

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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July 12, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2009-483
Petitioner,	:	A.C. No. 12-02010-185538-03
	:	
v.	:	
	:	
BLACK BEAUTY COAL COMPANY,	:	
Respondent.	:	Mine: Air Quality

**DECISION**

Appearances:           Natalie Lien and Nadia Hafeez, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;  
                                  R. Henry Moore, Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before:                    Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Black Beauty Coal Company at its Air Quality mine, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act” or “Act”). The case includes 34 violations with a total proposed of \$171,483.00. As set forth more fully below, the parties have agreed to resolve all but three of the violations, leaving those for decision here. The parties presented testimony and documentary evidence at the hearing held in Evansville, Indiana commencing on April 20, 2011.

**I. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Black Beauty Coal Company (“Black Beauty”) operates the Air Quality #1 mine (the “mine”), a bituminous coal mine near Vincennes, Indiana. The mine is subject to regular inspections by the Secretary’s Mine Safety and Health Administration (“MSHA”) pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). The parties stipulated that Black Beauty is the operator of the Air Quality mine, that the mine’s operations affect interstate commerce, and that it is subject to the jurisdiction of the Mine Act. It. Stip.1-5. Black Beauty, like a number of other mines in the Indiana-Illinois area, is owned by Peabody Energy. The mine is a large

operator, utilizing the room and pillar mining method. (Tr.8-9).

*a. Citation No. 8415328*

On April 10, 2009, Inspector Phillip Herndon issued Citation No. 8415328 to Air Quality for a violation of section 75.220(a)(1) of the Secretary's regulations. The regulation requires the mine to comply with the provisions of its approved roof control plan. The citation alleges that:

A continuous miner operator was observed positioned in the Red Zone between the Co. No. 53 Joy continuous miner and the No. 1 entry coal rib on the MMU-001 as he was tramping out of the face. The miner operator was removed immediately from the unsafe condition. The condition was a factor that contributed to the issuance of Imminent Danger Order No. 8415327 dated 04/10/2009. Therefore no abatement time was set.

The inspector found that a serious injury was highly likely to occur, that the violation was significant and substantial, that one person would be affected, and that the violation was the result of moderate negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of \$9,882.00. An imminent danger order was issued with this citation.

**1. The Violation**

Phillip Herndon, an MSHA mine inspector, has worked for the Mine Safety and Health Administration for the past four years. He has worked in surface and underground coal mines since 1982, and worked at Air Quality for eight years prior to becoming a mine inspector. On April 10, 2009, Herndon was at the Air Quality mine to conduct a spot inspection. Terry Courtney, the mine foreman, accompanied Herndon on that day. During the course of his inspection, Herndon issued a citation for a ventilation violation at the working face and, as a result, the continuous mining machine had to be pulled back from the face area to make room to extend a curtain. Herndon testified that, while the continuous miner was being trammed out, the miner operator entered the red zone. (Tr. 15 -18).

Herndon explained that the Red Zone is any place considered a pinch point between the continuous mining machine and the coal rib, and any area around the machine where the miner operator could be crushed. (Tr. 18). The roof control plan requires that "no one shall be in red zone while a miner is being trammed from place to place or while being positioned in a working place." Sec'y Ex. 4, p. 6, no. 8. Herndon demonstrated where Carie, the operator of the continuous miner, was standing, near the tail while tramping the machine, by drawing a line on the diagram on page 6a of the roof control plan. (Tr. 19- 20). Herndon testified that while he was writing up the ventilation violation he looked up, and saw Carie moving the machine while in the red zone. Herndon immediately issued an imminent danger order to stop the action and

remove Carie from his position. Herndon believed that the pump motor had not been turned off while Carie was standing between the miner and the rib. (Tr. 21); Sec'y Ex. 2.

At the close out conference, Herndon asked Courtney where Carie was standing, and Herndon understood Courtney to agree that Carie was standing in the tail area with the pump motor in the on position. (Tr. 23). The red zone is created only when the continuous miner is energized, i.e., the pump motor is running. *Cooper v. Ingersoll Rand Co.*, 628 F. Supp. 1488, 1492 (W.D. Va. 1986). There are a number of tasks that the miner operator must undertake in an area next to the mining machine while the pump motor is turned off. Conducting those activities with the pump motor off is not violative of the red zone prohibition. (Tr. 26). However, if a miner is positioned between the mining machine and the rib while the pump motor is running, the miner is considered to be in the "red zone."

Trent Harris, a lead man for Air Quality, has been in the mining industry for a number of years and was present when Herndon issued the imminent danger order. (Tr. 37) According to Harris, Herndon first issued a citation for "low air" and, as a result, Harris instructed Carie to reposition the miner in order to extend the ventilation curtain. Carie had to back up the continuous miner, and he did so in the proper position behind the machine. He backed the miner up about ten feet, then realized that the cable was too close to the miner, so he hit the button on the remote control to turn off the pump motor and, in effect, shut down the miner. Carie then stepped next to the miner to move the cable and the water line, at which point Herndon shouted out that there was an imminent danger, as he believed Carie to be positioned between the rib and the machine while the continuous miner was still in operation. Harris could not understand why Herndon believed this to be an imminent danger because, in his view, the pump motor was turned off. Carie was not near the miner when it was tramming, but after turning off the pump motor he did walk next to the miner. Harris is certain that the pump motor had been turned off prior to Carie entering the red zone to move the cable. (Tr. 37-38).

Matthew Carie was operating the continuous miner when Herndon issued the citation. (Tr. 37). Carie was a roof bolter in April, 2009, but was filling in to operate the continuous mining machine. Carie was trained in the concept of the red zone when he received other training on November 10, 2008. On January 16, 2009, he was task trained on the operation of the continuous miner, and specifically to "keep workers out of red zone." (Tr. 45-48).

On April 10, 2009, Carie was operating the continuous miner when he was told by Harris to back the miner out of the entry to allow workers to extend a ventilation curtain. He backed out, turned off the machine, but was then instructed to back the machine further out so that the curtain could be accessed. After beginning to do so, he realized that the cable was in the way, so he once again turned the pump motor off, and started to walk toward the machine. As soon as he reached the tail area, Herndon shouted at him about the red zone. Carie credibly testified that the pump motor on the miner was turned off at the time he entered the tail area to move the cable. (Tr. 49-50).

Terry Courtney, has worked more than 17 years in the mining industry and has held a number of positions at Air Quality. (Tr. 61). He was present when Herndon issued the red zone citation, but he had his back to the miner and did not observe the condition alleged by Herndon. After Herndon issued the ventilation citation, Courtney's attention was directed toward correcting the condition so he flagged off the loader while the ventilation was being corrected. (Tr. 62). He turned to see Carie near the miner only after he heard Herndon shout that there was an imminent danger. (Tr. 62-63). Carie was near the tail and did not have his hands on the box, so Courtney understood that the pump motor was off. Even so, after Herndon issued the order, Courtney had Carie removed from the mine, both to investigate the allegation and to terminate the citation. Courtney explained that Air Quality takes the issue of the red zone very seriously, as they have had a fatality and another miner seriously injured when in the red zone. Violating the company policy regarding the red zone will result in termination of an employee. (Tr. 63-65).

Gerald Haantz is the operation superintendent with Air Quality and was the underground mine superintendent at the time the citation was issued by Herndon. (Tr. 76). He conducted an investigation into the incident and, based upon the information he learned, found that Carie was not in the red zone as alleged and, therefore, Carie was not terminated from his employment. The mine has let go two miners in the past few years for violating the red zone rule. (Tr. 77-78).

While there is no question that Carie was standing next to the continuous miner, between the machine and the rib, which is an area that is considered the red zone, there is clearly a dispute of fact as to whether or not the pump motor was in the off position while Carie was in that area to move the cable. Just prior to entering the red zone, Carie was backing out the machine for the second time. He explained that he turned off the pump motor after tramming and before entering the red zone. (Tr. 52). Herndon testified that Carie was tramming, and that the pump motor was on while Carie was in the area between the rib and miner. (Tr. 21). Courtney did not know if the motor was off, but Harris testified that Carie had turned off the motor, and Carie asserts that he turned off the motor prior to entering the area near the miner. (Tr. 38, 63-64). The Secretary's evidence is minimal at best, as the inspector did not describe how he knew the pump motor was on, other than to say that he observed Carie tramming with it on. (Tr. 21). The other witnesses all agree that Carie was tramming before he entered the red zone and, therefore, would have had the pump motor running while tramming. It is quite plausible that Herndon observed the tramming but did not see Carie de-energize the pump motor prior to entering area to move the cable. I find Carie to be a credible witness and credit his testimony that the pump motor was not running when he walked between the rib and the continuous miner.

“The Mine Act imposes on the Secretary the burden of proving each alleged violation by a preponderance of the credible evidence.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998) (quoting *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). “The preponderance standard, in general, means proof that something is more likely so than not so.” *In re: Contests of Respirable Dust*, 17 FMSHRC at 1838. I find that the Secretary has not met her burden of proof in this case and therefore the

citation is vacated.

*b. Citation No. 9942562*

On April 8, 2009, Inspector Charles Weilbaker issued Citation No. 9942562 to Air Quality for a violation of Section 70.100(a) Secretary's regulations. The citation alleges that:

The average concentration of respirable dust in the working environment of the designated occupation was 2.512 milligrams per cubic meter which exceeds the 2.0 milligrams per cubic meter standard. This finding was based on the results of five (5) valid dust samples collected by the operator. The operator shall take corrective action to lower the respirable dust. The corrective action must be submitted to the MSHA District Manager for review. After the corrective action has been reviewed and acknowledged, the mine operator must sample each production shift until five (5) valid samples are collected. The operator must notify MSHA at least 24 hours in advance of the date and shift that sampling will commence. The samples must be submitted to the Pittsburgh Respirable Dust Processing laboratory.

The inspector found that a serious injury was reasonably likely to occur, that the violation was significant and substantial, that 12 persons would be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of \$18,271.

**1. The Violation**

The parties agree that the mine operator submitted the dust samples for MMU-001, as required by MSHA, and that the testing of the five samples indicated an exposure of 2.512, which constitutes a violation of the dust standard as alleged by the Secretary. The parties also agree, given the decisions issued by the Commission regarding respirable dust, that the violation is properly designated as S&S. Given the agreement of the parties, I find that a violation is established and that the violation is significant and substantial as alleged by the Secretary. The issues that remain for decision are the amount of negligence attributed to the operator and the number of persons affected.

Weilbaker found that the violation was the result of high negligence on the part of the mine operator and that 12 persons were exposed to the dust. He testified that he is retired from MSHA, but was with MSHA for twenty years as a supervisory health and safety specialist. He has a BA, served as an industrial hygienist, received training in such, and worked as a mine inspector. As a part of his duties, he spoke regularly with mine management regarding conditions at the mine, including problems due to the excessive dust. His purpose was to

encourage management to look for the source of the respirable dust when over-exposed and make changes as necessary. (Tr. 90-92). He issued the citation on MMU-001 after receiving the notice from the Pittsburgh lab. The results, Sec'y Ex. 6, show the five sample results to be 3.438, 2.560, 4.259, .897 and 1.408. (Tr. 96). He looked at the total number of people on the section and the fact that several of the concentrations were very high, and believed that the exposure continued into the second shift, thereby exposing twelve persons in all. Weilbaker determined that 6 of the 9 persons on the shift would have been affected, including the miner operator, roof bolters, and car operators. Further, both shifts were exposed, thereby creating an exposure to 12 miners in total. (Tr. 96); Sec'y Ex. 6. However, there were no samples taken on the second shift and no evidence of production amounts, such that Weilbaker can only presume that an over exposure occurred on that shift as well. (Tr. 96).

Weilbaker determined that the negligence was high based upon what he knew about the dust conditions at the mine, prior samples, and the conversations he held with persons at the mine after he received the results of the sampling. After he received the results of the samples, Weilbaker called the mine and spoke with Ron Madlen in an attempt to discover the problem with the respirable dust and the over exposures. (Tr. 98). From his conversation he understood that the mine had been cutting into rock, causing the higher than normal concentration. (Tr. 98-99). Weilbaker reviewed the previous bi-monthly samples, and found that the samples were lower while the production higher, leading him to agree with the conclusion that the mine had been cutting rock at the time of the overexposure. Based upon his experience, he testified that the dust is easier to see when cutting rock and should be a good indication that there is high respirable dust during that time and, therefore, greater precautions are necessary. (Tr. 98-100). The mine asserts, on the other hand, that there are a number of scenarios that can result in high dust samples. Further, and more significantly, Air Quality has dealt with the issue of rock in the seams for an extended period of time and its ventilation plan takes the cutting of rock into consideration. The mine disagrees that miners working on the section the day the samples were taken could see a significant increase in dust in the air, particularly when the production was reduced during those shifts. (Tr. 102).

Weilbaker asked the mine to amend the ventilation plan in order to abate the violation. (Tr. 100). Although the mine had an approved plan in place and they may well have been in compliance with the plan when the over exposure was found, Weilbaker believes they should have done more. He agrees that there are reasons other than cutting into rock that would lead to high concentrations of dust. The set of samples that the mine provided prior to this violation indicate that the mine was in compliance when that set was sampled. Further, Air Quality had not been cited for a violation of dust concentration since January 2008 and it had averaged under 2.0 mg for some period of time. (Tr. 102).

The conclusion drawn by Weilbaker, that the failure on the part of the mine to allow the overexposure to occur was the result of high negligence, is not supported by the record as a whole. Since any number of items, or a combination thereof, could have caused the overexposure, and there is no credible evidence that the mine saw or was aware of high

concentrations at the time of sampling, the high negligence has not been demonstrated. Nor is there substantial evidence that the mine was put on notice through earlier sampling that there was a dust issue to be addressed. The same is true for the number of persons exposed. Therefore, I find that the negligence was moderate and that the three persons who were wearing pumps that demonstrated a concentration above 2.0 mg were exposed. However, I do find over exposure to dust concentrations for three persons to be a serious violation and I assess a penalty of \$10,000.

*c. Citation No. 8017946*

Inspector James Preece issued this citation for a violation of Safeguard No. 7018511, which requires safe access to travel under conveyor belts. The citation states:

An adequate cross under was not being provided on the 4 West "A" belt conveyor located at the No. 1 crosscut. Multiple visible tracks were observed underneath the moving belt conveyor in by the haulage travel road towards the 4 main North flop gate. The height was measured from the mine floor to the bottom of the moving belt and measured from 4.5 to 6 feet. The exposed area above the mobile equipment tire tracks measured 39 feet in length.

Preece designated the violation as significant and substantial, with moderate negligence, and a penalty of \$946.00 has been proposed.

**1. The Violation**

James Preece has been an inspector for the Mine Safety and Health Administration since October 2000. He began his career with MSHA as a surface specialist, then became a health specialist and, finally an inspector. He has worked in underground coal mines since 1975, is a graduate of the West Virginia school of technology, and has a mining engineering degree. (Tr. 123-125). Preece testified that on April 8, 2009, he was conducting a roof control evaluation at the mine and was accompanied by representatives of the mine during that evaluation. (Tr. 125).

Prior to traveling underground, Preece reviewed the mine file, including the safeguard at issue. (Tr. 126). While in the area of the 4 west A belt he observed footprints and tire tracks through the area, including under the unprotected belt conveyor. Preece photographed the area. Sec'y Ex. 12. The photographs indicate foot prints and tire tracks under the conveyor belt in areas not designated as safe crossing locations. In this part of the mine, Preece explained, there were two areas that were designated as cross-unders for this belt. One area was a roadway not far from the area cited, and the other area was a cross-under for miners on foot. The miners were not using the designated areas to travel under the conveyor and, instead, were taking shortcuts and walking under the belt conveyor in the areas cited by Preece.(Tr. 126-128); Sec'y Ex. 12.

The tracks and footprints under the belt lead Preece to believe that vehicles and foot traffic were crossing under the belt conveyor at an area not designated for such traffic. Further, the areas were not protected against the moving belt overhead. Preece testified that any number of vehicles could be using the undesignated cross-under, including vehicles that transport miners. (Tr. 128). Preece measured the height of the belt, over the course of 39 feet and the belt ranged from 4.5 feet to 6 feet above the travel area. Preece believes, given the need to examine and clean around the belt, there were many miners crossing under the belt each day in areas that were not protected. In his experience, a miner would contact the moving belt above and would suffer serious injuries after becoming entangled. Although Preece observed no one traveling under the belt, the footprints and tire tracks demonstrate that persons were crossing under the belt at the cited location. (Tr. 130-131). Preece explained that his concern was the hazard of the exposure to the moving belt. Preece indicated that crossing under the belt in the area cited, either on foot or while riding in mobile equipment, is likely to result in a miner coming into contact with the moving belt and rollers, thereby leading to an injury. (Tr. 132).

Sylvester DiLorenzo, the Vincennes field office supervisor, testified on behalf of the Secretary regarding the issuance of the safeguard that was the basis for the citation written by Preece. He has been with MSHA since May 2005 and had 30 years prior experience in the coal mining industry. (Tr. 114). Safeguard No. 7018511 was issued on June 4, 2003. (Tr. 115-116). The inspector who issued the safeguard was not available to testify but the notes were available. DiLorenzo reviewed the notes and testified regarding the basis for the safeguard. (Tr. 115). DiLorenzo explained that the hazard addressed by the safeguard is miners crossing under the moving unguarded conveyor belts and coming in contact with the moving belt and rollers. (Tr. 116-117). The safeguard cited 75.1403-5(j) which requires that “[p]ersons should not cross moving belt conveyors, except where suitable crossing facilities are provided.” The notes of the inspector who issued the safeguard, Sec’y Ex. 9, address the hazard as contacting the moving belt and being injured as a result. The notes include mention that contact with the belt is the hazard, and also that mud and water constitute tripping hazards under the belt. DiLorenzo does not understand the safeguard to include only foot traffic, and, in his view, it includes moving equipment (Tr. 122).

Ron Madlem worked at Air Quality for 17 years. His last position at the mine was safety supervisor. (Tr. 145). He accompanied Inspector Battistoni in 2003, on the day Battistoni issued the safeguard. At that time Madlem observed miners shoveling a coal spill on the back side of the belt. The miners had walked under the belt to access the area to be shoveled. (Tr. 146). There were cross-unders nearby, but, like the citation issued by Preece, the miners chose to use a different route under the belt instead of using the designated route with guarded cross-unders. (Tr. 147). In Madlem’s view, the use of vulcanized splices greatly reduces the breaks in the belt and thereby reduces the possibility of injury to a miner crossing under the belt. (Tr. 148). When the safeguard was issued it was in an area where, given the size of the pathway used by the miners, there was no vehicle access. (Tr. 149-150). In order to terminate the safeguard in 2003, a cross under was installed. Madlem stated that the safeguard made no mention of, and therefore does not apply to, vehicle traffic. (Tr. 150).

Rick Carie is the assistant manager of the mine. (Tr. 154). He traveled with Preece at the time the citation was issued. (Tr. 155). Carie testified that there were two cross-unders in the area, one on the road that leads under the conveyor and another for foot traffic. (Tr. 155). In the unlikely event that vehicles drive under the belt at an unprotected area, the vehicles have canopies, and, even for those few vehicles that do not, the belt is high enough that one can avoid the belt by ducking under the conveyor. The cross-under that was a road designated for use by vehicles had been in use for four to five years. The other crossing was for miners on foot and was installed in an effort to avoid using the road where vehicles traveled. (Tr. 156). The mine operates three shifts, with production on the first two shifts. During the third shift, maintenance is conducted and the belts are often shut down. In addition to maintenance activities, the belts are cleaned and rock dusted while shut down. (Tr. 157). Carie believes that if someone did cross under the belt in the area designated by Preece, the conveyor was high enough above the ground that one could easily walk under, although some ducking may be required. (Tr. 160).

#### I. The Underlying Safeguard

Black Beauty alleges that the notice to provide safeguard is invalid and, therefore, the citation issued for a violation of such should be vacated. Black Beauty makes two arguments in support of its contention. First, Black Beauty argues that the notice to provide safeguard is not valid because there was no transportation hazard and the safeguard, therefore, does not specifically identify the nature of the hazard. Given that there were safe areas to cross under the belt, i.e., one for vehicles and one for foot traffic, within a short distance of the area cited, there can be no hazard. Second, Black Beauty argues that the notice to provide safeguard does not apply to the condition cited in this instance. A strict construction of the safeguard reveals that it addressed only foot traffic under the conveyor belt and did not apply to vehicles traveling under the belt. Black Beauty argues that “the safeguard was issued to specifically address walking under the conveyor belt in wet and sloppy conditions.”

The Secretary argues that the notice to provide safeguard identifies a transportation hazard as well as the conduct required to remedy the hazard. The safeguard, Sec’y Ex. 8, provides that “[t]his is a Notice to Provide Safeguard(s) requiring an adequate crossing facility at this location, and all other locations along belt conveyors where miners need to cross under the moving belt.” The paragraph contained above the safeguard notice describes that two miners advised the inspector they walked under the moving conveyor belt in an unguarded area where the mine bottom was wet and slippery. The Secretary argues that this safeguard refers to the standard, 75.1403-5(j), that deals with crossing under conveyors and the language specifically requires a safe crossing and describes with necessary specificity the hazard of coming into contact with the moving conveyor when walking or riding under it. Finally, this safeguard was issued in 2003 with presumably no objection to its validity until this hearing in 2011. The mine history, Sec’y Ex. 13, shows a number of safeguard violations in the 15 months prior to this citation, four of which are for violations of 74.1403-5(j).

Section 314(b) of the Mine Act grants the Secretary authority to issue “[o]ther safeguards

adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials.” 30 U.S.C. § 874(b). A representative of the Secretary, generally an inspector, may issue a notice to provide safeguard only after “determin[ing] that there exists . . . an actual transportation hazard this is not covered by a mandatory standard.” *Southern Ohio Coal Co.*, 14 FMSHRC 1, 8 (Jan. 1992). The Commission has held that, because a notice to provide safeguard is issued by an inspector and is not subject to the notice and comment procedural protections of section 101, the language of a notice to provide safeguard “must be narrowly construed” and is “bounded by a rule of interpretation more restrained than that accorded promulgated standards.” *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985). In recognition of such, and in order to provide proper due process, a notice to provide safeguard “must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard.” See *Cyprus Cumberland Resources Corp.*, 19 FMSHRC 1781, 1784-1785 (Nov. 1997).

Black Beauty argues that hazards were not identified with the necessary specificity. I find to the contrary. The notice to provide safeguard requires “an adequate crossing facility at . . . all locations along belt conveyors where miners need to cross under the moving belt.” The safeguard clearly identifies the hazard of “crossing under a moving belt.” The hazard or danger of walking under a moving belt is commonly understood in mining and need not be spelled out any more specifically in order for this safeguard to be valid. The inspectors determined, and I agree, that the conditions, i.e. walking in an area under an unprotected moving conveyor, could affect the safe transportation of men and materials. Accordingly, I find that the notice to provide safeguard, is sufficiently specific as far as identifying the hazard.

The order to provide safeguard is required to specify the “conduct required of the operator to remedy such hazard.” *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985). The safeguard is clear in this instance and states that “an adequate crossing facility” is required to prevent the hazard of crossing under the moving belt. I find that the safeguard meets the requirement for specifically setting forth the conduct required. Given that the safeguard describes a specific hazard of traveling under a moving belt and that an adequate crossing facility is necessary to remedy the hazard, I find the safeguard is valid.

ii. Application of Facts to the Safeguard

I have found that the safeguard is valid and I now look to whether or not the Secretary has met her burden to prove a violation of the safeguard. I find that she has not. The safeguard requires an adequate crossing where miners need to cross under the moving belt. The Secretary has produced no substantive evidence that miners were crossing under the belt while it was in operation. While the Secretary would have me assume that the tracks and prints were made under the belt while it was in motion, there is nothing to substantiate that assumption. In fact, the Air Quality witnesses testified that maintenance, rock dusting, and cleaning of the belt, a time when footprints and vehicle tracks may well be made under the belt, is done at a time when the belt is shut down. Unlike the admission of the miners that they walked under the moving belt

when the safeguard was initially issued, there is no evidence here that miners walked under or rode on vehicles under the belt while it was in motion.

The only testimony regarding discussions with miners by Preece is that he was told that guards were needed in the areas cited. He was not told that anyone had walked or ridden under the belt when it was in motion. While I agree with Preece that this is a heavily traveled area and that there was not adequate protection in the areas where he identified foot prints and tracks under the belt, I cannot agree that he has shown that any traffic was crossing under the belt while it was in operation. There is evidence to demonstrate that there are two areas in close proximity where both foot traffic and vehicles may safely cross under the belt while it is in motion. There is nothing to dispute that those safe cross-unders were not utilized while the belt was in motion. Based upon the above, the citation is vacated.

## II. PENALTY

The principles governing the authority of Commission administrative law judge to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(I) of the Mine Act delegates to the Commission and its judges the authority to assess all civil penalties provided in [the] Act. 30 U.S.C. § 820(I). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. 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).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size and ability to continue in business and that the violations were abated in good faith. Jt. Stip. 9 -12; (Tr. 8-9). The history shows the past violations at this mine, including citations for the standards discussed above. The size of the operator is large. I have discussed the negligence and gravity associated with each citation above. Based upon the record as a whole, I assess the following penalties:

Citation No. 8415328	Vacated
Citation No. 8414037	\$10,000
Citation No. 8017946	Vacated

The parties have settled the remaining citations and orders contained in these dockets and the settlement is set forth below.

Citation/Order No.	Modification to Citation	Proposed Penalty	Amended Penalty
8415284	Modify from high to moderate negligence	\$2,106	\$1,472
7698694	Modify from reasonably likely to unlikely; non s&s	\$3,143	\$2,200
7698695	Modify from reasonably likely to unlikely; non s&s	\$4,329	\$3,030
8415524	Modify from high to moderate negligence	\$3,689	\$2,582
8415525	Modify from high to moderate negligence	\$6,696	\$4,687
8415287	Modify from fatal to permanently disabling; Modify from high to moderate negligence	\$15,570	\$10,899
8415528	No change	\$8,893	\$6,669
8415288	Modify from high to moderate negligence	\$3,689	\$2,600
8415531	No change	\$8,209	\$5,746
8415292	Modify from high to moderate negligence	\$19,793	\$13,855
8415293	Modify from high to moderate negligence	\$10,437	\$7,305
8415294	No change	\$117	\$100
8415534	Modify from reasonably likely to unlikely; non s&s	\$5,503	\$3,852
8415536	Modify to 3 people affected	\$5,503	\$3,852
6681977	No change	\$1,412	\$989
6681980	No change	\$1,412	\$989
6681398	No change	\$1,412	\$989
6681399	Modify from high to moderate negligence	\$11,306	\$7,914
6681981	Modify from lost workdays to no lost workdays; Modify from moderate negligence to low negligence	\$873.00	\$611
8017943	Modify from high to moderate negligence	\$8,893	\$6,225
6681984	No change	\$1,203	\$842
6681400	No change	\$807	\$565
8415319	Modify from fatal to no lost workdays	\$634	\$444
6681985	Modify from fatal to no lost workdays	\$2,473	\$1,731
8514320	Modify from reasonably likely to unlikely; non s&s	\$1,795	\$1,257
8417945	Modify from reasonably likely to unlikely; non s&s	\$2,473	\$1,731

8415706	No change	\$5,961	\$4,172
8415707	No change	\$585	\$410
	Total:	\$138,916	\$97,718

As to the proposed settlement, I have considered the representations and documentation submitted, and I find that the modifications are reasonable and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(I) of the Act. The motion to approve settlement is **GRANTED**.

### III. ORDER

Based on the criteria in section 110(I) of the Mine Act, 30 U.S.C. § 820(I), I assess the penalties listed above for a total penalty of \$10,000 for the citations decided after hearing and a total of \$97,718.00 for the citations that were settled. Black Beauty Coal Company is hereby **ORDERED** to pay the Secretary of Labor the sum of \$107,718.00 within 30 days of the date of this decision.

Margaret A. Miller  
Administrative Law Judge

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