FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 23 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. SE 2011-502-M A.C. No. 54-00001-251949-01 Docket No. SE 2011-503-M A.C. No. 54-00001-251949-02
v.	Docket No. SE 2013-130-M A.C. No. 54-00001-307347 Mine: Ponce Cement Plant
CEMEX DE PUERTO RICO, Respondent	Docket No. SE 2011-504-M A.C. No. 54-00240-251950-01 Mine: Canteras Canas

DECISION AND ORDER

Appearances: Terrence Duncan, Esq., U.S Department of Labor, Office of the Solicitor, New York, NY for the Secretary

Manuel A. Quilichini, Esq., Quilichini Law Offices, San Juan, PR for Respondent

Before: Judge Andrews

STATEMENT OF THE CASE

These cases are before the undersigned Administrative Law Judge on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor against Respondent, Cemex de Puerto Rico ("Respondent" or "Cemex") pursuant to Section 104 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(d). A hearing was held in San Juan, Puerto Rico on August 5, 2013.

PROCEDURAL HISTORY

MSHA inspector Isaac Villahermosa conducted several inspections of Respondent's various operations. On August 26, 2010, he conducted an inspection of the Canteras Canas Mine and issued a citation under Section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 ("the Act"). On November 23, 2010, he conducted an inspection of the Ponce Cement Plant and issued two citations, one under Section 104(a) and one under section 104(d)(1). Finally, on June 20, 2012, he conducted another inspection of the Ponce Cement Plant and issued an order under 104(b) of the Act. Respondent contested these four issuances and each was placed in a separate civil penalty docket (SE 2011-502-M, SE 2011-503-M, SE 2011-504-M, and SE 2013-130-M). The total assessed penalty for the four citations was $29,711.00. On August 5, 2013 a hearing was held on these citations. The parties submitted Post-Hearing Briefs and the Secretary submitted a Reply Brief.

STIPULATIONS

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

1. The Federal Mine Safety and Health Commission has jurisdiction over these proceedings pursuant to Section 105(d) of the Mine Act, 30 U.S.C. §815(d).

2. Respondent Cemex De Puerto Rico was/is a mine within the meaning of Section 4 of the Federal Mine Safety and Health Act, 30 U.S.C. §804, and has/had products which entered interstate commerce within the meaning of §4 at the time of the violations alleged in the citations.

3. Respondent Cemex De Puerto Rico was/is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. §801 et seq., at the time of the violations alleged in the citations.

4. Respondent Cemex De Puerto Rico was/is the owner/operator of the Cantera Canas Mine, I.D. #54-00240 and the Ponce Cement Plant, ID No. 54-00001, at the time of the violations alleged in the citations.

5. On or about August 26, 2010, Inspector Isaac Villahermosa conducted an inspection of Respondent's Cantera Canas Mine.

6. At the end of his inspection, Mr. Villahermosa issue (sic) several citations which alleged that Respondent was operating some of its mobile equipment with various defects, some of which allegedly remained uncorrected for extended periods of time.

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

7. Respondent did not contest the citations which alleged that violations existed on its Pettibone Cranes Nos. 771 and 774, its Chevrolet Water Truck #37-007, its Caterpillar Dozer No. 2 and its Caterpillar Loader No. 302.

8. Respondent only contested Citation No. 8544130 which alleged that respondent violated 30 C.F.R. §56.14100(c).

9. At the time of inspector Villahermosa's inspection, Horacio Terron was the Mobile and Crushing Equipment Maintenance Coordinator at Respondent's Cantera Canas Mine.

10. Respondent's equipment operators inspected the equipment they operated before each shift and completed pre-shift inspection reports.

11. As Coordinator of Maintenance, Horacio Terron was responsible for correcting the defects identified in the vehicles pre-shift inspection reports.

12. Horacio Terron supervised Crane Operator Edwin Bautista.

13. Edwin Bautista submitted equipment pre-shift inspection reports for the equipment he operated to Horacio Terron.

14. At the time of MSHA's inspection, Guillermo Vazquez was Respondent's Quarry Coordinator at the Cantera Canans (sic) Mine.

15. Guillermo Vazquez supervised the equipment operators who worked at the quarry at Respondent's Cantera Canans (sic) Mine.

16. The equipment operators who worked at Respondent's quarry at the Cantera Canans (sic) Mine inspected the equipment they operated before each shift and completed pre-shift inspection reports.

17. Guillermo Vazquez received and reviewed the equipment pre-shift inspection reports for the equipment that operated at Respondent's quarry at the Cantera Canans (sic) Mine.

18. Guillermo Vazquez was responsible for among other things, taking defective equipment out of operation until the defects were corrected.

19. On November 23, 2010, inspector Isaac Villahermosa visited Respondent's limestone plant to conduct a second inspection.

20. At approximately 1:30 p.m. on November 23, 2010, Mr. Villahermosa went to the No. 11 mill at Respondent's cement plant.

21. On or about November 23, 2010, Juan Martinez used the handrails located on the platform of the No. 11 mill, and then scaled the "mill's structure" to reach the top of the mill.

22. On or about November 23, 2010, Carlos Vargas saw Juan Martinez used (sic) the handrails located on the platform of the No. 11 mill, and then scaled (sic) the "mill's structure" to reach the top of the mill.

Joint Exhibit 1 (*see also* Transcript at 6-7).[2]

MILL NO.11 CITATIONS

I. SUMMARY OF TESTIMONY

Inspector Isaac Villahermosa conducted an inspection of Respondent's cement plant on November 23, 2010.[3] (Tr. 21, 118). On that day, he was initially inspecting Respondent's lime plant.[4] (Tr. 22). During his lunch break at Respondent's Mine Office, a cement plant employee approached him and told him to go to Mill No. 11, but not until after lunch so that miners would be there. (Tr. 22-23, 76-77). He asked the miner why he should go to the mill and the miner said, "Just go there. You'll see." (Tr. 77). He had no idea what he would see. (Tr. 77-78). A trip to the cement plant was not part of his itinerary. (Tr. 22). Villahermosa did not solicit these comments and the miner did not describe the nature of the problem. (Tr. 23, 77).

After lunch, Villahermosa waited for Respondent's safety representative, Carlos Collazo, to join him.[5] (Tr. 23-24, 78). He did not recall who else was at the mine office that day, beyond Collazo. (Tr. 79). However, Collazo did not arrive and, at around 1:15-1:20, Villahermosa went to the area by himself. (Tr. 23-24, 29). He did not try to contact Collazo first. (Tr. 79).

Around the same time, Joel Martinez left lunch and returned to work at Mill 11, as he had that morning.[6] (Tr. 116, 118, 130). That day he was assigned to weld over some cracks that had occurred in the mill spout as a result of wear. (Tr. 116, 171). He did these sorts of repairs once or twice a month and climbed up the equipment each time. (Tr. 116-117, 129-130). At the time of the hearing, he no longer did this kind of maintenance because a new liner had been installed,

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

[3] Isaac Villahermosa appeared at hearing and testified for the Secretary. (Tr. 20). Villahermosa had worked as an MSHA inspector for six years and was also a special investigator. (Tr. 21). In that capacity he has performed over 200 regular inspections at quarries and plants. (Tr. 21).

[4] Respondent has three plants: a lime plant, a cement plant, and the Canas quarry. (Tr. 22).

[5] Carlos Alberto Collazo Vasquez appeared at the hearing and testified for Respondent. (Tr. 223). At the time of the hearing Collazo was Respondent's Safety Director and had held that position for about five years. (Tr. 224).

[6] Joel Martinez Torres appeared at hearing and testified for Respondent. (Tr. 114). Martinez had worked for Respondent since 2002 or 2003. (Tr. 114). At the time of the hearing he was a welder/mechanic and had held that position for five years. (Tr. 115). In that capacity he repaired broken structure and manufactured items. (Tr. 115).

making repairs unnecessary. (Tr. 117). The spout was without a liner for a year or two. (Tr. 118). Carlos Vargas was also working at Mill 11 and was standing at ground level.[7] (Tr. 170).

When he left the office, Villahermosa walked down the street towards Mill No. 11.[8] (Tr. 80). To approach the mill, he traveled on a walkway to a platform. (Tr. 24-25). He estimated that the top of the mill was seven feet above the platform and 12 feet above the ground, though he did not measure. (Tr. 25, 95). Martinez estimated that top of the mill was 5 or 6 feet above the platform and 8 or 10 feet from the ground. (Tr. 126, 131-132). The parties agreed that there was spillage around the platform. (Tr. 96, 126). Respondent believed that this material would prevent a miner from falling all the way to ground, but Villahermosa was not sure. (Tr. 96, 126). The top of the mill was rounded and sometimes covered in dust. (Tr. 31-32, 133).

The parties have different accounts as to what happened once Villahermosa reached Mill 11. According to Villahermosa, when he arrived at the cement plant he saw Martinez on top of the mill with no harness. (Tr. 24, 26). When he first reached the walkway, he was far from the mill and could only see someone on top. (Tr. 25). It was not until he was on the platform that he saw that the miner was not tied to a safety line and there was no hand rail. (Tr. 25). Because the condition was unsafe and he feared Martinez would fall, Villahermosa told him to sit down. (Tr. 25).

After the miner sat down, a supervisor, Vargas, approached and Villahermosa explained the situation. (Tr. 26, 34, 259). Villahermosa did not approach Vargas, because he did not know that Vargas was the supervisor. (Tr. 259). Villahermosa told Vargas that they needed to get Martinez off of the mill safely. (Tr. 26). Villahermosa suggested using a ladder. (Tr. 26). Vargas called for a ladder and Martinez was brought down from on top of the mill. (Tr. 26, 28).

When Martinez got off the mill, Villahermosa questioned him. (Tr. 26). Martinez told Villahermosa how he got up on the mill and the name of the supervisor who directed him to perform the task. (Tr. 26-27). Martinez said he used the handrails and the mill structure to climb to the top. (Tr. 27-28, GX-7, p.1-3). There were two handrails on the mill platform. (Tr. 28, 95). The bottom rail was about 20 inches above the platform. (Tr. 257). The top one was 40-44 inches above the platform. (Tr. 31, 95-96). Martinez stated he climbed one rung (the second), and stepped on the bearing cover. (Tr. 96). Climbing onto the structure put Martinez at an even

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[7] Carlos G. Vargas Martinez was present at the hearing and testified for Respondent. (Tr. 168). Vargas retired on June 30, 2011, after working for Respondent for 36 years. (Tr. 168-169, 178). His last position at the company was Industrial Mechanic Supervisor. (Tr. 169). In that capacity he oversaw a group of mechanics, including Martinez. (Tr. 169). Since retirement, Vargas had had little contact with Respondent's management, though he remained friends with some of his employees. (Tr. 178). Vargas did not know who issued the subpoena for the hearing. (Tr. 178).

[8] Respondent's counsel asked Villahermosa to review digital photographs of the street (RX-1). (Tr. 81). These photographs were taken just three weeks before the hearing (three years after the citation) by Respondent's counsel. (Tr. 81). They showed that from the angle of the photographs, it was not possible to see the area cited. (Tr. 82-83). Martinez testified that the area shown in these photographs was similar to how it looked three years ago. (Tr. 127). However, he could not authenticate the photographs. (Tr. 161-162).

greater height. (Tr. 31). Martinez stated he climbed to the top with his hands free. (Tr. 265). He stated he did not tie himself off when climbing. (Tr. 96).

Villahermosa believed that the way Martinez traveled to the top of the mill created exposure to serious or fatal injury. (Tr. 30-31). The area was not safe to access. (Tr. 31). As soon as Martinez began to climb the rails, he was not protected and could have been injured in a fall. (Tr. 31, 256). Even the lower handrail posed a hazard, albeit a lesser one. (Tr. 257, 264). The higher the miner climbed, the more hazardous the condition would be. (Tr. 264-265). Standing on the top rail posed a danger because a four-foot fall could cause serious injury. (Tr. 257, 264-266). Once he reached the top of the mill, the surface was rounded, making a slip more likely.[9] (Tr. 31-32, 258). If he fell the 7 feet from that area, the metal in the location could have struck his head causing a serious injury or fatality. (Tr. 31, 258). The resultant broken skull or neck could be fatal. (Tr. 34). The miner could also break an arm or be cut. (Tr. 33).

Martinez was wearing a lanyard and a harness but he told Villahermosa that he did not use it to tie off. (Tr. 28-29). Villahermosa believed that Martinez did not claim he was using the harness and lanyard to tie off until several months later during the 110(c) investigation. (Tr. 29-30). Even if Martinez had been tied off, he would have been exposed to a fall, though perhaps a less severe one. (Tr. 32, 265). In tying off, he would have been standing on the top rail and reaching up, thereby exposing himself to a fall. (Tr. 256-257, 264-266). When a line is tied off, generally the miner would like to tie off at a higher level. (Tr. 32). When climbing, a miner must reach down to unhook the tie and can fall. (Tr. 33, 258). Further, a miner can fall while tied off, and as the lanyard is 5-6 feet long, the miner could still hit structure or walkway. (Tr. 33). Further, he could have fallen while walking to tie off on top of the mill. (Tr. 258).

Respondent's witnesses offered a far different account. According to Martinez, when Villahermosa arrived at the mill, he was still on the platform and had not yet climbed the mill.[10] (Tr. 119). In response to questioning, Martinez told Villahermosa he would be welding. (Tr. 119). Martinez testified Vargas arrived while they were speaking. (Tr. 128). However, Vargas testified that Villahermosa approached him at the ground level and that they had walked together to the platform where Martinez was working. (Tr. 170-171). At ground level, Villahermosa had asked Vargas who was in charge and said that he was in the area because of an imminent danger. (Tr. 170-172). Vargas said he was in charge. (Tr. 170).

Regardless of the order of arrival, Villahermosa asked how Martinez would get to the top of the mill and Martinez explained how he would routinely climb up while tying off. (Tr. 119, 124-125, 130, 134, 172). This was the way he had reached the area that morning. (Tr. 130).

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[9] On cross examination, Villahermosa discussed a guard on top of the mill. (Tr. 97-98). He stated that he could see the top of the guard from below, that it was five and a half feet high, and that he did not observe planks on the guard for a walking surface. (Tr. 97-99). There was no guard on the backside. (Tr. 96-97).

[10] Martinez had seen Villahermosa before the day of the inspection but had never spoken to him before. (Tr. 160-161). He never had any conflict with Villahermosa before that day. (Tr. 161). Vargas had some encounters with Villahermosa before that day. (Tr. 179).

Martinez testified that after the explanation, Villahermosa requested that he demonstrate how he would climb while tying off with his harness. (Tr. 119, 125, 142-143). Vargas testified that Villahermosa interrupted Martinez's explanation in asking for the demonstration. (Tr. 172). The harness was manufactured so Martinez could tie in with two lines. (Tr. 124, 134). He had been trained on how to climb by Respondent. (Tr. 143). He used the handrails to begin. (Tr. 120, 134). He put his feet on the first rail and tied himself to the green lubricant pipe above his head. (Tr. 120-123, 135-136, 173). The pipe was four to five feet above the rail, or 2 to 3 feet above his head. (Tr. 136-139). He was cautious in balancing on the rail. (Tr. 136). Martinez then climbed to the second handrail. (Tr. 139). He then stepped on the bearing for the mill and tied himself to the green pipe. (Tr. 139-140, 156-157, 173). There was also an eyelet he could tie off on. (Tr. 123, 173). When he reached the top, he would tie off on a pipe located there, untie from the green pipe, and his assistant would hand up his tools. (Tr. 131-133, 141-143).

On this day, when he reached the top Villahermosa told him to sit down and not tie off while a ladder was retrieved. (Tr. 119, 124-126, 143-144, 158, 173, 181). Villahermosa told him to untie from the lower pipe as well. (Tr. 158-159). Vargas also saw the inspector tell Martinez to sit. (Tr. 145, 173). Villahermosa ordered Vargas to get the ladder. (Tr. 173-174). When the ladder arrived, Martinez climbed down. (Tr. 127). When he got down, Villahermosa told him that he had come to the mine over a matter of life and death. (Tr. 127). He also said that the work could not be performed until necessary arrangements were made to do the work safely and that the equipment had to be left on top. (Tr. 174). Vargas called his supervisor, the engineer in charge, and said that work could not be done until arrangements were made. (Tr. 175).

Martinez knew it was wrong to sit down without tying off and that doing so placed him in danger. (Tr. 144-145). He followed the order because the inspector told him to do so and he felt that he was safe while sitting. (Tr. 144-145). Vargas agreed that Villahermosa's instructions were unsafe. (Tr. 181-182). An untied miner could fall and receive serious injury. (Tr. 182). Villahermosa testified that he did not order the miner to climb the structure. (Tr. 107).

The parties agreed that later that day, Villahermosa spoke with Martinez, Collazo, and Vargas about the cited condition in a conference room.[11] (Tr. 35-36, 127-128, 174, 226). Vargas testified that he was asked to leave the room when Collazo arrived. (Tr. 174). They went to the room to clarify any misunderstandings. (Tr. 36). Martinez said that the inspector told him stay calm and that no one would fire him. (Tr. 129). Vargas said that Villahermosa gave Martinez a card and said that "no one could touch him; that he was like a god and that no one could fire him." (Tr. 174). Villahermosa told those at the meeting that he had all the information, that he had conducted all the interviews, explained the condition, and noted the condition was an imminent danger for unsafe access. (Tr. 36, 129, 226-228, 243-244). Villahermosa said that Martinez reached the mill through unsafe access and that handrails, access area, and spout at Mill No. 11 could not be used for climbing. (Tr. 227-228).

Villahermosa testified that at the meeting, Callazo and Vargas confirmed that the condition existed. (Tr. 36). He said Vargas had seen Martinez climb on the mill and did not say that Martinez tied off. (Tr. 36, 99). Villahermosa testified that Vargas did not mention "three

[11] Collazo learned about the condition when Villahermosa called him at lunch. (Tr. 226). He arrived 20 minutes later. (Tr. 226). Martinez and Vargas were already there. (Tr. 243).

points of contact"; that issue was not raised until much later. (Tr. 99). At the meeting, Collazo said that the condition should not be aggravated conducted because Vargas did not recognize the hazard. (Tr. 34-35, 37, 99-100). Collazo testified that he believed the access was safe but the inspector said that MSHA did not approve. (Tr. 228). Collazo also testified he had not heard in training that "three points of contact" was no longer authorized by MSHA, so he accepted what the inspector said. (Tr. 228). Villahermosa left after speaking. (Tr. 229).

The unsafe access citation (No. 8629721 (GX-5)) stated that an injury or illness was reasonably likely because Martinez told the inspector that he had accessed the area in the morning and in the afternoon in an unsafe manner. (Tr. 21, 37-38, 45-46). If Martinez were to fall 7 feet, there could be fatal injury, broken or dislocated bones, twisted ankles, or other injuries depending on how he landed. (Tr. 39, 46).

The inspector testified that the citation was marked as S&S because of the combination of the unsafe way Martinez accessed the area and the possible injury he would sustain. (Tr. 39, 46).

Inspector Villahermosa also testified that Respondent engaged in an unwarrantable failure/aggravated conduct because it required Martinez to do a job without safe access. (Tr. 40). He stated that management was aware of the miner in that area and observed him climbing. (Tr. 40-41). He found the violation occurred as a result of high negligence because Respondent was aware of what was required for safe access, having been cited nine times in the past, but failed to provide it. (Tr. 40). In fact, he believed they approved of such access because Vargas said he did not recognize a hazard. (Tr. 40).

Villahermosa also reviewed citation No. 8629720 (GX-12). (Tr. 37-38, 106-107). The miner was wearing a harness but it was not tied off. (Tr. 41, 107). A photograph (GX-13) showed Martinez sitting on the mill. (Tr. 41). There was a green pipe for Martinez to tie off on at the top of the mill. (Tr. 43, 94). Villahermosa learned about this place later and did not see it at the time of the issuance. (Tr. 94-95). He did not ask Martinez if he could tie off. (Tr. 95).

Vargas did not know when he learned that Martinez was cited for not being tied off. (Tr. 181). He testified that he did not speak with Collazo about the violation or the instructions not to tie off on the day of the incident. (Tr. 175, 182, 184). He also did not speak to MSHA or file a complaint about Villahermosa's alleged instruction for Martinez to climb. (Tr. 175-176, 183-184). This was because he was a mechanic's supervisor; safety personnel were supposed to deal with those issues. (Tr. 183-184). Vargas did not talk about the condition at all until a meeting with Collazo three days after the alleged violation in which he learned MSHA had issued a citation. (Tr. 175, 182, 227, 229). At the meeting, Collazo talked about safe access. (Tr. 229, 244). At that time he did not have any evidence to contradict the inspector's assertion that "three points of contact" and that the use of handrails was not safe. (Tr. 229). He told the employees that they would need to change the method of access. (Tr. 229). Collazo heard that Martinez was already on top of the mill when Villahermosa arrived. (Tr. 149). No one said anything to undermine this understanding or the citation, so Collazo accepted the citation and the inspector's explanation. (Tr. 227). Vargas conceded that never spoke with Collazo or recommended letting MSHA know about Villahermosa's actions. (Tr. 184).

Respondent decided that the citation was not accurate and drafted a letter requesting a meeting with the MSHA supervisor, Valentin, at the local office. (Tr. 230-231, 234). This followed the protocol of the Mine Act and occurred 10 days after the citation. (Tr. 230-231, 244). Respondent told Valentin that it had used the "three-points of contact" method, as Martinez had done, for 5-10 years, believed it was safe, and had never been told to discontinue the practice. (Tr. 231-232). Valentin upheld the citations, noting that the use of the handrails as a ladder and using three points of contact was not allowed. (Tr. 231). Villahermosa testified that "three points of contact" was for areas that already had safe access, like a ladder. (Tr. 258, 266). It was for moving hands-free and without falling on safe access. (Tr. 259). It could not be used everywhere. (Tr. 259). It is not for scaling handrails and structures. (Tr. 259). Villahermosa never cited anyone simply for the use of "three points of contact." (Tr. 266-268).

Several weeks after the inspection and the Valentin meeting, Jose Figueroa conducted a 110(c) investigation. (Tr. 230, 245-246). It was during the investigation that Collazo first heard information that contradicted the citation. (Tr. 232, 234, 245). Specifically, Martinez stated that he was not at the mill spout when the inspector arrived. (Tr. 148-149, 233). Martinez had not spoken with management about Villahermosa's instructions to not tie off until that time. (Tr. 148-149). He did not know until the investigation that MSHA believed he was caught standing on top of the mill without tying off. (Tr. 164-167). Martinez explained to Figueoroa that Villahermosa had asked him to demonstrate climbing the mill and asked him not to tie off when he reached the top. (Tr. 233-234). He explained that after he demonstrated how he climbed the inspector took the picture. (Tr. 233-234). Vargas corroborated Martinez's story for Collazo. (Tr. 165-166, 234, 246-247). Martinez did not talk to Collazo about the condition until after the MSHA investigation, despite seeing Collazo during the interim. (Tr. 152-153).

During the investigation, Vargas asked Martinez why there was a picture of him not tied off and Martinez explained he was following Villahermosa's instructions. (Tr. 166-167). However, Vargas was present when Villahermosa told Martinez not to tie off, so he was already aware. (Tr. 167). Martinez conceded that in an October 18, 2012 deposition he testified that he did not speak with anyone, including Vargas, about the instructions. (Tr. 150-154).

In an October 17, 2012 deposition, Collazo stated that he filed a verbal complaint against Villahermosa with Figueroa during the investigation. (Tr. 252-253). Specifically, he told Figueroa that Villahermosa had lied and that Martinez's statement was the truth. (Tr. 253-254). Collazo also stated that Respondent did not file a formal complaint with MSHA. (Tr. 253). However, because Respondent had learned about the discrepancies between the citation and events, Collazo wrote a complaint letter to Michael Davis. (Tr. 234-235, 244, 247). He did not receive a response. (Tr. 234-235, 248). During the 110(c) investigation, Figueroa told them that Davis received the letter and that his investigation would cover the citations and the allegations in the letter. (Tr. 235). No further letter was sent to Davis because Collazo believed that one was enough and feared negative repercussions for the company if he did more. (Tr. 235-236). Collazo did not bring a copy of the letter to the hearing, but had one. (Tr. 248).

II. CONTENTIONS OF THE PARTIES REGARDING CITATION NO. 8269720

The Secretary issued two citations following the November 23, 2010 inspection. One citation was issued for an alleged failure on the part of Martinez to tie off on Mill No. 11 when working. (GX-12). The other citation was issued for an alleged failure of Respondent to provide safe access to the top of Mill No. 11. (GX-5).

With respect to Citation No. 8269720 (alleged failure to tie off), the Secretary asserts that Respondent violated 30 C.F.R. §56.15005, that this violation was highly likely to result in fatal injuries to one miner, that the violation was S&S, and that it resulted from high negligence. (GX-12)(*Secretary's Post-Hearing Brief* at 18-24). The Secretary also asserts that a penalty of $9,122.00 is appropriate. (*Id.*)

Respondent asserts this it did not violate the cited standard. (*Respondent's Post-Hearing Brief* at 14). It further avers that if a violation existed, it was unlikely to result in any injury, that any injury sustained would be "lost workday/restricted duty" rather than fatal, and its actions would be better characterized as showing "low" or "no" negligence. (*Id.*) Presumably, Respondent would also prefer a reduction in the penalty.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CITATION NO. 8269720

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

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

On November 23, 2010, Inspector Villahermosa issued a 104(a) Citation, No. 8269720, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> A miner was observed working on top of the #11 Mill without the safety harness and line tied. The miner had the harness on but was not tied. The miner was exposed to falling from approximately 7 feet to the walkway and sustaining serious or fatal injuries. The mine operator was aware the miner was going to

perform the task but did not ensure the miner had an area where to tie off without being exposed to a falling hazard.

This condition was a factor that contributed to the issuance of order 8629719 dated 11/23/2010. Therefore, no abatement time was set.

(GX-12).

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

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

30 C.F.R. §56.15005.

With respect to a 30 C.F.R. §56.15005 violation, "the Commission has held that a danger of falling exists when an informed, reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines." *Hunt Martin Materials, LLC*, 2013 WL 1856613, *5 (Sept. 2013)(ALJ Simonton), *citing Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983); *see also United Taconite, LLC*, 2014 WL 1010076, * 12 (Feb. 2014)(ALJ Lewis). Therefore, the issue here is two-fold: was the miner wearing belts or lines and, if not, would a reasonably prudent person recognize a danger of falling. *See e.g. Boart Longyear Company*, 2014 WL 586878, *7 (Jan. 9, 2014)(ALJ Barbour).

In the instant matter, The Secretary presented evidence that Respondent violated the cited standard, as described in the citation. Inspector Villahermosa credibly testified that upon seeing Martinez he noted that the miner was wearing his harness, but was not tied off. (Tr. 24, 26, 28-29). The photographic evidence supports this conclusion. (Tr. 41) (GX-13). Therefore, I find that Martinez was not wearing safety belts or lines in the manner required by regulation.

As a result, the only issue remaining in determining the validity of this citation is whether a reasonably prudent person would recognize a danger of falling. Once again, I find that the Secretary presented credible evidence to prove, by a preponderance of the evidence, that such a reasonably apparent danger existed. Inspector Villahermosa testified that the top of the mill, where the miner was working and standing, was not intended as a walking surface. Specifically, the top of the mill posed a slipping hazard because it was rounded and dusty. (Tr. 31-32, 258). In addition, there was no handrail or other protection to prevent a fall. (Tr. 25). The evidence also showed that the top of the mill was 7 feet above the walkway and roughly 10-12 feet from the top of the mill to the ground below. (Tr. 25, 95). Commission case law has consistently held that a fall anywhere from 7 to 12 feet poses a danger. *See e.g. Grand Western Electric Co.*, 5 FMSHRC at 843 (holding that 12 feet is a substantial height from which to fall); *Morton Company, LP*, 31 FMSHRC 427 (Marc. 2009)(ALJ) (holding that a fall from 7 feet was S&S); *Laramie County Road & Bridge*, 17 FMSHRC 902, 905 (Jun. 1995)(ALJ) (holding that a fall of 8-12 feet was S&S); and *United Taconite, LLC*, 2014 WL 1010076, *supra* (holding that a fall

danger of 65-inches constituted a violation of 30 C.F.R. §56.15005).

Both the unsuitability of the mill as a walking surface, the lack of guardrails, and the dangerous height of the mill were obvious indications of danger. Therefore, I find that a reasonably prudent person seeing the cited condition would have recognized that the miner standing on the mill without fall protection was in danger of falling and that belts *and* lines were warranted. As such, the citation at issue here was validly issued.

In its brief, Respondent asserted several arguments to support its claim that this citation was invalid. (*Respondent's Post-Hearing Brief* at 7-9). However, those arguments are not supported by the evidence.

Respondent argued that both Vargas and Martinez consistently testified that Inspector Villahermosa had created the dangerous situation. (*Respondent's Post-Hearing Brief* at 7). Specifically, Respondent's witnesses testified that Villahermosa asked Martinez to climb up the mill. (Tr. 119). Further, they testified that when Martinez reached the top of the mill, his failure to tie off was the result of Villahermosa's specific instructions. (Tr. 119, 124-126, 143-144, 158, 173, 181). Therefore, Respondent argues that it was not responsible for the violation and that the citation was invalid.

I find the testimony of Respondent's witnesses on this point to be incredible. First, I find the accounts given by Respondent's witnesses to be inconsistent. Martinez testified that he was approached by Villahermosa as he was standing on the platform and that Vargas arrived later, as they were speaking. (Tr. 119, 128). Vargas testified that he was working at the ground level when Villahermosa arrived and that he and the inspector approached Martinez together. (Tr. 170-172). Martinez testified that after he explained how he climbed the mill, Villahermosa requested that he demonstrate. (Tr. 119, 125, 142-143). Conversely, Vargas testified that Villahermosa interrupted Martinez's explanation to demand a demonstration. (Tr. 172). Furthermore, Martinez and Vargas' testimony is inconsistent with Collazo's testimony. Specifically, Martinez and Vargas stated that when Martinez reached the top of the mill, Villahermosa told him to sit down without tying off. (Tr. 119, 173). Collazo testified instead that Martinez tied off on the top, but that Villahermosa asked him to untie and then sit down. (Tr. 233-234). Respondent's witnesses cannot agree on the basic facts surrounding this violation.

In addition to these discrepancies, Respondent's witnesses did not behave in a manner consistent with their testimony that Villahermosa ordered the violation. Martinez testified that he knew that Villahermosa's alleged instructions were unsafe, but never objected (Tr. 144-145). More importantly, after the citation was issued, Martinez did not complain about Villahermosa's actions to MSHA or to his supervisors *at that time*. (Tr. 150-154). Similarly, Vargas did not object to Villahermosa placing the miner in danger. (Tr. 99). Also, Vargas did not speak to his supervisor or MSHA about Villahermosa's alleged actions after the citation was issued. (Tr. 175-176-183-184). The fact that each witness passively accepted an admittedly unsafe situation and then neglected to speak about it undermines the credibility of those witnesses. Such action is unnatural and unbelievable.

With respect to informing his supervisors, Martinez testified that he told Vargas about Villahermosa's dangerous instructions several days after the citation. (Tr. 166-167). However, Vargas was present when Villahermosa gave the unsafe instructions. (Tr. 167). This testimony is strange because, if Vargas was present to hear Villahermosa give the dangerous instructions, then there was no need for Martinez to apprise him of that fact several days later. (Tr. 167). Further, Martinez's testimony on this point at hearing directly contradicted his deposition testimony. (Tr. 150-154). Moving up the corporate hierarchy, Vargas and Martinez testified that they did not speak to their supervisor, Collazo, about Villahermosa's alleged actions even when a meeting was held regarding the citation. (Tr. 227). After the citation was issued, Collazo testified that he spoke with Vargas and Martinez and told them they could no longer use the railing to climb the mill. (Tr. 229). However, despite this admonition from their supervisor, neither Vargas nor Martinez took the opportunity to explain that Villahermosa had instigated the violation. (Tr. 227). The fact that neither witness chose to speak seriously undermines the credibility of their testimony.

Collazo's testimony further adds to the problems with Respondent's argument. Collazo testified that he did not learn that Villahermosa directed Martinez not to tie off until a month after the citation, during the 110(c) investigation. (Tr. 232-234). Collazo testified that after receiving this information, he wrote a letter to MSHA. (Tr. 234-236). He testified that he learned that MSHA had received this letter from Figueroa during the 110(c) investigation. (Tr. 234-236). Callazo's testimony is absurd. If Callazo learned about Villahermosa's instructions during the 110(c) investigation, then it was impossible for the investigator to have information regarding a letter Callazo wrote complaining about that instruction. He would have had to write the letter before he learned of a reason for drafting that letter. As Respondent presented no evidence that Callazo was capable of somnambulant psychic letter-writing, no weight can be given to this testimony.

Finally, regardless of the actions or testimony of Respondent's witnesses, I find that there would be no reason for Inspector Villahermosa to ask Martinez to climb the mill. "Once an inspector has identified a violation, there is no requirement in the Mine Act or Commission case law that he endanger himself or a miner by exposure to the conditions giving rise to the violation." *Western Industrial, Inc.*, 25 FMSHRC 449, 453 (Aug. 2003). If Martinez told the inspector that he worked on top of the mill and the inspector felt that doing so was a violation of the Act, he was within his rights to issue a citation. The inspector did not need to place Martinez in danger to justify the issuance of the citation. In short, there was no incentive for Inspector Villahermosa to entrap Respondent.

This inconsistent testimony and inexplicable behavior is insufficient evidence upon which to base a finding that the Inspector framed or had some sort of vendetta against Respondent. Instead the far more likely scenario, and the one supported by the preponderance of the evidence, is the explanation given by Inspector Villahermosa. Specifically, that the inspector arrived at the mill following an anonymous tip and found a miner already standing on top of the mill, untied. (Tr. 24, 26, 28-29). Villahermosa consistently testified to these events at all stages of this litigation and the photographic evidence supports his testimony. This would explain why Respondent's witnesses related different stories and why they did not quickly complain about Villahermosa's action: there was nothing to complain about. I find that Respondent's witnesses

either became confused about events that occurred several years in the past or, perhaps, formulated their stories after the fact for the purposes of litigation.[12]

In a related argument, Respondent contended that the inspector's testimony was unreliable and could not form the basis of a finding that a violation took place. (*Respondent's Post-Hearing Brief* at 7-8). I find that there is no credible evidence to support this claim. I will address each instance of allegedly unreliable testimony from the inspector in turn.

Respondent noted that Villahermosa testified that he saw the miner from a distance, but that photographs submitted by Respondent's counsel showed that he could not possibly see the top of the mill until he was standing on the platform below. (*Respondent Post-Hearing Brief* at 7-8). However, the photographs relied upon by Respondent were admitted only as demonstrative evidence so show what the area looked like. (Tr. 81-83, 127, 161-162). Those photographs did not show Villahermosa's point of view when he entered the area and are not evidence of what he could see. (Tr. 81-83). Villahermosa credibly testified that from where he approached the mill, he could see the miner on top of the mill from a distance. (Tr. 24-26). In fact, one of Villahermosa's photographs shows the miner at a distance. (GX-13). I find Villahermosa's testimony on this point credible and consistent with other evidence in this proceeding.

Respondent contended the Villahermosa was also unreliable because he was unable to recall how he reached the mill area. (*Respondent's Post-Hearing Brief* at 8). In so doing, Respondent refers to an exceedingly confusing section of the transcript (the testimony contained several references to locations situated "here" and "there" with no explanation as to what "here" or "there" meant relative to anything else). (Tr. 82-83). In that section Villahermosa stated that, in reviewing photographs taken by Respondent's counsel, he was unsure of where he had entered the area. (Tr. 82-83). He stated that the inspection had been three years earlier and he was not positive of which route, between two possible avenues, he had taken. (Tr. 83). However, Respondent's counsel conceded that the photographs had been taken just weeks before the hearing. (Tr. 84). No witness ever authenticated these photographs. It is entirely possible that the area looked different in the photographs than it did during the inspection. Further, as stated *supra*, the point of view in the photographs was not the same as the one Villahermosa had during the inspection. (Tr. 81-83). A photograph shown from the angle of his approach may have refreshed the inspector's memory. Perhaps most importantly, I find that even if Villahermosa simply forgot the route he took to reach the mill, this failure to recall would not be grounds upon which to discredit his testimony. Inspector Villahermosa's goal that day was to inspect the mine for violations, not to memorize a route. Inspector Villahermosa sufficiently recalled the substantive aspects of his inspection; failure to recall unnecessary details does not undermine his credibility.

Respondent further contended that Villahermosa was unreliable because on direct examination he did not state that he asked the anonymous informant why he should inspect the mill, but on cross-examination he stated he did. (*Respondent's Post-Hearing Brief* at 8).

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[12] Considering the latter explanation, the obviously ill-conceived and poorly executed *ad hominem* attack on the veracity of Inspector Villahermosa utterly fails. The scheme hatched to place blame on the inspector is readily transparent. Indeed, the idea that a MSHA inspector would order a miner to perform any act prohibited by safety regulations is simply preposterous.

Respondent fails to note in its brief that during direct examination, Villahermosa was not questioned about what he stated to the anonymous informant. (Tr. 22-23). Only when Respondent's counsel specifically asked Villahermosa his response to the miner, did the inspector provide that information. (Tr. 77). Villahermosa's testimony was in no way inconsistent and I find no reason to question his credibility on this point.[13]

Respondent also argued that it was strange Villahermosa could remember the details of who he spoke with during this inspection, but could not remember the name of the person who spoke to regarding the BC-N conveyor citation, which occurred two years later. (*Respondent's Post-Hearing Brief* at 8)(Tr. 59). While it is true that Inspector Villahermosa never stated who he spoke with regarding the BC-N conveyor Order, there is a good reason for this. No one asked. The evidence does not show that Villahermosa was unsure who he spoke with, the record is completely silent on that issue. I do not find Villahermosa's testimony is incredible simply because he did not answer a question that was not asked.

Respondent's final argument with respect to Villahermosa's credibility is that the Inspector could remember minute details of the inspection but could not recall where he waited for Respondent's representative after lunch. (*Respondent's Post-Hearing Brief* at 8). As noted *supra*, the Inspector's goal that day was to inspect the mine for violations, not to memorize locations. The fact that the inspector could recall details regarding the violations but could not recall irrelevant details does not undermine his credibility. In fact, it shows that he was focused on the substantive matter at hand.

Respondent attempts to contrast Villahermosa's alleged lack of credibility with Vargas' credibility. (*Respondent's Post-Hearing Brief* at 7-8). Specifically, Respondent noted several times that Vargas no longer worked for Respondent and, therefore, his testimony was unbiased. (*Id.*). As noted *supra*, there are several logical inconsistencies in Respondent's witnesses' testimony that undermine Vargas' credibility, regardless of his level of bias. Further, Vargas testified that he was still friends with several of Respondent's miners. (Tr. 178). Therefore, he was not wholly neutral or disinterested. Perhaps most importantly, even if Vargas were credible, that would not change the fact that Villahermosa was also credible while Martinez and Collazo were not.

Respondent's final argument was that a reasonably prudent person would not perceive this condition as a danger. (*Respondent's Post-Hearing Brief* at 8-9). To that end, Respondent argued that Villahermosa was overly pessimistic regarding the hazard posed by a 7-foot fall. (*Id.*). Further, it noted that pads eyes were present for tie off on top of the mill. (*Id.*). As noted *supra*, relevant case law supports a finding that a 7-foot fall can pose a serious hazard. In fact, the existence of the pads eye shows that Respondent recognized that a 7-foot fall could pose a danger. The danger of a fall was apparent to anyone working for Respondent and this tie-off point was added. Unfortunately, Martinez was not tied off when the Inspector arrived. (Tr. 24, 26, 28-29). Therefore, the miner was exposed to a fall. A reasonably prudent person would recognize this exposure.

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[13] Respondent's attempt to undermine the credibility of the inspector through misrepresentation of the record has the effect of bolstering the Inspector's testimony and undermining the credibility of Respondent.

The preponderance of the evidence shows that Martinez was not properly wearing the required belts or lines and that a reasonably prudent person would recognize a danger of falling. Therefore, this citation was validly issued.

2. The Violation Was Highly Likely to Result in a Fatal Injury to One Miner And Was Significant And Substantial In Nature

Inspector Villahermosa marked the gravity of the cited danger in Citation No. 8269720 as "Highly Likely" to result in "Fatal" injury to one person. (GX-12). These determinations are supported by a preponderance of the evidence.

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

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

30 C.F.R. §100.3(e).

The event against which the instant standard, 30 C.F.R. §56.15005 is essentially stated in the language of the rule. Specifically, the standard is designed to protect miners from situations in which "there is danger of falling." Here, the inspector credibly testified that a fall from the top of the mill was highly likely to result in a fatal injury. Specifically, Inspector Villahermosa stated that the top of the mill, where Martinez was standing, was not intended as a walking surface. Instead, the top of the mill was rounded and dusty, creating a slipping hazard. (Tr. 31-32, 258). Further, there was no handrail or other protection to prevent a fall. (Tr. 25). Finally, the miner was not tied off. (Tr. 24,26, 28-29, 96). Given these conditions, it was highly likely that a miner working and using equipment on top of the mill would eventually slip and fall the 7 feet to the walkway below. A fall from that height could be fatal. Inspector Villahermosa credibly testified that if Martinez fell 7 feet, there could be fatal injury, broken or dislocated bones, twisted ankles, or other injuries depending on how he landed. (Tr. 39, 46). Relevant case law supports a finding that a fall from around this height onto a walkway can be fatal. *See e.g.*, *United Taconite, LLC*, 2014 WL 1010076, *supra*. Therefore, a fall was highly likely to result in fatal injury.

Respondent argued that such a fall would be unlikely to result in a fatality because the tie off points were a reasonable and acceptable safety measure that prevented a fall. (*Respondent's Post-Hearing Brief* at 11). As noted *supra*, the credible evidence shows that the miner was not tied off was highly likely to fall 7 feet onto his head or neck. (Tr. 31-34, 258). Perhaps if the miner had used the tie-off point, the likelihood or the severity of the danger would be lessened. Unfortunately, Martinez was exposed to a 7-foot fall while standing on a slippery, rounded mill. Respondent's argument is not supported by the evidence.

Finally, only one miner was on top of the mill. (Tr. 24, 26). There was no indication that more than one miner would ever be working on top of this area. As a result, the preponderance of the evidence supports a finding that one person would be affected.

Therefore, I find that the cited violation was highly likely to result in fatal injuries to one miner. I will now turn to the S&S designation in this matter.

Well-settled Commission precedent sets forth the standard used to determine if a violation is S&S. A violation is S&S "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). The Commission later clarified this standard, explaining:

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

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

With respect to the first element, the underlying violation of a mandatory safety standard, it has already been established that Respondent violated 30 C.F.R. §75.15005.

With respect to the second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – As discussed *supra*, the cited condition contributed to the danger of a fall. The miner was standing on a mill 7 feet above a platform without a tie-off. (Tr. 24, 26, 28-29, 126, 131-132). As has already been stated, this made a fall highly likely.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. The preponderance of the evidence establishes that the hazard contributed to in this matter would be reasonably likely to result in injury.

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

Co., 27 FMSHRC 899, 906 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996).

If the hazard contributed here were realized, specifically if the miner were to fall off of the mill, an injury would be highly likely. Inspector Villahermosa credibly testified that if Martinez fell 7 feet to the walkway below, there could be a fatal injury, broken or dislocated bones, twisted ankles, or other injuries depending on how he landed. (Tr. 39, 46). Other ALJs have found similar hazards to be sufficiently likely to cause injury to support an S&S designation. *See e.g. Morton Company, LP*, *supra*; *Laramie County Road & Bridge*, *supra*; and *United Taconite, LLC*, *supra.*

Respondent argued that the hazard contributed to by this violation created no likelihood of an injury. (*Respondent's Post-Hearing Brief* at 11). However, this argument was not compelling. Respondent argued that the inspector testified that any fall would be serious, but that this understanding was not "objective." Further, Respondent argued that it used precautions to prevent a fall. The Inspector's understanding of whether a fall would be serious at different heights is immaterial to this issue. The only issue is whether a fall from 7 feet would be reasonably likely to result in an injury. The credible evidence shows that such a fall could result in a multitude of injuries. (Tr. 39, 46). Further, the evidence showed that no "precautions" were used. The miner was standing on top of the mill and was not tied off. (Tr. 24, 26, 28-29). Therefore, the third prong of *Mathies* is met.

Under *Mathies,* the fourth and final element that the Secretary must establish is that there was a "reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC at 3-4; *U.S. Steel*, 6 FMSHRC 1573, 1574 (July 1984). As discussed *supra*, the inspector credibly testified that a fall from the mill could result in serious, perhaps fatal injury. (Tr. 39, 46). A fatal injury (or broken bones) would be undoubtedly be serious. As a result, the fourth prong of *Mathies* is met.

As a result of these factors, I find that the Secretary proved the violation was S&S by a preponderance of the evidence.

3. Respondent's Conduct Displayed "High" Negligence.

In the citation at issue, Inspector Villahermosa found that the operator's conduct was highly negligent in character. (GX-12).

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

> (d) Negligence. Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence. The negligence criterion

assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.

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

I find that Respondent knew about the violation and that there were no mitigating factors. With respect to knowledge, well-settled Commission precedent recognizes that the negligence of an operator's agent is imputed to the operator for penalty assessments and unwarrantable failure determinations. *See Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-197 (Feb. 1991); and *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-1464 (Aug. 1982). An agent is defined as someone with responsibilities normally delegated to management personnel, has responsibilities that are crucial to the mine's operations, and exercises managerial responsibilities at the time of the negligent conduct. *Martin Marietta Aggregates*, 22 FMSHRC 633, 637-638 (May 2000) *see also* 30 U.S.C. §802(e) (an agent is "any person charged with responsibility for the operation of all or part of a...mine or the supervision of the miners in a...mine.").

With respect to the instant violation, the evidence shows that Respondent's agent, Vargas, had actual knowledge of this violation. There is no question that Vargas was an agent. His title was Industrial Mechanic Supervisor and he testified that he oversaw the work of the mechanics like Martinez. (Tr. 169). In fact, Vargas directed Martinez to climb on top of the mill. (Tr. 26-27). Villahermosa testified that when he arrived at the mill, Vargas was watching Martinez. (Tr. 40-41). Martinez and Vargas both conceded that Vargas was present and observed Martinez on top of the mill; albeit with the discredited explanation that Villahermosa caused him to be there. (Tr. 128, 145, 173). As a result, it is clear that Vargas, and therefore Respondent, was aware of the violation.

Having found the requisite knowledge, the next issue is whether there were any mitigating circumstances. I find that none existed. Therefore, I find the Secretary's designation of "high" negligence appropriate.

Respondent argued that there were mitigating circumstances. It noted again that precautions were taken for working atop the mill, including the installation of pad-eyes. *(Respondent's Post-Hearing Brief* at 11-12). While the installation of pad-eyes may have been a mitigating circumstance if they were used, the evidence here shows that the miner was not tied off. (Tr. 24, 26, 28-29). The mere existence of a tie off point, if unused, does not mitigate Respondent's negligence.

Respondent also argued that Martinez followed all safety precautions until he was required to stop by Inspector Villahermosa. (*Respondent's Post-Hearing Brief* at 12). As noted *supra*, I do not find any reliable evidence exists to support a finding that Inspector Villahermosa framed Respondent. As a result, I cannot find the alleged conspiracy by MSHA to be a mitigating circumstance.

4. Penalty

Under the assessment regulations described in 30 CFR §100, the Secretary proposed a penalty of $9,122.00 for Citation No. 8269720. The Commission has affirmed that ALJs are not bound the Secretary's proposals. *Sec. v. Performance Coal Co.*, (Docket No. WEVA 2008-1825 (8/2/2013) (*see also* 30 U.S.C. §820(i) and 29 C.F.R. §2700.30(b)). However, the Commission also held that, although there is no presumption of validity given to the Secretary's proposed assessments, substantial deviation from the Secretary's proposed assessments must be adequately explained using §110(i) criteria. (*Id.* at p. 2). (*see also Cantina Green*, 22 FMSHRC 616, 620-621 (May 2000)). However, having affirmed the Secretary's determinations in all respects, no deviation is necessary. In fact, the proposed penalty is appropriate under the Act. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $9,122.00 with respect to this violation.

IV. CONTENTIONS OF THE PARTIES REGARDING CITATION NO. 8269721

With respect to Citation No. 8269721 (alleged failure to provide safe access), the Secretary asserts that Respondent violated 30 C.F.R. §56.11001, that this violation was reasonably likely to result in fatal injuries to one miner, that the violation was S&S, that it resulted from high negligence, and that it was an unwarrantable failure to comply. (GX-5)(*Secretary's Post-Hearing Brief* at 13-18). The Secretary also asserts that a penalty of $11,900.00 is appropriate. (Id.)

With Respect to Citation No. 8269721, Respondent asserts that the alleged violation was unlikely to result in any injury, that any injury sustained would be "lost workday/restricted duty" rather than fatal, and its actions would be better characterized as showing "low" or "no" negligence. (*Respondent's Post-Hearing Brief* at 14.) Presumably, Respondent would also prefer a reduction in the penalty.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CITATION NO. 8269721

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §56.11001.

On November 23, 2010, Inspector Villahermosa issued a 104(d)(1) Citation, No. 8269721, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> A safe access was not provided to work on top of #11 Mill. A welder climbed the area using the hand rails and mill structure to climb on top of the mill. The welder was exposed to sustaining serious or fatal injuries if he fell from approximately 7 feet to the ground. The Mechanical Supervisor showed a lack of degree of care since he directed the welder to work in the area and observed him access the area without taking any preventative or corrective actions. Mechanical Supervisor Carlos Vargas engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the lack of safe access to the top of the mill and directed the welder to access the area. Mr. Vargas also observed the welder climb using the rails and mill structure and did not take any actions to stop the welder. This was an unwarrantable failure to comply with a mandatory standard. The mine operator has been cited 9 times for this standard.

(GX-5).

The cited standard, 30 C.F.R. §56.11001 ("Safe Access"), provides the following:

> Safe means of access shall be provided and maintained to all working places.

30 C.F.R. §56.11001.

The Commission has held that this standard "comprises the dual requirements of providing and maintaining safe access to working places." *Watkins Engineers & Constructors*, 24 FMSHRC 669, 680 (July 2002) (citation omitted). The Commission held that the second portion of that duty, to "maintain" safe access" is "an on-going responsibility ... to ensure that a means of safe access is utilized." *Id.* In reading and applying the terms of section 56.11001, the Commission has utilized a "plain meaning" approach. *See e.g. Lopke Quarries, Inc.*, 23 FMSHRC 705, 707-708 (July 2001). In determining the plain meaning of 30 C.F.R. §56.11001, the Commission has previously approved of the using the definition of "safe" found in *Webster's Third New International Dictionary 1998* (1993), which defines "safe" as "secure from threat of danger, harm, or loss." *Western Industrial, Inc.*, 25 FMSHRC at 452. Therefore, the existence of a §56.11001 violation turns on whether access to a work area posed a danger to miners. *Id.* Because the cited standard is broadly worded, determining in a given situation whether a danger existed should consider whether "a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the" hazard. *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990).

In the instant matter, The Secretary presented credible evidence that Respondent violated the cited standard, as described in the citation. There is undisputed evidence that Martinez was assigned to climb up the mill platform to perform repairs. (Tr. 116). Further, there is no question that Martinez used the handrails as a sort of makeshift ladder to climb up the mill. (Stip. 21) (Tr. 26-28, 119-125, 129-130, 173). In fact, Vargas saw Martinez climb up the handrails in this manner. (Stip. 22) (Tr. 35, 173). Villahermosa credibly testified that Martinez did not tie off with his harness as he climbed. (Tr. 28-29). Villahermosa further testified that this condition exposed Martinez to serious or fatal injury from a fall. (Tr. 30-32, 34). Such an injury could have been caused by falling from the handrail or from falling while higher up and

hitting his head. (Tr. 119-123). The miner also could have fallen during descent from the mill. (*Secretary's Post-Hearing Brief* at 15).

A reasonably prudent person would have recognized that an untied miner, scrambling up a handrail while untied would face a hazard. Utilizing this method of accessing the top of the mill was unsafe. Therefore, the citation is valid.

In its brief, Respondent asserted several arguments to support its claim that this citation was invalid. (*Respondent's Post-Hearing Brief* at 7-9). However, those arguments are not supported by the evidence.

As with Citation No. 8269720, Respondent argued that both Vargas and Martinez consistently testified that Inspector Villahermosa had created the dangerous situation. (*Respondent's Post-Hearing Brief* at 7). Respondent also contended that Inspector Villahermosa's testimony regarding the access was unreliable. (*Id.* at 7-8). For the reasons discussed with respect to Citation No. 8269720 *supra*, I find that the substantial evidence does not support these arguments. To the contrary, I find that a preponderance of the evidence supports Inspector Villahermosa's credible testimony that Martinez used the unsafe access cited before Villahermosa had arrived at the mill. (Tr. 24, 26, 28-29, 96). Further, I find that Villahermosa's testimony, in contrast to the testimony of Vargas and Martinez, was highly credible.

Respondent also argued that the way in which the miner accessed the work area was safe. (*Respondent's Post-Hearing Brief* at 8-9) Respondent claimed that pads eyes were present and that Martinez claimed that he tied off while climbing. (Tr. 32, 123-124, 141-142) I credit the testimony of Inspector Villahermosa that Martinez was not tied off while climbing. (Tr. 96). I further credit the testimony of the inspector that even if the miner had been tied off, that he would have been exposed to a danger, albeit a slightly lesser one. (Tr. 32, 265). The cited condition occurred at an industrial work site, not at a jungle gym. There was absolutely no reason for a miner to be climbing on handrails or scrambling up the side of a mill. Even if Martinez had been tied off, it would still be inappropriate and unsafe for him to climb on the handrails and structure in this manner. A ladder, like ones provided at other mills at the mine, should have been provided for Martinez.

With respect to safety, Respondent also noted that Martinez's hands were empty as he climbed, that he maintained "three points of contact" and that items were handed up to him (rather than carried during the climb). (*Respondent's Post-Hearing Brief* at 9). The evidence presented supports these assertions; however these issues are largely inconsequential to the outcome here. Even if Martinez's hands were empty and he was able to maintain "three points of contact" there was still a violation of the cited standard. The issue was that Martinez scrambled to the top of the mill using handrails. Even if his hands were free, he was exposed to a dangerous fall from the mill. Further, as noted by Judge Lewis in discussing a similar standard, "[n]othing in the Act, regulations, or case law provides an exception to the rule based on points of contact. Respondent cites to no legal authority for the proposition that three or four points of contact eliminates an imminent fall danger." *United Taconite, LLC*, 2014 WL 1010076, *supra.*

Villahermosa testified that "three points of contact" is a standard used for otherwise safe access, not for scrambling up the side of equipment. (Tr. 258, 266).

Respondent also argued that Inspector Villahermosa's belief about the degree of danger was unreasonable. (*Respondent's Post-Hearing Brief* at 8-9). Specifically, it noted that the Inspector believed that Martinez was in danger of a serious injury even when he was only four feet off the ground. (Tr. 265). I credit the testimony of Inspector Villahermosa that a fall, even from as low as four feet, could pose a serious danger to a miner. However, I further find that this issue is largely academic. The evidence presented shows that the miner was exposed not only to a four foot fall, but a seven foot fall from climbing. As discussed at length with respect to Citation No. 8269720, such a fall would constitute a serious danger. As a result, whether a four-foot fall could cause a serious or fatal injury is irrelevant to the instant matter.

Respondent's final argument is that use of the handrails was not prohibited by MSHA's rules or regulations and that Respondent had used this method to climb for ten years. (*Respondent's Post-Hearing Brief* at 9). While it is true that the standard does not specifically state that climbing on handrails is prohibited, this is because the standard is broadly worded to encompass any unsafe access. The fact that this broad statement does not include a specific reference to climbing up the side of a mill is not fatal to this citation. Further, the Commission has held that the issue with respect to such a broadly worded standard is not actual notice, but whether a reasonably prudent person would recognize the danger. *Ideal Cement Co.*, *supra.* Even if Respondent had no prior notice that scrambling up the side of the mill was unsafe, it should have been readily apparent to anyone watching, including Vargas, that Martinez was in danger of falling. Therefore, Respondent's argument does not undermine the validity of this citation.

The preponderance of the evidence shows that the access provided was unsafe. Therefore, this citation was validly issued.

2. <u>The Violation Was Reasonably to Result in a Fatal Injury to One Miner And Was Significant And Substantial In Nature</u>

Inspector Villahermosa marked the gravity of the cited danger in Citation No. 8269721 as "Reasonably Likely" to result in "Fatal" injury to one person. (GX-5). These determinations are supported by a preponderance of the evidence.

The event against which the instant standard, 30 C.F.R. §56.11001 is applied is exposure to dangerous conditions while accessing a workplace. Here, the inspector credibly testified that a fall while climbing up the mill would be reasonably likely to result in a serious, perhaps fatal, injury. (Tr. 30-32, 34). Specifically, Inspector Villahermosa testified that if Martinez had fallen while climbing up the handrails, he could have hit his head or neck. (Tr. 119-123). This type of fall could have resulted in a broken neck or fractured skull. (Tr. 34). Martinez could also have been injured as he reached the top of the mill and fallen from an even greater height. (Tr. 31-32, 34, 133). He could have also fallen during his descent. As the miner was untied and using handrails (and other structure) in an unintended fashion to climb, such injuries were reasonably likely to occur.

Respondent argued that such a fall would be possible, but would be less serious because the miner was tied off. (*Respondent's Post-Hearing Brief* at 12-13). As discussed at length *supra*, I found that Martinez and Vargas to be incredible witnesses as it relates to Martinez accessing the mill. I credit the testimony of Inspector Villahermosa that the miner was not tied-off when he first arrived and further that Martinez conceded that he had not tied off on his climb. (Tr. 24, 26, 28-29, 96). Further, given the unintended use Martinez made of the handrails and the mill, as well as the large amount of equipment and other items in the mill area, I find that even if Martinez was tied-off, he faced considerable hazards. Therefore, I affirm the Secretary's findings with respect to gravity.

Finally, only one miner was on top of the mill. (Tr. 24, 26). There was no indication that more than one miner would ever be working on top of this area. As a result, the preponderance of the evidence supports a finding that one person would be affected.

With respect to S&S, the first element - the underlying violation of a mandatory safety standard - it has already been established that Respondent violated 30 C.F.R. §75.11001.

With respect to the second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – was also met. As discussed *supra*, the cited condition contributed to the danger of a fall. The miner was scrambling up the side of a mill using handrails to a work area 7 feet above a platform (10 feet above the ground) without a tie-off. (Tr. 39, 46). The miner was reasonably likely to fall.

Respondent argued that the cited condition did not contribute to a safety hazard because climbing the structure was safe, even if other methods might have been safer. (*Respondent's Post-Hearing Brief* at 12). As discussed at length, Respondent's decision to allow Martinez to scramble up the side of the mill untied exposed the miner to a fall. This is not a conflict between two "safe" options, one preferred by the operator and one by the inspector. Respondent's method did *not* provide the requisite safety to the miner.

Respondent also argued that the cited condition did not contribute to a safety hazard because the miner used "three points of contact" and was tied. (*Respondent's Post-Hearing Brief* at 12). As noted before, the use of "three points of contact" does not transform an otherwise unsafe access into a safe access. As noted by the inspector, "three points of contact" is a safety precaution used for proper forms of climbing, like using ladders or stairs, not for scrambling up handrails. (Tr. 258, 266). Further, as discussed *supra*, I credited the testimony of Inspector Villahermosa that the miner was not tied off. However, I find that even if Martinez was tied off, the miner's method of scrambling up the side of the mill on the handrails exposed him to a fall, which constitutes a safety hazard. Therefore, even if he were tied off, the second prong of *Mathies* would be met.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. The preponderance of the evidence establishes that the hazard contributed to in this matter would be reasonably likely to result in injury. As discussed

supra, in the event of a fall from the side or top of the mill, a miner would be reasonably likely to suffer an injury, including a fractured neck or skull or other serious injuries. (Tr. 39, 46).

Respondent argued that the hazard contributed to by this violation created no likelihood of an injury because the miner was tied off. (*Respondent's Post-Hearing Brief* at 12). Once again, I credited the testimony of Inspector Villahermosa that the miner was not tied off. Further, even if the miner had been tied off, the unsafe climb still exposed the miner to a fall that would have result in an injury. Therefore, even if he were tied off, the third prong of *Mathies* would be met.

The fourth element - that the injury be of a reasonably serious nature - was also met. As discussed *supra*, the inspector credibly testified that a fall from the mill could result in serious, perhaps fatal injury. (Tr. 39, 46). A fatal injury (or a fracture neck) would be undoubtedly be serious. As a result, the fourth prong of *Mathies* is met.

As a result of these factors, I find that the Secretary proved the violation was S&S by a preponderance of the evidence.

3. Respondent's Conduct Displayed "High" Negligence and an Unwarrantable Failure.

In the citation at issue, Inspector Villahermosa found that the operator's conduct was highly negligent in character. (GX-5). The substantial evidence supports this designation.

With respect knowledge, the factual situation presented here is substantially similar to that in Citation No. 8269720. Specifically, a supervisor within in the definition provided in 30 U.S.C. 802(e) and *Martin Marietta Aggregates*, *supra*, witnessed the cited action and actually directed it. (Tr. 26-27, 40-41). Therefore, Vargas was clearly aware of the violation. Further, as a supervisor, Vargas' conduct was imputed to Respondent. *Whayne Supply Co.*, *supra*; *Rochester & Pittsburgh Coal Co.*, *supra*; and *Southern Ohio Coal Co.*, *supra*.

Having found the requisite knowledge, the next issue is whether there were any mitigating circumstances. I find that none existed. Therefore, I find the Secretary's designation of "high" negligence appropriate.

Respondent argued that there were mitigating circumstances. However, Respondent addressed those arguments in its brief to the issue of unwarrantable failure. As a result, those arguments will be discussed in the unwarrantable failure discussion *infra*.

The Commission has recognized the close relationship between a finding of unwarrantable failure and a finding of high negligence. *San Juan Coal Co.*, 29 FMSHRC 125, 139 (Mar. 2007) *see also Consolidation Coal Company*, 22 FMSHRC 340, 353 (2000) (holding that if there is mitigation, an unwarrantable failure finding is inappropriate). *Emery Mining Corp.*, defines an unwarrantable failure, as "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997, 2002 (Dec. 1987). Such conduct may be characterized as reckless disregard, intentional misconduct, indifference, or serious lack of

reasonable care. *Id.* at 2004; *see also Buck Creek Coal*, 52 F.3d 133, 135-136 (7th Cir. 1995). The Commission formulated a six-factor test to determine aggravating conduct. *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1350-1351 (Dec. 2009). While each factor does not need to be present in order to find unwarrantable failure, all six factors must be considered. The Administrative Law Judge will consider each of those factors in turn:

1. Extent Of The Violative Condition

This particular condition occurred on a single, damaged mill at the mine. While Respondent had been cited for similar conditions in the past (as will be discussed *infra*), the instant violation was not particularly extensive.

2. The Length of Time of the Violation Existed

The evidence showed that the condition had existed for some time. The uncontested evidence shows that Martinez climbed the mill twice a month for two years. (Tr. 129-130). Therefore, the condition was quite lengthy.

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

The violation at issue here was obvious and posed a considerable danger. Martinez scrambled up the side of the mill in plain sight and was, in fact, under the observation of Vargas. Climbing on equipment that is not intended for climbing is obviously a violation of the act. As discussed, *supra*, a reasonably prudent person would have been aware that this was a violation of the act.

Similarly, the evidence shows that the condition posed a high degree of danger. As noted in the gravity discussion, this condition was reasonably likely to result in fatal injuries to a miner and was S&S. There is no question that the condition posed a high degree of danger.

Respondent argued that the condition was neither obvious nor posed a high degree of danger because it "took every precaution" to ensure that the employees ascended safely. (*Respondent's Post-Hearing Brief* at 13). Those precautions included the harness, three points of contact, and free hands. (*Id.*). Of course, one precaution that Respondent failed to take was to provide a ladder or some other form of access that was intended to be used for climbing. Instead, the miner was required to scramble up the side of the mill using handrails and structure as a ladder. I find that Respondent exposed the miner to a dangerous fall as a result of this improvised access method. For the reasons discussed at length earlier, the un-tied harness, three points of contact, and free hands did not lessen this danger. Further, they did not make the danger any less obvious, the miner was still scrambling up the side of the mill with no ladder at a dangerous height. Therefore, the evidence does not support Respondent's argument.

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

Respondent was aware that greater efforts were needed. The Secretary presented evidence that Respondent had been cited nine times in the past for similar violations. (*Secretary's Post-Hearing Brief* at 17). Past citations are relevant to the issue of whether Respondent had notice. *IO Coal* at 1353-1355. Therefore, Respondent had meaningful notice that the cited condition was not permissible and should have taken action to correct it.

Respondent argued that it did not receive notice because it had been climbing in this manner for 10 years without being told that it was unsafe. (*Respondent's Post-Hearing Brief* at 13). There is no requirement that an MSHA inspector explain to an operator each and every action that might constitute a violation of every standard. The nine previous citations should have given Respondent ample notice that it was doing something wrong.

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

The evidence shows that the condition was abated without delay.

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

"It is well-settled that an operator's knowledge may be established, and a finding of unwarrantable failure supported, where an operator reasonably should have known of a violative condition." *IO Coal Co.*, 31 FMSHRC at 1356-1357 (*citing Emery*, 9 FMSHRC at 2002-2004). A supervisor's knowledge and involvement is an important factor in an unwarrantable failure determination. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) *citing* (*REB Enterprises, Inc.*, 20 FMSHRC 203, 224 (Mar. 1998) and *Secretary of Labor v. Roy Glenn*, 6 FMSHRC 1583, 1587 (July 1984). In fact, a supervisors actual knowledge can be imputed to the Respondent for purposes of determining an unwarrantable failure, in addition to the penalty. *Whayne Supply Co.*, *supra*; *Rochester & Pittsburgh Coal Co.*, *supra*; and *Southern Ohio Coal Co.*, *supra*. As discussed *supra*, the preponderance of the evidence shows that Vargas actually directed and witnessed Martinez's actions. Therefore, his knowledge can be imputed to Respondent. Respondent had actual knowledge of the existence of this violation.

In light of the length of time the violation had existed, the obviousness and high degree of danger posed by the condition, the notice Respondent received, Respondent's knowledge of the cited condition, and the fact that Respondent's actions are best characterized as "high" negligence, I find that this violation was an unwarrantable failure on the part of the operator.

4. Penalty

Having affirmed the Secretary's determinations in all respects, no deviation in the civil penalty is necessary. In fact, the proposed penalty is appropriate under the Act. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $11,900.00 with respect to this violation.

Defective Equipment Citation

I. SUMMARY OF TESTIMONY

Villahermosa was at the Cantera Canas Mine on August 26, 2010 and inspected the equipment. (Tr. 46-47). Usually, the person accompanying Villahermosa for the inspection organizes the equipment for examination. (Tr. 49-50). The inspections can occur at the shop area or out on the road. (Tr. 50). During this inspection, Villahermosa and the safety representative, Noe Arroyo, went to the road and waited for the trucks. (Tr. 51). This allowed them to inspect trucks while they were loaded, as required. (Tr. 50-51).

During that inspection Villahermosa issued Citation No. 8544130 (GX-15) for failure to take several pieces of defective equipment out of operation. (Tr. 47-49, 100-101). None of the equipment inspected had tags, markings, or was placed in an area indicating it was out of service. (Tr. 51). Villahermosa informed Arroyo of each violation and that that the overall inspection of mobile equipment was ineffective. (Tr. 57, 59-60). The maintenance shop coordinator, Horacio Terron learned about the conditions later, when he returned to the plant.[14] (Tr. 189). Terron was away from the plant periodically between July and October 2010 for private medical reasons, including the day of the instant inspection. (Tr. 198-199).

Inspector Villahermosa testified that two of Respondent's cranes had non-functioning parking brakes, deteriorated seats, no load charts, missing engine guards, and one had a seat belt unattached and lying on the floor. (Tr. 47, GX-16). When Villahermosa arrived, the seat belt for Crane 771 was located on the tire. (Tr. 55-56). Lack of seatbelt could result in serious injury in a collision. (Tr. 52). If the cranes were to run off the road or hit a berm, a miner could be thrown from the equipment and suffer a fatal injury. (Tr. 52,66). The miner could be run over by the equipment after ejection. (Tr. 66).

Inspector Villahermosa also found that a lack of load charts could result in too much weight being placed on the crane causing a collapse and fatalities. (Tr. 52, 66). However, Respondent told Villahermosa that they would not load the cranes to the maximum capacity and he had no information to contradict that claim. (Tr. 106). Further, Terron learned in a personnel meeting that the operator had used the equipment for about 15 years and had not used a load chart in years. (Tr. 195-196). The operator was trained in the equipment and was used to working with it. (Tr. 196).

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[14] Horacio Osvaldo Terron Vanga appeared at hearing and testified for Respondent. (Tr. 185). At the time of the hearing, Terron worked for Respondent and had done so since February 2004. (Tr. 186). He started at Respondent as a maintenance planner for the concrete fleet. (Tr. 186-187). He then worked as maintenance chief for the concrete division, maintenance manager for concrete and logistics, the Dessarrollos Multiples (quarry) division, and the coordinator of the maintenance shop in Ponce. (Tr. 187). At the time of the hearing he was the maintenance planner for the milling and packing division inside the plant. (Tr. 187). On August 26, 2010 he was the coordinator of the maintenance shop in the cement plant. (Tr. 188). In that capacity he would plan maintenance of mobile equipment in the quarry. (Tr. 188-189).

In Inspector Villahermosa's opinion, defective parking brakes would allow the crane to roll and strike someone if parked on a hill. (Tr. 52-53, 107-108). However, Villahermosa did not know if the equipment was used on grades. (Tr. 108). Further, the mine used "riggers" as brakes and these most likely would have prevented the vehicle form moving. (Tr. 108).

A defective guard on the crane could allow miners to contact moving parts. (Tr. 53).

The broken seats had existed for a long time, perhaps years and were in bad shape. (Tr. 108). Long-term use of seats without cushion could cause back problems. (Tr. 53, 108). Villahermosa did not recall being informed that Respondent sought new seats to comply with the standard. (Tr. 108).

One of the Pettibone cranes, 771, was parked behind the maintenance shop. (Tr. 102, 190-191, 205, 259-260). Terron testified that it was behind the shed since July 2010 because it had a leak on the bottle for the jacks and was waiting on spare parts. (Tr. 191-193). It was still there at the time of the hearing. (Tr. 193). The area behind the shed was where Respondent parked out-of-service equipment. (Tr. 191). This equipment may only be accessed by a certified mechanic under Puerto Rican law. (Tr. 192-193). Terron testified that it had been there, behind a green truck for several weeks before the inspection and had not moved when he returned to work after the inspection. (Tr. 192, 205). Terron testified that he told Bautista that the 771 crane was out of service in July and that he should not use it. (Tr. 200-201, 206). However, Terron could not be certain that Bautista did not use it when he was out. (Tr. 201).

No one told Villahermosa that the machine had been out of service since June 2010. (Tr. 103). Instead, the equipment operator, Bautista, told the inspector that the equipment was used when the other one, 774, was not working. (Tr. 103, 261-262). In fact, that day Villahermosa asked to inspect machines that would be used and Bautista led him to the 771 crane. (Tr. 260, 272). While he knew the equipment was behind the shed, the operator said it was used on more than one occasion, in June and August. (Tr. 260-261, 272-273). The miner's statement contradicted Terron's testimony. (Tr. 270). Villahermosa testified that operators, including Respondent, often argue that equipment is out of service if he is trying to inspect. (Tr. 269).

Whether the equipment was in use was not included in Villahermosa's notes. (Tr. 269). The fact that Bautista said the equipment was used weeks earlier was in the notes, just not the actual statement. (Tr. 269-270). Generally, Villahermosa does not include whether equipment is in use in his notes. (Tr. 272, 275). The operator determines what equipment is in service. (Tr. 273). He asks what will be in service so he can inspect it. (Tr. 272). If an operator says that equipment is out of service, he would ask why. (Tr. 272). He did not recall anyone telling him the equipment could be used on August 24-26. (Tr. 273-274). It was probably not used that day, but it was used before. (Tr. 271). Further, on the day of the citation, as far as he could tell the 771 crane was ready to be used because it was not tagged. (Tr. 272).

Terron believed that at some point the cabin of 771 was removed. (Tr. 194). Without the cabin, it could not be used. (Tr. 194). He was not sure if anything else was removed. (Tr. 194). Villahermosa believed the crane had a cage when the citation was issued. (Tr. 102-103).

Next, Respondent's front-end-loader did not have safe access. (Tr. 53). Respondent had modified the loader so that it was no longer greased at floor level, but instead at the front of the machine. (Tr. 53-54). In order to reach the front, miners had to climb the loader. (Tr. 54). Some of the miners reached the loader by climbing a ladder or the tire. (Tr. 55). A fall from that point, seven feet high, could cause serious injury or death (depending on how the miner fell). (Tr. 54-55, 65-66, 104). Miners working on this equipment tied themselves to the mirror or handrail, but they could have fallen and hit the structure or, depending on the length of the line, the ground. (Tr. 54-55, 104-106). Such a fall was likely to occur and cause permanently disabling injuries, including severe cuts to the skull or broken bones. (Tr. 105-106). Terron testified that the lubrication technicians could lubricate the equipment by parking the loader close to the balcony and reaching it from there. (Tr. 194-195). However, he never saw anyone perform this task. (Tr. 195).

Respondent had two defective dozers; one was missing a front wiper and another had an uncharged fire extinguisher. (Tr. 66, 107, GX-16). Low visibility from a missing wiper could result in the equipment striking miners or other machinery causing injury to those inside or outside the machine. (Tr. 52, 66). The lack of a charged fire extinguisher could cause serious injury in the event of a fire. (Tr. 67).

Also, Respondent had a water truck with a defective parking brake. (GX-16). If the water truck's parking brake failed, it could result in someone being run over. (Tr. 66-67).

Finally, a haul truck was equipped with a faulty speedometer and fuel gauge. (GX-16).

Terron testified regarding the difficulty he experienced getting additional parts. (Tr. 196-198). While his duties included ordering replacement parts, another department handled the negotiations and purchasing. (Tr. 196). First, Terron would make a request for parts, which had to be authorized. (Tr. 197). Then the request went to the planning department for validation. (Tr. 197). Then the request went to the purchasing department where a negotiator would purchase the part. (Tr. 197). The validation and ordering process took 10 days and then the equipment has to come from the U.S. or another country. (Tr. 197). Then the part would go to the plant. (Tr. 197). Some parts, like for the Caterpillar, arrived more quickly than others. (Tr. 196). There was less support for the Pettibone Cranes because there were no dealers in Puerto Rico and the equipment was old (it was bought used and refurbished 15-20 years ago). (Tr. 197). It is harder to find replacement parts for older, discontinued equipment. (Tr. 198). The replacements were generally new, non-original parts that had to be adapted or modified to work. (Tr. 198). Sometimes the bases or supports had to be modified or adapted. (Tr. 198).

Villahermosa believed the cited conditions were reasonably likely to result in injury because the equipment had defects that affected safety, the conditions were not corrected, and the machines were still being used. (Tr. 65). The equipment operators and miners in the area were those exposed. (Tr. 68). This citation was marked as S&S because there was a lot of equipment with a lot of safety defects, and they were still being used. (Tr. 67).

Villahermosa believed that Terron and Guillermo Vasquez engaged in aggravated conduct because they received daily examination records. (Tr. 60-61, 67). With respect to the

cranes, Bautista, completed a "daily inspection report" of the machines and submitted them to Terron as per Respondent's policy. (Tr. 62-63, 199-200). Such an inspection was supposed to occur on all equipment that was to be used that day and was supposed to check the security points (wipers, seatbelts, fire extinguishers, and other devices). (Tr. 199-200, 204, 270-271). Terron, as Bautista's supervisor, was tasked with collecting these reports and coordinating repairs of defective equipment. (Tr. 61-63). Bautista would leave the reports in Terron's office and he would review, but not sign, them. (Tr. 202, 206-207). If Bautista said the equipment was defective, Terron would get a mechanic to inspect it and then take it out of service. (Tr. 202, 207). Terron had the authority to do so. (Tr. 63-64, 202).

Terron reviewed the daily inspection report for the 771 Crane dated August 24, 2010. (Tr. 204). That report showed that the crane was defective. (Tr. 67-68). Specifically, that it had leaks in its hydraulic system, rusted wires, a broken cabin, and a broken seat. (Tr. 207-208). The leak was the reason the crane was removed from service in July. (Tr. 208). However, Terron did not take action to prevent exposure. (Tr. 67-68). In fact, that daily report says that the equipment was available for service. (GX-28, Tr. 204-205, 268-269). Bautista said that equipment was used when reported hazardous. (Tr. 260, 269) There were two crane inspections that day, showing that both cranes, not just 774, were available. (Tr. 262-263, 279).

Vasquez was the quarry coordinator and was a supervisor for other mobile equipment operators. (Tr. 64, 202-203). Vasquez also knew about these defects because his employees had turned in inspection forms. (Tr. 65). Both the miners and Vasquez stated that these forms were turned in. (Tr. 65). He also had authority to remove unsafe equipment from service. (Tr. 203).

Villahermosa believed Respondent was highly negligent because it was aware of the cited conditions and took no corrective action. (Tr. 68). He also believed this condition was an unwarrantable failure to comply because there were defects, Respondent continued to use the equipment, and miners were exposed to hazards. (Tr. 68). The equipment should have been repaired or removed from service. (Tr. 68).

II. CONTENTIONS OF THE PARTIES

The Secretary issued a citation following the August 26, 2010 inspection. This citation was issued for an alleged failure to take defective equipment out of service. (GX-15).

With respect to this citation, No. 8544130, the Secretary asserts that Respondent violated 30 C.F.R. §56.15005, that this violation was reasonably likely to result in fatal injuries to one miner, that the violation was S&S, that it resulted from high negligence, and that it was an unwarrantable failure to comply. (GX-15)(*Secretary's Post-Hearing Brief* at 24-32). The Secretary also asserts that a penalty of $3,689.00 is appropriate. (*Id.*)

Respondent asserts that the alleged violation was unlikely to result in any injury, that any injury sustained would be non-fatal, and its actions would be better characterized as showing "moderate" negligence. (*Respondent's Post-Hearing Brief* at 16.) Presumably, Respondent would also prefer a reduction in the penalty.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That 30 C.F.R. §56.1400(c) Was Violated.

On August 26, 2010, Inspector Villahermosa issued a 104(d)(1) Citation, No. 8544130, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> The mine operator did not ensure that defects on mobile equipment that affect safety were corrected in a timely manner to prevent the creation of a hazard to persons. The mine operator received the inspection reports and did not make any effort to correct the reported conditions. Some conditions were reported for several months without corrections or preventative actions taken while allowing the equipment to be operated with the defects. Not correcting hazards and allowing equipment to be used can lead to serious or fatal injuries. Horacio Terron (Maintenance Coordinator) and Guillermo Vazquez (Quarry Coordinator) engaged in aggravated conduct constituting more than ordinary negligence in that he was aware that of the mobile equipment safety defects and allowed the equipment to be used by miners. This violation is an unwarrantable failure to comply with a mandatory standard.

(GX-15).

The cited standard, 30 C.F.R. §56.14100(c) ("Safety Devices and Maintenance Requirements"), provides the following:

> When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

30 C.F.R. §56.14100(c).

As Judge Weisberger noted in *Dix River Stone, Inc.*, "to show a violation of Section 56.14100(c) *supra*, the Secretary must establish 1) the existence of a defect, that 2) makes continued operations hazardous to persons, and 3) the machine was not taken out of service." 32 FMSHRC 1779, 1784 (Nov. 2010)(ALJ). In order to find a violation, each of those factors must be met. *See e.g. North Idaho Drilling, Inc.*, 2013 WL 4140375, *9-10 (Aug. 7, 2013)(ALJ Manning) (finding a violation did not exist when there was a defect, the machine was not taken out of service, but continued operations did not expose miners to a hazard). In discussing a similar standard, the Commission stated that equipment is still in service if it "is located in a normal work area, fully capable of being operated." *Ideal Basic Industries, Cement Division*, 3 FMSHRC 843, 845 (April 1981); *see also Mountain Parkway Stone, Inc.*, 12 FMSHRC 960, 963 (May 1990) (equipment was in use when it was "parked in the mine in turn-key condition and had not been removed from service.") The Commission found that allowing equipment to stay

"parked in a primary working area could allow operators easily to use unsafe equipment yet escape citation merely by shutting it down when an inspector arrives." *Id.* Therefore, the equipment does not have to be actually used, just be available for use.

In the instant matter, credible evidence establishes that there were several pieces of equipment at the mine that were defective. (*See Secretary's Post-Hearing Brief* at 24-26). Inspector Villahermosa testified at length about the various dangers that would arise from these defects. (Tr. 47, 52-55, 65-67, 104-108). In addition, Respondent was cited 12 times for these pieces of defective equipment and paid the levied fines. (GX-15). The payment of a civil penalty constitutes an admission that the cited conduct actually occurred and renders the citation final. *See Old Ben Coal Co.*, 7 FMSHRC 205, 209 (Feb. 1985). Finally, Respondent explicitly concedes in its brief that it was cited for defects in several pieces of equipment. (*Respondent's Post-Hearing Brief* at 16). Therefore, there is no issue as to whether defects existed or as to whether those defects were hazardous to persons under continued operations. The only question is if the equipment was taken out of service.

The Secretary presented credible evidence to support a finding that the equipment at issue here was not removed from service. Perhaps most persuasively, Respondent had conducted pre-operational examinations of the cited equipment. (Tr. 199-200)(GX-28). This is especially important because Respondent would only conduct pre-operational examinations on equipment that was going to be used that day. (Tr. 204-205). Therefore, under Respondent's protocols, there was no question that the defective equipment was "in use." It had been prepared for operation on the day of the inspection with every indication that it would be used.

Even without the pre-operational examinations, the evidence shows that this equipment was not removed from service. The evidence shows that the cited equipment was sitting in the regular work area. Inspector Villahermosa credibly testified that he conducted his inspection of the equipment in an active work area, so that he could see the equipment while loaded. (Tr. 50-51). Further, none of the equipment was marked "out of service" or placed in an area specifically marked for "out-of-service" equipment. (Tr. 51). Further, when Inspector Villahermosa inspected the equipment, no one told him that the specific pieces he was citing were not being used. (*Secretary's Post-Hearing Brief* at 28). This type of action would be reasonable if he was inspecting equipment that was actually removed from service. In fact, employees told Villahermosa that the equipment was recently operated. (Tr. 260-261, 269-270, 272-273).

Therefore, the preponderance of the evidence shows that the equipment was not removed from service, but actually in a working area, ready for use, and "available" under existing protocol. In light of the failure to remove this equipment from service, and the fact that the equipment was defective and hazardous, I find that Respondent violated 30 C.F.R. §56.14100(c).

In its brief, Respondent asserted several arguments to support its claim that this citation was invalid. (*Respondent's Post-Hearing Brief* at 8, 16). However, those arguments are not supported by the evidence.

As with the Mill Citations, Respondent contended that the inspector's testimony was unreliable and could not form the basis of a finding that a violation took place. (*Respondent's Post-Hearing Brief* at 8). I find that there is no credible evidence to support this claim. I will address each instance of allegedly unreliable testimony from the inspector in turn.

First, Respondent noted that Inspector Villahermosa could not remember where he inspected the Pettibone Crane No. 771 and did not include that information in his notes. (*Respondent's Post-Hearing Brief* at 8). This assertion is based on Inspector Villahermosa's testimony. (Tr. 102). However, even though Villahermosa was unsure of the location of the Pettibone Crane, I find him credible. The issue for the inspector was whether Respondent violated a safety standard. He found that found that the crane was dangerously defective. (Tr. 47, 52-53, 55-56, 66, 107-108). He also found that it was not tagged out of service and was, in fact, given a pre-shift examination so that it could be used that day. (Tr. 51). Those were the relevant facts needed to find a violation of the cited standard. The location of the crane was not relevant to that issue. I find that it is natural that the inspector would not include the location in his notes and that he would not remember irrelevant details during the three years between the inspection and the hearing.

Respondent also questioned Inspector Villahermosa's credibility because he did not include in his notes that a miner told him the Pettibone Crane No. 771 was being used. Specifically, the inspector stated that a miner told him that the equipment had recently been used, but did not include the miner's actual statement in the notes. (Tr. 268-270). But this is not relevant. The equipment was ready for use and could have been used. In fact, Villahermosa asked Respondent's representative to take him to the active equipment and the miner brought him to the Pettibone Crane No. 771. (Tr. 260, 272). Again, Villahermosa credibly testified to the substantive issues in this matter, his failure to recall irrelevant trivia does not affect that credibility.

In addition to questioning Inspector Villahermosa's credibility, Respondent also argued that the citation was invalid because it was attempting to correct the problem. (*Respondent's Post-Hearing Brief* at 16). It argued that it tried to correct the problems, but did not have time. (*Id.*). There is no evidence, beyond Terron's self-serving testimony, that Respondent made any attempts to correct the cited conditions. (Tr. 196-198). There are no receipts, no work orders, and no invoices to show that repairs were being made. However, even if there were, Respondent would still have violated the cited standard. The standard does not require Respondent to make efforts to repair defective equipment. It requires operators to remove defective equipment from service. Here there was defective equipment that was still available for use. Even if all the replacement parts were sitting at Respondent's mine and there were concrete plans to repair the equipment the next day, Respondent still violated the standard by not removing the equipment from service while the repairs were pending. Respondent's argument, even if supported by the evidence, would not undermine the validity of this citation.

2. The Violation Was Reasonably Likely to Result in a Fatal Injury to One Miner And Was Significant And Substantial In Nature

Inspector Villahermosa marked the gravity of the cited danger in Citation No. 8544130 as "Reasonably Likely" to result in "Fatal" injury to one person. (GX-15). These determinations are supported by a preponderance of the evidence.

The event against which the instant standard, 30 C.F.R. §56.14100(c) is applied is exposure to hazards related to defective equipment. Here, the inspector testified credibly testified that various defects in the equipment exposed miners to a reasonable likelihood of serious injury. With respect to the bulldozer, missing windshield wipers, in the event of low visibility or inclement weather, could impair the vision of the operator to the extent that he would be unable to see other miners walking or working in his vicinity resulting in a collision. (Tr. 66). With respect to the crane, the absence of seatbelts could cause an operator to be thrown from the cabin if he went over a berm or down a steep decline. (Tr. 66). Further, if the cranes' booms broke because the operator erroneously lifted loads that exceeded their capacity, the broken booms and the loads could cause serious or fatal injuries if they struck individuals in the vicinity. (Tr. 66). Defective brakes on those cranes or on the water truck could cause the vehicles to roll away and strike miners. (Tr. 66). All of these pieces of equipment were extremely heavy and would cause fatal injuries if they struck a miner. In addition, a defective guard on a crane could allow miners to contact moving parts. (Tr. 53). A miner falling from the front-end loader, even if tied, could suffer serious injury. (Tr. 54-55, 104-106). Deteriorated seats could also cause some long-term injuries to miners. (Tr. 53, 108). In short, the defective equipment exposed miners to a multitude of potential hazards, most fatal, that were reasonably likely to occur while the equipment was in service.

Only one miner would likely be affected by these conditions at any one time.

With respect to S&S, the first element, the underlying violation of a mandatory safety standard, it has already been established that Respondent violated 30 C.F.R. §56.14100(c).

With respect to the second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – was also met. The cited condition, failure to remove defective equipment from the mine, contributed to several discrete safety hazards. Miners were exposed to being struck by faulty equipment, to being thrown from and crushed by faulty equipment, to being crushed by broken equipment, to contacting moving equipment, to a fall, and to possible long-term back injury. (Tr. 47, 52-55, 65-67, 104-108).

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. The preponderance of the evidence establishes that the hazard contributed to in this matter would be reasonably likely to result in injury. As discussed *supra*, if a miner was struck by these large pieces of equipment, the likely result would be a crushing or striking injury. (Tr. 52-53, 107-108, 66-67). Other pieces of equipment, like the crane with a missing guard, exposed the miners to other types of injury. (Tr. 53-55, 65-67, 104-106, 108).

The fourth element -that the injury be of a reasonably serious nature - was also met. As discussed *supra*, the inspector credibly testified that in the event the hazards here were realized, miners being struck or crushed by large equipment would suffer fatal injury. Other defects exposed miners to serious, if less fatal, injuries. As a result, the fourth prong of *Mathies* is met.

As a result of these factors, I find that the Secretary proved the violation was S&S by a preponderance of the evidence.

Respondent argues that this citation should not be S&S because 10 of the underlying twelve violations were not S&S. (*Respondent's Post-Hearing Brief* at 16). Of course, that means that two of the underlying twelve violations were S&S. If the dangers associated with some of the underlying defects were S&S, then obviously failure to remove the defective equipment from service was also S&S. It would defy logic if the existence of defective equipment was S&S, but the presence and use of that equipment was not.

3. Respondent's Conduct Displayed "High" Negligence and an Unwarrantable Failure.

In the citation at issue, Inspector Villahermosa found that the operator's conduct was highly negligent in character. (GX-15). The substantial evidence supports this designation.

The facts establish that Respondent, through its agent, had actual knowledge of the cited condition. Terron was the coordinator of maintenance and a supervisor within in the definition provided in 30 U.S.C. 802(e) and *Martin Marietta Aggregates*, *supra*. (Stip. 9)(Tr. 188). The same was true of Vasquez, the quarry coordinator. (Tr. 65, 202-203). At the mine, equipment operator's would conduct pre-shift examinations and submit the reports to Terron and/or Vasquez. (Stip. 10) (Tr.65). Terron and Vasquez were responsible for correcting defects found as a result and could remove defective equipment from service. (Tr. 60-64, 67, 203). In the instant matter, the equipment operator, Bautista, submitted forms on August 24, 2010 that clearly stated that the Pettibone Crane No. 771 was defective.[15] (Tr. 67-68). Terron reviewed this report but did not take action to prevent exposure. (Tr. 67-68, 204). In fact, that daily report shows that the equipment was available for service. (GX-28) (Tr. 204-205, 268-269). Bautista stated that equipment was used when reported hazardous. (Tr. 260, 269) Vasquez was also aware of defects in the equipment. (Tr. 65). Therefore, Terron and Vasquez had actual knowledge that hazardously defective equipment was not removed from service. As supervisors, Terron and Vasquez's conduct was imputed to Respondent. *Whayne Supply Co.*, *supra*; *Rochester & Pittsburgh Coal Co.*, *supra*; and *Southern Ohio Coal Co.*, *supra*.

Having found the requisite knowledge, the next issue is whether there were any mitigating circumstances. I find that none existed. Therefore, I find the Secretary's designation of "high" negligence appropriate.

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[15] The report showed the crane had leaks in its hydraulic system, rusted wires, a broken cabin, and a broken seat. (Tr. 207-208). The leak was the reason the crane was removed from service in July. (Tr. 208). There were two crane inspections that day, showing that both cranes, not just 774, were available. (Tr. 262-263, 279).

Respondent argued that there were mitigating circumstances. However, Respondent addressed those arguments in its brief to the issue of unwarrantable failure. As a result, those arguments will be addressed in the unwarrantable failure discussion *infra*.

The Secretary cited Respondent's conduct as an unwarrantable failure to comply with the cited standard. A preponderance of the evidence, as analyzed in through the *IO Coal* factors, supports this determination:

1. Extent Of The Violative Condition

The cited condition dealt with several different pieces of equipment. (Tr. 47-49, 100-101). Further, some of the equipment had more than one defect. (Tr. 47, 53, 68) (GX-16). This equipment was examined and reported to management, but it was placed into service or at least made available for service. (Tr. 67-68). The evidence supports the Secretary's characterization that Respondent had a "culture of neglect" with respect to the equipment at the mine. (*Secretary's Reply Brief* at 16). I find that the cited condition was extensive.

2. The Length of Time of the Violation Existed

The evidence showed that the condition had existed for some time. The evidence showed that, for example, the Pettibone Crane No. 771 was damaged for over a month, but remained in service. (Tr. 67-68, 204-205, 268-269)(GX-28). Further, Inspector Villahermosa testified that some of the deterioration in the equipment that he observed would have taken considerable time to develop. Therefore, the condition was quite lengthy.

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

The violation at issue here was obvious and posed a considerable danger. As discussed at length *supra*, the dangerously defective equipment was highly likely to result in fatal or other serious types of injury. (Tr. 47, 52-55, 65-67, 104-108). Miner could have been struck or crushed by equipment, caught within equipment, thrown from equipment, and falling from equipment. The condition was also obvious. The defective equipment included easily visible conditions like missing seatbelts and warning signs. Further, the defects were actually observed during pre-shift examinations, indicating that they were obvious to a prudent examiner. (Tr. 67-68, 207-208)(GX-28).

Respondent argued that the condition was neither obvious nor posed a high degree of danger because it did its best comply with the standard, but did not have sufficient time. (*Respondent's Post-Hearing Brief* at 16-17). There is some evidence that Respondent had attempted to repair the defects, albeit in the form of self-serving testimony without documentation. (Tr. 196-198). However, Respondent was not cited for failure to repair equipment. It was not required under the cited standard to repair equipment. It was required to remove defective equipment from service. Repair was optional. There is no indication in the evidence that Respondent made any effort to remove equipment from service. Instead, records show that the equipment was in regular work areas and was marked "available" on pre-shift reports. The evidence does not support Respondent's argument.

Respondent also argued that the equipment did not pose a danger because it was not actually used, notwithstanding the "available" marking on the pre-shift reports. (*Respondent's Post-Hearing Brief* at 17). It asserts that the body of those reports indicated that the equipment was not available. (*Id.*). As discussed *supra*, "removal from service" does not simply turn on whether the equipment is actually used. Even if the equipment cited here was not actually used (though the evidence supports a finding that it was), the violation was that the equipment was sitting in the regular work area in turn-key condition and was in no way marked as "out-of-service." In fact, Respondent's documentation indicated that this equipment was "available" and was examined in a way that only active equipment was examined. I find nothing in the body of any of the documents submitted that indicated that equipment otherwise marked as "available" was actually "unavailable." Therefore, the evidence does not support Respondent's argument.

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

Respondent was aware that greater efforts were needed with respect to the equipment. As noted, Respondent had, just days before the instant citation, been cited 12 times for failure to maintain mobile equipment. (GX-27). Further, Respondent knew from its own records (the pre-shift examinations) that it had extensive problems with its mobile equipment. Respondent had sufficient notice that the equipment it had marked "available" for use on the day of the citation was in no condition to be operated.

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

The evidence shows that the condition was abated without delay.

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

As discussed at length in the negligence section, *supra*, Respondent's agents Terron and Vasquez had actual knowledge of the cited condition from the pre-shift reports. (Tr. 60-61, 67). A supervisor's actual knowledge can be imputed to the Respondent for purposes of determining an unwarrantable failure, in addition to the penalty. *Whayne Supply Co.*, *supra*; *Rochester & Pittsburgh Coal Co.*, *supra*; and *Southern Ohio Coal Co.*, *supra*. Therefore, this knowledge can be imputed to Respondent. Respondent had actual knowledge of the existence of this violation.

In light of the extensive nature of the condition, the length of time the violation had existed, the obviousness and high degree of danger posed by the condition, the notice Respondent received, Respondent's knowledge of the cited condition, and the fact that Respondent's actions are best characterized as "high" negligence, the Administrative Law Judge finds that this violation was an unwarrantable failure on the part of the operator.

4. Penalty

Having affirmed the Secretary's determinations in all respects no deviation in the civil penalty is necessary. In fact, the proposed penalty is appropriate under the Act. Therefore,

Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $3,689.00 with respect to this violation.

BCN Conveyor Citation

I. SUMMARY OF TESTIMONY

Villahermosa reviewed Citation No. 8643560 (GX-27), which was issued pursuant to previous violations. (Tr. 68-69). The initial citation, given on March 1, was issued because material was spilled along the BCN conveyor, creating unsafe, hazardous access to the area. (Tr. 68-69, 214). The problem was caused because the chute that lowered raw cement material from the conveyor was damaged, resulting in spillage. (Tr. 212-214).

Imilcen Rivera recalled that after the initial citation, she called someone to close off the area and then put a plan in place for the area to be cleaned.[16] (Tr. 214). Maintenance cleaned the spillage. (Tr. 214). Respondent then made a risk evaluation for the BCN conveyor and developed a protocol to correct the conditions. (Tr. 237). This included reconstruction of the roof of the chute which would take six months and cost $300,000.00. (Tr. 215, 237). It would take time to fix the condition because there was over 20,000 tons of raw material in the warehouse that needed to be emptied before the belt could be reached. (Tr. 215, 238). The contractor's plans were complicated and made on a month-to-month basis while the plant adapted. (Tr. 215). The condition was corrected in August 2012. (Tr. 238-239).

Rivera testified that in the interim, the area was constantly cleaned because if the material too high, it would stop the conveyor. (Tr. 216, 219). They had someone check the conditions each day and clean the mounds of material with a shovel and bucket. (Tr. 219, 242). There were miners in the cited area, but only to prepare the area to be cleaned. (Tr. 239).

Respondent received five time abatement extensions because it was unable to correct the problem. (Tr. 69). Rivera testified that several inspections found that the condition still existed. (Tr. 215-216). Each time, Respondent closed and cleaned the walkway. (Tr. 216, 237-238). After the fifth extension, and a month before the instant citation, Villahermosa saw that the material was still present and footprints were in the material so he issued an Order. (Tr. 70-71, 241). Respondent had placed yellow tape around the area, but there were still footprints in the material. (Tr. 71). Collazo felt that the abatement periods given were too short, especially considering Respondent told MSHA the condition would take six months to repair. (Tr. 241). Collazo testified that the inspector knew on each of these subsequent inspections what Respondent was trying to do. (Tr. 238). If miners were required to leave this area until MSHA verified that the condition was corrected, Respondent's business would grind to a halt. (Tr. 241).

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[16] Imilcen Rivera appeared at hearing and testified for Respondent. (Tr. 210). Rivera worked at Respondent as a Safety Coordinator and had done so for a year and eight months. (Tr. 210). Before that he had worked as a safety coordinator for Marlin, a contractor, for nine years. (Tr. 210-211). Rivera's nickname is Emily, which appears on some forms. (Tr. 211-212).

With respect to Citation No. 8643560, Villahermosa once again observed footprints in the material and broken tape. (Tr. 71-74, 216). The area was not closed off and there was about two feet of material with footprints in it (though they did not measure it). (Tr. 216-217). Rivera testified that there were two footprints; the first was at the beginning of the pile and maybe half an inch deep and the second was farther in, but shallower and partial. (Tr. 217-218, 220-221). Rivera believed that someone had stepped in, not put their full weight in, and stepped out (she was not present to see them made and could not be sure). (Tr. 218, 220-222). There was no third footprint in the material. (Tr. 221). Villahermosa saw more than two; he saw a trail. (Tr. 263). Collazo told Villahermosa that the footprints were present because miners went over the area to clean it. (Tr. 264). Villahermosa told Collazo that this was improper because it exposed miners to the hazard and that miners should have begun cleaning at the front. (Tr. 264). Respondent had not complied with the Order. (Tr. 71).

Miners could have slipped and hit structure or twisted an ankle or wrist. (Tr. 75). Laborers and mechanics were affected when traveling through the area. (Tr. 74-75).

Respondent was highly negligent because miners continued to access the area in an unsafe manner. (Tr. 74).

II. CONTENTIONS OF THE PARTIES

The Secretary issued a citation following the above-described inspection. This citation was issued for an alleged failure to correct or limit exposure to a previously cited hazard. (GX-27).

With respect to this citation, No. 8643560, the Secretary asserts that Respondent violated Section 104(b) of the Act, that this violation had no likelihood to result in injuries to a miner, and that it resulted from high negligence. (GX-27)(*Secretary's Post-Hearing Brief* at 32-34). The Secretary also asserts that a penalty of $5,000.00 is appropriate. (*Id.*)

Respondent asserts that the alleged violation would be better characterized as showing "low" negligence. (*Respondent's Post-Hearing Brief* at 19.) Presumably, Respondent would also prefer a reduction in the penalty.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That 30 U.S.C. §814(b) Was Violated.

On June 20, 2012 Inspector Villahermosa issued a 104(a) Order, No. 8643560, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> The mine operator continued to allow personnel to transit along conveyor BC-N with approximately 2-1/2 feet of spilled material even though a 104(b) Order No. 8643534 for non-compliance was issued by MSHA on May 24, 2012. His order required the walkway next to the conveyor to withdrawn from service until the

spilled material was removed and a safe access is obtained. Foot prints were observed on top of the spilled material indicating a person or persons transited the area. Area was not closed off. This condition has not been designated "significant and substantial) because the conduct violated a provision of the Mine Act rather than a mandatory Safety or health standard

(GX-27).

The cited Section, 30 U.S.C. §814(b) ("Citations and Orders") provides the following:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds(1) that a violation described in a citation issued pursuant to subsection (a) of this section has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and(2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. §814(b).

The Secretary presented credible evidence that Respondent was issued a 104(a) citation regarding the BCN conveyor on March 1. (Tr. 68-69, 214)(GX-27). Further, Inspector Villahermosa credibly testified that, despite five extensions, Respondent failed to totally abate the cited condition and was issued a 104(b) Order on May 24, 2014. (GX-27). A follow-up inspection showed Respondent had not complied with the 104(b) Order, leading to the instant Order. In its brief, Respondent did not contest the validity of this Order and explicitly stated that it did not intend to dispute any finding by the Secretary, save for the negligence designation. (*Respondent's Post-Hearing Brief* at 18). In light of this fact, and the evidence presented, I find that this citation was valid.

2. The Violation Posed No Likelihood of Injury.

Inspector Villahermosa marked the gravity of the cited danger in Citation No. 8643560 as "No Likelihood" to result in "No Lost Workdays" injury" to a miner. (GX-27). The evidence supports this designation. (Tr. 68-69, 74-75, 214). In its brief, Respondent did not contest gravity designation of this Order and explicitly stated that it did not intend to dispute any finding by the Secretary, save for the negligence designation. (*Respondent's Post-Hearing Brief* at 18). Therefore, I find the preponderance of the evidence supports the Secretary's findings.

3. Respondent's Conduct Displayed "High" Negligence.

In the citation at issue, Inspector Villahermosa found that the operator's conduct was highly negligent in character. (GX-27). The preponderance of the evidence supports this finding.

With respect to knowledge, Respondent absolutely knew the condition existed. Inspector Villahermosa testified that he had issued the initial citation for the messy walkway over a month earlier and further, had been back to the mine five times to extend the abatement period. (Tr. 68-69, 214). Further, Respondent's witness, Rivera, testified that they were attempting to correct the condition but, for various reasons, were unable to do so. (Tr. 214-215, 237-239). Rivera was the Safety Coordinator for Respondent and therefore a supervisor. (Tr. 210). Her knowledge of the cited condition is imputed to Respondent. Therefore, there is no question that Respondent had knowledge that it had failed to abate the cited condition and had failed to comply with the previous Order.

Therefore, the only issue remaining is whether there were any mitigating circumstances. The preponderance of the evidence shows that there is not. Respondent simply failed to comply with the Order and failed to abate the initial citation.

Respondent presented several putative mitigating factors with respect to this order. However, none of those arguments were compelling.

First, Respondent argued that it "did its best" to cordon off the area and keep miners out. (*Respondent's Post-Hearing Brief* at 18). Respondent noted that some miners had been in to bar the area or correct conditions. (Tr. 216, 219, 242, 239). This is not a mitigating factor. Under the 104(b) Order issued on May 24, 2014, Respondent was not permitted to access the cited area until the spilled material was removed and safe access maintained. Its failure to do so is the crux of the citation. Any efforts to cordon off the area were wholly ineffectual. Miners were entering the area and leaving footprints. (Tr. 71-74, 216, 241). This condition occurred on two separate occasions. (Tr. 70-74, 216). When actions taken to prevent, correct, or limit exposure to hazards are grossly inadequate, this is not mitigation. *See e.g. Maple Creek Mining, Inc.*, 26 FMSHRC 539, 555 (Aug. 2005)(ALJ Bulluck). Therefore, Respondent's efforts here were not mitigation.

Next, Respondent argued that a high negligence designation was inappropriate because there were only a few footprints in the material. (*Respondent's Post-Hearing Brief* at 18). However, Inspector Villahermosa credibly testified that there was a "trail" of footprints through the area. (Tr. 263). Therefore, the preponderance of the evidence does not support Respondent's assertion. Perhaps more importantly, this was the second time Respondent had failed to keep miners from this area. The number of times miners were exposed to danger is far more significant that the number of footprints in the material. Finally, the argument seems to be that Respondent only violated that May 24, 2014 104(b) Order a little bit and therefore was less negligent. This, of course, is not mitigation. Respondent is required to comply with all health and safety standards as well as the Order issued pertaining to them.

Next, Respondent argued that it was impossible for the mine to close the plant, because it needed to get 20,000 pounds of "clinker" out of the warehouse before the damaged chute could be serviced. (*Respondent's Post-Hearing Brief* at 19). Respondent was never ordered to close the entire mine. Respondent was ordered to keep the walkway closed. (Tr. 70-71, 241) (GX-27). Respondent could have had full use of the walkway if, at any time, it had demonstrated to MSHA an ability to keep the walkway clear and safe for miners or completely barred. This

could have been as easy as keeping a miner at the walkway to shovel it clean (without climbing on top of the material). In fact, Respondent received five extensions in its efforts to achieve this goal and was unable to do so. Further, even if Respondent was forced to close its plant, I see no reason why this would mitigate its negligence in failing to keep the area clean. Therefore, this is not mitigation.

Finally, Respondent argued the economic situation in Puerto Rico was dire and closing the plant would cause hardship. (*Respondent's Post-Hearing Brief* at 19). Once again, Respondent was not required to close its mine; it was required to keep a single walkway clean or barred. More importantly, this argument is completely unrelated to negligence. The economic situation could, in fact, be dire and Respondent could still be liable under the Mine Act. Respondent presented no evidence that this order or the penalty flowing from it would prevent the company from staying in business. Perhaps most importantly, the health and safety of miners (the "most precious resource" in the mining industry) is not an economic commodity that fluctuates in value with the markets. 30 U.S.C. §801(a). There is no ticker symbol on the Dow Jones for miners' lives. The lives of miners are as valuable in good economic times as bad. I see no reason to find mitigation on these grounds.

In light of the foregoing, I affirm the inspector's finding of "high negligence."

4. Penalty

In light of the fact that the Administrative Law Judge has affirmed the Secretary's citation as issued, it is appropriate to affirm the assessed penalty as issued. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $5,000.00 with respect to this violation.

ORDER

It is hereby **ORDERED** that Citation/Order Nos. 8629720, 8629721, 8544130, and 8643560 are **AFFIRMED**.

Respondent is **ORDERED** to pay civil penalties in the total amount of $29,711.00 within 30 days of the date of this decision.[17]

Kenneth R. Andrews
Administrative Law Judge

[17] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

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/tjb