FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. VULCAN CONSTRUCTION MATERIALS, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. SE 2023-0117 A.C. No. 01-03143-571391 Mine: South Russellville Quarry

DECISION AND ORDER

Appearances: Alessandra T. Palazzolo, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner,

Jean C. Abreu, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner,

Misty Hillis, Vulcan Construction Materials, LLC, Birmingham, Alabama, for the Respondent,

Autumn Graves, Vulcan Construction Materials, LLC, Birmingham, Alabama, for the Respondent.

Before: Judge Sullivan

I. INTRODUCTION

This case is before me upon a Petition for the Assessment of Civil Penalty filed by the Secretary of Labor through her Mine Safety and Health Administration ("MSHA") against Vulcan Construction Materials, LLC ("Vulcan" or "Respondent"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act'), 30 U.S.C. § 815(d). The Secretary alleges that Vulcan violated 30 C.F.R. § 56.11012 when it failed to properly guard a ladderway opening on an elevated walkway adjoining a conveyor at Vulcan's South Russellville Quarry in Russellville, Alabama.

The parties presented testimony and documentary evidence at a virtual hearing via ZOOM for Government on September 19, 2023. MSHA Inspector Timothy Schmidt testified on behalf of the Secretary. Vulcan's area manager, Coleman McNider, and Russellville's plant

manager, Rob Molyneux testified on behalf of the Respondent which is acting pro se in this matter. The Secretary filed her post-hearing brief on December 1, 2023, and Vulcan filed its response on December 29, 2023.[1] For the reasons below, I affirm the single citation and uphold MSHA's proposed penalty.

II. GENERAL FACTUAL AND PROCEDURAL BACKGROUND

The South Russellville Quarry involves typical quarry operations, including the drilling and blasting of rock that is then processed through a plant that crushes and sizes the material using multiple crushers, screeners, and belt conveyor systems. Among these systems is the C-17 conveyor, which includes, among other components, a radial stacker, a shoot entryway where rock pours from an adjacent conveyor, skirting, and guarding. Tr. 13, 15-16, 38-39.

Running alongside the C-17 conveyor system is an adjoining elevated metal walkway, a catwalk that is accessible at one end by a fixed ladder. Atop the ladder is the metal structure of the conveyor to the left, and on the right is the start of the railing that runs the length of the catwalk. At the other end of the catwalk is the conveyor's head pulley section, where the conveyor's drive belt motor is located. Tr. 15; Ex. S-2 & 3 (photographs).

On June 6, 2022, Inspector Schmidt conducted a regular inspection of the quarry. Before working at MSHA, Inspector Schmidt, over the course of seven years held multiple positions, including plant operator at a surface mining company. In January 2017, he started his current position as a MSHA inspector and successfully completed his training at the Mine Safety and Health Academy. As part of his mandatory refresher training, Inspector Schmidt returns to the academy every two years. Annually, he conducts approximately fifty to sixty regular inspections – 20 to 30% of which involve limestone quarries. Tr. 11-13.

During his prior inspection of the South Russellville plant, six months earlier, Inspector Schmidt did not cite Vulcan for any unguarded ladderways, including at C-17. Tr. 29-31. Later, however, a month before his June inspection, Inspector Schmidt issued citations for violations of section 56.11012 involving unguarded ladderway openings at two of Vulcan's other operations. Tr. 25, 27; Ex. S-5 & S-7. Section 56.11012 provides that "[o]penings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed." Vulcan did not contest those citations, or the penalties assessed for them. Tr. 57; Ex. S-6 & S-8.

During his June inspection at Russellville, Inspector Schmidt issued Citation No. 9700252, alleging a violation of section 56.11012 for the unguarded opening at the top of the ladderway to the C-17 catwalk that exposed a miner atop the walkway to a vertical drop of approximately 50 inches to the ground below. Tr. 14-15; Ex. S-1. The inspector designated the violation as unlikely to result in injury or illness, that any injury that did occur would result in lost workdays or restricted duty, and that it was due to low negligence on the part of Vulcan.

[1] In this decision, the joint stipulations, transcript, Secretary's exhibits, and Respondent's exhibits are abbreviated as follows: "Jt. Stip.," "Tr.," "Ex. S-#," and "Ex. R-#."

Ex. S-1. That same day, Vulcan terminated the citation by adding a chain that could be strung between the railing and the conveyor structure to close the opening atop the ladderway. Tr. 24; Ex. S-4 (post-abatement photograph); Ex. S-13, at 4 (Admission No. 7).

The Secretary later petitioned the Commission for a civil penalty assessment, proposing the then-minimum penalty of $143. At issue here is whether Vulcan violated 30 C.F.R. § 56.11012, and if so, the penalty to be assessed**.**

III. FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Fact of Violation

Citation No. 9700252 states:

> No chain or barrier is provided for an opening on the work platform on the walkway of the C-17 conveyor. The ladderway opening has no chain or gate exposing a drop off of approximately 50 inches. Miners may work in the area to change skirt boards, work on guards or conveyor parts. This condition exposes miners to a fall hazard should they misstep into the unguarded drop off while working. Should a miner fall through the opening injuries such as fractures, strains, and contusions would likely occur.

Ex. S-1. To prevail here, the Secretary must prove the cited violation "by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citations omitted). The Secretary's burden of proof requires her to demonstrate that the "existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotations omitted).

There is no dispute regarding the lack of either guarding around the ladderway opening or an alternative warning signal at the top of the C-17 ladderway. Tr. 14, 21-23, 35; Ex. S-1, S-2, S-13, at 4 (Admission No. 8); Jt. Stip. No. 9. Rather, the Secretary and Vulcan disagree on whether the opening at the top of the ladderway was subject to section 56.11012 and thus protection as provided by the standard.

At hearing, in explaining why he issued the citation, Inspector Schmidt's primary focus was on the risk posed to a miner working on the catwalk close to the ladderway opening. The inspector, drawing upon his experience with conveyor maintenance, explained why he had concluded that a miner would work from the catwalk at a point close to the ladderway opening. Tr. 16-17.

The inspector began by pointing out that, immediately to the left of the opening above the ladderway, was a shoot entryway where rocks poured onto the C-17 conveyor from an adjacent conveyor. Tr. 15; Ex. S-3 (supporting photograph). At that entryway, skirting was present to settle the rocks, preventing them from bouncing or spilling off the conveyor. The inspector also described in detail other various rubber and metal components of that section of the conveyor,

and estimated that, due to wear and tear over time, there would be a relatively frequent need to maintain and repair the skirting and other parts. Tr. 15-18.

Inspector Schmidt also testified to additional potential maintenance issues with the conveyor that may require a miner to work from the catwalk, including at a point near the ladderway opening. The conveyor ran on various types of rollers, that the inspector also predicted would wear out over time, which could lead to misalignment of the belt and prompt the need for replacement of the rollers. He also discussed that at the other end of catwalk was the conveyor's drive pulley, or V-belt, which, attached to its motor like a large rubber band, had to pull the weight of the whole conveyor. In the inspector's opinion, such pressure and stretching of the drive pulley would eventually lead to the need to replace the belt. The inspector also explained that all the guarding at the head pulley's moving parts would wear down and need replacement due to vibration and wear. The inspector further testified that cleanup of spillage from the conveyor would occur from the catwalk, as well as sampling of material for quality control and other purposes. Tr. 18-20.

Lastly, the inspector stated that the length of the catwalk would be traveled each month by a miner to grease the head pulley, and on an annual basis to change the oil in in the gear box there. The inspector's ultimate estimate was that miners would need to travel upon at least part of the catwalk a minimum of two to three times per week, on average. Tr. 20-21.

According to Vulcan's two witnesses, the inspector vastly overstated miners' use of the catwalk for conveyance maintenance and repair assignments. Mr. McNider, Vulcan's area operations manager reviewed the work plan records for the C-17 conveyor for the preceding two years. Ex. R-4. He testified that these plans showed all the maintenance and repair work being done by miners either standing on the ground or using a manlift while wearing fall protection. The projects included maintenance and repair work on the tail pulley, head section, and the conveyor's return pan. McNider also said that skirt board or guarding maintenance or repair would be done by a miner in a manlift, and that the miner would be outfitted in fall protection. Tr. 39-41, 43.

The testimony of Mr. Molyneux, the Vulcan plant manager at Russellville, largely supported McNider's on how much of the repair and maintenance on the C-17 conveyor is usually accomplished. Tr. 59, 62. Molyneux further testified that quality control is also done from the ground after a sample is dumped by a loader bucket. Tr. 59-60.

For the most part, I credit the Vulcan witnesses over Inspector Schmidt on the issue of how frequently miners would perform conveyor maintenance or repair tasks from the catwalk, particularly near the ladderway. The Vulcan witnesses' testimony was based on records kept by Vulcan and their general knowledge of how work was done on the C-17 conveyor, while Schmidt's testimony was based solely on his general, previous experience from working on conveyors like the C-17.

I nevertheless conclude that the Secretary established that the ladderway opening was, in the terms of section 56.11012 an "[o]pening . . . below [] or near [a] travelway[] through which" the miner could fall if the opening was not protected. A "travelway" is specifically defined in the regulations as "a passage, walk or way regularly used and designated for persons to go from one place to another." 30 C.F.R. § 56.2. Here, there is more than sufficient evidence that miners would regularly access the catwalk by foot using the ladderway, and thus, upon return from

whatever their task, be exposed to the unprotected drop off at the ladderway to the ground 50 or so inches below.

Prior to hearing, Vulcan answered interrogatories from the Secretary, providing information that "miners moved or walked on or otherwise used the C-17 Walkway between June 6, 2020, and June 6, 2022" in order "to access the head pulley for greasing and inspections," and that the walkway was accessed for such inspections "usually [one to two] times per month." Ex. S-12, at 4-5 (Answers to Interrogatory Nos. 2 and 5); Jt. Stip. No. 11. Similarly, Vulcan admitted that during that period "miners accessed the C-17 Walkway at least once per month to inspect the C-17 conveyor's motor head and pulley." Ex. S-13, at 5 (Admission No. 12); Jt. Stip. No. 10. Finally, the parties stipulated that miners use the C-17 walkway for conveyor inspection and head pulley greasing at least once per month. Jt. Stips. 13-15.

Use of the catwalk for conveyor inspection and head pulley maintenance was also addressed at hearing. Inspector Schmidt testified that the citation was predicated in part upon such miner use of the catwalk. Tr. 18, 20. More importantly, Vulcan's McNider stated that "[t]he catwalk is used to inspect the conveyor," and that "[t]he catwalk at Russellville is a travelway for inspection purposes of the conveyor system." Tr. 39, 44;[2] *see also* Resp't Post-Hearing Br. at 2 ("Vulcan does perform periodic inspection and greasing at the head pulley of our conveyors, as stated in the admissions. . . . . The location of greasing and inspection at the head pulley, which is 92 feet from the end of the catwalk."). McNider testified that miners would access the catwalk not only by using a manlift, but also by climbing the ladder to the catwalk. Tr. 38-39.

The foregoing establishes, under the section 56.2 definition of travelway as providing "a way regularly used and designated for person to go from one place to another," that the catwalk here is a travelway, and thus subject to the terms of section 56.11012. The catwalk was used by miners to go from the ladderway to points elsewhere on the catwalk, and then used by them to return to the exposed ladderway opening. The inspector may have viewed the primary danger posed to miners to be use of the catwalk as a working platform for maintenance and repair projects conducted near the ladderway opening. However, Vulcan had adequate notice that it was also being cited for violating section 56.11012 by exposing miners traveling back to the unguarded ladderway from other points on the catwalk, such as the tail pulley area, to the risk of falling to the ground. *Cf. Nolichuckey Sand*, 22 FMSHRC at 1060-61.

Vulcan does not contest that the ladderway and catwalk was, in the terms of the section 56.2 definition of travelway, the "designated" way for miners conducting inspection and greasing of the head pulley on foot. With no other manual access point, such miners had no choice but to

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[2] McNider's testimony was contradictory, as he also argued that the catwalk did *not* qualify as a travelway in this instance because traveling from "one place to another" in section 56.2 means to travel from a catwalk to an adjacent catwalk or from one conveyor to another. Tr. 39. However, there is nothing in the standard or its regulatory history that leads to the conclusion that the phrase "one place to another" in section 56.2 is so limited. Indeed, the Commission has held to the contrary. *See Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1059-61 (Sept. 2000) (finding end of maintenance platform was a "place" under the plain meaning of that term as it is used in section 56.2 definition of travelway); *see also Nordic Ind.*, 36 FMSHRC 2687, 2688-89 (Oct. 2014 (ALJ) (platform used to gain access to mine equipment constituted travelway under section 56.1101).

climb up to the catwalk and return to the ground via the ladderway. *See Watkins Engineers & Constructors*, 24 FMSHRC 669, 678 (July 2002).

In addition, that this occurred on at least a monthly basis establishes that the catwalk was "regularly used" as a travelway under the section 56.2 definition. Recently, Commission Judges have been looking more to the regularity of use of an alleged travelway rather than the frequency of its use. *See, e.g., Oil-Dri Prod. Co.*, 32 FMSHRC 1761, 1769-1770 (Nov. 2010) (ALJ) (finding regular use even where operator employees did not use testing platform when evidence was that contractor employees conducted emission testing from it every two years); *see also Nordic Ind.*, 36 FMSHRC at 2688-89 (unprotected landing accessed once a week for inspections purposes held to be a "regularly used" travelway and thus subject to section 56.11012).

Instead, at hearing the testimony of Vulcan's witnesses largely focused on discrediting the statement in the citation that the catwalk was subject to use as "a work platform" near the ladderway for the previously discussed C-17 repair and maintenance projects. Tr. 40-41. Given the greater relative credibility of its witnesses on this subject, Vulcan argues that the citation should therefore be dismissed in this instance. Resp't Post-Hearing Br. at 2.

Nothing in section 56.11012, or the definition of travelway provided by section 56.2, however, limits the application of section 56.11012 to just those times or places where the travelway is being used as a work platform. Section 56.11012 applies to any "[o]pening[] . . . . through which persons or materials may fall . . . ." While it is unlikely that a miner, having accessed the catwalk via the ladderway would, upon returning, fail to perceive the ladderway opening and fall to the ground below, it is at least possible. Moreover, the lack of likelihood of the occurrence of this hazard was reflected in the citation as written (Tr. 23), and, consequentially, in the minimal penalty assessed.

Vulcan alternatively argues that the cited unguarded ladderway does not require a gate or chain because of MSHA guidance clarifying the requirements of 30 C.F.R. §§ 56/57.15005. Resp't Post-Hearing Br. at 1; Ex. R-14 (PPL No. P14-IV-02 (Mar. 25, 2014)). In that Program Policy Letter, MSHA generally adopts OSHA's fall protection standard requiring guardrail systems, safety net systems, or personal fall arrest systems to protect employees that walk or work on a horizontal or vertical surface with an unprotected side or edge at least six feet above a lower level. Ex. R-14; *see* 29 C.F.R. § 1926.50(b)(1). Vulcan's position is that the PPL thus establishes that the 50-inch drop off from the top of the unguarded ladderway to the ground at issue here is not a violation. Tr. 49-50.

I agree with the Secretary that the PPL's guidance with respect to totally different standards – sections 56.15005 and 57.15005 – has no bearing on how section 56.11012 is to be applied. There is no indication whatsoever therein that MSHA intended for the PPL to apply to standards beyond the two it specified.[3] Vulcan is essentially arguing that its compliance with section 56.15005 permits it to ignore the plain terms of section 56.11012, a view that is contrary

[3] Even if the letter provided relevant and appropriate guidance, MSHA in the PPL recognizes that the OSHA fall protection standard may not always satisfy MSHA's standards. The PPL states that MSHA retains the discretion to independently "evaluate all work area hazards to ensure appropriate fall protection provisions are in place to protect miners from fall hazards." Ex. R-14. Under this discretionary reading, the "6 feet above a lower level" standard is not absolute.

to how the Mine Act is enforced. *See Consol Pennsylvania Coal Co.*, 44 FMSHRC 691, 696 n.10 (Dec. 2022) (compliance with another applicable standard has no bearing on whether the Secretary established a violation of the cited standard).

Finally, Vulcan argues that because MSHA does not cite unguarded openings to stairways as violations of section 56.11012, it should not be permitted to enforce the standard with respect to unprotected ladderways. Resp't Br. at 2; Tr. 48, Ex. R-11 & 13. This is little more than an impermissible collateral attack on section 56.11012. In any event, as Inspector Schmidt explained in his rebuttal testimony, stairways and ladderways are fundamentally different, and are treated as such under the regulations. He stated that a ladder is inherently more dangerous than a stairway as a ladder has a vertical drop while a stairway has a more gradual incline. Tr. 64-66. The regulations recognize these differences in incline by requiring a stairway leading to an elevated walkway to only have hand railings. *See* 30 C.F.R. 56.11002 ("Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition.").

Accordingly, I conclude that the cited area was a "travelway" under the Mine Act's definition, and that by failing to install a chain, barrier, or protective cover on the ladderway, Vulcan violated section 56.11012.

B. Fair Notice

Vulcan also argues that it should not be penalized because MSHA failed to provide it fair notice in this instance of what section 56.11012 required of it concerning the C-17 catwalk and ladderway. Resp't Br. at 2. However, as a matter of law, Vulcan was provided sufficient notice that its C-17 catwalk qualified as a travelway under section 56.2, and thus subject to the terms of section 56.11012, by the previously discussed plain meaning of section 56.2's definition of travelway. "The Commission has held that when 'the meaning of a standard is clear based on its plain language, it follows that the standard provided the operator with adequate notice of its requirements.'" *Austin Powder Co.*, 29 FMSHRC 909, 919 (Nov. 2007) (quoting *LaFarge Constr. Materials*, 20 FMSHRC 1140, 1144 (Oct. 1998)); *see also Nolichuckey Sand*, 22 FMSHRC at 1059-61.

Vulcan maintains that notice was especially lacking because Inspector Schmidt had, as recently as the previous year, inspected the Russellville plant and had not cited the C-17 ladderway or any other similar ladderway at the plant for lacking required protection. Resp't Br. at 2; Tr. 61. Vulcan's contention is essentially a form of estoppel argument that has been consistently rejected by the Commission and the courts. The "Commission has long held that an inconsistent enforcement pattern by MSHA inspectors does not prevent MSHA from proceeding under an application of the standard that it concludes is correct." *Austin Powder*, 29 FMSHRC at 919-20 (citing *Nolichuckey Sand*, 22 FMSHRC at 1063-64); *see also Mainline Rock & Ballast, Inc., v. Sec'y of Labor*, 693 F.3d 1181, 1187 (10th Cir. 2012) ("MSHA cannot be estopped from enforcing its regulations simply because it did not previously cite the mine operator. . . . 'Those who deal with the [g]overnment are expected to know the law and may not rely on the conduct of government agents contrary to the law.'" 693 F.3d at 1187 (quoting *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984)); *Palmer Coking Coal Co.*, 22 FMSHRC 887, 890 (July 2000) (ALJ) ("[o]perator is in no worse position than if MSHA had cited the condition

five years ago. It simply would have had to correct the condition and pay the civil penalty at that time.").[4]

In sum, fair notice of the requirements of section 56.11012 was provided to Vulcan in this instance and the minimum requirements of due process have been satisfied.

C. Gravity

For Citation No. 9700252, Inspector Schmidt designated the citation as "unlikely" to cause an injury or illness, given that most of the travel, work, or maintenance done on the walkway would be completed away from the ladderway opening and the side skirt. Tr. 23. If an injury occurred, Inspector Schmidt concluded that it could result in one person suffering an injury reasonably expected to lead to lost workdays or restricted duties. Tr. 23. Because the citation is designated as "unlikely," it was not designated as a significant and substantial violation.

Inspector Schmidt, given his years of experience, offered credible testimony that one person would travel along or complete work and maintenance on the C-17 walkway at a time, subjecting only that one person from falling through the unguarded ladderway opening. In the unlikely event of a person falling, Inspector Schmidt anticipated that the possible injuries would include fractures, sprains, or bruises. According to his testimony, these relatively minor injuries are associated with a fall from four to five and a half feet and would likely result in restricted duty or missed work. Tr. 23.

Given the facts above and Vulcan's silence on this issue, I affirm the assessed likelihood, severity, and number of persons likely to be affected.

D. Negligence

Commission "judges may evaluate negligence from the starting point of a traditional negligence analysis" rather than based on the Secretary's definition of negligence under 30 C.F.R. § 100.3(d). *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *JWR Res. Inc.*, FMSHRC 1972, 1975 n. 4 (Aug. 2014) (explaining that the MSHA regulations are not binding in Commission proceedings). The Commission has further recognized that "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and

[4] At hearing, evidence was introduced that Inspector Schmidt, the month before he cited the C-17 conveyor at Russellville, had issued citations involving unguarded ladderway openings to Vulcan at two of its other mines. Ex. S-5, 7. Vulcan maintains that it did not contest those citations because it conceded in those instances that its miners would use areas near the openings to conduct work assignments. Resp't Br. at 1. I have no reason to doubt Vulcan on this, and thus that Vulcan may have reasonably considered the citations to have been issued for that reason. Indeed, Inspector Schmidt testified as much. Tr. 26-27. However, as discussed, the scope of section 56.11012 is not limited to "work platforms," but rather is broader, with the regulation applying to all "travelways." The earlier citations are thus of little relevance to my finding of violation here.

an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation…occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983).

The Commission's negligence analysis asks whether an operator has met "the requisite standard of care – a standard of care that is high under the Mine Act." *Brody Mining, LLC*, 37 FMSHRC at 1702. To determine whether an operator met its duty of care, Commission Judges consider "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Id.* (citations omitted). A Judge, however, "is not limited to an evaluation of allegedly 'mitigating' circumstances" and should consider the "totality of the circumstances holistically." *Id.* at 1702-1703*; see* 30 C.F.R. § 100.3(d) (stating that operators must be "on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices."). Lastly, the Commission has recognized that an "operator's knowledge (actual or constructive) is a key component of a negligence determination." *Ohio Cty. Coal Co.*, 40 FMSHRC 1096, 1099 (Aug. 2018).

Here, Vulcan does not challenge Inspector Schmidt's designation of low negligence. In his determination, Inspector Schmidt explained that low negligence was appropriate because there had been no indication that there was a recent change, such as the removal or addition of a chain or barrier, and the operator may not have noticed the condition. Tr. 23-24. His explanation is supported by Mr. Molyneux's testimony that none of the six conveyors at the quarry had chains or gates for at least six months before the June citation was issued. Tr. 63.

While it is plausible that a reasonably prudent person familiar with the mining industry under the same circumstances, would have guarded the ladderway opening with a chain, gate, or comparable barrier to protect miners from a vertical drop, I credit Inspector Schmidt's decision to give Vulcan the benefit of the doubt of not noticing the condition. Tr. 23-24. With that, I find that the operator possessed little to no actual or constructive knowledge of the violation.

Considering the totality of the circumstances, I conclude that a designation of low negligence is appropriate.

IV. PENALTY

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

> (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).

In the fifteen months preceding the issuance of Citation No. 9700252, MSHA issued two violations of section 56.11012 to Vulcan Construction Materials, LLC. *See* MSHA, *Mine Data Retrieval System*, https://www.msha.gov/mine-data-retrieval-system (last visited March 4, 2024). While Mr. McNider asserts that the upholding of the citation would be devastating to the operator's continued operation of all its mines to the tune of millions of dollars, Vulcan failed to provide any supporting evidence to substantiate that claim or convince me that the penalty would impact its ability to stay in business. Tr. 52. With no such evidence, I presume that no such adverse effect would occur. *See John Richards Constr.*, 39 FMSHRC 959, 965 (May 2017) (confirming that "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur") (citations omitted).

For Citation No. 9700252, the Secretary proposed a penalty of $143.00. I determined Vulcan's negligence to be low. *See* discussion *supra* Part III.D. Regarding the gravity of the violation, I also determined that it would affect one person, was unlikely to result in injury or illness, and was reasonably likely to result in a lost workdays/restricted duty-type injury. *See* discussion *supra* Part III.C. Moreover, Vulcan demonstrated good faith by promptly adding a chain to barricade the ladderway opening on the same day it received the citation. Tr. 24; Ex. S-4. Considering the six criteria set forth under section 110(i) of the Mine Act in conjunction with the relevant facts, I hereby assess a penalty of $143.00.

V. CONCLUSION AND ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation No. 9700252 is **AFFIRMED** and that Respondent pay a penalty of **$143.00** within 30 days of the date of this decision. Accordingly, this case is **DISMISSED**.

John T. Sullivan
Administrative Law Judge

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