

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

Office of Administrative Law Judges  
601 New Jersey Avenue, NW, Suite 9500  
Washington, DC 20001-2021

June 16, 2011

KNIFE RIVER,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. WEST 2009-1147-RM
	:	Citation No. 6479737; 07/22/2009
	:	
	:	Docket No. WEST 2009-1167-RM
	:	Citation No. 6479744; 07/28/2009
	:	
	:	Docket No. WEST 2009-1168-RM
	:	Citation No. 6479745; 07/28/2009
	:	
	:	Docket No. WEST 2009-1169-RM
	:	Citation No. 6479738; 07/22/2009
	:	
	:	Docket No. WEST 2009-1170-RM
	:	Citation No. 6479741; 07/27/2009
	:	
	:	Docket No. WEST 2009-1171-RM
	:	Order No. 6479742; 07/28/2009
	:	
	:	Docket No. WEST 2009-1172-RM
	:	Order No. 6479743; 07/28/2009
v.	:	
	:	Docket No. WEST 2009-1185-RM
	:	Citation No. 6479746; 07/29/2009
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine ID: 35-02968
Respondent.	:	Mine: Reed Pit
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2009-1437-M
Petitioner,	:	A.C. No. 35-02968-195779-01
	:	
	:	Docket No. WEST 2009-1438-M
	:	A.C. No. 35-02968-195779-02
	:	
	:	Docket No. WEST 2010-232-M
	:	A.C. No. 35-02968-202121
v.	:	
KNIFE RIVER,	:	
Respondent.	:	Mine: Reed Pit

## DECISION

Appearances: Patricia Drummond, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, on behalf of the Secretary of Labor;  
Adele L. Abrams, Esq., Law Office of Adele L. Abrams, P.C., Beltsville, Maryland, on behalf of Knife River.

Before: Judge Paez

### **I. Statement of the Case**

The above-captioned proceedings are before me on Notices of Contest filed by Knife River against the Secretary of Labor, acting on behalf of the Mine Safety and Health Administration (“MSHA”) pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815 (2006).<sup>1</sup> In accordance with my Order of Consolidation, the above-captioned penalty proceedings are before me upon the Secretary of Labor’s Petitions for Assessment of Civil Penalties pursuant to section 105 of the Mine Act.

In these combined contest and civil penalty proceedings, Knife River challenges the validity of five citations and one order issued in July 2009 at its Reed Pit mine.<sup>2</sup> Citation No. 6479741 and Order No. 6479743 allege violations of 30 C.F.R. § 56.14100(b), a mandatory safety standard requiring correction of defects on any equipment, machinery and tools that affect safety.<sup>3</sup> Citation No. 6479746 alleges a violation of Order No. 6479743. Citation Nos. 6479737, 6479744 and 6479745 allege violations of 30 C.F.R. § 56.11027, a mandatory safety standard requiring working platforms to be of substantial construction and provided with handrails and toeboards in good condition.<sup>4</sup>

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<sup>1</sup> In this decision, the hearing transcript, Knife River’s exhibits, and the Secretary’s exhibits are abbreviated as “Tr.,” “Ex. KR-#,” and “Ex. S-#,” respectively. In citations, Knife River is abbreviated as “KR.”

<sup>2</sup> Initially, the company challenged a sixth citation and a second order, but at the hearing the parties stated that Citation No. 6479738 and Order No. 6479742 were settled out of court. (Tr. 10:1–11:17.) After the hearing, the parties filed a Joint Motion to Approve Settlement, and the motion is considered at the end of this decision.

<sup>3</sup> Unless otherwise indicated, all citations to the Code of Federal Regulations are to the 2009 edition, the provisions of which were in effect at the time these citations and orders were issued.

<sup>4</sup> Citation No. 6479737 was originally issued on July 22, 2009, as a violation of 30 C.F.R. § 57.11002. It was first amended on July 23, 2009, to reflect a violation of 30 C.F.R. §56.11002 and then subsequently amended on July 27, 2009, to reflect a violation of 30 C.F.R. § 56.11027.

I conducted a hearing in Portland, Oregon where both parties offered documentary evidence and witness testimony.<sup>5</sup> Both parties submitted post-hearing briefs including supplemental exhibits, which I admitted into the record. The parties have agreed to several stipulations and facts established by admissions regarding the Commission's jurisdiction and the factual circumstances leading to the citations and order. (Sec'y Prehr'g Report 2-3; KR Prehr'g Report 1-3.)

## **II. Issues**

Knife River denies any violations occurred and denies the allegations set forth in the citations and order. It further contends that the cited conditions in question existed for many years with MSHA's knowledge and contests the Secretary's application of the regulations. Knife River argues that the issuance of these citations violated its rights to fair notice and due process. The Secretary responds that the conditions were properly cited as violations and that the allegations underlying the citations and order are valid. Accordingly, the following issues are before me:

Whether the cited conditions were violations of the Secretary's mandatory health and safety standards.

Whether the Secretary's assertions regarding the gravity of the alleged violations are supported by the record.

Whether the Secretary's assertions regarding Knife River's negligence in committing the alleged violations are supported by the record.

Whether the proposed civil penalties are appropriate.

## **III. Background and Findings of Fact**

### **A. The Operation at Reed Pit**

Knife River owns and operates Reed Pit, a mine located near Salem, Oregon. (KR Prehr'g Statement 1.) The mine produces sand and gravel and operates twenty-four hours a day. (Tr. 24:2-7, 24:21-25.) The sand and gravel deposit is extracted by a floating piece of machinery, a dredge, which removes the gravel from the surface below the mine site's pond and transports it to land where it is dewatered, sized, and screened. (Tr. 24:22-25.) Knife River uses floating machinery as well as land-based machinery for dewatering, sizing, and crushing. (Tr. 25:3-5.) The dredge sits on a pond that is more than seven hundred square feet in size and

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<sup>5</sup> Knife River filed a Motion to Expedite Proceedings, which was denied by Order dated August 5, 2009.

approximately fifteen to twenty feet deep. (Tr. 25:10–14.) A walkway leads to a dock on the edge of the pond. (Tr. 29:25–30:4.) The pond water levels fluctuate, which can change the angle of the walkway that leads to the dock. (Tr. 34:14–15.) Reed Pit requires that life jackets be used at all times when work is being conducted over water. (Tr. 337:17–338:1.)

Once gravel is extracted, it is sorted by size, and a portion of it is conveyed to a cobble surge pile. (Ex. S-12, at 3.) A single feeder sits below approximately at the center of the pile. (Tr. 493:13–20.) A draw-off tunnel (“tunnel”), which is also known as a culvert, runs from the feeder out through the side of the pile. (Ex. S-12, at 3.) The tunnel is made of corrugated galvanized steel and is ninety-three feet long. (*Id.* at 4.) A forty-foot section of the middle of the tunnel is reinforced by twelve vertical posts, spaced approximately four-and-a-half feet apart. (*Id.* at 4–5.) Nine posts measure four-and-a-half inches in diameter; two measure six-and-a-half inches in diameter; and one is a three- by five-inch rectangular steel tube. (*Id.* at 4.) A conveyor belt runs through the tunnel. (*Id.* at 3.) Half of the belt is held up and suspended by turnbuckles, which are similar to hangers, and attached to the structure of the tunnel, and the other half of the belt is supported by the floor of the conveyor. (Tr. 276:4–15.)

A twenty- to thirty-foot wall was erected adjacent to the crushing unit to contain dust and noise. (Ex. S-12, at 8.) The wall is held up by several wooden structural columns. (*Id.* at 8–9.) These columns are supported by steel brackets installed at their bases, which were installed following MSHA’s inspection of the mine. (*Id.* at 8.) The trailer housing the crusher operator station, which also serves as a break room, passes through and beneath the wall. (Tr. 50:13–14.) A small workshop is located off to one side of the operator station. (Tr. 50:18–19.)

#### B. Knife River’s Report Concerning the Tunnel

Around September 2008, Lynn Gullickson, Knife River’s Safety Director, asked Dr. Keith Kaufman, Chief Engineer of Knife River’s prestress plant in Harrisburg, Oregon, to inspect the tunnel and to give his viewpoints on its structural condition. (Tr. 353:1–4, 407:23–408:2.) Gullickson made the request because MSHA had identified a structural issue at Knife River’s Springfield quarry, and he wanted to confirm that the tunnel was a “safe structure.” (Tr. 352:22–353:3, 407:23–408:2.) On September 8, 2008, Kaufman inspected the tunnel for fifteen to twenty minutes. (Tr. 408:18–19.) He did not walk the tunnel’s entire length or take any measurements of it. (Tr. 409:2–3, 410:7.) Kaufman also inquired of Steve Zurfluh, Reed Pit’s plant manager at the time, about information concerning the tunnel’s design. (Tr. 408:19–21.) Zurfluh had no information about the tunnel’s design. (*Id.*)

Kaufman issued his report on the tunnel on October 26, 2008. (Ex. S-6.) He noted that “[a] structural analysis of the culvert would be extremely difficult to perform. The age of the structure combined with the deformed shape and temporary shoring would require difficult engineering assumptions in the analysis.” (*Id.* at 2.) Kaufman made six recommendations concerning the tunnel:

1. Provide a sump pump to remove the standing water in the culvert.
2. Provide horizontal control points spaced at 10 feet along the length of the culvert. . . . Record measurements on a weekly interval and then monthly once it has been identified that the geometry is stable. If the geometry of the stock pile changes significantly or becomes non symmetric to the axis of the culvert then measurements should be increased as required.
3. Measure and record the deformations between adjacent seams that have exhibited movement.
4. Make sure the stockpile loading does not extend to the region of the culvert where the local buckling and damage has [sic] occurred as shown in the second photo.
5. Maintain a balanced geometry of the stockpile on each side of the longitudinal axis of the culvert.
6. Inspect the condition of the temporary struts and the top of the culvert to ensure the concentrated reactions do not result in localized failure of the culvert skin.

(Ex. S-6, at 3.) Kaufman further stated:

Signs of deformation changes might require discontinued use of the culvert. Replacement of the culvert should be considered. Though I have little knowledge of this type of stock pile access of aggregates, a flexible culvert is a wrong application. A rigid culvert would better handle the possibilities of unbalanced loading if a continued bottom stock pile access is desired.

(Ex. S-6, at 3.)

C. MSHA's Inspection of Reed Pit

In July of 2009, Brad Breland, MSHA supervisory mine inspector of the Albany, Oregon, field office, was asked to select mines that MSHA officials would tour while in Oregon for a meeting. (Tr. 163:9–18.) MSHA Acting Deputy Administrator Neal Merrifield, MSHA Western District Manager Art Ellis, and Conference Litigation Officer John Pereza toured the Reed Pit mine. (*Id.*) The MSHA officials were accompanied on the tour by Knife River representatives, including Knife River Safety Director Lynn Gullickson, Reed Pit Superintendent Bill Wetmore, and Corporate Safety Manager Zack Knoop. (Tr. 164:19–165:7.) During the tour, Art Ellis viewed the dredge area and spoke with Zack Knoop regarding the need for handrails on the work

boats and docks, as well as the need for adequate illumination for miners working after dark.<sup>6</sup> (Tr. 164:19–25.) Knoop asked Ellis to speak with Bill Wetmore, the mine superintendent, regarding the matter. (Tr. 348:7–9.) Even though Ellis and Wetmore never had a conversation about the handrail and illumination issues, Knoop told Gullickson about his conversation with Ellis. (Tr. 347:4–10, 347:20–348:16.) After the tour concluded, Gullickson and Knoop met with Ellis and Merrifield to further discuss MSHA’s position regarding the requirement for handrails. (Tr. 348:17–350:15.) According to Gullickson, the conversation was rather heated. (*Id.*)

A few weeks after the tour, Breland informed MSHA Inspector Brian Chaix that it was time to administer a “regular” inspection of Reed Pit and that he should follow up on the handrail and illumination concerns. (Tr. 23:5–20.) On July 21, 2009, Chaix began his inspection, which lasted several days. (Tr. 23:19–23, 27:9–12.) Initially, Breland was not present at the inspection; however, Breland returned to Reed Pit mine at the request of Production Superintendent Fred Sondermayer and met with Chaix to discuss the inspection and Kaufman’s October 2008 report. (Tr. 165:20–166:22.)

Chaix cited several conditions as alleged violations of the Secretary’s mandatory safety standards, which are now at issue before me. On July 22, Chaix issued Citation No. 6479737 pursuant to section 104(a) of the Mine Act alleging that the work boats and dock at the mine site’s pond lacked handrails and toeboards, exposing miners to the risk of fatal drowning by falling into the pond after a slip or fall. (Ex. S-2, at 1.) Chaix alleged that the gravity of the citation was “significant and substantial” (“S&S”).<sup>7</sup> (*Id.*) In accordance with MSHA policy, on July 28, Chaix divided Citation No. 6479737 and issued Citation Nos. 6479744 and 6479745 specifically covering the lack of handrails and toeboards on Knife River’s work boats. (Tr. 28:18–29:13; Ex. S-2, at 21–24.)

Additionally, Chaix issued a citation and an order under section 104(d)(1) of the Mine Act, alleging the existence of S&S violations that were the result of Knife River’s unwarrantable failure to comply with the Secretary’s mandatory health and safety standards.<sup>8</sup> Chaix issued Citation No. 6479741 on July 27 asserting that the tunnel underneath the surge pile had structural failures and was not being maintained properly. (*Id.* at 10.) On July 28, Chaix issued Order No.

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<sup>6</sup> Knife River subsequently added more illumination, which addressed this issue. (Tr. 24:8–10.)

<sup>7</sup> The S&S terminology is taken from section 104(d)(1) of the Mine Act, which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d)(1).

<sup>8</sup> The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, which establishes more severe sanctions for any violation that is caused by “an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.” 30 U.S.C. § 814(d)(1).

6479743, noting that five of the six posts in the wall alongside the crushing unit had rotted away, creating the risk of the wall falling on the miners. (*Id.* at 17.)

After the issuance of the order, Knife River, on its own initiative (Tr. 73:14–16), put up caution tape around the wall in an attempt to comply with the order’s requirement to withdraw from the affected area (Tr. 173:3–174:8). Sondermayer showed the tape to Breland and stated that his miners could operate the crusher without entering the taped-off area. (Tr. 173:9–174:17, 581:12–582:23.) At the time, though, Breland was unaware the crusher operation booth was in the area subject to closure under the order. (Tr. 183:9–19.) On July 29, Chaix issued Citation No. 6479746 under section 104(a) of the Mine Act asserting that miners improperly entered the area subject to the order. (Ex. S-2, at 25.) No evidence suggests that the alleged violations before me had been previously cited or even raised into question during prior MSHA inspections in 2008 and 2009. (Tr. 93:19–107:24.)

#### **IV. Principles of Law**

##### **A. The Secretary’s Interpretation of Regulations**

To assess the validity of the Secretary’s interpretation of her regulations, the Commission explains as follows:

[w]here the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989). If, however, a standard is ambiguous, courts have deferred to the Secretary’s reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec’y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) (“agency’s interpretation of its own regulation is of ‘controlling weight unless it is plainly erroneous or inconsistent with the regulation.’”) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The Secretary’s interpretation of her regulations is reasonable where it is “logically consistent with the language of the regulation[s] and . . . serves a permissible regulatory function.” *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted).

*Lodestar Energy, Inc.*, 24 FMSHRC 689, 692 (July 2002). The required analysis asks whether the Secretary’s interpretation of the regulation is reasonable. *Id.* (citing *Energy West Mining*, 40 F.3d at 463). The Secretary’s interpretation must harmonize with and advance the objective of the statute it implements and not conflict with it. *Lodestar Energy*, 24 FMSHRC at 692 (quoting *Emery Mining Corp. v. Sec’y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984)). An individual provision of the Secretary’s regulations should comport with the other sections of the regulations

so as “to effectuate the Mine Act’s goal of promoting the safety and health of miners.” *Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (citing *Emery Mining*, 744 F.2d at 1414).

B. Fair Notice

Regarding the minimum notice due that is due to the regulated community with regard to the Secretary’s enforcement position of a particular regulatory provision, the Commission states that

“[d]ue process . . . prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.” *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986). An agency’s interpretation may be “permissible” but nevertheless fail to provide the notice required under this principle of administrative law to support imposition of a civil sanction. [*General Elec. Co. v. EPA*, 53 F.3d 1324, 1333–34 (D.C. Cir. 1995)].

*Island Creek Coal Co.*, 20 FMSHRC 14, 24 (Jan. 1998).

Actual notice of the Secretary’s interpretation is not required. *Id.* Instead, the test for notice follows an objective standard that asks “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.” *Id.* (quoting *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990)). A regulation cannot be “so incomplete, vague, indefinite or uncertain that men of common intelligence must necessarily guess at its meaning and differ as to its application.” *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982) (quoting *Connolly v. Gerald Construction Co.*, 269 U.S. 385, 391 (1926)). Under the Commission’s test, the reasonably prudent person, the operator, is “charged with knowledge of the ‘mining industry and the protective purposes of the standard.’” *Island Creek Coal*, 20 FMSHRC at 25 (quoting *Ideal Cement*, 12 FMSHRC at 2416).

The analysis of the notice afforded to the operator is explicitly focused on the facts of that particular case. *Alabama By-Products*, 4 FMSHRC at 2129. In applying this test, the Administrative Law Judge should consider a “wide variety of factors,” such as “the text of [the] regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency’s enforcement, and whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question.” *Lodestar Energy*, 24 FMSHRC at 694–95 (citations omitted).

C. Significant and Substantial

An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. §814(d)(1).

A violation is S&S “if, based on the particular facts surrounding that 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., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S violation, the Secretary 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) (footnote omitted). *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria). The Commission has further found that “an inspector’s judgment is an important element in an S&S determination.” *Mathies*, 6 FMSHRC at 5 (citing *National Gypsum*, 3 FMSHRC at 825–26); *see also Buck Creek Coal*, 52 F.3d at 135–36 (stating that ALJ did not abuse discretion in crediting opinion of experienced inspector). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

#### D. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Mine Act and refers to more serious conduct by an operator in connection with a violation. 30 U.S.C. § 814(d). In *Emery Mining*, the Commission determined that an unwarrantable failure is “aggravated conduct constituting more than ordinary negligence.” 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003–04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d at 136 (approving the Commission’s unwarrantable failure test).

Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator’s knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev’d on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243–44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). 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. *Consolidation Coal*, 22 FMSHRC at 353.

## V. Further Findings of Fact, Analysis, and Conclusions of Law

### A. Citation No. 6479737 – The Dock and Walkway

#### 1. Violation

Originally, Citation No. 6479737 was issued for alleged violations found on the work boats, the dock, and the walkway. However, Chaix modified the citation to cover only the docks and the walkway. (Tr. 28:18–29:13.) The modification resulted from a conclusion that the work boats “were different pieces of equipment” and Chaix “needed to issue separate citations for separate pieces of equipment” in accordance with MSHA policy. (Tr. 28:21–24.) Also, Citation No. 6479737 originally alleged a violation of the mandatory safety standard at 30 C.F.R. § 57.11002 but was amended to allege a violation of the mandatory safety standard at 30 C.F.R. § 56.11027 (Tr. 29:3–6), which requires, in pertinent part, that “[s]caffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition. . . . Working platforms shall be provided with toeboards when necessary.” Chaix deemed the alleged violation to be S&S based on his reasoning that “the hazard was clear and present” and “the sort of injuries that [he] would expect to result from an accident . . . would be serious.” (Tr. 31:24–32:8, Ex. KR-1, at 1.) According to Chaix’s documentation in the citation, the dock lacked handrails and toeboards, “exposing miners to the risk of fatal drowning in the event of a slip or fall into water reported to be . . . approximately 20 feet deep.” (Ex. KR-1, at 1.)

Knife River contends that no work is performed on the dock or walkway. (Tr. 337:10–14.) Additionally, it argues that the walkway has handrails, that life jackets are required, and that no accidents have occurred in the area, demonstrating the existence of minimal safety risks. (Tr. 337:15–338:1, 343:19–344:2, 558:8–11.) However, the evidence shows that miners assembled materials, as well as loaded and unloaded items from the dock. (Tr. 31:18–23, 395:25–396:2.) Also, miners traveled in this area at least twice each shift—to get to the dredge and back—and when making trips for materials. (Tr. 31:4–12.) MSHA Supervisor Breland personally observed two miners on the dock who did not properly secure their life jackets, such that had they fallen into the water, the life jackets could have either slipped off or choked the miners. (Tr. 178:24–179:25.)

The Secretary’s and Knife River’s witnesses acknowledged that work activities regularly took place on the dock. Because miners periodically performed work-related tasks on the dock, it is a working platform that falls within the cited regulation at 30 C.F.R. § 56.11027. Under these circumstances, a reasonably prudent operator like Knife River should have recognized that the dock would be considered a “working platform.” Based on these facts, this citation does not involve a novel interpretation of § 56.11027. Even assuming, *arguendo*, that this proceeding involves a novel regulatory interpretation, Knife River had prior, explicit notice of the Secretary’s enforcement position of § 56.11027. During the visit by MSHA officials preceding

Chaix's inspection, MSHA Western District Manager Art Ellis informed Knife River's officials about the need to install handrails.

## 2. Gravity and S&S

As for the question of whether this violation was S&S, Knife River's violation of a mandatory safety standard establishes the first element of the *Mathies* test. As for the remaining elements of *Mathies*, the Secretary asserts that the discrete safety hazard is the danger of slipping and falling on the dock, potentially falling into the water and drowning. The evidence demonstrates that miners frequently worked on the dock, which lacked both handrails and toeboards. Knife River admitted that it regularly operates in rainy weather, a common occurrence in the area. (Tr. 570:23–571:3.) Given that miners worked frequently in this area, often in wet conditions, the lack of handrails and toeboards created the discrete safety hazard of slipping and falling. The handrails on the walkway to the dock did not obviate this risk.

Given the dock's proximity to water, the risk of slipping and falling created not only the possibility of a miner hitting an object from such a fall but also the possibility of a miner falling into the water, potentially incurring hypothermia or drowning. (Tr. 178:24–179:13.) Knife River's lifejacket policy did not ameliorate the risk of injuries associated with falling into the water. Supervisory Mine Inspector Breland's observations about the miners' improper use of lifejackets demonstrate that miners do not always properly secure life jackets, and as a consequence, miners could be seriously injured or drown should they fall into the water.

Besides Knife River's lifejacket policy, another factor offered to mitigate the risks associated with this violation is the assertion that some of Knife River's miners work in steel-toed boots. (Tr. 223:17–224:24.) Nevertheless, despite the rugged construction of such shoes, they do not guarantee stability, particularly if their soles are worn. (Tr. 225:1–15.) This possibility is why toeboards are required in slippery areas to increase surface traction. (*Id.*)

In light of the slippery environment where this violation took place and the miners' frequent exposure to that environment, I determine that the violation created the reasonably likely risk that the hazard would contribute to injuries associated with slipping, falling, and drowning. These injuries could be broken bones, or in the case of falling into the water with an improperly secured lifejacket, death by drowning. These types of injuries are more serious than mere bumps and bruises and are to be expected from the types of accidents associated with the hazards created by this violation. Significant injuries, including fatal ones, were reasonably likely as a result of this violation. I conclude that the gravity of this violation was appropriately assessed as a reasonable likelihood of fatal injuries. Accordingly, I determine that the violation created the reasonable likelihood that the expected injury would be of a reasonably serious nature. This violation created a discrete safety hazard that gave rise to the reasonable likelihood of an injury of a reasonably serious nature, establishing the remaining three elements of the *Mathies* test. I conclude that the violation was S&S.

### 3. Negligence

The Secretary asserts that Knife River was moderately negligent in committing this violation. Here, Knife River required the use of life jackets in the area at issue. Unfortunately, as noted above, this policy did not adequately guard against the risks associated with working in this area. The evidence demonstrates that the improper use of lifejackets was not uncommon. Knife River could have taken the cost-effective measures of installing handrails and toeboards on the dock and significantly reduced the risks of working in this area. In light of the fact that Knife River took partial measures to address the risks in this area, I determine that Knife River's violation constitutes moderate negligence. Citation No. 6479737 is hereby **AFFIRMED**, as written.

### 4. Civil Penalty

Under section 110(i) of the Mine Act, the Administrative Law Judge must consider six criteria in assessing a civil penalty: the operator's history of previous violations, the appropriateness of the penalty relative to the size of the operator's business, the operator's negligence, the penalty's effect on the operator's ability to continue in business, the violation's gravity, and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

Knife River's history of violations over the fifteen months preceding this violation consists of merely nine non-S&S violations assessed at \$100 each, none of which involve the standard breached in Citation No. 6479737. Nothing in the record suggests that the proposed penalty amount of \$585 that the Secretary seeks in these proceedings is inappropriate for the size of Knife River's business or that it would infringe on Knife River's ability to remain in business. Moreover, once this citation was issued, nothing suggests that Knife River failed to make a good faith effort to achieve rapid compliance with the safety standard. Knife River was moderately negligent, and the violation exposed one miner to a reasonable risk of fatal injuries. In considering all of the facts and circumstances of this matter, I hereby assess a civil penalty of \$585.

## B. Citation Nos. 6479744 and 6479745 – The Work Boats

### 1. Violation

Citation No. 6479744 was issued for the 40-horsepower work boat not having handrails or toeboards. The boat measured approximately 15-feet long and 10-feet wide, and according to Inspector Chaix "[t]his boat was observed to be in use by the dredge operator for transport to and from the dredge at least twice each shift." (Ex. KR-10.) Citation No. 6479745 was issued for the 20-horsepower work boat not having handrails or toeboards. (Ex. KR-12.) The boat was approximately 14-feet long and 8-feet wide and according to Chaix was "used on an as-needed basis for transport and as a work platform." (*Id.*) Like a platform, these work boats are flat with

no sides or gunnels. (Ex. S-9.) Also, the boats have cranes built onto them. (Ex. S-9.) On the night of the inspection, the 40-horsepower boat was holding welding equipment. (Tr. 58:17–25; Ex. S-9.)

Citation Nos. 6479744 and 6479745 allege violations of 30 C.F.R. § 50.11027, which, as stated above, require working platforms to be provided with handrails and toeboards. Both of the alleged violations were deemed S&S by Chaix based on his determination that miners were exposed to the risk of drowning. (Exs. KR-10, KR-12.) Knife River does not view the boats as work platforms. (Tr. 337:6–7.) However, uncontroverted testimony showed that miners work on the dredge and pipeline from the boats. (Tr. 58:17–59:9, 60:3–15.) Miners position the boats on the water where they must perform necessary work tasks, such as moving them against the pipeline so that they can use the welder, torches, and the crane. (Tr. 60:7–15.) Miners stand on the boats to bolt and maintain the pipeline that carries out the sand, rock, and slurry mixture. (Tr. 60:16–61:21.) Periodic work is conducted on the boats, and the work is not so infrequent as to preclude them from being regarded as working platforms. *See Rohloff Sand & Gravel Co.*, 20 FMSHRC 868 (Aug. 1998) (ALJ Barbour) (finding a water pump platform floating on a pond to be a “working platform”). Accordingly, I find that these boats constitute working platforms.

The analysis of Knife River’s notice regarding the application of § 56.11027 to its work boats parallels the analysis of § 56.11027’s application to the dock. *See* discussion *supra* Part IV.A.1. Knife River’s miners regularly performed work tasks from these boats. A reasonably prudent operator should have recognized that the boats would be considered “working platforms.” Even if the need to install handrails had been unclear, Knife River received notice from MSHA official Art Ellis prior to Chaix’s inspection that it needed to install handrails on the boats. Thus, I reject Knife River’s arguments to the contrary.

## 2. Gravity and S&S

As articulated above, Knife River’s violations of a mandatory safety standard establishes the first element of the *Mathies* test for an S&S violation. Like the dock, the boats need handrails and toeboards to keep miners from slipping and falling either against other objects or into the water, notwithstanding any mere inconvenience these safeguards may pose. (Tr. 575:1–19, 576:23–577:11.) The heightened possibility of such falls caused by this violation constitutes a discrete safety hazard.

The miners had relatively frequent exposure to the hazard in these violations. The fact that a miner had fallen off of a work boat in the past while on the job demonstrates the risks of working in this environment. (Tr. 63:6–10.) Work is conducted on the boats during inclement weather, such as rain, heightening the risk of slipping on a wet surface despite scoring on the boats’ surfaces designed to add foot traction. (Tr. 91:14–15, 151:2–5, 570:10–571:3.) Life jackets do not adequately ameliorate the varied hazards of this work environment, as they may not be properly secured. Moreover, besides drowning, a falling miner could catch hypothermia from exposure to the water or break a bone. As with the violation concerning the dock, the

nature of this hazard exposes one miner to the risk of drowning, a potentially fatal injury. Given the nature of the hazard, the miners' exposure to it, and the likelihood of injury, I conclude that the violation resulted in a discrete safety hazard associated with the reasonable likelihood of an injury of a reasonably serious nature. This conclusion establishes the remaining three elements of the *Mathies* test for an S&S violation. I determine that these violations were S&S.

### 3. Negligence

These citations charged Knife River with moderate negligence. The general circumstances surrounding these violations are similar to the circumstances surrounding Knife River's failure to provide adequate safety measures on the dock. In light of Knife River's notice of these violations, the likelihood of injury, and the nature of the injury, I agree with the inspector's determination that Knife River's negligence was moderate. As a result, Citation Nos. 6479744 and 6479745 are hereby **AFFIRMED**.

### 4. Civil Penalty

The Secretary seeks a civil penalty of \$585 for each of these violations. I have considered Knife River's history of few violations. I have determined that the gravity and negligence of Knife River's violations in these two citations is the same as that committed in Citation No. 6479737, which involves the same safety standard as the one breached in Citation Nos. 6479744 and 6479745. Nothing suggests that Knife River failed to make a good faith effort to achieve rapid compliance with the safety standard once Citation Nos. 6479744 and 6479745 were issued. Accordingly, based on the six civil penalty criteria, I conclude that the proposed civil penalty for these violations is appropriate and hereby assess a civil penalty of \$1,170.

## C. Citation No. 6479741

### 1. Additional Findings of Fact – The Experts' Reports

Citation No. 6479741 was issued by Inspector Chaix because the corrugated steel tunnel running underneath the cobble surge pile had "at least two radial seams" that were failing and "other significant deformations in the structure." (Ex. KR-4, at 10.) One of the radial seams split near the first vertical support. (Ex. S-5, at 3.) The second radial seam split near the twelfth vertical support. (Ex. S-5, at 6.) The tunnel's "other significant deformations" included buckling, areas where the roof is inverted (Tr. 246:22–247:2), and distortion of the tunnel's vertical supports. Chaix felt the damage was "obvious" because the tunnel was visibly buckled, curved, kinked, and bulged. (Tr. 35:13–38:22, 44:9–45:4.)

Two experts and one of Knife River's engineers offered detailed testimony concerning the condition of the tunnel. Terence Taylor testified on behalf of the Secretary and was accepted as an expert in civil structural engineering. (Tr. 241:8–10.) H. John Head testified on behalf of Knife River and was accepted as an expert in mining engineering. (Tr. 472:7–14.) Dr. Keith

Kaufman, author of Knife River's 2008 report concerning the tunnel and Chief Engineer at Knife River's prestress plant in Knife River's western Oregon division, also testified on behalf of Knife River. (Tr. 404:19–405:4.)

Taylor observed that the overall shape of the tunnel was skewed, meaning the tunnel was not a perfect ellipse or circle. (Tr. 250:8–14.) Part of the tunnel had widened out, but the expansion ranged between only seven and thirteen inches. (Tr. 250:15–24.) This expansion occurred in an area reinforced by the vertical posts. (*Id.*) Kaufman and both experts agreed that the tunnel's circular design is integral to its function. (Tr. 290:20–25, 409:18–25, 476:8–15.) They also agreed that the cobble must be loaded evenly on the tunnel, as uneven loading could compromise its strength. (Tr. 261:10–19, 418:22–419:1, 477:10–22.) Kaufman asserted that cobble should not be removed from the tunnel in such a way as to unbalance its load. (Tr. 441:3–8; Ex. S-6, at 3.) Head agreed with this point and stressed that the tunnel should never be uncovered. (Tr. 480:6–9.)

Taylor explained that a twenty percent deflection measurement indicates a risk of incipient collapse, which is the point when the tunnel will buckle (or bulge) and go into a reverse curvature shape. (Tr. 291:6–13.) Taylor relied upon two separate criteria to determine whether a particular part of the tunnel had failed: (1) a measurement of twenty percent deflection or (2) buckling. (Tr. 310:24–311:1.) Knife River engineer Kaufman acknowledged that a buckle constitutes a localized failure of the tunnel. (Tr. 450:4–6.) Here, the range of the tunnel's deformation measurements equated to a six to eleven percent deflection of the pipe. (Tr. 251:2–3.) According to Taylor, the industry allows a deflection measurement of five percent. (Tr. 291:1–4.)

Taylor documented six bulges in the tunnel. (Tr. 244:16–18.) He stated that the tunnel had permanently deflected in the bulging areas and would not return to its original shape. (Tr. 290:16–18.) Taylor described two bulges at the back of the tunnel and opined that the feeder frame had prevented the tunnel's complete collapse in that section. (Tr. 245:7–13.) Two bulges were observed in the middle section of the tunnel. Head, Kaufman, and Taylor noted that the vertical supports in this area added redundant support to the tunnel. (Tr. Tr. 293:5–16, 413:3–12, 516:19–24.) Finally, Taylor described two bulges at the entrance of the tunnel, which he recognized as the ones shown in Kaufman's report. (Tr. 246:12–17.)

Taylor's analysis corroborated the two seam splits identified by Chaix and recognized a third one located between the sixth and seventh vertical supports. (Tr. 247:15–21, 249:16–17.) Kaufman's report identified only the seam split near the first vertical support. (Ex. S-6, at 2.) Kaufman recognized seam separation as a criterion indicating failure of the tunnel. (Tr. 450:7–9.)

Taylor testified that the tunnel's design did not give it a safety factor of two, the prudent design standard, and that in its current condition a variety of potential structural failures could occur, such as the sudden buckling of a portion of the tunnel's roof. (Tr. 269:9–270:5.) The safety factor measures the ratio of the tunnel's load bearing capacity over the load associated

with the height of the cobble pile. (Tr. 501:3–8.) To compute the safety factor, Taylor estimated the load on the tunnel based on the cobble density measurement of one hundred pounds per cubic foot provided by Knife River. (Tr. 288:11–21.) He approached the calculation from “an engineering standpoint,” estimating the safety factor based on the maximum expected load, that is, the maximum estimated height of the cobble pile, which he stated to be thirty feet. (Tr. 288:11–289:25.) Head disagreed with Taylor’s calculations, criticizing the compaction value chosen by Taylor.<sup>9</sup> (Tr. 503:23–505:14.) Head stated that although the exact value is unknown, it lies somewhere between the extremes of seventy percent—“almost no compaction”—and eighty five percent—“the good end” of the range. (Tr. 507:20–508:3.) Noting that Taylor used a compaction measurement of seventy percent, Head explained that a compaction factor of seventy-three percent would yield a safety factor of two. (Tr. 505:16–506:14.) In response to this criticism, Taylor explained his position that a compaction measurement of seventy percent “really [gave] the company the benefit of the doubt,” in light of how loose the cobble material surrounding the tunnel is. (Tr. 592:12–21.) Nevertheless, Taylor conceded that his analysis did not account for the tunnel in its present condition, i.e., with installation of supplemental supports and buckles in the tunnel’s structure. (Tr. 297:25–298:4.)

As one of the steps taken to abate this citation, MSHA required Knife River to measure changes in the tunnel’s size. (Tr. 361:7–365:24.) Knife River measured the tunnel’s width in four locations and also measured the size of two of the larger bulges. (Tr. 362:23–363:6.) The monitoring data reveal that the measurements of these locations did not change in a sample of thirty-five days spanning from September 2009 to October 2009. (Ex. KR-26.) During that time, the cobble pile’s height varied from fifteen percent to eighty-five percent of its maximum. (*Id.*)

Although the tunnel has been damaged for a number of years, the damage’s cause is unclear. (Tr. 135:20–136:6, 280:11–19.) The experts and Knife River’s engineer agree, however, that at least the two bulges located nearest to the tunnel’s entrance were created by equipment loading and unloading the surge pile. (Tr. 256:14–24, 258:9–15, 280:20–281:1, 432:13–22, 479:21–480:1.)

Indeed, no expert could specifically trace the progression of the tunnel’s damage, and it was evident that the tunnel existed in mostly the same condition for a long period of time. The tunnel’s vertical supports were installed approximately fourteen years ago. (Tr. 253:25–254:4.) Kaufman and Head reported that they spoke with Knife River employees who stated that the tunnel has been in its present condition for at least fourteen years. (Tr. 408:3–25, 484:11–14.) Taylor noted that the bearing channel, which runs along the roof of the tunnel and connects to the vertical supports, had rotated at the site of one of the buckles, implying that the tunnel was damaged after the installation of the vertical supports. (Tr. 253:13–254:4.) Kaufman agreed that “a lot of [the] deformation occurred after the retrofit,” specifically identifying the area with the vertical supports. (Tr. 422:13–423:17.) He did state, though, that the bulges are not new developments. (Tr. 421:22–422:1.) Head concurred that none of the damage to the tunnel was

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<sup>9</sup> The compaction value measures how tightly packed the cobble is. (Tr. 503:23–504:7.)

new. (Tr. 484:15–21.) In contrast to Taylor and Kaufman, Head did not think that the tunnel had deformed after the installation of the vertical supports. (Ex. KR-28, at 5.)

The substantial education and experience of Taylor, Kaufman, and Head allowed them to make expert conclusions about the tunnel’s present condition. (Tr. 237:1–241:7, 405:2–406:16, 465:18–472:5.) Taylor’s analysis carefully documented the condition of the tunnel, finding several locations where it had failed. In contrast, Kaufman visited the tunnel for fifteen minutes and neither walked its entire length nor noted all of its deformations. (Tr. 410:5–19.) Head explained that because some of the facts concerning the tunnel are unknown, he felt that a “subjective analysis” was more appropriate than a “detailed, quantitative analysis.” (Tr. 473:24–474:7.) Head acknowledged that he did not perform “a rigorous technical evaluation” and admitted that it was not “quite as complex as Mr. Taylor’s exam.” (Tr. 485:13–23.) Also, in discussing his conclusion that the tunnel is safe, Head stated his opinion that “[s]hort of complete inversion, [the] tunnel would not make me uncomfortable.” (Tr. 541:14–15.) The notion that a tunnel on the verge of collapse is acceptable is incongruent with the Mine Act’s goal of protecting miners’ safety. I grant more weight to Taylor’s analysis of the tunnel because it was more thorough than Kaufman’s and Head’s reports and because Taylor did not rely on premises contrary to the purpose of the Mine Act.

## 2. The Violation

This citation alleges a violation of 30 C.F.R. § 56.14100(b), which states that “[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.” Chaix deemed the alleged violation S&S and an unwarrantable failure to comply with a mandatory safety standard. He regarded the violation as unwarrantable because Knife River had notice of the defect through a written report emailed on October 26, 2008, by engineer Keith Kaufman to Gullickson, Dave Bull, Knife River Western Oregon Division President, and Steve Zurfluh, Superintendent of Reed Pit prior to Wetmore. (Tr. 44:25–45:12; Ex. S-6.)

Knife River objects to the application of § 56.14100, and argues, in essence, that the tunnel in question is not “equipment” within the ordinary meaning of the word as set forth in § 56.14100(b). Knife River further contends that even if, *arguendo*, the tunnel is considered “equipment,” the Secretary has not demonstrated that the structures at issue had “defects affecting safety” because no “mining” occurs within the tunnel; only a conveyor runs through it, and the tunnel is rarely occupied by miners.<sup>10</sup>

Equipment is defined, in pertinent part, as “1a: the equipping of a person or thing; b: the state of being equipped; 2a: the physical resources serving to equip a person or thing as (1): the implements (as machinery or tools) used in an operation or activity (2): all the fixed assets other

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<sup>10</sup> Knife River acknowledged that miners access the cited culvert tunnel periodically to perform workplace examinations or maintenance on the conveyor. (KN’s Prehr’g Statement 2.)

than land and buildings of a business enterprise. . . .” *Webster’s Third New International Dictionary, Unabridged* 768 (2002). Accordingly, inasmuch as the testimony indicates that the tunnel is a fixed asset used in Knife River’s mining operation but is not a building, and is used in the transport of materials in Knife River’s mining operation, it comes within the definition of “equipment,” and thus is within the purview of § 56.14100(b).

Additionally, reference to the regulations further illuminates the Secretary’s interpretation of her regulation. Part 56, Subpart M—“Machinery and Equipment,” regards large physical components of mining operations as equipment. Several sections of the subpart regulate conveyor systems, of which the tunnel is an integral part. *E.g.*, 30 C.F.R. § 56.14109. The Secretary’s interpretation of § 56.14100 is consistent with 30 C.F.R. Part 56, which sets forth the safety and health standards governing surface metal and nonmetal mines, such as Reed Pit. I find that the Secretary’s definition is a reasonable interpretation, as the tunnel allows Knife River to carry on its aggregate mining activity. Therefore, the Secretary has established a violation. In light of this conclusion, a reasonably prudent operator should have recognized that this standard applied to its operation. Indeed, as noted by the Secretary (Sec’y Br. 61), Knife River admitted that it initiated Kauman’s report in light of MSHA’s enforcement action against a structure at another one of its facilities, implying that it was well aware equipment like the tunnel is subject to MSHA’s regulatory authority.

### 3. Gravity and S&S

Having established a violation of a mandatory safety standard, the first element of the *Mathies* test, I now turn to the questions of gravity and whether this violation was S&S. The tunnel deformations resulted in a discrete safety hazard. The buckling and deformations of the tunnel could easily contribute to the potential collapse of the tunnel. Because the damage has been present for a significant period of time, continued mining operations, with no additional remedial measures, could contribute to increased deterioration. Assuming continued mining operations from the issuance of the citation, further deterioration of the tunnel’s structure was reasonably likely, creating a discrete hazard that could contribute to a miner’s injury. Significantly, no accurate means exist to predict what circumstances might cause the tunnel to collapse or even when a collapse might occur. (Tr. 298:20–25.) Miners must regularly work in this environment, and to perform maintenance work, miners access the entire tunnel. (Tr. 430:19–21.) At least one miner is required to spend some time in the tunnel every day as part of his job. (Tr. 484:4–6.) A tunnel cave-in with miners inside of it would result in a reasonably serious, if not fatal, injury. Accordingly, the hazard associated with this violation was properly cited as a reasonably likely risk of fatal injury to one miner. The violation created a discrete safety hazard associated with the reasonable likelihood of a reasonably serious injury. I conclude that this violation was S&S.

#### 4. Negligence and Unwarrantable Failure

In this case, Knife River initiated the report on its own accord to confirm the tunnel's safety in light of MSHA's concerns of a structure at another one of its mines. Moreover, Knife River followed several of Kaufman's recommendations. Its employees visually inspected the tunnel's deformations and temporary struts on a daily basis, recording their observations of the struts, as recommended by the report. (Tr. 381:20–382:2, 383:14–23.) Most importantly, Knife River ensured that it evenly loaded the tunnel in accordance with Kaufman's recommendation. (Tr. 382:11–383:13.) Indeed, all of the experts agreed that evenly loading the tunnel was crucial to preserving its structural integrity. Nonetheless, Knife River did not implement all of Kaufman's recommendations. It did not install a sump pump to remove water from the tunnel.<sup>11</sup> (Tr. 381:9–15.) Most significantly, Knife River did not install horizontal control points in the tunnel in order to take periodic measurements of the tunnel's geometry. (Tr. 381:16–19.)

When the violation was cited, the tunnel's condition was relatively static. Only some of the damage had occurred since the installation of the tunnel's vertical supports approximately fourteen years ago. All of the experts agreed that the vertical supports supplemented the tunnel's strength. Moreover, Taylor's albeit thorough analysis of the tunnel did not account for these supports. This fact softens Taylor's criticism of Knife River that the tunnel, as originally designed, was inadequate to its use. The present stability of the tunnel given Knife River's own observations of it and the tunnel's 2009 size measurements under MSHA's direction suggest that the tunnel is not in immediate danger of collapse. At the same time, although the tunnel conditions remained static, none of the experts could provide calculations that accurately established its safety factor. This unknown risk factor posed a risk to miners' safety that Knife River failed to adequately address.

Here, Knife River did take some steps to investigate the condition of its damaged tunnel and implemented measures to ensure that it did not pose a danger to its miners. The relatively static condition of the tunnel did not give Knife River reason to think that its tunnel posed an immediate threat to its miners. At the same time, Knife River failed to take significant, yet cost-effective, steps to mitigate the dangers posed by the tunnel, including researching its original design plan and measuring its size. Furthermore, relying on visual observations, instead of taking measurements of horizontal control points, is no way to ensure equipment such as this tunnel, which had sustained visible damage long ago, was in a condition that it would not fail. Based on these considerations, I conclude that Knife River's violation evinced a high degree of negligence.

None of the evidence suggests that in using the tunnel Knife River engaged in aggravated conduct constituting more than ordinary negligence. Knife River took steps to ensure that its miners would not be exposed to the tunnel's collapse. Knife River could have taken further

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<sup>11</sup> Chaix issued Order No. 6479742 alleging standing water in the tunnel, and he referenced Kaufman's recommendation to install a sump pump. As explained below, I have approved the parties' agreement to settle the order, modifying it to a section 104(a) citation.

simple steps to ameliorate the hazards associated with this tunnel. However, it should not be penalized for its self-directed efforts to investigate the tunnel and its attempt to address the tunnel's compromised structure. I conclude that this violation did not constitute an aggravated failure to adhere to a mandatory safety standard.

Accordingly, Citation No. 6479741 is hereby **MODIFIED** to a section 104(a) citation.

#### 5. Civil Penalty

The Secretary seeks a civil penalty of \$2,000 for this violation. Here, nothing suggests that Knife River failed to make a good faith effort to achieve rapid compliance after this citation was issued. However, I have determined that this citation still involved Knife River's high negligence with regard to a hazard involving the reasonably likely risk of fatal injuries to one miner. Therefore, a civil penalty of \$1,000 is appropriate for this violation.

#### D. Order No. 6479743

##### 1. Violation

Both Order No. 6479743, issued July 28, 2009, and Citation No. 6479746, issued July 29, 2009, involve a wooden barrier wall. The wall is 100-feet long by 28-feet high and was built to suppress noise and dust. (Tr. 370:1–3, Ex. S-12, at 8.) It originally surrounded the entire crusher, but some sections had been removed. (Tr. 370:5–12, Ex. S-12, at 8.) Order No. 6479743 was issued based on Inspector Chaix's assertions that five of the six support columns in the wall were significantly rotted at the time of the inspection, and the remaining column was only slightly less rotted. (Ex. KR-8.) Chaix testified that daylight was visible beneath the posts. (Tr. 46:22–24, Ex. S-8.) Also, the wall was attached to the crusher operator station and to a workshop.<sup>12</sup> (Tr. 318:7–15; 520:1–4; Ex. S-12, at 8.) Chaix determined that miners working and traveling in the area would be exposed to the hazard of the wall moving abruptly or collapsing altogether. (Tr. 49:23–50:21, 52:20–23.)

Order No. 6479743 was issued as a section 104(d)(1) order for an alleged violation of 30 C.F.R. § 56.14100(b), which requires that “[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.” Chaix found the alleged violation to be S&S and an unwarrantable failure, stating that “[m]ine management engaged in aggravated conduct constituting higher than ordinary negligence in that they were aware of the condition of the wall and the need for it to be removed, but failed to act to protect their miners by ensuring the correction of the condition prior assigning miners to continue to work and travel in the area.” (Ex. KR-8.) Chaix's allegations of “aggravated

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<sup>12</sup> The wall's plywood paneling was toed into the sill plate, and angled bracing also supported the wall. (Tr. 520:1–521:2, Ex. S-12, at 8–9.)

conduct” stem from the “obvious” poor condition of the wall and the fact that Reed Pit management allowed miners to travel to and from the crusher operator station located under the wall. (Tr. 53:12–24.) Terence Taylor testified that due to the rotted columns, it would not have the capacity to resist the significant wind loading expected for that part of Oregon—eighty-five miles per hour. (Tr. 272:17–273:1.) The order required Knife River employees to be withdrawn from the north wall along the crusher and the area beneath the wall on both sides “for a distance equal to its height.” (Ex. KR-8.) Citation No. 6479746 was issued for an alleged failure by Knife River to follow the withdrawal order. (Ex. KR-14.)

Knife River contends that the wall is not within any ordinary definition of “equipment, machinery, and tools.” While Knife River acknowledged that it was aware of the condition of the wall and was in the process of taking it down, it had been almost a year since Knife River worked on removing the wall. (Tr. 56:14–23, 565:19–566:1, 572:13–23.)<sup>13</sup> Also, the evidence showed that the wall still blocks noise and dust—intentionally or not. (Tr. 48:13–49:22, 131:20–22, 370:1–3; Ex. S-12, at 8.) I find that the wall served as a physical resource, equipping Knife River in its mine operation in that the wall still blocks dust and noise. *See* discussion *supra* Part IV.C (analyzing the meaning of the term equipment). Reference to Subpart M of 30 C.F.R. Part 56 reveals that the regulations regard items like this barrier wall as “equipment.” Section 56.14110 requires the construction of “guards, shields, or other devices that provide protection against . . . flying or falling materials.” Knife River constructed the wall, in part, to block the dust generated by the crusher unit. Therefore, I find that the Secretary has reasonably interpreted the term “equipment” to include the wall and has therefore established a violation.

## 2. Gravity and S&S

Based on the evidence, a danger to safety from the wall was present because the posts holding the wall were rotted, posing a high risk of the wall falling in light of the expected wind velocities in that part of Oregon. Even though the wall is reinforced by plywood backing anchored into a concrete and steel base, the base posts were extensively rotted and cracked. (Tr. 124:3–125:21, 561:11–24.) Simply because the wall had not previously shown signs of instability in high winds does not mean a gust could not knock the wall over. This fact simply means that a wall collapse is not highly likely should mining operations continue. Even though MSHA Supervisor Breland testified that the crusher operator station would protect the miners if the wall fell, miners not inside the operator station were exposed to the risk of the falling wall. (Tr. 230:16–231:16.) A wall collapse could result in severe or even fatal injuries. The gravity of this violation was properly cited as a reasonably likely risk of fatal injuries to two miners. I conclude that this violation was S&S.

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<sup>13</sup> Knife River planned on removing the wall because it was considered an “eyesore” and because it created a blind spot for mobile equipment. (Tr. 566:2–15.)

### 3. Negligence and Unwarrantable Failure

Here, the evidence demonstrates that the posts supporting the wall had severely rotted away. This deterioration could not have happened abruptly. Instead, it developed over time. Prior to the abatement of this violation, the wall was reinforced by plywood backing anchored into a concrete and steel base. (Tr. 124:3–125:21, 561:11–24.) Furthermore, the structure of the wall is such that its position abutting the trailer gave the wall added stability. In light of these reinforcements, the deteriorated condition of the wall was not so extensive as to justify a finding of unwarrantable failure. Knife River had taken steps to remove other parts of the wall and stated it had intentions of removing the remaining portion, though the subsequent dismantling of the wall had not yet occurred. Additionally, during prior inspections Knife River had not been told that their measures to secure the wall were inadequate. Aggravated conduct exhibiting more than ordinary negligence is not present in this case, and I conclude that the violation cited in Order No. 6479743 does not rise to the level of unwarrantable failure. Instead, a finding of high negligence more accurately reflects Knife River’s dilatory response to the wall’s structural problems.

Based on the foregoing, Order No. 6479743 is hereby **MODIFIED** to a 104(a) citation.

### 4. Civil Penalty

Here, the Secretary seeks a civil penalty of \$2,341. This violation involved Knife River’s high negligence as to a hazard involving the reasonably likely risk of fatal injuries to two miners. No evidence leads to the conclusion that Knife River failed to make a good faith effort to achieve rapid compliance after this citation was issued. Given the significant gravity of this violation, I determine that a civil penalty of \$1,100 is appropriate.

### E. Citation No. 6479746

#### 1. Violation

Citation No. 6479746 alleges Knife River’s violation of Order No. 6479743, which was issued under section 104(d)(1) of the Mine Act. (Ex. KR-14.) Inspector Chaix asserted that “[m]iners were not withdrawn from the area affected . . . in [the] Order of Withdrawal # 6479743 . . . . Two miners were observed to have been assigned to work and travel in, through, and near the crusher operator shack, which was located through and underneath the North wall.” (*Id.*) Knife River argues that should Order No. 6479743 be found invalid, Citation No. 6479746 should be vacated. (KR Br. 34.) Given that I have modified Order No. 6479743 to a section 104(a) citation, the issue presented by Citation No. 6479746 is whether the Secretary can establish a violation.

In *Lodestar Energy, Inc.*, 25 FMSHRC 343 (July 2003), the Commission vacated an Administrative Law Judge’s decision affirming a section 104(d)(1) withdrawal order on the basis

that the Judge negated the section 104(d)(1) citation underlying the order, thereby removing one of the necessary predicates to the issuance of the withdrawal order. *Id.* at 346. The difference between *Lodestar Energy* and this case, however, is that the underlying violation in *Lodestar Energy* could still stand as a section 104(a) citation, as the violation concerned the breach of a particular safety standard. *Id.* at 346–47. Here, Citation No. 6479746 concerns the breach of a withdrawal order that has been invalidated by this decision.

Although the withdrawal order underlying Citation No. 6479746 has been found to be invalid, when the Citation No. 6479746 was issued, the withdrawal order was still effective. The question here is whether the post-citation invalidation of the order underlying a section 104(a) citation through the judicial process necessitates the invalidation of the section 104(a) citation. The text of section 104(a) is silent on this issue:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall with reasonable promptness, issue a citation to the operator.

30 U.S.C. § 814(a).

The Commission has recognized that “[s]ection 104(d) is an integral part of the Mine Act’s graduated enforcement scheme.” *Greenwich Collieries*, 12 FMSHRC 940, 945 (May 1990). As the Secretary’s representatives, mine inspectors play a crucial role in ensuring miners’ health and safety. *See Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2164 (Nov. 1989) (discussing the mine inspector’s discretion to issue imminent danger orders).

If the violation of a withdrawal order may be vacated simply by the Commission’s post-inspection modification of the underlying withdrawal order to a section 104(a) citation, then mine operators will have a significantly reduced incentive to comply with the withdrawal order. Adherence to withdrawal orders is vital to the Mine Act’s enforcement scheme, and violating these orders, even if they are ultimately found not to be sustainable under section 104(d), may risk the lives of miners. Moreover, the unprecedented caseload before the Commission means that the validity of a particular withdrawal order may go unresolved for a significant period of time. Based on the text and purpose of the Mine Act, I conclude that a violation of an effective withdrawal order may be established by demonstrating the breach of the order, notwithstanding the result of the post-inspection adjudication of the withdrawal order.

As for the factual circumstances surrounding this citation, the facts demonstrate that following the issuance of the withdrawal order concerning the wall, miners entered and exited the crusher operator station. (Tr. 69:5–72:3.) This structure ran underneath and adjacent to the barrier wall and was clearly visible within the area subject to the order. (Tr.51:21–52:13, 68:16–20; Ex. S-8, at 1.) Miners entered an area closed by MSHA’s withdrawal order, so I conclude that a violation occurred.

## 2. Gravity

The Secretary has asserted that the likelihood of injury in this violation was non-existent. Here, the deteriorated wall had remained standing for years. Miners entered the area affected by the risk of the wall's collapse in violation of Order No. 6479743 for merely a day. Indeed, the wall did not fall during that brief time period. Application of the "continued normal mining operations" test invokes a counterfactual inquiry into the risks associated with an operator continuing to mine in spite of a particular condition that violates a mandatory health or safety standard. The instant violation does not involve a condition that breaches a particular mandatory safety standard. Instead, the instant violation involves the breach of a government order. Given this distinction and the limited duration of the violation, the continued normal mining operations test has limited use here. I conclude that this violation was not associated with the risk of any injury.

## 3. Negligence

Knife River argues that its negligence should be reduced based on its good faith effort to comply with the withdrawal order. (KR Br. 33–34.) Knife River put up tape around the area affected by the withdrawal order in an attempt to comply with it. Inspector Chaix did not direct Knife River to erect this tape. (Tr. 73:14–16, 126:19–21.) In Knife River's favor, MSHA Supervisor Breland did state that Knife River could continue operating its crusher, not realizing that the crusher was in the area subject to the order. (Tr. 183:9–19.) MSHA Supervisor Breland acknowledged that a misunderstanding may have occurred, and he modified the citation from high negligence to moderate. (Tr. 181:16–22.) Regardless of whether a miscommunication occurred, if Knife River had any doubts as to the parameters of the order, Knife River could have clarified thoroughly with Chaix or Breland. Most importantly, the crusher operator station's location inside the tape set up by Knife River was clear to the naked eye. Knife River violated the withdrawal order because miners continued to work near the crusher operator station, which was within the parameters of the area subject to the withdrawal order.

At the same time, the evidence demonstrates that the risk of Knife River's violation was low. The miners were entering and exiting the crusher operator station where the expectation of injury was virtually non-existent. Based on all of these factors, I conclude that Knife River committed no more than ordinary negligence in this violation and conclude that the violation was appropriately determined to involve moderate negligence. Citation No. 6479746 is hereby AFFIRMED.

## 4. Civil Penalty

The Secretary seeks \$112 for this violation. Based on the gravity and negligence associated with the violation, as well as the fact that the evidence does not reveal any lack of good faith by Knife River to achieve rapid compliance after being alerted of the violation, I conclude that a civil penalty of \$112 is appropriate for this violation.

F. Settlement of Citation No. 6479738 and Order No. 6479742

As stated above, the parties reported at the hearing that Citation No. 6479738 and Order No. 6479742 have settled. The Secretary has filed a Joint Motion to Approve Settlement pursuant to Commission Rule 31, 29 C.F.R. § 2700.31. The originally assessed amount of the applicable two citations at issue was \$2,117, and the proposed settlement is \$410. The proposed settlement is as follows:

**Docket No. WEST 2009-1437-M**

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
6479742	07/28/2009	56.20003(b)	\$2,000	\$293

**Docket No. WEST 2009-1438-M**

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
6479738	07/22/2009	56.18002(a)	\$117	\$117

Knife River has agreed that as a condition of settling Citation No. 6479738, it will conduct visual inspections of the escape tunnel at issue on a daily basis, and someone will travel and inspect the entire length of the tunnel on a quarterly basis. (Tr. 9:25–10:17.) In the Joint Motion to Approve Settlement, the Secretary has agreed to modify Order No. 6479742 to a citation under section 104(a) of the Mine Act involving Knife River’s “moderate” negligence.

In support of the proposed settlement, the Secretary has submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act, 30 U.S.C. 820(i), including information regarding Knife River’s size, ability to continue in business, and history of previous violations.

In addition, the Secretary has stated reasons fully warranting the agreed upon reduction in the proposed penalties.

After review and consideration of the pleadings, arguments, and submissions in support of the settlement motion, I find the proposed settlement is reasonable and in the public interest. Pursuant to 29 C.F.R. 2700.31, the motion is **GRANTED**, and the settlement is **APPROVED**.

## **VI. ORDER**

In light of the foregoing, it is hereby **ORDERED** that Citation Nos. 6479737, 6479744, 6479745, and 6479746 are **AFFIRMED**. Knife River is **ORDERED** to pay a civil penalty of \$4,377 within 40 days of this decision. Upon payment of the civil penalty, the above-captioned contest proceedings are **DISMISSED**.

Also within 40 days of this decision, the Secretary is **ORDERED** to **MODIFY** Order No. 6479742 by striking its designation as an unwarrantable failure to comply with a mandatory safety standard, reducing its negligence to “medium,” and changing it to a citation issued under section 104(a) of the Mine Act.

Alan G. Paez  
Administrative Law Judge

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