

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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September 20, 2016

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

v.

COEUR ALASKA, INC.,  
Respondent.

**CIVIL PENALTY PROCEEDINGS**

Docket No. WEST 2015-346-M  
A.C. No. 50-01544-370187

Docket No. WEST 2015-401-M  
A.C. No. 50-01544-373015

Docket No. WEST 2015-422-M  
A.C. No. 50-01544-373488

Docket No. WEST 2015-470-M  
A.C. No. 50-01544-375449

Mine: Kensington

**DECISION**

Appearances: Sean J. Allen, U.S. Department of Labor, Office of the Solicitor, MSHA  
Backlog Project  
1244 Speer Blvd., Suite 216, Denver, Colorado 80204

Donna V. Pryor, Husch Blackwell LLP  
1700 Lincoln St., Suite 4700, Denver, Colorado 80203

Before: Judge Simonton

**I. INTRODUCTION**

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Coeur Alaska, Inc., at the Kensington Mine, pursuant to the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. §801. These cases involve ten citations issued between July 17, 2014 and December 5, 2014, with a total proposed penalty of **\$199,047.00**. The parties presented testimony and documentary evidence at a hearing held in Juneau, Alaska on November 3-5, 2015.

**II. BACKGROUND**

Coeur Alaska, Inc. (“Coeur”) operates the Kensington Mine in the Berners Bay Mining District 40 miles north of Juneau, Alaska. Tr. 475. The mine consists of an underground gold mine, a process facility, a water treatment plant, a camp for the miners, an administration

building, a maintenance shop, and a port facility. *Id.* Coeur has operated the Kensington Mine since July 1995. *Id.* The mine's underground levels are labeled by number based on elevation. Tr. 477; Ex. P-3.

On July 17, 2014, MSHA Inspector Robert Dreyer ("Dreyer") began his inspection of the Kensington Mine. Tr. 37:2. Dreyer was accompanied by Tom Herndon ("Herndon"), the Health and Safety Coordinator at the Mine, and Arnoldo Tapia ("Tapia"), a Miner's Representative. Tr. 711: 6-12. Dreyer found repeated instances of torn or damaged wire mesh adjacent to loose or separated rock and material throughout the Kensington Mine. Tr. 56-57, 64, 67, 81. Between July 17 and July 19, Inspector Dreyer issued five citations<sup>1</sup> for alleged violations of 30 C.F.R. § 57.3360 for failure to maintain installed ground support. *See* Ex. P-2; P-7; P-10; P-12; P-15. Coeur abated each hazard and the citations were terminated.

On December 3, 2014, MSHA Inspector Thomas E. Rasmussen ("Rasmussen") began his inspection of the Kensington Mine. Tr. 327. Rasmussen observed repeated instances of damaged wire mesh and loose rocks present throughout the mine that created potential hazards to miners. *See* Ex. P-17, P-22, P-26, P-30. Between December 3 and December 5, Inspector Rasmussen issued Citations No. 8786150 and 8786162 for alleged violations of 30 C.F.R. § 57.3360 for unmaintained ground support. Ex. P-17, P-30. He also issued Citations No. 8786152 and 8786153 for alleged violations of 30 C.F.R. § 57.320 citing failure to take down, support, or barricade hazardous ground conditions. Ex. P-22, P-26. Coeur abated each hazard and the citations were terminated.

On December 4, 2014, MSHA Inspector James E. Stembridge ("Stembridge") inspected the Kensington Mine. Tr. 298-99. Stembridge observed loose rocks present among the 1140-180 up ramp and the 1425 and 1485 areas that created potential hazards to miners in the area. Ex. P-35. The rocks were barred down, and Stembridge issued Citation No. 8780941 for an alleged violation of 30 C.F.R. § 57.3200 for failure to correct or warn of ground conditions that pose a hazard to miners. *Id.* Coeur abated the hazard and the citation was terminated.

The Secretary designated six violations of § 57.3360 and one violation of § 57.3200 as Significant and Substantial ("S&S"), and specially assessed penalties for six of the violations of § 57.3360. At hearing, Coeur contested each of the ten alleged violations. Resp. Br. 1. Coeur contested the factual representations of the MSHA inspectors, the legal basis for finding the violations, the S&S and negligence designations, and the special penalty assessments. *See* Resp. Br. 1-2. At hearing, Inspectors Dreyer, Stembridge, and Rasmussen all testified on behalf of the Secretary. Witnesses for Coeur included (1) Jeff Murray, Health and Safety Manager; (2) Justin Wilbur, Mine Captain; (3) Thomas Herndon, Health and Safety Coordinator; (4) Eddie Petrie, Underground Mine Trainer; (5) Robert Rich, Grader Operator and Miners' Representative; (6) Alan Gordon, Underground Mine Trainer; (7) Arnoldo "Arnie" Tapia, Paste Plant Operator and Miners' Representative; and (8) Radford Langston, a geologist and engineer that served as an

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<sup>1</sup> The citations, all alleging unmaintained ground support, include: Citation No. 8611872 for five separate instances in the 480 North travelway and the 196, 200, 212, 216, 220, and 240 intersections; Citation No. 8611874 in the 555 South travelway and the 188 and 180 intersections; Citation No. 8611875 in the 555 North travelway and the 200, 208, and 236 intersections; Citation No. 8611879 in the back of 1355 intersection and the main upramp; and Citation No. 8611880 in the 1355 at the 189 and 214 intersections. *See* Ex. P-2; P-7; P-10; P-12; P-15.

expert witness. I have organized my findings and detailed my final ruling by each individual citation.

For the reasons stated herein, I affirm the underlying violations for nine citations and vacate Citation No. 8780941. I reduce the negligence designation for Citation No. 8611879 from high to moderate. I increase the negligence designations for Citations No. 8786152 and 8786153 from moderate to high. I vacate the S&S designation for Citation No. 8786152 and reduce the gravity to unlikely to result in lost workdays or restricted duty. In addition, I vacate the special assessments in Citation Nos. 8611875 and 8611879. After considering the necessary criteria for penalty assessments, I find that a penalty of **\$159,634.00** is appropriate.

### **III. STATEMENT OF LAW**

#### **A. 30 C.F.R. § 57.3360**

Section 57.3360 states:

“Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks.”

30 C.F.R. § 57.3360. Section 57.3360 requires that in locations (1) where ground support is necessary, (2) the support system shall be designed, installed, and maintained to support the ground (3) in places where persons work or travel. *See Hecla Limited*, 37 FMSHRC 877, 884 (Apr. 2015) (ALJ). Loose and fractured rock is a violation of the standard. *See ASARCO Mining Co.*, 15 FMSHRC 1303, 1304 (July 1993). Section 57.3360 does not specify the type of ground support to be used, but only requires a showing that the area required the support. *See id.* at 1308-09.

The Secretary bears the burden of proving by a preponderance of the evidence that a reasonably prudent person familiar with the mining industry and the standard’s protective purpose would have recognized the hazardous condition. *Canon Coal*, 9 FMSHRC 667, 668 (Apr. 1987). “To prove by a preponderance of the evidence means that the evidence supporting the violation must be more convincing than the evidence which is offered in opposition to it.” *Newmont Gold Company*, 20 FMSHRC 1035, 1038 (Sept. 1998) (ALJ) (citations omitted). The Commission has held that testimony by MSHA inspectors regarding the requirement of ground control measures constitutes substantial evidence where the judge determines that the inspector’s testimony is reliable. *See id.* at 1307.

#### **B. 30 C.F.R. § 57.3200**

Section 30 C.F.R. § 57.3200 states:

“Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.”

30 C.F.R. § 57.3200. The provision aims to require elimination of hazardous conditions. *ASARCO, Inc.*, 14 FMSHRC 941, 951 (Jun. 1992). The Secretary may not use the occurrence of a ground fall in itself as sufficient evidence of a violation, but must prove that a “reasonably detectable hazard” existed prior to the ground fall. *Id.* The Secretary’s conclusion must be supported by substantial evidence that “a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 951 (citations omitted). Testing an area of questionable roof and erroneously concluding that it is safe is sufficient to violate section 57.3200. *Id.* at 946-47. Factors to be considered to determine whether loose ground is present includes “the results of sounding tests, the size of the drummy area, the presence of visible fractures and sloughed material, ‘popping’ and ‘snapping’ sounds in the ground, the presence, if any, of roof support, and the operating experience of the mine or any of its particular areas.” 14 FMSHRC at 952; *Amax Chemical Corp.*, 8 FMSHRC 1146, 1149. Material is loose and hazardous when it can be pried free by hand with scaling bars. *See Springfield Underground*, 17 FMSHRC 613, 619 (Apr. 1995) (ALJ) (Upholding violation where “loose” material was scaled down by hand while vacating violations where material was brought down by a large mechanical scaler).

### **C. Significant and Substantial**

A violation is significant and substantial (S&S), “if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In order to uphold a citation as S&S, the Commission has held that the Secretary of Labor must prove: 1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984).

The Secretary must prove there was a reasonable likelihood that the hazard contributed to by the violation will cause an injury, not a reasonable likelihood that the violation, itself, will cause injury. *West Ridge Resources, Inc.*, 37 FMSHRC 1061, 1067 (May 2015) (ALJ), citing *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010). Evaluation of the four factors is made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

## **D. Negligence**

Under the Mine Act, operators are held to a high standard of care, and “must be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.” 30 C.F.R. § 100.3(d). High negligence occurs when the operator “knew or should have known of the violative condition and there are no mitigating circumstances.” 30 CFR § 100.3: Table X. Moderate negligence occurs when the operator “knew or should have known of a violative condition or practice, but there are mitigating circumstances.” *Id.*

## **E. Penalty Assessment**

It is well established that Commission administrative law judges have the authority to assess civil penalties *de novo* for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (March 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

(1) the operator’s history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator’s ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

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

These criteria are generally incorporated by the Secretary within a standardized penalty calculation that results in a pre-determined penalty amount based on assigned penalty points. 30 CFR 100.3: Table 1- Table XIV. If the conditions of the violation so warrant, the Secretary may waive the regular assessment under § 100.3(a) and specially assess a penalty. 30 C.F.R. § 100.5(a). The special assessment must also be based upon the six criteria outlined above, and all findings must be in narrative form. 30 C.F.R. § 100.5(b).

## **IV. ANALYSIS**

### **1. Citation No. 8611872**

MSHA Inspector Robert Dreyer (“Dreyer”) issued Citation No. 8611872 on July 17, 2014 for an alleged violation of 30 C.F.R. § 57.3360. Ex. P-2. The citation alleged that wire mesh used for ground support in the mine was damaged and improperly maintained. *See id.* Dreyer observed loose material adjacent to the patches of damaged wire mesh along the 480 North travelway (“the 480 North”) and the 196, 200, 212, 216/220, and 240 intersections. *See* Ex. P-2, P-3. The 480 is the only means to reach these intersections. Tr. 83:14-20. Inspector Dreyer testified that the damaged wire mesh and loose materials could have resulted in five separate citations rather than one single citation for the entire area. Tr. 80: 13-18. He designated the violation as S&S, reasonably likely to result in permanently disabling injury, and the result of

high negligence. Ex. P-2. The Secretary specially assessed a penalty of \$33,400.00. Ex. P-2, R-Z-1, R-Z-2.

**a. The Violation**

Coeur violated section 57.3360 because Coeur failed to maintain wire mesh that was necessary to reduce scaling requirements along the 480 North. To prove a violation of § 57.3360 a reasonably prudent person familiar with mining must conclude that (1) the area required ground support, (2) the method was installed, designed, and maintained to support the ground, and (3) miners worked in or traveled along the walkway. *See Canon Coal*, 9 FMSHRC 667, 668 (Apr. 1987); *Hecla Limited*, 37 FMSHRC 877, 884 (Apr. 2015) (ALJ).

Ground support is necessary in the 480 North travelway. Inspector Dreyer identified fractured or separating rock located near or adjacent to torn or damaged wire mesh in five different areas along the 480 North. Tr. 51:11-15. During his testimony, Dreyer circled and identified rocks of concern in the photographs he took during the inspection. *See* Ex. P-2, C-3, C-6, C-12, C-17. He noted a large fractured and separating rock in the 196 intersection. Tr. 53-54. He estimated that the rock measured 18 inches by 18 inches by 6 to 8 inches and weighed over 100 pounds. Tr. 53-54; Ex. P-2, C3. He observed a 12-inch tear in a protruding portion of wire that was full of loose material on the rib of the 200 section. Tr. 62-63:15; Ex. P-3, C-6. Exposed loose material was adjacent to a large hole in the wire in the 212. Tr. 71:18-22. A “keyed” in rock adjacent to torn wire in the 216 and 220 intersections; if that rock were removed, more loose material would fall as well. Tr. 72:17-73:5. He also observed broken wire and loose rock located approximately 16 feet above a vehicle and an equipment operator in the 240. Tr. 77:6-23; Ex. P-2, C-17, C-19.

Coeur contests Inspector Dreyer’s findings and argues that the Kensington Mine consists of diorite rock of such outstanding quality that ground support is not necessary in the cited areas. Resp. Br. 9. Radford Langston, a geologist, engineer, and Coeur’s expert witness, testified that the diorite in the Kensington Mine is very strong and is characterized by minimal loosening and movement along the fractures. Tr. 575:22-579:7. Yet Mr. Langston also testified that the high quality diorite nonetheless requires scaling to ensure that loose rock does not become a hazard. *See* Tr. 622, 634, 638. In fact, the first page of Coeur’s ground control manual for the Kensington Mine indicates that scaling and barring down rock is necessary. *See* Ex. R-O, 1. Langston also agreed that wire mesh can be used as a form of ground support, though he did not believe that it was being used in that capacity here. Tr. 616:20-22.

In each of the cited areas, torn or rusted wire mesh was located near or adjacent to the areas of loose rock that concerned Dreyer. Tr. 49-50. The torn or rusted wire was clearly visible in Inspector Dreyer’s photographs. *See generally* Ex. P-2. While Coeur argues that Inspector Dreyer was unable to point out evidence of loose material in a number of his photographs, he testified credibly to personally observing fractures, cracks, and gaps along the rocks in the cited areas. Tr. 232.

The evidence also shows that the wire mesh was designed, installed, and maintained to support the ground because the wire mesh reduced the need to scale. Coeur argues that the wire

mesh is “redundant;” it posits that its ground control plan does not require wire mesh to be installed and that the mesh was intended for convenience rather than for ground support because it was not installed throughout the entire mine. Resp. Br. 10. These arguments are not persuasive. The wire mesh *was* installed throughout the 480 North and other cited travelways. Tr. 627:19-628:18. The wire mesh may be convenient because its installation and maintenance cut down on scaling time, but its purpose is to reduce the ground support responsibilities of individual miners. Resp. Br. 10; Tr. 493: 13; Tr. 634:6-10. The wire thus acts as substitute ground support, and was installed to function as such. Inspector Dreyer’s observations show loose or unconsolidated material behind unmaintained wire. Without the wire mesh, the material would have to be scaled or could create a hazard, and Coeur’s failure to maintain the wire increased the risk of that hazard.

Furthermore, Coeur’s ground support manual indicates that wire mesh should be installed throughout the mine “as needed.” *See* Sec’y Br. 13; Tr. 609, 625-30; Ex. R-O, p. 28,44, 48, 50. “As needed” appears to mean “necessary;” Coeur’s miners have no discretion in installing the wire mesh, and the mesh is present throughout the 480 North. *See* Resp. Br. 3, FN 2. Both Mr. Langston and Inspector Dreyer agreed that once installed, the wire mesh needed to be maintained. Tr. 46-49; 634. While the ground support manual does not explicitly require wire mesh, it is obvious, given the extent of loose material behind it, that it was installed and intended to act as such. *See* Tr. 624-629.

Finally, it is clear that miners work near and travel along the cited areas in the 480 North. Inspector Dreyer saw three miners exiting the 480 North during his inspection. Tr. 200:24-202:1. He also took pictures of a vehicle located directly under the hazard identified in the 240 intersection and testified that an equipment operator was working in the same area. Tr. 77-80; Ex. P-2, C-17-19. The outlay of the 480 North indicates that the equipment operator must have traveled by every violation in order to reach the 240. Tr. 84:1-4; Ex. P-3.

Ground control was necessary along the 480 North and the wire mesh was installed to reduce manual ground control efforts. Loose rock was present behind portions of wire mesh that Coeur clearly failed to properly maintain. Inspector Dreyer personally observed miners near the travelway on foot, and in one case parked and working near one of the hazards. Citation No. 8611872 is **AFFIRMED**.

#### **b. Significant and Substantial**

I have already held that Coeur violated 30 C.F.R. § 57.3360, a mandatory safety standard, when it failed to maintain wire mesh in the 480 North. Coeur’s failure to maintain the wire mesh also contributed to a discrete safety hazard. The specific hazard posed by the violation was that loose material would fall through torn or unmaintained wire mesh and contact miners working or traveling through the area. Given the particular facts surrounding this citation, the hazard was reasonably likely to occur. Inspector Dreyer’s photographs clearly indicate that the wire was damaged or poorly maintained throughout the entire 480 North. *See* Ex. P-2. Loose material was identified near the damaged wire in the cited areas, and miners worked or traveled in the 480 North during the inspection. Coeur’s failure to maintain or repair the damaged wire mesh would

contribute directly to the occurrence of such hazard by allowing the loose material to fall through the damaged areas and contact passing miners. Tr. 87.

The hazard of the falling material was reasonably likely to result in injuries to miners because loose material and damaged or torn wire were found throughout the 480 North. S&S violations are determined not only on the facts existing at the time of the citation, but also in the context of continued mining operations. *See U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (1984). Loose rock adjacent to torn or damaged wire mesh existed throughout the 480. Tr. 63:20-25; 66:9-14; 72-73:10. The loose material was likely to come down through natural mining processes. Tr. 57:6-7. The prevalence of damaged or unmaintained wire mesh in each cited area indicates that there is a reasonable likelihood that miners would be exposed to the risk of contact by loose material.

Coeur points to adequate roof bolting and the soundness of the rocks in the back and ribs of the 480 North. Resp. Br. 28. Coeur's witness Arnoldo Tapia ("Tapia") testified that any material that became loose would fall near the rib on the side of the travelway where miners are instructed not to travel. *Id.* Yet the presence of loose material indicates that neither bolting nor the solidity of the rocks eliminated the need for scaling or functional wire mesh. The location of the falling material is also unpersuasive. The entire 480 North was open for travel. Tr. 84-58. Coeur has no written plan requiring miners to walk down the center of travelways. Tr. 85:8-16; Tr. 555. Dreyer also testified that he and the accompanying miners traveled in all sections of the 480 North during his inspection. *Id.* The deterioration of the wire mesh contributed to the hazard of falling loose material in a utilized travelway, and would be reasonably likely to result in the injury of a passing miner.<sup>2</sup>

The extent of unmaintained wire mesh and the size of the loose material throughout the 480 indicate that the hazard created a reasonable likelihood of exposure to a serious and permanently disabling injury. The damaged wires were often adjacent to the loose material and the height of the loose material ranged from about 6 to 8 feet high in the 216 to nearly 14 feet high in the 200. Tr. 64; 72:14-17. Inspector Dreyer estimated that the 18 inch by 18 inch rock observed in the 196 weighed nearly 100 pounds, and would undoubtedly result in broken bones or crushing injuries. Tr. 57, 87. I agree and therefore uphold Citation No. 8611872 as S&S.

### c. Negligence

I also find that the violation was the result of high negligence on the part of Coeur. High negligence occurs when the operator "knew or should have known of the violative condition and there are no mitigating circumstances." 30 CFR § 100.3: Table X. The unmaintained wire mesh was extensive throughout the travelway and Coeur failed to demonstrate any mitigating circumstances. The existence of torn or unmaintained wire mesh along the entire 480 North demonstrates that Coeur's lack of care was not an isolated occurrence. Tr. 88:9-18.

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<sup>2</sup> While I have reservations that a reasonable likelihood of injury exists in the muck bay at the 196 intersection, Inspector Dreyer observed miners and equipment in the 240 and exiting the 480 North. Tr. 51:19-22. Even if no miners were exposed to the hazards in the 196, the extent of the unmaintained wire mesh and the lack of care in maintaining the wire throughout the area demonstrate that the violation on the whole is S&S. If even one of the hazards described in this the citation could be designated S&S, it is sufficient to uphold the entire citation as such.



While Coeur disputes the length of time the violations existed and whether management knew of the violation, actual knowledge is not required to designate a violation highly negligent. *See* 30 C.F.R. § 100.3(d): Table X. Individuals were present in the cited areas and were even working directly under the violations. Tr. 78; 89; 199. They either failed to notice the unmaintained wire and loose material or took no action in response to it. In many areas, the torn wire showed signs of rust, which is unlikely to occur overnight or within a single shift. Tr. 58; P-1, C-11. The torn wire was obvious and frequent throughout the 480 North, and Coeur should have known of its existence. Tr. 88:9-18.

I also credit Inspector Dreyer's decision to refuse to consider the mine rehabilitation program and employee training program to be mitigating factors.<sup>3</sup> The evidence indicates that Coeur took minimal measures to prevent, correct, or limit exposure to risks created by the torn wire. Inspector Dreyer continuously asked Safety Coordinator Tom Herndon to provide evidence of mitigating factors, and Herndon failed to do so. Tr. 90-91. Rather, he merely responded that the conditions along the 480 North were "bad." *Id.* Inspector Dreyer saw no evidence that any rehabilitation had taken place in the 480 North. Tr. 210. I credit Inspector Dreyer's testimony that the rehab program and miner training were irrelevant factors in the citation; either factor, if properly implemented in the area, would have reduced the extent of the violations. I therefore uphold the high negligence designation.

#### **d. Special Assessment**

Although I assess monetary penalties *de novo*, the Secretary submitted a specially assessed penalty of \$33,400.00. *See* Ex. R-Z-1, 2. The citation was for a violation of a Rule to Live By, which Inspectors are required to submit for consideration of a special assessment. Ex. R-Z-1; Tr. 91:10-92:5.

Coeur's violation history is reasonable. Ex. P-1; R-Z-1. However, this citation describes five areas each of which could constitute separate citations. Coeur is a large operator, and there is no indication that the penalty will interfere with its ability to continue operations. *See* Ex. R-Z-2. As discussed above, the violation was S&S with a reasonable likelihood of permanently disabling injury and the result of Coeur's high negligence. The pervasive and obvious nature of the violations throughout the 480 North indicates that the wire mesh was not closely examined or that miners were unaware of the threat the loose material may pose. The wire mesh was likely not maintained for an extensive period of time because it showed signs of rust, and because Coeur believed that the rock was of such high quality that ground support was generally not necessary. Coeur demonstrated good faith in abating the citations. The gravity, negligence, extensiveness of the violation and size of Coeur all justify the assessment of a special assessment in this instance.

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<sup>3</sup> Both parties cite Coeur's miner workplace examination cards as another factor that should have been considered. Tr. 99-101; Resp. Br. 29. While I admitted the workplace exam information as evidence, I place little weight on them because the Inspectors did not use them or rely on them when they wrote the various citations. *See* Tr. 99-101:5.

Coeur contests all of the Secretary's special assessments because they falsely state that management was aware of the violations. *See* Resp. Br. 44. While it is true that the Special Assessment Narrative Form inaccurately stated that Coeur's management was aware of the hazards, actual knowledge that a violation exists is not the sole factor in designating high negligence or specially assessing a penalty. *See* Ex. R-Z-1. High negligence and gravity are also designated through continued mining operations, and it is sufficient to determine that the operator should have known that the violation existed. Here, the presence of miners and the amount of damaged wire along the 480 North indicate that Coeur should have been aware of the condition. I therefore uphold the special assessment of \$33,400.00.

## **2. Citation No. 8611874**

On July 18, 2014, Inspector Dreyer issued Citation No. 8611874 for an alleged violation of 30 C.F.R. § 57.3360. Ex. P-7. The citation alleged that the conditions in the 555 South travelway ("the 555 South") and the 180 and 188 intersections required bolts to be installed and the damaged mesh wire to be maintained. *See Id.* The area is an access road to various other headings. Tr. 108. There were no barriers, barricades or signage to prevent entry. *Id.* The citation alleged that the violation was S&S, likely to result in a permanently disabling injury, and the result of high negligence. *Id.* The Secretary specially assessed a penalty of \$33,400.00. Ex. R-Z-2.

### **a. The Violation**

As with the previous citation, I find that the wire mesh here was necessary for ground support and was installed to support the ground because Coeur used the wire mesh throughout the entire area to reduce scaling. Inspector Dreyer observed loose material above the 555 South, on the 188 pillar, and between the 180 and 188 intersections. Tr. 108:13-17. A pile of loose material was located directly beneath one area of concern on the floor in the 188. Tr. 109: 9-12. Cracks and fractures were visible in the rock. *Id.* Inspector Dreyer's photographs show loose material and torn wire, as well as a bolt plate that no longer touched the face of the rock. *See* Ex. P-7, C-7, C-8. Torn, ripped, or otherwise unmaintained wire mesh was present near each of these areas. *Id.* Dreyer also observed bar marks in the area that demonstrated some rehabilitation, but the existence of loose and flaky material indicated that the rehabilitation was insufficient or incomplete. Tr. 108: 19-23. Coeur's assertion that the 555 South travelway had been rehabbed three days before the citation was issued supports these observations. *See* Resp. Br. 13; Tr. 109-111.

I also find that miners worked in or traveled through the 555 South. While Inspector Dreyer did not observe any miners in the area, the 555 South was not barricaded and did not warn against travel. Tr. 125:9-126:8. It remained open to the miners, as evidenced by a vent bag in the area. Ex. P-7, C-5; Tr. 123:9-17. Mobile equipment traveled through the area and, according to Coeur, was the likely cause of damage to the wire mesh. Tr. 114:21-25. Citation No. 8611874 is **AFFIRMED**.

### **b. Significant and Substantial**

I have already upheld Coeur's violation of § 57.3360. Coeur's failure to maintain the wire mesh also contributed to a discrete safety hazard. The specific hazard posed by the violation was that loose material would fall through torn or unmaintained wire mesh and contact miners working or traveling through the areas. Given the particular facts surrounding this citation, the hazard was reasonably likely to occur. Damaged wire mesh was present in the area, and loose material was visible above the 555 South and on the pillar of the 188. Tr. 108-109. Coeur's failure to maintain the wire exposed the loose material, and it was reasonably likely that the rocks would fall through the damaged or torn wire mesh and contact a miner. Thus, the violation constituted a discrete safety hazard to miners.

The hazard was reasonably likely to result in injury to miners because loose, cracked, and fractured material was located above the travelway and on the pillar. Loose material was visible on the pillar and on the floor directly beneath the unmaintained wires. Tr. 118, 122-23. The 188 pillar is the first pillar seen by miners entering the 555 South, and miners stage and park equipment in the area. Tr. 125-26. The location of the torn mesh and loose material directly above an unblocked and un-barricaded travelway created a reasonable likelihood of injury.

The hazard is reasonably likely to result in a serious injury. Ex. P-7, C-7. Inspector Dreyer considered the loose rock on the 188 pillar one of the most dangerous conditions in the first inspection because fractures were visible and the material could be easily dislodged. Tr. 109-111. Again, miners would have to travel past the hazards to enter or exit the 555 South. Tr. 125-26. I credit Inspector Dreyer's testimony that the size and location of the hazards were also likely to cause serious injuries such as broken bones and crushing. Tr. 128:8-14. I thus uphold the S&S designation.

### **c. Negligence**

I find the Secretary's high negligence designation to be appropriate due to the open and obvious extent of the hazards in the area. The hazards were located close to the level access and the area was used to stage equipment, where traffic is more frequent. Tr. 125: 15-25. Furthermore, evidence of barring demonstrates that individuals knew of the hazard but did not complete the rehabilitation or scaling process. Tr. 130:1-7. While Coeur argues that there is no evidence that the area was in use, it also explained to Inspector Dreyer that the wire mesh was likely torn by mobile equipment. Tr. 114: 16-25. This suggests that the area was either recently used for travel or that the hazard existed for a long period of time. For this reason, I also credit Inspector Dreyer's decision to disregard the rehabilitation and miner training as mitigating factors. The evidence of incomplete barring and the presence of loose material a mere three days after rehabilitation allegedly took place indicate that neither program was effective. I therefore hold that Coeur should have been aware of the hazards, and uphold the high negligence designation.

#### **d. Special Assessment**

The Secretary specially assessed a penalty of \$33,400.00. *See* Ex. R-Z-2. The citation was for a violation of a Rule to Live By; Inspectors must submit violations of Rules to Live By for consideration of a special assessment. Ex. R-Z-2; Tr. 91:10-92:5. Coeur's violation history is reasonable. Ex. P-7. However, this violation consisted of three different areas that could have qualified as separate citations. Ex. P-7. In addition, Inspector Dreyer issued five citations to Coeur for violation of § 57.3360 during the course of his inspection. The violation was S&S with a reasonable likelihood of permanently disabling injury and the result of Coeur's high negligence. The pervasive and obvious nature of the violations throughout the 555 South indicates that the wire mesh was not closely examined or properly rehabilitated. If vehicles caused the damage to the wire mesh in the 555 South, it indicates that miners were in the area recently or that the violation existed for a significant period of time.

Coeur is a large operator, and there is no indication that the penalty will interfere with its ability to continue operations. *See* Ex R-Z-2. Coeur abated the violation within a reasonable amount of time. *Id.* The gravity and negligence of the violation justify the assessment of a special assessment. I therefore uphold the special assessment of \$33,400.00.

#### **3. Citation No. 8611875**

On July 18, 2014, Inspector Dreyer issued Citation No. 8611875 citing an alleged violation of § 57.3360. Ex. P-10. The citation alleged that several areas of damaged and stressed wire mesh existed in the 200, 208, and 236 intersections of the 555 North travelway ("555 North"), and were not properly maintained to prevent hazards to miners. *Id.* The citation alleged that the violation was non-S&S, unlikely to result in lost workdays or restricted duty, and was the result of high negligence. *Id.* The Secretary specially assessed a penalty of \$3,000.00. Ex. R-Z-2. Coeur challenged the underlying violation, high negligence designation, and the special assessment. Resp. Br. 14, 32, 47.

##### **a. The Violation**

As with the previous citations, I find that the wire mesh was necessary for ground support in the Kensington Mine and was installed to support the ground because Coeur used the wire mesh throughout the entire area to reduce scaling. Loose material was visible throughout the 555 North. Tr. 137; Ex. P-10, C-2, C-7. A large, bulging section of wire filled with loose material existed directly over the 555 North and the 208 intersection. Tr. 139; Ex. P-10, C-2. Inspector Dreyer also noted and photographed unmaintained wire mesh in the 236, adjacent to loose and separated material. Ex. P-10, C-10, C-11. The 555 North is a travelway to other intersections. Tr. 108. Miners would walk through the 555 to access other parts of the mine. Citation No. 8611875 is **AFFIRMED**.

##### **b. Significant and Substantial**

Inspector Dreyer designated the violation as non-S&S and unlikely to result in lost workdays or restricted duty. Ex. P-10. Dreyer testified that the bulging section of material held

in place by stressed and damaged wire mesh in the 208 had not yet failed and that the loose material within the bulge was relatively small. Tr. 143:11-19. Dreyer testified that the unmaintained wire in the 200 and 236 intersections left only small openings. Tr. 143:23-25. He did not believe that the loose material was likely to fall through the openings and contact a miner. Tr. 144:1-6. Furthermore, Dreyer believed that if the material in any section were to contact a miner, the contact would result in less concerning injuries such as cuts and lacerations. Tr. 144:14-18.

I find Inspector Dreyer's testimony to be credible. Coeur violated a mandatory standard and the violation was likely to contribute to a discrete safety hazard because the loose material could fall through the unmaintained wire mesh and contact a miner. However, the bulging wire mesh in the 208 was still intact, albeit damaged, and the holes in the wire mesh in the 200 and 236 intersections were quite small. Furthermore, the loose material observed in all three intersections was relatively small. The hazard was not reasonably likely to cause a serious injury. I therefore defer to Inspector Dreyer's testimony and uphold his assessment of the violation as non-S&S and unlikely to result in lost workdays or restricted duty.

### **c. Negligence**

The open and obvious extent of the hazards in the 555 North justifies a high negligence designation. The frequency with which Inspector Dreyer observed loose material near damaged or unmaintained wire mesh during this inspection demonstrate a large-scale failure to address these hazards. Tr. 145:3-146:15. Again, I credit Inspector Dreyer's decision to disregard the rehabilitation and miner training as mitigating factors. Tr. 145. Safety Coordinator Herndon offered no explanation for the poor condition of the wire mesh. *Id.* While Coeur argues that the area had been rehabbed just three days prior, such evidence is not visible in Mr. Dreyer's photographs, and I find it unlikely that a bulging section of wire filled with loose material developed over the course of three days. Resp. Br. 15; *See* Ex. P-10. Coeur's training and rehabilitation procedures were thus insufficient to identify or remedy the damaged wire mesh and loose material, and cannot be considered mitigating factors. I therefore uphold the high negligence designation.

### **d. Special Assessment**

The Secretary proposed a special assessment of \$3,000.00. Ex. R-Z-2. The citation was for a violation of a Rule to Live By; Inspectors are required to submit these violations for consideration of a special assessment. Ex. R-Z-2; Tr. 91:10-92:5. Coeur's citation history prior to this inspection is reasonable, but Coeur was issued five citations for the same violation over the course of the inspection. The violation was non-S&S and unlikely to result in lost workdays or restricted duty, and the result of high negligence. Ex. P-10. Loose material was clearly visible and located close to unmaintained wire mesh. Ex. P-10, C-10, C-11.

There is no indication that the penalty will interfere with Coeur's ability to continue operations. *See* Ex R-Z-2. Coeur demonstrated good faith in abating the citations. *Id.* Because, unlike the two citations above, this violation was non-S&S and was unlikely to cause serious

injury, the special assessment appears excessive. I therefore vacate the special assessment and assess a penalty of \$1,203.00.

#### **4. Citation No. 8611879**

On July 19, 2014, Inspector Dreyer issued Citation No. 8611879 for an alleged violation of § 57.3360 for Coeur's failure to maintain wire mesh at the 1355 intersection and upramp. Ex. P-12. The 1355 is a main route and was located near a primary escape way. *Id.* The citation alleged extensive damage to wire mesh at the back of the intersection near large, loose rocks. *Id.* Miners and equipment traveled through the area. *Id.* The citation alleged that the violation was S&S, reasonably likely to be fatal, and the result of high negligence. *Id.* The Secretary specially assessed a penalty of \$60,000.00. Ex. R-Z-5.

##### **a. The Violation**

As in the previous violations, ground support was necessary to ensure that loose material did not become a hazard and the wire mesh was installed to reduce scaling and support the ground. It is clear here that Coeur failed to maintain its ground support. Large rocks were balanced on the wire mesh and a large patch of damaged wire mesh was visible 18 feet above the ground in the 1355. Tr. 158; Ex. P-12, C-9. The rock was already protruding past the point of damage on the wire mesh. Tr. 159:12-13. Maintenance of the wire was therefore necessary to prevent a hazard developing in the 1355.

The 1355 is a travelway to other portions of the mine. Tr. 163:6-13. Though Coeur argues that no loading took place in the area for at least two days, Inspector Dreyer's conversations with other miners indicate that the rock could have only been loosened by contact from loading a truck in the intersection. Resp. Br. 16; Tr. 168:2-11. Furthermore, Dreyer observed a Porta-Potty in the area, indicating miners had reason to access the area by foot. Tr. 163-64. I credit Inspector Dreyer's detailed testimony and uphold the violation. Citation No. 8611879 is **AFFIRMED**.

##### **b. Significant and Substantial**

I have held above that Coeur violated §57.3360, a mandatory standard. The failure to maintain the wire mesh also contributed to a discrete safety hazard. The specific hazard posed by the violation was that loose material would fall through torn or unmaintained wire mesh and contact miners working or traveling through the areas. Given the particular facts surrounding this citation, the hazard was reasonably likely to occur. Loose rocks were balanced on the damaged wire, and could break through the wire mesh and contact a miner. Tr. 158. Coeur's failure to maintain the wire mesh thus made it reasonably likely that the hazard would develop.

The hazard was reasonably likely to result in injury to a miner because loose rock and damaged wire were located directly above an area with the potential for high traffic. The rock was likely loosened by loading or unloading beneath the hazard. Tr. 168:2-11. Equipment was present in the area at the time the citation was issued, and miners used the 1355 to reach the Porta-Potty and to access other areas of the mine. Tr. 163-64. Again, Coeur's argument that the

rock's location slightly off to the side of the travelway reduced its threat of injury is unpersuasive. Resp. Br. 35. The 1355 has no designated or required paths and Coeur has no written plan requiring miners to walk in the center of travelways. Tr. 85:8-16; Tr. 555. The potential for traffic along the travelway suggests that the rock posed a reasonable likelihood of injury to miners.

The size of the rock was reasonably likely to cause a serious, if not fatal, injury. The rock appeared to be about 12 inches by 6 inches by 3.8 inches in size. Tr. 158. It was located 12 to 18 feet above the travelway. Tr. 171:6-10. The rock was visible, loose, and balanced on a damaged portion of the wire mesh. *Id.* If it were to fall and contact a miner, the result could have been a serious broken bone or crushing injury. The risk of the rock falling during continued mining operations supports the S&S designation.

### **c. Negligence**

Inspector Dreyer designated the violation as high negligence. Ex. P-12. He referenced Coeur's repeated violations during the inspection, as well as the fact that the inspection crew immediately diverted their efforts removing the hazard once discovered. Tr. 172:3-21. Unlike the other violations, however, there remains significant question as to how long the hazard existed and how the hazard was created. Miners working in the area from inside the mucker had a restricted view of the area, and thus the violation was not particularly obvious or noticeable. *See* Ex. P-12; Tr. 173:15-18. These miners were also protected by haul truck cabs at the time. Tr. 265:8-12. The restricted view of the miners working in the area and the unknown duration of the hazard's existence are valid mitigating factors that should have been considered. I therefore reduce negligence from high to moderate.

### **d. Special Assessment**

The Secretary issued a special assessment of \$60,000.00. Ex. R-Z-5. The citation was for a violation of a Rule to Live By; Inspectors are required to submit these violations for consideration of a special assessment. Ex. R-Z-2; Tr. 91:10-92:5. While Coeur's citation history is reasonable, Dreyer issued five citations to Coeur for the same violation over the course of the inspection. I found that the violation was S&S with a reasonable likelihood of fatal injury, and reduced the negligence designation from high to moderate. The hazard was obscured from view and the miners in the area were protected by truck cabs. *See* Ex. P-12; Tr. 173:15-18.

There is no indication that the penalty will interfere with Coeur's ability to continue operations. *See* Ex R-Z-2. Coeur demonstrated good faith in abating the citations. *Id.* I find the special assessment to be excessive for a violation of moderate negligence. I therefore vacate the special assessment and assess a penalty of \$19,794.00.

## **5. Citation No. 8611880**

On July 19, 2014, Inspector Dreyer issued Citation No. 8611880 for an alleged violation of § 57.3360 for failure to maintain wire mesh at the 1355 intersection ("the 1355"). Ex. P-15. Partially damaged wire mesh was observed throughout the area. *Id.* About 9 to 10 feet up the

pillar hazardous ground existed where the wire mesh was completely destroyed. *Id.* Two rocks, measuring 17 inches by 29 inches by 7 inches and 28 inches by 15 inches by 10 inches, were barred down during the inspection. *Id.* The citation designated the violation as S&S, reasonably likely to result in a permanently disabling injury, and the result of high negligence. *Id.* The Secretary specially assessed a penalty of \$33,400.00. Ex. R-Z-2.

**a. The Violation**

Again, I first find that the wire mesh here was necessary for ground support and was installed to support the ground because Coeur used the wire mesh throughout the entire area to reduce scaling. Here, Inspector Dreyer observed loose and separated rock adjacent to the damaged wire throughout the 1355, and particularly near the 189 and 214 intersections. Tr. 179. In the 189, a large rock was visible 9 to 10 feet up the pillar and was barred down during the inspection. Tr. 179-80; Ex. P-15, C-7. Additional large rocks were barred down in the 214 intersection. Tr. 186; Ex. P-15, C-11. In fact, Coeur was barring down rock during the entire advance through the section to ensure safety for the inspection crew. Tr. 190. Coeur Safety Coordinator Herndon admitted that the area contained broken wire mesh and loose rock. Tr. 538, 541-42, 557. Finally, the presence of the mucker in the 214 intersection indicates that miners traveled and worked in the area. *See* Tr. 182:17-183:14. Regardless of whether Dreyer observed the mucker's operator actually working in the area, the 1355 is a travelway and the mucker was present near the hazard. Mr. Herndon also testified that there was a miner in the area at the time of the inspection. Tr. 560:8-9. Citation No. 8611880 is **AFFIRMED**.

**b. Significant and Substantial**

I have already held that Coeur violated § 57.3360, a mandatory safety standard. The failure to maintain the wire mesh also contributed to a discrete safety hazard. The specific hazard posed by the violation was that loose material would fall through torn or unmaintained wire mesh and contact miners working or traveling through the areas. Here, a safety hazard already existed at the time of the inspection. Coeur was actively barring down rocks in this area during the inspection to ensure it was safe to continue on. *See* Tr. 179-80; 190; P-15. Immediate scaling likely would not have been necessary if Coeur had properly maintained the wire mesh, and their violation contributed to the likelihood of the hazard.

The hazard in the 1355 was reasonably likely to result in injury to miners because it was used for travel and Coeur's representatives barred down loose rock adjacent to the unmaintained wire mesh. *See* Tr. 179-80; 190. The 1355 was open for travel, as evidenced by the presence of the mucker in the area. Tr. 182:10-19. In order to reach the mucker, miners would have to travel past the hazards. Tr. 183. Mr. Herndon testified that there was a miner in the area at the time of the inspection. Tr. 560:8-9. The loose rocks were therefore likely to fall through the damaged wire and cause an injury.

Again, I reject Coeur's argument that an injury to a miner was not reasonably likely because the rocks fell close to the rib and not directly over the travelway. Resp. Br. 36. Coeur has no written plan requiring miners to walk down the center of travelways. Tr. 85:8-16; Tr. 555. In addition, vehicle traffic affects where foot traffic is able to walk in the travelway. *See*



Tr. 8485. In the course of continuous mining operations, miners would be exposed to these hazards. Given the size of the loose rocks it is also reasonably likely that these hazards, had they not been barred down, would have led to a permanently disabling injury such as crushing or broken bones. *See* P-15, C-7, C-8. I therefore uphold the S&S designation.

### **c. Negligence**

Inspector Dreyer designated the violation to be the result of Coeur's high negligence. Ex. P-15. The damaged wire and loose rock throughout the 1355 were obvious, as evidenced by the barring that took place before Inspector Dreyer passed through the area. Tr. 190, 282. Dreyer also noted that the wires were rusted. Tr. 190:24. Contrary to Coeur's representation in their brief, Mr. Herndon explained that he could not provide mitigating factors for this citation because there was a miner working in the area during the inspection. *See* Resp. Br. 37; Tr. 560:8-9. It is clear from these facts that Coeur should have known that dangerous conditions existed in the 1355 and once again failed to address them. The absence of mitigating factors and the presence of miners and equipment in the area support a designation of high negligence.

### **d. Special Assessment**

The Secretary specially assessed a penalty of \$33,400.00. *See* Ex. R-Z-2. The citation was for a violation of a Rule to Live By; Inspectors are required to submit these violations for consideration of a special assessment. Ex. R-Z-2; Tr. 91:10-92:5. While Coeur's citation history is reasonable, Coeur was issued five citations for the same violation over the course of the inspection. The violation was S&S with a reasonable likelihood of permanently disabling injury and was the result of Coeur's high negligence. The poor condition of the wire mesh throughout the 1355, an area where miners were present, indicates that the wire mesh was not closely examined or properly rehabilitated, and that Coeur should have been aware of the condition.

There is no indication that the penalty will interfere with Coeur's ability to continue operations. *See* Ex R-Z-2. Coeur demonstrated good faith in abating the citations. *Id.* I uphold the special assessment of \$33,400.00.

## **6. Citation No. 8780941**

On December 4, 2014, Inspector James Stembridge issued Citation No. 8780941 for an alleged violation of 30 C.F.R. § 57.3200. Ex. P-35. The citation alleged that ground conditions created a hazard along the 1140-180 upramp ("the 1140") that was not taken down or supported. *Id.* The rocks varied in size and were located 3 to 7 feet above the ground. *Id.* The citation alleges that the violation was non-S&S, unlikely to result in a permanently disabling injury, and the result of moderate negligence. *Id.* The Secretary assessed a penalty of \$263.00.

Coeur's arguments against the three violations of 30 C.F.R. § 57.3200 are relatively similar. Coeur argues that the Secretary failed to prove the existence of a "reasonably detectable hazard" as required by the provision because no employees worked in or near the area affected by the hazard. Resp. Br. 1, 21. Coeur also argues that the fact that some material was scaled down is not sufficient to support a violation of the standard. *Id.*

**a. The Violation**

I find that the Secretary failed to establish that the hazards discovered in the 1140 were “reasonably detectable” under § 57.3200. *See ASARCO, Inc.*, 14 FMSHRC 941, 951 (Jun. 1992). While testing an area of roof and erroneously concluding it is safe is sufficient under the provision to merit a violation, the Secretary provided no evidence that miners worked or traveled in the area to the extent that they would be able to reasonably detect the hazard. *See id.* at 946-47. Inspector Stembridge acknowledged that there was minimal foot traffic in the area. Tr. 305:24-25. Coeur’s witness Alan Gordon also testified without refutation that the area had been mined out and backfilled. *See* Tr. 695:11-21. Absent evidence to the contrary, I credit Mr. Gordon’s testimony that there would be no reason to travel here to detect the hazard. Tr. 696:11-13. There is no evidence to prove that the hazard would not have been detected had the area been used or entered regularly. Citation No. 8780941 is **VACATED**, and for that reason I need not address the Secretary’s gravity or negligence designations.

**7. Citation No. 8786150**

On December 3, 2014, Inspector Thomas Rasmussen issued Citation No. 8786150 for an alleged violation of § 57.3360, citing Coeur’s failure to maintain wire mesh along the 1635 development heading (“the 1635”). Ex. P-17. Inspector Rasmussen noted a 12 inch by 36 inch hole in the wiring and loose rocks near the area. *Id.* The hazard existed approximately 6 feet above the ground, and Rasmussen observed one miner in the area. *Id.* The citation alleged that the hazard was non-S&S, unlikely to result in an injury causing lost workdays or restricted duty, and the result of moderate negligence. *Id.* The Secretary assessed a penalty of \$176.00. Coeur challenges the underlying violation and the designation of moderate negligence. Resp. Br. 18, 37-38.

**a. The Violation**

As discussed above, I find that the wire mesh here was necessary for ground support and was installed to support the ground because Coeur used the wire mesh throughout the entire area to reduce scaling. Inspector Rasmussen’s photographs show loose material behind the wire mesh and on the ground below the hazard. Ex. P-17, C-2, C-3. The damaged wire mesh was adjacent to loose rocks in the middle of the 1635 and approximately 100 feet from the face. Tr. 332:22-23; Ex. P-17, C-2, C-3. Inspector Rasmussen also noted other loose material on the rib 15 feet from the hole that was barred down during the inspection. Tr. 332:13-333:9.

The 1635 is a development travelway where drilling, blasting, and mucking take place to access new ore. Tr. 331:6-17. A miner was present in the area operating a bolter between the hazards on the face and on the rib. Tr. 333:15-18. These factors indicate that miners were present and working near the hazard and unmaintained wire mesh. Citation No. 8786150 is **AFFIRMED**.

### **b. Significant and Substantial**

Inspector Rasmussen designated this violation as non-S&S and unlikely to result in lost workdays or restricted duty. Ex. P-17. Rasmussen testified that the loose rocks that he observed in the 1635 were smaller in size than in the previous areas he inspected and only partially exposed by the unmaintained wire mesh. Tr. 338: 14-20. These facts rendered the chance of an injury to passing miners less likely. *Id.* Further, Rasmussen explained that were such an injury to occur, it was likely to result in cuts and bruises, and not broken bones or crushing injuries. Tr. 339:3-9.

Considering the violation in light of the *Mathies* factors, I find Inspector Rasmussen's testimony to be credible. Coeur violated the mandatory safety standard and the loose materials and unmaintained wire mesh created a discrete safety hazard because they could fall and contact a miner. But the small material and its partial exposure indicate that the hazard was not reasonably likely to result in serious injury. I defer to Inspector Rasmussen's testimony and uphold his assessment that the hazard was non-S&S and unlikely to result in lost workdays or restricted duty.

### **c. Negligence**

Inspector Rasmussen designated the violation as the result of moderate negligence. Inspector Rasmussen testified that the bolter operator had already scaled the area that day and missed the cited hazard. Tr. 340:7-9. While the bolter operator should have noticed the hazard, the rocks that were barred down were no larger than four inches and were only partially exposed. Tr. 339:3-9. The size of the loose rocks and the evidence that some rehabilitation took place in the area prior to the inspection are mitigating factors. I uphold the designation of moderate negligence.

### **d. Penalty Assessment**

The Secretary has proposed a regularly assessed a penalty of \$176.00 for this citation. The violation was non-S&S, unlikely to result in an injury causing lost workdays or restricted duty, and the result of moderate negligence. Ex. P-17. Coeur's citation history is reasonable. *Id.* Coeur is a large operator, and there is no indication that the penalty will interfere with Coeur's ability to continue operations. Coeur demonstrated good faith in abating the citation. *Id.* In light of these criteria, I uphold the penalty of \$176.00 for Citation No. 8786150.

## **8. Citation No. 8786152**

On December 3, 2014, Inspector Thomas Rasmussen issued Citation No. 8786152 for an alleged violation of § 57.3200. Ex. P-22. The citation alleged that Coeur failed to take down, support, or barricade ground condition hazards located by the secondary escape way entrance in the 1485 travelway ("the 1485"). *Id.* Large rocks, the largest of which measured 12 inches by 18 inches by 6 inches, were easily barred down from 4 to 6 feet above ground level and landed in the 1485. *Id.* The citation designated the violation S&S, reasonably likely to result in a

permanently disabling injury, and the result of moderate negligence. *Id.* The Secretary assessed a penalty of \$1,304.00.

**a. The Violation**

The loose material was a reasonably detectable hazardous condition because a significant amount of material was barred down and was visible and in close proximity to the travelway. The 1485 is an active mining area and travelway, and a secondary escape way is located nearby. Tr. 347:18-21. The escape way entrance is visible in the photographs near the barred material. Tr. 348:3-7; P-22, C-1.

Coeur's witness and miners' representative Robert Rich testified that he did not believe the material posed a hazard because it was located low on the rib and required scaling. Tr. 684:23-685:3. However, loose material is considered hazardous if it can be pried free by scaling. *See Springfield Underground*, 17 FMSHRC 613, 619 (Apr. 1995) (ALJ). While located low on the rib, the area was not secured with wire or any ground support. Tr. 346:4-8. The material was large in size; one of the rocks measured 12 inches by 18 inches by 6 inches. Tr. 346:12-14. When barred down, the material did not settle directly below the rib but rolled approximately 2.5 to 3 feet out of from the rib. Tr. 350:14-15; Ex. P-22, C-1, C-2. The size of the material and the slant of the ground indicate that the rocks posed a hazard as they fell. Furthermore, Inspector Rasmussen testified that he observed miners working up the ramp during the inspection. Tr. 350:18-19. The proximity of the intersection to an active mining area and an escape way, and the prominence of the material removed from the rib, indicate that a reasonably detectable hazard existed.

Coeur also failed to install a warning or barrier near the hazard until it could properly be taken down or supported. The loose material was barred down during the inspection. Tr. 347:6-7, 683:10-15. Aside from a dusty "Carbon Monoxide" ("CO") sign in the area, there was no other sign present and no barricade or warning indicating that the hazard existed. Tr. 351:20-24. Citation No. 8786152 is **AFFIRMED**.

**b. Significant and Substantial**

I upheld the violation of § 57.3200, a mandatory safety standard. The failure to take down or support the hazardous ground conditions also contributed to a discrete safety hazard. The specific hazard posed by the violation was that the loose material would fall and contact miners working in or traveling through the areas. I find that the hazard was reasonably likely to occur. Coeur failed to bar down the material until the inspection. *See* Tr. 347:6-7. In addition, Coeur's failure to barricade or mark the area also contributed to the hazard because miners were still permitted to travel through the area. The hazard of falling rocks was thus reasonably likely to occur due to Coeur's failure to provide support or barricade the area.

Here, however, the hazard does not present a reasonable likelihood of injury to miners because the area no longer saw heavy traffic. Inspector Rasmussen testified that miners would travel past the area, and in an emergency they would travel past the loose rib. Tr. 346, 348, 351. He also testified that the CO sign was stretched across the entry directly adjacent to the loose

rock to warn miners of the risk of high carbon monoxide levels after a blast. Sec'y Br. 40; Tr. 349. The Secretary argues that presence of the CO sign indicates that one or more miners would have walked past the hazard to place the sign there and to retrieve it. Sec'y Br. 40. Mr. Rich, however, testified to a second escape way door on the other side of the pillar that was operational at the time of the inspection. Tr. 681:7-23. Rasmussen was uncertain of whether that door was operational at the time of the inspection, and therefore I credit Mr. Rich's testimony that it was present. See Tr.424: 21-23. Further, the Secretary does not provide any proof that the CO sign was placed there while the hazard was present. Rasmussen was uncertain as to when the sign was put up, and testified that it looked dusty in the photographs. Tr. 425: 15-22.

Even if an injury were to occur, the hazard's height off of the ground indicates that it is unlikely to be serious. Mr. Rich and Mr. Rasmussen both testified that the material was located only 4 to 6 feet above ground level. Tr. 345:19-346:1, 682:1-4. Falling material from this height is not reasonably likely to cause a permanently disabling injury. Therefore, I vacate the S&S designation and reduce the gravity to unlikely to cause lost workdays or restricted duty.

### **c. Negligence**

Inspector Rasmussen designated the violation to be the result of Coeur's moderate negligence. Ex. P-22. Rasmussen testified that although an obvious hazard existed in the 1485, he gave Coeur the benefit of the doubt because management had not yet visited this part of the mine at the time of his inspection. Tr. 356: 4-10. Rasmussen also acknowledged Coeur's rehabilitation program as a mitigating factor in this particular area of the mine. Tr. 356:23-357:3.

I see no evidence that distinguishes Coeur's rehabilitation efforts in the 1485 from their efforts in the other cited areas. Coeur's rehabilitation program did little to address the hazards existing in other areas of the mine and therefore was not credited as a mitigating factor. There is no indication that Coeur's management would have properly addressed the hazard upon visiting the 1485. Rather, the other citations indicate that Coeur continuously failed to address similar hazards. Coeur should have known that loose material was present in the travelway. The material was loose, and Rasmussen observed miners working up the ramp nearby who could have noticed and addressed the hazard. To credit Coeur's rehabilitation program here, when the program failed to mitigate numerous other hazards throughout the mine, would be inconsistent and contrary to the evidence. I increase Coeur's negligence from moderate to high.

### **d. Penalty Assessment**

The Secretary has proposed a regularly assessed a penalty of \$1,304.00 for this citation. I have held that the violation was non-S&S, unlikely to result in an injury causing lost workdays or restricted duty, and the result of high negligence. Coeur's citation history is reasonable. Ex. P-22. Coeur is a large operator, and there is no indication that the penalty will interfere with Coeur's ability to continue operations. Coeur demonstrated good faith in abating the citation. *Id.* In light of these criteria, I hereby modify the penalty to \$651.00.

## 9. Citation No. 8786153

On December 3, 2014, Inspector Rasmussen issued Citation No. 8786153 for a violation of § 57.3200. Ex. P-26. The citation alleged that hazardous ground conditions on the upramp at the 1425 entry intersection (“the 1425”) were not taken down, supported, or properly barricaded to prevent entry. *Id.* Large rocks, measuring approximately 8 inches by 8 inches by 8 inches, were barred off the ribs, while other loose rocks were visible along the edge of the wire. *Id.* Inspector Rasmussen designated the violation as S&S, reasonably likely to result in permanent disability, and the result of moderate negligence. *Id.* The Secretary assessed a penalty of \$1,304,000.

### a. The Violation

The loose material was a reasonably detectable hazard because large, loose rocks were visible along a main travelway. Tr. 361:5-11. The loose rocks were barred down during the inspection, and no sign or barricade was posted to restrict travel in the 1425. *Id.* In addition, the loose material was 5 to 9 feet up the rib near a waste pass. Tr. 359-62. Inspector Rasmussen testified that he observed “broken, separated rocks with large cracks.” Tr. 362:5-9.

Mr. Rich testified that he performed the scaling on the rib and that the rocks took some effort to bar down. Tr. 545:9-11. He was also unable to bar down the material in the back. *Id.* While the ease with which the material was barred down is disputed, loose material can be considered hazardous if it can be pried free by scaling. *See Springfield Underground*, 17 FMSHRC 613, 619 (Apr. 1995) (ALJ). Mr. Rich was able to bar down the rocks by hand, and therefore they constituted a hazard.

The amount of material barred down is also significant. *See* Ex. P-26, C-2, C-6. Mr. Herndon testified that the material was behind undamaged wire mesh. Tr. 544-45. Yet Inspector Rasmussen’s photographs show no evidence of undamaged wire covering the barred area. Ex. P-26, C-1. In fact, only one picture shows loose material held up by wire mesh. Ex. P-26, C-9. The other photographs show damaged wire or no wire at all. *See generally* Ex. P-26.

Coeur also argues that because the waste pass was seldom used, the hazard was not reasonably detectable. Resp. Br. 23-24. However, the rocks were located along the 1425, which granted access to the upper level of the mine. Tr. 359-60. The 1425 was a main escape way, and miners would also access the back. Tr. 370:21-371:1. Furthermore, Inspector Rasmussen explained that the waste pass was seldom accessed *by foot*, but was accessed by a variety of vehicles, including open cab vehicles. Tr. 362:10-16. I credit Inspector Rasmussen’s detailed testimony. Citation No. 8786153 is **AFFIRMED**.

### b. Significant and Substantial

I have held that Coeur violated section 57.3200, a mandatory safety standard. The failure to support or remove the hazardous ground, or to barricade the area, also contributed to a discrete safety hazard. The specific hazard posed by the violation was that the loose material could fall and contact miners working in or traveling through the area. Given the particular facts

surrounding this citation, the hazard was reasonably likely to occur. Coeur failed to support or scale the area until the loose material was discovered during the inspection, and the material came down in large quantities. Tr. 544-45. Thus, it is clear that Coeur's violation contributed to likelihood that the rocks would fall and contact a miner.

The hazard was reasonably likely to result in injury to miners because it was located in a travelway and the material was loose. The hazards were located in a travelway to upper levels of the mine where covered and uncovered vehicles moved through the area. Tr. 370-71. Some rocks were already loose and balanced on wires at the time of the inspection, increasing the likelihood that they would fall through the damaged wire mesh under continued normal mining operations. Tr. 369. I find it reasonably likely that miners would be injured by falling rock hazards in the travelway.

The hazard was also reasonably likely to cause a serious injury given the height and amount of barred material from the two locations. The loose rock in the rib was 5 to 9 feet up and fell close to the rib, while the material in the back was 16 feet above the ground. Tr. 359-62; 370:4-6. The photographs show that significant amounts of material were barred down. Ex. P-26, C-2, C-6, C-7. Thus, if the loose material were to fall, it is reasonably likely that the rock could cause serious crushing injuries. I therefore uphold the S&S designation.

#### **c. Negligence**

Inspector Rasmussen designated the violation as a result of Coeur's moderate negligence. Inspector Rasmussen was unsure of whether management had been in the area yet that day to discover the hazard, and thus credited Coeur's rehabilitation plan as a mitigating factor. Tr. 362:10-16. As discussed previously, however, I find no reason to credit Coeur's rehabilitation program here when it was ineffective throughout the other areas of the mine. Coeur should have been aware of the violation because the loose material was large and located along the 1425 travelway and upramp, a frequently traveled area. Tr. 373. Multiple vehicles drove through the area and past the hazards to access the waste ramp. Tr. 362:10-16. Coeur should have noticed the hazard, and should have barred down the loose material prior to doing so during the inspection. There is no evidence that management would have properly addressed the issue had they been in the area. I therefore increase the negligence designation from moderate to high.

#### **d. Penalty Assessment**

The Secretary has proposed a regularly assessed a penalty of \$1,304.00 for this citation. I have upheld that the violation was S&S and reasonably likely to result in a permanently disabling injury. I also increased the Secretary's negligence designation from moderate to high. Coeur's citation history is reasonable. Ex. P-22.

Coeur is a large operator, and there is no indication that the penalty will interfere with Coeur's ability to continue operations. Coeur demonstrated good faith in abating the citation. *Id.* In light of these criteria, I hereby modify the penalty to \$4,810.00.

## 10. Citation No. 8786162

On December 5, 2014, Inspector Rasmussen issued Citation No. 8786162 for an alleged violation of § 57.3360 for failure to maintain adequate ground control in the 480 South travelway at the 152 intersection (“the 480 South”). Ex. P-30. The citation alleged that rocks up to 12 inches by 12 inches by 8 inches in size were located near areas of damaged wire mesh. *Id.* A large segment of wire was also missing from the pillar, where large rocks were easily barred off. *Id.* An electrical outlet providing power to a jumbo roof bolter was also located nearby. *Id.* Inspector Rasmussen designated the violation as S&S, reasonably likely to cause fatal injuries, and the result of high negligence. *Id.* The Secretary specially assessed a penalty of \$32,800.00. Ex. Z-7.

### a. The Violation

For the reasons already discussed, I hold that ground support was necessary throughout the Kensington Mine and that the wire mesh was installed to reduce scaling and support the ground. The conditions of the 480 South are no exception. Three holes in the damaged wire were visible approximately 16 feet above the ground. Tr. 382; Ex. P-30, C-1, C-2. The holes ranged from approximately 24 inches by 24 inches, 12 inches by 24 inches, and 8 inches by 8 inches. Tr. 382:11-13. In addition, torn wire was ripped away from the pillar between the 148 and 152 intersections, and several bolts on the pillar were bent and bolt plates missing. Tr. 378; Ex. P-30, C-8, C-9, C-10. Inspector Rasmussen testified that Coeur painted the word “Bolt” onto the affected area during the inspection to ensure that new bolts would be installed. Tr. 397:3-12; P-30, C-10.

Coeur’s witness Eddie Petrie disputed the proximity of the loose rocks to the holes in the mesh, and whether new bolts were needed. Tr. 650:2-6, 9-10. Coeur argues that Inspector Rasmussen’s testimony is unreliable because he could not point to areas of loose rock during his deposition, but was able to do so during the hearing. Resp. Br. 20, FN 8. I disagree. During his testimony, Inspector Rasmussen attempted to point out loose materials in his photographs and explained that he was not “100 percent certain” which rocks were loose. Tr. 386:1-7. His testimony does not amount to the “pure speculation” that Coeur alleges in its brief. *See* Resp. Br. 39. Rasmussen credibly testified that the loose material was easier to see in the enlarged photographs available at the hearing. Tr. 435:11-15. Most of the enlarged photographs do in fact show loose material and damaged wire, even if Rasmussen could not positively identify loose material in every photograph. *See* Ex. P-30, C-1, C-3, C-8, C-9, C-10. I believe that the enlarged photographs improved Mr. Rasmussen’s ability to see the loose material and adequately explained the discrepancy between his deposition and testimony.

It is also clear that miners worked and traveled in the 480 South. The 480 South is an active mining area and a main travelway to reach other intersections. Tr. 380:6-13. The area was recently rehabbed multiple times. *Id.* at 20. The power cord connecting to the jumbo roof bolter ran underneath one of the hazards and the bolter itself was located within 100 feet from the hazard. Tr. 384:9-17. It is therefore clear that ground support was necessary in the area, and that Coeur’s failure to maintain the wire mesh could affect miners traveling or working nearby. Citation No. 8786162 is **AFFIRMED**.



### **b. Significant and Substantial**

I have already held that Coeur violated § 57.3360 in the cited area. The failure to maintain the wire mesh also contributed to a discrete safety hazard. The specific hazard posed by the violation was that loose material would fall through torn or unmaintained wire mesh and contact miners working or traveling through the 480 South. Given the particular facts surrounding this citation, the hazard was reasonably likely to occur. The loose rocks near the pillar could fall through the torn and unmaintained wire mesh, contact a miner, and cause injuries.

The hazard was reasonably likely to result in injury to miners because the loose material was barred down with ease and miners worked or traveled in the vicinity. A jumbo roof bolter was present in the area. Tr. 384:9-17. The jumbo roof bolter had to travel past the pillar at some point to be parked closely to the intersection. Tr. 383-84, 393. A miner also had to route the power cord under the hazard. Tr. 394, 98. While the bolter may not have been used during the shift on which the citation was issued, the jumbo bolter was likely to be used during continued mining operations, at which time its operator would be subject to a reasonable likelihood of injury. *See* Tr. 398. Thus, it is reasonably likely that miners would be exposed to the falling rocks.

Mr. Rasmussen's photographs also indicate that some of the rocks barred down were quite large. Ex. P-30, C-8, C-9. That the barred rocks were over 100 pounds and would likely cause fatal injuries to the miners exposed to them. Tr. 407; Ex. P-30, C-7, C-8, C-9. I therefore uphold the S&S designation.

### **c. Negligence**

Inspector Rasmussen designated Coeur's negligence as high because the violations were extensive and obviously visible from some distance away. Tr. 407:24-409:13. The jumbo roof bolter was present and set up prior to the inspection shift. Tr. 394:16-18. Given Inspector Rasmussen's testimony that the wire mesh was rusty, the hazard likely existed longer than one shift and the power cord was set up while the condition existed and went unnoticed. Tr. 410:8-12. Finally, Coeur was issued the same violation six months earlier in the 480, indicating they should have been on notice for ground support problems in the area. Tr. 409. Even if Coeur rehabbed the area multiple times since the previous violation, it is unlikely that the rust and loose material developed within the ten days since the last rehab, indicating that Coeur's rehabilitation procedure in the 480 is insufficient and not a mitigating factor. *See* Resp. Br. 39. I therefore uphold the high negligence designation.

### **d. Special Assessment**

The Secretary issued a special assessment of \$32,800.00 for this citation. Ex. R-Z-7, 8. The citation was for a violation of a Rule to Live By; Inspectors must submit violations of Rules to Live By for consideration of a special assessment. *See* Ex. R-Z-7, 8; Tr. 91:10-92:5. Coeur's violation history was relatively normal until the period at issue in this case, where Coeur was issued six citations for violation of § 57.3360 between July and December 2014. In fact, Coeur

was issued a citation for failure to maintain ground support in the 480 six months earlier, and thus should have been aware of potential ground support issues in the area. Tr. 409. The violation was S&S with a reasonable likelihood of fatal injury and the result of Coeur’s high negligence. Miners were working in the area, and Inspector Rasmussen testified that he found it hard to believe that whoever drove the vehicle that impacted the area did not know about the hazard. Tr. 411:7-412:4. The violation was obvious and pervasive, and appears to be the result of a systematic disregard for the condition of wire mesh in the Kensington Mine.

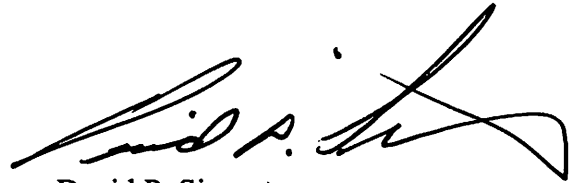
There is no indication that the penalty will interfere with Coeur’s ability to continue operations. See Ex R-Z-2. Coeur demonstrated good faith in abating the citations. Ex. R-Z-8. I therefore uphold the special assessment of \$32,800.00.

### V. Penalty Summary

Citation No.	Originally Proposed Assessment	Judgment Amount	Modification
<b>WEST 2015-346</b>			
8611872	\$33,400.00	\$33,400.00	
8611874	\$33,400.00	\$33,400.00	
8611875	\$3,000.00	\$1,203.00	Remove Special Assessment
8611880	\$33,400.00	\$33,400.00	
<b>WEST 2015-422</b>			
8611879	\$60,000.00	\$19,794.00	Remove Special Assessment  Reduce negligence from “High” to “Moderate”
<b>WEST 2015-401</b>			
8786150	\$176.00	\$176.00	
8786152	\$1,304.00	\$651.00	Remove Significant and Substantial Designation  Reduce Gravity from “Reasonably Likely to Cause Permanently Disabling Injury” to “Unlikely to Cause Lost Workdays or Restricted Duty”  Increase Negligence from “Moderate” to “High”
8786153	\$1,304.00	\$4,810.00	Increase Negligence from “Moderate” to “High”
8780941	\$263.00	--	Vacate Citation
<b>WEST 2015-470</b>			
8786162	\$32,800.00	\$32,800.000	
<b>TOTAL:</b>	<b>\$199,047.00</b>	<b>\$159,634.00</b>	

**VI. ORDER**

Respondent is hereby **ORDERED** to pay the Secretary of Labor the total sum of **\$159,634.00** within 30 days of this order.<sup>4</sup>



David P. Simonton  
Administrative Law Judge

Distribution: (U.S. First Class Mail)

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<sup>4</sup> Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390