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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEST 2011-119-M A.C. No. 04-01299-232472 Docket No. WEST 2011-465-M A.C. No. 04-01299-241610
v.	Docket No. WEST 2011-1239-M A.C. No. 04-01299-258369
ORIGINAL SIXTEEN TO ONE MINE, INCORPORATED, Respondent	Docket No. WEST 2012-516-M A.C. No. 04-01299-278376 Mine: Sixteen to One Mine

DECISION

Appearances: Douglas L. Sanders, Esq., U.S. Dept. of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

Michael M. Miller, President, Original Sixteen to One Mine, Inc., Alleghany, California, 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 Original Sixteen to One Mine, Incorporated ("Original Sixteen"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The Secretary seeks a total civil penalty in the amount of $2,582.00 for twenty-two violations of his mandatory safety standards.

A hearing was held in Nevada City, California. The following issues are before me: (1) whether Respondent violated the standards; (2) whether the violations were significant and substantial, where alleged; (3) whether the violations were attributable to the level of gravity alleged; and (4) whether the violations were attributable to the level of negligence alleged.[1] The

[1] The Secretary's Motion for Partial Summary Decision on MSHA's jurisdiction over the mine was granted from the bench, incorporating by reference an earlier decision finding jurisdiction, docket No. WEST 2009-63-M. Tr. 4-5.

parties' Post-hearing Briefs are of record.

For the reasons set forth below, I **VACATE** two citations; **AFFIRM** nine citations, as issued, and eleven citations, as modified; and assess penalties against Respondent.

FACTUAL BACKGROUND

Original Sixteen operates the Sixteen to One Mine, an underground gold mine in Alleghany, California. Tr. 289, 336. On May 10, 2011, Bruce Allard, an MSHA inspector for approximately twelve years, conducted a regular inspection of the mine.[2] Tr. 12-14. He observed several conditions for which he cited Original Sixteen: a fire extinguisher that had not been inspected since February 2007; a ladder with broken rungs; a fire suppression system that had been turned off; an out-of-adjustment stationary grinder; bolts strewn on a storage room floor; uncovered plastic pails containing oil and other combustible materials; and unlabeled pails containing oil and other combustible materials. Exs. P-4, P-5, P-7, P-8, P-9, P-10, P-11; Tr. 17, 21, 25, 31, 35, 38, 41. Allard returned to the mine on May 11 and issued citations to Original Sixteen for excess timber stored within 100 feet of the mine portal, and for failure to keep a record of defects on a front-end loader. Exs. P-12, P-13; Tr. 44-45, 47-48.

On July 20, 2010, MSHA Inspector William Berglof inspected the mine. Tr. 113, 116-17. He issued a citation to Original Sixteen for an arc welder with an uninsulated stinger. Ex. P-14; Tr. 115-16. The following day, he returned to the mine and issued citations for failure to conduct underground evacuation drills within a six-month period, and for exceeding the noise limit to which a miner may be exposed without enrolling him in a hearing conservation program. Exs. P-15, P-16; Tr. 122, 127.

On October 20, 2010, Berglof returned to the mine, accompanied by MSHA Inspector Joshua Love. Tr. 150-51. Berglof issued several citations for violations which he encountered: a broken shovel; two fire extinguishers that had not been inspected since September 2009, and one that had not been inspected since August 2007; a power cord with a damaged outer jacket; an out-of-adjustment stationary grinder; dry vegetation near a diesel storage tank; and missing berms on an access road. Exs. P-17, P-18, P-24, P-21, P-19, P-20, P-22, P-23; Tr. 152, 155, 161-62, 159, 163-64, 170, 176-77, 182. The next day, Berglof and Love returned to the mine, and Berglof issued a citation for an open hole adjacent to a travelway. Ex. P-25; Tr. 186-87.

On December 13, 2011, Jerry Hulsey, an MSHA inspector for approximately thirteen years, inspected Sixteen to One. Tr. 107-08, 112. He issued a citation for Original Sixteen's

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[2] Allard left MSHA in January 2012 and at the time of the hearing, worked for the California Department of Industrial Relations, Division of Occupational Safety and Health. Tr. 13-14.

failure to conduct continuity and resistance testing for its electrical grounding system.[3] Ex. P-2; Tr. 112.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Citation No. 8561729

Inspector Allard issued 104(a) Citation No. 8561729, alleging a violation of section 57.4201(a)(2) that was "unlikely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Original Sixteen's "high" negligence.[4] The "Condition or Practice" is described as follows:

> A 10 lb. fire extinguisher located on the 1300 level at 49 Winze had not received an annual inspection of the mechanical parts and extinguishing agent since February 2007. The fire extinguisher appeared to be in good condition. The area is normally accessed by one miner once a month. Three citations were issued at this mine for similar violations on the last inspection.

Ex. P-4. The citation was terminated after a compliant fire extinguisher was brought to the 1300 level.

A. Fact of Violation

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)).

Allard testified that the standard requires fire extinguishers to be inspected annually, and that this fire extinguisher's inspection tag indicated that its last inspection had occurred in February of 2007. Tr. 17-18. Allard opined that if the fire extinguisher were defective, a miner fighting fires would suffer burns or smoke inhalation; however, because this extinguisher was charged and in good condition, injuries would be unlikely. Tr. 18-19.

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[3] At hearing, Original Sixteen withdrew contest of Citation No. 8609870, and agreed to pay-in-full the Secretary's proposed penalty of $100.00. Tr. 111-12.

[4] 30 C.F.R. § 57.4201(a)(2) provides that: "Firefighting equipment shall be inspected according to the following schedules: [a]t least once every twelve months, maintenance checks shall be made of mechanical parts, the amount and condition of extinguishing agent and expellant, and the condition of the hose, nozzle, and vessel to determine that the fire extinguishers will operate effectively."

Michael Miller, President of Original Sixteen, disagreed, opining that there was no likelihood of injury, since no ignition source was present. Tr. 340-41. The record indicates that the fire extinguisher had not been inspected in over three years, and I credit Allard's testimony that burns or smoke inhalation, while unlikely, would result in lost time or restricted duty injuries. Therefore, I find that the Secretary has proven a violation of section 57.4201(a)(2).

B. Negligence

Allard opined that Original Sixteen's negligence was high, since it had received three citations on a previous inspection for failure to inspect Sixteen to One's fire extinguishers. Tr. 18-19. Miller argued that the area was not a travelway, that no work was taking place in the location during the inspection, that the mine had a small crew of experienced miners, and that this extinguisher had not been cited in four years, all mitigating factors in his view. Tr. 340. Miller added that Original Sixteen had at least 50 fire extinguishers in the mine. Tr. 413.

I credit Miller's testimony that no miners were working on the 1300 level at the time of inspection, and that there were at least 50 fire extinguishers in the mine. Original Sixteen may have neglected to inspect the subject fire extinguisher, which was not located in an active mining area, based on the sheer abundance extinguishers in the mine, irrespective of notice that greater efforts at compliance were necessary; simply put, it was likely overlooked. Therefore, I find that the negligence in violating the standard was lower than alleged, and that Original Sixteen was moderately negligent.

2. Citation No. 8561730

Inspector Allard issued 104(a) Citation No. 8561730, alleging a "significant and substantial" violation of section 57.11050(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 Original Sixteen's "moderate" negligence.[5] The "Condition or Practice" is described as follows:

> The secondary escapeway was not properly maintained in that the upper wooden stairway/ladder in the 49 Winze would not support the weight of a miner. The second and third rungs broke during this inspection. It is reasonably likely that unmaintained stairway/ladders in this travelway would result in serious injuries to the miner who travels it monthly for inspection and to check the water level in the winze.

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[5] 30 C.F.R. § 57.11050(a) provides that: "Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of others. A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during the exploration or development of an ore body."

Ex. P-5. The citation was terminated after a new ladder was installed.

A. Fact of Violation

Allard testified that the second and third rungs broke when either he or the accompanying miner mounted the ladder. Tr. 21-22. He opined that MSHA's Program Policy Manual requires that escapeways provide miners with safe means of egress to the surface during an evacuation. Tr. 23; Ex. P-6. Without a functional ladder, a miner would be unable to safely negotiate the ten-foot vertical distance between the upper and lower levels to escape in an emergency. Tr. 23-24. Allard testified that it would be reasonably likely that a miner attempting to climb the ladder would break through the rungs and fall 1½ feet, sustaining strains, sprains or a broken ankle. Tr. 24-25. Allard also opined that Original Sixteen was moderately negligent, because the ladder was used infrequently. Tr. 25.

Miller made counter arguments that the area was not an escapeway and that it was infrequently used, that Original Sixteen could not anticipate the rungs breaking, and that miners were trained to act properly in emergencies. Tr. 342-47. The operator also argues that because it was exploring or developing an ore body on the 1000 level, a secondary escapeway was not required. Resp't Br. at 2; Tr. 346. Unfortunately, the record is devoid of evidence supportive of Original Sixteen's contention. I find, based on record evidence that the ladder was defective, that Original Sixteen violated the standard.

B. 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 "significant and substantial" ("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 Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'd* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). 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). The Secretary need not prove a reasonable likelihood that the violation, itself, will cause injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010).

The fact of violation has been established, and a miner using the ladder to conduct monthly inspections or as part of an escapeway would be subjected to the hazard of a 1½ foot fall. The focus of the S&S analysis, then, is the third and fourth *Mathies* criteria, i.e., whether the

hazard was reasonably likely to result in an injury, and whether the injury would be serious.

I find that a miner breaking through the ladder rungs and falling 1½ feet would be reasonably likely to suffer musculoskeletal injuries such as sprains, strains and fractures. Therefore, I find that the violation was S&S.

C. Negligence

I also find that the defect was not obvious based on the fact that it was not readily apparent until the rungs broke. Ex. P-5 at 3. While it is clear that the ladder was old and that periodic, precautionary replacement would have been prudent to prevent an accident, it is speculative to pinpoint when that should have happened. Therefore, I find that Original Sixteen was negligent, but that its negligence was low.

3. Citation No. 8561731

Inspector Allard issued 104(a) Citation No. 8561731, alleging a violation of section 57.4560(a) that was "unlikely" to cause an injury that could reasonably be expected to be "fatal" and was caused by Original Sixteen's "high" negligence.[6] The "Condition or Practice" is described as follows:

> The fire suppression system provided for the timber in the mine portal was not maintained. The water supply has been turned off and two sprinkler heads leaked when the water was turned on. A fire in the portal could result in fatal injuries to the three miners who normally work underground. A 480 volt power cable entering the mine through the portal provides a possible ignition source. This same condition of the fire suppression system has been cited previously at this mine.

Ex. P-7. The citation was terminated after the water supply was turned on.

A. Fact of Violation

Original Sixteen has conceded the violation, but contests the gravity and negligence designations. Tr. 16.

Allard opined that when mine fires occur in the portal, carbon monoxide is pulled into the mine which, historically, has fatally poisoned miners. Tr. 29. However, he also testified that miners would be able to escape from the Sixteen to One mine. Tr. 29.

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[6] 30 C.F.R. § 57.4560(a) provides that: "For at least 200 feet inside the mine portal or collar timber used for ground support in intake openings and in exhaust openings that are designated as escapeways shall be . . . a fire suppression system, other than fire extinguishers and water hoses, capable of controlling a fire in its early stages [.]"

On the other hand, Miller testified that Original Sixteen is ventilated by natural air flow and that in May, when the citation was issued, air was flowing out of the mine. Therefore, by his account, should a fire have occurred, no carbon monoxide would be entering the mine. Tr. 349; Resp't Br. at 3. Allard agreed that the mine has a natural ventilation system, and that air flows in or out depending on temperature. Tr. 60-61.

I find that, in the unlikely event of a fire which could occur from the ignition source of the 480-volt cable running through the portal, based on Allard's testimony that miners could escape, that miners would be likely to suffer lost time or restricted duty or, at worst, permanently disabling respiratory injuries. I further note that the likelihood of a miner suffering permanently disabling injuries is lessened by Miller's unchallenged testimony that the portal was ventilated with out-flowing air, which would dilute noxious fumes. Therefore, I find that the Secretary has proven that the violation of section 57.4560(a) was unlikely to result in lost workdays or restricted duty, rather than fatal injuries.

B. Negligence

Allard opined that Original Sixteen's negligence was high, because it had been cited for this condition on at least two previous occasions; he testified that he had issued one of these citations. Tr. 30. These prior citations, he argued, put Original Sixteen on notice of the requirement that the portal have a functional sprinkler system. Tr. 30-31. In response, Miller argued that Original Sixteen was using fire retardant paint which, according to him, is acceptable as a fire suppression system. Tr. 348. There is no support in the record for Original Sixteen's contention that fire retardant paint satisfies the requirement for a fire suppression system, and I also find that Original Sixteen had been put on notice that greater efforts at compliance were necessary. Therefore, I find that Original Sixteen was highly negligent in violating the standard.

4. Citation No. 8561732

Inspector Allard issued 104(a) Citation No. 8561732, alleging a "significant and substantial" violation of section 57.14115(b) 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 Original Sixteen's "moderate" negligence.[7] The "Condition or Practice" is described as follows:

> The adjustable tool rest on the "Bitco" stationary grinder located in the upper shop was not adjusted so that the distance between the grinding surface of the wheel and the rest was not greater than ⅛". The tool rest was $^{5}/_{16}$" from the grinding wheel. It is reasonably likely that the miner who uses the grinder several times per month would suffer serious injuries from small parts being caught between the rest and

[7] 30 C.F.R. § 57.14115(b) provides that: "Stationary grinding machines, other than special bit grinders, shall be equipped with adjustable tool rests set so that the distance between the grinding surface of the wheel and the tool rest is not greater than ⅛ inch [.]"

the grinding wheel.

Ex. P-8. The citation was terminated after the tool rest was properly adjusted.

A. Fact of Violation

Allard testified that if the distance between the wheel and the tool rest is greater than ⅛ inch, a small object being ground could be pulled in between the wheel and the rest, pulling a miner's hand along with it into the wheel. Tr. 31-32. He opined that the wheel could be spinning as fast as 3400 revolutions per minute, and contact with the wheel could result in abrasions and broken bones to the hand. Tr. 33-34. Original Sixteen argues that the purpose of the standard is to ensure that grinders can be adjusted to ⅛ inch, and that this grinder had that adjustment. Resp't Br. at 4.

Contrary to Original Sixteen's contention, the standard requires that grinders be set so that the distance between the wheel and the rest does not exceed ⅛ inch. Clearly, the condition of the grinder was in violation of the standard.

B. Significant and Substantial

The fact of violation has been established, and miners using the wheel out-of-adjustment would be subjected to broken bones or lacerations to the hands and fingers. Moving to the third and fourth *Mathies* criteria, the focus is whether the hazard was reasonably likely to result in an injury, and whether the injury would be serious.

Allard opined that since the grinder was used several times per month, it would be reasonably likely that a tool would be pulled in between the wheel and the tool rest. Tr. 34. Jonathan Farrell, former mine manager at Original Sixteen, disagreed, arguing that the $^{5}/_{16}$ inch distance between the wheel and the tool rest would be insufficient to cause injury. Tr. 300-01. However, he admitted that it would be unsafe to grind a tool smaller than the size of the gap. Tr. 325. I find that a miner would be reasonably likely to sustain broken bones and lacerations to the hands or fingers should a small hand tool be pulled in between the wheel and the tool rest. Therefore, I find that the violation was S&S.

C. Negligence

Allard opined that management may not have been aware of the condition, and miners had likely received safety training on operating the grinder. Tr. 34-35. Farrell testified that when he was in charge of the workforce, he stopped miners from using equipment unsafely and trained them in proper usage. Tr. 7, 301. There is no indication in the record of Farrell's period of employment at the mine, however, and without establishing that he was working there in May of 2011, his testimony is of no value in assessing the operator's negligence. I credit Allard's testimony, and find that Original Sixteen was moderately negligent in violating section

57.14115(b).

5. Citation No. 8561733

Inspector Allard issued 104(a) Citation No. 8561733, alleging a "significant and substantial" violation of section 57.20003(a) that was "reasonably likely" to cause an injury that could reasonably be expected result in "lost workdays or restricted duty," and was caused by Original Sixteen's "moderate" negligence.[8] The "Condition or Practice" is described as follows:

> The bolt storage room in the upper shop was not kept clean and orderly. The floor was covered with bolts of various sizes and other small parts. It is reasonably likely that the miner who accesses the room several times daily would suffer serious injuries from slipping on small rolling objects.

Ex. P-9. The citation was terminated after the bolts and parts were removed from the floor and returned to their container.

A. Fact of Violation

Allard testified that he observed that a container of bolts, nuts and other small parts had been emptied onto the storage room floor, and not cleaned up afterwards. Tr. 35-36; Ex. P-9 at 2. Original Sixteen offered no challenge to the inspector's allegation. I credit Allard's testimony that the storage room floor was littered with small objects, and I find that Original Sixteen violated section 57.20003.

B. Significant and Substantial

Allard opined that miners accessing the room several times daily could slip and fall on these small, rolling objects, resulting in sprains and broken bones. Tr. 36-37. Miller testified, on the other hand, that miners do not often enter the room, located in a remote area, and that they only do so if looking for an irregular-sized bolt. Tr. 351-53; Resp't Br. at 4. He opined that a miner faced no danger of injury because the room was not open to everyone. Tr. 352.

I find that the hardware debris littering the storage room floor posed a slip-and-fall hazard, and that a miner slipping and falling would be reasonably likely to suffer musculosketetal injuries including strains, sprains, and broken bones. Therefore, I find that the violation was S&S.

C. Negligence

Allard testified that the miners had received some training in housekeeping of the storage

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[8] 30 C.F.R. § 57.20003(a) provides that: "At all mining operations [w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly [.]"

room. Tr. 37. According to Miller, the miner leaving the hardware strewn on the floor was following Original Sixteen's safety first policy, "SQUARE," of mining first, then housekeeping later, time permitting.[9] Tr. 353.

By Original Sixteen's admission, mining was prioritized over housekeeping. Allard and Miller both pointed out that miners had received safety training. Although the condition was obvious, the room was remotely located and, therefore, management may not have been aware of the condition. Therefore, I find that Original Sixteen was moderately negligent in violating the standard.

6. Citation No. 8561734

Inspector Allard issued 104(a) Citation No. 8561734, alleging a violation of section 57.4104(a) that was "unlikely" to cause an injury that could reasonably be expected to result in"lost workdays or restricted duty," and was caused by Original Sixteen's "high" negligence.[10] The "Condition or Practice" is described as follows:

> About 11 open plastic five gallon pails containing used oil and other combustible waste were being stored in a small room in the upper shop. There were also about 12 closed pails of used oil in the room. Serious injuries to the one miner normally in the area could result from a fire in this area. This condition was open and obvious.

Ex. P-10. The citation was terminated after the waste oil was transferred to closed containers.

A. Fact of Violation

Allard testified that he observed eleven uncovered five-gallon pails containing oil, oil filters, and waste rags that were being stored in the upper shop, as well as twelve additional pails that were closed. Tr. 38-39. He opined that oil is a combustible material within the purview of the standard, and that were a fire to occur, miners would suffer burns and smoke inhalation. Tr. 38-40. Allard also noted, however, that because oil does not readily burn, and since the pails were not stored in the sunlight, a fire was unlikely to occur. Tr. 40.

Original Sixteen argues that the Secretary has not satisfied the "quantity" requirement of the standard and, therefore, that he has failed to prove a violation. Resp't Br. at 5. In somewhat confusing testimony, Miller stated that there was no waste oil in the area, then identified the area

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[9] "SQUARE" is an acronym for Safety-Quality-You-Accountability-Responsibility Efficiency. Resp't Br. at 16.

[10] 30 C.F.R. § 57.4104(a) provides that: "Waste materials, including liquids, shall not accumulate in quantities that could create a fire hazard."

as designated for used oil storage. Tr. 355-56. He was also of the opinion that a fire would not occur because there was no ignition source, and that miners would not enter the area, except to store oil. Tr. 355.

The Secretary did not provide any evidence demonstrating that the quantity of oil being stored created a fire hazard. It is evident that Allard cited Original Sixteen because the pails were uncovered, and that he was not of the opinion that the quantity of oil created a hazard, since the violation was abated by transferring the oil to closed containers, rather than reducing the amount being stored. Therefore, I find that the Secretary has failed to prove a violation of section 57.4104(a), and I vacate the citation.

7. Citation No. 8561735

Inspector Allard issued 104(a) Citation No. 8561735, alleging a violation of section 47.41(a) that was "unlikely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Original Sixteen's "moderate" negligence.[11] The "Condition or Practice" is described as follows:

> About 23 plastic five gallon pails containing used oil stored in a small room in the upper shop were not labeled to indicate their contents. Serious injuries to the one miner normally in the area could result from improper use or contact with the contents.

Ex. P-11. The citation was terminated after a sign was posted in the area to indicate the pails' contents.[12]

A. Fact of Violation

Allard testified that the standard ensures that miners handling the containers are informed of their contents, so as to assure proper usage. Tr. 41. He stated that waste oil, a carcinogen, is classified by MSHA as a hazardous chemical. Tr. 41-42. He explained that the pails had originally contained other substances, and then recycled to store Sixteen to One's used oil; some pails were labeled, but with information pertaining to the original contents. Tr. 42. According to him, given waste oil's hazardous classification, improper use could cause miners to suffer lost workdays from long-term health issues, but miners were unlikely to suffer injury in this case because they were aware of the containers' contents. Tr. 42-43.

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[11] 30 C.F.R. § 47.41 provides that: "The operator must ensure that each container of a hazardous chemical has a label. If a container is tagged or marked with the appropriate information, it is labeled."

[12] I note that the action taken to abate the condition, posting a sign rather than labeling each unit, did not bring the containers into compliance with section 47.41.

Original Sixteen's argument that the containers were appropriately marked in compliance with the standard, is contradicted by Miller's own testimony that the pails could not be labeled. Resp't Br. at 5; Tr. 357. Original Sixteen also argues that Allard provided no evidence that waste oil is a hazardous chemical as defined by Part 47, that an exemption in section 47.91 for consumer products applies, that the mine has been inspected by CAL/OSHA four times a year and never cited for improper storage of waste oil, and that Allard provided no evidence of how a miner would suffer injury as a result of this condition. Resp't Br. at 5-6. Miller maintained that miners would be aware that the containers contained waste oil, and that they are not normally in the area and would only enter to dispose of oil. Tr. 356-57.

Section 47.11 defines a hazardous chemical as "any chemical that can present a physical or health hazard." 30 C.F.R. § 47.11. I credit Allard's testimony that MSHA classifies waste oil as a hazardous chemical, and Original Sixteen has presented no evidence beyond Miller's bare assertion, that the exemption for consumer products or hazardous substances regulated by the Consumer Product Safety Commission applies. In short, none of Original Sixteen's arguments exempt it from the labeling requirement. Therefore, I find that the standard was violated.

While I find that Original Sixteen violated the standard, in light of credible evidence that the miners were fully aware that the pails contained waste oil, the Secretary has presented no evidence respecting how they would suffer injury from inadequate labeling. Therefore, I find that this violation had no likelihood of causing injuries that would reasonably be expected to result in lost workdays or restricted duty injuries.

B. Negligence

The record establishes that the condition was obvious and had existed over an extended period of time, and Miller should have known that the oil was classified as hazardous, given that he is an experienced miner and mine owner. See Tr. 360. However, the area's known designation for used oil storage and the miners' knowledge and familiarity with the contents of the containers mitigated Original Sixteen's negligence. Therefore, I find that Original Sixteen was moderately negligent in violating the standard.

8. Citation No. 8561736

Inspector Allard issued 104(a) Citation No. 8561736, alleging a violation of section 57.4131(a) that was "unlikely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Original Sixteen's "moderate" negligence.[13]

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[13] 30 C.F.R. § 57.4131(a) provides that: "On the surface, no more than one day's supply of combustible materials shall be stored within 100 feet of mine openings or within 100 feet of fan installations used for underground ventilation."

The "Condition or Practice" is described as follows:

> More than one day's supply of timber was stored within 100 feet of the mine portal. About 100 pieces of timber ranging from 6" x 10" x 10' to 2" x 6" x 8" were stacked from 30' to 90' from the portal. In the unlikely event that the timber caught on fire, the three miners normally underground could suffer fatal injuries from toxic gases.

Ex. P-12. The citation was terminated after the timbers were moved away from the portal.

A. Fact of Violation

Allard testified that the regulation allows the operator to store only as much timber as the mine can normally use in one day, within 100 feet of the portal. Tr. 97-98. He opined that the amount of timber present exceeded a day's worth of timbering and, thus, Original Sixteen was storing for future timbering in violation of the standard. Tr. 93, 97-98. In support of his observation, he recalled that miner Mark Loving told him that timber was being stored near the portal because it was easier than going up the hill to retrieve it. Tr. 57, 99. Addressing the gravity of the violation, Allard opined that the timbers were relatively dry, that a power line, cutting torches, or smoking could serve as ignition sources, and that if a fire occurred, carbon monoxide could be pulled underground, fatally poisoning miners. Tr. 46-47, 88-92. However, in his opinion, combustion was unlikely to occur. Tr. 46-47.

Miller disagreed with Allard's assessment that 100 pieces of timber were being stored, estimating the count to range from 50 and 60 pieces, an amount that the miners could transport into the mine in a day and, in fact, in one shift. Tr. 362-63. However, Miller also testified that he believed that it is permissible to store more than one day's supply of timber, and that combustion was impossible, given that the timber was wet and no ignition sources were present. Tr. 363, 366-67, 374. Specifically, Miller stated that an electrical line that Allard identified as a possible ignition source was, in fact, a phone line. Tr. 89, 366-67; Ex. P-12 at 3-4.

I credit Allard's testimony and find that Original Sixteen was storing more than one day's supply of timber. While I credit Miller's testimony that the electrical line was a phone line, Allard's unrebutted testimony was that cutting torches and smoking were possible ignition sources. Consistent with my earlier finding respecting the fire suppression system, in the unlikely event of a fire, the miners would likely escape the mine. Therefore, I find that Original Sixteen violated the standard, and that the violation was unlikely to result in permanently disabling, rather than fatal, injuries.

B. Negligence

While Loving's statement to Allard suggests that Original Sixteen, as a general practice, had been storing excess timber at the portal for an extended period of time, I credit Allard's testimony that management may not have been aware of the practice. Therefore, I find that

Original Sixteen was moderately negligent in violating section 57.4131(a).

9. Citation No. 8561737

Inspector Allard issued 104(a) Citation No. 8561737, alleging a violation of section 57.14100(d) that had "no likelihood" of causing "no lost workdays," and was caused by Original Sixteen's "moderate" negligence.[14] The "Condition or Practice" is described as follows:

> A record of the defects on the 966 FEL located at the upper shop could not be produced. The loader was tagged out of service with no record of the defects.

Ex. P-13. The citation was terminated after the defects on the loader were documented.

A. Fact of Violation

Allard testified that the loader had been tagged "Do Not Use," but that Original Sixteen had not recorded the nature of the defect. Tr. 48. Allard opined that this was a paperwork violation, with no likelihood of injury. Tr. 49. Miller reasoned that he tagged-out the loader because he could not find the pre-operational examination record; therefore, according to him, the loader was not defective, and no record of the defect was kept. Tr. 385. Moreover, Original Sixteen argued that a log book is not an MSHA requirement. Resp't Br. at 7.

When Original Sixteen tagged-out the loader, it was required to record the defect and, therefore, I find that Original Sixteen violated the standard.

B. Negligence

Allard testified that the operator knew of the recording requirement and failed to report this defect, but that it had prevented miners from using unsafe equipment by tagging it out. Tr. 49-50. Miller testified that he believed Original Sixteen to have complied with the regulation by tagging-out a piece of equipment which did not have a pre-operational examination record. Tr. 378, 384-85.

I credit Miller's testimony that he, in good-faith, believed that he had complied with the standard. In fact, Miller took extra safety precautions by tagging out the loader, even though he was uncertain of its defects. However, the standard is clear, and Miller should have known of its recording requirement. Therefore, I find Original Sixteen' s violation of the standard was caused

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[14] 30 C.F.R. § 57.14100(d) provides that: "Defects on self-propelled mobile equipment affecting safety, which are not corrected immediately, shall be reported to, and recorded by, the mine operator. The records shall be kept at the mine or nearest mine office from the date the defects are recorded, until the defects are corrected. Such records shall be made available for inspection by an authorized representative of the Secretary."

by low, rather than moderate negligence.

10. Citation No. 8561105

Inspector William Berglof issued 104(a) Citation No. 8561105, alleging a violation of section 57.12030 that was "unlikely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Original Sixteen's "moderate" negligence.[15] The "Condition or Practice" is described as follows:

> The stinger located on the Lincoln Arc Welder, Ideal Arc R3R, located in the lower shop near the portal was defective, creating an electrocution hazard. Both the top and bottom tip and half of the bottom insulated components on the stinger were partially missing exposing the bare conductor. Miners use this welder as needed to fabricate and make repairs as needed in and around this shop. The welder was not tagged out of service and was accessible to any of the 4 miners working on site this day. This condition needs to be corrected prior to energizing the welding lead. A miner stated he had used this welder approximately 2-3 weeks ago. The welder was immediately tagged out of service.

Ex. P-14. The citation was terminated after the stinger was cut off of the positive lead on the welder.

A. Fact of Violation

Inspector Jerry Hulsey opined that electricity is transmitted through a stinger, which is connected to welding leads and clamps to the welding rod. Tr. 119-121. Viewing the photograph of the stinger, Hulsey opined that the bottom portion of the stinger was missing, exposing the bare conductors. Tr. 120-21; Ex. P-14 at 4. According to him, if the stinger were connected to a metal object, an arc flash could occur, potentially causing the person holding the stinger to be electrocuted. Tr. 118, 121. The Secretary argues that when Berglof inspected the welder, the stinger was energized with its bare conductors exposed. Secy' Br. at 20.

Miller opined that the stinger was obviously damaged, and that a miner would not energize the welder in such defective condition. Therefore, he asserted, the stinger was not energized, it did not create a hazard, and Original Sixteen could have repaired it before use. Tr. 387-90. Miller testified that only two miners would use the welder, but admitted that it had not been tagged-out.

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[15] Berglof did not testify at the hearing. The Secretary called Inspectors Jerry Hulsey or Joshua Love to testify, respecting citations issued by Berglof.

30 C.F.R. § 57.12030 provides that: "When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized."

Tr. 388.

Berglof's inspection notes state that he "Interviewed certified welder, he stated he used the welder 2 -3 weeks ago, it was not damaged like it is now. States he . . . would never use it with a broken stinger." Neither the face of the citation, nor Berglof's notes indicate that the welder was energized and, because Berglof was not called to testify, I find that the welder was not energized. Although the welder was not tagged-out of service, the damaged stinger was obvious, and the standard provides an opportunity for correction of a potentially dangerous condition before energizing equipment. Therefore, based on my finding that the welder was not energized when Berglof cited the operator, I vacate this citation.

11. Citation No. 8561106

Inspector Berglof issued 104(a) Citation No. 8561106, alleging a violation of section 57.4361(a) that was "unlikely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Original Sixteen's "high" negligence.[16] The "Condition or Practice" is described as follows:

> There has [sic] been no underground evacuation drills conducted at this mine this year. The underground drill is required at least every 6 months. These drills are required to assess the ability of all miners underground to reach the surface or refuge chambers within the time limits of the self-rescue devices. There were three miners working underground at the time of issuance.

Ex. P-15. The citation was terminated after an unannounced underground evacuation drill was conducted.

A. Fact of Violation

Original Sixteen conceded the violation, but contests the gravity and negligence designations. Tr. 396.

Miller opined that miners would evacuate the mine through their regular entrance and exit route and, therefore, there was no possibility that a miner would be killed in an emergency. Tr. 396-97.

Berglof's notes do not provide a justification for designating this violation as "fatal," and

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[16] 30 C.F.R. § 57.4361(a) provides that: "At least once every six months, mine evacuation drills shall be held to assess the ability of all persons underground to reach the surface or other designated points of safety within the time limits of the self-rescue devices that would be used during an actual emergency."

Hulsey did not address this issue. Ex. P-15 at 2. Berglof's notes state that injury was unlikely because miners were only working on the 1000 level of the mine. I find that were an emergency to occur, miners would be able to escape through their familiar routes. However, miners untrained in quick evacuation response could trip-and-fall, leading to musculoskeletal injuries such as sprains, strains, broken bones and head trauma or, in the event of a fire, smoke inhalation and burns. Thus, I find that failure to conduct regular evacuations in accordance with the standard would be reasonably expected to result in permanently disabling, rather than fatal injuries.

B. Negligence

Miller testified that Original Sixteen was not negligent because it has conducted emergency evacuation drills, including unannounced drills, and that miners were trained in how to exit the mine. Tr. 397-98.

Berglof's notes state that "Mr. Miller stated they just forgot to do it . . . . Mr. Miller also believes this is not required since he [is] in non-producing status . . . ." Ex. P-15 at 2. Based on the record, I find that Original Sixteen's management was aware of the requirement to conduct evacuation drills, and that it has provided no justification for failure to comply with the standard. Therefore, I find that there are no mitigating factors, and that Original Sixteen was highly negligent in violating section 57.4361(a).

12. Citation No. 8561107

Inspector Berglof issued 104(a) Citation No. 8561107, alleging a violation of section 62.120 that was "unlikely" to cause an injury that could reasonably be expected to be "permanently disabling," and was caused by Original Sixteen's "moderate" negligence.[17] The "Condition or Practice" is described as follows:

> The results of an MSHA full shift noise sample taken on 07/21/10 showed the utility miner working underground received an action level noise dose of 132.0%. This exceeds the action level dose or 50% plus the error factor (or 66%). The miner was not enrolled in a hearing conservation program as required by 30 C.F.R. 62.120.
>
> The abatement date for this citation is to allow the mine operator time to enroll the miner into a formal hearing conservation program which meets all the requirements of 30 C.F.R. 62.150.

[17] 30 C.F.R. § 62.120 provides that: "If during any work shift a miner's noise exposure equals or exceeds the action level the mine operator must enroll the miner in a hearing conservation program that complies with § 62.150 of this part."

Ex. P-16. The citation was terminated after the operator offered audiograms to all miners.

A. Fact of Violation

Hulsey testified that if a noise sample exceeds the action level limit, the operator must enroll miners in a hearing conservation program. Tr. 128-130. The noise sample showed that the utility miner received a noise dose of 132% which, as Hulsey opined, is double the permissible limit of the action level, including an error factor. Tr. 129-130; Ex. P-16 at 3. According to Berglof's notes, the miner exposed to the excess noise was not enrolled in a hearing conservation program. Tr. 130; Ex. P-16 at 3. Berglof's notes also state that a miner exposed to excessive noise would suffer permanently disabling hearing loss, but that it would be unlikely to occur, because the miners wore ear plugs and muffs. Ex. P-16 at 3.

Miller agreed that the sample accurately reflected the noise dose that the miner received, but testified that Original Sixteen offered miners the opportunity to enroll in a hearing conservation program, which they refused. Tr. 399-400. He testified that as Berglof was conducting the test, he stated that an air leak distorted the test and made it noisier than normal levels. Tr. 398. Original Sixteen argues that application of this standard is inappropriate to Sixteen to One because the mine does not have a predictable noise level; rather, the noise reading was anomalous. Resp't Br. at 8-9; Tr. 400.

Miller conceded that the miner received a noise dose in excess of the action level limit, and Original Sixteen's contention that it offered miners enrollment in a hearing conservation program falls short of the requirement of actually enrolling the miner. A miner exposed to excessive noise over a prolonged period may suffer permanently disabling hearing loss. Therefore, I find a violation of section 62.120, and that it was unlikely to cause permanently disabling injuries.

B. Negligence

Berglof's notes state that the miners had received training on the importance of hearing protection, and that they were provided ear plugs and ear muffs. Ex. P-16 at 3. No evidence has been produced to rebut Original Sixteen's argument that it does not have a history of noise violations. While these factors mitigate Original Sixteen's negligence, the noise dose received by the miner far exceeded the action level. Therefore, I find that Original Sixteen was moderately negligent in violating the standard.

13. Citation No. 8561177

Inspector Berglof issued 104(a) Citation No. 8561177, alleging a "significant and substantial" violation of section 57.14100(b) 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

Original Sixteen's "moderate" negligence.[18] The "Condition or Practice" is described as follows:

> The square nosed shovel, located at the shop, had a damaged splintered handle. The 32 inch handle had a 3 ½ inch splintered end with sharp ends. The shovel is used for clean-up. The shovel was not tagged out of service and is readily available to any of the five miners on site. This condition exposes miners to a hand injury hazard.

Ex. P-17. The citation was terminated after the damaged section of the shovel was repaired.

A. Fact of Violation

Inspector Joshua Love testified that he had been an MSHA inspector since June 2009, and that he accompanied Inspector Berglof on his October 20 and October 21 inspections of Sixteen to One, and observed each of the conditions cited during the inspections. Tr. 150-51. He stated that the shovel with the broken handle was available for use, and miners using it would be subjected to hand lacerations and possible infection. Tr. 153; Ex. P-17 at 3. Miller, on the other hand, testified that miners working at Sixteen to One would not have picked up the broken shovel, especially given that a new shovel was standing next to it. Tr. 403, 405. Miller also argued that the standard does not apply to a shovel because it is not a mechanical tool. Tr. 409. Original Sixteen argues that it satisfied the standard by removing the shovel in a timely manner. Resp't Br. at 9-10.

The evidence establishes that the shovel had a splintered handle, and that it was available for use. Miners using the shovel would be subjected to any of the injuries associated with handling splintered wood, lacerations and splinters penetrating the fingers or hands, and infection; therefore, the tool could not be used safely. I credit Miller's testimony that a new shovel was readily available next to the splintered one and, therefore, conclude that the violation was unlikely to result in an injury that would not require lost workdays. Therefore, I find that Original Sixteen violated the standard, but I also find that the violation was non - S&S.

B. Negligence

Love agreed with Berglof's assessment of moderate negligence, and opined that the break in the shovel was obvious, but that the operator had trained miners to repair broken shovels and had provided other shovels in good condition. Tr. 154-55. The record establishes that the hazard was obvious, but that Original Sixteen had provided adequate training and made available tools in good condition, which I consider mitigating factors. Therefore, I find Original Sixteen's violation

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[18] 30 C.F.R. § 57.14100(b) provides that: "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

of the standard to be caused by its low, rather than moderate negligence.

14. Citation No. 8561178

Inspector Berglof issued 104(a) Citation No. 8561178, alleging a violation of section 57.4201(a)(2) that was "unlikely" to cause an injury that could reasonably be expected to result in"lost workdays or restricted duty," and was caused by Original Sixteen's "moderate" negligence. The "Condition or Practice" is described as follows:

> The fire extinguisher, located at the shop, did not have the required annual maintenance inspection conducted within the last 12 months. The last maintenance inspection was done on September 2009. The fire extinguisher has no visible damage to the cylinder and the hose was in good condition. This condition exposes miners to the hazard of fighting a fire without a fire ready fire extinguisher.

Ex. P-18. The citation was terminated after the out-of-compliance extinguisher was replaced by one inspected within the last year.

A. Fact of Violation

Original Sixteen conceded the violation, but contests the gravity and negligence designations. Tr. 412.

Inspector Love testified that a miner fighting a fire with a defective extinguisher would suffer smoke inhalation and first-degree burns; however, in his opinion, injury was unlikely because there was no visible damage to the extinguisher. Tr. 158. Miller opined that this fire extinguisher was not required, and that it was in good condition. Tr. 413.

Original Sixteen argued that "miners were not endangered due to the paper oversight." Resp't Br. at 10. The record makes clear that the fire extinguisher was in good condition. Therefore, I find a violation that was unlikely to cause a miner to suffer injuries resulting in lost workdays or restricted duty.

B. Negligence

Love and Miller agreed that there were other annually-inspected fire extinguishers in the area. Tr. 158, 413. While the inspection date on the extinguisher was obvious, I find that the availability of the other extinguishers mitigated Original Sixteen's negligence. Therefore, I find that Original Sixteen was moderately negligent in violating the standard.

15. Citation No. 8561181

Inspector Berglof issued 104(a) Citation No. 8561181, alleging a violation of section 57.4201(a)(2) that was "unlikely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Original Sixteen's "moderate" negligence. The "Condition or Practice" is described as follows:

> The fire extinguisher, located at the upper shop, did not have the required annual maintenance inspection conducted within the last 12 months. The last maintenance inspection was done on August 21, 2007. The fire extinguisher has no visible damage to the cylinder and the hose was in good condition. This condition exposes miners to the hazard of fighting a fire without a ready fire extinguisher.

Ex. P-21. The citation was terminated after the out-of-compliance extinguisher was replaced by one that was in compliance.

A. Fact of Violation

Love stated that based on Berglof's notes, this fire extinguisher had not been inspected in approximately three years, and agreed with Berglof's gravity determinations for the reasons that he articulated respecting the prior citation. Tr. 160-61; Ex. P-21 at 3. Original Sixteen offered no new arguments for its failure to maintain its fire extinguishers in accordance with the standard. Therefore, I find that Original Sixteen violated the standard.

B. Negligence

Love testified that he agreed with Berglof's negligence determination for the reasons that he articulated respecting the prior violation. Tr. 161. Applying the same analysis as in the previous violation, I find that Original Sixteen was moderately negligent.

16. Citation No. 8561184

Inspector Berglof issued 104(a) Citation No. 8561184, alleging a violation of section 57.4201(a)(2) that was "unlikely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Original Sixteen's "moderate" negligence. The "Condition or Practice" is described as follows:

> The fire extinguisher, located at the 800 level MCC, did not have the required annual maintenance inspection conducted within the last 12 months. The last maintenance inspection was done on September 2009. The fire extinguisher has no visible damage to the cylinder and the hose was in good condition. This condition exposes miners to the hazard of fighting a fire without a fire ready fire extinguisher.

Ex. P-24. The citation was terminated after the out-of-compliance extinguisher was replaced by one that was in compliance.

A. Fact of Violation

Love testified that based on Berglof's notes, this fire extinguisher had not been inspected in approximately one year and agreed with Berglof's gravity determinations, for the reasons he articulated for the last citation. Tr. 162-63; Ex. P-24 at 3. Original Sixteen offered no new arguments for this citation. Therefore, I find that Original Sixteen violated the standard.

B. Negligence

Love stated that he agreed with Berglof's negligence determination for reasons that he had articulated respecting the previous fire extinguisher violations. Tr. 163. Therefore, I find that Original Sixteen was moderately negligent.

17. Citation No. 8561179

Inspector Berglof issued 104(a) Citation No. 8561179, alleging a violation of section 57.12004 that was "unlikely" to cause an injury that could reasonably be expected to result in "no lost workdays," and was caused by Original Sixteen's "moderate" negligence.[19] The "Condition or Practice" is described as follows:

> The 120v power cord to the overhead light in the change room, had a damaged outer jacket, exposing the inner insulated conductors to mechanical damage. The outer jacket had a ¼ inch cut in the outer jacket. Miners use the change room daily. This condition exposes miners to an electric shock hazard.

Ex. P-19. The citation was terminated after the operator repaired the cable.

A. Fact of Violation

Love testified that the quarter-inch cut in the outer jacket exposed the inner electrical wires to mechanical damage. Tr. 164-67; Ex. P-19 at 3. He opined that the cut indicated that the cable had been damaged, and that something had sliced it. Tr. 167. According to Love, injury was unlikely because a miner would have to intentionally reach overhead to contact the cable. Tr. 169-170. A miner contacting the wires would merely be shocked which, in Love's opinion,

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[19] 30 C.F.R. § 57.12004 provides that: "Electrical conductors shall be of a sufficient size and current-carrying capacity to ensure that a rise in temperature resulting from normal operations will not damage the insulating materials. Electrical conductors exposed to mechanical damage shall be protected."

would not result in lost work time, since the injury would be less severe than first degree burns. Tr. 168-69.

Original Sixteen argues that an outer jacket is not required. Resp't Br. at 11. Miller admitted that the outer jacket was damaged, but opined that a miner would not be shocked because the inner wires were not exposed to mechanical damage. Tr. 419-420.

I find that the cut in the outer jacket exposed the inner electrical wires to mechanical damage and that, in the unlikely event that a miner were to contact the exposed wires, an electrical shock would occur, and any injury would be minor.

B. Negligence

Love agreed with Berglof's assessment that Original Sixteen was moderately negligent, opining that management may not have been aware of the condition of the cable because the room is typically used only by rank-and-file miners, and that the damaged cable would be difficult to contact. Tr. 170. I find that Original Sixteen was moderately negligent in violating the standard.

18. Citation No. 8561180

Inspector Berglof issued 104(a) Citation No. 8561180, alleging a "significant and substantial" violation of section 57.14115(b) that was "reasonably likely" to cause an injury that could reasonably be expected to be "permanently disabling," and was caused by Original Sixteen's "moderate" negligence. The "Condition or Practice" is described as follows:

> At the fabrication storage, the tool rest on the bench grinder was not set properly. The bench grinder was 120V and plugged in. The tool rest was set at 1¼ inch opening. The bench grinder has a speed of 1750 RPM. The grinder was readily accessible to any of the 5 miners on site. This condition exposes miners to a serious injury from contacting the grinder wheel.

Ex. P-20. The citation was terminated after the tool rest was adjusted.

A. Fact of Violation

Love testified that the distance between the wheel and tool rest on this grinder was 1¼ inch. Tr. 173; Ex. P-20 at 3-4. Original Sixteen reiterated its argument respecting the prior grinder citation, that the standard ensures only that the rest be adjustable to ⅛ inch, rather than requiring that the distance between the wheel and tool rest not exceed that maximum setting. Resp't Br. at 11. Miller asserted that "everything the inspector wrote was pure speculation." Tr. 421. As has been discussed, I find Original Sixteen's position unavailing, and I conclude that the condition of the grinder violated the standard.

B. Significant and Substantial

Love agreed with Berglof's determination that permanently disabling injuries, such as cuts and lacerations to the hands were reasonably likely to occur, because a hand-held tool would be pulled into the gap between the wheel and the rest. Tr. 174-75. Again, Miller contended that the gap would not cause an accident. Tr. 421.

As with the prior citation for an out-of-adjustment grinding wheel, I find that a miner would be reasonably likely to suffer broken bones and lacerations should his hands or fingers be pulled in between the wheel and the tool rest. Therefore, I find that this violation was S&S, and that broken bones or lacerations to hands or fingers would be reasonably likely to result in lost workdays or restricted duty, rather than permanently disabling injuries.

C. Negligence

Love, also in agreement with Berglof's determination of moderate negligence, opined that, while the condition was open and obvious, miners had received training in properly adjusting the grinder. Tr. 175-76. Miller testified that the only miner who would use the grinder was experienced. Tr. 421. Based on the obviousness of the condition and evidence that miners had received training on properly adjusting the machine, I find that Original Sixteen was moderately negligent in violating the standard.

19. Citation No. 8561182

Inspector Berglof issued 104(a) Citation No. 8561182, alleging a violation of section 57.4130(b) that was "unlikely" to cause an injury that could reasonably be expected be "permanently disabling," and was caused by Original Sixteen's "moderate" negligence.[20] The "Condition or Practice" is described as follows:

> The area around the diesel storage tank was not clear of dry vegetation. The diesel storage tank capacity is 5000 gallons. There is an estimated 300 gallons of diesel in the tank. There was [sic] large amounts of dry branches 5' in front of and 15' behind the fuel storage. Miners access the area as needed to fuel service vehicles. This condition exposes miners to fire hazards.

Ex. P-22. The citation was terminated after the vegetation was removed.

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[20] 30 C.F.R. § 57.4130(b), pertaining to surface electric substations and liquid storage facilities, provides that: "The area within the 25-foot perimeter shall be kept free of dry vegetation."

A. Fact of Violation

Love opined that the regulation applies to the diesel storage tank, because it stores combustible liquid.[21] Tr. 178-79. He testified that because there were no identifiable heat sources, a fire would be unlikely to occur. Tr. 180. He also opined that the tank was infrequently used, but a fire could result from any vegetation accumulated under a heated engine when fueling a vehicle. Tr. 180. Love disagreed with Berglof's severity-of-injury determination, however, testifying that if a fire were to occur, miners would suffer smoke inhalation and first-degree burns, which would be reasonably likely to result in lost workdays or restricted duty, rather than permanently disabling injuries. Tr. 179.

Original Sixteen argues that the photograph taken by the inspector shows vegetation more than 25 feet away from the tank, and that no consideration was given regarding the current conditions at the mine. Resp't Br. at 12. Miller testified that no miner was fueling equipment when the condition was cited, and that no ignition sources were present. Tr. 421-23.

I find that dry vegetation was present within the 25-foot perimeter of the fuel storage tank, and that the tank was infrequently used. I also find that in the unlikely event of a fire, miners would be subjected to injuries from smoke inhalation and first degree burns, resulting in lost workdays or restricted duty. Therefore, I find that Original Sixteen violated the standard.

B. Negligence

Love agreed with Berglof's assessment of moderate negligence, because the operator removed some of the vegetation prior to the citation being issued. Tr. 180-81; Ex. P-22 at 5. Original Sixteen argued that it was pulling the dry vegetation away from the tank when the inspector arrived. Resp't Br. at 12. While the condition was obvious, the evidence is lacking as to how long the condition had existed; indeed, Original Sixteen was engaged in removing the dry vegetation when the condition was cited. Therefore, I find that Original Sixteen's negligence in violating the standard was low, rather than moderate.

20. Citation No. 8561183

Inspector Berglof issued 104(a) Citation No. 8561183, alleging a "significant and substantial" violation of section 57.9300(a) that was "reasonably likely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Original Sixteen's "moderate"

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[21] 30 C.F.R. § 57.4130(a)(2) provides that: "If a hazard to persons could be created, no combustible materials shall be stored or allowed to accumulate within 25 feet of . . . [u]nburied, flammable, or combustible liquid storage tanks."

negligence.[22] The "Condition or Practice" is described as follows:

> The berms along the bank of the access road to the Tightener Portal were not being maintained. There are two missing berms at the culverts. The road had an average width of 11 feet. The openings in the berms are between 12-15 feet wide. The remainder of the berms showed signs of degrading. The estimated drop is 150+ feet fall to the floor below. Miners recently accessed the road for the installation of a fan in the Tightener Portal. This condition exposes miners to a roll over vehicle hazard.

Ex. P-23. The citation was terminated after a gate and delineators were installed and a warning sign was posted.

A. Fact of Violation

Love testified that loaders and service trucks, not equipped with rollover protection, typically travel on the roadway and, if they were to leave the road, they would fall 150 feet to the ground below and roll over. Tr. 184-85. Miller argued that miners were in no danger of running through the berms. Tr. 427. Original Sixteen contends that the mine roads were maintained, and that the abatement, mere installation of a sign, indicates that the missing berms posed no danger. Resp't Br. at 13.

I find that there were two 12 to 15-foot gaps between the berms, and that they were reasonably likely to result in service trucks and loaders leaving the road and plunging down the 150 foot embankment. Therefore, I find that Original Sixteen violated the standard.

B. Significant and Substantial

In Love's opinion, because the road was rough, uneven and rutted, it would be reasonably likely that a truck would travel through a berm, resulting in the operator's death. Tr. 185-86. Miller opined that miners infrequently traveled in the area, and that no danger was present. Tr. 424-27.

I find that a truck or loader, without rollover protection, running through a berm and plunging 150 feet and overturning, would be reasonably likely to result in the driver sustaining severe injuries ranging from head trauma to crush injuries, which are potentially fatal. Therefore, I find that the violation was S&S.

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[22] 30 C.F.R. § 57.9300(a) provides that: "Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment."

C. Negligence

Love agreed with Berglof's assessment of moderate negligence, opining that weather had deteriorated the berms. Tr. 186, 268. The evidence establishes that the condition of the berms was obvious, and that they had been eroded by weather. I find that, in failing to maintain the berms in good condition, Original Sixteen was moderately negligent in violating the standard.

21. Citation No. 8561185

Inspector Berglof issued 104(a) Citation No. 8561185, alleging a "significant and substantial" violation of section 57.11012 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 Original Sixteen's "moderate" negligence.[23] The "Condition or Practice" is described as follows:

> The travelway leading to the 1088 timber repair area has an open hole where persons or materials may fall and was not protected with a barrier, cover or railing, creating a slip, trip and/or fall hazard. The open hole is located at the 1084 dump point. The unprotected area is approximately 8 feet in length with a gradual downward slope, consisting of loose and unconsolidated material ranging in size from dust to 14-inches in diameter. A miner slipping and/or falling in this area would reasonably likely sustain an ankle or knee strain or sprain type injury. The travelway through this area narrows down to 24 inches, with visible under-cutting the east side rail noted. Miners access this travelway daily.

Ex. P-25. The citation was terminated after the hole was covered.

A. Fact of Violation

Love referred to Berglof's notes, which stated that miners traveled this travelway at least twice daily to get to the 1088 timber repair area. Tr. 188, 271-72; Ex. P-25 at 5. Love opined that the hole was eight feet wide by approximately two feet deep, large enough for a person to fall through, and that it was being used by Original Sixteen to dump ore. Tr. 188-91, 194; Ex. P-25 at 6. He testified that there was no railing, barrier, cover, sign or barricade. Tr. 195.

Jonathan Farrell testified that the hole was against the mine ribs, which is not where miners walked, but admitted that the hole was near a travelway. Tr. 317-322. He opined that a warning light installed by Original Sixteen brought the operator into compliance with the

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[23] 30 C.F.R. § 57.11012 provides that: "Openings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed."

standard. Tr. 449. Miller also believed that the light provided adequate warning, referencing another case in which an MSHA special investigator had advised him that a warning light provides sufficient notice of a hazardous condition. Tr. 455-56. Original Sixteen argues that Love has limited experience inspecting underground mines, and no experience inspecting gold mines. Resp't Br. at 15-16.

I find that the hole was near the travelway used by miners, and that Original Sixteen failed to protect miners from falling into it. While the warning light illuminating the hole alerted miners to the hazard, it did not prevent them from falling into the hole as a result of slipping or tripping, and a protective barrier, as required by section 57.11012, was not impractical. Therefore, I find that Original Sixteen violated the standard.

B. Significant and Substantial

Love agreed with Berglof, testifying that because miners often traveled the walkway which, at one point, narrows to 24 inches, a fall into the hole was reasonably likely, and a miner would receive muscle strains, twisted ankles or broken bones. Tr. 190, 193.

Farrell testified that miners, familiar with the area, would not trip and fall into the hole and, even if a fall occurred, the miner would not be harmed. Tr. 310, 313. Miller also opined that the miners would not fall into the hole, given that the floor was flat and a mine car would not flip over, and that the area was infrequently traveled. Tr. 429, 431, 433.

The record establishes that the hole was located near a travelway used, at least infrequently, by miners, and I find that a miner falling into the hole and down the slope of unconsolidated material would be reasonably likely to suffer musculoskeletal injuries such as sprains, strains and broken bones. Therefore, I find that the violation is S&S.

C. Negligence

Love opined that Original Sixteen's negligence was moderate, because the operator may have reasonably believed that no cover was needed for an area where work was being performed. Tr. 194. I find that the hole was obvious, and that Original Sixteen held a good faith belief that the warning light was sufficient to warn against the danger. However, the standard requires a physical barrier, and erecting one would not have blocked access to the hole. Therefore, I find that providing the warning light mitigated Original Sixteen's negligence, and that it was low, rather than moderate.

PENALTIES

While the Secretary has proposed a total civil penalty of $2,582.00 for the violations, 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). *Sellersburg Co.*, 5

FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that Original Sixteen is a small operator with an overall history of violations that is not an aggravating factor in assessing appropriate penalties.[24] I also find that Original Sixteen demonstrated good faith in achieving rapid compliance after notice of the violations.

Addressing Original Sixteen's ability to pay, Miller testified that the operator does not have the assets to pay the penalty proposed by the Secretary, that he would be paying the penalties personally, and that he does not have sufficient funds to continue operating the mine. Tr. 442. In support of its contention, Original Sixteen submitted a gold production report and its Quarterly Report to the Securities and Exchange Commission for the quarter ending March 31, 2012. Exs. R-1, R-7.

The Commission has held that the mine operator has the burden to prove that the proposed penalty will affect its ability to continue in business. *Sellersburg*, 5 FMSHRC at 294. The financial report submitted by Original Sixteen is unaudited which, as other judges have recognized, is insufficient support for an inability-to-pay defense. *Apex Quarry*, 33 FMSHRC 3158, 3162-63 (Dec. 2011) (ALJ) (citing *Johnco Materials, Inc.*, 33 FMSHRC 1431, 1433-34 (June 2011) (ALJ)). Without adequate documentation of Original Sixteen's financial status, the effect of the proposed penalties on its ability to continue in business cannot be determined. Therefore, I find that Original Sixteen has not met its burden, and that the proposed civil penalties will not affect the operator's ability to continue in business.

The remaining criteria involve consideration of the gravity of the violations and Original Sixteen'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.

1. Citation No. 8561729

It has been established that this violation of section 57.4201(a)(2) was unlikely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Original Sixteen was moderately negligent, and that it was timely abated. The Secretary proposed a penalty of $100.00. In consideration of my finding as to negligence, I find that a penalty of $70.00 is appropriate.

2. Citation No. 8561730

It has been established that this S&S violation of section 57.11050(a) was reasonably

[24] The presumption of Original Sixteen's relevant history as a non-aggravating factor is occasioned by the Secretary's failure to put in evidence the Assessed Violation History Report.

likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Original Sixteen's negligence was low, and that it was timely abated. The Secretary proposed a penalty of $100.00. In consideration of my finding as to negligence, I find that a penalty of $80.00 is appropriate.

3. Citation No. 8561731

It has been established that this violation of section 57.4560(a) was unlikely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Original Sixteen was highly negligent, and that it was timely abated. The Secretary proposed a penalty of $224.00. In consideration of my finding as to gravity, I find that a penalty of $160.00 is appropriate.

4. Citation No. 8561732

It has been established that this S&S violation of section 57.14115(b) was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Original Sixteen was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of $100.00, as proposed by the Secretary, is appropriate.

5. Citation No. 8561733

It has been established that this S&S violation of section 57.20003(a) was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Original Sixteen was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of $100.00, as proposed by the Secretary, is appropriate.

6. Citation No. 8561734 - VACATED

7. Citation No. 8561735

It has been established that this violation of section 47.41(a) had no likelihood of causing an injury that could reasonably be expected to result in lost workdays or restricted duty, that Original Sixteen was moderately negligent, and that it was timely abated. The Secretary proposed a penalty of $100.00. In consideration of my finding as to negligence, I find that a penalty of $100.00 is appropriate.

8. Citation No. 8561736

It has been established that this violation of section 57.4131(a) was unlikely to cause an injury that could reasonably be expected to be permanently disabling, that Original Sixteen was moderately negligent, and that it was timely abated. The Secretary proposed a penalty of $100.00. In consideration of my finding as to gravity, I find that a penalty of $100.00 is appropriate.

9. Citation No. 8561737

It has been established that this violation of section 57.14100(d) had no likelihood of resulting in an injury that could reasonably be expected to result in no lost workdays, that Original Sixteen' s negligence was low, and that it was timely abated. The Secretary proposed a penalty of $100.00. In consideration of my finding as to negligence, I find that a penalty of $70.00 is appropriate.

10. Citation No. 8561105 - VACATED

11. Citation No. 8561106

It has been established that this violation of section 57.4361(a) was unlikely to cause an injury that could reasonably be expected to be permanently disabling, that Original Sixteen was highly negligent, and that it was timely abated. The Secretary proposed a penalty of $207.00. In consideration of my finding as to gravity, I find that a penalty of $170.00 is appropriate.

12. Citation No. 8561107

It has been established that this violation of section 62.120 was unlikely to cause an injury that could reasonably be expected to be permanently disabling, that Original Sixteen was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of $100.00, as proposed by the Secretary, is appropriate.

13. Citation No. 8561177

It has been established that this violation of section 57.14100(b) was unlikely to cause an injury that could reasonably be expected to result in no lost workdays, that Original Sixteen's negligence was low, and that it was timely abated. The Secretary proposed a penalty of $100.00. In consideration of my findings as to gravity and negligence, I find that a penalty of $70.00 is appropriate.

14. Citation No. 8561178

It has been established that this violation of section 57.4201(a)(2) was unlikely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Original Sixteen was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of $100.00, as proposed by the Secretary, is appropriate.

15. Citation No. 8561181

It has been established that this violation of section 57.4201(a)(2) was unlikely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Original

Sixteen was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of $100.00, as proposed by the Secretary, is appropriate.

16. Citation No. 8561184

It has been established that this violation of section 57.4201(a)(2) was unlikely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Original Sixteen was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of $100.00, as proposed by the Secretary, is appropriate.

17. Citation No. 8561179

It has been established that this violation of section 57.12004 was unlikely to cause an injury that could reasonably be expected to result in no lost workdays, that Original Sixteen was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of $100.00, as proposed by the Secretary, is appropriate.

18. Citation No. 8561180

It has been established that this S&S violation of section 57.14115(b) was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Original Sixteen's negligence was moderate, and that it was timely abated. The Secretary proposed a penalty of $108.00. In consideration of my finding as to gravity, I find that a penalty of $100.00 is appropriate.

19. Citation No. 8561182

It has been established that this violation of section 57.4130(b) was unlikely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Original Sixteen's negligence was low, and that it was timely abated. The Secretary proposed a penalty of $100.00. In consideration of my findings as to gravity and negligence, I find that a penalty of $70.00 is appropriate.

20. Citation No. 8561183

It has been established that this S&S violation of section 57.9300(a) was reasonably likely to cause an injury that could reasonably be expected to be fatal, that Original Sixteen was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of $243.00, as proposed by the Secretary, is appropriate.

21. Citation No. 8561185

It has been established that this S&S violation of section 57.11012 was reasonably likely

to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Original Sixteen's negligence was low, and that it was timely abated. The Secretary proposed a penalty of $100.00. In consideration of my finding as to negligence, I find that a penalty of $80.00 is appropriate.

ORDER

WHEREFORE, it is **ORDERED** that Citation Nos. 8561734 and 8561105 are **VACATED**.

It is further **ORDERED** that Citation Nos., 8609870, 8561732, 8561733, 8561107, 8561178, 8561181, 8561184, 8561179 and 8561183 are **AFFIRMED**, as issued.

It is further **ORDERED** that the Secretary **MODIFY** Citation No. 8561729 to reduce the degree of negligence to "moderate;" Citation Nos. 8561730, 8561737 and 8561185 to reduce the degree of negligence to "low;" Citation No. 8561735 to reduce the level of gravity to "no likelihood;" Citation Nos. 8561736 and 8561106 to reduce the level of gravity to "permanently disabling;" Citation Nos. 8561731 and 8561180 to reduce the level of gravity to "lost workdays or restricted duty;" Citation No. 8561182 to reduce the level of gravity to "lost workdays or restricted duty," and the degree of negligence to "low;" and Citation No. 8561177 to reduce the level of gravity to "unlikely," "non-significant and substantial" and "no lost workdays," and the degree of negligence to "low;" and that the citations are **AFFIRMED**, as modified.

It is further **ORDERED** that Original Sixteen to One Mine, Incorporated, **PAY** a civil penalty of $2,113.00 within 30 days of the date of this Decision.[25] **ACCORDINGLY**, these cases are **DISMISSED**.

Jacqueline R. Bulluck

Jacqueline R. Bulluck
Administrative Law Judge

[25] 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. Please include Docket numbers and A.C. numbers.

Distribution:

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