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FEB 28 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2008-406-M A.C. No. 47-00398-146216
	:	Docket No. LAKE 2010-153-M A.C. No. 47-00398-199574
v.	:	
	:	Docket No. LAKE 2010-154-M A.C. No. 47-00398-199574
BUECHEL STONE CORPORATION, Respondent	:	Mine: Chilton Quarry

DECISION

Appearances: Amanda K. Slater, Esq., U.S. Dept. of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

Denise Greathouse, Esq., Michael Best & Friedrich, LLP, Waukesha, Wisconsin, for Respondent.

Before: Judge Bulluck

These cases are before me upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") on behalf of his Mine Safety and Health Administration ("MSHA"), against Buechel Stone Corporation ("Buechel"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815(d). The Secretary seeks total civil penalties in the amount of $29,482.00 for 18 alleged violations of his mandatory safety standards and one violation of the Act.

The parties reached an agreement that settled 12 citations prior to commencement of the hearing in Madison, Wisconsin. Five citations were the subject of the hearing.[1] The issues are: (1) whether Respondent violated 30 C.F.R. §§ 56.14107(a), 56.15020, 56.16009, 56.20003(a), and 46.9(a); (2) whether the violations were significant and substantial, where alleged; (3) whether the degree of negligence charged is appropriate; and (4) whether the violations were

[1] The hearing commenced with six violations at issue. Prior to close of the record, the parties reached a settlement of Citation No. 6414887 (Lake 2010-154-M). Tr. 292.

attributable to Buechel's unwarrantable failure to comply with the Secretary's safety standards, where alleged. The parties' Post-hearing Briefs are of record.

For the reasons set forth below, I **AFFIRM** the citations, as issued, assess penalties against Respondent, and approve the parties' Partial Settlement.

I. Stipulations

The parties stipulated as follows, respecting the five citations at issue:

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

2. Buechel is the owner and operator of the Chilton Quarry, MSHA ID No. M/NM 47-00398.

3. Buechel 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 were properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, but not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits offered by Respondent 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 operator demonstrated good faith in abating the violations.

8. Citation No. 6199159: The areas cited by Inspector Leppanen were workplaces and/or passageways for purposes of 30 C.F.R. § 56.20003(a).

16. Citation No. 6414879: The Wilson saw at issue in this citation has a moving machine part that could cause severe permanently disabling injuries.

18. Citation No. 6414885: There were no life jackets provided to the employees who work on water pumps in the lower east pond at the Chilton Quarry.

19. Citation No. 6414885: On the day of the inspection, the water in the pond was approximately 4 feet deep.

Sec'y Pre-hr'g Rep. at 1-3.

II. Factual Background

Buechel owns and operates the Chilton Quarry, a surface dimensional stone operation that cuts limestone for decorative use in the building construction industry, located between Brothertown and Chilton, Wisconsin. Tr. 14-15. The quarry employed approximately 67 workers in 2008 and operated two shifts, 6:00 a.m. to 2:30 p.m. and 2:30 p.m. to 11:00 p.m. Tr. 64.

On the morning of January 9, 2008, MSHA Inspector Robert Leppanen conducted a regular E-01 inspection of the Chilton Quarry, accompanied by mine maintenance engineer technician Steve Grossenbach. Tr. 16. Leppanen inspected the entire quarry, including the CMF ("Chilton Manufacturing Facility") building where the Wilson saw is located, and took field notes as the inspection progressed. Tr. 16, 294.[2] As a result of observing accumulations of mud, water and saw cuttings on the travelway to the northeast and northwest of the Wilson saw, Leppanen issued a housekeeping citation to Buechel for the operator's failure to keep the areas free of debris, posing a slip-and-fall hazard. Tr. 18-19; Exs. P-1, P-2.

On August 25, 2009, MSHA Inspector James Hautamaki, observed by MSHA Southeast Assistant District Manager Fred Gatewood, conducted a spot inspection of the Chilton Quarry. Tr. 124-26, 222-23, 256. According to Hautamaki, "a Buechel," Steve Grossenbach, and site manager Jason Zahringer also traveled with him. Tr. 125-26, 263. Inspector Hautamaki issued several citations as a result of this inspection.

Although Hautamaki had inspected the Chilton Quarry on previous occasions, during this inspection, he became aware of three settling ponds on mine property that had never been inspected because they were not readily visible and because MSHA had not been advised that they existed. Tr. 128-29. Hautamaki took photographs of the ponds and, because no miners were working in the area, talked to Grossenbach about the work involved in maintaining them. Tr. 129-31. Based on his observations of the work environment, and Grossenbach's description of seasonal maintenance work on the pumps submersed in the ponds, Hautamaki cited Buechel for failure to provide its employees with personal floatation devices. Tr. 126, 131-33; Exs. P-19, P-20.

Hautamaki inspected the CMF building and, although the Wilson saw was not running, he observed that no guarding was installed around the saw's perimeter and cited Buechel for failure to prevent persons from contacting its moving parts when in operation. Tr. 181-82; Exs. P-12, P-13. The inspector also issued another citation in the CMF building for a miner's failure to stay clear of a suspended load, after observing a forklift operator leave his cab and position himself at or very near the edge of a large stone slab, propped up in mid-air by the tips of

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[2] The Wilson saw is a gantry-type wet saw that cuts large blocks of stone into slabs of varying widths. Tr. 79. Splitters, also known as guillotines, located in front of the saw, chop the slabs into smaller lengths. Tr. 41.

the forks. Tr. 189-90; Exs. P-15, P-16.

Hautamaki also inspected the mine's annual refresher and new miner training records and, finding the forms incomplete, cited the operator for failure to provide the information required by the Secretary's Part 46 Training Regulations. Tr. 198-200; Exs. P-23, P-24.

III. Findings of Fact and Conclusions of Law

A. Citation No. 6199159

1. Fact of Violation

Inspector Leppanen issued 104(a) Citation No. 6199159, alleging a "significant and substantial" violation of section 56.20003(a) that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Buechel's "moderate" negligence." [3] The "Condition or Practice" is described as follows:

> The northeast and northwest travel ways at the Wilson Saw were not kept neat and orderly. There was spilled fine saw cuttings, mud and water on the floor causing a slippery condition. If a person accessing this area were to slip and fall on this spilled material, lost time injuries could occur. These areas are accessed daily; there were several footprints traveling through the spilled material.

Ex. P-1. The citation was terminated the same day, after the cited material had been removed. Tr. 47, 68.

In order to establish a violation of one of his mandatory safety standards, the Secretary must prove that the violation occurred "by a preponderance of the credible evidence." *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

The parties have stipulated that the areas cited by Leppanen were workplaces and/or passageways. Stip. 8. The Secretary takes the position, therefore, that he need only establish that they were not maintained in a clean and orderly manner in order to prove a violation of section 56.20003(a). According to him, the photographs of the areas, alone, establish the violation. Sec'y Br. at 5; Ex. P-2.

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[3] 30 C.F.R. § 56.20003(a) provides that at all mining operations, "workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly."

Buechel argues that it is allowed a reasonable amount of time to clean the surrounding area after the Wilson saw has been operating, and that the Secretary has failed to refute that the saw had recently completed a project prior to the inspection. Resp't Br. at 5.

Leppanen, assigned to the Marquette, Michigan field office, and experienced in surface and underground mining and heavy equipment operation and maintenance, had worked for MSHA for almost nine years when the case was heard. Tr. 10-13. Leppanen described the accumulations of wet mud and saw cuttings around the Wilson saw as approximately one-eighth to one-half inch deep, with tracks and footprints indicating that equipment and pedestrians had traveled through them. Tr. 19-22, 46-47, 52-53; Ex. P-2. When asked his opinion as to how the materials got onto the floor, the inspector stated the following:

> It appeared to me that they came from the saw cuttings. They use water to cool the saw blade and assist in the cutting of the stone. Also, when they bring the stones into the building, they'll bring 'em in with forklifts. So if it's a wet condition outside, the mud gets tracked-in in the treads on the forklifts, and it gets spilled onto the floor area.

Tr. 22. Leppanen estimated the accumulations to extend approximately 20 feet long, by 6 feet wide, and concluded that the cement floor was slippery by testing it with his foot. Tr. 22-23. He stated that about 20 employees were working in the CMF building, and that he observed employees running the guillotines in the general area of the saw, but not in the specific area where he cited the mud. Tr. 24. He also stated that a lunchroom and foreman's office are located in the building, and that a bathroom is near the muddy area. Tr. 25, 44, 46. He testified that the Wilson saw's controls are near the saw, but not where the mud had accumulated. Tr. 49. In Leppanen's opinion, it was reasonably likely that someone would fall on the slippery cement floor and suffer strains, sprains and broken bones, because the slippery areas were being traveled; he also noted that pedestrians would have had to have stepped over a curb before stepping down into the mud. Tr. 23-24; see 49-50. He also testified that he did not actually witness anyone traveling through the material, that it was not being cleaned when he arrived on the scene, that no warning signs or barriers blocked off the slippery areas, and that it had to have taken a substantial amount of time for the saw cuttings to have accumulated. Tr. 26. Leppanen explained that he ascribed moderate negligence to Buechel because the foreman should have seen the muddy accumulations from his office window and had them cleaned up. Tr. 26-27, 53-54; see 69. Finally, he stated that if there had been no evidence of foot traffic, he would not have cited the condition. Tr. 54-55, 69.

Maintenance engineer technician Steven Grossenbach worked at Buechel from about May 2007 until December 2009. Tr. 75. He testified that he had accompanied Leppanen when he inspected the Wilson saw, that he had observed footprints and forklift tracks in what he described as "kind of like a half-dried mud puddle," and that it was he who had called for someone in the area to clean up the material. Tr. 75-76, 79-80, 82, 83, 85, 88. Grossenbach explained that in 2008, the Wilson saw was run two to three times weekly, that it was typically programmed in the afternoon to run through the night and, less frequently, into the morning hours, depending on the

job. Tr. 78. When asked about procedures to clean up the "mess" created by operating the saw, Grossenbach explained that when the saw completes a cycle, the oncoming shift cleans the floor, then moves the product by crane, loader or forklift, depending on where the stone is needed. Tr. 79. He also stated that the Wilson saw operator may be in the area while it is operating or, if a splitter operator has programmed the saw, that worker will have moved on to the splitter. Tr. 81-82. Grossenbach placed the lunchroom about 100 feet from the northeast accumulation and, while he conceded only the possibility that someone would use the muddy area to get to it, he acknowledged having used the travelway, himself, to get from the CMF building to the saw shop and assumed that others did so as well. Tr. 84-85, 88-89.

Maintenance worker David Petrie also testified that the Wilson saw is not run every day, and that it operates at night and sometimes in the morning, depending on the product. Tr. 91. He stated that he has witnessed workers use a fireman's style hose to clean the leavings around the saw. Tr. 92. When Petrie was shown a photograph of the cited northwest muddy area, he identified it as "a walkway by that splitter," that is a frequently traveled area for the person who operates the saw. Tr. 93; Ex. P-2. He identified a second photograph, the northeast accumulation, as an infrequently traveled area along the north wall, and stated that it was used to access the hose to wash down the Wilson bay and to travel to the saw shop, the next building north of the CMF building. Tr. 93-94; Ex. P-2. Finally, Petrie conceded not knowing how frequently the area around the saw was cleaned. Tr. 95.

Buechel's executive vice-president, Scott Buechel, corroborated that operation of the Wilson saw depends upon the orders - - daily to three times a week - - and that it is typically programmed during the day then, at the end of the shift, it runs at night and, occasionally, a couple of hours into the morning. Tr. 98-99. He described a drainage system, running east to west, that carries away much of the lime sediment prior to manual cleaning that occurs after the bunkers are removed, and opined that the saw operator would be working in the area where the footprints were observed in the sludge. Tr. 104, 107-08. Buechel gave a detailed description of the operator's cleaning procedure:

> So we'll have the forklifts go in, pick up the stone, put it onto the splitter that's right there; then the operator will go in with a crane, pick up the bunker, move it to a place where they can get at it comfortably and safely; and then after they've got that product out, then they will go in, and they'll clean down the area so that they can get at everything at one time.
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> * * * * * * * *
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> Typically they'll use a water hose. Once in a while, if the sludge is a little thicker, they may go in with a shovel just to clean it, make it a little easier.

Tr. 99-100.[4] According to him, "they're supposed to clean it up right after they remove the stone out of there." Tr. 100.

Scott Buechel testified that the company's policy requires that the Wilson bay be cleaned immediately. Tr. 110. Buechel asserts that the sets of footprints were that of the Wilson saw operator preparing to clean the area after the saw had finished running. Resp't Br. at 5. Scott Buechel's reaction to the photograph of the accumulation to the northwest of the saw was that "it is a lime sludge . . . so the guys don't want to walk there." Tr. 107. His reaction to the northeast accumulation was that "the only reason somebody'd be back there is to grab the water hose to clean the floor." Tr. 108; see 111. Petrie testified likewise, explaining that the saw operator would be the only traveler to the water hose, for the sole purpose of cleaning the Wilson bay.

Indeed, the Secretary has presented no evidence as to when the saw was last operated but, by the same token, neither has Buechel. The photographic evidence indicates that there was pedestrian activity in the muddy northwest area around the splitter, as well as the muddy northeast area near the water hose. Ex. P-2. If, however, as Buechel suggests, the saw had been recently run, according to its cleaning policy, Leppanen would have observed the Wilson bay being hosed-down. On the contrary, no evidence of cleaning or preparation for cleaning was taking place. Despite the fact that the Wilson saw is computer programmed prior to operating, it has been established that some foot traffic in the Wilson bay is necessary around the splitters but, since no hosing was occurring, Buechel has provided no explanation for the footprints around the hose. Furthermore, while it is unclear from the record whether the sets of footprints were that of one or multiple individuals, Grossenbach's and Petrie's credible testimony establishes that miners had been using the cited areas as a travelway to access the saw shop next door, and the footprints are consistent with a finding that more than occasional travel occurred through the hazardous muck. Because Buechel permitted the muddy, slippery areas around the Wilson saw to be used as a travelway, despite the fact that they may not have been intended as such, it is clear that the company's cleaning policy was ineffective and subjected miners to slip-and-fall hazards. Therefore, I find that section 56.20003(a) was violated.

2. Significant and Substantial

In *Mathies Coal Company*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*, 3 FMSHRC 822 (Apr. 1981): 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. 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of*

[4] Buechel described a bunker as a 6' by 6' by 8' metal pallet, upon which a slab of stone is placed, that can be picked up by a crane and moved from place to place. Tr. 102.

Labor, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Company*, 7 FMSHRC 1125, 1129, (Aug. 1985), the Commission provided additional guidance:

> We have explained that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." 6 FMSHRC at 1834, 1836 (Aug. 1984). We have explained that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U. S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984); *U. S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding that violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987). More recently, the Commission clarified that the "the Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010). 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); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853,857 (June 1996)).

The fact of violation has been established. The second criterion of the *Mathies* test has been met in that miners traveling through the muddy, slippery travelway were subjected to slip-and-fall hazards. The focus of the S&S analysis, then, is the third and fourth *Mathies* criteria, i.e., whether the hazard contributed to was reasonably likely to result in an injury, and whether the injury would be serious. Clearly, slips and falls on a cement surface are reasonably likely to result in musculoskeletal injuries such as strains, sprains and broken bones of a serious nature that are, at least, reasonably likely to result in lost workdays or restricted duty. Therefore, I find that the violation was S&S.

3. Negligence

The record makes clear that Buechel recognized or should have recognized its responsibility to maintain its workplace and passageways free of hazards, as evidenced by its policy that the Wilson bay be cleaned immediately following a production cycle. It is also evident that its policy lacked vigor, since the muddy byproduct of production was allowed to accumulate, and miners were permitted to move about in slippery, hazardous conditions. Furthermore, the maintenance shop foreman's office provides a clear view of the work floor. Tr. 27. Accordingly,

because the Secretary did not establish when the Wilson saw had last operated and, therefore, how long the condition had existed, I find that Buechel was moderately negligent in violating the standard.

B. Citation No. 6414879

1. Fact of Violation

Inspector Hautamaki issued 104(a) Citation No. 6414879, alleging a violation of section 56.14107(a) that was "unlikely" to cause an injury that could reasonably be expected to be "permanently disabling," and was caused by Buechel's "high" negligence.[5] The "Condition or Practice" is described as follows:

> There were no guards provided around the Wilson saw in the CMF building to prevent an employee from contacting the saw when in operation. The 48" saw could cause severe injuries to a person if contacted.

Ex. P-12. The citation was terminated by erecting a post, cable and chain barricade around the Wilson saw. Ex. P-13.

The Secretary argues that Buechel knew that the Wilson saw required guarding, since the operator has five similar saws located in another building at the Chilton Quarry, which are guarded. Sec'y Br. at 17. Moreover, he points out that Buechel stipulated that the Wilson saw's moving parts can cause severe permanently disabling injuries. Stip. 16.

It is undisputed that the Wilson saw was not running during the inspection, and Hautamaki opined that it had last been run the day before. Tr. 161. Buechel concedes that the Wilson saw was unguarded, but argues that it was not provided with fair notice of what the standard requires because MSHA had never cited it during prior inspections. Resp't Br. at 6, 8. Furthermore, Buechel contends that the standard is broad and ambiguous, since its language neither specifies the extent of guarding required, nor how the moving parts shall be guarded. Resp't Br. at 7.

Scott Buechel's testimony is illuminating in resolving the issues raised by this citation. He stated that MSHA had provided the CMF building with a courtesy safety startup "pre-inspection" when the Wilson saw was installed in the summer of 2006 and that, between 2006 and 2008, the saw had been operating without any guards or barriers except a set of cement blocks that run perpendicular to the east-west movement of the saw. Tr. 293-98, 300-03; Exs. R-3, R-4, R-5, P-13. Buechel testified that, "on this particular saw, because we had inspectors coming through

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[5] 30 C.F.R. § 56.14107(a) requires that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

and doing inspections on the entire building, on the saws, splitters, everything, because they didn't bring anything up, I thought we were in compliance." Tr. 304; see 305.

The guarding standard at issue may be broad, but it is not ambiguous. Buechel was not new to the limestone cutting business in 2006 when it installed a new Wilson saw. Its fair notice defense is unavailing, especially since, for several years, it had been operating five similar saws outfitted with the same post, cable and chain guarding that it installed around the Wilson saw to abate the hazard. Tr. 305-09. Indeed, Buechel's attempt to transfer responsility for bypassing the standard's requirements to MSHA inspectors was laced with an admission that "[t]here's probably no good reason that we shouldn't have . . . put the guarding on." Tr. 309; see Tr. 306. In short, the Wilson saw has a blade four feet in diameter, and is capable of seriously maiming or killing a person upon contact. It is painfully obvious that it should have been provided with a barricade to ward off access during operation and, the fact that Buechel had not been cited previously does not absolve the operator of its responsibility to know and adhere to the safety standards designed to ensure a safe work environment for its employees. Therefore, I find that the Secretary has proven that Buechel violated section 56.14107(a).

2. Negligence

Despite the enormous size of the saws at the quarry and the obvious danger of contacting the blades during their operation, the evidence establishes that Buechel was on notice that the Wilson saw required guarding but, for some reason, took the calculated risk of relying upon MSHA's apparent oversight as a justification for its prolonged non-compliance. The low concrete barriers, while presenting some obstacle to direct contact, have been given minimal weight, given Buechel's years of operating five other saws with compliant guarding that dangers-off prohibited areas of contact. Considering the similarity of the saws, Buechel's actions raise a legitimate question as to why guarding was maintained on the other five if the company actually believed that it was an unnecessary component of operating the Wilson saw. Finding no mitigating circumstances that would justify Buechel's inconsistency, and also noting that, during the same inspection, Hautamaki also cited the operator for not having the area guarding in place on the other saws, I find that Buechel was lax in compliance and highly negligent in violating the standard. See Tr. 186-87.

C. Citation No. 6414880

1. Fact of Violation

Inspector Hautamaki issued 104(a) Citation No. 6414880, alleging an S&S violation of section 56.16009 that was "reasonably likely" to cause an injury that could reasonably be expected to be "permanently disabling," and was caused by Buechel's "moderate" negligence.[6] The

[6] 30 C.F.R. § 56.16009 provides that "[p]ersons shall stay clear of suspended loads."

"Condition or Practice" is described as follows:

> The operator of the Linde fork lift Co. #C12015 had a slab of stone 6' by 8' by 6' that was propped up by the forks that were approximately four feet in the air. The stone was at approximately a 45 degree angle when he got out of the cab to clean the stone of dirt. The operator had to go close to the suspended load to clean it. If the load were to shift or the forks were to drop, the employee would suffer serious injuries.

Ex. P-15. The citation was terminated immediately because the forklift operator, upon sighting the MSHA inspector, lowered the slab from suspension, and management discussed safe work practices with him. Buechel has conceded the violation, but contests the S&S and negligence allegations. Tr. 180.

2. Significant and Substantial

The first two *Mathies* criteria have been met, in that the violation has been established, and it is obvious that standing in close proximity to the suspended limestone slab heightened the danger of the forklift operator sustaining serious injury were an accident to occur. Here, again, the focus shifts to the third and fourth *Mathies* criteria, to determine the reasonable likelihood of the hazard resulting in an injury, and whether the injury would be of a serious nature.

Hautamaki opined that the forklift operator was reasonably likely to be injured were the slab to have slipped and slid out from its propped-up position, or cracked and broken, or were the forks to have failed, or the brakes to have unexpectedly released. Tr. 196-97, 254. While he believed that Buechel had properly trained its employees to perform the work safely, he noted the presence of a supervisor in the area where the violation occurred and, in his opinion, Buechel was not enforcing its training. Tr. 198.

Buechel's contest of the S&S designation relies heavily upon the fact that Hautamaki observed the forklift operator cleaning the stone from a distance of approximately 50 feet and, therefore, the operator contends that he could not see exactly how close the miner stood to the stone. Moreover, Buechel points out that the inspector was unclear as to whether the miner lowered the stone onto the ground or on top of another stone resting on a pallet. Resp't Br. at 11; see Tr. 248; Ex. P-16. It follows, according to Buechel, that "since it is unclear whether there was a stone and a pallet under the stone in question at the time that the employee wiped off the dirt from the stone, there is a strong possibility that the employee was never in danger of dropping the stone on his feet." Resp't Br. at 12.

Buechel's position lacks merit primarily because it is premised upon the assumption that injury was likely only if the miner's feet were situated under the slab. Indeed, its own witness, Zahringer, observed the forklift operator's conduct and recognized the danger since the "stone could slip off the forks or whatever." Tr. 291. Clearly, the forklift could have moved, if only

slightly, the stone could have shifted from its base, or it could have fragmented and fallen. Any unforseen movement of the equipment, its forks, or the stone was reasonably likely to result in broken bones or crush injuries to the feet, legs, arms or torso, and the injuries were reasonably likely to be permanently disabling. Therefore, I find that the violation was S&S.

3. Negligence

The Secretary contends that, despite adequate training of its employees, enforcement of Buechel's safety policies and procedures lacks vigor. Sec'y Br. at 22. Buechel argues that it should be charged with "low" rather than "moderate" negligence, because the forklift operator was fully aware that his conduct ran afoul of company safety policy, as evidenced by his haste in lowering the stone and returning to his cab upon his awareness of being observed by the inspection team. Resp't Br. at 12. The evidence establishes that Buechel adequately task trained its employees in safe work procedures, and that a supervisor was on-site when the violation occurred. However, because Buechel offered no evidence to rebut the appearance that it was lax in oversight of its safety policies, and because the miner's conduct was very dangerous, I find that the operator was moderately negligent in violating the standard.

D. Citation No. 6414885

1. Fact of Violation

Inspector Hautamaki issued 104(d)(1) Citation No. 6414885, alleging an S&S violation of section 56.15020 that was "reasonably likely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Buechel's "high" negligence and "unwarrantable failure" to comply with the standard.[7] The "Condition or Practice" is described as follows:

> A life jacket or belt was not provided for miners who were required to work at the saw shop water ponds. One miner checked the ponds daily. Other miners changed out pumps and drained and cleaned out the ponds on an as-needed basis. One of the miners could fall into the water and would suffer serious injury. Management engaged in aggravated conduct constituting more than ordinary negligence in that they were aware miners worked at the ponds and that they were not provided life jackets. This was an unwarrantable failure to comply with a mandatory standard.

Ex. P-19. The citation was terminated by providing life jackets for use by Buechel's miners, as needed. Tr. 139.

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[7] 30 C.F.R. § 56.15020 provides that "[l]ife jackets or belts shall be worn where there is danger from falling into water."

The parties have stipulated that life jackets were not provided to the employees who maintained the water pumps in the lower east pond, and that water in the pond on the day of inspection was approximately four feet deep. Stips. 18, 19.

The Secretary contends that periodic maintenance of the submersible pumps requires that miners access the pond by traveling down a sand and gravel embankment to the work platform, that the slope and platform are often slippery, and that a hose is positioned in the middle of the platform - - conditions that posed tripping hazards that heightened the likelihood of falling into the water and drowning. Sec'y Br. at 9-10; Ex. P-20. Furthermore, the Secretary asserts that changing-out the pumps requires a miner to "lean out over the water," clearly increasing the likelihood of accidental drowning. Sec'y Br. at 9.

Buechel makes several arguments to support its position that the citation should be vacated. It argues that it was not given fair notice of the requirements of the standard, and that its employees were using proper fall protection, but not any floatation device, which is not required by the standard. Resp't Br. at 13, 15. Furthermore, according to the operator, the standard does not specify exclusive use of floatation devices to prevent drowning. Resp't Br. at 16-17. Finally, the operator argues that the water is only six inches deep when maintenance is being performed, and "there is not a concern for an employee falling and drowning in six inches of water. If it is a concern, then even a life jacket cannot prevent an employee from drowning in six inches of water." Resp't Br. at 17.

Hautamaki explained that three settling ponds act as a filtration system for the sedimentary byproduct of operating the large saws, and provide recycled water for cooling and lubricating the saw blades during the stone cutting process. Tr. 128. According to him, he only learned of the ponds, located in a valley, after expressing doubt that the small concrete pond behind the CMF building had the capacity to feed the six saws operating at the quarry. Tr. 128-29, 146. He testified that no one was present at the cited lower east pond, and that Grossenbach explained to him that miners repair the submersible pumps when necessary, remove them in the Fall to keep them from freezing in place, then return them to service in the Spring, Upper Peninsula weather permitting. Tr. 130-31. Grossenbach did not mention the use of fall protection in his discussion with Hautamaki. Tr. 144, 152. Removing a pump entails working from a narrow platform, accessing a hatch, and attaching a chain hoist to the pump to lift it out of the water. Tr. 131; see Ex. P-20. Hautamaki expressed concern that seasonal weather conditions can make the slope going down to the pond, as well as the work platform, slippery. Tr. 132-33. He estimated that work is performed one foot above and within inches of the water, and opined that "[a]nybody working that close to the edge, you're concentrating on lifting the pumps out, you could fall in, especially if it was icy or frost or dew or anything." Tr. 133-34. Hautamaki was also told by Grossenbach that three maintenance workers, including himself, performed the work. Tr. 133. He also stated that, as a general rule of thumb, working within six feet of water's edge requires a life jacket. Tr. 133.

David Petrie testified that he changes-out the submersible pumps up to three times a year with the assistance of a partner, either Grossenbach or Ryan Blindauer. Tr. 154-55, 157, 164. He explained that the pumps are sunk in a cement pit, 5 feet deep by 15 feet wide, located at the edge of the work platform. Tr. 156, 158. During maintenance, water is pumped from the pit back into the pond so as to keep the pit water level at six inches and, according to him, work is performed three feet away from the surrounding pond. Tr. 156-57. When asked whether he used fall protection, he responded that he wore a harness with a lanyard attached to the steel A-frame stationed on the work platform directly above the pit, used to support the weight of the pumps hoisted out of the pit with a hand winch. Tr. 155-56, 163-65. He testified that the harnesses are stored in the CMF building, that Grossenbach had also worn a harness when they had worked together, and that he, Petrie, had not been trained in using the harness. Tr. 159-61. Petrie estimated the A-frame to be six to seven feet tall, and the submersible pumps to weigh 100 pounds, but he was unable to estimate the A-frame's weight capacity. Tr. 159. While he denied having fallen into the water, Petrie stated that the pumps are changed "year round, and I think once you pull the pump up, it gets icy, and it's slippery. I never fell, but it's slippery." Tr. 160-61, 167. He testified that, as a result of the operator being cited, he has been using both harness and life jacket when performing his duties at the ponds. Tr. 161-62.

Grossenbach testified that he and Petrie had worked together to change-out the pumps, and that they, as well as Blindauer, had used a harness clipped onto the A-frame as fall protection, although he was not certain that fall protection was always used. Tr. 168-70. On cross-examination, Grossenbach acknowledged that he had written to the MSHA North Central District Office seeking review of the citation, and did not mention use of fall protection among the mitigation factors set forth to challenge the gravity of the violation. Tr. 172, 175; Sec'y Br., Ex. A. Moreover, he admitted to being unprotected on the work platform prior to tying onto the A-frame. Tr. 176-79.

Section 56.15020, a provision under the Personal Protection Subpart, specifically addresses the danger of falling into water, and is intended to prevent drowning. The plain meaning of "life jacket" is not in dispute. Contrary to Respondent's contention that the standard does not provide fair notice of its requirements, comprehension of its terms only requires application of ordinary syntactical rules, and the term "life jacket" provides the modifier for the *alternative* floatation device, read as "life belt;" therefore, the standard is clearly intended to require use of one floatation device or the other."[8] This standard is distinguishable from the more general companion standard under the same Subpart, section 56.15005, which requires use of "safety belts" or "lines" to prevent injury from falling, without regard to any specific scenario. Because neither life jackets

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[8] A "life jacket" is defined as "a life preserver in the form of a sleeveless jacket or vest." The American Heritage Dictionary of the English Language 1011 (4th ed. 2009). A "life preserver" is defined as "a buoyant device, usually in the shape of a ring, belt or jacket, designed to keep a person afloat in the water." *Id.* A "life belt" is defined as "a life preserver worn like a belt." *Id.*

nor life belts were provided by Buechel for use by the maintenance crew servicing the settling ponds, I find that the standard was violated.

2. Significant and Substantial

The fact of violation has been established. The second criterion of the *Mathies* test has been satisfied, i.e., the lack of protection for maintenance workers, unequipped with personal floatation devices and exposed to working in slippery, wet conditions in close proximity to water, contributed to the hazard of drowning. The third and fourth *Mathies* criteria, the reasonable likelihood of injury and the seriousness of the injury, have also been met. The record belies Buechel's contention that its maintenance crew used harnesses and lanyards. Grossenbach made no mention of fall protection when describing to Hautamaki how the ponds were maintained, nor did he mention it to MSHA as a mitigating factor in his written request for review of the citation. Petrie's testimony that fall protection was used does little, if anything, to substantiate Buechel's claim, especially given that this defense was not raised earlier and, according to Petrie, no training whatsoever was provided for use of fall protection equipment. Furthermore, even if fall protection had been used, the operator has not established that tethering to the A-frame prevented slips and falls into the water and, more importantly, drowning. Petrie testified that his estimated seven foot lanyard allowed him to stretch out at the edge of the platform to work. The actual length of the alleged lanyard was never established, nor the capacity of the A-frame to support the weight of the pump and hoisting gear, along with the added weight of two workers. As Hautamaki pointed out, seasonal weather conditions make the work treacherous at water's edge and, a slip-and-fall on a concrete platform into the water is reasonably likely to involve a head or musculoskeletal injury, the water temperature may cause hypothermia, and any attempt at rescue by a workmate, also unprotected, subjects the rescuer to drowning as well. This is true whether miners were exposed to six inches of water in the pit or four feet of water in the pond. See Exs. P-22, P-23. Consequently, with or without fall protection, I find that the violation was S&S.

3. Negligence and Unwarrantable Failure

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," indifference," or a "serious lack of reasonable care." *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d at 136. The Commission has recognized the relevance of several factors in determining whether conduct is "aggravated" in the context of unwarrantable failure, such as the extensiveness of the violation, the length of time that the violation has existed, the operator's efforts in eliminating the violative condition, and whether the operator has been put on notice that greater efforts are necessary for compliance. *See Consolidation Coal Co.*, 22 FMSHRC 328, 331 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994). The Commission has also considered whether the violative condition is obvious or poses a high degree of danger. *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999) (citing *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren*

Steen Construction, Inc., 14 FMSHRC 1125, 1129 (July 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984)). Each case must be examined on its own facts to determine whether an actor's conduct is aggravated, or whether mitigating circumstances exist. *Eagle Energy, Inc.*, 23 FMSHRC 829, 834 (Aug. 2001) (citing *Consolidation Coal*, 22 FMSHRC at 353).

The record establishes that the large saws had been operating at the Chilton Quarry for several years and, therefore, the three settling ponds would have also been providing filtration to the saws during that time span. Buechel operated and maintained the ponds without MSHA's knowledge and oversight until Hautamaki stumbled upon them, and provided no explanation as to why MSHA was not advised of their existence during prior inspections. Consistent with its conduct in failing to guard the Wilson saw, Buechel knowingly operated in a non-compliant manner so long as its behavior evaded detection on MSHA's radar screen. Consequently, I do not find the operator's lack of disclosure inadvertent, but rather a deliberate attempt to escape governmental scrutiny and regulation until it got caught. Other than the dubious testimony that fall protection was used by the maintenance crew, albeit without any training, the record is bereft of any indication that Buechel had a water safety policy or took water safety seriously, that it task trained its workers on servicing the pumps, or that it kept abreast of safe work practices and the requirements of the regulation. Moreover, Buechel's conduct was highly negligent given that Grossenbach often performed the work with Petrie and, as the supervisor, should have appreciated the danger posed by the work environment, and assured that personal floatation devices were made available and used to perform the tasks safely. Therefore, I impute Grossenbach's high negligence to the operator, and find that the Secretary has met his burden of establishing a serious lack of reasonable care by Buechel that constituted an unwarrantable failure to comply with the standard.

E. Citation No. 6414886

1. Fact of Violation

Inspector Hautamaki issued 104(a) Citation No. 6414886, alleging a violation of section 46.9(a) that was "non-significant and substantial," with "no likelihood" of causing injury or illness, reasonably expected to result in "no lost workdays," and was caused by Buechel's high negligence.[9] The "Condition or Practice" is described as follows:

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[9] 30 C.F.R § 46.9(a) requires that mine operators "record and certify on MSHA form 5000-23, or on a form that contains the information listed in paragraph (b) of this subsection, that each miner has received training under this part." 30 C.F.R § 46.9(b) requires the form to include the following: (1) the name of the trainee; (2) the type of training; (3) the duration, date and name of competent trainer; (4) the mine name, ID, and training location; and (5) signed certification that training has been completed.

> The Part 46 training record form used by the operator did not include the mine name, MSHA ID number, or location of the training. Several records had not been signed by the person responsible for training.

Ex. P-23. The citation was terminated after the annual refresher training records were completed and signed. Buechel has conceded the violation, but contests the negligence allegation.

Hautamaki testified that during an inspection four months earlier in May 2009, as a result of finding new miner and annual refresher training records incomplete, he spent an hour instructing Jason Zahringer as to the information required on the training forms and, therefore, how to comply with Part 46 training regulations. Tr. 198-200. According to the inspector, he found the records in the same shape when he returned in August, despite his warning to Zahringer that "you've got to get these records up to date because if you don't, the next inspector is going to give you a citation for it." Tr. 200. Hautamaki also pointed to several resources available to mine operators to assist in compliance with training standards, including MSHA's website and Program Policy Manual. Tr. 200-01; see Ex. P-24.

Buechel contends that there were "minor problems" with its training forms, that Zahringer had been using forms completed by the former safety director as his guide, and that Hautamaki only instructed him to sign the forms during the earlier inspection. Resp't Br. at 17-18.

According to Zahringer, he used old training forms as his model and, based on Hautamaki's instruction during the May inspection, he signed them, although he was uncertain whether he had signed them all. Tr. 265, 280. Zahringer maintains that Hautamaki never pointed out any deficiencies other than lack of signatures, and that the deficiencies noted in August, such as lack of the mine ID number and location of the training, were never mentioned in May. Tr. 266-68, 279. Zahringer admitted unfamiliarity with MSHA's website, characterizing it as "so hard to find what you want," as well as MSHA's Program Policy Manual. Tr. 266, 271, 278. In response to questions about the reasonableness of familiarizing himself with the standard pertaining to training records, Zahringer generally described Volume 30 of the Code of Federal Regulations as "very vague," and testified that he did not recall seeing the regulation. Tr. 280-282.

The training records reviewed by Hautamaki in May were the same that he reviewed in August. Tr. 269. Jason Zahringer had been the site manager responsible for maintaining the mine's training records since January 2008, more than a year before the earlier inspection. Tr. 265. The record is clear that in May, Hautamaki accepted the same excuse advanced in August, but elected to give Buechel an opportunity to cure the deficiencies in its record-keeping. By failing to avail itself of any readily available resource other than the existing, deficient records, Buechel continued to disregard its responsibility to familiarize itself with the standard. The duty falls on the operator to know and implement the regulations that govern its safe operation, not MSHA, and,

consequently, MSHA is not required, metaphorically, to hold its hand. I find none of the excuses advanced by Buechel to constitute mitigating factors that would warrant lower negligence, especially because it failed to heed MSHA's warning that, with minimal effort, should have resulted in full compliance. Therefore, I find that Buechel was highly negligent in violating the standard.

IV. Penalties

While the Secretary has proposed a total civil penalty of $29,482.00, the Judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). *See Sellersburg Co.,* 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). The penalty criteria are: the operator's history of previous violations; the appropriateness of the penalty to the size of the operator's business; whether the operator was negligent; the effect of the penalty on the operator's ability to continue in business; the gravity of the violation; and the demonstrated good faith efforts in achieving rapid compliance after notification of the violation. 30 U.S.C. § 820(i).

The parties stipulated that Buechel demonstrated good faith in abating the violations. Stip. 7. Buechel is a medium-sized operator and, in the absence of any contention by the operator of an inability to pay, I find that the penalty will not affect the operator's ability to continue in business. See Sec'y Pen. Pet., Ex. A. Buechel's relevant history of similar violations includes one prior housekeeping violation and one guarding violation, which I find does not constitute an aggravating factor in assessing appropriate penalties. Ex. P-28.

The remaining criteria involve consideration of the gravity of the violations and Buechel's negligence in committing them. These factors have been discussed fully, respecting each violation. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

A. Citation No. 6199159

It has been established that this S&S violation was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, and that it was timely abated. While I find that the violation was serious, without evidence establishing when the Wilson saw had last operated and, therefore, how long the violation had existed, I find that Buechel was moderately negligent. Applying the civil penalty criteria, I find that a penalty of $745.00, as proposed by the Secretary, is appropriate.

B. Citation No. 6414879

It has been established that this S&S violation was unlikely to cause an injury that could reasonably be expected to be permanently disabling, and that it was timely abated. Buechel's awareness of the requirements of the standard was demonstrated by its guarding of five similar saws.

Because the operator knowingly failed to guard the Wilson saw, I find that it was highly negligent. Applying the civil penalty criteria, I find that a penalty of $745.00 is appropriate.

C. Citation No. 6414880

It has been established that this S&S violation was reasonably likely to cause an injury that could reasonably be expected to be permanently disabling, and that it was timely abated. I find that the violation was very serious and, given that a supervisor was on-site, Buechel's safety policy lacked vigor. Because of evidence that the operator adequately trained its workers, I find that it was moderately negligent. The Secretary seeks a penalty substantially elevated from his originally proposed penalty of $1,111.00 based on the fact that the violation occurred in an area where supervisors are frequently present. Sec'y Br. at 22. Applying the civil penalty criteria, because of the demonstrated ineffectiveness of its supervisory oversight, I find that a penalty of $1,800.00 is appropriate.

D. Citation No. 6414885

It has been established that this S&S violation was reasonably likely to cause an injury that could reasonably be expected to be fatal, and that it was timely abated. I find that Buechel's failure to provide personal floatation devices for workers exposed to slips-and-falls into water, was due to high negligence and a serious lack of reasonable care that constituted an unwarrantable failure to comply with the standard. Applying the civil penalty criteria, I find that a civil penalty of $8,209.00, as proposed by the Secretary, is appropriate.

E. Citation No. 6414886

It has been established that this record-keeping violation had no likelihood of causing an injury, and that it was timely abated. Buechel had been placed on notice during a previous inspection of the standard's requirements, and that its training records were incomplete. Because no significant effort to perfect the training records was made, I find that the operator was highly negligent. While the Secretary has proposed a penalty of $108.00, applying the civil penalty criteria, I find that a penalty of $200.00 is appropriate.

V. Approval of Settlement

The Secretary has filed a Motion to Approve Partial Settlement and Order Payment respecting thirteen of the seventeen citations involved in docket Nos. LAKE 2008-406-M and LAKE 2010-154-M. A reduction in penalty from $18,564.00 to $8,296.00 is proposed. The citations, initial assessments, and the proposed settlement amounts are as follows:

	Citation No.	Initial Assessment	Proposed Settlement
LAKE 2008-406-M	6199164	$ 1,111.00	$ 950.00
	6199172	$ 1,944.00	$ 1,499.00
	6199173	$ 1,944.00	$ 1,400.00
LAKE 2010-154-M	6414874	$ 499.00	$ 499.00
	6414875	$ 224.00	$ 224.00
	6414876	$ 499.00	$ 499.00
	6414877	$ 150.00	$ 150.00
	6414878	$ 745.00	$ 500.00
	6414881	$ 224.00	$ 224.00
	6414882	$ 150.00	$ 150.00
	6414883	$ 8,209.00	$ 0.00
	6414884	$ 2,473.00	$ 2,000.00
	6414887	$ 392.00	$ 300.00
	TOTAL:	$18,564.00	$ 8,296.00

I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

ORDER

WHEREFORE, it is **ORDERED** that Citation Nos. 6199159, 6414879, 6414880, 6414885 and 6414886 are **AFFIRMED**, as issued; that Citation No. 6414883 is **VACATED**; that Citation Nos. 6199164, 6199172, 6199173, 6414874, 6414875, 6414876, 6414877, 6414881, 6414882 and 6414884 are **AFFIRMED**, as issued; that the Secretary **MODIFY** Citation No. 6414878 to reduce the level of gravity to "unlikely" and "non-significant and substantial," and Citation No. 6414887 to reduce the degree of negligence to "moderate;" and that Buechel **PAY** a civil penalty of $19,995.00 within 40 days of the date of this Decision.

Jacqueline R. Bulluck
Administrative Law Judge

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