FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 30, 2025

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. MORTON SALT, INC. Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2022-0248 Docket No. CENT 2022-0264 A.C. No. 000560680 Mine: Weeks Island Mine and Mill Mine ID: 16-00970

DECISION AND ORDER

Appearances:	W. Tyler Nash, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, for the Secretary of Labor; Allyson Gault, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, for the Secretary of Labor; Donna Pryor, Esq., Denver, Colorado, for Morton Salt, Inc.;
Party Representatives:	Brandon Olivier, Safety Specialist, MSHA, Broussard, Louisiana, for the Secretary of Labor; Nathan Boles, for Morton Salt, Inc.; Fadi Qutaish, for Morton Salt, Inc.;
Witnesses:	Brandon Olivier, MSHA Inspector; O'Neal Robertson, MSHA Inspector; Colin Francis, Store Room Worker, Morton Salt, Inc.; Dalton Gary, Miner, Morton Salt, Inc.; Eddie Jean-Louis, Hoistman, Morton Salt, Inc.; Fadi Qutaish, Environmental Health and Safety Manager, Morton Salt, Inc.; Heath Segura, Maintenance General Foreman, Morton Salt, Inc.; Landon Olivier, Safety Trainer, Morton Salt, Inc.; Lee Franks, Supervisor, Morton Salt, Inc.; Reggie Provost, Production Supervisor, Morton Salt, Inc.; Scott Frith, Production Supervisor, Morton Salt, Inc.; Troy Rabeaux, Load Operator, Morton Salt, Inc.;
Before:	Administrative Law Judge, Thomas P. McCarthy

I. INTRODUCTION

These two cases are before the undersigned upon a Petition for the Assessment of Civil Penalty under § 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(d).

The cases involve twenty-three citations issued to Morton Salt, Inc. ("Morton Salt" or "Respondent") by the Secretary of Labor between June 13 and 28, 2022 by MSHA inspectors Brandon Olivier and O'Neal Robertson. The Secretary issued the citations for alleged violations found at sites regulated as Mine ID 16-00970 and known as the Weeks Island Mine and Mill. Seventeen of these twenty-three citations were settled by the parties during the prehearing process. The parties presented testimony and evidence concerning the six remaining citations at a hearing held in Lafayette, Louisiana, and subsequently submitted post-hearing briefs. For the reasons discussed below, the undersigned affirms Citation Nos. 9649750, 9649752, 9649757, 9649758, 9673091, and 9649769, as modified. The undersigned assesses a total penalty of $39,900.00 for the six citations that were litigated at hearing.

II. PREHEARING STIPULATIONS

1. The parties have settled Citation Nos. 9649743, 9649744, 9649747, 9649748, 9649753, 9649756, 9649764, 9649765, 9673084, 9673085, 9673082, 9673090, 9673092, and 9673099.

2. This docket involves an underground salt mine known as the Weeks Island Mine and Mill (the "Mine"), which is owned and operated by Morton Salt.

3. Morton Salt has been the "operator" as defined in § 3(d) of the Mine Act, 30 U.S.C. § 802(d), of the mine at which the citations at issue in this proceeding were issued at all relevant times.

4. The assessed civil penalty would not affect Morton Salt's ability to remain in business. However, given the mine's POV [Pattern of Violation] status, these citations could result in the mine's temporary or permanent closure.

5. The citations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of Morton, on or about the date and place stated therein and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevancy of any statements asserted therein.

III. HEARING EXHIBITS

Petitioner's Exhibits

P-1. Citation/Order No. 9649750 - 104a Order [DOL0101-0102]
P-2. Brandon Olivier's General Field Notes from June 14, 2022 [DOL0224-0237]
P-3. MSHA Mounted Photos for Citation/Order No. 9649750 [DOL0434-0435]
P-5. MSHA Photo related to Citation/Order No. 9649750 [DOL0641]
P-6. MSHA Photo related to Citation/Order No. 9649750 [DOL0642]
P-11. MSHA Photo related to Citation/Order No. 9649750 [DOL0668]
P-12. MSHA Photo related to Citation/Order No. 9649750 [DOL0669]

P-14. Morton Excel Schedule for June 13, 2022 [MORTON 00744-0745
P-15. Morton Excel Schedule for June 14, 2022 [MORTON 00746-0747]
P-17. Citation/Order No. 9649752 - 104a Order [DOL0105-0106]
P-18. MSHA Mounted Photos for Citation/Order No. 9649752 [DOL0437-0438]
P-19. MSHA Photo related to Citation/Order No. 9649752 [DOL0671]
P-20. MSHA Photo related to Citation/Order No. 9649752 [DOL0672]
P-21. MSHA Photo related to Citation/Order No. 9649752 [DOL0673]
P-24. Citation/Order No. 9649757 - 104a Order
P-27. MSHA Photo related to Citation/Order No. 9649757 [DOL0715]
P-28. MSHA Photo related to Citation/Order No. 9649757 [DOL0716]
P-30. MSHA Photo related to Citation/Order No. 9649757 [DOL0774]
P-31. MSHA Photo related to Citation/Order No. 9649757 [DOL0775]
P-32. MSHA Photo related to Citation/Order No. 9649757 [DOL0776]
P-33. MSHA Photo related to Citation/Order No. 9649757 [DOL0777]
P-34. MSHA Photo related to Citation/Order No. 9649757 [DOL0778]
P-35. MSHA Photo related to Citation/Order No. 9649757 [DOL0779]
P-36. MSHA Photo related to Citation/Order No. 9649757 [DOL0780]
P-37. MSHA Photo related to Citation/Order No. 9649757 [DOL0781]
P-46. Morton Workplace Inspections [MORTON 00503-00515]
P-47. Morton Workplace Inspections [MORTON 00516-00529]
P-48. Morton Workplace Inspections [MORTON 00530-00533]
P-50. Morton Workplace Inspections [MORTON 00538-00565]
P-51. Morton Workplace Inspections [MORTON 00566-00580]
P-52. Morton Excel Schedule for June 2, 2022 [MORTON 00754-0755]
P-53. Morton Excel Schedule for June 2, 2022 [MORTON 00756-0757]
P-56. Morton Workplace Inspection [MORTON 00248-00249]
P-57. Morton Mucking Diagram [MORTON 00462]
P-58. Citation/Order No. 9649758 - 104a Order [DOL0119-0121]
P-59. Brandon Olivier's General Field Notes from June 17, 2022 [DOL0238-0241]
P-66. Morton Workplace Inspection [MORTON 00581-00582]
P-87. Citation/Order No. 9649767 - 104a Order [DOL0141-143]
P-88. Brandon Olivier's General Field Notes from June 28, 2022 [DOL0273-0279]
P-90. Morton Map [MORTON 00742]
P-92. Citation/Order No. 9673091 - 104a Order [DOL0164-0166]
P-94. MSHA Mounted Photos for Citation/Order No. 9673091 [DOL0461-0462]
P-97. Assessed Violation History Report [DOL0907-0922 (Pages 915 to 922)]
P-98. Morton Workplace Exam/Equipment Training Presentation [MORTON 00363-00402]
P-109. Morton Workplace Inspection PowerPoint [MORTON 00699-00670]
P-117. Morton Rel-Tek SOP [DOL0923-0935]

Respondent's Exhibits

R-2. Production Report [MORTON 744-745]
R-4. New Employee Training Program [MORTON 403-412]
R-6. Safety meeting minutes [MORTON 214-217; 222-233; 659-671; 677-680; 697]
R-8. Morton Employee Awards Program [MORTON 00759]
R-9. Corrective Action Review Forms [MORTON 234-243]
R-12. Mine Maps [MORTON 741-743]
R-14. Diagram [MORTON 00462]

R-15. Workplace Exams [MORTON 00518-519; 00578-579; 00527; 00533; 00528-529; 00248-249; 00580; 00532]
R-17. R2900G Underground Mining Loader Technical Specifications [MORTON 00464-471]
R-18. Sandvik LH621 Mass Mining Loaders Technical Specifications [MORTON 00472-480]
R-21. Production Reports [MORTON 00756-757; 00744-745; 00746-747; 00748-749]
R-22. Blasting Summary June 2022 in 21 G&F, 22 G [MORTON 00758]
R-24. Training records [MORTON 436-442; 444-446; 448-459]
R-25. List of miners [MORTON 460-461]
R-30. Citation 9649767 [DOL 142]
R-32. Workplace Exams [MORTON 00285-286; 00284-285; 00361-362; 00271-272]
R-37. Demonstrative exhibits
R-39. Drawing by Lee Frank

IV. SETTLED CITATIONS

On March 13, 2024, the Secretary filed a motion to approve partial settlement for this docket, proposing a reduction in the total proposed penalties for seventeen of the twenty-three citations from $59,986.00 to $38,320.00. The Secretary proposes no changes to Citation Nos. 9673082, 9649743, 9673085, 9649744, 9649748, 9649759, 9649760, and 9673099. The Secretary has agreed to vacate Citation No. 9649765. *See Secretary v. RBK Construction, Inc*., 15 FMSHRC 2099 (1993).[1] The Secretary proposes a reduction in the assessed penalties for Citation Nos. 9673084, 9649747, 9673090, 9649753, 9649761, 9673092, 9649764, and 9649756. For Citation Nos. 9649753, 9649761, 9649764, and 9649756, the Secretary proposes reducing the assessed negligence level from 'high' to 'moderate'. For Citation Nos. 9673084, 9649747, 9673090, 9649761, 9673092, and 9649756, the Secretary proposes (1) modification of the likelihood of injury or illness from 'reasonably likely' to 'unlikely' and (2) removal of the significant and substantial designation. In support of these proposed modifications, the Secretary cites legitimate factual disputes concerning the assessed levels of gravity and negligence.

The Secretary contends that she has exercised her prosecutorial discretion to remove the designation of significant and substantial from Citation Nos. 9673084, 9649747, 9673090, 9649761, 9673092, and 9649756. *See* Mot. to App. Settlement at 3-4 (citing *Am. Aggregates of Michigan, Inc*., 42 FMSHRC 570, 576-79 (Aug. 2020) and *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, 879-80 (June 1996)). Yet, the Secretary presents an overbroad reading of *Mechanicsville*. In *Mechanicsville*, the Commission addressed whether a Commission administrative law judge could sua sponte designate a violation as significant and substantial when the Secretary had not designated a violation as significant and substantial. The Commission ruled that there is "no material difference between the Secretary's discretion . . . on the one hand to vacate a citation and her discretion on the other hand not to issue a citation in the first instance or not to designate a citation as [significant and substantial]." *Mechanicsville*, 18 FMSHRC at 879. The Commission iterated that the designation of a violation as significant and substantial "in the first instance" is a prosecutorial decision akin to the decision to vacate a citation. *Id*. at 880.

[1] The Commission has recently held that the Secretary's authority to vacate citations is not "unfettered." *Secretary v. Crimson Oak Grove Resources*, WL 4185861, at *9. Under these facts, the undersigned concludes that the parties' proposal to vacate Citation No. 4649765 is fair, reasonable, appropriate under the facts, and protects the public interest under the test set forth in *The American Coal Co*., 38 FMSHRC 1972, 1976 (Aug. 2016), and is appropriate under the criteria set forth in § 110(i) of the Act.

However, *Mechanicsville* does not address situations—such as here—where the Secretary has already exercised her discretion to designate a violation as significant and substantial and the parties are now before a Commission judge to approve a settlement. The current situation fits squarely within the plain language of section 110(k) of the Mine Act. Section 110(k) states that "[n]o proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). The matter before the undersigned involves the parties' request for "the approval of the Commission" to compromise, mitigate, or settle" a violation already designated as significant and substantial. *Id*. That's a far cry from supplanting the Secretary's discretion through an authorized representative to designate a violation as significant and substantial in the first instance. Accordingly, the undersigned rejects the contention that the removal of a designation of significant and substantial is an exercise of the Secretary's discretion.

The Commission has recently endorsed the above reasoning and held that the Secretary does not possess the unilateral discretion to vacate an S&S finding. *See Secretary v. Knight Hawk Coal, LLC*, 2024 WL 4252697, at *1. Consequently, the undersigned evaluated the settlement agreement absent the arguments rejected above.

The undersigned considered the representations and documentation submitted in this case, and the undersigned concludes that the proffered settlement is fair, reasonable, appropriate under the facts, and protects the public interest under *The American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016), and is appropriate under the criteria set forth in § 110(i) of the Act. The settlement amounts are as follows:

Citation No.	Assessment	Settlement
9673082	$296.00	$296.00
9673084	$1,471.00	$381.00
9649743	$133.00	$133.00
9673085	$7,285.00	$7,285.00
9649744	$133.00	$133.00
9649747	$2,194.00	$477.00
9649748	$273.00	$273.00
9673090	$1,471.00	$318.00
9649753	$4,884.00	$1,586.00
9649759	$16,213.00	$16,213.00
9649760	$7,285.00	$7,285.00
9649761	$7,285.00	$1,064.00
9649765	$442.00	$0.00
9673092	$987.00	$214.00
9649764	$7,285.00	$2,364.00
9673099	$155.00	$155.00
9649756	$2,194.00	$143.00
	$59,986.00	$38,320.00

WHEREFORE, the motion for approval of partial settlement is **GRANTED**, and it is **ORDERED** that the operator pay an assessed penalty of $38,320.00 for Citation Nos. 9673082, 9673084, 9649743, 9673085, 9649744, 9649747, 9649748, 9673090, 9649753, 9649759,

9649760, 9649761, 9649765, 9673092, 9649764, 9673099, and 9649756 within thirty days of this order.

V. PRINCIPLES OF LAW

a. Establishing a Violation

To prevail on a penalty petition, the Secretary bears the burden to prove, by a preponderance of the evidence, that a violation of the Mine Act occurred. *See Jim Walter Res., Inc.*, 28 FMSHRC 983, 992 (Dec. 2006); *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001). A mine operator is generally held strictly liable for violations that occur at its mine. *See Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 361 (D.C. Cir. 1997); *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Nally & Hamilton Enters., Inc.*, 33 FMSHRC 1759, 1764 (Aug. 2011). An operator may avoid liability by showing that it was not properly on notice of the violative nature of its conduct. Even in the absence of actual notice, the Secretary may properly charge an operator with a violation when a reasonably prudent person familiar with the protective purposes of the cited standard and the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would have recognized a hazard warranting corrective action within the purview of the applicable regulation. *LaFarge North America*, 35 FMSHRC 3497, 3500-01 (Dec. 2013); *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

b. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See, e.g.*, *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ).

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially affected. The Commission has recognized that an assessment of the likelihood of injury is to be made assuming continued normal mining operations, without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

c. Significant and Substantial Designation

A violation is properly designated as significant and substantial ("S&S") if, "based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (citing *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)); *see also Buck Creek Coal, Inc. v. MSHA,* 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). The question of whether a particular violation is S&S

must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498, 500 (Apr. 1988); *Youghiogheny & Ohio Coal Co*., 9 FMSHRC 2007, 2011-12 (Dec. 1987).

The four elements required for an S&S finding are expressed as follows:

> (1) [T]he underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of the hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, LLC, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016)).

An S&S determination must be based on the assumed continuation of normal mining operations. *See Consol Pa. Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (Jan. 1984)) ("A determination of 'significant and substantial' must be based on the facts existing at the time of issuance and assuming continued normal mining operations, absent any assumption of abatement or inference that the violative condition will cease."). The Commission has held that the S&S inquiry considers "the violative conditions as they existed both prior to and at the time of the violation and as they would have existed had normal operations continued." *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016), *citing Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1132 (May 2014); *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991 (Aug. 2014).

d. Negligence

Negligence is not defined in the Mine Act. The Commission has found "[e]ach mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (internal citations omitted). In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984). *See also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975, 1976-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated).

Although MSHA's regulations regarding negligence are not binding on the Commission, *see Wade Sand & Gravel Co*., 37 FMSHRC 1874, 1878 n.5 (Sept. 2015), MSHA defines negligence by regulation in the civil penalty context as follows:

> Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine

> that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices . . .

30 C.F.R. § 100.3(d).

MSHA regulations further provide that mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, and that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions. 30 C.F.R. § 100.3(d). According to MSHA, the level of negligence is properly designated as high when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3, Table X. The level of negligence is properly designated as moderate when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id*. The level of negligence is properly designated as low when there are considerable mitigating circumstances surrounding the violation. *Id*.

Commission judges are not required to apply the level-of-negligence definitions in Part 100 and *may* evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015); *accord Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016). Moreover, because Commission judges are not bound by the definitions in Part 100 when considering an operator's negligence, they are not limited to a specific evaluation of potential mitigating circumstances, and may find "high negligence," despite mitigating circumstances, or moderate negligence, without identifying mitigating circumstances. *Brody*, 37 FMSHRC at 1701; *Mach Mining*, 809 F.3d at 1263-64. In this regard, the gravamen of high negligence is "an aggravated lack of care that is more than ordinary negligence." *Brody*, 37 FMSHRC at 1701, (citing *Topper Coal Co.*, 20 FMSHRC 344, 350) (Apr. 1998). Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances and may consider the totality of the circumstances holistically. Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Id.*

e. Penalty Assessment

The Act requires that the Commission consider the following statutory criteria when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business; (3) the operator's negligence; (4) the operator's ability to stay in business; (5) the gravity of the violation; and (6) any good-faith compliance after notice of the violation. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. § 820(i). The Commission is not required to give equal weight to each criterion but must provide an explanation for any substantial divergence of the proposed penalty by MSHA based on such criteria. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

VI. BACKGROUND FACTS

The Weeks Island mine is located outside of New Iberia, Louisiana, near the coast of the Gulf of Mexico (now America). Tr. 1041:5-1042:13. Weeks Island was acquired by Stone Canyon Holdings in 2021 and has been in operation for over one hundred years. Tr. 1042:17-1043:15, 1047:20-1053:20. Respondent currently mines 1.6 to 2 million tons of salt annually at Weeks Island. Tr. 1042:17-1043:15.

Weeks Island is a large, class II-A domal salt, gassy mine under 30 C.F.R. § 57.22003. It is roughly two miles in diameter and 1,600 feet in depth, with eight miles of drift or roadway. Tr. 534:14-535:5; 612:25. Class II applies to domal salt mines where "the history of the mine or geological area indicates the occurrence of, or the potential for, an outburst."[2] 30 C.F.R. § 57.22003. Subclass II-A applies to a domal salt mine where "an outburst that results in 0.25 percent or more methane in the mine atmosphere" has occurred. *Id.*; 30 C.F.R. § 57.22004.

As Weeks Island is a class II-A mine under 30 C.F.R. § 57.22003, its operations are subject to section 103(i) spot inspections by MSHA every 15 days. Tr. 257:10-14, 613:10-21, 614:16-615:3; 687:20-21; *see* 30 U.S.C. § 813(i). This class of mine presents unique safety hazards from "scales"[3] and the accumulation of methane. Class II-A Mines can release methane unpredictably and thus present substantial explosion hazards. Tr. 613:7-21; 615:22-616:6; 687:2-5. The accumulation of methane is an inherent concern at Class II-A mines because of its volatility. Miners working in such mines rely on specialized equipment to track ambient methane levels as the presence of methane, which is naturally colorless and odorless, is otherwise difficult to detect. Tr. 257:3-21; 616:1-9. To mitigate the hazards that heightened methane levels would present, Respondent monitors the presence of methane (and other dangerous gases) with an atmospheric monitoring system ("AMS"). Tr. 264:15-24.

The other primary safety concern at Weeks Island is the presence of "scales", which are pieces of loose, cracked salt that are not firmly attached to the body of the salt dome. Tr. 419:4-9. Scales are created by natural geophysical forces such as gravitational pressure, or by movement of salt within the Mine caused by blasting and other mining processes. Tr. 259: 19-24; 536:12-16; 616:22-617:22; 1183:17-1184:7.

If not properly removed or secured, scales create hazardous loose ground conditions that present safety hazards to miners. Tr. 75:1-25; 76:6; 357:2-12, 358:4-13, 419:4-9. Indeed, miners at Weeks Island are taught that "the most dangerous thing in the mine is a scale." Tr. 418:15-17. At least one miner at Weeks Island has been injured by a falling scale, resulting in injuries of sufficient severity to require his removal from the mine for a substantial, indeterminate period. Tr. 358:2-359:1. Accordingly, Respondent's miners are trained to conduct daily workplace inspections for hazardous ground conditions, including for the presence of scales. Tr. 1185:1-10.

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[2] An outburst is a "sudden, violent release of solids and high-pressure occluded gases, including methane in a domal salt mine." 30 C.F.R. § 57.2.

[3] "Scaling" is the "removal of insecure material from a face or highwall," and is defined generally as "[t]he plucking down of loose stones or coal adhering to the solid face after a shot or a round of shots has been fired," or the "[r]emoval of loose rocks from the roof or walls." 30 C.F.R. § 57.2; Dictionary of Mining, Mineral, and Related Terms.

At hearing, Respondent presented extensive testimony concerning steps taken, following its acquisition of the Stone Canyon facility in 2021, to mitigate ground conditions that presented safety hazards. For example, Respondent expanded the required ground control training for its miners and implemented refresher safety training; created a safety superintendent role and hired contractors focused on ground conditions; invested in new physical and mechanical scaling equipment; and implemented a daily compliance sheet to track and ameliorate ground condition issues. Tr. 1047:20-1054:22; 1141:9-1142:4. According to one witness at hearing, 312 days had passed without a recordable loss of time incident occurring at Weeks Island. Tr. 1056:5-18.

At the time of hearing, Weeks Island operated on a 24-hour basis and had five subterranean levels – the 1000', 1200', 1400', 1500', and 1600' levels. Tr. 534:14-535:5, 612:24-25, 1043:16-1044:3, 1044:6-18, 1055:4-17. The designated number for each level corresponds with that level's respective depth below the earth's surface. Tr. 535:1-5. Only the 1500' and 1600' levels had active mining operations at the time the citations in question were issued, and there were active benches on the 1500' level at sections 22G East, West, and North, 21G West, 21F West, and 21F North. Tr. 76:15-22; 963:9- 964:14; Ex. R-22.

To extract salt, Respondent drills deep into areas of salt in the benches[4] and faces[5] within the active mine complex, loads these areas with explosives, "blasts" the explosives, "mucks"[6] the blasted salt with Load Haul Dump ("LHD") loaders, and then hauls the salt away from the extraction site and up to the earth's surface for further processing. Tr. 77:19-78:1-25; 1045:3-24. The force of the explosives used while blasting is powerful enough to be felt at the surface of the mine. Tr. 617:19-22. Prior to blasting a bench, a miner will drill vertical holes and load explosives into the bench surface. Tr. 77:18-78:25, 82:13-19; Ex. P-57. Each blast results in a muck pile of dislodged salt that can cover the entire bench area to a height of up to three to five feet below the bench ledge and the face. Tr. 1167:18-1169:4.

After blasting the bench and prior to extracting the muck pile from the bench area by "mucking" it, the benchtop area is debrided of scales and cleaned. Tr. 337:23-338:7, 349:18-350:24; *see*, Ex. P-48 at 00533. The LHD operator are required to undertake a workplace examination before mucking the area to check for hazards related to ground conditions. Tr. 978:22-981:24, 1035:8-14. During this examination, the operator inspects for any existing scales from the bottom of the bench, including loose sections within the ceiling and ribs. Tr. 218:15-220:20, 239:17-241:12. The operator's headlamp is bright enough to provide some illumination to the top of a 60-foot-tall bench face when that operator is looking up from near the bottom of the bench face. Tr. 299:18-24. If the operator is unable to obtain sufficient line of sight to the top of the bench, he or she can contact a supervisor to bring a spotlight with better luminosity. Tr. 404:15-25. Additionally, the operator or a supervisor will travel to the top of the bench during the pre-

[4] A "bench" is defined generally as a "steeply sloping mass of any earthy or rock material rising above the digging level from which the soil or rock is to be extracted from its natural or blasted position in an open-pit mine or quarry." Dictionary of Mining, Mineral, and Related Terms.

[5] "Face" or "bank" means that part of any mine where excavating is progressing or was last done. 30 C.F.R. § 57.2. The term is generally applied "to ledges of all kinds of rock that are shaped like steps or terraces." Dictionary of Mining, Mineral, and Related Terms.

[6] "Mucking" is defined as "the operation of loading broken rock by hand or machine, usually in shafts or tunnels." Dictionary of Mining, Mineral, and Related Terms.

mucking inspection in an effort to locate and examine any suspected scales. Tr. 218:15-220:20, 1143:24-1144:1146:5. Any scales uncovered during this inspection are removed from the mine ceiling and ribs with scalers. Tr. 239:17-241:12; 365:12-368:16-369:2; 394:24-395:19; 402:7-404:16. Once mucking is commenced, the operator continues to monitor the muck site for hazardous ground conditions, including scales. Tr. 1149:17-1150:10.

Respondent presented extensive testimonial evidence concerning its recent efforts to improve and effectuate safety standards at Weeks Island. For example, Respondent requires that any miner who discovers a scale that cannot be readily removed with a manual or mechanical scaler, must report the location of the scale to a supervisor and block off the area from access with a physical barricade or other barrier. Tr. 1189:9-15. Respondent provides specific scaling training to its miners, has acquired new scaling equipment, and has hired contractors specialized in scale removal. Tr. 1185:11-1187:16.

VII. PENDING CITATIONS

Five of the six unresolved citations were issued by MSHA inspectors Brandon Olivier and O'Neal Robertson during an E01 quarterly inspection conducted in June 2022. Sec'y Br. at 3. MSHA issued three of these citations under 30 C.F.R. § 57.3200 for failure to correct dangerous ground conditions and two citations under 30 C.F.R. § 57.3401 for failure to examine the areas where the dangerous conditions were located. Inspector Olivier issued the remaining citation during an investigation initiated after MSHA's receipt of section 103(g) hazard complaints made by miners at Weeks Island. *See* 30 U.S.C. § 813(g)(1).

A. Citation Number 9649750: The Secretary Has Established That Morton Salt Violated 30 C.F.R. § 57.3200 *[Failure to Correct Hazardous Ground Conditions]*

Findings of Fact

During his routine inspection conducted on June 14, 2022, inspector Olivier discovered a potential scale at the corner of a bench area in the 21N section of the mine. Ex. P-1, p.1-2. During this portion of the inspection, inspector Olivier was accompanied by MSHA assistant district manager Nick Gutierrez and MSHA field supervisor Mike Tefertiller, as well as by miner Landon Olivier and miner representative Colin Francis. Tr. 426:12-15, 486:7-19, 811:16-812:11, 1079:19-1081:9. This inspection team initially passed through the 21N section twice before observing the allegedly hazardous ground condition on a third pass. Tr. 426:12-15, 486:7-19.

The scale in question was located on a rib near the top of a bench area approximately "10 [to] 20 feet high next to the travelway." *Id.*; Tr. 689:16-19, 711:11-712:1, 712:19-713:5. Inspector Olivier did not know the precise dimensions or weight of the scale, but he estimated that it was approximately five feet in length and two to three feet in width. Tr. 713:7-714:15. Inspector Olivier observed that pre-existing mechanical scale marks were present on the rib face, suggesting that the area had been scaled during a prior inspection by Respondent. Tr. 813:15-814:2.

Inspector Olivier testified that the base of the scale was about 10 to 15 feet above the bottom of the bench. Tr. 816:3-818:1. Miner representative Francis similarly estimated the height of the scale's base to be between eight and ten feet above the ground. Tr. 441:1-12. A five-foot-high, spray-painted 21N marker is visible in inspection photographs, and provides a visual reference point as to the height of the purported scale. P.3; P. 5; P. 6; Tr. 714:1-9; *see* Sec'y Br. at 14. The

crack forming the delimiting edge of the scale starts multiple feet above the 21N marker, corroborating inspector Oliver's and Francis' testimony. *See id*.

Following his discovery of this ground condition, inspector Olivier issued Citation No. 9649750, which alleges a violation of 30 C.F.R. § 57.3200 for failure to correct dangerous ground conditions. This citation specifically alleges that:

> "Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. There was loose ground found on the corner of 21N in the bench area. The loose was observed approximately 10-20 feet high next to the travel way. Small vehicle tracks were observed within 2 feet from the rib where the loose was observed. This condition exposes miners to serious injuries if the loose was to fall on the miners or equipment while they are in the area."

Ex. P-1.

In part due to small vehicle tracks being found "within 2 feet from the rib where the loose was observed," inspector Olivier assessed this alleged violation as being (1) of moderate negligence, (2) reasonably likely to result in a "lost workdays or restricted duty" injury, and (3) a significant and substantial infraction. Ex. P-1 at DOL0101.

The travel way had last been inspected by Respondent on June 13, 2022, the date prior to inspector Olivier's inspection. Ex. R-2; Tr. 1097:21-23, 1217:4-1218:6. Inspector Olivier was unsure whether the observed track marks were created prior to or after Respondent's inspection, and testified that some of the tracks were from LHDs, while others were from smaller, all-terrain vehicles, without overhead protection. Tr. 806:23-808:1; *see* Exs, R-17 (R2900G Technical Specifications); R-18 (Sandvik LH621 Technical Specification).

To terminate Citation No. 9649750, a contractor hand scaled the loose ground with a scaling bar. Ex. P-1. Respondent contends that this caused the loose to fall approximately two to three feet from the rib and break into smaller pieces, though inspector Olivier testified that the scale fell as far as ten feet into the travel way. Tr. 713:23; 1193:6-1195:4. Multiple witnesses testified that removing a scale with a scaling bar might result in the scale falling further away from the rib face than if the scale has been allowed to fall off on its own. *See* Tr. 522:23-523:11; 1089:3-14; 1195:10-20.

The parties agree that on June 14, 2022, no miners were working in the immediate area of 21N, and the loose ground was discovered in an area that was not an active worksite. *See* Tr. 803:2-8; 1085:11-1086:10. However, 21N was used by miners as one of two possible travel ways to access nearby benchtops, and 21N was both a primary and secondary escapeway should miners need to exit to the surface. Ex. P-90A; Tr. 8-13; 427:7-429:2; 709:20-711:10; 1092:3-1095:22; 1121:3-12. At the time of inspection, active mining operations were in progress at the 19-O, 21-GW, 22-GW, 22-GE, and 22-GN sections of the mine. Sec'y Br. at 12 (citing Exs. P-14, p. 1; P-15, p.1; P-16, p. 1; P-52, p.1; P-53, p. 1). Miners would also have reason to enter 21N to access a distribution box and inspect cables that provide power to the fans and drills in the 19-O section. Ex. P-90A; Tr. 100:14-15; 102:4-8; 704:3-25; 709:20-23; 711:10.

Violation

The Secretary bears the burden to prove, by a preponderance of the evidence, that the alleged violation of the Mine Act occurred as charged. *See Jim Walter Res., Inc.*, 28 FMSHRC 983, 992 (Dec. 2006); *Sec'y of Labor v. Wyoming Fuel Co*., 14 FMSHRC 1282, 1294 (Aug. 1992); *Sec'y of Labor v. Garden Creek Pocahontas Co*., 11 FMSHRC 2148, 2152 (Nov. 1989). The preponderance of the evidence standard requires that the trier of fact "believe that the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

Citation No. 9649750 alleges that Respondent violated 30 C.F.R. § 57.3200, which requires that:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

The Secretary submits that the "scale" discovered by inspector Olivier could have fallen on a miner and constituted a hazardous ground condition violative of 30 C.F.R. § 57.3200. Sec'y Br. at 12; Tr. 429:913; 689:17-19; 702:7. The Secretary points to Francis' testimony that the scale was "protruding" and could potentially fall from the wall and strike a nearby miner. Sec'y Br. at 12; Tr. 426:8-15; 429:15-20; 433:19-434:2. The Secretary further contends that the Respondent failed to fulfill its regulatory obligations under 30 C.F.R. § 57.3200 by (1) failing to remove the scale, and (2) not installing warning signs or physical barriers, thereby allowing unrestricted access to the 21N area. Sec'y Br. at 12-13; Exs. P-3; P-5; P. 6; Tr. 433:25-434:2; 693:9-18.

The Respondent counters that this scale was "tied in" and would not have fallen on its own. Resp. Br. at 8, 21, 27; *see* Tr. 1079:3-1082:14, 1083:19-1084:16, 1116:1-4. According to the Respondent, a tied-in scale can be "broken open on one side but [is] otherwise connected to the rib with no breakage or flaky material." Resp. Br. at 8. In support of this position, Respondent cites inspector Olivier's testimony that he was not certain whether the scale would have fallen on its own, as well as miner Landon Olivier's testimony that he "[didn't] think it would've [come] down on it's [sic] own." Tr. 809:22-810:10, 1083:23-24. The Respondent also argues that, even if inspector Oliver's description of this condition as a "scale" was proper, the scale was not a reasonably detectable hazard because MSHA inspectors passed the 21N section on a couple of occasions before the scale was discovered. Resp. Br. at 22; *see Sec'y of Labor v. ASARCO, Inc.,*14 FMSHRC 941 (June 1992).

For the reasons set forth below, the undersigned concludes that the Respondent's arguments are not persuasive. Considering Respondent's reliance on Landon Olivier's testimony, the undersigned finds that though Mr. Olivier was a generally credible witness, his testimony on whether the loose ground discovered by inspector Olivier can be properly categorized as a scale was equivocal. Mr. Olivier first testified that a "tied in" scale is open "on one side, but if you look at the other side, if it is continued into the hard rock to where there's no breakage or loose flaky material from the actual hard rock." Tr. 1082:2-6. However, upon questioning by the undersigned, he clarified that loose with multiple cracks or openings on three of its four sides is "definitely" a scale, loose with cracks or openings on two sides has the "potential to be a scale," and loose with a crack or opening on one side may or may not be a scale, and "it's hard to determine" whether it

is a true scale. Tr. 1082:18-1083:17. Indeed, Olivier testified that "[i]t just depends, Judge. It's just really loose, flaky material. It just really depends." Tr. 1083:11-13. Mr. Olivier then opined that, based on his own experience, he did not believe that the loose would have fallen on its own. Tr. 1083:23-1084:4. Mr. Olivier provided no clarification on what might make loose with cracks or openings on only one side any more or less likely to fall, or what characteristics would make loose unbounded on one side qualify as a true scale. *See id*.

For her part, the Secretary has presented substantial evidence supporting the conclusion that the loose discovered by inspector Olivier was a scale and thus represented a ground condition hazard. *See* 30 C.F.R. § 57.3200; *Asarco*, 14 FMSHRC at 951. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Asarco*, 14 FMSHRC at 951 (quoting *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1137 (May 1982); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

In evaluating whether the Secretary has met her burden to establish that a loose ground condition was present in a given area of a mine, an ALJ should consider such factors as "the results of sounding tests, the size of the drummy area, the presence of visible fractures and sloughed material, 'popping' and 'snapping' sounds in the ground, the presence, if any, of roof support, and the operating experience of the mine or any of its particular areas." *Asarco*, 14 FMSHRC at 952; *Amax Chemical Corp.*, 8 FMSHRC 1146, 1149. A scale may be loose and therefore hazardous when it can be readily scaled by hand with scaling bars. *See Springfield Underground*, 17 FMSHRC 613, 619 (Apr. 1995) (ALJ) (upholding violation where "loose" material was scaled down by hand, while vacating violations where material was brought down by a large mechanical scaler).

Here, the evidence before me reflects that two of the *Asarco* factors – the presence of visible factors and the operating experience of the mine – support a finding that the scale referenced in Citation No. 9649750 was indeed a ground hazard. Inspector Olivier credibly testified that there was loose ground "on the corner of 21N where employees were still passing, mobile and foot traffic. That was not removed." Tr. 693:4-6. Inspector Olivier also testified that, as of the date of hearing, he had performed approximately 75 inspections at Weeks Island, including regular inspections, hazard complaints, special visits, and spot inspections. Tr. 688:7-12. Accordingly, inspector Olivier is well familiar with the miners and members of management that work at Weeks Island and has extensive, on-site experience in evaluating potentially hazardous ground conditions at a domal salt mine like Weeks Island. Tr. 688:13-24. Given the breadth and depth of inspector Oliver's experience, the undersigned finds that his opinion on whether a potential scale qualifies as a ground hazard should be afforded substantial probative weight. *See Buck Creek Coal Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Harland Cumberland Coal Co*., 20 FMSHRC 1275, 1278-79 (Dec. 1998).

Moreover, inspector Olivier's testimony is corroborated by that of Colin Francis, who testified that this scale was of a 'nice size' and thickness, was in "bad condition," and presented a hazard to any miners passing through the travel way. Tr. 438:14-20, 440:17-441:3. Francis testified that, given his role as a powder man, he has had many opportunities to observe scales of various sizes within the Weeks Island Mine. Tr. 439:22-25. Francis has also received training from Respondent concerning identification and removal of potential scales. Tr. 440:4-9. Although Respondent has counseled that most scales have cracking or openings on three sides, any potential material that appears to be separating from the domal salt body should be identified and flagged for removal. Tr. 440:9-16. Here, the scale in question was easily removed by hand with scaling bars, supporting

inspector Olivier's and Francis' observation that the scale was beginning to come loose and was therefore hazardous. Tr. 709:18-710:2; *see Springfield Underground*, 17 FMSHRC 613, 619.

Further, based on my own independent review, photographs taken of the scale in question readily show a significant degree of cracking within the rib and initial separation of the scale from the larger salt body. *See* Exs. P-3; P-5; P-6; Tr. 713:24-714:6. Considering these "visible fractures," as well as the "operating experience of the mine" – which was cited 69 times for alleged violations of 30 C.F.R. § 57.3200 in the two years prior to June 14, 2022 – the undersigned concludes that the Secretary has met her burden to establish that this ground condition was indeed hazardous. *See Asarco, Inc.*, 14 at 952; *Jim Walter Res., Inc.*, 28 FMSHRC at 992.

Neither party disputes that Respondent did not install any barriers or otherwise restrict access to 21N. *See* Sec'y Br. at 11-12, Resp. Br. at 21-22. Therefore, the final consideration in assessing whether the Secretary has met her burden of proof is whether this hazardous scale was "reasonably detectable." *See* Resp. Br. at 22; *see ASARCO, Inc.,*14 FMSHRC at 951. As identified above, the Respondent contends that this scale was not reasonably detectable because it was not discovered by MSHA inspectors during the first two passes through the 21N section. This argument is unavailing.

First, as a general matter, a Respondent is on notice of its obligations and responsibilities under the Mine Act regardless of whether it has been previously cited for a violative condition. *Cactus Canyon Quarries, Inc. v. FMSHRC*, 64 F.4th 662 (5th Cir. 2023), aff'g 44 FMSHRC 289 (Apr. 2022). Further, an operator with an extensive history of violating a given standard, like Respondent here, is on notice of the need for greater compliance efforts to meet its regulatory obligations. *IO Coal Co*., 31 FMSHRC 1346, 1351 (Dec. 2009). The Respondent's own internal policies support the need for achieving greater compliance with the cited standard. Indeed, in training miners on how to detect hazardous ground conditions, Respondent has described the uncertainty about when and how scales will come to form, and has acknowledged the need for targeted, ongoing inspection efforts and miner training to combat scales at Weeks Island. *See e.g.*, Tr. 1185:11-1187:16.

The Respondent cites *Asarco* for the proposition that a scale that is overlooked by MSHA during the initial stages of its inspection is not reasonably detectable. Br. at 21-22; *ASARCO*, 14 FMSHRC at 951. But the facts in *Asarco* are readily distinguishable from the facts applicable to this citation. In *Asarco*, the Commission concluded that the Secretary failed to meet her burden of proof where she presented no evidence that any visible loose ground conditions existed prior to a roof fall. *ASARCO*, 14 FMSHRC at 951-52; *see also Master Aggregates TOA Baja Corp*., 28 FMSHRC 835, 839-840 (Sept. 2016) (ALJ) (vacating a citation issued under section 56.3200 where the Secretary presented no probative, direct evidence of hazardous conditions that existed prior to a fatal fall of ground).

Here, by contrast, a scale was found prior to the occurrence of any fall, and the scale was located on a rib near a maintained, travel-way marker. *See* Ex. P-1. The Respondent also cites evidence of a recent past inspection, including mechanical scale marks, as supporting the conclusion that the scale at issue was not reasonably detectable. Resp. Br. at 21; *see* Tr. 813:15-814:2, 816:3-818:1; Ex. P-3. However, the undersigned finds that this evidence better supports a conclusion that the Respondent, for whatever reason, overlooked a scale that was loose enough to be readily removed by hand scaling, while removing other loose in the area with a mechanical scaler. *See id*.

In sum, the undersigned concludes that the Secretary has met her burden, by a preponderance of the evidence, to establish a violation of 30 C.F.R. § 57.3200. Citation No. 9649750 is therefore AFFIRMED, as modified below.

Gravity

The Respondent alternatively argues that, even if the violation of 30 C.F.R. § 57.3200 is sustained, the gravity level was over assessed, and this violation was improperly designated as significant and substantial. The undersigned agrees with the Respondent's position.

Under the Commission's refined framework for establishing a significant and substantial violation, the Secretary bears the burden to establish the following:

> (1) [T]he underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of the hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, LLC, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016)).

Step 1 of this framework is clearly met here based upon my finding that Respondent's failure to remove the loose ground condition in 21N constituted a violation of 30 C.F.R. § 57.3200.

Further, the Secretary has carried her burden concerning the second step of the modified *Mathies* test. *See Newtown Energy*, 38 FMSHRC at 2038 (holding that "a clear description of the hazard at issue places the analysis of the violation's potential harm in context, by requiring a determination of the relative likelihood that the violation will have a meaningful, adverse effect on conditions miners will encounter during normal mining operations.") Pursuant to *Mathies*, the hazard contributed to by the violation is defined "in terms of the prospective danger the cited safety standard is intended to prevent," and therefore "the starting point for determining the hazard is the actual cited section [of the Code of Federal Regulations]." *Id*. Therefore, under step 2 of the modified *Mathies* test, the discrete safety hazard contributed to by the violation of 30 C.F.R. § 57.3200 is that miners could be exposed to "ground conditions that create a hazard to persons." 30 C.F.R. § 57.3200. The record is replete with testimony that failing to remove or secure a scale creates a hazardous ground condition that presents a safety hazard to miners. *See e.g.*, Tr. 75:1-25; 76:6; 357:2-12, 358:4-13, 419:4-9. Indeed, miners at Weeks Island are taught that "the most dangerous thing in the mine is a scale." Tr. 418:15-17. Given the fragile, flaky nature of scales within domal salt mines, the undersigned finds that Respondent's failure to remove a developing scale presented a reasonable likelihood of exposing miners to a hazardous ground condition.

However, despite carrying her burden at steps 1 and 2, the Secretary has not established that a miner's exposure to this hazardous scale would be reasonably likely to cause an injury. *See Peabody Midwest Mining, LLC*, 42 FMSHRC at 383. At hearing, inspector Olivier testified that his decision to assess this violation as significant and substantial was based on several factors, including (1) that the scale's location within 21N was within an active travel way and escapeway, (2) the presence of vehicle tracks in the immediate area, (3) the ease with which the scale was removed before the citation was terminated, and (4) the risk of being struck from overhead to any

minor inspecting trench cable on foot, or to a miner driving through the travel way in an all-terrain vehicle, without overhead protection. Tr. 702:6-14, 704:1-25, 709:12-710:22, 711:18-712:18, 714:16-25. However, inspector Olivier admitted that he was unsure when the tire tracks were created, and whether the tire tracks he observed closest to the rib were created by a LHD or a smaller vehicle. Tr. 806:23-808:1.

Moreover, Landon Olivier credibly testified that miners passing through this area generally travel in the center of a travel way and would not have a reason to navigate a vehicle close to the rib in question. Tr. 1084:17-1085:2. The undersigned credits this testimony and concludes that the Secretary has not presented sufficient evidence that it is *reasonably likely* that a miner exposed to the hazardous ground conditions created by this scale when entering the travel way would experience an injury upon that scale falling. *See Peabody Midwest Mining, LLC*, 42 FMSHRC at 383 (describing step 2 of the significant and substantial analysis as being whether "the violation was *reasonably likely* to cause the occurrence of the discrete safety hazard against which the standard is directed." (emphasis added)).

In light of the above considerations, the undersigned MODIFIES Citation No. 9649750 to a non-significant and substantial offense, with a 'low' likelihood of injury or illness.

Negligence

Under the Mine Act, operators are held to a high standard of care and 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." 30 C.F.R. § 100.3(d).

Commission ALJs may evaluate whether an operator has met its duty of care using a traditional negligence analysis, considering the "totality of the circumstances holistically," including "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." *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015).

In the instant matter, Respondent held a duty of care to remove any potentially hazardous ground conditions from active mining areas and travel ways. *Brody Mining, LLC*, 37 FMSHRC at 1702. Respondent breached this duty of care by failing to remove or otherwise block off the scale in the 21N travel way. Ex. P-1. However, several factors serve to mitigate Respondent's level of negligence. *See* 30 C.F.R. § 100.3(d). Respondent was unaware of the existence of this scale until it was discovered by the MSHA inspection team, and Respondent had recently endeavored to mechanically scale other visible scales in the vicinity of 21N. This mechanical scaling was undertaken as part of a broader initiative to utilize newly acquired scaling equipment operated by contractors specialized in scale removal. Tr. 1185:11-1187:16.

Given the above considerations, the undersigned concludes that it is more appropriate to reduce the negligence level for this citation from 'moderate' to 'low.'

Penalty

For Citation No. 9649750, the Secretary proposed a regularly assessed penalty of $1,471.00, calculated from total points of $1,635.00, with a ten percent reduction for good faith. Sec'y Ex. P-1.

It is well established that Commission Administrative Law Judges have the authority to assess civil penalties de novo for violations of the Mine Act. *See e.g. Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983). When assessing civil monetary penalties, a Commission ALJ must consider the following statutory penalty criteria:

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

30 U.S.C. § 820(i).

In evaluating the appropriateness of the Secretary's proposed penalty, the undersigned first considers the factors weighing against the Respondent. Morton Salt's history of violating this legal standard is extensive, having been cited 69 times at Weeks Island in the two years preceding the issuance of Citation No. 9649750. Ex. P-1; 30 U.S.C. § 820(i)(1) ("the operator's history of previous violations"). Also weighing against Morton Salt is the size of the Weeks Island operation. 30 U.S.C. § 820(i)(2)("the appropriateness of such penalty to the size of the business of the operator charged"). Respondent mines 1.6 to 2 million tons of salt annually at Weeks Island and employs about 170 miners. Tr. 1042:17-1043:15, Tr. 1047:18.

A factor that basically is neutral in the analysis is that the parties have stipulated that the penalties proposed by the Secretary will not affect Respondent's ability to remain in business. *See supra*, Prehearing Stip. 4; 30 U.S.C. § 820(i)(4)("the effect on the operator's ability to continue in business".); *see also John Richards Constr*., 39 FMSHRC 959, 965 (May 2017) (recognizing presumption of no adverse effect, absent proof that imposition of penalty will adversely affect operator's ability to continue in business).

Factors weighing in favor of a reduction in penalty are the operator's low level of negligence, the relatively minor gravity of the violation, and the good faith of the operator in attempting to achieve rapid compliance after notice of the violation. 30 U.S.C. § 820(i)(3), (5)-(6). As discussed above, this violation is non-significant and substantial, is 'unlikely' to result in an injury causing 'lost workdays or restricted duty,' and is the result of Morton Salt's low level of negligence. Furthermore, the record reflects that the violative scale was removed with a scaler immediately after being ordered removed by inspector Olivier. Ex. P-1; Tr. 713:23; 1193:6-1195:4.

In light of these factors, the undersigned finds that a penalty of $900.00 is appropriate under the circumstances. Accordingly, Citation No. 9649750 is AFFIRMED, as modified.

B. Citation Number 9649752: The Secretary Has Established That Morton Salt Violated 30 C.F.R. § 57.3200 [Failure To Correct Hazardous Ground Conditions], And That This Violation Was Properly Designated As Significant And Substantial

Findings of Fact

On June 15, 2022, inspector Olivier issued a second citation under 30 C.F.R. § 57.3200. Ex. P-17. After uncovering purportedly loose ground conditions "on the ceiling in between 25E and 26E along the belt line," inspector Olivier issued Citation Number 9649752, which alleges:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. There was loose ground found on the ceiling in between 25E and 26E along the belt line. The loose was observed [approximately] 25ft high. This area is traveled by miners daily on each shift. This condition exposes miners to serious [injuries] if the loose was to fall on the miners or equipment while they are in the area.

Ex. P-17.

Inspector Olivier testified that he issued this citation because he identified a scale approximately 24 or 25 feet high on the ceiling in between the 25E and 26E sections of the 1500' level of the mine. Tr. 737:25-738:13. Although no miners were actively working in the area at the time of his inspection, inspector Olivier believed that miners would have several different reasons to access this area. *See* Tr. 818:12-19, 819:2-8. For example, miners would naturally use this area as a passageway when travelling between the 25E and 26E sections. P.90-A; Tr. 733:8-11. Respondent did not physically barricade this area or post signage limiting miner access, and miners could readily enter the allegedly hazardous area through a strip curtain located at the edge of the 25E section. Tr. 41:4-8; 109:2-23; 547:13-19; 736:22-737:5; *see* Ex. P 90-A. The vehicles that travelled through this narrow area either lacked overhead protection, or had limited overhead protection that was rated insufficiently to protect from falling scales. Tr. 113:12-13; 738:22-739:2.

A miner would also have reason to pass by this area to access a nearby FEMCO[7] phone to contact the surface. P. 90-A; Tr. 105:16-106:4; 542:16; 733:4-6. The next closest FEMCO phone was located around 1,000 feet away, increasing the likelihood that a miner would access this phone if he or she needed to communicate with a supervisor at the surface. Tr. 107:20-21.

A miner might also enter this area to access a transformer and methane monitor. Tr. 114:5-115:5-8; 733:18-23. Transformers are used by Weeks Island miners to power equipment, and the next closest transformer to the 25E/26E junction was located approximately 800 feet away. Tr. 114:5-115:5-8. A miner would need to access the methane monitor monthly for required calibrations. Tr. 733:22-23.

[7] A FEMCO phone is a stationary phone located at set intervals within the mine that allows miners located underground to communicate with their counterparts at the surface. *See generally*, P. 90-A; Tr. 105:16-106:4; 542:16; 733:4-6.

To terminate this citation, "the loose was hand scaled and fell in the middle of [the] roadway. The loose ground fell as solid pieces and broke into smaller pieces when it hit the floor." Ex. P-17. Miners' representative Eddie Jean Louis testified that the scale was cracked, separating from the salt body, and could "fall at any time." Tr. 540:7-541:3; Ex. P-19. Jean-Louis did not recall the precise size of the scale but testified that a small amount of material fell when it was scaled with a hand scaler. Tr. 538:23-539:4, 593:10-594:16. Miner Lee Franks testified that the scale was "a little bit larger" than a dinner plate – or around six to eight inches thick – and was brittle. Tr. 1210:16-1212:4.

Inspector Olivier testified that he did not assess this citation as an "unwarrantable failure" because Respondent presented some documentation of recent improvements to their workplace safety protocols. Tr. 739:13-20. However, inspector Olivier assessed this citation as the result of high negligence because the condition was "open and obvious" and within an area that was an "open travelway for all miners to access." Tr. 739:5-7. Indeed, the scale in question had already begun to exfoliate small pieces onto the passageway floor when it was discovered. Tr. 740:1-7. Though Respondent designates all employees as competent to conduct a workplace safety examination, nobody was able to provide inspector Olivier with documentation reflecting the most recent examination of this section. Tr. 739:7-12. In part because of the height of the scale above the travelway, inspector Olivier assessed this condition as being reasonably likely to result in a permanently disabling injury and as a significant and substantial violation.[8] Tr. 738:11-24; *see* Ex. P-17.

Violation

Citation Number 9649752 alleges a violation of 30 C.F.R. § 57.3200, which requires that:

> "Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry." 30 C.F.R. § 57.3200.

Respondent does not challenge that it violated 30 C.F.R. § 57.3200 as alleged in the citation. Resp. Br. at 31-33; *see* Ex. P-17. Rather, Respondent contends that the assessed level of gravity and negligence were over evaluated. Resp. Br. at 31.

The Secretary submitted ample evidence in support of the charged violation. Inspector Olivier testified credibly about the presence of a loose scale in the ceiling between the 25E and 26E sections. Tr. 737:25-738:13. His testimony is corroborated by miner Jean Louis' testimony that the scale had nearly separated from the ceiling entirely, and by the Secretary's photographic evidence showing remnants of scaled material of a dinner-plate-sized diameter. Tr. 540:7-541:3; Exs. P-18, P-19, P-20, and P-21; *see also* Tr. 1210:16-1212:4. After considering these factors and reviewing the totality of the evidence before me, the undersigned finds that the Secretary has met her burden to prove the alleged violation of 30 C.F.R. § 57.3200. *See Jim Walter Res., Inc.*, 28 FMSHRC at 992; *RAG Cumberland Res. Corp.*, 22 FMSHRC at 1070.

[8] During direct examination of inspector Olivier, counsel for the Secretary erroneously referred to the assessed gravity level as being "fatal" rather than permanently disabling. Tr. 738:14-15.

Gravity and Significant and Substantial Finding

A violation is significant and substantial if, "based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (citing *Cement Div., Nat'l Gypsum Co*., 3 FMSHRC 822, 825 (Apr. 1981)). The Commission has long implemented a four-step analysis in evaluating whether a violation qualifies as significant and substantial. In *Mathies*, the Commission enumerated the four steps required for a finding of S&S as follows:

> (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 at 3-4.

More recently, the Commission restated *Mathies* step 2 in terms of finding that "the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016). More recently still, the Commission proposed a refined S&S analysis, holding that the four elements required for an S&S finding are as follows:

> (1) [T]he underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of the hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, LLC, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016)). Notably, an S&S determination is based on the facts existing at the time of citation issuance and assumes normal mining operations will continue. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (Jan. 1984); *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012) ("[t]he [S&S] evaluation is made in consideration of the length of time that the violative [berm] condition existed prior to the citation and the time it would have existed if normal mining operations had continued.").

In the instant matter, step 1 of the Commission's significant and substantial analysis is resolved by my finding that Respondent's failure to remove the loose scale between 25E and 26E constituted a violation of 30 C.F.R. § 57.3200.

Turning to step 2 of the analysis, the Commission has held that "a clear description of the hazard at issue places the analysis of the violation's potential harm in context, by requiring a determination of the relative likelihood that the violation will have a meaningful, adverse effect on conditions miners will encounter during normal mining operations." *Newtown Energy*, 38

FMSHRC at 2038. Under the modified *Mathies* test, the hazard contributed to by the violation is defined "in terms of the prospective danger the cited safety standard is intended to prevent," and therefore "the starting point for determining the hazard is the actual cited section [of the Code of Federal Regulations]." *Id*.

The discrete safety hazard contributed to by a violation of 30 C.F.R. § 57.3200 is the exposure of miners to potentially hazardous ground conditions capable of causing bodily injury. Respondent's failure to remove or restrict access to a section of the mine containing a loose flaking scale stood directly odds with this purpose and contributed to the foregoing safety hazard. *See Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383. Moreover, the fact that this scale was located in an area of the mine that was readily accessible to miners and to which miners would have good reason to access on a regular basis should that miner (1) be travelling between active areas of the mine, (2) need to access a FEMCO phone or transformer, or (3) need to read or calibrate a methane monitor, supports the conclusion that the violation would be "reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed. *Id*.; Tr. 105:16-106:4; 114:5-115:5-8542:16; 733:4-6, 18-23; Ex. P-90A.

The Respondent does not dispute that a Weeks Island miner would have reason to enter this area in order to access equipment but challenges the Secretary's position that a miner would have reason to utilize this area as a travel way. Resp. Br. at 32; *see* Tr. 452:9; 542:16; 546:23. The Respondent cites the testimony of miner Lee Franks as support for a conclusion that miners generally avoid driving through this area "given dust in the area and because the overlapping curtain was difficult to go through." Resp. Br. at 32 (citing Tr. 1199:2-1200:15, 1206:11-22). But that was not Franks' testimony. Rather, Franks testified that *he* generally avoids driving through that area, stating that "it's cleaner to go around and then go through it," and that "I choose not to [drive through it]". Tr. 1200:9-15. Franks testified that another person could drive through the area if they wished, and did not clarify whether other miners were known to or preferred to drive through this potential shortcut. *Id*. Although Franks testified that most of the technicians would prefer to drive around this section rather than walk past the feeder breaker, he did not indicate whether a technician would ever drive past the feeder breaker in a suitably sized vehicle. Tr. 1210:10-11. Notably, neither Franks nor any other witness testified that Respondent in any way restricted or otherwise discouraged access to the 25E/26E junction. Tr. 1199:2-1200:15, 1206:11-22; *see* Exs. R-12, R-39. Thus, Franks testimony is of limited probative value in resolving the frequency with which miners access this area of the mine for reasons other than accessing equipment and does little to obviate concerns that miners could (or did) travel through an area with unscaled, hazardous ground conditions present. *See id*.

Notably, the Respondent does not contest that a miner had multiple other reasons to be in this area. As inspector Olivier credibly testified, miners have reason to enter the area "to access the transformers and power equipment. There's also right next to the transformer, "there's a methane monitor that electricians have to calibrate and access monthly." Tr. 733:20-23. Further, a miner needing to contact the surface – for any reason – would have reason to enter the area to utilize the only FEMCO phone within 1,000 feet. *See* P. 90-A; Tr. 105:16-106:4; 542:16; 733:4-6.

Given the above considerations, the undersigned concludes that "the violation [of 30 C.F.R. § 57.3200] was reasonably likely to cause the occurrence of the discrete safety hazard [of miner exposure to hazardous ground conditions] against which the standard is directed." *Peabody Midwest Mining, LLC*, 42 FMSHRC at 383. According, the Secretary has met her burden concerning step 2 of the modified *Mathies* test.

Turning to the third and fourth modified *Mathies* steps, the undersigned must determine whether the discrete hazard identified in step 2 would be reasonably likely to result in an injury and whether there is a reasonable likelihood that the injury would be of a reasonably serious nature. *See Newtown Energy*, 38 FMSHRC at 2038. In the context of Citation No. 9649752, the undersigned must determine whether the Secretary has established that (1) it is reasonably likely that a miner would be struck from overhead and injured by the scale in question, and (2) that any resulting injury would be reasonably serious in nature. *Id.*

I consider first whether the Secretary has established that it is reasonably likely that a miner would have been injured by this scale had inspector Olivier failed to discover the condition and ordered the scale to be removed.

The Secretary argues that it was reasonably likely that this scale would strike a miner and result in an injury of a 'permanently disabling' degree of severity. Sec'y Br. at 16. First, the Secretary argues that miners had multiple reasons to be in proximity to this scale, including to use equipment and access the beltline or "a primary escapeway [which]runs just to the west of the curtain and the area of the scale." Sec'y Br. at 16 (citing Tr. 733:7-734:4).

Second, the Secretary argues that, as a general matter, scales and other loose ground conditions present "one of the most dangerous conditions at Weeks Island." *Id*.; *see* Tr. 418:15-19. The Secretary cites inspector Olivier's uncontroverted testimony that the loose scale was located approximately 25 feet above the mine floor and presented a risk of injury to a miner's head or shoulder, and further argues that the scale could cause "life-altering damage" were it to hit a miner. *Id*. (citing Tr. 738:13, 16-21). The Secretary also references the size of the scale which, after falling and breaking apart, "consumed much of the travel way, indicating it was large before it fell." *Id*.; *see* Ex. P-20. Finally, the Secretary points to the small dimensions of the passageway. Less than half of the vehicles able to navigate this corridor are equipped with overhead protections, and those vehicles that are so equipped are not rated to prevent an injury from a scale falling from overhead. Tr. 113:12-13, 738:22-739:2.

The Respondent counters that "there was no active mining on the 1500' development level when the citation was issued, meaning there would be less need for miners to be in the area." Resp. Br. at 32 (citing Tr. 1249:23-1250:18). The Respondent also cites (1) Franks' testimony that only minor injuries would be expected because "only small stuff" came down when the scale was removed, and (2) that neither inspector Olivier nor miner Jean Louis knew the precise dimensions of the scale. Resp. Br. at 32 (citing Tr. 593:10-594:16, 818:12-19, 819:2-8, 1213:18-1216:23). Finally, Respondent cites miner testimony that they never saw a scale fall on its own or fall and injure a miner. Resp. Br. at 32 (Tr. 411:20-21, 478:15-23, 525:10-14, 558:12- 560:24).

I am unpersuaded by the Respondent's argument that a visibly large scale would present a diminished risk of injury to a miner simply because that scale broke into pieces after falling approximately 25 feet onto the solid rock floor of the mine. *See* Resp. Br. at 32. Indeed, the Respondent's own witnesses acknowledge the brittle nature of domal salt scales, and it stands to reason that a scale of any size might break upon falling such a significant distance given the lack of rigidity of the rock. *See e.g.* Tr. 1083:11-13; 1210:16-1212:4. As discussed above, miners had several discrete reasons to be in this area, and I credit inspector Olivier's testimony that the scale presented a significant risk of harm to any miner in the area. Tr. 738:13, 16-21. Considering this testimony, in conjunction with the photographic evidence of record, I conclude that the Secretary has met her burden to prove the reasonable likelihood that a miner would suffer a reasonably

serious injury should the scale break loose and fall from 25 feet above with sufficient force to hit a miner in the head or shoulder. *See* Exs. P-18 to P-21. Accordingly, the undersigned upholds MSHA's gravity findings and designation of this violation as significant and substantial.

Negligence

Respondent argues that MSHA and the Secretary failed to acknowledge "considerable mitigating factors" in assessing this violation as the result of of high negligence. Resp. Br. at 33. Accordingly, Respondent submits that the negligence level for this citation should be reduced from 'high' to 'moderate.' I disagree.

Under MSHA's practice pursuant to Part 100, the level of negligence is properly designated as high when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3, Table X. By contrast, the level of negligence is properly designated as moderate when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id*.

However, the undersigned is not bound by the Part 100 framework in my consideration of Respondent's degree of negligence in this instance, and I am not limited to a specific evaluation of the presence of any mitigating circumstances in evaluating whether Respondent's conduct exhibited a 'high' degree of negligence. *See Brody*, 37 FMSHRC at 1701, (citing *Topper Coal Co.*, 20 FMSHRC 344, 350) (Apr. 1998). A high level of negligence may be properly found if, despite mitigating circumstances, a Respondent's conduct reflects "an aggravated lack of care that is more than ordinary negligence" under the totality of the circumstances. *Id*.; *Mach Mining*, 809 F.3d at 1263-64.

The Secretary asserts that "Respondent's culpability rises above ordinary or moderate negligence" given the open and obvious nature of this violation and the presence, at the time of inspection, of broken pieces of scale that had already broken away from the passageway ceiling. Sec'y Br. at 16; *see* P-20; Tr. 739:6-740:7. The Secretary also maintains that there are "little circumstances mitigating this violation and no excuse for exposing miners to this unnecessary danger." Sec'y Br. at 16.

Respondent counters that it has presented "considerable" evidence of factors mitigating its level of negligence, including (1) "the extensive training Morton Salt provides employees on identifying and examining loose ground hazards," (2) "Morton Salt's efforts to encourage safe practices through progressive discipline and a popular rewards program," and (3) a June 13, 2022 Production Report suggesting that travel ways and escapeways throughout the mine had recently been inspected. Resp. Br. at 33; *see* Tr. 739:14-20, 1072:15-1076:22, 1189:16-1192:21); Exs R-2, R-8, R-9. Given these submissions, Respondent argues that this citation should be lowered to moderate negligence "with a commensurate penalty reduction." Resp. Br. at 31, 33.[9]

[9] Respondent cites inspector Olivier's testimony that "[Respondent does] have some mitigating factors that they are providing some type of training to the working miner" as a purported admission that factors exist which offset a finding of high negligence. Resp. Br. at 33; *see* Tr. 739:17-20. This argument misstates the inspector's testimony. Inspector Olivier testified that he considered some evidence of mitigating factors in deciding not to assess this violation as an unwarrantable failure, rather than in his consideration of Respondent's negligence as a more general matter. Tr. 739:13-20; *see Emery Mining Corp*., 9 FMSHRC 1997, 2001 (Dec. 1987)

The undersigned finds that the Respondent's description of the "considerable" nature of the evidence mitigating its degree of negligence is inaccurate, and that there are minimal circumstances mitigating Respondent's generally high level of negligence here. Resp. Br. at 33, Sec'y Br. at 16. Though the verisimilitude of Respondent's evidence that it conducted an inspection of all travel ways and escapeways two days prior to the issuance of this citation has not been challenged, this evidence makes no specific reference to the scope or thoroughness of any inspection conducted at the 25E/26E junction. *See* Ex. R-2. As referenced above, Respondent has argued that this passageway was not routinely used by miners as a preferred travel way, which belies its position that it would have nonetheless considered that area as a travel way when conducting a regular, mine-wide inspection for hazardous ground conditions. *See* Resp. Br. at 32; Exs. R-12, R-39; Tr. 1199:2-1200:15, 1206:11-22. Moreover, while Respondent's recent efforts to improve workplace safety conditions at Weeks Island are commendable, these efforts apparently did not contribute towards meaningful compliance regarding this particular violation. Mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, and that tends to reduce the likelihood of an injury to a miner. 30 C.F.R. § 100.3(d). Here, Respondent presented testimony that a miner who discovers a potential scale is required to either seek assistance with manually or mechanically removing the scale, or must report the location of the scale to a supervisor and block physical access to the area. Tr. 1189:9-15; *see* Ex. P-17. Respondent also presented testimony that it provides scaling training to its miners, has hired contractors who specialize in removing scales, and has acquired new scaling equipment to prioritize hazardous scale removal. Tr. 1185:11-1187:16. Even when taking this testimony at face value, these efforts are of little use and not true mitigation if the Respondent does not – and here has not – prioritized removing scales from an area of the mine containing necessary equipment that is only accessible every 800 or 1,000 feet, including Femco phones and transformers. *See* P. 90-A; Tr. 105:16-106:4; 114:5-115:5-8; 542:16; 733:4-6.

After considering the totality of the evidence presented, the undersigned concludes that the Respondent's conduct fell at the lower threshold of a 'high negligence' designation, and therefore sustains MSHA's negligence designation, as issued.

Penalty

For Citation No. 9649752, the Secretary proposed a regularly assessed penalty of $7,285.00, calculated from total points of $8,095.00, with a ten percent reduction for good faith. Sec'y Ex. P-17.

As with Citation No. 9649750, a factor weighing neutrally against Respondent here is the parties' prehearing stipulation that this proposed penalty will not affect Respondent's ability to remain in business. *See supra*, Prehearing Stip. 4; 30 U.S.C. § 820(i)(4) ("the effect on the operator's ability to continue in business".). Weighing in favor of Respondent is its immediate efforts to achieve compliance after being ordered to scale the loose by inspector Olivier. Ex. P-17; 30 U.S.C. § 820(i)(6). Weighing against the Respondent are the large size of its operation, a

(defining an unwarrantable failure as "aggravated conduct constituting more than ordinary negligence."). A high negligence finding does not, standing alone, support an unwarrantable failure finding, as an unwarrantable failure is such conduct that demonstrates "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp*., 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc*., 52 F.3d 133, 136 (7th Cir. 1995).

history of 70 prior citations for alleged violations of 30 C.F.R. § 57.3200 in the two years prior to the issuance of Citation No. 9649752, the Respondent's negligence – which fell at the low end of a high negligence designation, and the fact that this citation was properly designated as significant and substantial. 30 U.S.C. § 820(i)(1)-(3), (5).

After careful consideration of the above factors, the undersigned reduces the Secretary's proposed penalty to $6,500.00 and otherwise AFFIRMS Citation No. 9649752, as issued.

C. Citation Number 9649757: The Secretary Has Established That Morton Salt Violated 30 C.F.R. § 57.3200 [Failure To Correct Hazardous Ground Conditions], And That This Violation Was Properly Designated As Significant And Substantial

Findings of Fact

Inspector Olivier issued a third citation under 30 C.F.R. § 57.3200 on June 15, 2022. Ex. P-24. As he traveled along the ledge of 22G East, he noticed alleged loose ground conditions on the top of the bench and issued Citation No. 9649757, which alleges, in relevant part that:

> There was loose ground found along the ledge of 22G east top of bench. The loose [ground] was observed approximately 60 feet high from the lower level. This room was shot on 6/2/2022 and had been mucked by the LHD operators. This condition exposes the operators and others to serious injuries if the loose [material] was to fall while they are in the area.

P-24 at 1.

Inspector Olivier credibly testified that he issued this citation for "loose ground found on the edge of 22G that was left unattended…[where] miners were allowed to continue working at the bottom of the bench without correct[ing] [the] issue." Tr. 743. At the time the citation was issued, no one was working in the area. Tr. 756-57, 823. However, Olivier explained that he conversed with miners and observed the Load Haul Dump (LHD) down at the bottom of the bench, which led him to believe that the machine was being serviced. Tr. 745. Olivier recalled observing a piece of equipment at the bottom of the bench area. Tr. 745. During this time, Olivier also noticed that the room had started to be mucked but had not yet been fully completed. Tr. 745. Based on his experience and knowledge, he estimated that approximately 20 additional feet of the area had to be mucked. Tr. 745-46. In addition to mucking, the miners would access the areas beneath the bench ledges to scale. Tr. 561, 767.

Olivier expressed about the size of the loose material. While referring to Ex. P-27, Olivier explained that the photograph depicts the loose ground on top of the ledge on the bench side of 22G East. Tr. 749, 753. He pointed out two separate cracked pieces along the edge but could not tell the exact size of the pieces as they were buried further down than shown in the photographs. Tr. 753. Olivier estimated that the pieces ranged possibly to ten feet in total from the edge on the bottom of the photograph to the piece that is leaning out by the crack to the top of the photograph. Tr. 754. The other photographs submitted by the Secretary reveal the same cracked pieces and loose ground but at slightly different angles and magnification. Ex. P-28; P-30; P-31; P-32; P-33; P-34; P-34; P-35; P-37 Tr. 749, 752. Specifically, P-36 reveals a side view of the ledge showing the same crack. The crack runs north along the edge and the separated piece to the right of the

crack is around one to two feet down. P-36; Tr. 754. As it runs north, the crack widens which further reveals the thickness of the scale to be about five feet. In another area of the photograph, there is separation along the crack from the bottom base all the way up. Tr. 755.

Based on his experience, Olivier charactered the loose as "large scale[s]." Tr. 753-54. He concluded that the height of the ledge, which measured sixty feet, exacerbated his concerns with the "hazard." Tr. 756. He determined it to be hazardous because the size of the loose material along the ledge, coupled with the height of the ledge could, if dislodged, fall and crush someone. Tr. 746, 756. This concern was shared by Eddie-Jean Louis, who testified that he was worried about miners working in the areas beneath the ledge. Tr. 549-552.

Shortly after noticing these cracks and alleged loose ground conditions, Olivier questioned supervising miner Lee Franks about whether there had been any recent blasting. Tr. 755. Franks then radioed either Reggie Provost, the production supervisor, or another miner Jack Maxie, who later informed Olivier that the area was blasted or shot on June 2. Based on this information and the visible ground conditions, Olivier issued citation No. 9649757, with no mention of any signage. Tr. 741, 743, 995-96.

To terminate the citation, Morton used a mechanical scaler. Lee Franks testified that "[i]t took a good while. We had to reposition it multiple times. We picked at it and got in the crack a few different times, but had to keep moving and rolling and kind of physically guiding [it], trying the best we could by radio so we could get in and get the right leverage on it to pull it." Tr. 1219-20.

It is necessary to examine the timeline of events regarding alleged inspections and examinations of the area leading up to the citation before assessing whether there has been a violation. The area of 22G East initially had been blasted or shot on June 2, 2022. Tr. 756, 57-58. Olivier testified that Reggie Provost was the fire boss that night, but he only went to the room to check on the gas or methane levels—not to inspect the ledge. Tr. 757-58. Olivier suggested that Respondent provided no documentation showing that the ledge had been examined at some point after the blast and before his inspection. Tr. 759. However, the record reveals that the bench area underwent a secondary blast on June 8. Ex. P-52; P-53; R-22; Tr. 122-23, 135-36, 338. Production supervisor Scott Frith testified that he fire-bossed 22G East after this secondary blast. He could not recall exactly whether he went to the bench top as part of the inspection but suggested that he would have gone. Tr. 912-17. He testified that in any case, he observed no hazard. Tr. 915-17. Similarly, Colin Francis testified that he did not recall seeing the large, cracked pieces shown in Ex. P-27, on June 8, when he loaded the shots and conducted the workplace examination at the top and bottom of the bench ledge that day. Tr. 475-78, 519-20. Respondent also presented evidence that Stephen Herbert conducted a workplace examination in which a mechanical scaler had been used to scale the bench top and ledge in 22G North and East on June 10, 2022. Ex. P-48; Tr. 217-21.

The day before the citation was issued on June 15, 2022, Respondent blasted approximately 3000 pounds of nitrate for three lines in a nearby bench area, 22G West. Tr. 974-76; P-15. Frith and Dalton Gary both testified that the active benches in 22G West were close enough to 22G East that a blast in that area could affect the ground conditions nearby and create a scale. Tr. 965-73, 978,1161-62. Miner representative Colin Francis and miner Eddie-Jean Louis testified that the conditions depicted in Ex. P-27 were likely caused by recent blast as there was loose salt present on the top area. Tr. 443-45, 552-55.

Gary mucked in 22G East during the next graveyard shift running from 11:30pm to 7:30am on June 13, 2022. P-15; P-56; Tr. 522, 952-54. Following that shift, Gary noted in his workplace examination that he had completed his mucking and found no hazards after checking the bench ledge at the top. Tr. 955, 1153-56. No intervening blast had occurred between his examination and the time Olivier completed his routine inspection. P-54.

Violation

Citation No. 9649757 alleges a violation of 30 C.F.R. § 57.3200, which requires that:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry, and, when left unattended, a barrier shall be installed to impede unauthorized entry.

30 C.F.R. § 57.3200.

The Secretary asserts that Respondent violated the standard by instructing miners to commence work in 22G East after failing to ensure that the cited ground conditions were safe after blasting on June 2. Sec'y Br. at 17. She suggests that Respondent issued work orders for cleaning, scaling, bolting, and mucking, without removing or supporting the scale or posting any barriers or warning signs. Sec'y Br. at 18. Respondent maintains that the evidence establishes that the area had been inspected numerous times since the June 2 blast, that the cracks did not form until after all work was completed, and that any cracks on the bench ledge of 22G had been caused by blasts occurring in areas nearby on the night shift of June 13, 2022. Resp't Br. at 23, 24. I find the testimony and evidence presented by Respondent to be potential mitigating circumstances but conclude that 30 C.F.R. § 57.3200 has been violated.

Under a plain reading of the regulation, there are three requirements for a violation. First, a ground condition that creates a hazard. Second, that hazardous condition must be removed or supported before work *or* travel may occur in the area. And third, the area must be posted with a warning against entry and when left unattended, a barrier must be erected. 30 C.F.R. § 57.3200. As a preliminary matter, the third requirement is not at issue here. Neither party contests that the area had not been posted with a warning sign or dangered off with a barrier. Tr. 995-96. Therefore, the remaining issues are: (1) whether the Secretary proved the presence of a ground condition constituting a hazard; and (2) whether that condition had not been removed or supported before work or travel commenced.

Loose Ground Hazard

The Commission has adopted a series of factors to consider in determining whether "loose ground" is present. *See Asarco*, 14 FMSHRC at 952-53 (citation omitted). These factors include, "the results of sounding tests, the size of the drummy area, the presence of visible fractures and sloughed material, 'popping' and 'snapping' sounds in the ground, the presence, if any, of roof support, and the operating experience of the mine or any of its particular areas." *Id.* The Commission, in another context, approved the definition of "hazard" as a "possible source of peril, danger, duress, or difficulty," or "a condition that tends to create or increase the possibility of loss." *Enlow Fork Mining Co.*, 19 FMSHRC 5, 14 (Jan. 1997) (citing *Webster's Third New International Dictionary* 104 (1971)).

Morton Salt does not seem to contest that the cracks depicted in P-27 and P-36 constituted ground hazards. Rather, Respondent argues that such cracks did not appear until right before Olivier's inspection. On the other hand, the Secretary presents ample photographic evidence that there were ground conditions present. These photographs, along with the inspector's credible testimony, help prove the existence of a ground condition that creates a hazard.

Under either approach, *Asarco* or the Commission's broader definition of hazard under *Enlow Fork*, these "large scales" satisfy the first requirement. Two *Asarco* factors—the presence of visible factors and the operating experience of the mine—support a finding that the cracks and scale referenced in Citation No. 9649757 constitute hazardous ground conditions. Olivier testified that there was visible loose ground found on the ledge of 22G East. Tr. 743. Such visibility or obviousness is buttressed by the numerous photographs submitted, specifically P-27 and P-36. P-27 depicts two, separated, cracked pieces along the ledge edge that Olivier estimated to be approximately ten feet in total. Tr. 754. P-36 reveals the side view of the same cracks, showing that as the crack runs north it becomes wider, further highlighting the thickness of the scale. Additionally, P-36 depicts some separation along the crack near the bottom base. Tr. 755. As mentioned previously, Olivier testified that he had performed around 75 inspections at the mine, including regular inspections, hazard complaints, special visits, and spot inspections. Tr. 688. Due to his familiarity with miners, management, and on-site experience identifying potentially hazardous conditions at Weeks Island, the undersigned again credits his opinion that the conditions cited qualify as a ground hazard. *See e.g., Buck Creek Coal Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Harland Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

Alternatively, given the size of the cracks ranging from about 10 feet long to 5 feet wide and forming large, heavy slabs of salt separating from the face of the bench, these conditions clearly qualify as a "possible source of peril, danger…" *Enlow Fork*, 19 FMSHRC at 14. As Olivier testified, the ledge was approximately sixty feet high so if any of the material fell below to the area where Gary had been mucking or working and where the piece of equipment was located, there would be cause for concern or danger. Ex. P-27; Tr. 756, 374-75, 444, 551, 914. I thus find that the first requirement is satisfied.

Removal or Support of Ground Conditions

The next issue is whether the hazardous ground conditions were removed or supported before work or travel commenced. This is a closer call and heavily depends on the timeline of events. Based on the evidence, the cited area of 22G East had been blasted on June 2, 2022. Tr. 756, 757-58. Olivier testified, with no meaningful rebuttal, that Provost, who fire bossed that night, admitted that he had not inspected the ledge. Tr. 757-58. The record further shows that the area underwent a secondary blast, which is typically completed to break up rock at the base of the bench that had not broken correctly during the initial blast. Tr. 209. Frith performed that fire boss but admitted that he generally would only give the ledge a "glance." Tr. 917. These facts show that neither fire boss acknowledged the presence of any cracks or scales given their cursory inspection or failure to closely examine the area. If they had no acknowledgment of these conditions, it follows that they had no reason to remove or support them prior to any work or travel commencing. The evidence suggests that there was continuous mucking and scaling occurring in the area up until the day of the inspection. One miner used a mechanical scaler to scale the bench top and ledge in 22G East on June 10, 2022. Ex. P-48; Tr. 217-21. The day before the citation had been issued, Gary mucked the area. P-15; P-56; Tr. 522, 952-54.

An issue arises whether the scale had been present when mucking occurred after June 2, 2022, before work commenced in the ensuing days. However, it is enough that a blast occurred on June 13 nearby in 22G West. Though the Respondent suggests that this weighs against a finding of a violation, it in fact confirms a violation. Respondent presents evidence that it blasted approximately 3000 pounds of nitrate for three lines in a nearby bench area, 22G West. Tr. 974-76. Two of its witnesses agreed that blasting the active benches in that area could affect the ground conditions nearby and create a scale. Tr. 965-73, 978. Both miner representatives similarly concluded that the conditions depicted in Ex. P-27 likely were caused by a more recent blast than that of June 2, 2022. Tr. 443-45, 552-55. Based on this timeline, Gary still mucked in 22G after the more recent and nearby blast that occurred on June 13 had been completed, so the cracks as depicted in inspector Olivier's photographs were at least more likely than not present during Gary's mucking. Furthermore, Olivier testified that equipment had been located at the bottom of the bench when he conducted his routine inspection, which could in itself provide evidence sufficient to satisfy the "travel" portion of the regulation.

While it may be true that Gary did not observe any hazardous conditions when he checked the bench ledge at the top of 22G on June 13, 2022, it is clear that hazardous ground conditions existed on June 15 when the citation was issued, and that miners had been mucking and operating equipment post-blast leading up to the time the inspector issued the citation. *See* P-15; P-56; Tr. 522, 952-54.

After carefully considering the *Asarco* factors and reviewing the record testimony and submitted evidence, the undersigned concludes that the Secretary has satisfied her burden to prove the alleged violation of 30 C.F.R. § 57.3200.

Gravity and Significant and Substantial Finding

When inspector Olivier issued Citation No. 9649757, he designated it as significant and substantial and reasonably likely to cause a fatal injury affecting one person. Ex. P-24. Respondent contests the S&S designation and specifically challenges step two and four of the Commission's refined *Mathies* test, alleging that the defined hazard, a falling piece of scale or slab hitting a miner, and a reasonably serious injury, were unlikely to occur. Resp't Br. at 28-30. Respondent first argues that no miner would be affected by the hazard as the crack was formed after miners had stopped working in the area. Resp't Br. at 28. It next contends that a reasonably serious injury would not be reasonably likely given the unlikelihood of a scale striking an LHD operator, the completely bolted mine ceiling, and the protective specifications of the Sandvik LHD present at Weeks Island. Resp't Br. at 29-30. Assuming normal continued mining conditions, the piece of equipment at the bottom of the bench would need to be moved. At that point, the miners would be traveling to, or perhaps as Olivier suggests, servicing the LHD. Tr. 745.

The Secretary disagrees and maintains that all four of the *Mathies* elements are met and that there was a reasonable likelihood for the loose ground conditions to separate and fall and strike a miner resulting in a reasonably serious injury. For the reasons below, I agree with the Secretary and uphold the S&S designation.

For starters, the inspector assessed the loose ground hazard as reasonably likely to cause a fatal injury or illness to a miner. Ex. P-24. The single miner that would have been affected either would be Gary, who recently mucked the area, or someone traveling below to operate or move the piece of equipment. Tr. 952-54, 955. As will be discussed in the S&S analysis, the record shows that

there is a reasonable likelihood of the hazard to cause a fatal or reasonably serious injury to that single miner. These gravity designations are therefore upheld.

Mandatory Safety Standard

Turning to the first *Mathies* element, in the preceding section, I concluded that Respondent violated section 57.3200, a mandatory safety standard, when it failed to remove or support hazardous ground conditions before miners were allowed to travel, access, muck, and scale the affected area. This element is satisfied.

Reasonably Likely to Cause the Defined Hazard

As previously mentioned, the discrete safety hazard contributed to by a violation of 30 C.F.R. § 57.3200 is the exposure of miners to potentially hazardous ground conditions that could cause bodily injury, including loose scales falling from ledges of sixty plus feet onto a miner. While the inspector did not witness a miner under the scales, the likelihood of the occurrence of the hazard is determined by assuming continued mining operations. *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986). It is disputed whether the mucking process of the cited room area had been completed. Olivier testified that it was not completed and needed another twenty feet. Tr. 745-46. Crediting his position would result in prolonged exposure to miners who would be instructed to muck that area. However, according to Respondent, Gary had completed his mucking process of 22G and completed a workplace inspection that found no hazards. Resp't at 23; Ex. P-56; Tr. 248-51, 1153-56. Additionally, Respondent notes that Olivier acknowledged that no miners had been working at the base of the bench when he issued the citation. Tr. 756-57. Regardless of whether a miner would continue to muck in the area, Olivier had observed a piece of equipment down at the bottom of the bench that he believed was being serviced. Tr. 745. As noted above, miners would be traveling to and potentially servicing the LHD. Tr. 745.

Given this exposure of miners at the base of the bench to slabs and cracks separating from the ledge above, there is a reasonable likelihood that such scales could eventually fall and strike a miner in the area. P-27; P-36. This conclusion is supported by the fact that Gary was in the area mucking in 22G East during the graveyard shift on June 13, and the recent blasting activity in the area that evening. As Frith and Gary both testified, blasting of the nearby benches in 22G West could affect the ground conditions in the cited area and create additional scaling. Tr. 965-73, 1161-63. Crediting their testimony means that the already cracked areas of 22G East could be exacerbated by continued normal blasting schedules, which increases the likelihood that the loose ground hazards would fall. I ultimately find this second element satisfied as there is evidence that miners were close to the scales presenting a hazardous condition prior to the citation and because there was a piece of equipment still at the bottom of the bench.

Reasonably Likely to Cause a Reasonably Serious Injury

Turning to the final two *Mathies* elements, assuming the occurrence of the specific hazard, that is, loose ground conditions falling on a miner, it is reasonably likely that a miner mucking below or accessing the area to move the LHD would be injured and that the injury would be reasonably serious. Respondent primarily argues that even if there was a hazardous condition when the bench area was being mucked, a serious injury would not be reasonably likely to occur. Resp't Br. at 28. Respondent relies on Troy Rabeaux's testimony for support. He testified that the LHD operators who muck in front of a bench face are "never really close enough" to the bench face to be hit by

any loose debris that could fall from above. Tr. 364-65. Another miner, Eddie Jean-Louis, explained that if a scale fell when the LHD was perpendicular to the bench face, the scale would hit the LHD bucker rather than the miner. Tr. 556-57. Additionally, Respondent emphasizes miner training to examine the ribs, roofs, or ground conditions during the mucking process. Resp't Br. at 29. Lastly, the Respondent highlights the safety rating for the Sandvik LHDs at the Weeks Island Mine and Mill. It asserts that the LHDs have laminated windows that are shatter resistant and cabs that provide overhead protection. Though I consider Respondent's arguments helpful, they are ultimately unpersuasive in reversing the S&S designation.

The circumstances cited by Respondent may lessen the likelihood of an injury, but Respondent fails to consider whether a miner would be traveling or working in the area below without an LHD. Specifically, it ignores the possibility that it is reasonably likely that a miner could be struck by a falling scale while attempting to get into their LHD vehicle, when exiting the vehicle, or performing hand scaling. As discussed, during continued mining operations, miners had numerous reasons to be in the bench area to scale, finish the mucking process, and ensure that the piece of equipment was eventually moved or serviced. I credit Olivier's persuasive testimony that the large scale presented a significant risk of harm to any miner in the area. Tr. 756; Tr. 374-75, 444, 551, 745, 753-54. Olivier testified in general that loose ground conditions can result in roof collapse, and that the danger associated with scales on the loose ground can be fatal by falling on someone or damaging equipment. Tr. 689. Olivier explained that the specific loose ground conditions at issue and the exposure to miners in the area below the bench was "alarming." Tr. 756. He characterized the cracks as significant being around 10 feet long and 5 feet wide. These cracks formed large and heavy slabs of salt that separated from the face of the bench about a foot or two. Ex. P-27; P-36. As these cracks ran north along the 22G East ledge, the pieces of cracked salt widened. P-36; Tr. 754. The sixty foot height of the ledge also adds to the gravity of the danger and risk for a fatal injury. Tr. 756. Again, even though there was no miner currently at the base when Olivier issued his citation and took his photographs, The Secretary has established that it was reasonably likely that a miner would be in the area with during continued normal mining operations at Weeks Island. Tr. 756-57.

In sum, the record reveals that if a scale or a piece of the "large scale" were to fall, a serious or fatal injury to a miner below would be reasonably expected. I therefore find this element satisfied. Since I conclude that the four *Mathies* elements are satisfied, the S&S designation for Citation No. 9649757 is upheld.

Negligence

With respect to this citation, Respondent contests the high negligence designation and seeks a reduction to "moderate" negligence. It specifically lists four "considerable" mitigating factors. The factors cited include: "(1) the extensive training Morton Salt provides employees on identifying and examining loose ground hazards; (2) documented workplace inspections for 22G East during the relevant period… (3) the fall-protection LHDs provide operators; and (4) the testimony of multiple miners that show workplace inspections are conducted before and during the mucking process…" Of these four factors, I find somewhat persuasive the documented workplace inspections and the testimony that the large scales and cracks could have been created by a nearby blasting of section 22G West a day prior to the inspection rather than by a blast from June 2. But these are not necessarily dispositive of the issue.

The Secretary maintains that Respondent was highly negligent because it was aware that blasting into bench areas can cause dangerous ground conditions, yet Provost failed to check the ledge for dangerous conditions during his fire boss. Provost further testified that he could not name a single miner who had gone to the top of the ledge to check for the loose ground. Tr. 301, 747. The Secretary views this as bordering on "recklessness." Sec'y Br. at 27. If there were no examinations or evidence that other blasting occurred after June 2, then the Secretary would have a stronger argument for recklessness. But there is record evidence that suggests there had been a secondary blast on June 8, 2022, and blasting in a nearby bench area had occurred only a day before with some form of inspections or examinations. Nonetheless, after consideration of the testimony and entire record, I affirm the high negligence designation.

Here, Olivier assessed the negligence as high because the room and ledge should be checked after blasting and Respondent, or any reasonable operator, should be aware that blasting into benches can cause dangerous loose ground conditions that could injure miners working and traveling below. It is clear from Olivier's conversation with Provost that the top of the bench had not been inspected post-blast on June 2, 2022. The record also reveals a series of workplace examinations taking place after June 2, all of which do not mention any hazardous condition. P-47; P-48; P-51. Olivier testified that most of the workplace examination documents concerning 22G East failed to include any hazard identification pages. *Id.* A reasonable operator would have ensured that these hazard identification pages were adequately used and attached to the relevant workplace examinations as these pages notify management and other miners of the hazards in the area. Additionally, given the size and risk of the loose scales or material falling from sixty feet high, management should be inspecting the ledges from above and below before miners are allowed to muck, scale, or travel in the area. Testimony from the miners reveals that they are not instructed to inspect from above and Provost and Frith both confirmed that they had only done cursory examinations. Tr. 209, 917. Based on the foregoing, high negligence is warranted.

Penalty

For Citation No. 9649757, the Secretary proposed a regularly assessed penalty of $16,213.00, calculated from total points of $18,015.00 with a 10% reduction for good faith.

In the fifteen months preceding the issuance of Citation No. 9649757, MSHA issued 49 violations of section 57.3200 to Morton Salt, Inc., at its Weeks Island Mine and Mill. *See* MSHA, *Mine Data Retrieval System*, https://www.msha.gov/mine-data-retrieval-system (last visited July 17, 2025). The parties stipulated that payment of the total proposed penalties in this matter would not affect Morton's ability to continue in business. *See supra*, Prehearing Stip. 4. I assessed Respondent's negligence as high. Regarding the gravity, I found that the violation was S&S, affected one miner, and was reasonably likely to result in a fatal injury. Respondent demonstrated good faith by timely abating the loose ground conditions using a mechanical scale. Tr. 1219-22. Considering the six criteria set forth under 110(i) of the Mine Act in conjunction with the relevant facts, I hereby assess a reduced penalty of $15,000.00.

D. Citation Number 9649758: The Secretary Has Established That Morton Salt Violated 30 C.F.R. § 57.3401 [Failure To Inspect Ground Conditions], And That This Violation Was Properly Designated As Significant And Substantial

Findings of Fact

On June 17, 2022, inspector Olivier issued a related citation to the previous one. After discovering the loose ground conditions and developing an alleged reasonable belief that no one properly examined or tested the bench top area of 22G East, the inspector issued Citation No. 9649758. That citation states in relevant part that: "[t]he bench top of 22G was not examined nor tested after blasting. There was loose ground found along the top ledge and miners were allowed to muck out the room in this condition." Ex. P-58. Olivier designated the citation as a significant and substantial violation that was reasonably likely to cause an injury that would reasonably be expected to be "fatal," would affect one miner, and was caused by Respondent's high negligence. Ex. P-58.

The loose ground referenced here is the same as the violation found in Citation No. 9649757. Tr. 762. Because the operative, relevant facts regarding the loose ground are similar for both citations, the above fact section for Citation No. 9649757 is incorporated by reference in this section and will apply in my subsequent analysis.

Violation

This citation alleges that:

> Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift. The bench top of 22G east was not examined nor tested after blasting. There was loose ground found along the top ledge and the miners were allowed to muck out the room in this condition.

Ex. P-58.

Inspector Olivier found that the alleged facts set forth in the citation, when taken as a whole, demonstrate a violation of 30 C.F.R. § 57.3401. That regulation requires in relevant part that, "[a]ppropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift." 30 C.F.R. § 57.3401.

Respondent challenges the citation on two distinct grounds. It first argues that the citation should be vacated because it is duplicative of Citation No. 9649757. As legal support, Respondent asserts that citations must impose separate and distinct legal duties on an operator to avoid being qualified as duplicative. *Sec'y of Labor v. JWR, Inc.*, 29 FMSHRC 212, 222 (Mar. 2007) (ALJ). Additionally, Respondent contends that a citation for a specific standard can be duplicative of a charge for violating a more general standard when identical evidence is used. *See e.g., Sec'y of Labor v. Western Fuels Utah Inc.*, 19 FMSHRC 1005 (June 1997).

I disagree that these citations are duplicative. There are two separate duties imposed by the two regulations. The first regulation addresses a duty to remove identifiable hazardous ground conditions before work or travel can occur while the latter regulation requires a duty to examine and test for ground conditions in any area where work is to be performed, or after blasting. *Contrast* 30 C.F.R. § 57.3200 *with* § 57.3401. This sort of framework is hardly restricted to ground conditions-related violations, as the Mine Act imposes multiple duties to correct potential safety hazards and to conduct regular inspections for the existence of discrete hazards. *See e.g.* 30 C.F.R. § 57.14107 (Moving machine parts) and 30 C.F.R. § 57.14100 (Safety defects; examination, correction and records); 30 C.F.R. § 57.19019 (Guide ropes) and 30 C.F.R. § 57.19023 (Examinations); 30 C.F.R. § 75.202 (Protection from falls of roof, face and ribs) and 30 C.F.R. § 75.211 (Roof testing and scaling); 30 C.F.R. 75.334(d) (Worked-out areas and areas where pillars are being recovered) and 30 C.F.R. 75.364(a)(2)(iii) (Weekly examination of methane and oxygen concentrations and air quantity).

"The 1977 Mine Act imposes a duty upon operators to comply with all mandatory safety and health standards, it does not permit an operator to shield itself from liability for a violation of a mandatory standard simply because the operator violated a different, but related, mandatory standard." *El Paso Rock Quarries, Inc*., 3 FMSHRC 35, 40 (Jan. 1981); *see also Sumpter v. Sec'y of Labor*, 763 F.3d 1292, 1300-01 (11th Cir. 2014)(quoting *Cyprus Tonopah Mining Corp.,* 15 FMSHRC 367, 378-79 (1993) ("although the [operator's] violations may have emanated from the same events, the citations are not duplicative because the two standards impose separate and distinct duties upon an operator."). The undersigned finds that 30 C.F.R. § 57.3200 imposes a duty to remove which is corrective in nature, while 30 C.F.R. § 57.3401 imposes a duty to examine, which can be seen as preventative or proactive. Similarly, as shown by the plain language of both regulations, one is not a more specific standard of the other. In other words, one does not encapsulate the other since if one is violated, it does not per se mean that the other is violated as well. For these reasons, I find no duplicative citations.[10]

Respondent next argues that the citation should be vacated because the cited area of 22G East had been properly and regularly examined for hazards and multiple workers documented that no hazards were present. Resp't Br. at 37. As support, Respondent cites to several miners who performed tasks in the area between June 1 and June 13, and who either conducted workplace examinations or were supervised by someone who confirmed that prior, proper inspections had been completed. Because of this, Respondent claims that the Secretary has failed to carry her burden.

In opposition, the Secretary maintains that Respondent violated the standard because there is no concrete documentation that the top of the bench area had been properly examined before work commenced in the area, and the size and severity of the cracks and scales demonstrate that an adequate examination had not been conducted. Sec'y Br. at 22. After carefully considering both

[10] To the extent that the Respondent argues that it is important to consider that inspector Olivier could not recall whether he had ever issued a citation for a violation of Section 57.3401 in his approximately 75 previous inspections of Weeks Island prior to June 2022, the undersigned finds that the Respondent is on notice of the requirements under the Act regardless of whether it has been cited previously for a violation of this regulation. *See Cactus Canyon Quarries, Inc. v. FMSHRC*, 64 F.4th 662 (5th Cir. 2023); Tr. 862:3-863:23.

parties' arguments and the relevant testimony and evidence, I conclude that Respondent violated the standard.

At hearing, Olivier testified that he identified loose ground conditions and significant cracks along the ledge of 22G East. Tr. 689, 743, 745. When he investigated further, he discovered that the scales were located sixty feet above the ground from the bench area below. The record shows that miners accessed this area to scale. Tr. 561, 767. While Respondent trains its miners to inspect for ground conditions,[11] the large scales indicate that the area was not sufficiently examined after blasting occurred either on June 2, 8, or at the nearby bench area during the graveyard shift of June 13. With respect to the June 2 blasting, Olivier testified that Reggie Provost, the production supervisor, performed the fire boss that evening but only checked the room for gas conditions and did not check the ledge for hazardous ground conditions. Tr. 757. During the hearing, Provost could not recall whether he checked the ledge. Tr. 307.

Olivier later explained that when he followed up concerning whether any miner or designated official adequately checked the ledge, Respondent could not provide clear documentation. Tr. 759. The documents provided include workplace inspections of 22G East, but only four out of the fifteen included hazard identification pages, which are sections that notify management of any hazards. P-47; P-48; P-51. None of the documents clearly indicate that a miner or designated official checked the ledge. Regarding the June 8 blast, Frith, who performed the fire boss that evening, explained that he gave the ledge a "glance." Tr. 917. A glance is insufficient to satisfy the examination requirement under 30 C.F.R. § 57.3401. Based on the record evidence and testimony, I find that there was a violation of the cited standard. *See Sec'y of Labor v. Sunbelt Rentals, Inc.; Lvr, Inc.; and Roanoke Cement Co., LLC*, 38 FMSHRC 1619, 1627 (July 2016) (holding that, under 30 C.F.R. § 56.18002(a), examination of working places "must be adequate in the sense that it identifies conditions which may adversely affect safety and health that a reasonably prudent competent examiner would recognize.").

Gravity and Significant and Substantial Designation

When inspector Olivier issued this citation, he designated it as significant and substantial and reasonably likely to cause a fatal injury affecting one person. Ex. P-58. Respondent does not specifically contest these designations. The Secretary argues that the likelihood and gravity arguments and evidence are the same as for Citation No. 9649757. She further argues that there is a heightened element of danger present when there is no adequate examination of the ledge. Sec'y Br. at 26-27. In sum, the Secretary argues that if miners are relying on the management and fire boss to check and identify these hazardous, loose ground conditions, then the miners are more vulnerable to those hazards as they would be operating under a false sense of security. Sec'y Br. at 27. Overall, I agree with the Secretary that the cited gravity and S&S designations are appropriate.

[11] There is testimony by Mr. Rabeaux explaining that a mucker is trained to use their headlamps and lights from their LHD equipment to "see what [they] can see" from the bottom of the bench looking upward. Tr. 368. This is problematic because Morton failed to train miners to go to the top of the bench and inspect for the loose ground and scales. Tr. 368-71; Tr. 448 (Francis testifying to the same). Provost also testified that the miners could look at the bottom or take their LHD to the top "if they need to." Tr. 298-99.

For starters, the inspector assessed the loose ground hazard as reasonably likely to cause a fatal injury or illness to a miner. Ex. P-58. Olivier credibly testified that the scales, one of which ranged from an estimated 10 feet long to 5 feet wide, was located approximately sixty feet above the bench area that had equipment below and had been recently mucked. Based on the size and thickness of the cracked material depicted in P-27 and P-36, along with the fact that Gary had mucked the area and there was a piece of equipment present below, these gravity designations are affirmed.

Next, the S&S analysis is similar to that for Citation No. 9649757, and for this reason, my analysis is concise. Here, the first step of the refined *Mathies* test is satisfied because I have found that a violation of a mandatory safety standard, section 57.3401, has occurred. Second, the cited standard is meant to prevent hazardous ground conditions including scales and cracked pieces from falling onto miners. Tr. 763-64. Olivier expressed concern that the failure to adhere to the mandatory safety standard by not examining the area or testing the loose ground conditions, greatly endangered miners who traveled or scaled near the ledge. Tr. 763, 764-65. Given the loose nature and size of the cracked and scale material and the exposure of miners mucking, scaling, or operating equipment below during continued mining operations, it is reasonably likely that the safety hazard would occur, satisfying the second *Mathies* step. Tr. 764. As with Citation No. 9649757, the record reveals that if a scale or a piece of the "large scale" that extended 10 feet long to 5 feet wide were to fall from sixty feet above, a serious or fatal injury to a miner working or traveling below would be reasonably expected during continued mining operations. Therefore, the remaining two elements of *Mathies* are also satisfied. Based on the foregoing, the S&S designation is upheld.

Negligence

Inspector Olivier designated this citation as resulting from the operator's high negligence. Respondent does not specifically contest this designation but argues that the citation should be vacated, as discussed above, because the Secretary failed to prove that a violation of the standard or issued it as a duplicative citation. The Secretary argues that high negligence is appropriate because Provost, who was in the best position to check the ledge for dangerous ground conditions during his fire boss, failed to do so. Sec'y Br. at 27. Because Respondent fails to present any contradictory evidence or argument, and Respondent allowed miners to muck and scale work in the cited area shortly after the June 2 blast, I affirm the Secretary's high negligence designation.

Here, as with Citation No. 9649757, the record shows that at least one supervisor or designated official, Provost, failed to adequately inspect or examine the ledge for ground conditions after the June 2 blast. Tr. 266, 304, 305, 349. His imputed negligence arises from admitting to Olivier that he had only gone to the top of the bench to check on gas or methane levels. Tr. 266. Provost testified that he had not instructed miners to check at the top of the ledge, meaning that it squarely falls on management to inspect from above to ensure safe working and traveling conditions. Tr. 304-05, 349. Instead of conducting an adequate examination or inspection following the June 2 blast, Provost directed miners to begin mucking the area with knowledge that he never checked the ledge for loose materials. Tr. 301, 757. I find these actions highly negligent and affirm Olivier's designation by imputing Provost's negligence to Respondent.

Penalty

For Citation No. 9649758, the Secretary proposed a regularly assessed penalty of $7,285.00, calculated from total points of $8,095.00 with a 10% reduction for good faith.

In the fifteen months preceding the issuance of Citation No. 9649758, MSHA issued one violation of section 57.3401 to Morton Salt, Inc., at its Weeks Island Mine and Mill. *See* MSHA, *Mine Data Retrieval System*, https://www.msha.gov/mine-data-retrieval-system (last visited July 16, 2025). Again, the parties stipulated that payment of the total proposed penalties would not affect Morton's ability to continue in business. *See supra*, Prehearing Stip. 4. As outlined above, I determined Respondent's negligence to be high. Regarding gravity, I found the violation to be S&S and reasonably likely to cause a fatal injury to a miner. Respondent demonstrated good faith by providing adequate training to the personnel that would conduct ground control examinations, and by using the mechanical scale to abate the underlying condition. Ex. P-58. Considering the six criteria set forth under 110(i) of the Mine Act in conjunction with the relevant facts, I hereby assess a reduced penalty of $6,500.00.

E. Citation Number 9673091: The Secretary Has Established That Morton Salt Violated 30 C.F.R. § 57.3401 [Failure To Inspect Ground Conditions], And That This Violation Was Properly Designated As Significant And Substantial

Findings of Fact

Prior to and on June 22, 2022, MSHA inspector O'Neal Robertson issued multiple ground condition citations during an E01 regular inspection. On June 14, 2022, inspector Robertson issued Citation No. 9673085, which alleges that:

> Poor ground conditions were found along the rib next to the maintenance/production supervisor office in the 1400' level. A scale was found on the west rib approximately 20 feet from the floor over the parked side by sides. A miner comes to the area as needed to inspect the vehicle before use and throughout the day. Footprints were found in the impact area of the scale. The scale came down by hand scaling and broke up when it contacted the ground, the average piece of salt was approximately 2' long X 3' wide 6 - 8 inch thick. The lose (sic) ground condition exposes a miner to receiving a disabling injury.

The parties have settled that citation, as issued. *See supra*, Section IV; Ex. P-92.

Inspector Robertson testified that, on June 22, 2022, he also issued three citations to correct hazardous scales within the underground maintenance shop area. Tr. 624:4-625:20; 635:21-23. Three separate sets of scales were discovered by Robertson in the machinery assembly section of the shop, over a parking area where side-by-side ATVS were actively parked, and over a refuse dumpster. *Id*.; *see* Sec'y Br. at 32-33.

After issuing these three citations, Robertson asked maintenance general foreman, Heath Segura, whether a pre-work inspection was conducted in the shop area. Tr. 622:18-625:20. Segura informed Robertson, "no", an inspection had not been performed, and that "they don't do it at all." *Id*. Segura also could not produce documentation that a pre-work inspection was conducted on June 22, 2022, nor could he produce any documentation of any inspections conducted over the several days prior to June 22, 2022. Tr. 622:21-25.

Following this conversation with Segura, Robertson issued Citation No. 9673091. *See* Exs. P-92, P-94. This citation alleges a violation of 30 C.F.R. § 57.3401 and was assessed as the result

of high negligence and reasonably likely to result in a fatal injury.[12] The violation was also designated as significant and substantial.

More specifically, Citation No. 9673091 alleges that:

> Appropriate supervisors or other designated persons shall examine and test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift. There were several travel/work areas in the underground maintenance shop where scales were found that [were] not examined or tested by a miner experienced in examining and testing loose ground conditions. These areas were found open and allowed during the inspection and allow[ed] miners to enter these areas with lose (sic) ground conditions. Miners access these areas daily as part of the mining process. A miner could receive at least a lost workday/restricted duty injury from entering these areas.

Ex. P-92 at DOL0164.

Violation

30 C.F.R. § 57.3401 mandates the following:

> Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift. Underground haulageways and travelways and surface area highwalls and banks adjoining travelways shall be examined weekly or more often if changing ground conditions warrant.

Inspector Robertson testified that he issued this citation after discovering three different sets of scales near the maintenance shop, which presented ground-condition hazards for which Robertson issued separate citations under Section 57.3200. Tr. 622:18-625:20; *see* Ex. P-94. Respondent does not contest that scales were indeed discovered by Robertson in and around the maintenance shop, nor does Respondent contest that the discovered scales were hazardous. *See* Resp. Br. at 14, 38-39. Rather, Respondent contends that I should credit Segura's hearing testimony that he conducted an examination of the maintenance shop prior to commencing work on June 22, 2022. Resp. Br. 38-39; *see* Tr. 1262:7-11, 1263:24-1264:3. I decline to do so.

Inspector Robertson testified that Citation No. 9673091 was issued following a conversation with Segura regarding whether anyone conducted an examination of the shop. Tr. 622:18-625:20. According to Robertson, Segura, who was the active underground maintenance general foreman, told him that nobody had conducted an examination, and further stated that "they don't do it at all." *Id*. However, Segura testified at hearing that he had misinterpreted Robertson's question as concerning whether records for inspection of the shop were kept, not whether an inspection had been completed as a more general matter. Tr. 1262:7-11, 1263:24-1264:3. Segura further testified

[12] Though the gravity was assessed as 'fatal,' the condition or practice section for this citation describes the likelihood of injury as 'lost workdays or restricted duty.' *See* Ex. P-92.

that he informed inspector Robertson that he could not readily provide any documentation, but that he did complete formal inspections of the shop every week, as well as ad hoc inspections for any bad ground conditions whenever he was working in the maintenance shop. Tr. 1263:23-1264:14.

The Secretary argues that "[t]his Court should not afford Mr. Segura's testimony at trial any credibility" given the readily obvious inconsistencies between his hearing testimony and testimony provided during a prehearing deposition. Sec'y Br. at 33. I agree.

On direct examination at hearing, Segura first testified that he believed that Robertson had inquired only about any records pertaining to an examination of the shop rather than whether the inspection occurred. Tr. 1263:24-1264:2. However, Segura had testified previously, again on direct examination, to only "very vaguely" remembering speaking to inspector Robertson about this citation. *Id*. Apparently, despite his hazy memory on the subject, Segura could recall with specificity his own representations to Robertson that he had conducted both weekly and ad hoc inspections of the shop area. Tr. 1262:1-6.

Then, on cross-examination, Segura admitted that he had previously testified during his deposition (1) that he had no memory of the specific facts of Citation No. 9673091, and (2) that, at the time of the deposition, he would not be able to provide testimony about the underlying facts of the citation if he were called to do so at hearing. Tr. 1262:12-1263, 1266:6-11. Finally, upon questioning by the undersigned, Segura testified to the purported details of a conversation with Robertson *after* the citation was issued. Tr. 1267:6-10. Segura testified to remembering that Robertson initiated the conversation and that after being asked whether he had conducted an inspection, he informed Robertson that "I did not document an exam. I [did an] exam throughout the shop as I passed through it." Tr. 1267:22-23, 1268:3-6. Yet Segura could recall anything said by Robertson other than the question about whether an exam had been completed, and he could not recall any of his own representations to Robertson other than his confirmation that he had completed an undocumented examination of the area. *See* Tr. 1268:7-22.

The Respondent provides no persuasive reasons why I should credit Segura's limited but seemingly convenient recollections of the circumstances surrounding this citation, including his partial memory of the nature and substance of his conversation with Robertson. *See* Resp. Br. 38-39. Nor does the Respondent provide any argument for how Segura's hearing testimony is not impugned by his prior testimony under oath that he had no recollection of the citation at all. *See* Tr. 1262:12-1263, 1266:6-11. Accordingly, I do not credit Segura's hearing testimony on the nature of the inspection he conducted (if any), and instead credit Robertson's more persuasive, internally consistent, testimony that an examination of the maintenance shop was not conducted on June 22, 2022. Based on the record evidence and Robertson's credible testimony, the undersigned finds that there was a violation of the cited standard.

Gravity and Significant and Substantial Designation

This citation was designated as significant and substantial and reasonably likely to cause a fatal injury affecting one person. Ex. P-92. As with Citation No. 9649758, Respondent has not specifically contested these designations on brief. For her part, the Secretary argues that a heightened gravity finding, and significant and substantial designation are appropriate under these facts. Sec'y Br. at 33-34.

In evaluating whether the facts before me are sufficient to carry the Secretary's burden for this citation, the undersigned first finds that step 1 of the modified *Mathies* step is met here based on my finding that a violation of section 57.3401, which imposes a mandatory safety standard to examine for hazardous ground conditions, has occurred. As found above, the intent of this standard is to prevent hazardous ground conditions, including scales and other cracked rock fragments, from falling, striking, and potentially injuring miners. *See* Tr. 763-64.

Concerning step 2, the presence of loose ground conditions in the area that were overlooked due to the lack of an adequate inspection has been established. On June 22, 2022, Robertson observed miners working in and around the shop and in close proximity to visible, hazardous scales. Tr. 660: 16-21; 625:23. One set of these scales was observed in the travel way adjacent to the shop. Tr. 660:19-21, 662:15-17. Another set of scales was found in the parking area and, at the time of inspection, Segura was performing vehicle maintenance nearby these scales, despite supposedly having inspected the area before beginning work. Tr. 626:2-6; 662:1-665:19. Other miners had reason to enter the parking area as well, either to relocate a vehicle or access safety equipment, such as fire extinguishers, that was stored in the parked vehicles. Tr. 640:14-16.

Turning to Steps 3 and 4, it is apparent that injury to a miner would be reasonably likely had inspector Robertson not intervened, and any resulting injury would almost certainly be reasonably serious in nature. The Secretary puts forth inspector Robertson's undisputed testimony that any scales present in the maintenance shop are likely to be encountered by one or more miners. Tr. 623-628; *see* Sec'y Br. at 33-34. The maintenance shop is the default working area for mechanics, and other miners travel through the maintenance shop throughout the day whenever repairs to equipment are needed. Tr. 623:10-11,628:1-3. Non-mechanic miners may spend at least two hours of an eight-hour shift within the maintenance shop. Tr. 1262:23-1263:14.

The scales in the parking area were so prevalent that parked vehicles had to be relocated so the ceiling could be fully scaled. Tr. 638:8-22; 640:4-9; Ex. P-94. Restrictive netting intended to provide miners with protection from these scales was actively torn at the time of inspection, and the netting did not prevent the scales from falling to the mine floor during scaling. Tr. 641:22-23, 675:18-19. This was despite the large size of the scales, which were approximately two feet by two and a half feet by 8-10 inches. Tr. 643:18-23. It thus appears that these minimal protective measures would have likely been ineffective at providing overhead protection to a miner had any of these scales fallen on their own. *Id.*

Based on the foregoing, the MSHA's S&S and gravity designations are upheld for this citation.

Negligence

Inspector Robertson designated this citation as resulting from the Respondent's high degree of negligence. As with Citation No. 9649758, the Respondent has not presented a specific argument regarding the assessed level of negligence. Rather, the Respondent argued summarily that this Citation should be vacated given Segura's (non-credible) hearing testimony that he did, in fact, conduct the requisite inspection prior to beginning work in the maintenance shop on June 22, 2022.

The Secretary argues that a finding of high negligence is appropriate because "multiple sets of scales existed in the maintenance shop, indicat[ing] Respondent showed little initiative in protecting its miners." Sec'y Br. at 34. The record evidence supports the Secretary's assertion. Indeed, Respondent concedes that scales were present and visible in and around the maintenance

shop on June 22, 2022, and that the scales were not removed or barricaded off prior to inspector Robertson's inspection. Resp. Br. at 14; *see* Exs. P-92, P-94.

Moreover, the Secretary has submitted uncontroverted evidence establishing that the vehicles in the parking area of the maintenance shop belonged to Morton Salt supervisors, which supports an inference that Respondent should have been aware of the presence of scales in the area and the need to conduct ameliorative pre-work inspections. Tr. 647:2-19; *see* Sec'y Br. at 34.

Though not framed specifically as an argument to lower the assessed level of negligence, Respondent has submitted some evidence that travel ways outside of the maintenance shop are generally inspected by Morton Salt supervisors on a weekly basis. *See* Tr. 1019:10-1020:23; 1097:12-20; Ex. R-2. Lee Franks also testified that all travel ways, including the travel way through the maintenance shop, are inspected by Morton Salt supervisors. Tr. 1243:14-1244:13. Franks also testified that supervisors generally conduct an inspection of the maintenance shop whenever they pass through the area but admitted that he cannot speak to whether all miners are counseled if they fail to properly complete their pre-shift inspection cards. 1244:1-1245:22. This testimony supports a finding that inspections of the maintenance shops have occurred on other occasions, but not that any inspection or recording thereof occurred on June 22, 2022. Accordingly, I find that there is no evidence of mitigating factors as to this citation, as mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated. 30 C.F.R. § 100.3(d). Failing to conduct any inspection on June 22 and failing to correct the hazardous ground conditions underlying this citation until instructed to by MSHA, are not the actions of an operator taking affirmative steps towards addressing and ameliorating the safety risks presented by these obvious ground-condition hazards. *See id*.

In sum, Respondent has failed to present sufficient contradictory evidence rebutting the testimony submitted by the Secretary supporting MSHA's high negligence finding. Accordingly, the undersigned AFFIRMS MSHA's high negligence designation.

Penalty

For Citation No. 9649758, the Secretary proposed a regularly assessed penalty of $7,285.00, calculated from total points of $8,095.00 with a 10% reduction for good faith.

As referenced in the analysis for Citation No. 9649758, the parties have stipulated that payment of this proposed penalty would not affect Respondent's ability to continue in business. *See supra*, Prehearing Stip. 4. Here, the undersigned has affirmed that Respondent's negligence level was high, (2) that Respondent's conduct underlying this violation presented a reasonable likelihood of causing a fatal injury to a single miner, and that the violation was significant and substantial. Respondent has demonstrated some good faith by providing adequate training to the personnel that would conduct ground control examinations prior to the termination of this citation. Ex. P-92. Considering the six criteria set forth under 110(i) of the Mine Act and all evidence before me, the undersigned assesses a penalty of $8,000.00.

F. Citation Number 9649767: The Secretary Has Established That Morton Salt Violated 30 C.F.R. § 57.22603(e) [Using an Impermissible Vehicle During a Mine Examination]

Findings of Fact

On June 28, 2022, inspector Olivier issued Citation No. 9649767 during an investigation initiated following MSHA's receipt of section 103(g) anonymous hazard complaints made by miners at Weeks Island. Tr. 868:1-23; *see* 30 U.S.C. § 813(g)(1). Section 103(g) of the Act provides that:

> Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this chapter or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger.

30 U.S.C. § 813(g)(1). According to the 103(g) hazard complaints received by MSHA, managers employed by Respondent traveled via non-permissible vehicles while conducting "fire bosses." Tr. 868:1-23; 871:2-7. A fire boss is "a post-blast examination for the presence of methane or other dangerous gases that may have been released during the blast." Sec'y Br. at 4; s*ee* Tr. 257:3-21; 574:5-21; 902:12-903:15.

During the evening shift on June 27, 2022, Respondent blasted in the 12H, 12I, and 12J sections of the 1600' level of Weeks Island. *See* P-90A; Tr. 786:9-14; 931:25-932:4; Tr. 936:8-11. Two Morton Salt employees, production supervisor Scott Frith and miner Seth Ronsanet,[13] then entered the mine to perform the fire boss. Tr. 930:16. Frith and Ronsanet entered the mine on foot via the number four shaft and walked to the blasted areas at 12H, 12I, and 12J to test for methane. Tr. 930:20-25; 931:1-2. After determining that methane levels at the blast site were within acceptable levels, Frith and Ronsanet walked to an allegedly non-permissible Kawasaki[14] four-seater mule, drove that mule through the bench tops to a Femco phone located at 15E, and then called up to the surface to "clear" the mine. Tr. 786:15-20; 789:2-21; 791:6-8; 936:2-14. Frith and Ronsanet then drove the mule from 15E through the 1600' level back to the access shaft and upwards to the surface of the mine. Tr. 931:6-8. Much of Firth and Ronsanet's travel path overlapped with the escape path of methane (and other volatile gases) fanned from the blast sites to the surface. Tr. 786:15-20; 789:2-21; 791:6-8; 936:2-14. The fire boss crew is supposed to follow the exhaust

[13] The correct spelling of miner "Ronsanet's" surname is not entirely clear based on the record before me. Inspector Olivier testified that this individual's surname is spelled "Ransonet," but the transcript at various times provides the spellings "Ransonet", "Ransonee", and "Ronsanet". *See eg*, Tr. 774:9-20, 935:7-10. The Secretary has adopted the spelling "Ransonet" in her post-hearing brief, whereas the Respondent has adopted the spelling of "Ronsonet". Sec'y Br. at 30; Resp. Br. at 17. Scott Frith, who works alongside miner "Ronsanet," testified that he believes his surname to be spelled R-O-N-S-A-N-E-T. Tr. 935:7-10. Given Frith's testimony, the undersigned has utilized the spelling of "Ronsanet" herein.

[14] The citation states that the vehicle in question was a Polaris ATV, but both parties agree that it was a Kawasaki, four seat, "mule" style, all-terrain vehicle (ATV). *See* Resp. Br. at 17; Sec'y Br. at 5, 28.

path while exiting the mine to monitor for any accumulations of methane, prior to clearing miners to work again underground. Tr. 391:19-21.

The citation issued by inspector Olivier alleges as follows:

> "Vehicles used for transportation when examining the mine shall be approved by MSHA under the applicable requirements of 30 CFR parts 18 through 36. The company used a non-permissible ATV to examine the mine during the post-blast inspection. The employees walked from the #4 shaft to 12-H, 12-I, and 12-J on the 1600 to clear the blast area. The employees then accessed a Polaris ATV that was parked in between 13-I and 13-J to travel through the exhaust on the 1500' before completing the examination. This condition exposes the employees to serious injuries if they were to encounter methane while traveling in the mine in the non-permissible cart." P. 89, p. 1.

Inspector Olivier issued this citation because the fire boss crew could encounter methane pockets in areas outside of the blast sites. Tr. 456:13-17. Inspector Olivier testified about other scenarios at the Weeks Island Mine where gases were released outside of recently blasted areas. Tr. 779:2-4.

Inspector Olivier designated the conduct of the fire boss crew as highly negligent, which presented a reasonable likelihood of a lost workdays or restricted duty injury. Further, inspector Olivier assessed this violation as being "significant and substantial". Exs. P-87, R-30.

Violation

30 C.F.R. § 57.22603 regulates surface blasting at Class II-A mines, and requires the following:

a) All development, production, and bench rounds shall be initiated from the surface after all persons are out of the mine. Persons shall not enter the mine until the mine has been ventilated for at least 15 minutes and the ventilating air has passed over the blast area and through at least one atmospheric monitoring sensor.
b) If the monitoring system indicates that methane in the mine is less than 0.5 percent, competent persons may enter the mine to test for methane in all blast areas.
c) If the monitoring system indicates that methane in the mine is 0.5 percent or more, the mine shall be ventilated and persons shall not enter the mine until the monitoring system indicates that methane in the mine is less than 0.5 percent.
d) If the monitoring system is inoperable or malfunctions, the mine shall be ventilated for at least 45 minutes and the mine power shall be deenergized before persons enter the mine. Only competent persons necessary to test for methane may enter the mine until the methane in the mine is less than 0.5 percent.
e) Vehicles used for transportation when examining the mine shall be approved by MSHA under the applicable requirements of 30 CFR parts 18 through 36. Vehicles shall not be used to examine the mine if the monitoring system is inoperable or has malfunctioned.

30 C.F.R. § 57.22603(a)-(e).

Citation Number 9649767 alleges that Respondent violated 30 C.F.R. § 57.22603(e) when a non-permissible vehicle was used to examine the 1600' level of Weeks Island during a fire boss conducted on June 27, 2022. Tr. 771:19-772:12. Both parties agree that the Kawasaki mule used during the fire boss was a non-permissible vehicle in the recently blasted areas. Tr. 933:14-18. Frith testified that he would not have driven the Kawasaki mule to the blasted areas because "it's not permissible." Tr. 933:14-18. Frith further testified that approaching the blast areas with a non-permissible vehicle would create an "ignition source" that could ignite any methane remaining in the area, which could potentially cause an explosion. Tr. 934:3-12.

In disputing this citation, Respondent argues that the non-permissible vehicle was not operated until after the requisite post-blast methane testing had been completed. More specifically, Respondent argues for a restrictive interpretation of the word "mine" as applied within the cited section 57.22603(e) regulation, which states that "vehicles used for transportation when examining the ***mine*** shall be approved by MSHA." According to Respondent, the word "mine" in this context, refers to areas close to the recently blasted areas of the mine and not the entire active mine. 30 C.F.R. § 57.22603(e)(emphasis added); *see* Resp. Br. at 39-41. The Respondent's requested interpretation of the permissible vehicle requirement promulgated at 30 C.F.R. § 57.22603(e) would restrict this regulation to (1) the inspection team's initial approach towards recently blasted sites, and (2) any travel between blasting sites while conducting secondary methane level testing. *See* Resp. Br. at 39.

In support of this argument, the Respondent points to the language of 30 C.F.R. § 57.22603(b), which requires that the AMS (not just the AMS sensors in closest proximity to active blast sites) must indicate "that methane in the mine is less than 0.5 percent" before "competent persons may enter the mine to test for methane in all blast areas. 30 C.F.R. § 57.22603(b). Given that § 57.22603(b) references testing of methane in "all blast areas" and not testing of methane in travel ways or any area of the mine that is not actively blasted, the Respondent argues that the § 57.22603(e) vehicle requirement extends only until methane testing has been completed at the blast areas. *See* Resp. Br. at 39-41. The Respondent thus argues that Frith and Ronsanet's usage of a non-permissible vehicle after all active blast areas had been tested for methane did not violate the requirements of 30 C.F.R. § 57.22603(e).

The Secretary argues that "Respondent fails to provide any reasonable justification for this interpretation," and further argues and the requested interpretation would be directly at odds with the plain meaning of 30 C.F.R. § 57.22603(e) that "[v]ehicles used for transportation when examining *the mine* shall be approved by MSHA". 30 C.F.R. § 57.22603(e)(emphasis added). Sec'y Br. at 28. I agree with the Secretary.

If a standard has a plain meaning, that meaning must be given effect unless it would lead to an absurd result or undermine the purpose of the Mine Act. *RAG Shoshone Coal Corp*., 26 FMSHRC 75, 80 n.7 (Feb. 2004). To determine the meaning of a regulation, the Commission "utilizes 'traditional tools of construction, including an examination of the text and intent of the drafters."' *Amax Coal Co*., 19 FMSHRC 470, 474 (Mar. 1997) (quoting *Local Union 1261, UMWA v. FMSHRC,* 917 F.2d 42, 44-45 (D.C. Cir. 1990)). In a plain meaning analysis, the Commission "must look to the language and design of the Secretary's regulations as a whole." *New Warwick Mining Co*., 18 FMSHRC 1365, 1368 (Aug. 1996).

The Secretary submits that the word "mine" in 30 C.F.R. § 57.22603(e) applies to the entire mine rather than areas adjacent to recently blasted areas. Sec'y Br. at 28; *see* Tr. 773:23-24, 773:25-774:3. The Secretary's position is well supported by the plain text of 30 C.F.R. § 57.22603.

The Respondent admits that the § 57.22603(a) requirement that no person enter the mine for at least 15 minutes after post-blast ventilation is applicable to miners working underground throughout the mine, not just to miners assigned to specific blasting areas. Resp. Br. at 39-40. 30 C.F.R. § 57.22603 subsections (c) and (d) similarly apply throughout the mine, requiring (1) that no person enter the mine (not just the area in proximity to a specific blast area) if the AMS detects a methane level equal to or greater than 0.5 percent, and (2) if the AMS is inoperable or malfunctioning, that the mine (not just specific areas of the mine) be deenergized and ventilated for at least 45 minutes prior to "competent persons" entering the mine for additional testing. 30 C.F.R. § 57.22603(c), (d); *see New Warwick Mining Co*., 18 FMSHRC 1368 (1996) (noting the importance of considering the statutory framework as a whole).

The Respondent claims that "applying the [30 C.F.R. § 57.22603(e)] standard to blast areas (not the entire mine) is also supported by other relevant standards." Resp. Br. at 40. Respondent first points to 30 C.F.R. § 57.22304(c), which requires that "t]ests for methane shall be conducted immediately before non-approved equipment is taken to a face or bench after blasting." Resp. Br. at 40. Respondent also points to 30 C.F.R. § 57.22228(d), which states that "[a] competent person shall test the mine atmosphere at each face blasted before work is started." *Id.* Respondent asserts that these 30 C.F.R. § 57 regulations, which also impose atmospheric testing requirements at active benches, support the proposition that 30 C.F.R. § 57.22603(e) should be construed to limit the vehicles that the safety team may use only while approaching active benches, and while "test[ing] for methane in all blast areas." *Id*.; 30 C.F.R. § 57.22603(b), (e). This argument is not persuasive. In fact, the Respondent's cited regulations support an opposite conclusion that Congress was aware of the need to delimit certain gas testing and equipment-type requirements to areas of near proximity to active benches yet elected not to incorporate such limiting language when promulgating 30 C.F.R. § 57.22603. *See Amax Coal Co*., 19 FMSHRC at 474 (including an examination of the text and intent of the drafters in the tool of statutory/regulatory construction available to the Commission).

In consideration of the above, the undersigned concludes that the plain language of 30 C.F.R. § 57.22603 requires that MSHA approved vehicles be utilized throughout the entirety of a post-blast fire boss inspection. Furthermore, the record comprehensively reflects that Respondent was aware of this requirement and yet elected to use a non-permissible vehicle "ostensibly because it believes using a non-permissible vehicle throughout the entire fire boss is inconvenient." Sec'y Br. at 28.

"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. As set forth below, the evidence of record reflects that (1) Respondent maintains a policy of testing areas outside of recent blast sites during fire bosses, and (2) Morton Salt miners were aware of restrictions on using unapproved vehicles during a fire blast. The undersigned therefore finds that Respondent was on notice of the requirements of § 57.22603. *See Austin Powder Co.*, 29 FMSHRC at 919.

Scott Frith admitted that he and other production supervisors continue to monitor for methane after clearing the blasted areas. Tr. 905:9-13. During the fire boss, Respondent uses several pieces of equipment to check for methane, including MX-4 and MX-6 gas sensors. *Id*.; Tr. 161:1-10. Respondent also utilizes a "big eye" monitor affixed to a pole that can extend up to 25 feet in the air so that miners can check for methane rising closer to the mine's ceilings. Tr. 161:1-10. The fire boss crew uses this equipment to continue checking other areas of the mine for methane, including travel ways, before exiting to the surface. Tr. 175:10-11; 273:5-15; 387:3-10; 904:1-12.

Morton Salt production supervisor, Reggie Provost, testified that he understood the meaning of "mine" in 30 C.F.R. § 57.22603 to impose requirements throughout the mine, not just near active bench faces. Tr. 282:9-285:9. Load operator, Troy Rabeaux, testified that Respondent's former policy when conducting fire boss examinations was to wait to clear the mine until the blasted areas and the exhaust route were both tested for concentrated areas of methane. Tr. 286:20-382:2. Storeroom miner Colin Francis similarly testified that a fire boss is not complete until the entire mine is clear of methane and other gases. Tr. 387:13-19; 392:10-13; 453:13-17; 454:10-14.

Respondent's safety trainer, Landon Olivier, testified that Respondent's standard practice is to utilize a permissible vehicle to clear and exit the mine "[i]n the event that we encountered any type of gas or something." Tr. 1113:21-22. Miner Eddie Jean-Louis testified that the mine is not cleared as soon as the inspection of the blast face because the fire boss team must "make sure that we don't have any gas because sometime (sic) gas can come afterwards. Gas pocket[s] can sit in a corner [for] some time in the front of a facing and it's not really moving at that – at that particular time. But then it can move eventually out. So we made sure we – everything was clear before we – that's the way I was taught, before we go back into the mine." Tr. 584:16-25.

In light of the foregoing evidence, the undersigned concludes that the Secretary has met her burden to prove, by the preponderance of the evidence, that Respondent violated 30 C.F.R. § 57.22603(e). *See Jim Walter Res., Inc.*, 28 FMSHRC at 992.

Gravity and Significant and Substantial Designation

A violation is significant and substantial if, "based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (citing *Cement Div., Nat'l Gypsum Co*., 3 FMSHRC 822, 825 (Apr. 1981)). The Commission has long implemented a four-step analysis in evaluating whether a violation qualifies as significant and substantial. In *Mathies*, the Commission enumerated the four steps required for a finding of S&S as follows:

> (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 at 3-4.

More recently, the Commission restated *Mathies* step 2 in terms of finding that "the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016). More recently still, the Commission proposed a refined S&S analysis, holding that the four elements required for an S&S finding are as follows:

> (1) [T]he underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of the hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, LLC, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016)).

Notably, an S&S determination is based on the facts existing at the time of citation issuance and assumes normal mining operations will continue. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (Jan. 1984); *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012) ("[t]he [S&S] evaluation is made in consideration of the length of time that the violative [berm] condition existed prior to the citation and the time it would have existed if normal mining operations had continued."). Additionally, redundant safety measures are not to be considered in determining whether a violation is S&S. *See Cumberland Coal Res. v. FMSHRC*, 717 F.3d 1020, 1029 (D.C. Cir. 2013); *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 162 (4th Cir. 2016); *Buck Creek, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015); *Secretary of Labor v. Acha Construction, LLC*, 38 FMSHRC 3025, 3032 (Dec. 28, 2016)(ALJ) (determining berm standard violation to be S&S after refusing to consider equipment's rollover protection and seatbelts because they were redundant safety measures).

In the instant matter, step 1 of the Commission's significant and substantial analysis is satisfied based on my finding that operating an impermissible vehicle while exiting the mine following a fire boss constituted a violation of 30 C.F.R. § 57.22603(e).

As to step 2 of the modified *Mathies* test, the discrete safety hazard contributed to by the violation of 30 C.F.R. § 57.22603(e) is straightforward. *See Newtown Energy*, 38 FMSHRC at 2038. As held by the Commission, "a clear description of the hazard at issue places the analysis of the violation's potential harm in context, by requiring a determination of the relative likelihood that the violation will have a meaningful, adverse effect on conditions miners will encounter during normal mining operations." *Id.* Under *Mathies*, the hazard contributed to by the violation is defined "in terms of the prospective danger the cited safety standard is intended to prevent," and therefore "the starting point for determining the hazard is the actual cited section [of the Code of Federal Regulations]." *Id*.

The purpose of 30 C.F.R. § 57.22603(e) is to protect miners from being exposed to explosive conditions by ensuring that any vehicle operated in an environment with potentially heightened levels of methane does not introduce an active ignition source. *See* Tr. 934:6-10. In a methane-rich domal salt mine, heat from a diesel or gasoline-powered vehicle could ignite any lingering methane and potentially result in an explosion. Tr. 651:1-652:1. Diesel-powered equipment cannot be used in areas where methane might accumulate following a blast because this equipment creates heat, and heated diesel particles burn through the exhaust system and enter the surrounding air. *Id*;

258:7-17. Respondent's decision to utilize an impermissible vehicle introduced potential ignition sources to areas of the mine where higher than normal levels of methane may have been encountered. *See id*.; Tr. 777:12-21; 933:19-934:2. Respondent's conduct thus stands at odds with the purposes of 30 C.F.R. § 57.22603(e) and contributed to the discrete safety hazard of a methane explosion. *See Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383. Thus, step 2 of the modified *Mathies* test is met here.

The third and fourth modified *Mathies* steps require an analysis of whether the discrete hazard(s) identified in step 2 would be reasonably likely to result in an injury and whether there is a reasonable likelihood that the injury would be of a reasonably serious nature. *See Newtown Energy*, 38 FMSHRC at 2038. In the context of Citation No 9649767, the question becomes whether (1) it is reasonably likely that the introduction of an ignition source to the 1600' level of Weeks Island would result in an explosion and associated injury to a miner, and (2) whether any resulting injury would be reasonably serious in nature. *Id.*

It is axiomatic that an explosion resulting from ignited methane (or another volatile gas) could result in an injury up to and including a fatality. *See* Tr. 613:7-21; 615:22-616:6; 687:2-5 As a fatality would inherently be reasonably serious in nature, the undersigned next considers whether the Secretary has established that it is reasonably likely that an explosion would have resulted from Respondent's introduction of an ignition source within the Weeks Island mine. *See Newtown Energy*, 38 FMSHRC at 2038.

An experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harlan Cumberland Coal Co*., 20 FMSHRC 1275, 1278-79 (1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995). However, when evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a "confluence of factors" was present based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co*., 12 FMSHRC 965, 970-71 (May 1990); *Enlow Fork Mining Co*., 5 FMSHRC 5, 9 (Jan. 1997); *Amax Coal Co*., 18 FMSHRC 1355, 1358 (Aug. 1996).

Respondent's ventilation system is designed to circulate fresh air into the mine to displace bad, potentially methane-rich air upwards to the surface and out of the mine. Tr. 291:14-292:11; 455:10-12. A primary surface fan blows fresh air down into the intake shafts, while secondary subterranean fans continue to push the fresh air further underground. Tr. 587:17-25; 779:17-20. A system of curtains helps guide the fresh air through the mine and push the bad air out along the exhaust path. Tr. 392:6-9.

Despite the presence of this ventilation system, gas can get caught in a pocket or the periphery of the upward air flow and not exit the mine. Tr. 584:5-25, 779:6-8. However, most gas pockets detected at Weeks Islands were found only after Respondent had identified malfunctioning safety equipment. Tr. 451:23-452:19; 647:25-648:5; 869:6-12. Inspector Robertson testified that he has observed malfunctioning AMS systems in other mines, including systems malfunctioning due to dead batteries or system-wide failure. Tr. 648:18-23; 649:9-13; 872:1-22. Here, however, inspector Olivier admitted that the AMS at Weeks Island did not malfunction, and no heightened methane gas levels were detected during the fire boss in question. Tr. 883:3-9.

The Secretary has presented some evidence of scenarios where methane (or other gas) monitoring equipment has failed at Weeks Island. For example, hand-held gas monitors can malfunction. Tr. 388:22-24. Rabeaux experienced one such situation when, during a fire boss, his monitoring equipment indicated that there was no nitrous oxide in the benches. Tr. 389:1-4. Miners reentering the mine noticed that the lighting appeared yellow, which can occur in a mine environment with heighted levels of nitrous oxide. Tr. 389:6-13. After his monitor continued to reflect no presence of nitrous oxide, Rabeaux borrowed another monitor, which promptly alarmed and consequently required a mine evacuation. Tr. 389:10-390:22.

The Secretary has also pointed to other, hypothetical scenarios where the Weeks Island menthane monitoring system could remain operational but nonetheless (1) fail to detect rising methane levels, or (2) provide a less than instantaneous alarm response upon detecting the presence of methane.

As to the first scenario, the Secretary's evidence establishes that the Weeks Island AMS is not "fool proof." Methane pockets can emerge unpredictably, and AMS monitors are located only above transformers. Tr. 262:23-263:7, 779:23-780:3. Accordingly, any methane pockets that arise away from a transformer would not be detected immediately. *Id*. While an initially undetected methane pocket would generally be expelled by the mine's ventilation system, a pocket could remain below the surface if the ventilation system were ever inoperable, or if the pocket were to emerge at the periphery of a ventilation shaft. *See* Tr. 291:14-292:11; 392:6-9; 455:10-12; 584:5-25; 587:17-25; 779:6-20.

As to the second proposed scenario, the AMS computer at Weeks Island is in a control room on the surface, so any alert for local methane levels above 0.25 percent is first received by an above-ground miner. *See* Ex. P-117; Tr. 569:9-17, 572:9-575:8. Since miners performing a fire boss must turn off their radios to avoid creating an ignition source, the only means of direct communication with the surface is by using a FEMCO phone. Tr. 289:19-290:6-11; 352:17-22; 582:8-18. A subsurface alarm is emitted if underground methane levels reach 0.5 percent, but this alarm is only audible in the No. 3 hoist building and change house, and it takes 30 seconds for the mine to de-energize if power is cut off at the surface. *See Ex.* P-117; Tr. 575:1; 580:18-581:1; 910:1-14.

The Secretary's evidence concerning these two scenarios is undisputed, and the undersigned finds that there is therefore *some* likelihood that an undetected methane pocket would have been present in the mine during the fire boss at issue. However, the Secretary has presented insufficient evidence to carry its burden to prove that the ignition of any present methane pockets was reasonably likely.

Respondent, for its part, has presented similarly undisputed evidence which demonstrates that the Weeks Island AMS sensors and ventilation system were functional on the date the citation was issued, and that heightened gas levels were not detected anywhere in the mine during the fire boss. Ex. P-87 at DOL0143; *see* Tr. 839:13-840:12, 883:3-9; 1012:15-18. While the hypotheticals presented by the Secretary are plausible and somewhat compelling, the Secretary points to no specific evidence that either a failure in the AMS system or an encounter with an isolated methane pocket presented anything beyond a relatively remote possibility. *See* Sec'y Br. at 30. Therefore, the undersigned finds that there exists insufficient evidence to support a conclusion that it is reasonably likely that either hypothetical would occur. Certainly, the Secretary's concerns with Respondent's conduct in exposing a potential ignition source into a potential methane-emitting

environment are well received. *See Consol of Kentucky, Inc*., 30 FMSHRC 1 (Jan. 2008) (finding that, in the context of an imminent danger order, the critical question in determining whether an accumulation of methane presents an imminent danger is whether there is an ignition source that might reasonably be expected to cause an explosion, resulting in death or serious injury within a short period of time); *see also Island Creek Coal Co*., 15 FMSHRC 3339, 346-247 (Mar. 1993); *Texasgulf*, Inc., 10 FMSHRC 498, 501 (Apr. 1988). However, without more, a significant and substantial designation is inappropriate under these facts.

In light of the above, the undersigned concludes that the Secretary has not proven that the Respondent's violation of 30 C.F.R. § 57.22603 represented a significant and substantial violation. Accordingly, the undersigned MODIFIES this citation to non-significant and substantial and reduces the assessed gravity to reflect a "low likelihood" of a fatal injury.

Negligence

The Commission has made clear that "where agents are negligent, that negligence may be imputed to the operator for penalty purposes." *Whayne Supply Co.*, 19 FMSHRC 447, 451, 453 (1997) *Southern Ohio Coal Co. (SOCCO)*, 4 FMSHRC 1459, 1463-64 (Aug. 1982). In *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-95, 198 (1991), the Commission clarified that an examiner may constitute an agent of the operator when it is "charged with responsibility for the operation of…part of the mine." *See also* 30 U.S.C. § 802(e). In other words, when carrying out the required examination duties for an operator, an examiner may be viewed as being "charged with responsibility for the operation of part of a mine." *Id.* at 194. If violative intentional misconduct is within the "scope" of the examiner's employment or authority as an agent, then negligence may be imputed. *Id.* at 196-97, 198; *see also Pocahontas Fuel Co.*, 8 IBMA 136, 146-48 (1977), *aff'd sub nom. Pocahontas Fuel Co. v. Andrus*, 590 F.2d 95 (4th Cir. 1979).

On the other hand, if the miner at issue is "rank-and-file," his negligence generally cannot be imputed to the operator for the purposes of penalty assessment. *Whayne Supply Co.*, 19 FMSHRC 447, 451, 453 (Mar. 1997); *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *SOCCO*, 4 FMSHRC at 1463-64. In such circumstances, the operator's negligence, fault, or lack thereof, must be determined by an examination of the operator's own conduct, which includes supervision and training. *SOCCO*, 4 FMSHRC at 1464-65; *see also Asarco, Inc.*, 8 FMSHRC 1632, 1636 (Nov. 1986).

Here, Frith's status as a supervisor charged with fire boss responsibilities forecloses any argument that he was a rank-and-file miner whose negligent acts cannot be properly attributed to Respondent. *Whayne Supply Co*., 19 FMSHRC at 453. In addition, I find credible and unrebutted the testimony of inspector Olivier that on June 26, 2022, he instructed Morton Salt safety team members Landon Olivier and Josh Morrow that a non-permissible vehicle cannot be used while conducting a fire boss. Tr. 780:8-15.

Although MSHA's regulations regarding negligence are not binding on the Commission, *see Wade Sand & Gravel Co*., 37 FMSHRC 1874, 1878 n.5 (Sept. 2015), they may be persuasive in evaluating whether Respondent's negligence was properly assessed as "high." According to MSHA, the level of negligence is properly designated as high when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3, Table X. Further, MSHA regulations provide that mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, and that tends

to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions. 30 C.F.R. § 100.3(d). Respondent identifies no mitigating factors relevant to this citation in its post-hearing brief, and the record is silent about mitigative efforts made by Respondent. *See* Resp. Br. at 16-17, 39-41. The Secretary presented credible testimony establishing that Respondent's safety team was instructed not to use a non-permissible vehicle for conducting a fire boss examination a mere day prior to Respondent's violation of 30 C.F.R. § 57.22603(e). Tr. 780:8-15. Considering Respondent's awareness of the violative condition and apparent intentional violation of a known safety regulation, the undersigned affirms MSHA's high negligence designation.

Penalty

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

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

30 U.S.C. § 820(i).

For Citation No. 9649767, the Secretary proposed a regularly assessed penalty of $2,573.00. The parties stipulated that this penalty will not affect Morton Salt's ability to continue in business. Pre-hearing Stip. 4. Morton Salt has no documented prior history of violating 30 C.F.R. § 57.22603(e). Morton Salt demonstrated high negligence in violating this standard, especially considering that it had been given prior, specific guidance from MSHA that operating a petroleum-fueled vehicle during a fire boss would constitute a citable offense. Despite this high degree of negligence, the undersigned found that this violation is not significant and substantial and presents a low likelihood of injury. Morton Salt demonstrated good faith by abating the condition the following day. Given these considerations, I find it appropriate to increase the assessed penalty to $3,000.00.

VIII. ORDER

For the reasons set forth above, **IT IS ORDERED THAT** Citation Nos. 9649752 and 9673091 be **AFFIRMED**, with a modification of the proposed penalty amount;

IT IS FURTHER ORDERED THAT Citation No. 9649757 be **AFFIRMED**, with a reduction in the proposed penalty amount, because of **RESPONDENT'S FAILURE TO CORRECT THE VIOLATIVE CONDITION AFTER JUNE 13, 2022**;

IT IS FURTHER ORDERED THAT Citation No. 9649758 be **AFFIRMED**, with a reduction in the proposed penalty amount, because of **RESPONDENT'S FAILURE TO CORRECT THE VIOLATIVE CONDITION AFTER JUNE 13, 2022;**

IT IS FURTHER ORDERED THAT Citation Nos. 9649767 be **MODIFIED** to reduce the likelihood of injury or illness from 'reasonably likely' to 'unlikely', remove the significant and substantial designation, and reduce the assessed penalty, but is otherwise **AFFIRMED** as issued;

IT IS FURTHER ORDERED THAT Citation Nos. 9649750 be **MODIFIED** to reduce the likelihood of injury or illness from 'reasonably likely' to 'unlikely', remove the significant and substantial designation, reduce the assessed negligence level from 'moderate' to 'low', and reduce the assessed penalty, but is otherwise **AFFIRMED** as issued;

The total proposed penalties for Citation Nos. 9649752, 9673091, 9649750, 9649769, 9649757, and 9649758 have been reduced from $42,112.00 to $39,900.00. The total settled penalty amount for Citation Nos. 9673082, 9673084, 9649743, 9673085, 9649744, 9649747, 9649748, 9673090, 9649753, 9649759, 9649760, 9649761, 9649765, 9673092, 9649764, 9673099, and 9649756 is $38,320.00. Accordingly, Morton Salt, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of $78,220.00 within thirty (30) days of the date of this decision.[15]

SO ORDERED.

Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

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[15] Payment should be sent to: Pay.gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508 or, alternately, Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.