FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 23, 2014

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

v.

WINN MATERIALS LLC,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. SE 2013-50-M
A.C. No. 40-03094-303407

Docket No. SE 2013-64-M
A.C. No. 40-03094-304286

Mine: Winn Materials, LLC

WINN MATERIALS LLC,
Contestant,

v.

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

CONTEST PROCEEDINGS

Docket No. SE 2012-76-RM
Citation No. 8637419; 11/17/11

Docket No. SE 2012-77-RM
Order No. 8637420; 11/17/2011

Docket No. SE 2012-78-RM
Order No. 8637421: 11/17/2011

Docket No. SE 2012-79-RM
Order No. 8637422; 11/17/2011

Docket No. SE 2012-80-RM
Order No. 8637423; 11/17/2011

Docket No. SE 2012-81-RM
Order No. 8637424; 11/17/2011

Docket No. SE 2012-82-RM
Order No. 8637425; 11/17/2011

Mine ID: 40-03094
Mine: Winn Materials, LLC

DECISION

Appearances: Angele Gregory, Office of the Solicitor, U.S. Department of Labor
618 Church Street, Suite 230, Nashville, TN 37219 for Petitioner

Justin Winter, Adele Abrams P.C.,
4740 Corridor Place, Suite D, Beltsville, MD 20705 for Respondent

Nicholas Scala, Adele Abrams P.C.,
4740 Corridor Place, Suite D, Beltsville, MD 20705 for Respondent

Before: Judge Simonton

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Winn Materials, LLC at the Winn Materials mine, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or "Act"). These cases include seven citations and orders with a total proposed penalty of **$547,100.00**. The parties presented testimony and documentary evidence at the hearing held in Nashville, TN beginning January 8, 2014.

I. INTRODUCTION

Winn Materials, LLC (Respondent) operates an above ground limestone aggregate mine, the Winn Materials mine (the "mine") in Clarksville, Tennessee. Tr. 25. The mine is subject to regular inspections by the Secretary's Mine Safety and Health Administration ("MSHA") pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). The parties stipulated that Winn Materials, LLC is the operator of the mine and that its operations affect interstate commerce and it is subject to the jurisdiction of the Mine Act. Tr. 9-10.

An anonymous caller filed a hazard complaint at 7 PM on November 16, 2011, alleging multiple safety violations at Respondent's Winn Materials mine, including unguarded tail pulleys on the "west side" of the plant. Tr. 11, 27. Acting on the report, MSHA Inspector Michael Hollis inspected the mine the next afternoon, November 17, 2011. Tr. 34-35. Although Hollis was unable to confirm any of the other hazard complaints, he did identify seven tail pulley locations that were either inadequately guarded or completely missing the required guard. Tr. 150. At the time of the inspection, only one of the unguarded belts was allegedly running and no workers were observed in the vicinity of any of the missing guards. Tr. 107, 157. However, none of the conveyor belts were locked or tagged out prior to the inspection. Tr. 311. On the basis of these observations, Hollis issued one 104 (d)(1) citation, five 104 (d)(1) orders for alleged violations of 30 CFR § 56.14107(a) and one 104 (d)(1) order for an alleged violation of 30 CFR § 56.14112(b). Tr. 13-14. During the penalty review process, Hollis eventually determined that all of the violations were the result of Respondent's reckless disregard for the Mine Act and worker safety. Tr. 179-80. Hollis and MSHA supervisors also determined that

Citation No. 8637419 and Orders Nos. 8637420 and 8637422 were 110(b)(2) flagrant violations. Tr. 13.

Respondent filed a notice of contest for each of the seven alleged violations on November 22, 2011. At hearing, Respondent did not contest any of the underlying violations, but did contest the gravity, negligence, unwarrantable failure and flagrant designations. Resp. Br., 1-2. Respondent also argued that the assessed penalties are highly excessive. Resp. Br., 2.

I have prepared a Statement of Law outlining the Commission's instructions regarding: 1) Statute Interpretation; 2) Burden of Proof; 3) Significant and Substantial (S&S) violations; 4) Unwarrantable Failure; 5) Flagrant Violations and 6) Civil Penalty and Special Assessment. I have followed these guidelines for each of the seven contested violations. As the parties generally constructed their arguments regarding the gravity, negligence, 104(d)(1) and 110(b)(2) designations in a cumulative fashion within their post-hearing briefs, I have set forth my findings by citation element rather than by individual citation.

For the reasons stated within, I affirm the underlying violation for all seven citations, but find that the Secretary failed to show, in light of Respondent's credible evidence to the contrary, that any of the violations were S&S or the result of reckless disregard on behalf of Respondent. As such, I have modified all seven citations and orders from 104(d) (1) actions to 104(a) citations. Additionally, having found that Citation No. 8637419, Order No. 8637420, and Order No. 8637422 were neither S&S nor the result of Respondent's' reckless disregard, I have also removed the 110(b)(2) penalty designations from these citations. After accounting for these findings and considering the six statutory penalty criteria, I have ordered Respondent to pay a total civil monetary penalty of $44,000.00.

II. STATEMENT OF LAW

A. Statute Interpretation

The Commission has stated that:

> the operator is entitled to the due process protection available in the enforcement of regulations... When a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express. Laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.

Energy West Mining Co., 17 FMSHRC 1317-18 (internal citations omitted).

However, the Secretary is not required to provide the operator actual notice of its interpretation of a mandatory safety standard, rather:

> "the Commission has applied an objective standard of notice, i.e., the reasonably prudent person test. The Commission has summarized this test as 'whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard."

Energy West Mining Co., 17 FMSHRC 1318 (internal citations omitted).

In the context of guarding violations, the Commission has stated,

> "We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct. See, e.g., *Great Western Electric*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Industries, Inc.*, 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-basis."

Thompson Bros. Coal, 6 FMSHRC 2094, 2097 (Sept 1984).

B. Burden of Proof

The Commission has long held, "In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation." *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (August 1992).

The Commission has described the Secretary's burden as:

> the burden of showing something by a "preponderance of the evidence," the most common standard in the civil law, simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence.

RAG Cumberland Res. Corp., 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

The Secretary may establish a violation by inference in certain situations. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2153. Any such inference, however, must be inherently

reasonable, and there must be a rational connection between the evidentiary facts and the ultimate fact inferred. *Mid-Continent Resources*, 6 FMSHRC 1132, 1138. (May 1984).

If the Secretary has established facts supporting the citation, the burden shifts to the respondent to rebut the Secretary's prima facie case. *Construction Materials*, 23 FMSHRC 321, 327 (March 2001) (ALJ Feldman).

C. Significant and Substantial

A violation is Significant & Substantial (S&S), "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981) (holding that S&S language of Section 104(d) of the Mine Act was not surplusage and required more than a showing of the violation itself.)

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

An S&S designation must be based upon the particular facts surrounding the violation and must be made in the context of continued normal mining operation. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). However, the Secretary "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (holding that failure to maintain emergency equipment was S&S despite low likelihood of emergency occurring); See also *Musser Engineering, Inc. and PBS Coals*, 32 FMSHRC 1257, 1280-81 (Oct. 2010)(stating that the third element of the Mathies test requires a showing that the hazard contributed to by the violation is reasonably likely to result in an injury).

The Commission has mandated that ALJs perform a full analysis of all four *Mathies* factors based on specific evidence, including the likelihood of an injury producing event occurring. *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1678 (Dec. 2010). The Commission has also maintained that an S&S determination must be based on more than a showing that a violation 'could' result in an injury. *Wolf Run Mining Co.*, 32 FMSHRC 1678 (quoting *Peabody Coal Co.*, 17 FMSHRC 26, 29 (Jan. 1995)).

As the Commission decided to analyze the hazards of unguarded tail pulleys on a case-by-case basis in *Thompson Bros. Coal*, recent S&S determinations involving 56.14107(a) violations appear to turn primarily upon the degree of exposure created by the lack of guarding. *See e.g. Stanley Mineral Resources*, 34 FMSHRC 1500, 1507 (ALJ Barbour) (June 2012) (holding 56.14107(a) a violation was S&S when employee was observed cleaning underneath an unguarded pulley with a shovel); *Holcomb*, 33 FMSHRC 1435, 1447 (ALJ Manning) (June

2011) (holding a 56.1407(a) violation was non- S&S when operator satisfactorily demonstrated that all cleaning activities were conducted between shifts).

D. Negligence

The Mine Act defines reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 CFR § 100.3: Table X. Deliberate action contrary to the Mine Act with the conscious knowledge that such activity may seriously endanger workers constitutes reckless disregard. *Roxcoal, Inc.*, 36 FMSHRC 625, 634 (ALJ Barbour) (March 2013) (finding reckless disregard when electrical foreman disabled safety switch to a high voltage electrical panel so that workers could access panel components while they were energized).

E. Unwarrantable Failure

Section 104(d)(1) of the Mine Act states:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health standard,... and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such findings in any citation given to the operator under this Act.

Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "willful intent", "indifference," or the "serious lack of reasonable care." *Id.* at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991).

The Commission considers the following factors when determining the validity of 104(d)(1) and 104(d) (2) orders: (1) the length of time that the violation has existed and the extent of the violative condition, (2) whether the operator has been placed on notice that greater efforts were necessary for compliance, (3) the operator's efforts in abating the violative condition, (4) whether the violation was obvious or posed a high degree of danger and (5) the operator's knowledge of the existence of the violation. *Consolidation Coal Co.,* 22 FMSHRC 340, 353 (Mar. 2000). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

F. Flagrant Violations

Under Section 110 (b)(2) of the Mine Act, the Secretary may assess a civil monetary penalty of up to $220,000.00 for "flagrant" violations. Section 110 (b) (2) defines a "flagrant" violation as a:

> "reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury."

30 USC § 820(b).

To date, the most comprehensive analysis of Section 110 (b)(2) of the Mine Act is set forth in *Stillhouse Mining*, 33 FMSHRC 778, 802 (March 2011)(ALJ Paez). Relying upon the language of the statute, the ALJ stated that the Secretary must show the following four elements in order to sustain a 110(b)(2) action: (1) A reckless or repeated failure to make reasonable efforts; (2) A known violation of a mandatory health or safety standard; (3a) That substantially and proximately caused; or (3b) Reasonably could have been expected to cause; (4) Death or serious bodily injury. *Stillhouse Mining*, 33 FMSHRC 802.

For the purposes of 110(b)(2) actions, reckless behavior is defined as a conscious or deliberate disregard of an unjustifiable risk of death or serious bodily injury. *Id.* at 805. The Secretary need not establish that MSHA had previously cited the operator for the violative condition. However, the Secretary does need to demonstrate than an individual "in a position to protect employee safety failed to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Cougar Coal, 25* FMSHRC 513, 517 (Sept. 2003). The likelihood of a resulting serious injury is evaluated under the specific set of circumstances present during the violation. *Id.*

G. Penalty Assessment

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

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

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

These criteria are generally incorporated by the Secretary within a standardized penalty calculation that includes consideration of negligence and gravity finding and permits proposed penalty assessments up to $70,000.00 per citation. 30 CFR 100.3: Table 1- Table XIV. In these cases, the Secretary has relied upon 30 CFR 100.5, and submitted specially assessed penalties for each citation, relying upon the multiple unguarded pulleys found at the mine as justification for the increase in penalty amount beyond the standard penalty calculation. Sec'y Proposed Assessment Docket SE 2013-50 & 64: Narrative Findings For A Special Assessment. Additionally, the Secretary has relied upon Section 110(b)(2) to designate Citation No. 8637419 and Order Nos. 8637420 and 8637422 as flagrant violations and assigned penalty amounts in excess of the Section 110(a)(1) cap of $70,000.00. Sec'y Proposed Assessment Docket No. SE 2013-64: Narrative Finding for a Special Assessment; Sec'y Br. 30-31.

For all penalty assessments, the Secretary bears the burden of establishing the proposed penalty is appropriate based upon the statutory criteria of Section 110(i) of the Act. *In re: Contest of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 239, 241 (ALJ Broderick) (January 1992) (Order). Similarly, for specially assessed penalties in excess of the standard penalty calculation, the Secretary has the burden of establishing the existence of aggravating factors to justify such an increase. *S&M Construction, Inc.*, 18 FMSHRC 108, 1052-53 (ALJ Koutras) (June 1996); *Freeport McMoran Morenci, Inc.*, 35 FMSHRC 172, 181 (ALJ Miller) (January 2013).

III. PLANT OPERATION

Respondent's above ground limestone mine includes a maintenance shop, office, scale house, pit quarry, secondary plant and stockpiles. Tr. 25, 203-04. Raw shot rock is transported from the quarry pit to the primary crusher. Tr. 191. The majority of the processed shot rock is then transported to the secondary plant for further processing into commercial finish products. Tr. 192. The secondary plant has a number of conveyor belts, screens, and crushers. Tr. 191, 218, 235. The secondary plant is divided into a wet and a dry side and different conveyor belts can be run independently depending on what products are desired. Tr. 57. It is not necessary for all belts to run in order for the plant to "operate". Tr. 57. The wet side of the plant uses water to process the material and the ground surrounding some conveyor belts is saturated to the point that is difficult to walk in certain areas. Tr. 307, 314.

The secondary plant is staffed by seven or eight workers during a normal shift. Tr. 203-04. The secondary plant operator controls the plant from an elevated control room where switches control all the conveyors and crushers. Tr. 203-04. Two skid steer operators work continuously to clean the spillage around crushers and conveyor belts. Tr. 204, 207. The skid steer operators are enclosed in a protective cab and use an extended rake attachment to clean around underneath the conveyor equipment. Tr. 207; Resp. Ex. 4, 3-4. The skid steer is more efficient than manually cleaning by hand. However, with the extended rake, the sensitivity of the controls lead to frequent guard damage. Tr. 214, 304, 329-30.

Front end loader operators load out finished product from stockpiles at the perimeter of the secondary plant to customer trucks. Tr. 204. A water truck operator applies water to both the haul paths and occasionally uses a water cannon to clean out from underneath conveyor belts.

Tr. 208. Due to the high pressure of the water cannon, the water truck does not have to come closer than 30' to the conveyor belt. Tr. 209. No employees walk the secondary plant on a regular basis but foot traffic is not specifically prohibited by Respondent's Safety Policy. Tr. 209, 215, 274.

Routine maintenance and greasing of the conveyor belts is performed between shifts while the belts are de-energized. Tr. 200. All conveyor belts are equipped with extended grease ports that allow the rollers to be greased without removing the guard. Tr. 223. The maintenance team generally travels the secondary plant in a work truck and only approaches a belt for repairs after it is de-energized and locked out. Tr. 220. The maintenance crew has the authority to lock out belts when needed and is expected to initiate necessary repairs without waiting for upper management approval. Tr. 303.

A belt is shut down when the control switch at the control tower is turned off and the belt is not moving. Tr. 259. A belt is de-energized when the controlling circuit breaker is switched off and power is not available to drive the belt even if the control tower switch is put into drive mode. Tr. 259. A belt is locked out and tagged out when the controlling circuit breaker is switched off and locked out with a physical lock. Tr. 259. Respondent conducts regular weekly safety meetings and had discussed lock-out tag-out procedures and conveyor belt safety in the months prior to the November 17 hazard complaint. Tr. 197-99; Resp. Ex. 3, 1-6. At the time of the inspection, the on-site foreman for the secondary plant was Jeremy Childress. Tr. 188. Sean Cotham was the area operations manager with ultimate responsibility for Respondent's mine at the time of the inspection. Tr. 187-88.

IV. TESTIMONY

A. The Secretary

Inspector Hollis testified regarding his observations at the mine and interactions with Respondent's management on November 17, 2011. Hollis stated that on Nov 17, 2011, his field office notified him of a hazard complaint. Tr. 27. Hollis explained that he reviewed the complaint documents and then met with the complainant who asked to remain anonymous. Tr. 28-29. The complainant claimed, among other allegations, that tail pulleys at the west side of the plant were not guarded. Tr. 29; Sec'y Ex. 1. Hollis then traveled to Respondent's plant and first notified Foreman Childress and then shortly thereafter, Operations Manager Cotham of the hazard complaint. Tr. 32-33. Hollis, accompanied by Cotham and Childress, proceeded to inspect the wet side secondary plant and first identified a missing guard at the tail pulley of the "10's" belt. Tr. 36. Hollis stated that the guard for the 10's belt was completely missing and that he issued Citation No. 8637419 for this condition which is a violation of 56.14107(a). Tr. 41.

Hollis stated that when he asked Cotham why the tail pulley was not guarded, Cotham responded "production needs," but also indicated that materials had been ordered to replace the 10s guard. Tr. 62-63. Hollis stated that the 10's belt was a fluted tail pulley located 6 inches off the ground. Tr. 46-47. Hollis explained that fluted tail pulleys are particularly dangerous as the flutes will draw a worker's entire body into the conveyor belt if a worker becomes entangled in the belt. Tr. 58-59. Hollis stated that the muddy and sloppy ground around the 10's belt

increased the possibility of a worker tripping and falling into the unguarded conveyor belt. Tr. 48. Hollis stated that while the 10's belt was not running at the time of the citation, Cotham informed him the belt was not locked out. Tr. 56.

Hollis also issued the following orders:

Order No. 8637420 for the lack of guarding at the wet side return conveyor. Tr. 76. Hollis testified that the fluted tail pulley at this location was completely unguarded and located approximately two and a half feet above ground level. Tr. 77. Hollis indicated that this conveyor belt was not running at the time of the inspection but that the belt was "operable." Tr. 78.

Order No. 8637421 for an alleged violation of 30 CFR 56.14112(b) after observing an insufficiently guarded tail pulley on the return wash-plant conveyor belt. Tr. 93, 98. Hollis stated that while the sides and top of the conveyor belt guard were intact at this location, the back of the guard was missing at the return point and referenced an inspection photo taken of the return wash plant conveyor belt. Tr. 93; Sec'y Ex. 13. Hollis stated that the belt was not running at the time of the inspection but that the belt was operable. Tr. 98.

Order No. 8637422 for an unguarded tail pulley at the blend conveyor belt. 102, 105. Hollis testified that this conveyor belt was moving rapidly at the time of the inspection and that the belt was located approximately two feet above ground level. Tr. 107-108. Hollis explained that there was some partial guarding on one side of the conveyor belt but that the majority of the tail pulley was unguarded. Tr. 109-110.

Order No. 8637423 for a partially unguarded tail pulley at the "1/2" belt. Tr. 119. Hollis referenced an inspection photo and explained that although the belt had guarding installed, it did not fully prevent contact with the bottom of conveyor belt. Tr. 119; Sec'y Ex. 21. Hollis believed that workers could fall into the conveyor belt by accident or during greasing or belt training operations. Tr. 120. Hollis stated that he did not observe any adjustment bolts at the tail pulley, that he did not actually know how the ½ conveyor belt was adjusted, and that it may have been possible to adjust the conveyor belt from the head pulley. Tr. 121.

Order No. 8637424 for a partially unguarded tail pulley at the "4's" belt. Tr. 129. Hollis referenced an inspection photo and testified that on the right side of the tail pulley, the guarding was damaged to the point that a worker could inadvertently contact the conveyor belt and become entangled. Tr. 131; Sec'y Ex. 25. In reference to this damaged guarding, Hollis stated that "no one is purposely is going to stick their hand in there." Tr. 131. On cross-examination, Hollis stated that the inspection photo did not show the entire guarding and mainly depicted only the exposed area of the conveyor belt. Tr. 167-68; Sec'y Ex. 25.

Order No. 8637425 for an insufficiently guarded tail pulley at the dry side return conveyor belt. Tr. 135, 141. Hollis stated that he initially observed the deficient guarding from the west side of the plant and walked across to inspect the conveyor more closely. Tr. 142. Hollis referenced an inspection photo and explained that there was some limited guarding in place at the time of the inspection but that the tail pulley was exposed. Tr. 142; Sec'y Ex. 29.

Hollis also stated that there were footprints within several feet of this conveyor belt and that when asked, Mr. Cotham did not offer any explanation regarding the footprints. Tr. 144-45.

For Order Nos. 8637420-8637425, Hollis stated that Manager Cotham did not offer any explanation for the lack of guarding, indicate that the plant was currently shut down, or offer evidence of repair plans and/or purchases. Tr. 149, 175. Hollis stated that all of the unguarded conveyor belts were very visible and should have been identified during a proper workplace exam. Tr. 152-53.

On cross-examination, Hollis stated that while he observed workers cleaning miscellaneous trash around the secondary plant, he did not see or find evidence of workers walking near any of the tail pulleys. Tr. 157-58. Hollis also stated that prior to the November 17, 2011 inspection, Respondent had not received any 104(d) unwarrantable failure orders during the mine's recorded inspection history. Tr. 155. In regards to the ½ belt cited in Order No. 8637423, Hollis confirmed that he had previously inspected the mine and had not found a reason to issue guarding violations at this belt. Tr. 165-66. Hollis additionally stated that he did not observe any belt adjustment or maintenance work at the time of the inspection and did not question Respondent's management regarding their belt maintenance procedures. Tr. 162.

When questioned by the Court on the difference between high negligence and reckless disregard, Hollis stated:

> "Reckless disregard, you know, is – is, again, the operator displays essentially a total lack of concern of what they've got there... High negligence is, okay, I knew about it—the mine operator knew about it. They haven't taken steps to take care of it immediately, but they have taken steps to take care of it in the long term, over the – a longer period of time.
>
> They knew about it; they haven't taken care; but maybe they've ordered the parts. Maybe they've ordered the material to fix it. ..."

Tr. 181.

B. Respondent

Operations Manager Sean Cotham testified for Respondent regarding the November 17 inspection and conveyor belt operations at the mine. Cotham confirmed that he accompanied Inspector Hollis and he agreed that the tail pulleys cited in Citation No. 8637419 and Order Nos. 8637420, 8637421, 8637422, and 86374255 were not properly guarded at the time of the inspection. Tr. 223, 229,231, 236, 250. For Order Nos. 8637423 and 8637424, Cotham stated the guarding present at those tail pulleys had always been installed in that manner and had recently been inspected by MSHA in August 2011 without adverse action or warnings. Tr. 244, 248.

Cotham stated that he had previously accompanied MSHA inspectors on other inspections at other operations and at Respondent's plant. Tr. 189. However, he testified that he had never previously been involved in a hazard complaint or 104(d) unwarrantable failure action. Tr. 191, 225. Cotham stated that he informed Inspector Hollis during the inspection that the guards had likely been damaged by skid-steer cleaning. Tr. 230. Cotham maintained that neither he nor Forman Childress told Inspector Hollis that the guards were not being repaired due to "production needs". Tr. 224. Cotham testified that he was unfamiliar with the consequences of a 104(d) order and that he decided to say as little as possible after Inspector Hollis informed him that he intended to issue 104(d) orders for the missing guards. Tr. 224-25.

Cotham also testified in detail regarding conveyor belt operation, clean up, and maintenance work at Respondent's secondary plant. Cotham stated the vast majority of clean-up operations were performed by the two skid steer operators assigned to that specific duty. Tr. 207. Cotham explained that maintenance and supervision personnel traveled the secondary plant in trucks. Tr. 218. Cotham maintained that while foot traffic was not prohibited in the secondary plant, there was no reason to walk through the secondary plant. Tr. 217-218. Cotham also testified that greasing and routine maintenance tasks were performed between shifts with the main electrical disconnect to the plant locked and tagged out. Tr. 216-17. On re-direct, Cotham stated that prior to the November 17 inspection, Respondent had both hired an extra maintenance worker and purchased additional expanded metal to better respond to ongoing problems with damaged guards. Tr. 296.

On cross-examination, Cotham maintained that if a bearing had to be replaced mid-shift due to sudden breakdown, the entire plant would be shut down for the repair. Tr. 275. Cotham explained that the extended grease port was used to avoid taking the guard off during routine greasing and that he had never observed anyone grease a conveyor belt while the belt was moving. Tr. 289. Cotham did state that at other mines he had observed belts adjusted with the tail pulley guard off and the belt running. Tr. 289. However, Cotham maintained that he had never directed such work at any mine and he that he had never observed or directed it at Respondent's mine. Tr. 287-88. Cotham also stated that particularly during the night shift, it was possible for a skid steer operator to damage a guard without realizing it. Tr. 241-42.

Current Quarry Foreman Jimmy Maclin testified regarding repair efforts at Respondent's plant. At the time of the November 2011 inspection, Maclin was the lead mechanic in charge of plant and mobile equipment repair. Tr. 301. Maclin testified that no one worked on foot in the secondary plant while it was operating. Tr. 302. Maclin stated that equipment was first shut down from the operator control room and then physically locked out before inspection and repairs were started. Tr. 303.

Maclin stated that in the weeks preceding the Novemeber 17, 2011 inspection, Respondent had been working long double shifts. Tr. 304. Maclin noted that a substantial number of guards had been damaged during this time, particularly during the night shift. Tr. 305. Maclin testified that he had instructed the skid steer operators to slow down and be more careful around the guards. Tr. 305. Maclin also stated the maintenance crew changed the attachment system for the guards to decrease damage and also provided additional lighting at the secondary plant to increase visibility. Tr. 305-06. Maclin stated that in the weeks preceding the

November 17 inspection, guards were "constantly getting tore up" and guarding repairs were necessary every day. Tr. 304-305.

Maclin testified that during pre-shift maintenance checks on November 17, the maintenance crew observed that the 10's tail pulley guard was damaged. Tr. 307. Maclin testified that the muddy conditions made it difficult to get close to the tail pulley itself, but that the crew removed the damaged guard to take measurements and begin repairs. Tr. 307. Maclin stated that no other guards were reported damaged that morning. Tr. 308. Maclin stated that the secondary plant did operate for approximately an hour until the primary crusher broke down when a piece of metal got into the crusher. Tr. 308, 313. Once the primary crusher broke down, the operator shut down the secondary plant and the primary crusher itself was both de-energized and locked out by the maintenance crew. Tr. 308-09.

Maclin confirmed that none of the conveyor belts at the secondary plant were locked out until Inspector Hollis directed him to do so at approximately 2:30 PM. Tr. 311-12. However, Maclin maintained that the 10's belt was not running during the Nov 17 morning shift and that conditions were so soft at the 10's belt in particular that it was very difficult for someone on foot to get near the 10's tail pulley. Tr. 314, 317. Maclin stated that prior to November 17, he had told Foreman Childress that the mine needed to hire different skid steer operators to avoid persistent guard damage, but that he was not aware of any corrective actions taken by Foreman Childress. Tr. 321.

V. ANALYSIS

A. The Violations

30 CFR § 56.14107 mandates that:

> (a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.
>
> (b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces

30 CFR § 56.14112(b) requires that:

> Guards shall be securely in place while machinery is operated, except when testing or making adjustments which cannot be performed without removal of the guard.

The Secretary has presented testimony and photos demonstrating that tail pulley guards were missing, loose, or insufficient at seven different locations. The testimony of Respondent's maintenance foreman Maclin, indicates that the conveyor belts at these locations were not locked or tagged out prior to the inspection. Tr. 308-09, 311-12. Thus, the Secretary has presented

sufficient evidence to support his allegations that six separate violations of 30 CFR 56. 14107(a) and one violation of 30 CFR 56.14112(b) occurred on Nov 17, 2011 at the Respondent's mine. Respondent has conceded that the missing and incomplete guards violated the cited standards. Resp. Br., 1. As such, I **AFFIRM** the underlying violations contained in Citation No. 8637419 and Order Nos. 8637420, 8637421, 8637422, 8637423, 8637424, 8637425.

I must next determine the following issues:

1) Did the lack of guarding at the tail pulleys create a reasonable likelihood of a serious injury and constitute significant and substantial violations?

2) Did Respondent display a total lack of care in maintaining pulley guards and thus demonstrate a reckless disregard for the requirements of the Mine Act?

3) Were the violations an unwarrantable failure to comply with a mandatory safety standard?

4) Were Citation No. 8637419 and Order Nos. 8637420 and 8637422 the result of Respondent's flagrant disregard for miner safety?

B. Significant and Substantial

Inspector Hollis testified specifically about the physical conditions of each guard individually and the Secretary re-iterated these findings within her post-hearing brief arguments concerning the S&S determinations. Sec'y Br., 20-23. However, when testifying about repair, greasing, foot traffic, and possibility of injury at the secondary plant, Inspector Hollis testified primarily in general terms that applied to all seven of the cited conditions. As such, I have combined the S&S analysis of the seven cited conditions in one section. I have considered and noted all relevant specific evidence in making my individual S&S findings for each citation. Nonetheless, I find that the Secretary has not demonstrated a reasonable likelihood of a serious injury resulting at any of the cited locations.

I have already found that the Secretary has established the underlying violation in each of the seven involved orders. Additionally, as none of the belts were locked out prior to inspection, the lack of guarding at these locations contributed to the discrete safety hazard of exposed and energized movable parts.

The Secretary has argued that this exposure was reasonably likely to cause a serious entanglement injury through one of three work practices: 1) routine greasing; 2) belt repair and adjustment; and 3) accidental trips and falls by workers travelling on foot. Sec'y Br., 18-19. Inspector Hollis felt that an injury was likely in this situation, in part, because he had previously observed greasing and maintenance operations performed at other mines with the conveyor belt moving. Tr. 94-95.

However, Operations Manager Cotham credibly testified that the conveyor belts were only greased between shifts when the belts were locked and tagged out. Tr. 217. Cotham and Maclin also testified that the belt repairs were only made with the belts de-energized and locked

and tagged out. Tr. 192-93; Tr. 302-03. Safety meetings conducted in the months previous to the November 17 inspection directing workers to lock and tag out machinery before attempting any repairs support this testimony. Resp. Ex. 3, 1-6.

Inspector Hollis testified that he did not observe anyone greasing or performing maintenance work on an operable or moving conveyor belt during the November 17 inspection. Tr. 157. Hollis did not claim to have seen this type of activity in his previous inspections of the mine or to have been notified of such activity by other inspectors or inspection records. The hazard complaint does not allege that repair work or greasing was being performed on moving or energized conveyor belts. Sec'y Ex. 1.

Thus, the Secretary has not provided any specific evidence refuting Respondent's credible testimony that greasing was performed through extended grease ports between shifts with the belts shut off and repairs were only conducted with the belts locked and tagged out. Furthermore, Inspector Hollis stated, that if "a miner de-energized a conveyor and shut it down, there's no entanglement hazard present." Tr. 159-160. Additionally, Hollis himself testified that MSHA regulations allowed belts to be adjusted with the belt moving under controlled conditions and that the guard would have to be removed in most situations regardless of whether it had been damaged or not. Tr. 96. Cotham similarly testified that when a belt was trained, all other belts were locked out to minimize exposure. Tr. 275-76. As such, I find that Inspector Hollis's testimony regarding past observations at other mines are not sufficient to establish the reasonable likelihood of an injury occurring during greasing or repair work at Respondent's mine.

Given the evidence referenced above, I find that it was not reasonably likely for an injury to occur during greasing or repair work at any of the seven cited locations. Accordingly, I proceed to analyzing the likelihood of foot travel occurring at the cited locations and resulting in an injury.

Respondent argues, in essence, that workers simply do not walk in the secondary plant except for repair or greasing work when the belts are shut down and locked and tagged out. Tr. 206-07, 216-17, 302. The photos entered into evidence demonstrate that Respondent does indeed use an enclosed skidsteer with an extended rake to clean underneath tail pulleys. Resp. Ex. 4, 3-6. Additionally, Operations Manager Cotham credibly testified, and the Secretary has not disputed, that the belts are operated from an elevated control tower. Tr. 206. Cotham further testified that pre-shift inspections were conducted by a drive through inspection and that the front-end loader operators worked at the outside rim of the secondary plant. Tr. 218, 269. Cotham also testified that the only time any workers cleaned the secondary plant on foot was "whenever the plant was down, something was broke down. And of course obviously the plant would be locked and tagged out." Tr. 215.

Inspector Hollis stated that during his inspection there were workers picking up garbage around the secondary plant but he did not see anyone walk or work near the tail pulleys. Tr. 157. The presence of workers on foot cleaning miscellaneous trash on November 17 is reasonably explained by Maclin's credible testimony that the primary crusher broke down earlier that day and the plant was idled. Tr. 313. Maclin's testimony that the plant was idled is also substantially corroborated by the fact that only one of the seven belts was moving at the time of

the inspection and Hollis did not observe any skid steer traffic. I do note that while the majority of secondary plant belts were shut off, it appears Respondent did not follow its own policy in locking and tagging out the secondary plant while cleanup work was performed on foot. Tr. 308-09. However, having already found that the missing and inadequate guards constituted a violation, this evidence is most properly considered in my negligence findings.

Additionally, the mere presence of workers on foot within some areas of the secondary plant does not automatically make a guarding violation reasonably likely to result in an injury. An ALJ has previously found guarding violations to be non-S&S when the Secretary did not show a likelihood or reason for workers to travel near exposed tail pulleys. *Bob Bak Construction*, 28 FMSHRC 817, 830 (ALJ Manning)(Sept 2006)(finding guarding violation non-S&S when majority of work in area was performed from within protected skidsteers and loaders but some foot traffic occurred). A Commission ALJ has even relied upon the 7 foot exception of 56.14107(b) and entirely vacated a 56.14107(a) citation when the judge credited an operator's testimony that only skid steers were used to clean up accumulations underneath exposed rollers while a belt was in operation. *C&E Concrete, Inc.*, 34 FMSHRC 2987, 2991-92 (ALJ Tureck)(November 2012) (vacating 56.1407(a) citation and holding that while workers were on foot in the general area they did not approach within 30 feet of moving conveyor belt per their training). An ALJ has found a guarding violation to be S&S when the majority of cleanup work was performed by a skid steer, but in that case the ALJ relied on the fact that the main roadway of that mine passed within 10 feet of the exposed pulley, the inspector observed a beaten path passing by the exposed pulley, and there was a shovel leaning up against a trailer within five feet of the exposed pulley. *Crimson Stone*, 27 FMSHRC 980, 985-86 (ALJ Melick)(December 2005).

In this case, Inspector Hollis observed workers within the secondary plant cleaning up trash, but he did not observe any of them near any of the exposed tail pulleys. Tr. 157. For Citation No. 8637419, Inspector Hollis testified that the area surrounding the 10's tail pulley was muddy and sloppy, increasing the possibility of a worker tripping and falling into the exposed tail pulley. Tr. 48. However, while Maintenance Foreman Maclin similarly described this area as wet and soft, he stated that this condition made it very difficult for workers to approach the tail pulley on foot, even if they tried to. Tr. 307, 314. After reviewing the testimony and entered photos regarding this area, I find that as workers had no specific reason to approach the 10's tail pulley, the saturated ground conditions made it even more unlikely for workers to travel near the 10's tail pulley either inadvertently or purposefully. Sec'y Ex. 5; Tr. 314.

Inspector Hollis did observe footprints near an inadequately guarded tail pulley on the dry side of the secondary plant. Tr. 144. However, as Manager Cotham credibly testified that greasing operations were conducted before every shift with the belt de-energized, the presence of footprints at that area is not surprising or indicative of foot travel while the belt was operating. Tr. 274-75, 289.

The Secretary has argued, in essence, that as Inspector Hollis traveled within several feet of the moving belt cited in Order No. 8637422, it is reasonably likely that Respondent's workers could and would have done the same. Sec'y Br., 22. I do not agree. The inspection photo of this tail pulley does not indicate that there is a build-up of material or even that the belt is

conveying material. Sec'y Ex. 17. As such, the Secretary has not shown that at this location workers had a production reason to approach this conveyor belt. Manager Cotham credibly testified that workers were trained and warned about the dangers of pinch points and moving conveyor belts. Tr. 197-98. Respondent has introduced records of safety meetings focusing on the dangers of conveyor belts in the months prior to the November 17th inspection. Resp. Ex. 3, 1-6. None of the pictures presented by the Secretary showed trash in the area of the tail pulleys. Sec'y Ex. 5, 8, 13, 17, 21, 25, 29. As such, I find that Respondent's workers on temporary clean-up duty did not have a reason to approach the tail pulleys and had recently been specifically warned about the dangers of conveyor belts. Tr. 197-98. Therefore, I find that the Secretary has not shown that workers traveled, or would travel, near enough to any of the cited tail pulleys for there to be a reasonable likelihood of an injury occurring.

While the *Thompson Bros* decision instructed ALJs to consider the vagaries of human conduct, including carelessness, in determining whether a guarding violation in fact occurred, the Secretary has not shown a confluence of factors existed at any of the cited locations that made an injury reasonably likely to occur. *Thompson Bros. Coal*, 6 FMSHRC 2097 (upholding violation and S&S designation when Commission found mechanics were likely to make adjustments with engine and unguarded cooling fan running). In making my S&S findings, I am not requiring the Secretary to show that it was reasonably likely for a worker on foot to actually contact the exposed tail pulley while it was energized. However, the Secretary has not shown anything more than a remote possibility of a worker on foot even entering the area around the exposed tail pulleys in which in injury could occur.

In making this ruling, I am aware Commission precedent emphasizes that a worker's exercise of caution does not mitigate the S&S nature of a violation. *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992)(rejecting ALJ's ruling that extensive water accumulation ranging from 16 to 48 inches deep in an entry way subject to mandatory examinations was non S&S because examiner could step cautiously while wading through murky water). However, in that case, an examiner had to enter the deep pool of water where injury was reasonably likely to occur in order to comply with the inspection requirements of the Mine Act. *Id.* at 1121. The facts of this case present a much different degree of exposure, as the Secretary did not show that workers on foot were required or reasonably likely to enter the area in which an entanglement injury could occur. Furthermore, the Respondent has presented credible evidence demonstrating that workers do not travel on foot near the tail pulleys during operation. Tr. 206-07, 215, 302; Resp. Ex. 4, 3-6.

Therefore, I find that the Secretary has not established a reasonable likelihood of an injury occurring at any of the cited locations. As such, the likelihood of injury for Citation No. 8637419 and Order Nos. 8637420, 8637421, 8637422, 8637423, 8637424, 8637425 is hereby **MODIFIED** from "reasonably likely" to "unlikely." Additionally, Citation No. 8637419 and Order Nos. 8637420, 8637421, 8637422, 8637423, 8637424, 8637425 are also **MODIFIED** from "S&S" to "non-S&S."

C. Gravity

For Citation No. 8637419 and Order Nos. 8637420, 8637421, 8637422, 8637423, and 8637425, Inspector Hollis testified that the exposed fluted tail pulleys at these areas were likely to cause a fatal injury if a worker became entangled as a worker's entire body could be dragged in. Tr. 58-59, 76-77, 101, 112, 122-23, 146. For Order No. 8637424, Hollis determined that because the wings of the No. 4 tail pulley were bent, that while a worker could lose a hand or arm, he did not believe this tail pulley could hold someone in long enough to cause a fatal injury. Tr. 133. Respondent did not directly contest the severity of injury designations for these citations at hearing or within their post-hearing brief. After reviewing the parties' testimony and inspection photos, I find the Secretary has produced sufficient testimony and evidence for me to uphold Inspector Hollis's severity of injury determinations for all six orders and one citation as written.

D. Negligence

The Secretary has alleged that the violations found at each of the seven cited locations were the result of Respondent's reckless disregard for the Mine Act and Worker Safety. Respondent disputes this finding and argues, in essence, that it acted with, at most, moderate negligence for all of the violations.

The Mine Act defines reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 CFR § 100.3: Table X. The Secretary and Respondent both set forth their negligence arguments in a general cumulative fashion. Sec'y Br. 23-27; Resp. Br. 15-17. However, I have analyzed the specific circumstances and operator's level of knowledge regarding each location individually and have set forth my negligence findings separately for each citation.

1. Citation No. 8637419

Inspector Hollis testified that when he asked Operations Manager Cotham why the missing guard at the 10's belt had not been replaced, Cotham replied "production needs" and indicated that he had been aware of the missing guard prior to the inspection. Tr. 62-63; Sec'y Ex. 2, 5-6. After reviewing Inspector Hollis' inspection notes, it appears that Hollis incorporated this alleged statement into the text of every other citation. Sec'y Ex 2. 5-6; Sec'y Exs. 7, 11, 15, 19, 23, 27. Hollis did testify that although he did not observe any ongoing repairs at the time of the inspection, Cotham informed him that he had previously instructed his staff to "get the guards fixed." Tr. 63; Sec'y Ex. 2, 4-5. Inspector Hollis's testimony that Foreman Childress told Hollis that he knew guards had been missing for "two to three" days is supported by Hollis's general inspection notes. Tr. 151; Sec'y Ex. 2, 6.

Cotham testified that he was not aware of the cited missing guards prior to the inspection

and that he never told Inspector Hollis "production needs" had prevented the guards from being replaced. Tr. 223-24. Maintenance Foreman Maclin testified that he first learned that the 10's guard was damaged early on the morning of November 17. Tr. 307. Maclin stated that his maintenance crew began fabricating a new guard for this location until repair efforts were directed to the primary crusher when it broke down. Tr. 308. Maclin maintained that although some areas of the wet plant operated briefly on November 17, the 10's belt did not run on the morning of November 17. Tr. 317. Foreman Childress, who was responsible for pre-shift inspections at the secondary plant, did not testify at the hearing. Tr. 326.

After reviewing the parties testimony and Inspector Hollis's inspection notes, I find that when Cotham and Childress stated they knew about "guards" being off prior to the inspection, they were most likely referring to their general knowledge of the ongoing problem of skid steers damaging guards and requiring repair rather than to longstanding knowledge of any specific missing guard.. Sec'y Ex. 2, 4-5; Tr. 280; Tr. 304. I also find that any comment from Cotham referencing "production needs" was most likely a statement explaining how the guards were damaged in the first place, given Cotham's belief that using skid steers to clean around the tail pulleys was both the most safe and efficient method. Tr. 287. It is simply not credible to conclude that Cotham, given his reticence and concern about saying something to Hollis that would make matters worse, would claim "production needs" trumped safety repairs in such an inflammatory and self-incriminating statement. Tr. 255.

Nevertheless, it is clear that the 10's guard was completely torn off the tail pulley prior to the beginning of the November 17 morning shift. It is unclear whether Foreman Childress took any action or even noted this obvious condition during his required pre-shift inspection. Tr. 256-57. However, Foreman Maclin credibly testified that the maintenance crew began fabricating a new guard once they noted the problem during pre-shift maintenance check, and maintained that the 10's belt was not run that morning. Tr. 317. However, neither Childress nor Maclin locked and tagged out the 10's belt or barricaded the belt from access. Tr. 311, 314. As such, I am left to determine whether uncompleted repair efforts and a failure to lock and tag out a conveyor belt with a known missing guard constitutes reckless disregard for worker safety. In these specific circumstances, I find that due to Respondent's credible evidence of general safety measures and specific repair attempts on the 10s guard, the Secretary has not shown that Respondent's management acted with a complete absence of care for worker safety at this location.

As a general matter, Respondent presented credible and undisputed evidence that it took considerable efforts to protect workers from entanglement hazards prior to the November 17 inspection. Management conducted safety talks emphasizing the importance of avoiding pinch points and locking and tagging out conveyor belts when movable parts needed repairs. Tr. 197-98. Skid steers and water trucks were used for routine cleaning at tail pulleys, distancing workers from the tail pulleys. Tr. 204, 209. When night work led to an increase in guard damage, additional light towers were brought in as an attempt to prevent further damage. Tr. 305-06. Due to the increase in guard damage, the maintenance crew began installing quick repair panels. Tr. 305-06. While not determinative, I note these measures and Respondent's clean accident and inspection history leading up to this inspection in finding that the Secretary has not shown that Respondent had a history of operating with indifference to MSHA regulations

or worker safety. Resp. Br. 17.

After identifying the missing 10's guard on November 17, Foreman Maclin apparently did not believe the unguarded tail pulley at the 10's belt needed to be locked and tagged out because the belt was not running that morning and miners did not normally work on foot in this area. Tr. 317, 322. This attitude failed to consider the remote possibility of unplanned foot traffic and the 10's belt being inadvertently energized and fell below the high standard of care imposed by the Mine Act on operators. However, I find Maclin's action did not demonstrate a complete absence of care for worker safety. Maclin did promptly direct his crew to fabricate a new guard and under normal conditions the 10's guard would have been replaced within several hours if not for the primary crusher breaking down. Tr. 308. This type of corrective action, albeit incomplete, corresponds with Inspector Hollis's explanation of the difference between high negligence and reckless disregard:

> Reckless disregard, you know, is – is, again, the operator displays essentially a total lack of concern of what they've got there. ... High negligence is, okay, I knew about it—the mine operator knew about it. They haven't taken steps to take care of it immediately, but they have taken steps to take care of it in the long term, over the – a longer period of time.
>
> They knew about it; they haven't taken care; but maybe they've ordered the parts. Maybe they've ordered the material to fix it.

Tr. 181.

The Secretary has urged me to discount Respondent's testimony regarding ongoing and planned guard repairs prior to Hollis's inspection. The Secretary has essentially argued that as Respondent failed to detail these repair efforts during the inspection or closeout meeting, these claims lack credibility. Tr. 151, Sec'y Br., 26. I disagree. Inspector Hollis himself testified and recorded in his inspection notes that Operations Manager Cotham informed him that he had previously requested maintenance workers to repair damaged guards. Tr. 63; Sec'y Ex. 2, 4-5. Operations Manager Cotham testified credibly that he was not specifically aware that the 10's guard was missing prior to the inspection, and as he was offsite on the morning of November 17, it is not surprising that Foreman Maclin had started repairs, according to company policy, without notifying Cotham or other management officials. Tr. 190, 223, 303. At hearing, Cotham named Dwight Sisk without hesitation as the extra individual hired prior to the November 17 inspection to assist with guard repairs. Tr. 296-97. As such, Cotham and Maclin testified with sufficient specificity and corroboration by Inspector Hollis's own testimony for me to conclude that repair efforts had actually started on the 10's belt prior to Hollis's inspection.

Furthermore, although the secondary plant operated some belts for approximately an hour before the primary crusher broke down, all evidence indicates that the 10's belt was deactivated and the only workers who may have traveled in that general area were skid steer operators enclosed in a protective cab. Tr. 317, 322. The 10's belt was not running at the time of Hollis's inspection while the plant was idled and I have held that the saturated ground conditions made it

highly unlikely for workers on foot to approach the unguarded tail pulley. Tr. 55, 307. Thus, the possibility of injury was extremely remote under these specific circumstances. Most critically, as I have held that Respondent made genuine, if incomplete efforts to repair the 10's guard, I find that Respondent did not act with deliberate disregard for an unjustifiable risk of harm. As such, the negligence designation for Citation No. 8637419 shall be **MODIFIED** from "reckless disregard" to "high."

2. Order No. 8637420

Inspector Hollis testified and referenced inspection photos showing that the guard at the wetside return conveyor was completely missing. Tr. 76; Sec'y Ex. 9. Although maintenance Foreman Maclin testified that he was not aware of any missing guards other than at the 10's belt, the submitted photo depicts a clearly obvious exposed tail pulley. Tr. 308; Sec'y Ex. 9. As such I hold that Respondent's management, notably Foreman Childress, should have identified the missing guard during the November 17 pre-shift examination. Tr. 153-54. However, as I have held earlier that all cleaning work during operations was performed from within a protective cab and workers relied on their training and did not approach the tail pulley on foot when the plant was idled, the Secretary has not shown that Respondent deliberately disregarded an unjustifiable risk of harm. I also again take note of Respondent's general proactive measures of conducting safety meetings focused on the dangers of moving parts, increasing lighting, and attempting to install more resilient guards. While these measures are not sufficient specific mitigating circumstances to reduce the negligence level to moderate, they do demonstrate that Respondent took measurable efforts in preventing entanglement injuries. As such I hold that the negligence designation for Order No. 8637420 shall be **MODIFIED** from "reckless disregard" to "high."

3. Order No. 8637421

Inspector Hollis testified and introduced an inspection photo showing that the back of the guard at the 6x16 tail pulley was missing. Tr. 93; Sec'y Ex. 13. In the inspection photo, the tail pulley is approximately 6 inches above the ground with the top of and sides of the guard intact thus appearing to substantially guard the tail pulley from incidental contact. Sec'y Ex. 13. This defect could have been missed during a routine pre-shift examination due to ordinary human error or an imperfect inspection angle rather than a total absence of care. Furthermore, the tail pulley is set back from the top and side guards approximately six inches and the extended grease fitting is clearly intact. Sec'y Ex. 13. As such, it appears that only a deliberate attempt to access the tail pulley with the conveyor belt moving in violation of Respondent's safety provisions could result in an injury. I find the fact that this guard was substantially intact and the defect was not readily apparent from all angles to be mitigating factors. Therefore, I find that the failure to identify and correct this condition shall be **MODIFIED** from "reckless disregard" to "moderate" negligence.

4. Order No. 8637422

Inspector Hollis testified and introduced a photo showing that the guarding at the blend conveyor belt tail was insufficient. Tr. 107; Sec'y Ex. 17. Hollis testified and the inspection photo appears to show that the blend conveyor belt was running at the time of the inspection.

The photo shows that there is only some partial guarding on one side of this tail pulley and the tail pulley is exposed on the top, bottom, and near side. Sec. Ex. 17; Tr. 107. Operations Manager Cotham confirmed that the guard was missing at the time of the inspection but maintained that workers did not walk in the area of this tail pulley and all cleaning during operations were performed by a skid-steer or water truck. Tr. 236. As noted above, Inspector Hollis testified that he did not see any workers walking in the area of any of the cited conveyor belts, including the blend conveyor belt at issue in this order. Tr. 157.

As both Cotham and Maclin credibly testified that they did not know that this particular guard was missing prior to the inspection, I find that Respondent's management did not have actual knowledge that this guard was missing. Tr. 237, 308. However, the area of exposure was obvious enough that Respondent's management, namely Foreman Childress, should have identified this condition during the November 17 pre-shift inspection. Tr. 153-54. Still, as cleaning operations were performed from within a protective cab and workers relied on their training and did not approach the tail pulley on foot when the plant was idled, the Secretary has not shown that Respondent deliberately disregarded an unjustifiable risk of harm in failing to identify and correct this condition. I also again take note of Respondent's general proactive measures of conducting safety meetings focused on the dangers of moving parts, increasing lighting, and attempting to install more resilient guards. While these measures are not sufficient specific mitigating circumstances to reduce the negligence level to moderate for this citation, they do demonstrate that Respondent took measurable efforts in preventing entanglement injuries. As such, I hold that the negligence designation for Order No. 8637422 shall be **MODIFIED** from "reckless disregard" to "high".

5. Order No. 8637423

Inspector Hollis testified and introduced an inspection photo showing that while the ½ tail pulley was guarded on the top, sides, and rear, the side guards failed to cover approximately two to three inches of the bottom of the tail pulley. Tr. 119; Sec'y Ex. 21. Operations Manager Cotham credibly testified that this guard had been in place as pictured during previous inspections by Mr. Hollis and other MSHA inspectors as recently as August 2011. Tr. 245-46. Hollis confirmed that he had previously inspected Respondent's plant without issuing guarding violations but maintained he would have issued a citation if he had observed this condition. Tr. 165. After reviewing the inspection photo and the language of the standard, I find that as there is a visible area of limited exposure, Inspector Hollis was within his authority to determine that additional guarding was needed. However, the bottom rail of the side guard is intact, indicating that this guard had not been recently damaged and was likely in this condition during previous MSHA inspections. Sec'y Ex. 21. As such, the pre-existing guard reduced the risk of contact all but entirely and it was reasonable for Respondent to conclude on the basis of previous inspections that the guard was sufficient. Having found that the minor deficiencies of the pre-existing guard were not apparent during a regular pre-shift inspection, I hold that the negligence designation for Order No. 8637423 shall be **MODIFIED** from "reckless disregard" to "low."

6. Order No. 8637424

Inspector Hollis testified and referenced an inspection photo showing that the guarding at

the 4" tail pulley had an opening in the right side of the guarding. Tr. 130; Sec'y Ex. 25. Inspector Hollis did not testify or list in his notes how large this opening was but did state that it was large enough to allow for accidental contact. Tr. 130; Sec'y Ex. 24. The inspection photo does not show the entire guard or the opening itself, but shows a close-up view of the tail pulley. Sec'y Ex. 25. The photo appears to have been taken very close to the guard as the expanded metal webbing of the guard is visible in extreme close-up on the left hand side of the photo. Sec'y Ex. 25. On cross examination, Inspector Hollis maintained that he did not take the photo from inside of the guard and that he took the photo from that point because he wanted to show the exposed tail pulley. Tr. 167. Manager Cotham testified that he considered the tail pulley at this location substantially guarded, and stated that this guard had been in the same condition during recent MSHA inspections and had not been cited. Tr. 248. Although Inspector Hollis stated that he believed the opening was large enough for accidental contact to occur, without an estimation of the size of the opening or a picture of the opening itself, I cannot conclude that the opening was large enough to be readily apparent during a pre-shift inspection. In fact, the inspection photo and both parties testimony indicate that the tail pulley was substantially, if not completely guarded, and the opening was of limited size and exposure. Sec'y Ex. 25. As the Secretary has not shown that the violative condition at this location was readily apparent, I find that the negligence designation for Order No. 8637424 shall be **MODIFIED** from "reckless disregard" to "low".

7. Order No. 8637425

Inspector Hollis testified and referenced an inspection photo showing that the guarding at the dry side return belt was insufficient. Tr. 143; Sec'y Ex. 29. In the inspection photo, only one side of the tail pulley is visible but it appears that this belt was only guarded with small side guards at the time of the inspection. Sec'y Ex. 29. Manager Cotham credibly testified that he was not aware that the guarding was damaged at this area prior to the inspection and stated additional guarding was normally present at this location. Tr. 249-50. Cotham's statement is seemingly corroborated by Inspector Hollis testimony that there was some additional guarding hanging from the conveyor structure at the time of the inspection. Tr. 143-44. While the partial guarding visible in the inspection photo did provide some degree of protection from incidental contact, the area of exposure is apparent enough that Respondent's management should have identified this condition during a pre-shift examination. Tr. 153-54. However, the only workers who entered this area during operation were skid-steer operators enclosed in protective cabs and Respondent had begun efforts to completely rebuild all guards in the secondary plant. Tr. 249, 297. Thus, the Secretary has not shown that Respondent disregarded an unjustifiable risk of harm or acted with a complete absence of care in failing to identify and correct this condition. As such, I find that the negligence designation for Order No. 8637425 shall be **MODIFIED** from "reckless disregard" to "high."

E. Unwarrantable Failure

Section 104(d)(1) of the Mine Act requires a finding that the underlying violation is of a significant and substantial nature. 30 U.S.C. 814(d)(1). As I have found that the Secretary failed to show that any of the seven violations were S&S, I find that Citation No. 8637419, shall be **MODIFIED** from a 104(d)(1) citation to a 104(a) citation and Order Nos. 8637420, 8637421,

8637422, 8637423, 8637424, 8637425 shall be **MODIFIED** from 104(d)(1) Orders to 104(a) citations.

F. Flagrant Violation Penalty Assessment

As outlined in the *Stillhouse* decision, the Secretary may only assess penalties in excess of $70,000.00 per citation per Section 110 (b)(2) of the Mine Act when he has shown the violation was a reckless or repeated failure to correct a hazard that was reasonably likely to result in serious injury. *Stillhouse Mining*, 33 FMSHRC 802. For the six orders and one citation in these dockets before me I have held that Respondent did not act with reckless disregard. I have also found that the underlying violations in these actions were not reasonably likely to result in an injury. As such, the Secretary has not shown two of the elements necessary to support penalty assessments under Section 110(b)(2) of the Mine Act. Therefore, I find that none of the violations at issue before me to be flagrant.

VI. PENALTY

In determining the appropriate penalty for a violation, 30 CFR 100.3 generally directs me to consider:

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

Additionally, per 30 CFR 100.5, the Secretary determined that all six orders and one citation warranted a special proposed penalty assessment with penalties in excess of the standard penalty tables contained in 30 CFR 100.3. However, the submitted special assessment narrative forms for the citations and orders simply noted that other guarding violations had been identified on the same day and restated the gravity and negligence determinations of Inspector Hollis. As such, these forms do not provide me with a detailed basis to determine the appropriateness of the specially assessed penalties. Still, the Secretary has argued, in essence, throughout the hearing and her brief that the multiple guarding violations found at Respondent's mine demonstrated such a high degree of negligence that enhanced penalties are needed. Tr. 13.

The Secretary's proposed assessments indicate that the Respondent had a total violation rate of 1.2 per inspection day with zero repeat violations of the guarding violations at issue. Sec'y Proposed Assessment Docket SE 2013-50 & 64, Exhibit A. The Secretary stated at hearing that MSHA had previously issued two guarding citations in 2010, but later informed the Court that that the two citations were not final when Inspector Hollis issued the November 17 104(d) citations and orders. The Secretary's proposed assessment also indicates that Respondent's mine is an average size and that Respondent is a small operator. Sec'y Proposed Assessment Docket SE 2013-50 & 64, Exhibit A; 30 CFR 100.3, Table III-IV. Although

Respondent has argued that the Secretary has proposed unjustifiably high monetary penalties, Respondent has not argued or presented any evidence indicating that the proposed penalties would affect their ability to continue business operations. I have discussed the gravity and negligence of each citation within my analysis. Both parties agreed that Respondent abated the violations by constructing and installing appropriate guards by the next day, November 18, 2014. Tr. 89; Tr. 316. I also note that Jeremy Childress, the foreman responsible for conducting pre-shift examinations at the secondary plant at the time of the inspection, was apparently relieved of his management duties at some point after the November 17 MSHA inspection. Tr. 251, 322.

Using the 30 CFR 100.3 penalty tables as a starting basis, I find that after accounting for my gravity and negligence findings, the standard penalty calculation would result in approximate penalties of $1,995.00 for Citation No. 8637419, Order Nos. 8637420, 8637422, and 8637425, $601.00 for Order No. 8637421, $270.00 for Order No. 8637423, and $121.00 for Order No. 8637424. However, I believe that increased penalties, specifically due to those guarding violations that should have been identified during a diligent pre-shift inspection and because the inadequately guarded tail pulleys had not been locked and tagged out at the time of the inspection, are warranted in these specific circumstances. After considering all six statutory penalty criteria, including the effect on Respondent's ability to continue operations, I believe that the following penalties are appropriate:

Citation No. 8637419- $10,000.00

Order No. 8637420- $10,000.00

Order No. 8637421- $2,500.00

Order No. 8637422- $10,000.00

Order No. 8637423- $1,000.00

Order No. 8637424- $500.00

Order No. 8637425- $10,000.00.

Furthermore, I am confident these penalties further the purpose of the Mine Act in motivating Respondent and other operators to adequately conduct pre-shift inspections and promptly lock and tag out unguarded tail pulleys, regardless of the likelihood of injury:

The complete summary of my judgment and penalty determinations is as follows:

Citation No.	Originally Proposed Assessment	Judgment Amount	Modification
SE 2013-50			
8637421	$42,600.00	$2,500.00	Reduce Likelihood of Injury from

			"Reasonably Likely" to "Unlikely" Remove Significant and Substantial Designation Modify 104(d)(1) Order to a 104(a) Citation Reduce Negligence from "Reckless Disregard " to "Moderate"
8637423	$42,600.00	$1,000.00	Reduce Likelihood of Injury from "Reasonably Likely" to "Unlikely" Remove Significant and Substantial Designation Modify 104(d)(1) Order to a 104(a) Citation Reduce Negligence from "Reckless Disregard " to "Low"
8637424	$31,100.00	$500.00	Reduce Likelihood of Injury from "Reasonably Likely" to "Unlikely" Remove Significant and Substantial Designation Modify 104(d)(1) Order to a 104(a) Citation Reduce Negligence from "Reckless Disregard " to "Low"
8637425	$42,600.00	$10,000.00	Reduce Likelihood of Injury from "Reasonably Likely" to "Unlikely" Remove Significant and Substantial Designation Modify 104(d)(1) Order to a 104(a) Citation Reduce Negligence from "Reckless Disregard " to "High"
SE 2013-64			
8637419	$129,400.00	$10,000.00	Reduce Likelihood of Injury from "Reasonably Likely" to "Unlikely" Remove Significant and Substantial Designation Modify 104(d)(1) Order to a 104(a) Citation Reduce Negligence from "Reckless Disregard " to "High"

8637420	$129,400.00	$10,000.00	Reduce Likelihood of Injury from "Reasonably Likely" to "Unlikely" Remove Significant and Substantial Designation Modify 104(d)(1) Order to a 104(a) Citation Reduce Negligence from "Reckless Disregard " to "High"
8637422	$129,400.00	$10,000.00	Reduce Likelihood of Injury from "Reasonably Likely" to "Unlikely" Remove Significant and Substantial Designation Modify 104(d)(1) Order to a 104(a) Citation Reduce Negligence from "Reckless Disregard " to "High"
Total	**$547,100.00**	**$44,000.00**	

VII. ORDER

Winn Materials, LLC is hereby **ORDERED** to pay the Secretary of Labor the total sum of **$44,000.00** within 30 days of this order.[1]

David P. Simonton
Administrative Law Judge

Distribution: (First Class U.S. Mail)

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Justin Winter, Adele Abrams P.C.,
4740 Corridor Place, Suite D, Beltsville, MD 20705 for Respondent

[1] 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