FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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UNITED TACONITE, LLC Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent,	CONTEST PROCEEDINGS Docket No. LAKE 2011-392-RM Order No. 6553379; 01/24/2011 Docket No. LAKE 2011-393-RM Order No. 6553380; 01/24/2011 Mine: United Plant Mine ID 21-03404
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. UNITED TACONITE, LLC Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2012-687-M A.C. No. 21-03404-289745-01 Docket No. LAKE 2012-841-M A.C. No. 21-03404-296882 Mine: United Plant

DECISION AND ORDER

Appearances: James M. Peck, U.S Department of Labor, Office of the Solicitor, Duluth, MN for the Secretary

Dana Svendsen, Esq., & R. Henry Moore, Esq., Jackson Kelly, PLLC, Denver, CO and Pittsburgh, PA respectively for Respondent

Before: Judge Lewis

STATEMENT OF THE CASE

These cases are before the undersigned Administrative Law Judge on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor against Respondent, United Taconite ("Respondent" or "United Taconite"), pursuant to Sections 104 and 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(d). A hearing was held in Duluth, Minnesota on August 27, 2013. The parties subsequently submitted post-hearing briefs.

PROCEDURAL HISTORY

On January 24, 2011, MSHA Inspector Thaddeus J. Sichmeller issued a 107(a) Imminent Danger Order and a corresponding 104(d)(1) Citation for an alleged safety violation at United Taconite's United Plant ("Plant") in St. Louis County, Minnesota. On April 26, 2011, Inspector Sichmeller issued a 104(a) citation for another alleged safety violation at the Plant. United Taconite contested these violations and all three issuances were brought to hearing.

STIPULATIONS

The parties have entered into several stipulations, admitted as Parties Joint Exhibit 1. Those stipulations include the following:

1. United Taconite LLC is engaged in mining operations in the United States, and its mining operations affect interstate commerce

2. United Taconite LLC is the operator of the United Plant, MSHA I.D. No. 21-03404. United Taconite LLC is an "operator" as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act), 30 U.S.C. 803(d).

3. United Taconite LLC is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et. seq.*

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations and orders were properly served by a duly authorized representative of the Secretary upon an agent of United Taconite LLC on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance.

6. The exhibits to be offered by United Taconite LLC and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The penalties, if affirmed, will not impair United Taconite LLC's ability to remain in business.

8. The Certified Assessed Violation History Report reflecting the history of the violations of the Respondent is an authentic copy and may be admitted into evidence as a business record of MSHA.

9. The operator demonstrated good faith in abating the conditions cited in Citation No. 6559833.

10. MSHA Inspector Thaddeus J. Sichmeller was acting in his official capacity and as an authorized representative of the Secretary of Labor when aforesaid citations and order were issued.

Joint Exhibit 1[1] (*see also* Transcript at 6).[2]

LAKE 2012-687-M

I. ISSUES

With respect to LAKE 2012-687-M, the issues to be determined are whether Respondent's alleged actions on January 24, 2011 constituted an imminent danger as charged in Order No. 6553379 and whether the violation alleged in the related 104(d)(1) Citation, Citation No. 6553380, was significant and substantial ("S&S"), whether it was reasonably likely to result in fatal injury, whether it was the result of high negligence, whether it was an unwarrantable failure, and the appropriate penalty.

II. SUMMARY OF TESTIMONY

On January 24, 2011, Inspector Thaddeus J. Sichmeller issued an imminent danger order, No. 6553379, after observing Mickey Krempich standing on the edge of a structure without required fall protection.[3] (GX-1).

Earlier that day, at 2:00 p.m., Lucas Greschner[4] attended a meeting where he learned that

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[1] Hereinafter the Joint Exhibits will be referred to as "JX" followed by the number. Similarly, the Secretary's Exhibits will be referred as "GX" and Respondent's Exhibits will be referred to as "RX."

[2] Hereinafter the transcript will be cited as "Tr." followed by the page number.

[3] At hearing, Inspector Thaddeus J. Sichmeller was present and testified for the Secretary. (Tr. 16). At that time, Inspector Sichmeller was a metal/non-metal mine inspector and accident investigator for MSHA and had worked for the administration for over ten years. (Tr. 16-17). In that capacity he conducted examinations of working areas in up to 65 mines in a year. (Tr. 17). Sichmeller took classes and had journeyman training at the Mine Academy in Beckley, West Virginia. (Tr. 17). He also received accident investigation training. (Tr. 17-18). He had an associate's degree in applied science from Marshall University. (Tr. 17). Before MSHA, Sichmeller worked as a millwright at Woodville Mine in Idaho for seven to eight years. (Tr. 18).

[4] At hearing, Lucas Greschner was present and testified for Respondent. (Tr. 237). At the time of the hearing he was a section manager but when the citation was issued he was an operation supervisor at the crusher and concentrator. (Tr. 237-238). He previously worked at a U.S. Steel pellet plant. (Tr. 238). He earned a bachelor's degree in business management and marketing at the University of Wisconsin at Eau Claire. (Tr. 238-239). Before the instant citation, Respondent received a citation because Greschner did not receive annual 500023 refresher training when he transferred from Minntac. (Tr. 257). He was trained but did not have a record.

a hydro separator at Respondent's Plant was overflowing and making a mess. (Tr. 240). The hydro separator or concentrator contained a rod mill floor, ball mill, grade floor, basement, and "Mexico" where the conveyors fed into the building. (Tr. 239). The mills crushed the ore into powder, turned the powder into slurry, and then sent the slurry to the pellet plant. (Tr. 239-240). There were seven ball mills. (Tr. 240). There were five concentrator mill lines and they all have boxes like the one in the cited area. (Tr. 258).

When Greschner went to fix the condition, he met up with an hourly employee, Krempich. (Tr. 241). He told Krempich that they had to move water between the thickeners. (Tr. 241). Greschner had never seen it done before, but had seen similar plugs pulled. (Tr. 241, 252, 256). Krempich worked at Respondent for 20-25 years and for 15 years with concentrators. (Tr. 259).

Krempich went to the hydro separator, where the order was later issued, and Greschner went to the overflowing one. (Tr. 241-242, 253). Both separators had thickeners with two boxes and the boxes had chain hoist setups to remove plugs. (Tr. 253-254). Greschner tried to use the chain but it came off the plug. (Tr. 242). At first he did not know what was wrong; he just could not lift the plug. (Tr. 254). Greschner inspected the plug to determine if the hook or chain was broken or if a new chain could be added. (Tr. 242). These chains break or slip off the plug on occasion. (Tr. 254-255). While he was working he stood on a step stool, or moving staircase, and reached up because the box was not high off the ground.[5] (Tr. 243). Greschner did not wear fall protection while he was on the step stool. (Tr. 243).

While Greschner was working on that separator, Krempich was working on a different one. (Tr. 243). Greschner did not know what Krempich was doing, only that he was diverting water. (Tr. 244). Greschner could not see Krempich from his position on the movable stairs. (Tr. 244-245). At some point, Greschner went to look for Krempich. (Tr. 244).

At around the same time, Inspector Sichmeller conducted a health and safety inspection at Respondent's Plant. (Tr. 147-158). During the inspection, Sichmeller travelled with Safety Manager Del Savela and Bryan Sandnas looking for structural issues.[6] (Tr. 160, 200-201, 212).

(Tr. 257). Minntac would not give out the information because he quit. (Tr. 257).

[5] Instead of climbing on top of the separator, miners commonly used a rolling stairwell. (Tr. 232, 234). The stairs have railings and a platform with railings. (Tr. 232). A miner could roll the stairs up to the side of the tank and use the chain jack. (Tr. 232-233).

[6]At hearing, Del Savela was present and testified for Respondent. (Tr. 55). At the time of the hearing, Savela had worked in the mining industry for over 36 years. (Tr. 56). He had worked for U.S. Steel and Respondent, the latter for over six years. (Tr. 56). At U.S. Steel he served as a millwright for 15 years and a safety engineer for 15 years. (Tr. 56). Savella passed the U.S. Steel millwright apprenticeship program, had an associate's degree in human services, a bachelor's degree in social work, and a master's degree in industrial safety. (Tr. 56). He received his Master's Degree from the University of Minnesota-Duluth. (Tr. 57). In 2011 Savela was the plant safety manager for Respondent and his duties included advising personnel on safety policies, procedures, systems, industrial hygiene issues, and fire protection. (Tr. 55-56,

The inspection group embarked from the main office and traveled toward the hydro-separator tanks. (Tr. 160). It was likely that they traveled together in a single-file line with Sichmeller in the front and Savela in the rear. (Tr. 216-217).

At around the time that Greschner reached the separator where Krempich was working, the inspection group entered the corridor where the tanks were located. (Tr. 160-161, 250, 258). Inspector Sichmeller saw Greschner standing at the base of a set of stairs and looking up. (Tr. 160-161). Inspector Sichmeller did not know what Greschner was looking at. (Tr. 199, 201). Initially, Sichmeller's line of sight was blocked by pipe structure, as shown in the photograph marked GX-6-B. (Tr. 199-200). As he drew closer, Sichmeller followed Greschner's gaze and saw Krempich, standing on top of the tank. (Tr. 160-161, 179).

Krempich was standing on the edge of the open-topped hydro separator box, reaching over a convertor box, and pulling plugs. (Tr. 158-160, 220, 223). Krempich had both feet on the grate near the edge and one hand on the chain hoist. (Tr. 175, 189, 221). Sichmeller did not know where the other hand was located because it was too fast. (Tr. 189). Savela believed the second hand may have been on the chain, but he was not sure because the hoist could be operated with one hand. (Tr. 220-223, 233). Krempich had three or four "points of contact." (Tr. 220). The miner was only wearing his hard hat, safety glasses and safety shoes. (Tr. 160). Savela did not know why Krempich was not using a movable stairway. (Tr. 234).

Greschner was about 50 yards away from Krempich. (Tr. 162, 170, 179-180). Greschner was leaning against the railing and looking up at the employee. (Tr. 170, 178-179, 217, 224-225, 229). Sichmeller believed that Greschner could see what was happening on top of the tank from where he was standing, as depicted in the photograph marked GX-6-H. (Tr. 178-179, 186-187). However, Savela believed that Greschner would be unable to see Krempich because a structure was in the way. (Tr. 218, 226). He believed GX-6-H was not taken from the correct location. (Tr. 226-227). Greschner testified that he could not see Krempich because beams, piping, and a launderer were in the way, as depicted in the photograph marked RX-38. (Tr. 245-249).

Sichmeller testified that he observed Greschner looking for 20-30 seconds but did not know how long he was there. (Tr. 170, 199, 202). Savela believed the inspection group and Greschner had converged on the area at the same time, but was uncertain. (Tr. 225, 230). Greschner testified that he saw Krempich for about five seconds before the inspection crew arrived and did not know Krempich was on the top of the tank before that time. (Tr. 250, 258).

Sichmeller believed that Krempich's location posed a high degree of danger. (Tr. 159, 173). He issued an imminent danger order, Order No. 6553379 (GX-1), because Krempich was not wearing fall protection and was in danger of falling. (Tr. 157-158). The most likely place for a fall was the diverter box because Krempich was standing on the middle edge of the tank,

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83). He accompanied inspectors and corporate audit teams. (Tr. 56). He had been doing so for 20 years and felt well-versed in policy and procedure. (Tr. 57). At Respondent's plant, he accompanied inspectors as a union representative for a few months and then, from September 2007, he did so as a salaried employee. (Tr. 57). During an MSHA inspection, Savela would coordinate, accompany inspectors, create work orders, and rectify situations. (Tr. 57).

reaching the chain hoist. (Tr. 158-159, 162). The inspection crew was about 30-50 feet away from Krempich when the order was issued. (Tr. 216-218, 250). Sichmeller believed that miner could have fallen into the diverter box and drowned or fallen onto the metal grating and received head and body trauma. (Tr. 159). The miner could have fallen into the box or onto the walkway below.[7] If a miner fell into the tank when the plugs were pulled, the suction would pull him to the bottom. (Tr. 169).

Sichmeller testified that the area may have been wet from splashing. (Tr. 188-189). (Tr. 158). Savela testified that the photographs marked RX-30 to RX-32 showed that the grate was largely dry. (Tr. 213-214, 227-228). Greschner testified that the grate was dry, but he did not inspect it because he did not have fall protection. (Tr. 255-256).

In order to issue the imminent danger order, Sichmeller had to wait for Savela to come up. (Tr. 161, 202). Then he pointed to the condition and told Sandnas and Savela that he was issuing an imminent danger order. (Tr. 161-162). Savela told Krempich to get down. (Tr. 161-162). Sichmeller did not spell out the imminent danger, but Savela immediately realized the problem. (Tr. 205-206). Sichmeller did not tell the miner to get down because, by law, he could not direct the work force; he had to issue an order to have something done. (Tr. 204-206). If Sichmeller had identified Greschner he would have issued the Order to him. (Tr. 207).

Savela did not think there was an imminent danger of falling. (Tr. 222). There was solid structure above the grating (depicted in the photograph marked RX-32) that could have broken the fall from the grating before a worker hit the floor or tank. (Tr. 192-193, 195, 231-234). However, once the plugs were lifted, the chain may have been able to move. (Tr. 235). There might also be a possibility of striking the structure in a fall. (Tr. 235). Sichmeller estimated the gap between the grating and the edge of the solid structure at three to four feet; enough space for a miner to fall through. (Tr. 185-188). However, Greschner testified that distance was measured only 21 inches at the widest point. (Tr. 252-253). Regardless of the structure, Savela conceded that if he was going to conduct this task, he would wear fall protection. (Tr. 230). Employees and supervisors would also be required to wear it. (Tr. 230-231).

Respondent conducted annual training courses, which discussed fall protection. (Tr. 208-209). Savela believed, but was not sure, that Krempich took the refresher course in 2010. (Tr. 209, 222, 230). Savela knew that Greschner received the training. (Tr. 230). Savela reviewed the presentation on fall protection shown to Respondent's employees (RX-36). (Tr. 209, 212).

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[7] Sichmeller could not measure the convertor box because he had no harness and could not reach the chain hoist, but he estimated its depth at three or four feet in the center (the box tapered at the sides). (Tr. 167, 184). The box was too deep to reach in and pull the plug. (Tr. 190). The outside of the tank was 65 inches deep. (Tr. 167). The opening was large enough for someone to fall in. (Tr. 167). However, the miner was taller than 5'11. (Tr. 188). The fall to the floor was 75 inches. (Tr. 166-167, 194). Sichmeller felt that any fall danger from this height was an imminent danger, as he had been trained to do. (Tr. 193-194). He has issued citations for less than six-foot falls including a 46 inch fall on a conveyor. (Tr. 194-195). A policy document issued after this Order and signed by Neil Merrifield, the MSHA administrator for metal/non-metal, states that individuals citing imminent dangers for falls have discretion. (Tr. 194-195).

The presentation was made by Respondent's parent company, Cliff's Natural Resources, based on MSHA's Rules to Live By. (Tr. 211). The second slide showed fall protection was required on elevation and also mentioned using three points of contact for stability. (Tr. 209-210). Fall protection was available in the maintenance room and in the safety department. (Tr. 210). Many crews had their own fall protection. (Tr. 210-211).

After the order was issued, Savela ordered Krempich down (terminating the Order) and Krempich made an "aw shucks" motion with his arms. (Tr. 163, 170-171, 223). Krempich knew he should have been wearing fall protection. (Tr. 221-222). A written warning was placed in his file. (Tr. 222). In the past, Savela had removed contractors from the property for failing to wear fall protection and had seen miners be disciplined for the same. (Tr. 223).

After termination, the inspection team spoke with Greschner about fall protection and his role in the violation. (Tr. 163, 170-171). Greschner was "meek" and did not answer questions. (Tr. 171). Sichmeller pointed out safety signs and Greschner shrugged his shoulders. (Tr. 171). The signs next to the convertor box near the stairway on the main walkway said "prior to entering, fall protection must be worn within six feet of the tank edge." (Tr. 162-163, 169, 229). Photographs 6-C and RX-34 depicted the safety sign located on the middle of the separator tank. (Tr. 175, 215). A miner would have to go past the sign to access the area. (Tr. 175). Savela could not recall if the signs were posted at his direction. (Tr. 215, 228). They were installed because miners often go out on the walkways away from the structure in the cited area, and fall protection would be needed. (Tr. 228-229). Savela stopped the inquiry and said they wanted to talk to counsel before answering questions. (Tr. 171). When the miner came down, Savela talked to him. (Tr. 173). That miner sometimes acted as a relief coordinator and did so just days after this Order was issued. (Tr. 172).

Sichmeller issued Citation No. 6553380 (GX-3) for the same condition. (Tr. 163-164). It was issued under § 56.15005, which requires safety belts and lines to be worn near fall dangers. (Tr. 164-165). The gravity of this citation was marked as "reasonably likely" because a worker could fall into the tank or onto the floor and receive an injury. (Tr. 165). The injury was marked "fatal" because a majority of mining fatalities are caused by fall trauma. (Tr. 165). There was also the danger of drowning in the box from the suction caused by pulled plugs. (Tr. 165). This condition was marked "S&S" because there was a discrete safety hazard that could result in a fatality. (Tr. 166). Only one miner was affected. (Tr. 169). The citation was a 104(d)(1) citation because it was an unwarrantable failure. (Tr. 170).

The negligence was marked as "high" and as an unwarrantable failure because it was an open and obvious condition and a foreman was watching. (Tr. 166, 170-173). In fact, the foreman's gaze is what caused Sichmeller to see the condition. (Tr. 166). No one indicated that fall protection was present and no mitigation was offered. (Tr. 169, 171). Sichmeller believed signs should have warned the miner about fall protection but it did not mitigate the negligence because Greschner was in the area looking at the miner and did not tell him to stop. (Tr. 202-203). However, Greschner testified that in the short time he observed Krempich he was unable to determine if the miner was wearing fall protection. (Tr. 250-251, 258).

The violation history shows that there were two violations in the previous 24-months. (Tr. 172, 197). Sichmeller issued one of those in 2010. (Tr. 197-198). The violation was not in the cited area. (Tr. 198). In that case, a contractor was loading a semi and was standing on a garbage bin inside the truck; there was no water hazard in that case. (Tr. 198). MSHA's does not consider anything "repeated" until there have been at least five prior citations in a 15-month period. (Tr. 203). However, patterns with the same person, area, or condition are a problem even if it is just a single repeat. (Tr. 203-204). Sichmeller had never issued a citation for this condition to Greschner or the miner or on this grating before. (Tr. 204).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact are based on the record as a whole and the Administrative Law Judge's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the Administrative Law Judge has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the Administrative Law Judge has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the Administrative Law Judge's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel,* 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of Evidence That The Cited Condition Constituted An Imminent Danger

On January 24, 2011, Inspector Sichmeller issued an imminent danger order, Order No. 6553379 to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> CONCENTRATOR: One employee was standing on top of the #4 Tails Hydro Separator Tank at the southwest side Hydro Convertor Box using a chain hoist to pull plugs for the Convertor Box. The employee was exposed to a fall hazard into the open top slurry filled box or a fall to the walkway below by not being protected due to lack of railings or fall protection in this area. The convertor box was 65 inches in depth an (sic) the height from the top of the Hydro Separator Tank to the metal grated walkway below was 75 inches. An oral 107(a) imminent danger order was issued to Del Savela, Plant Safety in this area at this time and date. Citation 6553380 was issued in conjunction with this order.

(GX-1).

Section 107(a) of the Mine Act provides the following:

> If, upon any inspection or investigation of a coal or other mine which is subject to this chapter, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such

> mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 814(c) of this title, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 814 of this title or the proposing of a penalty under section 820 of this title.

30 U.S.C. § 817(a).

Section 3(j) of the Act defines "imminent danger" as "the existence of any condition or practice in a coal mine or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). This definition has not changed from the definition contained in the Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 *et. seq.* (1976) (amended 1977) (the "Coal Act").

Imminent danger orders are not limited to situations where hazards pose an immediate threat; rather an imminent danger exists where "the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989)(citations omitted); *see also Cumberland Coal Res., LP*, 28 FMSHRC 545, 555 (Aug. 2006).

An inspector retains "considerable discretion" in determining whether an imminent danger exists because an inspector must "act with dispatch to eliminate conditions that create an imminent danger." *Wyoming Fuel Co.*, 14 FMSHRC 1282 (Aug. 1992), *citing R&P*, 11 FMSHRC at 2164 and *Utah Power & Light Co.*, 13 FMSHRC 1617, 1627 (Oct. 1991). In reviewing an inspector's finding of imminent danger, the Administrative Law Judge must support the inspector's finding "unless there is evidence that he has abused his discretion or authority." *Cumberland Coal*, 28 FMSHRC at 55, *citing R&P*, 11 FMSHRC at 2164; *Old Ben Coal Corp. v. Interior Bd. of Mine Op. App.*, 523 F.2d 25, 31 (7th Cir. 1975).

In the instant proceeding, Inspector Sichmeller issued an imminent danger order because Krempich was standing on a raised platform without a railing or any fall protection. (GX-1). A preponderance of the evidence supports the issuance of this Order. It is uncontested that Krempich was standing on a raised platform without fall protection of any kind. (Tr. 158, 189, 217, 220, *Respondent's LAKE 2012-687 Post-Hearing Brief* at 3, 9). Inspector Sichmeller determined, and the evidence supports, that Krempich was standing near a 65-inch deep slurry box and also a 75-inch precipice that dropped to the grated walkway below. (Tr. 167, 194). Inspector Sichmeller credibly testified that in this position, it could reasonably be expected that Krempich would fall into the box or onto the walkway and suffer a serious, perhaps fatal, injury. (Tr. 165). In fact, such a danger from a fall is so likely that MSHA promulgated a standard, 30 C.F.R. § 56.15005, to specifically address the use of fall protection when working in elevated areas where falls are possible. Krempich was working with a chain hoist and essentially leaning out over the precipice. Under normal continued mining operations it would be reasonably likely

that he could fall and that such a fall could cause broken bones, concussion, or drowning. Therefore, the 107(a) imminent danger order was appropriate.

Respondent offered several arguments to show that Krempich was not in imminent danger and that Inspector Sichmeller abused his discretion. However, most of these arguments were without any legal merit.

First, Respondent argued that Krempich was not in danger of falling because he had between three and four "points of contact" at all times while he was working. (*Respondent's LAKE 2012-687 Post-Hearing Brief* at 9). Nothing in the Act, regulations, or case law provides an exception to the rule based on points of contact. Respondent cites to no legal authority for the proposition that three or four points of contact eliminates an imminent fall danger. In fact, the only evidence regarding points of contact produced at hearing comes from Respondent's internal PowerPoint presentation, which Savela testified mentions using three points of contact to improve stability. (Tr. 210). Inspector Sichmeller credibly testified that, even with the use of at least three points of contact, Krempich was in danger of falling. There is no evidence to undermine that testimony.

Further, Respondent completely ignores the standard under 107(a), which requires the inspector to consider the danger *in light of continued mining operations without abatement.* Assuming, *arguendo,* that there was some validity to Respondent's three points of contact safe harbor, it was still reasonably likely that under normal mining conditions the situation would change. While Krempich had at least three points of contact when Inspector Sichmeller issued the Order, if the Order was not issued, Krempich would have released the chain hoist once the plugs were pulled. At that point, Krempich would have only two points of contact. The same was likely true when Krempich was walking towards the chain hoist. At any number of instances while working, it is reasonably likely Krempich would have fewer than three points making a fall imminent even under Respondent's own terms.

Respondent's second argument was that the risk of drowning was slight because Krempich was taller than the slurry box and that the slurry was not even at the top of the box. (*Respondent's LAKE 2012-687 Post-Hearing Brief* at 9). The evidence, including evidence developed by Respondent, showed that the area cited contained a large amount of equipment and structure. (Tr. 184, 189, 195, 231-234, 239, 245-246). It is likely that in the event of a fall into the slurry box, Krempich would have hit his head on this structure. He could have also fallen backwards and hit his head on the walkway before slipping into the slurry. Finally, he could have fallen head first into the box, hitting his head on the side or the bottom of the box. In any of these situations, Krempich could have been knocked unconscious or simply disoriented and drowned, regardless of the depth of the box. Further, even if Krempich did not strike his head, he could have been disoriented and drowned. The Secretary also raised the possibility that suction from removing the plugs could hold Krempich at the bottom of the slurry box. Finally, the height of the slurry box in no way changes the fact that Krempich could have fallen 75 inches to the walkway below. The height of the slurry box does not lessen the imminent danger here.

Respondent's third argument was that Inspector Sichmeller believed it was within his discretion to treat every fall hazard as an imminent danger. (*Respondent's LAKE 2012-687 Post-*

Hearing Brief at 10). Respondent argued that this belief was not consistent with the Mine Act or MSHA policy. (*Id.*). Inspector Sichmeller's beliefs about falls in general are irrelevant. The issue is whether in this particular instance, the condition or practice could reasonably be expected to cause death or serious physical harm before being abated. As discussed *supra*, with respect to the instant Order, that was the case.

Respondent also argued that a slip was unlikely because the floor was dry. (*Respondent's LAKE 2012-687 Post-Hearing Brief* at 10). The preponderance of the evidence shows that a fall hazard existed whether or not the floor was wet. Specifically, Sichmeller testified only that the floor "may" have been wet but was clear that a fall hazard existed. (Tr. 158-159,188-189). Even if the floor was dry, a fall was still reasonably likely.

Finally, Respondent argued that Krempich had only been in the cited area for a short time. (*Respondent's Lake 2012-687 Post-Hearing Brief* at 10). Once again, the issue is whether Krempich faced a reasonably likelihood of death of serious physical harm under continued mining conditions. It is totally irrelevant how long the condition had existed or would exist but if at any time Krempich would face an imminent danger.

Therefore, in light of the facts discussed *supra*, the Administrative Law Judge finds that Inspector Sichmeller did not abuse his discretion in issuing the 107(a) Order.

2. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That 30 C.F.R. § 56.15005 Was Violated.

On January 24, 2011, Inspector Sichmeller issued a 104(d)(1) Citation, Citation No. 6553380 to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> CONCENTRATOR: The employee was standing at the edge of the Line #4 Hydro Separator Tank pulling the drain plug for the southwest side convertor box for the separator. The employee was not protected from a fall in this area due to the lack of fall protection, railings, or coverers to the open convertor box. The height of the top of the Hydro Separator Tank to the metal grated walkway below was 75 inches, and the depth of the slurry filled box was 65 inches. The company does have warning signs posted in this area at the access point for fall protection when within six feet of the edge. The Cold Side Shift Coordinator was in this area observing the employee conducting the work activity. The Coordinator engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard. This citation was issued in conjunction with 107(a) imminent danger order #6553380 (sic). Standard 56.15005 was cited 4 times in two years at min 2103404 (2 to the operator, 2 to Contractors).[8]

(GX-3).

[8] On the same day, Inspector Sichmeller issued an amendment to this Citation to reflect the fact that the imminent danger order was given Order No. 6553380, not No. 6553379. (GX-3).

The cited standard, 30 C.F.R. § 56.15005 ("Safety Belts and Lines"), provides the following:

> Safety belts and lines shall be worn when persons work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

30 C.F.R. § 56.15005.

As Judge Simonton noted in discussing a 30 C.F.R. § 56.15005 violation, "the Commission has held that a danger of falling exists when an informed, reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines." *Hunt Martin Materials, LLC*, 2013 WL 1856613, *5 (Sept. 2013)(ALJ Simonton), *citing Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

Respondent did not contest Inspector's Sichmeller's finding that Krempich was not wearing fall protection. (Tr. 158, 189, 217, 220, *Respondent's LAKE 2012-687 Post-Hearing Brief* at 3, 9). Therefore, the only issue is whether a reasonably prudent person would recognize the fall danger.

Sichmeller credibly testified that the danger of a fall was readily apparent. (Tr. 166, 170-173, 205-206). This clear danger was discussed at length in the discussion on the imminent danger order *supra*. In addition, when Sichmeller pointed out the cited condition without speaking, Savela instantly knew why the imminent danger order was issued, specifically that there was a fall risk. (Tr. 205-206). It was obvious to Respondent's safety director the instant that he saw Krempich leaning over the slurry box that the condition posed a threat. Therefore, the Administrative Law Judge finds that a reasonably prudent person would have realized that standing on an elevated walkway without fall protection or a railing would constitute a fall hazard.

Respondent essentially argues that there was no fall hazard here. As discussed with respect to the imminent danger order, Respondent argues that Krempich had at least three points of contact, that he was taller than the slurry box, that Sichmeller misunderstands fall danger, that Krempich was in the position for a short time, and that the area was dry. For the same reasons discussed *supra*, the Administrative Law Judge rejects these arguments and finds that the Citation was validly issued.

3. Considering The Record *In Toto* And Applying Applicable Case Law, The Violation Was Reasonably Likely to Result in a Fatal Injury And Was Significant And Substantial In Nature

Inspector Sichmeller marked the gravity of the cited danger in Citation No. 6553380 "Reasonably Likely" to result in "Fatal" injury to one person. (GX-3). These determinations are supported by a preponderance of the evidence.

The Mine Act requires that "gravity of the violation" be considered in assessing a penalty. 30 U.S.C. § 820. The Secretary promulgated a three-factor inquiry to determine the gravity of a citation for purposes of determining the penalty. Those factors are:

> [T]he likelihood of the occurrence of the event against which a standard is directed; the severity of the illness or injury if the event has occurred or was to occur; and the number of persons potentially affected if the event has occurred or were to occur.

30 C.F.R. § 100.3(e).

The event against which the instant standard, 30 C.F.R. § 56.15005, is directed is a fall. For the reasons discussed *supra*, a fall was reasonably likely. Furthermore, as discussed at length with respect to the imminent danger order, a fall from the walkway could have resulted in a fatal injury from drowning in the slurry box or from severe head or back trauma from a fall to the walkway. Finally, the evidence shows that only Krempich would be affected.

Respondent's arguments regarding the likelihood of a fall or the gravity of the injury that would result were considered, and rejected, in the discussion of the imminent danger order *supra*. As a result, the Administrative Law Judge finds that the Secretary proved the alleged gravity of this violation by a preponderance of the evidence.

Well-settled Commission precedent sets forth the standard used to determine if a violation is S&S. A violation is 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 Div., National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). The Commission later clarified this standard, explaining:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

With respect to the first element, the underlying violation of a mandatory safety standard, it has already been established that Respondent violated 30 C.F.R. § 56.15005.

With respect to the second element of Mathies, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation, the record is likewise clear. In fact, finding that this citation was valid required a finding that a specific hazard, specifically a fall hazard, existed. As noted, Krempich's failure to wear fall protection on an elevated walkway created the possibility of a fall either to the walkway or into the slurry box.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – is also supported by the record and applicable case law.

The Commission clarified the third element of the *Mathies* test in *Musser Engineering, Inc., and PBS Coal Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) ("PBS") (affirming an S&S violation for using an inaccurate mine map). The Commission held that the "test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., [in that case] the danger of breakthrough and resulting inundation, will cause injury." *Id.* at 1281. Importantly, we clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Id.* The Commission concluded that the Secretary had presented sufficient evidence that miners who broke through into a flooded adjacent mine would face numerous dangers of injury. *Id.* The Commission also emphasized the well-established precedent that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id.* (*citing Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996).

As discussed *supra*, if Krempich were to fall from the elevated walkways he could suffer serious traumatic injury from the fall or even drown in the slurry box. As a result, the evidence shows that the third element of the *Mathies* test is met.

Respondent made several arguments attempting to show that there is no likelihood of injury from a fall. These arguments are, to say the least, not compelling.

First, Respondent argued that there was no likelihood of injury because Krempich maintained three or four points of contact at all times. (*Respondent's LAKE 2012-687 Post-Hearing Brief* at 19). As discussed *supra*, Respondent's insistence on "points of contact" has no basis in law and does not decrease the likelihood of accident. More importantly, whether Krempich had any points of contact is completely irrelevant to this discussion. Respondent patently misunderstands the third element of *Mathies*. The issue at this stage of the inquiry is whether the hazard contributed to by the violation, in this case a fall, would result in injury. The third element presupposes that the fall, is realized and asks whether an injury would be expected to result. Respondent's frivolous argument does not aid the Administrative Law Judge in determining whether a fall would, or would not, result in an injury and is therefore disregarded.

Second, Respondent argues that merely being on an elevated surface does not create the likelihood of injury. (*Respondent's LAKE 2012-687 Post-Hearing Brief* at 19-20). Once again Respondent does not understand the third element of *Mathies*. The issue is whether a fall from the cited location would be likely to result in injury, not whether the fall itself is likely. This argument is likewise frivolous and disregarded.

Finally, Respondent argues that if someone were to slip from the elevated walkway, there was structure in the way that would break the fall. (*Respondent's LAKE 2012-687 Post-Hearing Brief* at 20). This is a more appropriate argument with respect to the third element of *Mathies*, but the preponderance of evidence shows that an injury was still likely. Sichmeller credibly testified that even with the structure in place, there was a gap between the grating and the structure where a miner could fall. (Tr. 185-188). He also testified that if the plugs had come

undone, the chain hoist could have moved, exposing the miner to a fall. (Tr. 235). Further, under continued normal mining operations, Krempich may have moved away from the structure to complete his tasks. While it is true that the placement of the structure probably decreased the likelihood of an injury, the Administrative Law Judge still believes that an injury was reasonably likely. As a result, The Secretary has met his burden with respect to the third element of *Mathies*.

Under *Mathies* the fourth and final element that the Secretary must establish is that there was a "reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC at 3-4; *U.S. Steel*, 6 FMSHRC at 1574. As the Administrative Law Judge found that an injury from fall could result in broken bones or even death, this element is clearly met.[9]

As a result, the Administrative Law Judge finds that the Secretary proved the violation was S&S by a preponderance of the evidence.

4. Respondent's Conduct Did Not Display "High" Negligence And Was Not The Result Of An Unwarrantable Failure To Comply With the Standard.

In the citation at issue, Inspector Sichmeller found that the operator's conduct was highly negligent in character. (GX-3).

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[9] While the hazard here included the possibility of death from drowning, there was also the risk of serious injury from the fall as well. *See* Judge Bulluck's discussion regarding the risks associated with a fall in *Granite Rock Company*:

> In *Great Western Electric*, the Commission explained that a miner's "position twelve feet above the ground presented a substantial height from which to fall." 5 FMSHRC 840, 843 (May 1983); see also generally *Molton Co., LP*, 31 FMSHRC 427 (Mar. 2009) (ALJ) (crediting an inspector's testimony that fatal falls have occurred from heights of 10 feet or less, and finding an S&S violation where a miner was working without fall protection at a height of approximately 7 feet); *Cantera Green*, 21 FMSHRC 310 (Mar. 1999) (ALJ) (finding S&S, safe access violations where workers were working 8, 10, and 12 feet above ground); *Laramie Cnty. Road & Bridge*, 17 FMSHRC 902 (June 1995) (ALJ) (crediting an inspector's testimony that miners have been seriously injured and killed as a result of falling from heights of 8 to 12 feet, and finding an S&S violation). Moreover, the Commission has acknowledged that "[e]ven a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions, which could result in a fall." *Id.* at 842. Based on the evidence, I find that a fall from 8 to 12 feet would reasonably result in serious injuries ranging from broken bones and head trauma, possibly death. Therefore, I conclude that the violation of section 56.15005 was S&S.

34 FMSHRC 261 (January 2012) (ALJ Bulluck).

Standard 30 C.F.R. § 100.3(d) provides the following:

> (d) Negligence. Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to 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. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.

In 30 C.F.R. § 103(d), Table X, the category of high negligence is described thusly: "The operator knew or should have known of the violative condition or practice and there are no mitigating circumstances." Conversely, moderate negligence is shown when "[t]he operator knew or should have known of the violative condition or practice, but there are some mitigating circumstances." Low negligence is served for situations where there are "considerable" mitigating circumstances.

The Administrative Law Judge finds that while Respondent should have known about the violation, there were several mitigating factors. With respect to knowledge, well-settled Commission precedent recognizes that the negligence of an operator's agent is imputed to the operator for penalty assessments and unwarrantable failure determinations. *See Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-197 (Feb. 1991); and *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-1464 (Aug. 1982). An agent is defined as someone with responsibilities normally delegated to management personnel, has responsibilities that are crucial to the mine's operations, and exercises managerial responsibilities at the time of the negligent conduct. *Martin Marietta Aggregates*, 22 FMSHRC 633, 637-638 (May 2000) *see also* 30 U.S.C. §802(e) (an agent is "any person charged with responsibility for the operation of all or part of a...mine or the supervision of the miners in a...mine.").

With respect to the instant violation, evidence shows that Respondent's manager Greschner was not actually aware of the cited condition. The Secretary argued that Greschner, had actual knowledge of the violation because he was standing at the bottom of the stairs, looking up toward Krempich while the miner was working without fall protection. (*Secretary's Post-Hearing Brief* at 13-14). Greschner credibly testified that he had arrived at the location a few moments before the inspection crew. (Tr. 245-251). Further, he credibly testified that from the bottom of the stairs he was initially unable to see Krempich and that he did not have enough time after seeing the miner to determine whether he was wearing fall protection. (Tr. 245-246). Therefore, the Administrative Law Judge finds that Greschner, and hence Respondent, was not actually aware of the cited condition until Inspector Sichmeller cited it.[10]

[10] The Secretary also asserted that Krempich occasionally acted as a supervisor, creating liability on the part of Respondent for his actions. (*Secretary's Post-Hearing Brief* at 14). However, the

However, while Greschner did not know that Krempich was working without fall protection, he should have known. At the time of the violation Greschner was a supervisor. (Tr. 237-238). He was assigned to fix a unique problem and specifically sought out Krempich for assistance. (Tr. 241). He directed and oversaw Krempich work on the hydro separator, even if he did not watch Krempich the entire time. (Tr. 241, 244). As his supervisor, Greschner should have known that Krempich was violating the standard and taken actions to correct the problem. As a result, the Administrative Law Judge finds that Respondent was negligent.

While the Administrative Law Judge affirms the inspector's finding that Respondent was negligent, the evidence does not support a finding that this negligence was high; there were mitigating circumstances. Specifically, Respondent noted that it had posted signs encouraging miners to wear fall protection on the elevated walkway. (Tr. 202-203, 228-229, 256). The existence of these signs is not contested. This showed that Respondent was aware of the danger and that it had taken some action to ensure compliance.

Also, the evidence shows that while there was no railing or fall protection, there was structure near the miner. (Tr. 187-188, 231-234). This structure could break a miner's fall in case of a slip. Even inspector Sichmeller admitted as much. (Tr. 192-193, 195). Furthermore, the structure ensured that the area where the miner could fall would be limited. While the miner should have been wearing fall protection, management may have reasonably believed that this structure provided some protection.

Finally, the possible fall, at its highest, was around seven feet. (Tr. 194). While this height could be extremely dangerous (*see* gravity discussion *supra*), Respondent may have believed that the danger was limited at that elevation. As a result, its negligence may have been somewhat lessened.

In light of these mitigating circumstances, Respondent's actions are best characterized as showing "Moderate" rather than "High" negligence.

The Commission has recognized the close relationship between a finding of unwarrantable failure and a finding of high negligence. *San Juan Coal Co.*, 29 FMSHRC 125, 139 (Mar. 2007) (remanded because a finding of high negligence without a corresponding finding of unwarrantable failure was "seemingly at odds.") *see also Consolidation Coal Company*, 22 FMSHRC 340, 353 (2000) (holding that if there is mitigation, an unwarrantable failure finding is inappropriate). *Emery Mining Corp.*, defines an unwarrantable failure, as "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997, 2002 (Dec. 1987). Such conduct may be characterized as reckless disregard, intentional misconduct, indifference, or serious lack of reasonable care. *Id.* at 2004; *see also Buck Creek Coal*, 52 F.3d 133, 135-136 (7th Cir. 1995). The Commission formulated a six factor test to determine aggravating conduct. *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1350-1351 (Dec. 2009). The Administrative Law Judge will consider each of those factors in turn:

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miner was not acting as a supervisor at the time of the violation. This point is not contested. Therefore, his actions were not imputable to Respondent.

1. Extent Of The Violative Conditions

This particular condition dealt with a single miner failing to wear fall protection. (Tr. 169). There is no evidence that other miners were exposed or that this condition occurred regularly. In fact, Respondent posted signs encouraging miners to wear fall protection. (Tr. 202-203, 228-229, 256). Therefore, the violation in this matter was not particularly extensive.

2. The Length of Time the Violation Existed

Greschner credibly testified that Krempich had been in the area for only a short period of time before the citation was issued. (Tr. 250). Sichmeller testified that he saw the miner for a few minutes before the citation was issued but could not say how long the miner was exposed in general. (Tr. 170, 199, 202). Therefore, the violation had not existed for a lengthy period.

3. Whether the violation is obvious or poses a high degree of danger

The violation at issue here posed a considerable danger. As discussed *supra*, this condition was reasonably likely to result in serious, perhaps fatal, injuries to the miner. Whether the condition was obvious is a more complicated question. The miner was not wearing fall protection and that condition was immediately visible to Inspector Sichmeller and Savela during the inspection. (Tr. 158, 166, 170-173, 189, 217, 220). However, as noted, the condition had not existed for very long and visibility from other areas in the plant was not as clear. (Tr. 170, 250, 199, 202, 245-246). Therefore, the condition posed a high degree of danger but was something less than obvious.

4. Whether the operator had been placed on notice that greater efforts were necessary for compliance or that this condition was an issue.

Respondent's violation history indicates that in the 18 months preceding this violation the Plant was cited four times for this condition. (GX-3). Two of those citations were issued to Respondent while two were issued to contractors. (*Id.*). No evidence was presented of any other notice provided to Respondent. The Administrative Law Judge finds that Respondent did not have meaningful knowledge that this condition required particular attention.

5. The operator's efforts in abating the violative condition

Respondent abated the condition immediately after Inspector Sichmeller issued the imminent danger order.

6. Operator's knowledge of the existence of the violation

"It is well-settled that an operator's knowledge may be established, and a finding of unwarrantable failure supported, where an operator reasonably should have known of a violative condition." *IO Coal Co.*, 31 FMSHRC at 1356-1357 (*citing Emery*, 9 FMSHRC at 2002-2004). A supervisor's knowledge and involvement is an important factor in an unwarrantable failure

determination. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) *citing* (*REB Enterprises, Inc.*, 20 FMSHRC 203, 224 (Mar. 1998) and *Secretary of Labor v. Roy Glenn*, 6 FMSHRC 1583, 1587 (July 1984). As discussed above, the preponderance of the evidence shows that while Respondent did not have actual knowledge of the cited condition, it should have known of the violation.

In light of the isolated nature of the violation, short length of time the cited condition existed, the limited notice that greater efforts were needed, Respondent's efforts at abatement, and the fact that Respondent's negligence is better characterized as "moderate," the Administrative Law Judge holds that a finding of unwarrantable failure would be inappropriate.

5. Penalty

Under the assessment regulations described in 30 CFR §100, the Secretary proposed a penalty of $11,597.00 for Citation No. 8553380. A recent Commission decision, *Sec. v. Performance Coal Co.*, (Docket No. WEVA 2008-1825 (8/2/2013) reaffirmed that neither the ALJ nor the Commission is bound by the Secretary' proposed penalties. (*see also* 30 U.S.C. §820(i) and 29 C.F.R. §2700.30(b)). However, the Commission in *Performance Coal*, also held that, although there is no presumption of validity given to the Secretary's proposed assessments, substantial deviation from the Secretary's proposed assessments must be adequately explained using §110(i) criteria. (*Id.* at p. 2). (*see also Cantina Green*, 22 FMSHRC 616, 620-621 (May 2000)). The ALJ finds that a substantial deviation from the Secretary's proposed assessment is warranted herein and will evaluate the factors contained in 30 U.S.C. § 820(i) to explain that deviation. Those factors are as follows:

(1) The Operator's history of previous violations – in the 18 months preceding this violation the Plant was cited four times for this condition. (GX-3). Two of those citations were issued to Respondent while two were issued to contractors. (*Id.*).

(2) The appropriateness of the penalty compared to the size of the Operator's business – United Plant has 592,779 yearly mine hours and Respondent has 2,179,873 yearly controller hours. According to MSHA's penalty assessment guidelines this gives United Plant nine "mine size points" out of a possible 15 and Respondent seven "controller size points" out of a possible 10. *see* 30 CFR § 100.3(b). Thus, Respondent is a large operator with an above-average sized plant.

(3) Whether the Operator was negligent – As previously shown, the operator exhibited moderate negligence, rather than the high negligence and unwarrantable failure cited by the Secretary.

(4) The effect on the Operator's ability to remain in business – The parties have stipulated that the Orders at issue here would not affect Respondent's ability to remain in business. (JX-1)

(5) The gravity of the violation – As previously shown, this violation was reasonably likely to result in fatal injuries to one person.

(6) The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – The evidence shows the condition was abated rapidly and in good faith.

In light of the Administrative Law Judge's decision to modify the negligence from "High" to "Moderate" and to eliminate the unwarrantable failure designation, a reduction in the assessed penalty is appropriate. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $7,000.00.

LAKE 2012-841-M

I. ISSUE

With respect to LAKE 2012-841-M, the issues to be determined are whether Respondent's alleged actions on April 26, 2011 were a violation of § 56.20003(b) and, if so, whether that violation was significant and substantial ("S&S"), whether it was reasonably likely to result in lost workday/restrict duty injury, whether it was the result of high negligence, and the appropriate penalty for the violation.

II. SUMMARY OF TESTIMONY

On April 26, 2011 at 1:34 p.m., Inspector Sichmeller issued a Citation, No. 6559833, after observing a build-up of oil and oil saturated pads on walkways leadings to a compressor in an unloading area. (Tr. 19-20). The citation was issued under §56.2003(b), which requires all working places be clean and kept dry. (Tr. 20). The cited conditions were not noted in that workplace examination. (Tr. 50-51).

The cited area was in a separate room inside the pelletizing building. (Tr. 50). The pellet plant was roughly 460 feet long, 370 feet wide, and 110 feet high. (Tr. 58). It was five stories tall and the compressor was on the bottom floor. (Tr. 59, 95-96). The compressor room was 15 feet square. (Tr. 59). It was used to boost air pressure for moving additives (limestone, soda ash). (Tr. 59, 95-96). The high pressure air pushed the additives through a 3.5-inch hose to unload trucks. (Tr. 61-62, 95-96). Shari McGregor testified that a truck would pull up to the outside of the room, hook up to the hose, the compressor would be started, the material would unload, and then the hose would be unhooked and the compressor shut off.[11] (Tr. 95-96, 99).

[11] At hearing, Shari McGregor was present and testified for Respondent. (Tr. 93). At the time of the hearing she had been a miner since 1999 and worked at "every mining facility in Northern Minnesota." (Tr. 93). She had completed a millwright program at Eveleth Technical College. (Tr. 93). She worked through Millwright Local 1348's call-out hall. (Tr. 93). McGregor began working for Respondent in June of 2008 or 2009 as the pellet plant maintenance planner. (Tr. 94). At the time of the hearing she was the fines crusher maintenance planner. (Tr. 94). In that capacity she managed work orders as they came in off the floor, bought the parts necessary to make fixes, and helped schedule jobs in the order she saw fit. (Tr. 94). McGregor did not have any recollection of working on the instant citation. (Tr. 115).

The room contained a motor, compressor, incoming and outgoing pipe, and disconnect.[12] (Tr. 59). The controls for the compressor were located on the outside of the room where trucks were parked, 40 feet away, because the room was noisy. (Tr. 60, 97).

The compressor ran for the entire day shift (7 a.m. to 3 p.m.) when the trucks were unloading. (Tr. 98-98). It sometimes, though rarely, ran in the afternoon. (Tr. 99). The compressor only ran when unloading, so it was occasionally off. (Tr. 99). Only one truck could unload at a time. (Tr. 117). McGregor did not know how many trucks were unloaded during a shift, but it took an average of an hour and a half to unload a truck. (Tr. 117).

At the beginning of each shift, the compressor room would be accessed by the material unloader. (Tr. 60, 98, 116, 121). No one other than the material unloader would be there on a normal day. (Tr. 121). That individual would perform an exam, top off the oil, and make sure the cooling water was on.[13] (Tr. 21, 60, 98, 116, 121). Attendants would enter the filling area from the north side of the compressor. (Tr. 66-67). There was a north-to-south pathway around the compressor. (Tr. 63-64). The exam would be completed with the compressor off and no trucks present. (Tr. 61, 100). After the exam, no one would need to be in the room because the compressor could be operated from outside. (Tr. 60-61).

In addition to the daily shift examinations, two mechanics made a weekly pump route check of the area. (Tr. 100, 117). These mechanics would make quick fixes if possible and draft work orders for larger jobs. (Tr. 101, 121). Miners might also work on problems in the room while the compressor was running. (Tr. 99). Given the importance of running the compressor, there would be an "A" work order written, so work would be done immediately. (Tr. 101).

Sichmeller never saw anyone adding oil to the compressor, but he knew that in order to do so, an individual would have to stand right beside it. (Tr. 41). The area to add oil and operate the valves was on the south side of the compressor.[14] (Tr. 26, 41). The working floor surface

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[12] The compressor room was not a "wet process" room. (Tr. 74-75). Savela only saw moisture from a small amount of water on a drain pipe. (Tr. 75). That drain was outside of the walking and working surfaces where no one would walk. (Tr. 90-91).

[13] Take Five is a Cliff's Natural Resources policy that encourages miners to clean up and look for potential hazards before starting a job. (Tr. 101, 126-127).). It is a five-step process that all managers and miners are taught. (Tr. 127). When an individual would approach a task he would first try to think out the issue that may arise. (Tr. 101-102, 127). For the shift examination, Take Five might entail planning the strategy for the exam. (Tr. 101-102). The individual would think about tools or measures that could eliminate or reduce risks. (Tr. 127, 141). Then he would work safely while constantly re-evaluating safety. (Tr. 127). For larger jobs, it might entail looking to at the area, determining how to make the fix and strategizing the task before entering the area. (Tr. 102). Supervisors would explain each step in a project, whether a single day or something larger. (Tr. 106). Take Five information was posted in every room of the plant. (Tr. 105-106). As a planner, when McGregor would hand out Take Five slips with work orders. (Tr. 106). All of the miners were aware of the program. (Tr. 106).

[14] Sichmeller testified that the light on the south side of the compressor was blinking, possibly

was directly below the oil filling cap. (Tr. 70). Savela testified that an attendant would not walk to the far side, as it is a dead end blocked by a large pipe. (Tr. 67).

McGregor and Savela testified that the compressor needed to be re-filled daily because it placed oil into the lines to lubricate the machine, thereby "burning" the oil.[15] (Tr. 88, 98). However, Savela conceded he was not familiar with what happened to the oil and that he did not know what was causing the leaks. (Tr. 91-92). The oil often spilled because the compressor was repeatedly overfilled. (Tr. 73). McGregor testified that the oil overflowed because it was cold when filled, resulting in expansion when heated. (Tr. 103). In addition to oil expansion, leaks could also occur from vibrations. (Tr. 103, 116, 118). Savela testified that leaks occurred because the examiner would fill the compressor until the oil overflowed. (Tr. 74). The oil did not affect the attendant's ability to access the area. (Tr. 74). McGregor testified that the miners knew the oil was there, that they were not supposed to walk in it, and that they were to clean before working. (Tr. 104, 107, 121).

Sichmeller believed the compressor had hemorrhaged the oil into the walkways. (Tr. 23, 26, 29, 52). This was because there was oil all over the compressor, dripping, building up underneath, and spilling out into the walkway floor. (Tr. 23). However, Sichmeller conceded that he never determined the cause of the leaks. (Tr. 23, 43). If he were able to do so, he would have issued a citation under a different standard. (Tr. 43). He did not speak to the maintenance department to determine the source of the oil. (Tr. 45). He also did not recall if he talked to the attendant about the procedures for filling the compressor with oil or for placing pads. (Tr. 44). If he had, he probably would have included it in the citation. (Tr. 44). He had spoken with the attendant about those issues during an earlier inspection. (Tr. 45).

To stop leaks, maintenance would tighten lines and, if it was a small leak, set down pads. (Tr. 104, 108-109, 116). Spills larger than five gallons would require a work order. (Tr. 108). Absorbent pads were the same as having a dry floor. (Tr. 107). Pads sat behind the compressor or in a cabinet outside. (Tr. 107-108). They were disposed of in an oil containment area in the room and near the loading area. (Tr. 108).

Sichmeller testified that the instant spill stretched 10 inches into the 27-inch wide walkway on the south side of the compressor. (Tr. 23). On the north side, the spill was 20-by-24 inches in size and stretched underneath the compressor and out into the walkway. (Tr. 23). The walkway tapered to 20 inches at the north because of the compressor and piping. (Tr. 23-24, 28). The compressor could only be accessed from the north, meaning that entering and leaving would require travel through both spills. (Tr. 24). However, McGregor testified there was a clear path around the backside of the motor and compressor to reach the working area. (Tr. 104-105). A miner would return using the same path. (Tr. 105). Miners stood behind the compressor while

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affecting illumination. (Tr. 22). However, Sichmeller conceded that there was also a string of lights on the north side of the compressor room. (Tr. 46). Savela believed the lighting was adequate; sodium vapor lights on the south wall and half a dozen 120-volt lights. (Tr. 62, 68).

[15] The machine was filled each shift with a one-quart "tea pot." (Tr. 73-74). Savelea disagreed with McGregor that a sight glass was available to determine how much oil was needed. (Tr. 73-74, 98).

filing it with oil. (Tr. 105). Savela testified that the floor was dry and oil free. (Tr. 64-65, 80).

In addition to the walkway, Sichmeller testified there was oil saturation around the compressor's pedestal. (Tr. 27). Oil was on the pedestal because leaks on the compressor were building up. (Tr. 27, 52). Savela testified that the pedestal was reminiscent of a curb, and it held leaked oil.[16] (Tr. 70). Sichmeller did not believe there was a curb around the pedestal. (Tr. 42).

Sichmeller testified that there were two to four layers of absorbent pads on the spills. (Tr. 21-22, 26-28). These pads were in the middle of the walkway on the north side. (Tr. 29). Savela testified that the pads were not in the walkway. (Tr. 65, 73). He also testified that the pad in the working area had created a dry floor, so there was no need for additional pads. (Tr. 67-68). He further stated that the pads on the north side were only by the discharge pipe. (Tr. 73).

Pads were also placed on the floor on the south side of the compressor, in the containment area, and along the oil reservoir/manifold. (Tr. 73). On the south side, Savela testified there were three pads on the floor. (Tr. 66). Savela did not believe the pads were stacked and saw no puddles on the floor. (Tr. 67, 85). Savela also testified that there were pads in the containment area, but not on the working floor. (Tr. 72). He believed miners were not exposed to the pads in the containment area because the area was covered by the motor and compressor. (Tr. 71-72). Miners would not access this area and would not tamp the pads down with their feet. (Tr. 87). To contact the pads here, someone would have to put their hand or foot in the space between the equipment. (Tr. 72).

Sichmeller believed the pads added to the hazard as waste accumulation and as a slip hazard. (Tr. 22, 47). Oil had built up on the walkways to the point that the pads were saturated and no longer effective. (Tr. 26, 52). Someone saw the condition and added more pads. (Tr. 26-27). Savela agreed that it was not normal to use layers of pads, but conceded that there were layers in the cited area. (Tr. 84, 92). It was not Respondent's policy to stack layers of pads. (Tr. 119). Sichmeller believed the top-layer pad was ineffective and leaking. (Tr. 29). Savela testified that the top pad was not saturated, though there was some oil on it. (Tr. 84-85). McGregor testified that pads were replaced when saturated. (Tr. 107).

Sichmeller observed multiple foot prints in the oil. (Tr. 22-23, 47). The only warning sign in the area instructed employees to check the oil and listed the type of oil needed. (Tr. 30). Sichmeller did not see other warnings. (Tr. 30). However, Savela testified that when installing a pad, someone might use their boot to step on it and make it adhere and absorb. (Tr. 66, 87).

The citation was marked as "reasonably likely" because miners accessed this area at least once a day to check equipment and add oil. (Tr. 20). It was marked "lost workdays or restricted duty" because the area where the compressor was reached and maintained was congested with

[16] Savela testified that the pedestal was a steel enclosed rectangle fastened to the compressor. (Tr. 70). It created a containment area near the fill point. (Tr. 70-71). The compressor sat on one side and the motor was on the other, with pads below the shaft that connected them. (Tr. 72-73). This containment area was eight feet by three feet and prevented oil from getting into the walkway. (Tr. 71).

lots of piping. (Tr. 20, 52). The plant had multiple levels; the floors could be wet so oil on a boot was extremely slippery. (Tr. 52). Miners could slip and fall and get sprains, strains, and broken bones. (Tr. 20). Savela reviewed a material safety data sheet for the oil used in the compressor room (RX-8). (Tr. 81). The form cautioned on page 3, "[p]revent small spills and leakage to avoid slip hazard." (Tr. 86). McGregor testified that the oil was tacky rather than slippery. (Tr. 119). She also testified that oil that collected on someone's boot would wear off or be covered in dust because it was sticky. (Tr. 119). She stated that spills were cleaned to prevent stepping in oil, getting it on miners' hands, and for environmental reasons. (Tr. 119).

Sichmeller believed that friction from mechanical parts also created fire hazard. (Tr. 51). Worn out bearings could cause hydraulic fires and electrical short circuits. (Tr. 51). The pads added to that danger "like a candle wick," when saturated. (Tr. 51). Miners could inhale smoke if the oil caught fire. (Tr. 20). However, there was water on the machine to keep it cool. (Tr. 51). Further, Sichmeller conceded that he did not know what type of oil was used and that hydraulic oil of the type he would expect to find in the compressor room had a high flash point. (Tr. 46). According the to the material safety data sheet, there was very little flammability hazard.[17] (Tr. 82). The flash point was 453 Fahrenheit. (Tr. 82). The oil would not ignite unless it was twice as hot as boiling water. (Tr. 82). Also, no mechanical conditions were cited in the compressor room, despite the fact that Sichmeller inspected the room for those conditions. (Tr. 53-54). Savela was not aware of any fires or slip-and-falls occurring in the room. (Tr. 90).

Sichmeller marked the citation as "S&S" because it was a violation of a mandatory safety standard, it posed a discrete hazard, people were exposed, and there was a violation history. (Tr. 21). Further, the walkways were totally flooded. (Tr. 21). The citation was marked as affecting one person, because only one person would go into this area. (Tr. 24-25).

This citation was marked "high" negligence because Sichmeller had cited the same compressor two other times and knew about a third violation.[18] (Tr. 33). He had also spoken with management in 2007 and 2011 about the importance of the oil leak issue. (Tr. 33-34). He spoke with them about the degree of negligence because of the number of oil leak citations. (Tr. 34). He spoke about this issue during pre-shift inspection conferences and closeout conferences. (Tr. 34). Violation history is a big factor in negligence. (Tr. 34). Mine management saw the leaks and did not prevent recurrences. (Tr. 34). Sichmeller spoke with the safety manager and the miners' representatives about the fact that no changes were made as reflected in his notes. (Tr. 45). However, while he discussed oil leaks in general, he did not specifically talk about this room. (Tr. 47). Respondent could have brought up mitigation at any time. (Tr. 45). However no mitigation was brought to Sichmeller's attention. (Tr. 35).

Savela, McGregor, and Sichmeller reviewed Citation No. 6553335 (GX-11) which was issued on January 6, 2011 for conditions similar to the instant citation. (Tr. 36, 38, 78-79, 109).

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[17] Savela testified that the safety sheet showed the NFPA and HMIS flammability scale rating for this oil (Tr. 82). Both scales showed the oil to be a 1 out of 4. (Tr. 82). Presumably a lower score denotes a lower level of flammability, but Savela did not elaborate on the scales.

[18] Citation No. 6559833 referred to Citation Nos. 6553335 (issued during the first regular inspection), 6193967 (issued in 2007), and 6192368 (issued by another inspector). (Tr. 35-36).

Savela was present when that condition was cited. (Tr. 78). It was also marked S&S, "lost workdays or restricted duty," and "high" negligence. (Tr. 36). The negligence designation was the result of violation history and the fact that he had spoken to Respondent about this issue. (Tr. 36-37). Further, the area was a mess and the condition was obvious. (Tr. 37-38). On cross examination, Sichmeller conceded that this citation was issued for the entrance, not the filling area. (Tr. 42).

Savela testified that the oil spill in that citation was caused by a faulty pressure relief valve. (Tr. 79). At that time, when the relief valve was released, a mist of oil was generated. (Tr. 80). McGregor sent mechanics to the cited area to repair the condition under a Priority A work order. (Tr. 109, 110, 114). A pipe was installed to capture the oil in a lidded-pail, two valves were replaced (a rare and major fix), and the area was cleaned. (Tr. 80, 88, 111, 113-114). Sichmeller testified he saw this repair on the day of the instant citation. (Tr. 28). The cleanup included tightening fittings and placing a pan under the machine for overfill.[19] (Tr. 113-114). She did not know how long it would take for a valve to malfunction. (Tr. 114). The repairs took four to six hours, with a little more time for clean-up. (Tr. 114-115). These conditions were no longer present in April 2011. (Tr. 80).

Sichmeller also reviewed Citation No. 6193967 (GX-15), which he issued on August 16, 2007 under 56.20003(b). (Tr. 38-39). It was issued in the compressor room for oil saturated pads on the floor. (Tr. 39). Salvela was not with Sichmeller when he issued this citation; he was on the plant floor. (Tr. 48). The citation was marked as "reasonably likely," "lost workdays or restricted duty," and "high" negligence for the same reasons as the others. (Tr. 39). He was deposed with respect to this citation on November 15, 2010. (Tr. 40). In the deposition he stated that he had no problem with the use of these pads and that the practice was not against MSHA policy. (Tr. 40). Sichmeller reviewed a photograph depicting the conditions seen in Citation No. 6139367 (GX-18 A). (Tr. 48). There were more pads, three layers, in 2007 than in the instant citation where there were only two layers. (Tr. 48-50). The conditions in 2007 were much worse than in April 2011. (Tr. 50). However, Sichmeller believed this only showed that Respondent did not take precautions to correct the condition and had a history saturated pads. (Tr. 49).

The citation was terminated when Respondent removed all the oil-saturated pads, cleaned the oil, and cleaned the compressor components to show where the leaks originated. (Tr. 30-31, 81). The area underneath the compressor and pedestal as well as the valves were cleaned the pads removed. (Tr. 31). Respondent used degreaser to remove the oil from the walkway. (Tr. 30-31). Sichmeller did not know if they fixed any leaks. (Tr. 32-33). After the compressor was degreased it was no longer hemorrhaging oil. (Tr. 43). Savela testified that no oil leaks or hemorrhaging were found after cleaning. (Tr. 81, 90).

Several weeks after the citation was terminated, Respondent tested the cited surface to

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[19] In a photograph from the instant citation marked GX-10 A, McGregor could not tell if there was an oil pan for overfill. (Tr. 120). The photograph marked GX-10 B showed the same area, only closer, and she could not tell if the pan was there. (Tr. 120). She may have seen the outline of a pan. (Tr. 121). However, she found the pan was visible in the photograph marked GX-10 H. (Tr. 123).

determine if it was as slippery as MSHA believed. (Tr. 76, 128). The slipperiness of the area was not tested the day of the citation, but rather six months later. (Tr. 145-146). The testing was conducted by certified tribometrist, Jeffery Jarvela.[20] (Tr. 128). Tribometry is the measure of friction or traction on floor surfaces.[21] (Tr. 127). A slip meter or tribometer, here a Brungraber Mark II, provides a reading of both vertical and horizontal forces at the same time with the slip meter "shoe" on the surface.[22] (Tr. 131). This mimics the heel striking the floor. (Tr. 131). The slip tester then gives a measurement of the slip resistance in the form of a "slip index." (Tr. 127-128, 131). The slip index was a range between 0 and 1.1. (Tr. 131). A reading of 0.5 or less was slippery, 0.5-0.6 was acceptable, and 0.6 or higher was not slippery.[23] (Tr. 132-133, 148).

At the hearing, Jarvela reviewed the slip meter assessment for the plant dated October 17, 2011 (RX-4). (Tr. 129). He was present for the test and had contracted with Liberty Mutual to conduct it. (Tr. 129, 138). Perry Pastir, a senior consultant with the loss advisory group Helmsman Management Services conducted the test. (Tr. 129-130). Neither Liberty Mutual nor Pastir had any relationship with Respondent. (Ter. 138-139). Twenty-four measurements were taken in the plant, some in the compressor room. (Tr. 130-131). The average readings in the room were between 0.62 and 1.1, meaning the walking surfaces were non-slippery. (Tr. 132).

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[20] At hearing, Jeffrey Jarvela was present and testified for Respondent. (Tr. 124). He was employed as the safety program manager by Cliff's Natural Resources, Respondent's parent company, and had been employed there for over two years. (Tr. 124-125). In that capacity he performed safety support for mines sites including program development, implementation, training, and other needs. (Tr. 125). He primarily worked in Minnesota for Respondent, Hibbing Taconite, and Northshore Mining. (Tr. 125). Jarvela had a bachelor's degree in industrial technologies and a master's degree in industrial safety from Minnesota-Duluth. (Tr. 125). He was a certified safety professional and occupational health and safety technologist. (Tr. 125). An occupational health and safety technologist does the technical aspects of mine safety. (Tr. 125-126). He was certified in 1998 by the Board of Certified Safety Professionals. (Tr. 126). A safety professional is the highest certification in the field and deals with management. (Tr. 126). Jarvela had 13 years of experience in manufacturing including airlines, chemical manufacturing, and electronics' manufacturing under OSHA jurisdiction. (Tr. 126).

[21] The Secretary objected to the introduction of this evidence as MSHA does not recognize this measurement. (Tr. 142-143). MSHA does not determine slipperiness. (Tr. 147-148).

[22] Jarvela did know when the machine was sent for external calibration, but it was calibrated prior to testing. (Tr. 145). He could not say whether it was properly calibrated. (Tr. 145).

[23] Page 2 of Jarvela's report contained some bullets at the top which stated that 0.5 to 0.6 values are "generally unacceptable." (Tr. 143-144). However, Jarvela testified this was a typo. (Tr. 144). Another bullet stated, "[t]he slip shoe on the device penetrated the oil pads or got caught on the sticky surface during the measurements of the staged oil-soaked pad test and readings may be more slippery than indicated." (Tr. 144-145).

The first tests occurred on the floor of the compressor room.[24] (Tr. 129, 133-135, 146). The floor was clean, so oil had to be added. (Tr. 134-135). The average reading in that location was 0.62. (Tr. 135-136).

A second test was conducted with saturated pads on the floor. (Tr. 136). The pads were sticky because the oil had high viscosity. (Tr. 136). The pads were brown from stepping on them to soak in oil. (Tr. 137). The results were 0.88. (Tr. 136).

Respondent conducted another tests with the pads excessively soaked in oil. (Tr. 137). The results on these tests were the highest possible rating, 1.1, or not slippery. (Tr. 137-138). The more oil added, the less slippery the pads and floor. (Tr. 138, 147). However, Jarvela conceded they would clean up oil because of the slip risk and the area should be clean. (Tr. 147).

In another test, the slip test shoe was coated in oil to simulate someone stepping in oil. (Tr. 139). Generally, before testing the shoe was cleaned and sanded. (Tr. 151). The result was a reading of 0.64, which was not very slippery. (Tr. 139-140, 151).

Another test was taken in Savela's office and the report shows that the linoleum tile floor had a reading of 0.53 – more slippery than the compressor room. (Tr. 148-150). They did not test oil on a shoe in the office. (Tr. 150).

Jarvela and the other testers concluded that the rough surface of the compressor room with the dry dusty material was not slippery. (Tr. 140). The surface in that area was similar to other areas in the plant, except one area (the pump row) which tested below 0.5 (Tr. 140). Respondent contracted with a company to grind the pump row floor to increase the resistance. (Tr. 140-141). No similar changes were recommended for the compressor room. (Tr. 141).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That § 56.20003(b) (Citation No. 6559833) Was Violated.

On April 26, 2011, Inspector Sichmeller issued a 104(a) Citation, Citation No. 6559833 to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> PELLET PLANT: the walkways in the Limestone/Bentonite unloading compressor area was not being maintained in a clean condition. Oil and oil saturated absorbent pads were found built up on the walkways on both side (sic) of the main travel routes for accessing the compressor creating the hazard of slip/fall type injuries to person accessing this area. This area is accessed at least once per shift by operators for checking the compressor. The company does have a history of violation to this standard and in this area for these conditions on citations 6553338, 6193967, 6192368. Oil leaks and control of leaks have been

[24] A series of photographs was taken of the test. The photographs show the time they were taken, with the first and 11:37 and the last at 11:46. (Tr. 146-147).

addressed by MSHA to management

(GX-1).

Standard 30 C.F.R. § 56.20003(b) ("Housekeeping") provides the following:

> (b) The floor of every workplace shall be maintained in a clean and, so far as possible, dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places shall be provided where practicable

30 C.F.R. § 56.2003(b).

With respect to the instant citation, Inspector Sichmeller credibly testified that the walkways in the bentonite compressor room at the Pellet Plant were covered in oil. (Tr. 23, 26, 29, 52). Further, Sichmeller credibly testified that while pads were placed in the area to absorb this oil, the pads had become saturated to the point that they were no longer keeping the area clean and dry. (Tr. 21-22, 26-28, 47, 52). The photographic evidence provided by the Secretary supports a finding that the floor of the compressor room contained oil and saturated mats. (GX-10, A through J). In fact, Respondent's witnesses conceded that the compressor was routinely overfilled, causing the oil to leak out of the machine. (Tr. 73-74, 103). A preponderance of the evidence shows that the walkways were allowed to become wet with oil and that the pads used to collect the oil were saturated and ineffective.

Respondent offered several arguments to show that the instant citation was not validly issued. However, these arguments were not compelling.

First, Respondent argued that the areas cited were not walkways and that an open path existed on the walkway to allow safe travel. *(Respondent's LAKE 2012-841 Post-Hearing Brief* at 8). Specifically, Respondent argued that on the north side of the compressor the spilled oil was not in the walkway but instead underneath pipes and that miners did not enter the south side. (*Id.* at 9-10). It argued that the cited areas were not intended for travel. (*Id.* at 9). Respondent alleged that the dry path was shown in the photograph marked RX-3-1. (*Id.* at 9). Further, Respondent cited to ALJ Manning's decision in *Beco Construction Co., Inc.*, 23 FMSHRC 1182, 1194 (Oct. 2001) for the proposition that a citation for housekeeping should be vacated when a clear footpath is available and the area is relatively clean and orderly.

In a related argument, Respondent asserted that two of the areas cited areas were not working areas because they were under the oil reservoir and beneath the coupler shaft. (*Respondent's LAKE 2012-841 Post-Hearing Brief* at 9-10). Respondent argued that they were not "working places" within the definition of 30 C.F.R. §56.2 ("...any place in or about a mine where work is being performed."). Respondent claims that people would not go into these areas.

In short, Respondent argued that all of the areas cited could either be avoided by taking the clear path or were non-working areas that were inaccessible.

A preponderance of the evidence shows that some of the oil in this room was underneath equipment or within the "curb" built around the compressor to contain oil. (Tr. 27, 52, 70). However, the Administrative Law Judge is also convinced that a large amount of the oil was in the walkway where miners performed the work of filling the compressor. Sichmeller credibly testified that oil was in the walkway and that miners would have to enter these areas when filling the compressor or engaged in an inspection. (Tr. 23-24, 26, 29, 52). While some of the oil was in non-working areas and some of the walkways were clear, the Administrative Law Judge finds that there was enough oil in the working areas to constitute a violation of the cited standard.

Respondent also presented several arguments related to the use of pads. Specifically, it argued that the pads in the walkway were largely dry (just a little oily) and were not saturated. (*Respondent's LAKE 2012-841 Post-Hearing Brief* at 10-11). Also, Respondent asserted that the pads were necessary to prevent intermittent leaks and that Sichmeller agreed that the use of pads was not, *per se*, impermissible. (*Id.* at 11). Finally, Respondent claimed that the pads did not need to be removed because they were not saturated and did not pose a hazard. (*Id.*).

Nothing in the standard indicates that the use of pads, in general, is disfavored. In fact, the standard specifically calls for "mats" and other dry places for standing when wet processes are used. 30 C.F.R. § 56.20003(b). Therefore, the issue is not whether the general use of pads was appropriate, but instead whether the area, even with the pads, was maintained in a clean manner. A preponderance of the evidence shows that it was not. While Respondent appropriately used pads to collect leaks, Inspector Sichmeller credibly testified that those pads had become completely saturated to the point that they no longer served their valuable function. (Tr. 26, 52). Sichmeller and Savela testified that pads were saturated and more pads were simply stacked on top of them. (Tr. 21-22, 26-28, 84-92). The Administrative Law Judge finds that a preponderance of the evidence shows that the working areas and walkways were not maintained properly as there were both oil and oil saturated pads on the floor.

2. Considering The Record *In Toto* And Applying Applicable Case Law, The Violation Was Reasonably Likely to Result in a Fatal Injury And Was Significant And Substantial in Nature

Inspector Sichmeller marked the gravity of the cited danger in Citation No. 6559833 "Reasonably Likely" to result in "Lost Workday/Restricted Duty" injury to one person. (GX-1). These determinations are supported by a preponderance of the evidence.

The event against which the instant standard, 30 C.F.R. § 56.20003(b), is directed is injury caused by poorly maintained working areas. Inspector Sichmeller credibly testified that the existence of oil on the walkways in the compressor created a slip-and-fall hazard that could result in sprains, strains, and broken bones. (Tr. 20, 52). Further, the evidence shows that only one miner at a time would likely be in this area. (Tr. 60, 98, 116, 121).

Respondent provides several arguments asserting that an accident was unlikely. However these arguments are not compelling.

First, Respondent argued that the cited area was only minimally accessed and that there

were no tripping, electrical, or mechanical hazards in the area. (*Respondent's LAKE 2012-841 Post-Hearing Brief* at 11-12). The evidence supports Respondent's contention that the area was only accessed once a day when the miner entered to service the compressor. (Tr. 60, 98, 116, 121). However, the citation already states that only one person would be affected. (GX-1). Even granting that exposure was limited, the preponderance of the evidence supports the citation as issued with respect to persons affected. Also, while there were no electrical or mechanical hazards in the area; the evidence supports a finding that the oil and saturated pads alone constituted a slipping hazard. (Tr. 20, 53-54). Further, the tight confines of the compressor room and the various pieces of equipment and piping contained therein support a find that when a miner fell, it would result in lost working or restricted duty type injuries. (Tr. 20, 52).

Second, Respondent argued that the oil pads worked as intended and that the walkway was oil free. (*Respondent's LAKE 2012-841* Post-Hearing Brief at 12). As already discussed with respect to validity *supra*, a preponderance of the evidence supports a finding that the walkways were somewhat oily and that the pads were saturated with oil.

Finally, Respondent argued that even if there was oil in the walkway, the oil was sticky rather than slippery and that walking surface was less slippery with the oil than without. (*Respondent's LAKE 2012-841 Post-Hearing Brief* at 12-13). Respondent cites to the tribometry testing conducted by Jarvela to support this assertion. (*Id.*). The Administrative Law Judge does not find the tribometric evidence nor the testimony related thereto to be particularly probative.[25] Jarvela did not test the cited condition with the tribometer, he merely tested the area weeks later after placing oil on the floor. (Tr. 76, 128, 134-135). Jarvela's tests did not analyze conditions at the time of the citation and therefore are only partially credible. Perhaps more importantly, the Material Data Safety Sheet provided by the manufacturer of this oil warns customers to "[p]revent small spills and leakage to avoid slip hazard." (RX-8). Therefore, Respondent's assertion that increasing the amount oil on the floor decreased the slip hazard is not only counter-

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[25] The Administrative Law Judge fully recognizes the necessity for expert testimony in many of the cases before the Commission. However, there is abundant case law indicating why expert opinion evidence may in and of itself be problematic. Indeed, many states' juror instructions contain the following or similar language:

> In evaluating the credibility of the witness, you should consider their interests in the outcome of the case; that is, whether that interest in any fashion affected their testimony. The testimony of an expert witness is merely an opinion. An opinion is what someone thinks about something and the thought may be precisely accurate or totally inaccurate and yet represent the absolute, honest conviction of the person who expressed it. Because of this, opinion evidence is generally considered of inferior or low grade and not entitled to much weight against positive testimony of actual facts.

Fay v. Philadelphia, 344 Pa. 439, 441-43, 25 A.2d 145, 146-147 (1942); *Kutchinic v. McCrory*, 439 Pa. 314, 226 A.2d 723 (1970). Though not bound by said jurisprudence the undersigned, as trier-of-fact, believes such contains sage cautionary advice regarding the evaluation of expert opinion.

intuitive but also counter to the safety data provided by the manufacturer. Beyond that, a sticky floor could be just as much of a tripping hazard as a slippery floor. Finally, the record showed that MSHA and OSHA do not recognize tribometry for the purposes of workplace safety. (Tr. 142-143). As a result, the Administrative Law Judge finds that the oil was a slip hazard.

In addition to the slip hazard, the Secretary also asserts that the cited condition constitutes a fire hazard. (*Secretary's Post-Hearing Brief* at 15). Essentially, the Secretary notes that the oil in the cited area was flammable and could have ignited, causing burn injuries to miners. A preponderance of the evidence does not support this claim. As Respondent's witnesses noted, this oil had a flash point well above the temperatures to be expected in the compressor room. The Material Data Safety Sheet confirms that the flash point of this oil was around 453 degrees Fahrenheit. (RX-8). The likelihood of a fire in this area was low.

Therefore, the Administrative Law Judge finds that the cited condition was reasonably likely to result in lost workday/restricted duty injuries to one miner as a result of slip and fall hazard but that there was virtually no hazard of fire.

Citation No. 6559833 was also marked as S&S. (GX-1). It has already been established that the first element of the *Mathies* S&S analysis, the underlying violation of a mandatory safety standard, has been established with respect to this citation. As discussed *supra*, Respondent violated 30 C.F.R. §56.20003(b).

With respect to the second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation, the preponderance of the evidence shows that the oil and oil-saturated pads constituted a slip and fall hazard. As discussed *supra*, a miner stepping onto an oily floor surface or oil-saturated pads could loose his footing and fall. Once again, there was no credible fire hazard created by this condition.

Respondent produced several arguments for the proposition that this condition posed no hazards, none of which are compelling.

First, Respondent argued that the absorbent pads worked as intended and that they did not themselves constitute a slip hazard. (*Respondent's LAKE 2012-841 Post-Hearing Brief* at 14). As discussed, Inspector Sichmeller credibly testified that the pads were saturated and no longer providing a stable place to stand. (Tr. 26, 52). The oily pads were a slip hazard and no longer served to clean and stabilize the area. Even if sticky, the pads and floor could have been a trip hazazard.

Respondent also argues that the saturated pads were not located in the travelway. (*Respondent's LAKE 2012-841 Post-Hearing Brief* at 14). Again, a preponderance of the evidence shows that while some of the pads were outside of work areas, there was sufficient oil in the walkways to violate the standard and present a slip and fall hazard. (Tr. 20). In light of these facts, the Administrative Law Judge finds that the second prong of *Mathies* is met.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – is also supported by the record. A miner slipping on wet pads or an

oily walkway in the compressor room would be reasonably likely to suffer broken bones, head injury, contusions, or other lost workday/restricted duty injuries.

The fourth element - a reasonable likelihood that the injury in question will be of a reasonably serious nature – is also supported by the record. The slip and fall related injuries that would occur would be of a reasonably serious nature. *See e.g. Oak Grove Resources, LLC*, 35 FMSHRC 3039, 3052 (Sept. 2013) (ALJ Zielinski); *Oil-Dri Production Company*, 32 FMSHRC 1761 (Nov. 2010) (ALJ Manning); and *Mach Mining, LLC*, 32 FMSHRC 213 (Feb. 2010) (ALJ Weisberger).

As a result, the Administrative Law Judge finds that the Secretary proved the violation was S&S by a preponderance of the evidence.

3. Respondent's Conduct Was Not Reasonably Designated As Being "High" In Nature but instead showed "Moderate" Negligence.

In the citation at issue, Inspector Sichmeller found that the operator's conduct was highly negligent in character. He credibly testified that Respondent knew, or should have known, about the cited condition. First, the condition was obvious as the room contained a large amount of oil and soaked oil pads. (Tr. 21-23, 26-28). The compressor itself was soaked in oil. (Tr. 23). Further, an employee entered the compressor room every day to examine the area and service the machines. (Tr. 60, 98, 116, 121). Also, Respondent had been cited for the condition of the compressor room in the past, though Sichmeller conceded previous conditions were more serious. (Tr. 33, 49-50). Finally, Respondent noted that some spillage was unavoidable when filling the machine but did not take sufficient action to prevent hazards from arising from that spillage. (*Respondent's LAKE 2012-841 Post Hearing Brief* at 14-15 and Tr. 73). Therefore, the Administrative Law Judge finds that Respondent knew or should have known the condition existed.

However, the evidence does not support the Secretary's contention that there were no mitigating circumstances in this case. Several factors served to mitigate Respondent negligence with respect to the instant citation. First, Respondent had taken measures after the earlier citations to correct conditions in the compressor room. Specifically, a bucket was added to the compressor to collect discharge and a curb was placed to create a containment area. (Tr. 80, 88, 111, 113-114). While these measures did not eliminate the hazard here, they show that Respondent was making some effort to correct the conditions. The same is true of the pads. While Respondent allowed the pads to become saturated and improperly stacked the pads, the fact that it was using the pads shows it was aware of the condition and was attempting to alleviate it.

In light of these mitigating circumstances, a finding of "high" negligence is inappropriate. Respondent's actions are better characterized as showing "moderate" negligence.

4. Penalty

As with the previous citation, the Administrative Law Judge finds that a substantial

deviation from the Secretary's proposed assessment of $16,867.00 is warranted herein. Once again, the factors contained in 30 U.S.C. §820(i) will be used to explain that deviation. Those factors are as follows:

(1) The Operator's history of previous violations – in the 18 months preceding this violation the Plant was cited 3 times for this condition. (GX-1).

(2) The appropriateness of the penalty compared to the size of the Operator's business – As discussed with respect to the previous citation, Respondent is a large operator with an above-average sized plant.

(3) Whether the Operator was negligent – As previously shown, the operator exhibited moderate negligence, rather than the high negligence cited by the Secretary.

(4) The effect on the Operator's ability to remain in business – The parties have stipulated that the citation at issue here would not affect Respondent's ability to remain in business. (JX-1)

(5) The gravity of the violation – As previously shown, this violation was reasonably likely to result in lost workday/restricted duty injuries to one person.

(6) The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – The evidence shows the condition was abated rapidly and in good faith.

In light of the Administrative Law Judge's decision to modify the negligence from "High" to "Moderate" a reduction in the assessed penalty is appropriate. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $10,000.00 with respect to this violation.

ORDER

It is hereby **ORDERED** that Order No. 6553379, Citation No. 6553380 (LAKE 2012-687) and Citation 6559833 (LAKE 2012-841) are **AFFIRMED** as modified herein.

Respondent is **ORDERED** to pay civil penalties in the total amount of $17,000.00 within 30 days of the date of this decision.[26]

John Kent Lewis
Administrative Law Judge

[26] 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

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