's Post Hearing Brief and its Rejoinder Brief, titled, "RESPONDENT REJOINS SECRETARY OF LABOR'S REPLY TO RESPONDENT'S POST-HEARING BRIEF," dated August 3, 2018, this portion of the Court's Decision only speaks to its Preliminary Matter of Concern.

Again, the Court considers this to be a fair comment, within the bounds of advocacy and, while it does not subscribe to the Respondent's claim that MSHA Inspector Hooker failed to conduct her inspection in a manner consistent with the mine's specific conditions, it is a contention which the Court took into account and considered for each of the citations issued by Inspector Hooker and litigated during the hearing.

However, the Court's serious concern with the Respondent's Brief is with the following remarks by Mr. Miller, to wit:

> An Act of 1977 originated in Congress is a young law, but well-vetted by experienced participants. It has served America and the industry well, but is now being abused by **law whores**. As a relatively young agency, Mine Safety Health Administration has moved beyond the Congressional language and purposes of this law. MSHA's present behavior with Respondent in the specific inspection, citing, and prosecuting phases under review in this hearing must cease.
>
> The harmful consequences to America citizenry, the natural resource industry, and the miner goes beyond the harm to Respondent. Your time to pass judgment has arrived. Shall An Act of 1977 be ignored? Congress passed a law that was "necessary and proper" for improving the nation. Now it is the Commission's turn to act. Vacate the citations issued by AR Julie Hooker and modify the citations from ARs Rautiola, AR Basich, and AR Hulsey.

R's Br. at 6 (bold text added).

This intemperate and vituperative language employed by the Respondent has no place in legal proceedings and the Secretary of Labor has rightly voiced his objection to it in its Reply Brief. ("Sec.'s Reply," submitted July 26, 2018). In particular[3] the Secretary requested this Court

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[3] The Secretary's Reply also contends that the Respondent should be "barred from introducing additional evidence identified as "Exhibit R-A." Respondent attached Exhibit R-A to its Brief, which was served on the Secretary via email on July 11, 2018. This exhibit appears to be the Post-Hearing Brief that Respondent submitted to the Court in connection with the adjudication of MSHA citations in Docket No. WEST 2017-0119. Respondent did not obtain the Court's permission to submit Exhibit R-A and, therefore, Respondent is barred from supplementing the record evidence with this exhibit. Furthermore, Respondent's Exhibit R-A should be excluded from the evidence in these proceedings because it has no relevance to the factual or legal issues in these proceedings. Exhibit R-A pertains to a now-closed docket of unrelated citations (WEST 2017-0119). Since the evidence presented in the prior proceeding has no bearing on the relevant issues in these proceedings, Respondent is barred from using the evidence and law contained in Exhibit R-A to further its argument(s) in these proceedings." *Id.* at 2-3. The Court rejects the attempt to include proposed Exhibit R-A on two distinct grounds. First, it was not presented as part of the required prehearing exchange, nor was it offered at the hearing for inclusion as an exhibit. Second, the now rejected exhibit is in large measure a rehash of Mr. Miller's complaint

> strike the first paragraph on page 6 of Respondent's Brief that contains the derogatory term "law whores." A reasonable person reading the Brief could interpret the term "law whores" as a derogatory comment directed to the Secretary's female counsel. Derogatory comments such as this have no place in Commission briefs as it is inappropriate, offensive and harassing to the Secretary's counsel. Besides filing the Brief with the Commission, Respondent has posted its Brief on its website (see Exhibit A -- a screenshot of Respondent's website as of July 25, 2018), which contains a link to Respondent's Post-Hearing Brief dated July 12, 2018 for the general public to read.
>
> Therefore, the Secretary respectfully requests that the Commission issue an Order striking paragraph 1 on page 6 of Respondent's Post-Hearing Brief from the record and to direct Respondent to remove said Brief from its website in perpetuity.

Sec. Br. at 3.

The Court has no authority to direct that paragraph 1 on page 6 of Respondent's Post-Hearing Brief be stricken from the record nor to direct Respondent to remove his brief from its website in perpetuity.[4] That said, the Court is greatly disappointed that Mr. Miller would insert that kind of language in his brief because, having presided in four hearings involving Mr. Miller, it is out of character for him to use such language. The Court would surmise that Mr. Miller had a moment when his feelings momentarily got the better of his judgment. As the language employed by him is inconsistent with the person the Court has come to know during litigation and hearings in the course of four years, Mr. Miller can request that this language be stricken by withdrawing it and resubmitting his brief without that language. Further, Mr. Miller can voluntarily remove that offensive version from his website, perhaps upon realizing that the language was improper.

Further, the Court finds that the use of that language is unwarranted factually. Though it would have been better if Inspector Hooker had at least some prior mining experience in her background, that is a separate issue from whether she is a qualified inspector. As the Secretary notes in its Reply,

> The record in these proceedings establishes that the four MSHA inspectors who were involved in or issued the subject citations – Nick Basich, Jerry Hulsey, Craig Rautiola and Julie Hooker – are qualified and authorized representatives of the Secretary. Regardless of their mining background, each of these mine safety and health inspectors underwent a rigorous 21-week course of training on subjects such as the Federal Mine Safety and Health Act of 1977, as amended ("Mine Act"), the Mine Act's implementing regulations and MSHA policies and procedures in order to obtain their AR (authorized representative) cards, and

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that Inspector Hooker is insufficiently experienced to be an inspector. That assertion has already been independently made by Mr. Miller in this proceeding and therefore it is cumulative.

[4] *See generally* 29 C.F.R. § 2700.55, Powers of Judges.

> regularly participate in MSHA refresher training in order to remain up-to-date on the relevant law, policies and procedures. In addition, MSHA inspectors can receive on-the-job training by accompanying more senior inspectors on their inspections. (Tr. 16:19 to 17:2; 83:23 to 84:7; 129:15-20; 242:24 to 243:23) The record is clear that the four MSHA inspectors who testified at the hearing are qualified MSHA Metal/Nonmetal mine safety and health inspectors.

Id. at 2.

The Court agrees with the Secretary's observations and comments. It must also be said that, while there may be instances when practical prior mining experience assists a mine inspector in determining whether a condition is a violation, many conditions can be evaluated apart from such prior experience. As two examples from the matters addressed in this decision demonstrate, one does not need to have prior mining experience to determine if a ladder extends a distance of three feet above a landing or are provided with substantial handholds. Nor, as a second example, is such prior experience needed to determine if a compressor, or for that matter a self-rescuer, has been appropriately maintained. MSHA training and retraining are sufficient to inform inspectors of such issues.

Finally, the Court wishes to emphasize that, while it disagrees with Mr. Miller's claims and is disappointed that he utilized the inaccurate and combative language in his brief, those remarks *play absolutely no role* in the Court's evaluation of the evidence in these dockets. That is the nature of a court's role – to put aside uncalled-for remarks, and instead to decide the matters solely on the evidence presented at the hearing, and that is exactly what this Court did in these instances.

Penalty Determinations –Overview of penalty factors.

As each of the citations in this litigation are upheld, at least as to the fact of violation, the Court here outlines the penalty factors applied.

Section 110 of the Mine Act, codified as 30 U.S.C § 820, addresses civil penalties for violation of mandatory health or safety standards. Subsection (i) of that section, titled, "Authority to assess civil penalties," provides:

> The Commission shall have authority to assess all civil penalties provided in this chapter. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

Federal Mine Safety & Health Act of 1977 § 110(i), 30 U.S.C. § 820(i) (2012).

Penalty Factors, as applied to this case

History of violations: The Respondent mine's history of violations is reflected in Ex. P-1.

Size of operator's business: The Respondent's mine is small. Tr. 130, 213.

Good faith in compliance after notification of a violation: In each of the eight citations involved in the dockets, as listed above, the Respondent demonstrated good faith.

Effect on the operator's ability to continue in business: As discussed below, the Court finds that the Respondent did not meet its affirmative obligation to establish that the proposed penalties would have a cognizable effect on the Respondent mine's ability to continue in business. As the penalties imposed in this decision are, in total, less than the amounts proposed, this conclusion is reinforced.

Negligence and **Gravity** are discussed separately for each alleged violation. Where a designation made for negligence and/or gravity in a given citation was unchallenged by the Respondent, the Court upon consideration of the evidence has adopted the designations made.

Regarding the concept of "negligence," the Court notes that a fellow administrative law judge has recently remarked that,

> Section 110(i) of the Mine Act also includes "negligence" as one of the six criteria the Commission is required to consider in assessing a penalty. The term is not defined in the Act, but over 30 years ago the Commission recognized that: "[e]ach mandatory standard ... carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *A. H. Smith Stone Company*, 5 FMSHRC 13, 15 (Jan. 1983). The Commission has established that its judges may "evaluate negligence from the starting point of a traditional negligence analysis rather than based upon the Part 100 definitions. Under such an analysis, an operator is negligent if it fails to meet the requisite standard of care-a standard of care that is high under the Mine Act." *Brody Mining LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). This evaluation considers "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Jim Walter Resources*, 36 FMSHRC 1972, 1975 (Aug. 2014). ... The Commission and its judges are not bound to apply the 30 C.F.R. Part 100 regulations that govern the MSHA's determinations. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2048 (Aug. 2016) citing *Brody* at 1701-03. Therefore, the Commission's judges are not limited to an evaluation of allegedly "mitigating circumstances" and instead may consider the "totality of the circumstances holistically." *Brody*, at 1702; Mach Mining, 809 F.3d 1259, 1264 (D.C. Cir 2016). For example, the Commission has stated the real gravamen of

> high negligence is that it "suggests an aggravated lack of care that is more than ordinary negligence." *Newtown*, at 2049, citing *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998) citing *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991). High negligence may be found in spite of mitigating circumstances, or, for example, moderate negligence may be found without identifying mitigating circumstances. *Brody*, at 1702-03. The Commission has described ordinary negligence as "inadvertent," "thoughtless," or "inattentive" conduct. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2004 (Dec. 1987)."

Consol Pennsylvania Coal, 40 FMSHRC 429, 432-433, March 2018, (ALJ Andrews).

Findings of Fact

Docket No. WEST 2017-0546

Citation No. 8785581

The first matter is associated with Docket No. WEST 2017-0546. MSHA Inspector Nicholas Basich testified about Citation No. 8785581. It involved a section 104(a) citation alleging a violation of 30 C.F.R. §57.15031(a). That standard, titled, "Location of self-rescue devices," provides,

> (a) Except as provided in paragraph (b) and (c) of this section, self-rescue devices meeting the requirements of standard 57.15030 shall be worn or carried by all persons underground. (b) Where the wearing or carrying of self-rescue devices meeting the requirements of standard 57.15030 is hazardous to a person, such self-rescue devices shall be located at a distance no greater than 25 feet from such person. (c) Where a person works on or around mobile equipment, self-rescue devices may be placed in a readily accessible location on such equipment.

The citation alleged that,

> [a] miner took off his mine belt, with his self rescuer on it, inside the mine and exited the mine without the belt. The miner traveled about 1500 feet, according to the operator, from the "848" station to the "800" portal without a self-rescuer. The practice of traveling in an underground mine without a self-rescuer exposes a miner to suffocation hazards in the event of a mine fire. Miners access the mine daily and have been trained on the policies and procedures regarding wearing a self rescuer in the mine. Serious, potentially fatal suffocation type injuries would be expected in the event of an accident.

Ex. P 3-1.

The citation gravity was marked as unlikely for the injury or illness, and not significant and substantial, but the expected injury or illness was marked as "fatal." The number of persons affected was listed as "one" and negligence as "low." *Id.* As for abatement terminating the

citation, the citation reflects: "The miner was retrained on the policies and procedures regarding the use of a self rescuer, eliminating the hazard." *Id.*

Inspector Basich conducted his inspection at the mine pertaining to this matter on March 14, 2017. Tr. 19. This was part of a regular inspection. With him was Jerry Hulsey, another Mine Safety and Health inspector. Basich issued Citation Number 8785581 on March 15, 2017. The citation was issued upon the inspector observing a miner about to re-enter the mine without wearing his mine belt and self-rescuer. Upon questioning him, the inspector learned that the miner had removed his mine belt and self-rescuer near the 848 underground level and then exited to the surface without wearing the self-rescuer. Compounding that mistake, the miner wanted to correct the error by returning underground to retrieve his self-rescuer. Another miner, Reid Miller, equipped with a self-rescue device, then entered the mine and retrieved the other miner's device. The inspector required that the miner be retrained about the proper use of his self-rescue device, before being allowed to re-enter the mine. Tr. 20-21. In exiting the mine without his self-rescuer, the miner traveled about 1500 feet. Tr. 22. The purpose of the self-rescue device is to remove carbon monoxide from the atmosphere so that a miner can escape that poisonous air. *Id.*

Basich cited 30 C.F.R §57.15031 with its requirement that the self-rescuer device be worn or be carried by a miner at all times underground. The provision allows that if wearing the device creates a hazard, it may be located no more than 25 feet from the miner. Tr. 22-23. In this instance the miner was about 1500 feet away from his self-rescuer device. Tr. 24. As noted, the inspector marked the gravity as unlikely, but fatal. His reasoning was because "there's positive ventilation in the mine at the time, no history of mine fires or gas inundation, a straight exit path out of the mine, and there were other miners present." *Id.* However, he marked it as fatal because,

> [a]n inundation of a mine by CO or carbon monoxide from either a fire or it could be a fire outside of the mine, that the mine has positive ventilation that CO could be brought into the mine, in any event breathing CO can be fatal. So any gas inundation of CO inside a mine could prove to be fatal and that's why MSHA mandates the wearing of self-rescuers.

Tr. 25.

For negligence, the inspector marked it as low, "because this was the inadvertent act of a relatively new miner. I believe he had been working at the mine less than a year. The mine had policies and procedures in place that required the use of a self-rescuer, and the miner was trained. So that's why I rated this as low." Tr. 26.

On cross-examination the inspector stated that there were three or four miners working at the site. Tr. 62. As to the miners' location, he stated that they were on the 49 winze, which the Respondent advised was the "800 station." *Id.* Asked what combustible material was present from the portal to the 800 station, the inspector stated that it was the timber support in the mine

as well as the material being used to build the stairs. Tr. 63-64. Later, he added that abandoned workings in the mine left behind discarded timber supports. Tr. 70.

The inspector described the hazard as carbon monoxide caused by a fire. It was the Respondent's position that, if a fire were to occur, a miner could have simply walked out using the second exit. Tr. 66. As Mr. Miller is not an attorney, the Court attempted to refine the Respondent's question, asking if his point was that it would be "extremely unlikely that any fatality would occur because should there be some combustible material producing CO entering the mine the miner had multiple means to escape the mine besides the direction from which he originally entered, something like that." Mr. Miller agreed that was the point about which he was trying to question the inspector. *Id.*

The inspector responded that his rationale was that, as the miner was then at

> 1400 feet inside the mine ... [t]he mine becomes inundated with smoke, can be disorienting, can be a lot of things. Putting on a self-rescuer is not the easiest thing, however that's what you do to save yourself. Picking which route to go at that point to exit the 2100, which is the secondary escape, which I inspected, that takes time probably 15 minutes, maybe 20, maybe somebody not as big as I could make it quicker, but it's -- it wasn't easily accessed and exited by me. So I think the reason for the regulation is so that a miner can don his self-rescuer and safely exit the mine.

Tr. 67.

The questions posed by the Respondent were intended to show that it was not reasonable to mark the citation as "fatal." Tr. 69. As Mr. Miller put it, "That is my only complaint with this citation." Tr. 69. His contention was that the events leading to an underground fire or explosion were quite remote. Tr. 69-70. Inspector Basich then added that in addition to the supporting timbers and the material used for stairways, "there are many abandoned workings in the Sixteen to One Mine, and as a consequence supports have been discarded, leaving a lot of unused timber in the mine." Tr. 70. However, the inspector could not state that any of the discarded timber was between the 800 station and the portal. *Id.* The inspector acknowledged that the miner who left his self-rescuer had been properly trained on it, prior to the citation. Tr. 71. He also agreed that he had never seen a similar violation at the mine, where a miner did not have his self-rescuer appropriately nearby. *Id.*

Upon re-direct, the inspector testified that when evaluating the expected injury, his evaluation is not limited to the cited mine, but rather takes into account such incidents generally, that is, the importance of self-rescuers in the event of a mine fire at all mines.[5] Nevertheless, he asserted that his view was not based upon his general concern about what that safety standard addresses, *but rather what he observed at the particular location.* Tr. 72. When asked about the

[5] The inspector added that he applied the same approach to the other citation he issued during this inspection, involving an outdated inspection certificate for an air compressor. That is, he considers the hazard associated with the violation as it pertains to mines in general, not solely the Respondent's mine.

direction smoke would travel in the event of a fire, the inspector stated that temperatures at the mine can impact whether smoke-filled air would travel in or out of the mine at any given time. Tr. 76.

Mr. Miller, testifying with regard to this self-rescuer citation, stated that the fatal designation was inaccurate. Tr. 93. Miller asserted that, while that may be true in some underground mines, it does not apply to the Sixteen to One. He expressed that, applying the site-specific test to the violation, suffocation hazards in the event of a fire would not exist. Tr. 93. He maintained that, in the event of combustion or a fire or smoke inhalation, the need to use a self-rescuer would be non-existent and no miner would opt for that at the mine. Tr. 94-95. Miller asserted that not even lost workdays could occur. Tr. 95.

Upon cross-examination, Miller did not dispute that it was 1500 feet from the 800 portal and that the miner did not have his self-rescuer with him at the surface. Tr. 106-107. However, Miller did not agree that inspectors should consider the overall general injury dangers presented by miners who do not have their self-rescuers present. Instead, it was his view that the inspectors should evaluate the danger based on the Sixteen to One mine. Tr. 109. Apart from that view, Miller did not agree with the inspector's distinction between the *type of injury* and the *likelihood that such an injury would occur*. Instead, he believed that, because the miner was in an area where there were two ways to exit the mine, neither designation was appropriate. Tr. 110-111. It was his argument that the miner's location was at a "V," and therefore he had two exits to the outside and one of two exit routes would not have any smoke. Tr. 111-112.

Jerry Dean Hulsey also testified for the Secretary. Mr. Hulsey retired in March 2018. He had about 22 years of mining experience, mostly at sand and gravel operations. Following that he was an MSHA inspector, working in that role for some 20 years. Tr. 82-83. As an inspector he has inspected the Sixteen to One Mine about ten times. Tr. 84. Hulsey was with Inspector Basich during the March 2017 inspection at issue here. Regarding the self-rescuer violation, Hulsey stated that, during lunch on the day of the inspection, he was chatting with a new miner when he learned that the miner had left his self-rescuer in the mine. Apparently unaware of the safety implications, the miner offered to go back into the mine to retrieve the self-rescuer device. Tr. 89.

In the Secretary's post-hearing brief, it was acknowledged that the violation was unlikely to cause injuries, that there was positive ventilation in the mine, that the mine has no history of mine fires and that there was a straight exit path out of the mine. Sec. Br. at 5. The Secretary also admits that the negligence was low.

The Court, upon consideration of the testimony, credits Mr. Miller's view that a fatality was not likely in the event of smoke from a fire. At most, given his testimony about escape routes in the event of the admittedly "unlikely" event of the injury or illness for this non-S&S matter even occurring, the injury that could reasonably be expected at this mine would be lost workdays or restricted duty.

A proposed penalty of $220.00 was assessed by the Secretary under Part 100. Exhibit A to Docket WEST 2017-0546. Upon consideration of each of the statutory penalty factors, as set

forth generally and particularly, above, the Court's reevaluation of the expected injury **produces a penalty of $100.00.**

Citation No. 8785582

Citation No. 8785582, a section 104(a) citation, invoked 57.13015(a). In relevant part, that standard, titled, "Inspection of compressed-air receivers and other unfired pressure vessels[6]," provides,

> Compressed-air receivers and other unfired pressure vessels shall be inspected by inspectors holding a valid National Board Commission and in accordance with the applicable chapters of the National Board Inspection Code, a Manual for Boiler and Pressure Vessel Inspectors, 1979. This code is incorporated by reference and made a part of this standard.

The citation alleged,

> No documentation of a current inspection for the Speedair air compressor (ID # 3622-06), located in the lower shop at the mine, could be produced at the time of inspection. The air compressor is plugged in and the receiver tank is holding pressure. This condition exposes miners to tank explosion hazards if the air receiver tank is defective. Miners access the lower shop area of the mine several times a day at the beginning and end of the shift, and sometimes at lunch. Serious, potentially fatal blunt force trauma type injuries would be expected in the event of an accident.

Citation No. 8785582.

The citation gravity was marked as unlikely for the risk of injury or illness, and not significant and substantial, but the expected injury or illness marked as fatal. The number of persons affected was listed as one and the negligence as "moderate."

Inspector Basich testified about Citation No. 8785582, which was issued on March 15th. As noted, this involved a pressure vessel for an air compressor located in the lower shop of the mine. The inspector sought current permits for each of the mine's pressure vessels. Such permits were provided for all but one and therefore he issued a citation for that one vessel's lack of a current permit. Tr. 28. Three other vessels had permits and they all had the same permit date. *Id.* The inspector accepted the remark of one of the mine's employees (Ms. Rae Bell Arbogast) who informed Inspector Basich that the State of California pressure vessel inspector had simply missed one when performing his inspections of the vessels. Tr. 29.

The inspector also determined that the cited compressor was in use, as it was plugged in and holding pressure. Upon inspecting it, that is, apart from the issue of its lack of a current permit, the inspector determined that it was functioning properly. Tr. 31.

[6] A pressure vessel is a vessel that holds compressed air. Tr. 17.

The standard cited by the inspector 30 C.F.R. §57.130015, requires that a pressure vessel have a current inspection by a person certified to conduct pressure vessel inspections. It also requires that the mine operator keep records of such inspections and provide them to the inspector when requested. Tr. 32.

On direct examination, when referred to Ex. P 6, the inspector identified it as excerpt pages from the 1979 National Board Inspection Code, Manual for Boiler and Pressure Vessel Inspectors. It establishes "rules of safety governing the design, fabrication and inspection during the construction of boilers and pressure vessels." Tr. 33. Its intention is to ensure continued safe use of these devices. *Id.* The manual aside, the violation asserted here was the failure to establish that there had been a current inspection. Tr. 35. The inspector agreed that he found nothing inadequate about the compressor; his issue was solely that there was an absence of documentation. Tr. 36. The inspector added that his examination of the compressor was not the equivalent of a full inspection, but again that his issue was confined to the lack of documentation. Tr. 37.

Referring to Ex. P 7, the California Code of Regulations provision referring to air tanks, the inspector noted that Title 8, Section 461 of that code requires a permit for such tanks operation. Per that provision, the permit for the tank in question expired on September 21, 2015 and therefore, at the time of his inspection, the permit was 18 months out of date. Tr.41.

As noted, for this citation the inspector marked the gravity as "unlikely" but "fatal," if an accident occurred. Tr. 41. The "unlikely" designation was based on his examination of the tank, incomplete as it was, because he found that "the tank the gauge was in good apparent condition, the pressure relief valve was working, and the tank had not been altered or modified in any way." *Id.* The "fatal" designation was based on his view that in the "event of a pressure vessel explosion, shrapnel would be thrown in many directions. The air compressor is located in the lower shop. Miners work in the lower shop. ... so there was exposure and [if there was] an air tank explosion [he]would expect fatal blunt force trauma type injuries." Tr. 42. The inspector agreed that, as long as there was exposure, he would *always* mark a citation such as this one as "fatal" for that reason. *Id.* As he noted, there was exposure here, as the tank was located in the lower shop and miners would be in close proximity to it. Tr. 43.

For negligence, the inspector marked that as "moderate," because the vessels are required to be maintained and currently inspected, all to protect miners from potential injury. Tr. 44. Further, the inspector noted that the operator was aware of the inspection requirement, "because [the mine] had all [of its] other air compressors inspected. This one somehow was missed." *Id.*

Given that all the other vessels had been inspected, the Court inquired why the inspector could not have marked the negligence as low. The inspector responded that, for him, low negligence requires considerable mitigating factors. To meet that, he would need a showing "that the operator had done everything he could possibly do to keep -- in this case keep this pressure vessel inspected." *Id.* In effect, the inspector used the fact that all the other vessels had

been inspected, to show that the mine knew of the requirement and therefore that someone had "dropped the ball." *Id.*

In further explanation of his moderate negligence designation, he added that he "always" starts with "moderate" negligence and then adds his observations and any mitigation that may be presented. To be listed as low negligence, he will "take all that into account, and so if there are numerous mitigating factors that showed me that they have policies and procedures in place and they have done everything possible, [he] *might* have evaluated it as low." Tr. 45 (emphasis added). On the other side of the issue, the inspector stated that he applies the same high threshold in deciding whether to mark a violation as above moderate and list the negligence as "high." Tr. 46. Thus, he requires a "large amount of evidence" before he will mark the negligence as "high." *Id.*

Upon cross-examination, the inspector agreed that the fact all the other compressors had been inspected was a mitigating factor. Tr. 47. Asked if the mine's office representative had shown him "the phone record of the attempts [the mine] tried to get the inspectors to come up that predated even your date of inspection," the inspector responded that he was not shown that information, but had that occurred, he would have considered it as mitigation. *Id.* The inspector's notes for this citation reflect that he held a close-out conference with the mine office representative, Ms. Rae Bell Arbogast. Tr. 50. Those notes do not mention any comment from the mine representative about either of the cited matters. *Id.*

The Respondent questioned the inspector about the size of the cited tank but the Court ruled that the regulations do not exempt the inspection requirement based on the tank's size. The inspector did agree that his concern was the risk of an explosion, but he also admitted that he saw no indication that the compressor was altered or weakened and that the pressure relief gauge was operable and functioning as well. Tr.54. The inspector also noted that the tank was plugged in and holding pressure, and regretted that he did not include that in his notes. *Id.* However, no tools which would be used with the compressor were connected to it and the inspector conceded that the compressor would only be used for the operation of small hand tools. Tr. 56.

On re-direct, the inspector affirmed that, in evaluating what it would take for the tank to explode, that he considered "all the things that [he] checked and there was nothing wrong with those particular things, like the pressure relief valve and whether it was holding pressure, et cetera," and that he considered those things in rating the likelihood of an explosion. Tr. 73. However, it was still his perspective that an uninspected pressure vessel "is a bomb." Tr. 74. In terms of assessing the expected injury if the event occurred, he explained that inspectors are trained to consider what would be the worst case result in the event of an accident. *Id.* Here, his fatal designation was based upon miners being within 20 feet of an operating pressure vessel holding pressure. *Id.* In general such vessels operate at between 90 and 150 psi and if it exploded shrapnel would be created with fatal results for anyone within the blast radius. Tr. 75.

The inspector did not consider the air tank issue to be merely a paperwork violation because an injury could be involved. Tr. 77. In contrast, he identified a failure to file a quarterly report, or filing such a report late and, as another example, training, which was done, but for which the documentation was not completed, as examples of pure paperwork violations.

Id. Therefore, he resisted the Respondent's suggestion that the air tank was a paperwork only matter, because "in [his] mind an uninspected air pressure vessel is a bomb."[7] *Id.*

As noted, Jerry Dean Hulsey testified for the Secretary and his testimony included the compressor certification issue. Regarding the compressor violation, Hulsey stated that he double-checked and determined that the inspection certificate had in fact expired. Tr. 89. He also confirmed that the cited compressor was plugged in at the time of the inspection. *Id.*

Regarding the alleged compressor inspection violation, Mr. Miller admitted that the violation occurred, and then made a contention similar to the self-rescuer violation, asserting that there was zero possibility of an injury occurring regarding the compressor's lack of a current inspection certificate. Tr. 97. Admitting that the compressor was overlooked when the testing and re-certification was done for the other compressors, he noted that there was no incentive to have that omission occur, as it is an expensive proposition to have a California state inspector come to the mine, apart from the cost for each device inspected. Tr. 98. The Court agrees with Miller's comments on these points. Further, Miller maintained that significant efforts were made to have the state inspector come back to the mine to inspect the lone uncertified compressor. Tr. 99. With the expense of having the state inspector return to the mine at $600, the mine decided to remove the compressor from service. *Id.* Also, speaking to the likelihood issue, Miller asserted that the compressor was like new and relatively unused and therefore the likelihood of it turning into a bomb was farfetched. *Id.* Miller asserted, correctly, that under California law, permits to operate such equipment remain effective "during the time that a request for a permit remains unacted upon." Tr. 101. However, Miller conceded that he had no proof that he requested another permit inspection. *Id.* Following a back and forth between the parties, the Court ruled that, as Mr. Miller had no documentation that he requested a state inspection of the subject compressor until *after* it was cited, that exception did not apply in this instance. Tr. 104-105.

The Court then directed that, apart from the documentation issue, Miller could still testify about his disagreement with the inspector marking the citation as fatal and the negligence as moderate. The Court also noted that the inspector conceded that the violation was not S&S and that it was unlikely that an injury could occur. Tr. 105.

Upon cross-examination regarding the compressor inspection violation, Miller admitted that it was possible that no one noticed, between October 2014 and March 2017, that the mine had one compressor with a permit issued four years earlier than the others. Tr. 114.

The Secretary assessed the citation under Part 100 at a proposed penalty of $492.00. The Secretary admits in its post-hearing brief that the compressor's gauge was in good apparent condition, that the pressure relief valve was working and that the tank had not been altered or modified in any way. Sec. Br. at 9. The Secretary contends that the $492.00 assessment for this

[7] The Court advised that it would discount the two analogous hypotheticals offered by the inspector. This determination was based on their limited probative value to this matter. However, the Court does agree that the lack of a current inspection permit is more than a pure paperwork violation. As the Court noted, it would instead rely upon the inspector's view, generally, about the risk that compressors present, which he analogized to a bomb. Tr. 78.

violation "is appropriate based on the size of the Respondent's business and its MSHA violation history." *Id.* at 10. This argument by the Secretary appears for each citation and the Court finds that the Secretary is simply commenting upon those penalty determination factors and is not suggesting that the penalty sought is justified on those factors alone.

The Court does not take issue with the inspector's evaluation of the gravity – that it was unlikely to occur, that it was not significant and substantial, and that, unlikely as it was, if the compressor were to explode, a fatality was possible, albeit remotely. It was not disputed that the compressor was relatively new. However, based on all the testimony, the Court considers the negligence to be less than moderate. While the failure to inspect one of the compressors does not excuse the violation, this was clearly an oversight; one compressor was missed by the state inspector, with no design on the mine's part to avoid an inspection of that compressor, which was admittedly in good condition. Further, the Court has a different take than the Secretary's view that the penalty is appropriate based on the size of the Respondent's business and its MSHA violation history. The Court views those factors as lessening the assessed penalty for this violation. Accordingly, upon consideration of the totality of the circumstances and the penalty factors, **a penalty of $100.00 is imposed for this violation.**

Docket No. WEST 2017-0685

Citation No. 8879879

This citation, invoking 30 C.F.R. §57.15030, listed the condition or practice as follows: "A personal Mine W65 Self-Rescuer (unit EN8047) actively used at the underground operations was not maintained per manufacturers operating instructions. A self-rescuer may provide a miner 1-hour of survival and escape, in the event of a mine fire. It must be maintained (weighed) at least each 90-days to ensure readiness for intended use." Ex. P 10-1. The citation listed under gravity that the injury or illness was "unlikely," not S&S, one person affected, and the expected injury as "fatal." *Id.*

The standard, titled, "Provision and maintenance of self-rescue devices," provides: "A [one]-hour self-rescue device approved by MSHA and NIOSH under 42 CFR part 84 shall be made available by the operator to all personnel underground. Each operator shall maintain self-rescue devices in good condition." 30 C.F.R. § 57.15030.

MSHA inspector Craig Rautiola, the issuing inspector, testified regarding this violation. It is accurate to state that Inspector Rautiola has extensive mining experience. Tr. 128-130. Also, he has inspected the Sixteen to One mine on three occasions, including June 2017. Tr. 131-132. On June 27 of that year he found only *one* violation and issued a citation for that, Citation No. 8879879. Tr. 134, Ex. P-10. The citation alleged that a self-rescuer was not being maintained as required. Tr. 133. The inspector explained that, as part of good maintenance, self-rescuers have to go through a visual inspection and a weighing at least every 90 days. Tr. 135. In this instance he found that one self-rescuer device, assigned to Michael Miller, and which device was put into service in November 2016, had not been weighed thereafter. Tr. 136-137. All the other self-rescuers had been weighed in December 2016 and again in March 2017. *Id.*

Finding this failure, the inspector issued the citation, alleging a violation of 30 C.F.R. §57.15030. *Id.*

An MSHA program policy manual applicable to the cited standard amplifies the standard's requirements. It provides that,

> the operator needs to have an effective inspection program to ensure that each self-rescue device is maintained in good condition. This inspection includes a visual inspection and weighing. The visual inspection serves to identify surface defects and the weighing of each self-rescuer of 90 -- at least every 90 days has to be recorded and the record kept for inspection.

Tr. 138, Ex. P 11.

The operating manual for the cited self-rescue device contains the same inspection and weighing requirements. Tr. 139, Ex. 12. In the issued citation, the inspector marked the gravity as "unlikely," and "fatal." Tr. 139.

Explaining the basis for those designations, Rautiola stated,

> the unit visually looked good so I didn't see any surface blemishes, any dents, and then in addition to that fact the self-rescuer was just put into operation in November. So it had seven months on it. So it was relatively new and I didn't see any visual damage to the unit.

Tr. 140.

As for his determination that the injury and illness would reasonably be expected to be fatal, he explained, if it has to be used "...it means there is a fire in the mine. One of the off gases of a combustion process is carbon monoxide and in very small quantities carbon monoxide is toxic to the human body," and as the Court notes, can be deadly. Tr. 140. Negligence was marked as "moderate," because, according to Rautiola, "self-rescuers have been in use for decades and therefore the maintenance requirements were well known." Supporting this conclusion, the mine was following the requirements *except for one device*. Given that isolated failure, the Court inquired why the inspector didn't consider the negligence to be "low." Tr. 141. The inspector responded that it was an obvious and required task. *Id.* The Court inquired if the inspector would ever mark such a violation as "low" negligence. To this, the inspector responded that he "might" mark it as low, if one unit was not so maintained if it was a spare, but if that spare unit was being regularly used, he would mark it as "moderate" negligence. Tr. 142.

Asked for his definition of "moderate negligence," the inspector replied, "an experienced underground miner would or should have known that his or her self-rescuer needed to be weighed every 90 days." Tr. 143. He agreed that in his view, "would or should have known," is the applicable test for moderate negligence. *Id.*[8]

[8] Potential Exhibit R-06 was not admitted except for two pages on the back of the exhibit. Those two pages were admitted as Ex. P-32. Tr. 147. The inspector identified those pages as a

While cross-examining Mr. Rautiola, Mr. Miller informed the Court that he was not challenging the lack of an inspection of the self-rescuer. Tr. 152. He seemed to assert that the device was not on his belt when he went underground, but was instead in the back of his truck, Miller then advised the Court that he simply did not recall the device's location at that time. Tr. 153. In a somewhat unclear exchange about the point he was trying to make, the Court noted that if Miller was asserting that in fact he had a second self-rescuer on his person when he went underground, if found to be true, such a fact would impact the "fatal" designation for this violation. Tr. 155. However, Miller never established the spare rescuer claim.

The inspector stated that he and Miller did not go into the mine together on June 20th. Instead, on that date, he discovered, while in the mine's office, the issue of the self-rescuer not being weighed. Tr. 156. The following day, the inspector raised the issue of the self-rescuer records. A citation was then issued, as Mr. Miller did not have a justification for the failure. Tr. 157.

Mr. Miller next testified regarding the self-rescuer, stating that he doesn't like wearing it on his belt because it weighs heavily on his hips. He then asserted that the mine has extra self-rescuers "down there." Tr. 162. *He repeated that his challenge was limited to the "fatal" designation. Id.* The Court noted on the record that it could view the negligence differently than the inspector, since all but one self-rescuer was properly maintained. Tr. 161.

The violation was established for this citation and the Respondent does not contest this. Rather, as noted, Miller took issue with the assertion that the injury could reasonably be expected to be fatal. The Secretary admits that the inspector did not see any visual damage to the self-rescuer and that it was "relatively new," having been placed in service only seven months earlier. Sec. Br. at 12. This self-rescuer violation is distinguishable from the earlier-described citation, in that this one involved a failure to inspect and weigh a relatively new device, but there was no charge of failing to have the device present while underground. The unweighed device was in the mine office, which is at a different location from the mine. The Secretary contends that the negligence was appropriately designated as "moderate" because the Respondent, through Mr. Miller, was well aware of the need to inspect and weigh the device from Part 48 initial and refresher training, which address this requirement. The Secretary also ascribes the moderate negligence designation because "maintaining [the mine's] self-rescuers in ready condition is crucial to ensuring the safety of its underground miners in the event of a fire." *Id.* at 13.

The proposed penalty under Part 100 was $492.00. Docket No. WEST 2017-0685, and Ex. A for Docket No. WEST 2017-685. In support of the Secretary's view that the proposed penalty of $492.00 is appropriate, the Secretary again asserts "that this penalty is appropriate based on the size of Respondent's business and its MSHA violation history." *Id.* at 14. This analysis is based upon the Part 100 calculation. *Id.*

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photocopy of the spreadsheet he would have examined at the time of his inspection. While he confirmed that those pages showed the unit in question and that it was assigned to Mr. Miller, the inspector stated that the lines through Miller's name were not present when he examined the self-rescuer. Tr. 146. Also, the handwritten information on the form below the line "V equals visual examination," was not present when he examined the document. Tr. 146-147. The Court finds the inspector's testimony credible on these points.

Given that only one self-rescuer was non-compliant, that the device was not then in use, that the device was, as the Secretary concedes, a relatively new self-rescuer, and that, as the inspector acknowledged, the unit visually looked good and had no surface blemishes or dents, the Court agrees that the "fatal" designation is too much when the evidence is considered in context and in its entirety. **The Court imposes a civil penalty of $100.00**, an amount which the Court considers to be sufficient, both upon taking into account the statutory criteria and the effect of deterring future violations of the cited standard.

Docket No. WEST 2018-0100

Citation Nos. 8879886, and 8879887

Testimony was received with regard to Citation Nos. 8879886, and 8879887, out of Docket No. WEST 2018-100. Both were issued on August 18, 2017 and each was assessed with a proposed penalty of $492.00. Tr. 166, Ex. P 14.

Citation No. 8879886

This citation alleged a violation of 30 C.F.R. § 57.6160(b)(3). That standard, titled, "Main facilities," provides at subsection (b)(3): "Main facilities used to store explosive material underground shall be - ... (3) Kept clean, suitably dry, and orderly."

The Citation alleged that,

> [t]he Detonator Explosive Magazine, located underground at the 800-level beyond the Tightner Shaft (from the 800-Portal), was not suitably Dry for long-term storage of Dyno Nobel Nonel shock tube detonators nor Cobra Blasting Caps. Unpredictable degradation of these products can occur under damp storage, reducing the shelf life of the products, and/or negatively impacting the performance of the detonators. Hazard to the miner is inaccurate timing of the delay, dead-pressing of adjacent explosives, cutoffs and/or misfire. This hazard condition is very serious resulting in accidents up to fatal classification . The site Blaster's license expired September 16, 2016.

Ex. P 14-1.

In what is a familiar evaluation for the citations in these dockets, the inspector marked the gravity of the injury or illness as unlikely, not S&S, with one person affected and the injury or illness marked as fatal. Negligence was, as with the others, listed as moderate.

Regarding this Citation, the inspector stated that while underground, they "went down the 49 winze, came out the ballroom and ended up at an explosive magazine in a distant point in the mine. The explosive magazine was specifically for storage of detonators." Tr. 167. There he found a wooden wall with a locked wooden door. Once past the wooden door, the remainder of the structure was natural rock. Inside the structure, there was also a table, approximately 4 by 6.

On that table were numerous boxes of detonators. [9] *Id.* Although things were neat and orderly inside, the inspector observed significant dampness in the magazine. He also found there was no air flow there but he determined through an air quality reading that there was no toxic gases. His concern was the dampness and his stated observation that the detonators were water soaked. They were also stained and wet to the touch. Tr. 168. When asked, Miller informed the inspector that no blasting was scheduled; the miners were only doing rehab work. This reassured the inspector that no one would be using those explosives. *Id.*

At his hotel that evening the inspector began some research about the detonators he observed in the magazine; a Cobra number 8 blasting cap; and a Nonel. Tr. 169, 176. His research, which continued over the next several days, disclosed that both types of these detonators "need to be stored in a dry, cool, well ventilated magazine. Tr. 170, Exhibits P 16 and P 17. Following that, the inspector then contacted the detonators' manufacturers. Tr. 173. They confirmed his concerns about the detonator storage. Ultimately, the inspector learned, regarding his concern over any dangers to miners from wet detonators, that number 8 blasting caps can never be exposed to water. Tr. 174. The manufacturer advised that, once wet, the number 8 caps were deemed defective and they could not recommend their use. As for the Dyno Nobel detonators, those devices are water resistant but not waterproof. Those devices have a three year shelf life when stored in a cool, dry, environment. Tr. 175. That shelf life is shorter when stored in wet conditions as that "can degrade the product within the detonator to an unpredictable timing." *Id.* This is not insignificant.

The inspector explained,

> the danger to the miner in that case is, one, when you use the detonator for a design blast you can get a misfire or you can get what is called a dead press or you can get what is called a cut up. In any case, if any of these three event happen at the design blast the miner would have to go back into one of the most dangerous activities in mining is dealing with a misfire, okay. So in the case of a misfire you have to go back after a safe amount of time and you have to remove the defective detonator from the explosive or you need to find a way to detonate that explosive with other means, very dangerous activity.

Tr. 175-176.

Exhibits P 15-1 and 15-2 are photos taken by the inspector of the Cobra No. 8 blasting caps. According to the inspector, the photo shows delamination of the cardboard, showing that the box was very, very saturated. Tr. 177-179.

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[9] There were a number of boxes in the magazine. "[O]ne box was for the number 8 blasting caps and then each one of these different delays on the Nonel had its own autonomous box. ... There were eight boxes of Nonel and one box of the Cobra blasting number 8." Tr. 184. Every one of the boxes had the same saturation issue. *Id.*

Upon inquiry from the Court, the inspector stated that everything in the magazine was neat and orderly and that the box with the detonators was closed. Tr. 179. He added that the "specific box had four layers of like a pressed Styrofoam in it and each layer had 27 detonators in it. So the box contained 108 detonators in layers of 27." Tr. 180.

Asked whether, when he looked inside the box, it looked dry, *the inspector could not state that he saw dampness on the detonators themselves*. Tr. 180. He stated that, as the box was fully saturated all the way through, it would have come in contact with the interior but then admitted that "because the detonator is a metallic, ... [he] didn't see any visible moisture." Tr. 180. Clarifying the conditions he observed, the inspector affirmed that he "really [was] unable to determine if the Styrofoam shelves or the detonators themselves were actually damp. All you could tell was that the cardboard box certainly on the outside and you just said saturated through to the inside was damp." Tr. 181. However, the inspector did not concede that it was possible that the detonators themselves were still dry along with the dry Styrofoam shelves, because there was no hermetic seal between the shelves. Tr. 182. Nevertheless, he did not pick up the Styrofoam shelves to determine if there was moisture on them because the detonators are very sensitive. *Id.*

The inspector made it clear that his issue was directed at the wetness in the magazine itself. Therefore, if one assumed that the cardboard boxes were all dry, he still would have had an issue because the magazine itself was wet. Tr. 185. Because there could be some misunderstanding, when the inspector referred to the magazine, he made it clear that he was speaking to *the room itself* where the boxes were stored. Tr. 186.

Upon finding the conditions, the inspector cited 30 C.F.R. §57.6160(b)(3) and its provision that main facilities used to store explosive material on the ground shall be kept clean, suitably dry and orderly." Tr. 187. As he described the magazine, "the walls, the roof, the floor of the magazine were saturated, damp, wet. I took a humidity measurement of 87 to 90 just exterior to the magazine and further evidence was the saturated cardboard boxes within the magazine." Tr. 187. Further, as mentioned, he evaluated the ventilation. As there was no airflow, his anemometer could not provide a reading. Therefore, while he found the air quality to be good, the air flow was not.

Assessing the gravity, the inspector found the injury to be unlikely. This was based on Mr. Miller's statement that "they hadn't blasted since 2016 and they had no blasting scheduled in 2017 because his crew was fully dedicated to a rehab project in the 49 winze." Tr. 188. However, he classified the expected injury as "fatal," a determination based upon his "own experience and then in addition to that from my confirming conversations with the manufacturers. The danger to the miner is a misfire for that detonator not to work as intended." Tr. 189.

For negligence, he rated that as "moderate" for several reasons: "the magazine was obviously damp. ...The product specification sheets for both of these detonators clearly states that the detonators have to be stored in a clean, dry, well ventilated environment." Tr. 189. And, although "the mine had a licensed blaster, ... that individual's license had expired in 2016. So they didn't have an active blaster with a license." *Id.* Of note, the inspector had examined the

same magazine only three months earlier and noted that it was damp then, but not so damp as to be citable. *Id.* He informed Mr. Miller of this dampness at that time and was told that the magazine and its contents were planned to be moved to a location outside the mine. Tr. 190.

The Secretary seeks a civil penalty of $492.00 for this alleged violation.

Citation No. 8879887

Inspector Rautiola also testified with regard to Citation No. 8879887, issued by him on August 18, 2017. Tr. 190, Ex. P 19. The citation invoked § 57.6900, titled, Damaged or deteriorated explosive material," provides, "Damaged or deteriorated explosive material shall be disposed of in a safe manner in accordance with the instructions of the manufacturer."

This section 104(a) citation alleged:

> The detonator storage magazine, located underground on the 800-level beyond the Tightner Shaft (from the 800 portal), contained Dyno Nobel Nonel shock-tube detonators beyond their shelf life. One box of detonators had expired in 2014. The boxes containing these detonators were also very damp. The detonators must be stored in a suitable dry, well ventilated explosive magazine, per the Manufacturer. Unpredictable degradation of these products can occur impacting the performance of the detonators. Hazard to the miner is inaccurate timing of the delay, dead-pressing of adjacent explosives, cutoffs and/or misfire. This hazard condition is very serious resulting in accidents up to fatal classification. The site Blaster's license expired September 16, 2016.

Citation No. 8879887.

As with the related citation involving these same explosives, per Citation No. 8879886, the inspector marked the gravity of the injury or illness as unlikely, not S&S, with one person affected and the injury or illness marked as fatal. Negligence was listed as moderate.

The citation was issued at the same magazine regarding Citation No. 8879886. This one dealt with the manufacturing dates of those detonators. One box had a manufacturing date of 2011, and another had 2012. This was a problem because the manufacturer states that the shelf life is three years. Therefore, these detonators were beyond their shelf life. Tr. 191-192. The inspector then cited the Respondent for a violation of 30 C.F.R.§57.6900 and its provision that "damaged or deteriorated explosive material shall be disposed of in a safe manner in accordance with the instructions of the manufacturer of that product." Tr. 192. As with the other citation related to the magazine, the inspector marked the gravity as "unlikely," since the mine had no blasting on the schedule for the year. Tr. 193. Applying the same approach, with his concern about a misfire, he classified it as "a highly dangerous activity that could result in injuries up to fatal." *Id.* Negligence, too, was marked as "moderate," given the clear specification about the shelf life, the storage conditions, and that the mine no longer had a licensed blaster. *Id.* The latter factor, no licensed blaster, is significant because such a person would do a monthly

inventory of the magazines, which inventory would have found the shelf life problem. Tr. 193-194.

Upon cross-examination regarding these twin citations for magazine and detonators issues, the inspector stated that he cited 57.6900 as applicable because he analogized it to an "out-of-date product as a deteriorated product, whether it's a jug of milk or an explosive." Tr. 195. The cited products had expired, a determination he reached based upon the product specification sheets and upon speaking with a representative from Dyno Nobel about the Nonel product. *Id.* The inspector agreed that the Nonels are very good in a wet hole, as it is water resistant. However, he distinguished use from storage. For storage, they are not to be stored in wet conditions, as they are water resistant, but not waterproof. This is relevant because the manufacturer's representative informed that the three year shelf life applies when stored in dry, well ventilated conditions.[10] Tr. 197-198.

In his direct testimony, Mr. Miller stated that the boxes could not have been as wet as the inspector described, asserting that the boxes could not have looked so good upon being transported to the surface had their condition been as claimed. Thus, Miller contended that the degree of wetness of the box was overstated. Tr. 210. Miller also stated that no one at his mine would use a defective blasting cap for the end of a fuse. Tr. 211. More to the point, Miller stated that the Styrofoam used to store the caps was layered and the caps are stored in a little hole within that material. This shows, he contended, that the caps were not defective because of the moisture on the cardboard box or the humidity in the room. *Id.*

As for the Nonels, which are very different from the blasting caps, Miller asserted that none were wet. *Id.* In addition, none of the Nonels were removed and there was no type of testing done on them. Tr. 212. Miller emphasized that while there was moisture on the boxes, they were not supersaturated. *Id.* In terms of negligence, Miller seemed to concede that there was moderate or low negligence, but he rejected the claim that a fatality could occur. In part, this contention stemmed from the small number of miners employed at the Sixteen to One Mine. That is, it was Miller's view that where a mine with hundreds or more employees might be unaware of such hazards associated with these blasting materials, by contrast, the small number of miners at his mine would be aware of the issue. Tr. 213. Miller also expressed some frustration, as he related that the Nonels were placed underground because an earlier MSHA inspection had issues with the surface magazine for them, and this led to the mine locating them underground, primarily for security reasons. *Id.* MSHA did not dispute this assertion. Miller also stated that the issue of out of date stock and wetness had not been raised by MSHA before this instance and MSHA did not dispute this either. *Id.*

Based on his own contact with Nonel personnel, Miller asserted that a five year shelf life is common, with three years being conservative. Tr. 214-215. Thus, Miller disputed the inspector's interpretation of the danger associated with the Nonels. Tr. 215. On cross-examination of Miller, he asserted that he *did* take issue with the claim that the magazine was not

[10] It is noted that there were several pages of a "mine profile report" which the inspector used as a starting point for his inspection as it reflects the mine's past performance. Tr. 203. The Court advised that it considered the report to be without value to the issues involving these two blasting associated citations. Tr. 204.

suitably dry. To be clear, he was asserting that it was suitably dry. Tr. 218. As to whether he disputed the inspector's claim that there was water dripping from the walls and ceiling, Miller stated that he did not recall water dripping from the ceiling. Tr. 218-219. Miller did not dispute that the relative humidity just outside the magazine was 87 to 90 percent in that area, although he added he recalled it being "in the 80's." Tr. 220.

As to the inspector's testimony that he advised Miller in June 2017 about the dampness in that magazine and that if the dampness increased a citation might be issued, Miller responded that the inspector "didn't quite say it that way." *Id.* Instead, Miller expressed that Inspector Rautiola told him "you might want to take those out of there because it seems to be a higher humidity [but that] [h]e had no reference of any standard or anything." *Id.* Thus, Miller characterized the inspector's remark as a suggestion, as opposed to a recommendation. Tr. 221. As no enforcement action was taken by MSHA then, the Court finds Miller's version to be more credible.

For this alleged violation, the Secretary also seeks a civil penalty of $492.00.

Discussion of Citation Nos. 8879886 and 8879887

As these two citations are related, they will be discussed together. The chief distinction between Citation Nos. 8879886 and 8879887 is that the focus of the latter addresses expired detonators, while the former involves alleged dampness in the magazine itself.

As for the magazine, the Secretary states that the detonators are subject to malfunction when exposed to wet conditions. Though conceding that the magazine conditions were unlikely to cause injury, the Secretary maintains that if an injury were to occur it would be expected to be fatal. Thus, the Court notes that there was no claim that the detonators could go off on their own while in the magazine. Instead, for the fatal claim to occur, the detonators, admitted to be past their shelf life, would have to be used for blasting. Yet, the inspector conceded accepting Miller's assertion that the mine had no plans for any blasting to occur.

There is also no claim to support the idea that the mine would have employed these detonators for some unplanned possible future blasting. The Court accepts Miller's claim that, although the detonators had been stored, indeed moved underground, at MSHA's suggestion, for storage security reasons, they would not employ the detonators. Further, the Court finds that, at least for the Cobra blasting caps, the box was not as damp as the inspector asserted. The photographs introduced by the government do not support that claim.

Given these findings, the injury reasonably to be expected would not be fatal, but rather, no lost workdays. The mine should have disposed of the blasting caps, but the relevant gravity issue for the damp magazine issue was not fatal, nor, based on the testimony of Mr. Miller, was "fatal" an appropriate designation for the related citation requiring that deteriorated explosive material shall be disposed of in a safe manner in accordance with the instructions of the manufacturer. Again, there was no testimony that these devices could self-ignite. At most, while not dismissing the issue, the mine should have taken steps to dispose of the blasting materials, but it is too much to conclude that the materials, outdated and for the sake of

argument, damp, would have been used, not to mention that no blasting was planned at the mine for the foreseeable future. The Secretary admits that no blasting had occurred since 2016 and these violations were cited in August 2018. Sec. Br. at 17.

In sum, regarding the magazine dampness citation, while the violation was established, upon consideration of the testimony of the inspector and Mr. Miller and the photographs at Ex. P 15, 1 and 2, also listed on those photos as 2 and 3 of 4, the Court concludes that the inspector overstated the degree of wetness of the box of Cobra blasting caps. Thus, while the magazine was damp, the box itself was not as damp as described by the inspector. As to the deteriorated detonators, acknowledged by the inspector to be unlikely and non S&S, the Court cannot accept the fatal designation for that violation either.

The Secretary sought civil penalties in the amount of $492.00 for each citation. Accordingly, as to the damp magazine violation, **Citation No. 8879886**, upon consideration of all the statutory factors, the Court finds the negligence to be less than ordinary and **imposes a civil penalty of $50.00.** For the deteriorated material violation, **Citation No. 8879887**, the negligence is found to be ordinary and upon consideration of all the statutory factors, **a civil penalty of $100.00 is imposed for that violation.**

Docket No. WEST 2018-0224

Citation No. 9377049

MSHA Inspector Julie Hooker testified. Her only experience with mining has been through her employment with MSHA. She is now in her third year as an inspector. Tr. 244. The issue of Inspector Hooker's experience has been discussed above. In December 2017 she was conducting an E01 inspection at the Respondent's mine. Tr. 245. On December 6th of that year she issued Citation No. 9377049. She was then at the mine's 1300 level and at the 49 Winze. The winze, which is a vertical shaft, starts at the 800 level and it provides access to all the other levels at the mine, such as the 1300 and 1500 levels. Tr. 246. At that time, rehab work was being done at the 1500 level. Tr. 247, and Ex. P 24, a map of the mine.

Inspector Hooker issued Citation No. 9377049, citing 30 C.F.R. §57.11006. That standard, titled, "Fixed ladder landings," provides "Fixed ladders shall project at least 3 feet above landings, or substantial handholds shall be provided above the landings."

The inspector's section 104(a) citation listed the condition or practice as:

> The fixed ladders at the 1300 level and the 49 Winze level in the mine did not project at least 3 feet above their landings or (sic) were provided with substantial handholds above the landings. This condition exposed miners using the ladders to a potential fall hazard that could result in serious injuries to the miner. Miners had been utilizing the 49 Winze level ladder on a daily basis and had recently started utilizing the ladder at the 1300 level to gain access down to the 1500 level.

Citation No. 9377049.

The inspector marked the gravity of the injury or illness as reasonably likely, S&S, with one person affected and the injury or illness marked as permanently disabling. Negligence was listed as moderate. *Id.*

In her testimony, Inspector Hooker stated that "at the 1300 level of the 49 winze that goes to the 1300 level there was a fixed ladder. There is one in each area, and neither of those ladders extended above their landings at least three feet nor were there any substantial handholds that were observed." Tr. 248-49. She added that one of the ladders extended less than 5 inches above the opening to the landing while another was "probably even with the landing." Tr. 250. The hazard associated with this "is if you don't have something substantial to hold on, say like the ladder or a handhold, you can fall. You can fall back into that hole and, gosh, knows what can happen. A serious injury could happen, even a fatal." Tr. 251.

Handholds, the inspector agreed, are an alternative means of compliance under the cited standard. *Id.* A handhold can be anything substantial "so you can pull yourself up and so that you don't fall back down ... but it has to be something there where as you're coming out of that ladder you can grab up there and pull yourself so you can safely maneuver away from that hole." Tr. 252. A rope, a chain, even a piece of lumber may suffice, if it can accomplish the cited purpose. *Id.* The inspector did not see any type of a handhold. *Id.* This hazard, the inspector stated, applies both when exiting and entering the ladder. Tr. 253. The violation was abated by adding handholds, consisting of a piece of lumber for one condition and a handle attached to a wooden structure for the other. The ladders themselves were not modified. Tr. 254. Later, upon cross-examination, Miller agreed that Inspector Hooker did not direct that he build the handhold, nor how to build it. Tr. 396.

The inspector informed that the miners told her they were bringing supplies such as tools and lumber and backpacks too, down these ladders. Tr. 255. This meant that, with not having both hands free, there could be times when the miners lacked three points of contact, a good practice for ladder safety. Tr. 255-56. While the Court thought at the time of the hearing that this was outside of the focus of the cited standard, it has reconsidered that view, since it underscores the importance of a handhold or a sufficient ladder extension above the opening.

The cited ladders were about 10 feet in length for one and 13 to 14 feet for the other. Tr. 257-258. As noted, the cited standard, 57.11006, provides that fixed ladders have to extend, or project at least three feet above their landings or be provided with substantial handholds above the landings. Tr. 258. Assessing the gravity, the inspector concluded that it was "[r]easonably likely that an injury could occur, and if an injury could or would occur that it would be permanently disabling." Tr. 259. She also marked it as significant and substantial. The conclusion that it was reasonably likely that an injury would occur as a result of the conditions she observed was because the miners told her they were accessing those levels at least twice a day. *Id.* In marking the injury as permanently disabling, MSHA alerts have advised that falls of 10 feet have been permanently disabling. *Id.* For negligence, the inspector marked that as "moderate," because "they just recently started working in this area and so they were in the process of trying to do rehab work." Tr. 260.

Cross-examination began with the inspector acknowledging that she has never had any mining employment. Tr. 293. In explaining what she meant by a "substantial" handhold the inspector stated that it "would be something that they could grab onto, right, so the standard says handhold, so there needs to be at least probably two, right, so something that is not loose, ... that's probably within easy access, that they can grab onto to either help lower themselves onto the ladder or pull themselves off of that ladder so that they can keep balanced." Tr. 297.

The inspector noted that she went down the ladder for the 49 Winze to the 1300 level and ascended it too. Tr. 298. She did this prior to any installation of a substantial handhold. *Id.* Her recollection was that the condition was not corrected until the next day. Tr. 298-299. The inspector reaffirmed that there were two ladders in that area with the same deficiency. Tr. 299. In that citation, the inspector stated that it was a "tight area," and by that she meant the opening to descend was tight. Tr. 301.

Asked by Mr. Miller if she asked the miners whether they felt the condition was hazardous, she stated that she did not ask them about that issue. Tr. 301. However, the inspector affirmed that no miner asserted that the condition was *not* hazardous. Tr. 302. The Court noted that under section 57.2, "working place" is defined as "[a]ny place in or about a mine where work is being performed." Tr. 305. The Court then asked of the inspector whether she "determine[d] when [she] viewed the matters for all three of these citations that each of these involved a place in or about a mine where work was being performed." Tr. 305. The inspector affirmed she made that determination that it was a working place. The Court finds that, per the defined term, each area was a working place.

Continuing with his cross-examination of the inspector, Hooker affirmed that she did not see any handholds, substantial or otherwise. Tr. 305. Once handholds were installed, the inspector took photos of them, in connection with the termination of the citation. Tr. 306. Ex. P. 23-3 is such a photo. For that photo, the inspector was at the top of ladderway. Tr. 307. The handhold which was installed consisted of a piece of lumber and inspector circled the handhold on that photo. Tr. 307-308. On the same photo, the inspector also marked where the ladder was located, indicating that with an "L" and with a rectangle. Tr. 310.

Referencing the citation No. 9377049, the inspector was asked why she marked the citation as "S&S." She explained that her determination was "[b]ecause it was reasonably likely due to the fact that the miners were traveling down there at least twice daily that an accident would occur, and if an accident did occur, that it would result in a permanently disabling injury." Tr. 311. The inspector affirmed that the frequency of the ladder's use informed her S&S determination. Tr. 311-312. Even if the ladder use had been only once a day, the inspector would have marked the violation as S&S. The Court did remark that the photograph, Ex. P 23-1, was essentially useless and the same is true of Photo 23-2, because they provide no clear depiction. Tr. 314-315. An exchange with Mr. Miller revealed that his challenge with regard to these handhold citations was his assertion that handholds *were* present. Tr. 316.

Mr. Miller testified about Inspector Hooker's citations. He noted that at the time of these citations, the mine had only five active miners. Miller maintained that substantial handholds were present above the landings. Tr. 374. He identified it as the "handhold that anyone would

use coming up this ladder, if in fact they needed one, would be the vertical -- there's three pieces of wood and some which is wired like fence material that's rolled up right there. If in fact they wanted to use that for any reason or anybody wanted to use that, that is a substantial handhold." Tr. 375. Miller also contended that the material installed to abate the alleged violation "actually restrict[ed] [the miners] more and is causing it not to be safer." *Id.* Miller also contended that the likelihood that one of the miners could trip or fall was "no likelihood." Tr. 376. This contention was based on his assertion that the miners had been using the ladder for over a year and their skill and ability refutes the inspector's claim that this was an S&S violation. *Id.* Miller added, in further challenging the S&S designation, that unlike Hooker, Inspector Craig, who is experienced, never cited this condition. *Id.* The Secretary did not challenge the claim that the condition had not been cited previously. Miller also contended that there was no negligence, as the miners operate the mines and MSHA should "[l]et the miners do their work." Tr. 377. Also, no miner told the inspector that if they fell, it would be a fatal event. *Id.* The Court noted that the inspector did not mark this as fatal. Tr. 377.

The Secretary seeks a civil penalty of $462.00 for this alleged violation. The Court finds that the credible evidence establishes the violation alleged in this citation. The Inspector's testimony also establishes the other findings she made regarding the gravity aspect addressing reasonable likelihood, the risk of a permanently disabling injury and that the operator was negligent. The Court adopts the Secretary's view of the negligence involved as well. See, Sec's Br. at 23, paragraph 3.

As set forth below, upon applying the test for determining whether a violation is significant and substantial, the "S&S" designation was established upon the credible testimony of Inspector Hooker. For a violation to be considered S&S, as fellow Administrative Law Judge Kenneth Andrews recently noted,

> Section 104(d)(1) of the Mine Act describes an S&S violation as being "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d) (1). The Commission has established that a violation is significant and substantial if, based on the particular facts surrounding the violation, there exists a reasonable likelihood the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The four-part test long applied to establish the S&S nature of a violation examines: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a 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. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).
>
> The *Mathies* test has been revised to focus on the interplay between the second and third steps. The second step addresses the contribution of the violation to a

> discrete safety hazard and is now primarily concerned with "the extent to which the violation increases the likelihood of occurrence of the particular hazard against which the mandatory standard is directed." *ICG Illinois*, at 2475, *citing Newtown Energy Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016) *citing Knox Creek*, at 162-63. At this step a two-part analysis is required. First, the particular hazard to which the violation contributes must be clearly described. The Commission defines "hazard" in terms of prospective danger, *i.e.*, the danger which the safety standard at issue is intended to prevent. The starting point for determining the hazard is the regulation cited by MSHA. Second, a determination is required of whether, based on the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed. *ICG Illinois*, at 2475-76; *Newtown*, at 2038. The Commission has recognized that "reasonable likelihood" is not an exact standard capable of measurement in precise terms, but is a matter of the degree of risk of the occurrence of a hazard or a reasonably serious injury. *ICG Illinois*, at 2476; *Newtown*, at 2039.
>
> At step three the focus shifts from the violation to the hazard and the analysis is concerned with gravity. The *Knox Creek* Circuit Court reasoned that at this stage of the analysis the existence of the hazard should be assumed. *Knox Creek*, at 164. The inquiry is whether, based on the particular facts surrounding the violation, the occurrence of that hazard would be reasonably likely to result in an injury. *ICG Illinois*, at 2476, *Newtown*, at 2037, *citing Cumberland Coal Res.*, at 2365. The Commission has not equated the reasonable likelihood standard with a probability greater than fifty percent; The Secretary is not required to prove an injury was "more probable than not". *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865-66 (Jun. 1996). The step four gravity determination is essentially unchanged, whether any resultant injury would be reasonably likely to be of a reasonably serious nature. *Newtown*, at 2038.

Consol Pennsylvania Coal, 40 FMSHRC 429, 432, March 14, 2018. The Court finds Inspector Hooker's testimony regarding the lack of handholds, the frequency of ladder use, and the length of the falls that could occur, sufficient to justify the S&S designation.

Upon consideration of all the statutory criteria, the Court imposes a civil penalty in the amount of **$462.00.**

Citation No. 9377050

Inspector Hooker also issued Citation No. 9377050, on December 6, 2017. Hooker cited 30 C.F.R. §57.11012, which is titled, "Protection for openings around travelways" and provides, "Openings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed."

The section 104(a) citation described the condition as follows:

> An estimated 2 ½ feet by 4 feet open area at the top of the manway ladder to the 1500 level was not protected by a railing, barrier or cover to prevent miners from a fall when accessing this area. This condition exposes the miner to a fall hazard with an estimated fall height of about 13 feet to the level below and could result in serious injuries to the miner. Miners had recently begun accessing this area to begin rehabilitation and maintenance work.

Citation No. 9377050

The citation listed, under gravity, that the injury or illness was unlikely to occur, was not S&S, and would affect one person, but that the expected injury would be fatal. Negligence was listed as moderate. *Id.*

This alleged violation was in the same area as the ladder issues, just discussed, that is, at the 1300 to 1500 level. Tr. 261. At that location, that is, at the manway ladder to the 1500 level, Hooker found that there "was no cover on the manway as required." *Id.* Interestingly, there a cover to the left side of the opening but it was not in place. *Id.* Of course, the cover cannot be in place when using the opening; the problem was failing to put the cover back on, after such use. Tr. 262. As noted, the inspector cited 57.11012, which provides that where there are openings and a risk of falling, such areas are to be protected by a railing, barrier or cover or, alternatively, that there is a warning sign posted. Tr. 264. No sign was present. *Id.* Also, as noted above, the inspector marked the violation as unlikely that an injury would occur but that if it did occur the injury could be fatal. She listed it as "non-S&S. Tr. 265. For negligence, the inspector marked that as "moderate." To constitute moderate negligence, she stated, there must be a lot of mitigating circumstances. Tr. 266. How an inspector moves the negligence determination down to low negligence was less clear, as the inspector stated that one has "to have a lot of mitigating circumstances, I mean a lot.... [y]ou have to show above and beyond." Tr. 266. In terms of marking that it was unlikely that an injury would occur, the inspector stated that was "[b]ecause it was the same miners accessing this area and going down and they were all aware that it wasn't covered." Tr. 268. Her designation of "fatal," as mentioned, stemmed from knowing of instances where fatalities have occurred in drops of less than 13 feet. Tr. 269. In speaking with the miners at the cited location, the inspector advised that they agreed the injury could be fatal. Tr. 270. Ex P 27 is a fatalgram, describing an instance where a miner fell through an opening, for a distance of about 60 feet. Tr. 271. Ex. P 28 is another fatalgram, involving a miner who fell 28 feet through a four by six foot opening. Tr. 272. The inspector restated that she marked the negligence as moderate "because [the miners] were recently accessing the area, so they hadn't been there for very long, and they had -- they had a cover. They had just forgotten to put it back on." Tr. 273.

Cross-examination pertaining to Citation No. 9377050 began with the agreement that a cover was present, and that the citation was issued because the cover was not in place over the opening. Tr. 317. The inspector affirmed, consistent with her earlier testimony, that no warning signal was present either. Tr. 319. The Court inquired if the inspector's view was that the cover must be in place at all times, as it seemed impractical to require that. The inspector responded,

her "position would be that if it is an area where miners are passing through or maybe working, we want to get that cover over that opening so there's no fall hazard while they're there." *Id.* The Court remarked that if the cover were required all the time, it would impede use of the opening. To this, the inspector responded that her understanding of the standard is that the mine "should probably install that cover so they can open it and where it's not impeding it, so that's the purpose of it. It should be where you can open the cover so you can travel, you can bring your supplies down, but after you're done doing those things, you should close that, especially if there's people working around that area or traveling through that area." Tr. 320. In abating the violation, the inspector advised that the cover was replaced, and that in fact it was a new cover that was used. *Id.*

The inspector acknowledged that she noted, "[t]he same four miners work this area and they're all aware of the situation," and this was why she rated it as "unlikely." Tr. 322. Asked to explain the basis for S&S determinations for the ladders but not for the missing cover, Hooker expressed that the miners knew exactly where the opening was and therefore she concluded it was unlikely. In contrast, as for the ladders, she felt they were S&S because the area was dark and they could slip. Tr. 323.

Speaking to the absent "cover" violation, Miller remarked that the cover was there and that covers go on and off. If a miner were to leave an area, the cover would then be used. Tr. 378. Given the constant use of the winze, as the miners transport material down it, Miller contended that "[t]here is absolutely no requirement to close this when they're going back and forth, back and forth, bringing in supplies, handling things downwind from another." Tr. 379. Again, Miller maintained that if the miners left the area the cover would have been put in place. *Id.* Miller also asserted that under the circumstances, continuing to replace the cover would have been impractical. Tr. 380.

On a separate note, Miller maintained that the fatalgrams were "totally different" and accordingly distinguishable and therefore without probative value. Tr. 381-382.

The Secretary seeks a civil penalty of $208.00 for this alleged violation.

Upon review of the evidence, the Court concludes that the violation was established, but that the negligence was low and that, under the circumstances cited, it was very unlikely that the injury would occur. It is noted that a cover *was present* and with that there is the testimony from Mr. Miller that the practice is to replace that cover when the miners had completed work in that area. In the course of using the area it would be impractical to remove and then replace the cover each time the winze was being used. There was no evidence that the winze was not being used at the time of the citation's issuance. On the other side of the equation, the standard provides that where it is impractical to install such protective devices, adequate warning signals shall be installed. Further, the Secretary did not invoke the alternative means of compliance in its brief. The inspector also did not invoke that aspect of the standard in her citation, nor in her testimony. It is true that there have been fatalities where miners have fallen through uncovered openings and no protective device has been installed in lieu of a cover. **Given these evidentiary considerations, the Court imposes a civil penalty of $100.00.**

Citation No. 9377052

Testimony then turned to Citation No. 9377052, which Inspector Hooker also issued on December 6, 2017.

That section 104(a) citation invoked 30 C.F.R §57.4560(c). That section, titled, "Mine entrances," provides

> For at least 200 feet inside the mine portal or collar timber used for ground support in intake openings and in exhaust openings that are designated as escapeways shall be - (a) Provided with a fire suppression system, other than fire extinguishers and water hoses, capable of controlling a fire in its early stages; or (b) Covered with shotcrete, gunite, or other material with equivalent fire protection characteristics; or (c) Coated with fire-retardant paint or other material to reduce its flame spread rating to 25 or less and maintained in that condition.

As noted, the inspector cited subsection (c) from this standard.

The citation listed under the condition or practice section:

> Several pieces of timber *used for ground support* within 200 feet inside the 800 level portal entrance and within 200 feet of the portal entrance of the 21 Tunnel (designated second escapeway) was not coated with fire-retardant paint or other material to reduce its flame spread rating to 25 or less. The operator had installed some new pieces of treated wood inside the 800 level portal that had not been painted. At the 21 Tunnel area the fire retardant paint had peeled off some of the existing ground support timber exposing the wood. This condition creates a potential hazard of toxic smoke entering the mine in the event of a fire. Miners travel the 800 portal daily to enter and exit the mine and the 21 Tunnel at regular intervals for inspection or maintenance purposes.

Citation No. 9377052 (emphasis added).

The inspector marked the citation for gravity as unlikely for the injury or illness, not S&S, one person affected, but with the injury likely to be fatal. Negligence was listed as moderate. *Id.*

Inspector Hooker testified that at the entrance to the 800 portal and also the entrance to the 21 tunnel, which is the secondary escape way, she found several pieces of timber "that had recently been installed that were not painted, and inside the 800 portal there were several pieces of timber on the back, the roof that had been there for a while, but that were not painted." Tr. 274. In addition, "[a]t the 21 tunnel there were some pieces of timber in a stall, which [had been painted] ... but it had deteriorated so it had not been maintained ... with fire retardant paint or some other kind of material like gunite to reduce the flame spread to the rating of 25 or less." *Id.*

Ex. P 30-1 is a photo of some new pieces of lumber that had not been painted. Some pieces in the photo were painted. *Id.* Upon questioning by the Court, the inspector agreed that "*most* of this is correctly coated with fire retardant paint, [and that] *it's just a few areas* that [were] not." T. 275 (emphasis added). The inspector did not agree to the suggestion by the Court that it seemed a little unreasonable to cite when there are only a few spots needing paint. Tr. 275-276. The inspector also did not agree with the Court's perception that only a few spots were not painted, asserting "this is a whole piece of timber here. There is actually two pieces of timber, and I think in subsequent pictures there's a couple more pieces. So it's not just some spots. There are pieces of timber."[11] Tr. 276.

Ex. P 30, at page 2, is another photo taken by the inspector. She identified it as another piece of unpainted lumber. [12] Ex. P30, at page 3, is another photo of an unpainted piece of lumber. Tr. 278. The inspector acknowledged that this was "kind of hard to see, but there is a piece of lumber. That is within 200 feet of the entrance of the 800 portal and that piece of timber was not painted." *Id.* The Court remarked that her description that it was "kind of hard to see" was an understatement and the inspector acknowledged that in that photo she was referring to "a white dot in the bottom third of this photograph, right, and it's sort of a little off center." *Id.* Asked by the Court where the problematic lumber was located in relation to the white dot, the inspector responded that the "white dot" was actually light and that cited area there was lumber "in a diagonal kind of way." Tr. 279. The inspector maintained that the photo depicts just one piece of lumber but that the whole piece was unpainted. *Id.* All lumber within 200 feet of the portal is required to be painted. *Id.* The piece was on the roof to the right of the tunnel but she couldn't state how long the piece was, as measuring it was difficult – the piece was "kind of far up the [roof]." Tr. 280.

Next, the inspector was asked about Ex. P 30 at page 4. She identified it as another photo she took on December 6th and that it shows "one of the pieces of timber used for ground support at the 21 tunnel that wasn't coated ... [this appears] at the upper left." *Id.* Some of that lumber, she explained, had been painted but not maintained, as the paint was coming off. *Id.* Ex. P-30, at page 5, is another photograph taken in connection with this citation. This one was taken "outside ... the 21 tunnel, a stall, and at the bottom of it due to the water around it and the weather conditions and the environmental conditions at the time [,which the inspector believed showed] the paint was peeling off." Tr. 281.

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[11] In response to a clarifying question from the Court, the inspector affirmed that she was referring to the areas that are sandwiched between the gray paint, above and below, a sandwiched area that run horizontal. Tr. 276.

[12] Again, the Court asked clarifying questions to better understand the location of the areas alleged to be unpainted. The inspector described the area as "[b]ehind the water bottle is another piece of lumber that they put there and that had not been painted." The inspector agreed with the Court's remark that cited piece "run[s] essentially horizontal and about midway through the height of the water bottle and towards the rock." Tr. 277. She also agreed that the cited area did not involve either of the big pieces that occupy 60 percent of this photograph and that are painted either gray or white, ... but [that she was] talking about the piece of lumber that is at an angle to that gray or white wood that is not painted." *Id.*

The inspector cited 57.4560(c) with its requirement, as noted above, "that timber that is used for ground support within 200 feet of the entrance and the secondary escape ways need to be coated with fire retardant paint or any other material to reduce the flame spread rating to 25 or less and it has to be maintained." Tr. 281-282. She added, when asked, that the standard does allow as an alternative means of compliance "a fire suppression system, other than fire extinguishers and water hoses, capable of controlling a fire in its early stages or covered with shotcrete, gunite or other material with equivalent fire protection characteristics." Tr. 283.

The inspector was also asked to read from an MSHA policy manual, which essentially reiterated the requirements for compliance with the cited standard and her testimony about that standard's requirements. Tr. 284. Regarding her evaluation of the gravity, the inspector marked it as unlikely but under the assumption that if it did occur, she marked it as "fatal," but not S&S. In marking the negligence as "moderate," the inspector stated that was based on her finding that Mr. Miller trains his people to spot the hazard. Therefore, she concluded they were trained but that the problem had not been reported. The miners informed her that they simply forgot to paint the areas. Tr. 285.

In marking that it was unlikely to occur, the inspector reached this view because there were "winter weather conditions. It's raining. It's wet ... [and also because the miners] were wearing self-rescuers." Tr. 286. As for her "fatal" designation, she explained, "the wood that they were installing is treated wood and also with that paint. So if there was a fire, [ ] that smoke would be toxic, [ ] smoke. So it depends, of course, where they are at in the mine, but toxic smoke if ... for some reason they don't have their self-rescuers it could be fatal, moderate negligence, not S and S." [13] *Id.*

During cross-examination involving the missing paint, Miller asked what it would take for the timber to become combustible. The inspector noted that first one needs an ignition source for the timber. A source, the inspector offered as an example, could come from a welding tool. Still, she considered the event as unlikely to occur and she also marked it as non-S&S. Tr. 325-326. The inspector acknowledged that she did not tape the distance from the portal to the timber location. Tr. 330.

The Court inquired of the inspector whether any miner challenged her about her assertion of inadequate or, in some cases, missing paint on the cited timbers, and she responded, they did not. Tr. 331. Nor did anyone challenge the assertion that the wood was within 200 feet of the portal. That is, no one claimed that the lumber was beyond 200 feet. Tr. 331. Although no tape measure was used, the inspector informed that they walked the distance, and found that it was about 120 feet and the miners agreed with that estimate. Tr. 332. The other measurements were of a similar distance or less. For example, one cited location was right at the portal. *Id.*

Continuing with cross-examination, Miller asked if the miners suggested that the lumber behind the metal plate had no structural significance. The inspector replied that they informed one had been there for a long time and they were unsure if it provided any support or not. Tr.

[13] Regarding the use of a self-rescuer, the inspector, after stating that the device converts CO to CO2, did not know if it protects against toxic fumes. This question was asked in the context of whether the cited wood, if on fire, would give off toxic emissions. Tr. 346-347.

333. However, the inspector acknowledged that the miners claimed that the timber, per Ex. P 30-3, was not being used for support. Tr. 333-334. The Court then inquired, in face of the challenge as to whether it was being used for support, how she concluded to the contrary. Tr. 335. The inspector replied that "well, there's a reason it had to be there. People don't just put stuff up there just so, and also, you had the mesh, you had mesh and you can kind of see it in the photo." *Id.* Thus, it was the inspector's conclusion that "there's mesh there as well, so the timber had to be put up there at one time to support something." *Id.*

An issue then arose about the interpretation of the standard. The Secretary noted that the standard provides "For at least 200 feet inside the mine portal, or collar timber used for ground support and intake openings and exhaust openings." Tr. 337. The Secretary interpreted this to mean that "it's either for 200 feet in, or collar timbers used for ground support. It doesn't say it has to be 200 feet in and a collar timber used for support."[14] *Id.* The Court agrees with the Secretary's reading of the standard. Though inartfully worded, the most practical reading of the standard is that it applies to two situations. First, it pertains to two areas: "at least 200 feet inside the mine portal," and second, it applies to "collar timber used for ground support in intake openings and in exhaust openings that are designated as escapeways."

In this instance, the citation was directed at alleged timber located within 200 feet of the mine portal and the failure to coat that timber with fire-retardant paint. The citation itself is directed only to this aspect and the Secretary's brief is similarly confined to that part of the standard. Sec. Br. at 26.

In any event, the inspector testified that she did not consult with Inspector VanWey in making her determination that the timber was used for ground support. Tr. 337-338. Her only exchange with him was the determination to walk off the distance to confirm the cited timber was within 200 feet, which distance was confirmed and found to be about 120 feet. Tr. 338.

Cross-examination then moved to photograph Ex. P 30-4. The inspector identified the material in that photo as lagging. Tr. 341. She did not know if such material is collar timber. Tr. 341. However, the inspector affirmed that the material, the lagging, is used for ground support in that its purpose is to stop material from sloughing into the opening. Tr. 342. Further, the inspector stated that the lagging was at the 21 tunnel entrance. *Id.*

The inspector was then asked about Ex. P-30-5, a photo. She described the wood in that photo as "a round piece of wood. It was found supporting the rock above it and it was painted, but at the bottom you see there the paint had deteriorated due to what I assume to be the elements, the water and the rainy conditions at the time." Tr. 343. She agreed that the bottom of the wood was in water, but she stated that it looked substantial to her. Tr. 343-344. The matter was abated by removing all of the cited wood. Tr. 344. Miller, noting that the inspector marked

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[14] Subsequently, the inspector expressed that the word "collar" in the standard simply refers to a type of timber. Tr. 340. Collar timber, by her understanding, is timber support and it refers to "the name given to a section of that support." *Id.* Miller defined a collar as "a surrounding of material to hold back the sloughage from an excavation." Tr. 390.

the citation as fatal, asserted that as some timber was removed, it undercuts the claim that it was used for ground support. The Court considers this to be a fair comment.

The inspector agreed that Miller raised the issue of whether the cited wood was in fact used for support and that he informed the inspector that he would be removing the wood. Tr. 346. While not vitiating that the cited standard was violated, at least at some of the locations identified by the inspector, it is fair to note that Miller's point about the inspector's lack of any mining experience has resonance in that limited instance. However, even an inspector with mining experience might need to ask about whether a given piece of timber served a support function. Inspector Hooker should have asked about this.

Asked about Ex. P 30-2, a photo, the inspector was asked about a "white section," in the upper left hand quadrant of that photo. Tr. 354. She identified a piece of vertical timber in that area and confirmed that the opening in that area is the sky. Tr. 355. Regarding photo 7 of 8, associated with this citation, the inspector agreed the description states, "Termination photo, 21 tunnel portal, all wood removed from entrance."[15] *Id.*

The inspector then identified Photo 8 of 8, associated with Citation No. 9377052, which she described as "a termination photo at the 800 level portal. The wood that was installed on back of portal was removed and the new wood at entrance was painted with fire retardant paint. No photo was taken of that." Tr. 358. She agreed the wood looked wet. She added that a miner told her "this was the wood that was removed from the back which was within 120 feet of the opening." Tr. 359.

Miller spoke to what the Court called for shorthand, the "paint issue," asserting that "the piece that was under the rock bolt was greater than 200 feet from the portal," and that two of his miners taped the distance and told him it was beyond 200 feet. Tr. 383. However, Miller stated that he did not ask them what distance they came up with. *Id.* Asked to specify which location was greater than 200 feet, Miller identified it as Ex. P 30-3. Miller maintained that in 1984 or 1985 a rock bolt and some wood had been installed, purely as a precautionary measure since at that time people were unsure of the quality of the ground at that time. It was installed to capture loose rock but not for ground support and the mine had not been cited for this in some 30 years. Tr. 384-385. Miller summed up that the material was beyond 200 feet, that it was so wet that it could not be combustible and it had never been painted. Tr. 385.

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[15] Although the Court sustained several questions posed by Mr. Miller, it commented, that it "understood] [Mr. Miller's point] ... that Inspector Hooker comes upon some timber, she says it violates this particular standard, namely 57.4560, sub category C, and the mine's response is to remove the timber, so what [the Respondent is] inferring is that therefore it was not support timber because the Inspector did not have an objection to the removal of the timber, and therefore if the timber is removed, it could not have been used for support. That's your point." Tr. 356- 357. Miller agreed that was his point. Tr. 357. The Court also noted that no timber was replaced for the removed timber. *Id.*

The Court cannot credit Miller's testimony regarding this location, as his claim that the distance was greater than 200 feet was not credible. One making such an assertion would have asked the employees what the distance was, but Miller did not. Further, Miller admitted that, precautionary or not, at least that piece was used for support.

Miller also contended that, regarding Ex. P 30-1, that wood was outside and not quite underground and that it was not used for ground support. Tr. 389. As for Ex. P 30-2, Miller asserted that supports his claim that the wood was not underground and that it was not ground support.[16]

Referring to Ex. P 30-4, Miller also expressed that it was not ground support. Instead, he described it as "a horizontal position that was holding back a little bit, or it wasn't even holding back, it was put in a long time ago to support or to prevent any material coming from the left because there's a left coming down into the 21 tunnel. It was something that was useless or had no value, it had been there a long time, and there was no reason to take it out except when it generated a citation. Tr. 393. The material was not painted; instead it was removed. *Id.*

Turning to Ex. P 30-5, Miller contended it was the same issue and for "this one even more. Tr. 393. He contended it was not ground support because of its size, and because water had deteriorated it. Instead, it was "just something that had been there and left there." Tr. 394. Given that it was not support, Miller asserted that to call it a fatality was "nonsensical." *Id.*

Regarding his claim that the timber was more than 200 feet from the portal, Miller was asked how he determined the distance. He responded that they ran a 100 foot tape. Tr. 397. However, he couldn't give a precise measurement; only that it was more than 200 feet. *Id.* Asked if standard 30 C.F.R. § 57.4560, related to Citation No. 9377052, had an exception to its requirement if the timber is wet, Miller conceded there is no wetness exception. Tr. 398.

Turning to Ex. P 30-2, still involving the paint issue, Miller was asked if that location is inward from the 800 level portal. Miller informed that the portal "begins where one moves from the outside to the underground," and that some portals can be 50 feet out from the entrance. Tr. 399. Clarifying his answer, he added, photo P 30-2 is "probably eight feet or so outside the portal." *Id.* Thus, Miller contended that the cited timber was outside of the portal. Tr. 400.

The Secretary seeks a civil penalty of $208.00 for this alleged violation. Also, as previously noted, the inspector marked the citation for gravity as unlikely for the injury or illness, not S&S, one person affected, but with the injury likely to be fatal. Negligence was listed as moderate.

The Court noted during the hearing that "there were multiple locations listed by the Inspector as being in violation of 57.4560(c), so if [the Court were to] find that any of these locations were deficient and that they fit -- otherwise fit the requirements of the standard in terms of distance or timber used for support, then a violation is established. Now, it was only assessed at $208.00 ... , which is a relatively small amount by any sort of objective standard, but it may

[16] Miller's testimony was somewhat confusing as to whether he was actually referring to Ex. P 30-1 or Ex. P 30-2. Tr. 389-390.

be that [the Court] can find subject to [its] review of the testimony, including that which [Mr. Miller] may testify about, regarding 57.4560(c) that [the Court] could find that the amount of wood that was subject to the violation was less than what the Inspector alleged and that could impact the penalty downward." Tr. 360-361. The Court, taking this into account, finds that some of the timber was not in fact used for support, at least at the time of the citation's issuance.

Accordingly, while the violation was established, there were several problems with this citation which bear upon the appropriate penalty. First, that some timber was removed for abatement supports the Respondent's assertion that it was not used for ground support. Second, the amount of material in need of painting was minimal. Given that, the degree of negligence, in the Court's estimation of the entirety of the evidence for this citation, is that it was less than ordinary. Upon consideration of these factors, **the Court imposes a civil penalty of $50.00 for this marginal violation.**

The effect on the operator's ability to continue in business upon imposition of these civil penalties.

Testimony was received on the Respondent's contention that the penalties sought by the Secretary would have an effect on the operator's ability to continue in business, per Section 110(i) of the Mine Act. If all eight citations were affirmed and assessed as proposed, the total civil penalty would be $3,066.00. Mr. Miller began by stating that the mine has no "proven reserves." Tr. 403. He defined that as "something that for economic reasons you have an ore body that you can delineate expenses and expected revenue." *Id.* In terms of exhibits to support the claim of ability to continue in business, Miller introduced R 1, the Sixteen to One Mine condensed balance sheet for December 31, 2017 and December 31, 2016. Tr. 406. This was the only exhibit offered by the Respondent on this issue.

Miller then testified that, while the mine's fixed expenses are predictable, its income is unpredictable. It has significant expenses of labor and supplies. Tr. 407. He added that he has deferred his income. Although he has been issued a check, it has not been cashed. The mine's cash flow is a "tremendous problem." *Id.* "[E]very penny that [the mine] get[s] is going into something to sustain the operation." Tr. 407-408. There are no dividend payments. Tr. 408. Miller asserted that the mine's 2016 report shows a book profit but that 2017 will show a $429,000 loss. *Id.* He added that "[o]ver the years [the mine has] been down to two employees, [although] recently [it's] been up to six, ... which is still ridiculously small." Tr. 409. Miller also asserted that the mine has already spent over $3,066.00 terminating these citations. Tr. 411.

Upon cross-examination, Miller was directed to page 5 of Ex. R 1, and asked what the remark under inventory means where it states, "[j]ewelry is quoted at the market price for the gold content, plus labor cost." Tr. 412. Miller agreed that meant the gold was being valued at less than the retail sale price would be, adding that was consistent with Generally Accepted Accounting Principles, or "GAAP." Tr. 413.

Next, the Secretary directed Miller to page 6 of Ex. R 1, which "states that 'Accounts payable and accrued expenses was $1,197,026 at December 31st, 2017,' and then it states, 'This balance includes $753,783 in accrued wages owed to Michael Miller.'" Tr. 413. The page goes on to state, "Mr. Miller's salary has been mostly accrued (not paid) for over ten years and is secured with real estate." Tr. 414. Asked to explain this, Miller stated, "It means that my base salary for the past ten years for being President of this company is $60,000 a year, and it was mostly accrued until the directors decided it would be better to put some type of a payment on record which is modest and secured with real estate. In order to protect my family, I have a first trust deed note on part of the mine which, in order to borrow $500,000 from some metal technology people, I assigned them that note, so I'm now in a second position to a company called Quartz View on that secured note." Tr. 414.

Miller agreed that he has uncashed checks on his desk, that he receives a net check every two weeks of about $980.00, after Social Security and IRS payments have been deducted. Tr. 414-415. He stated that he has cashed a couple of those checks but he has also advanced $40,000 from his savings account to keep the mine going. Tr. 415. Miller agreed that the $753,783 in accrued wages, when divided into $1,197,026 in accounts payable and accrued expenses, means that about 62% of the mine's accounts payable and accrued expenses is allocated to his accrued wages. *Id.*

Referring to the mine's website and within that to gold sales and jewelry, Miller was asked why the site advises customers to "call for price" on such items. Miller responded that he had never before viewed this category but that it means that one has to check for the price because the mine doesn't manufacture the jewelry and the price of gold varies. Tr. 416. Asked how much the mine derives from such jewelry sales, Miller advised there is no fixed percentage. The mine is a wholesaler. Tr. 418.

Examining gold specimens listed for sale on the site, with the Secretary inquiring about one particular item, listed as item 17 at $425.00, Miller acknowledged that it was for sale. He added that if a specimen price is listed at $105.00, the mine's balance might list it at $50.00, as it does not reflect the value added. Tr. 421. He asserted that the mine's inventory value will go up or down depending on the price fluctuations of gold. However, Miller admitted that if a particular gold specimen is listed on the site and sold, the mine will receive that amount along with the expense of shipping. Tr. 424.

Upon review of the evidence on this issue, Mr. Miller failed to establish that the penalties imposed in these collective dockets would have an effect on the mine's ability to continue in business. This is true even if the full amount sought by the Secretary, $3,066.00, was imposed, let alone the amount the Court is imposing for these matters, totaling **$1,062.00**.

Summary

Having found that the citations described above were violations, the civil penalties for these citations are summarized here as follows:

Docket No. WEST 2017-0546

- **Citation No. 8785581 $100.00**
- **Citation No. 8785582 $100.00**

Docket No. WEST 2017-0685

- **Citation No. 8879879 $100.00**

Docket No. WEST 2018-0100

- **Citation No. 8879886 $50.00**
- **Citation No. 8879887 $100.00**

Docket No. WEST 2018-0224

- **Citation No. 9377049 $462.00**
- **Citation No. 9377050 $100.00**
- **Citation No. 9377052 $50.00**

ORDER

It is hereby **ORDERED** that the above listed citations are affirmed as written and that the Respondent is **ORDERED** to pay civil penalties in the total amount of **$1,062.00 within 30 days of this decision.**[17]

William B. Moran

William B. Moran
Administrative Law Judge

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

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