

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 22, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2007-241
Petitioner	:	A.C. No. 42-02335-105746
	:	
v.	:	Docket No. WEST 2007-449
	:	A.C. No. 42-02335-115973
C. W. MINING COMPANY,	:	
Respondent	:	Bear Canyon #4 Mine

DECISION

Appearances: Kristi Henes, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
 Carl E. Kingston, Esq., Salt Lake City, Utah, for Respondent.

Before: Judge Manning

These cases are before me on two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against C. W. Mining Company (“C. W. Mining”), 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”). C. W. Mining owns and operates the Bear Canyon #4 Mine, an underground coal mine in Emery County, Utah. It contested six citations issued by the Secretary, but the Secretary vacated two of these citations prior to the hearing. An evidentiary hearing was held in Salt Lake City, Utah.

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

A. Citation No. 7282952

On April 20, 2006, MSHA Inspector Donald E. Durrant issued Citation No. 7282952 under section 104(a) of the Mine Act alleging a violation of section 75.400 as follows:

Accumulations of loose coal, coal fines, much of which were dry in nature was allowed to exist along the #1 belt conveyor entry from the head pulley to the belt tailpiece, some 900 feet away. The accumulations ranged from 6 feet to upwards of 8 feet in width, and varied from 4 inches deep to about 27 inches deep beneath the

rollers (ant piles). These accumulations were obvious and extensive, even to the most casual of observers.

Inspector Durrant determined that an injury was reasonably likely and that any injury resulting from the violation was likely to result in lost workdays or restricted duty. He determined that the violation was of a significant and substantial nature (“S&S”) and that C. W. Mining’s negligence was moderate. The safety standard provides that “[c]oal dust, including float coal dust deposited on rock-duster surfaces, loose coal, and other combustible materials, shall be cleaned up and not be allowed to accumulate in active workings, or on diesel-powered and electric equipment therein.” The Secretary proposes a penalty of \$1,566.00 for this citation.

Inspector Durrant inspected the #1 beltway area of the mine, which begins at approximately crosscut three and runs to about crosscut ten or eleven, and observed accumulations of loose coal, coal fines, and float coal dust present for the entire length of the belt entry. (Tr. 19-20). He was carefully examining the belt entries in the mine because MSHA’s district manager had initiated a “belt initiative” following the January 2006 belt fire at the Aracoma Alma Mine. (Tr. 15-16; Ex. G-15). Most of the accumulations were located underneath the conveyor belt. (Tr. 125). Float coal dust was also seen on the electric motors and cables. Inspector Durrant determined that the loose coal and coal fines were dry in nature making it more volatile and able to burn more easily. (Tr. 24). His determination as to the dryness was based upon physically touching and squeezing them for moisture. The loose coal and coal fines were black in color indicating a higher content of carbonaceous material. (Tr. 24). He stated that he did not take a sample to test for combustibility as this is not a requirement under the standard and the accumulations were black in color. (Tr. 25, 119-20). However, he did measure the areas of accumulation and found they ranged from four inches deep to twenty-seven inches deep and from six to eight feet wide. (Tr. 26-28; Ex. G-5).

Inspector Durrant determined that this violation was significant and substantial. He felt that a discrete safety hazard was present that was reasonably likely to cause a serious accident or injury to a miner as two of the three elements for fire were present (oxygen and fuel). (Tr. 36). Potential ignition sources were present including electrical equipment, conductors, power cables, electric motors, electric controls for the belt starter, pump cables, power center, and a belt conveyor. (Tr. 37). The potential for a mine fire was present and the potential for injuries to miners would be great. There were 20 miners working in the mine on the day of inspection and all would be affected by a mine fire. He also determined that moderate negligence was present and that injury or illness was reasonably likely to result in lost workdays or restricted duty due to the violation.

C. W. Mining was given until 6:00 p.m. on April 20, 2006, to abate the citation. Inspector Durrant felt this was a reasonable abatement time based on the hazard posed to the miners. (Tr. 46). On April 21, 2006, at approximately 12:50 p.m., Inspector Durrant went back to the mine to attempt to terminate the citation. He determined that minimal effort had been made to remove the accumulations of loose coal and coal fines, and that additional rock dust had

not been applied. (Tr. 48). Moreover, he did not observe anyone in the area cleaning the accumulations and estimated that the job was less than fifty percent complete. *Id.* In his opinion, a diligent effort had not been made to abate the citation. As a consequence, he issued Order No. 7282964 under section 104(b) of the Mine Act. (Ex. G-12). After the issuance of this order, the citation was abated as the area was cleaned and dusted and the float coal was removed from the equipment. (Tr. 51)

Patrick Peterson testified on behalf of the operator. At the time of this inspection, Peterson was responsible for monitoring the belts and he supervised two to three miners. He also performed the preshift examinations. He stated that the ant hills underneath the belt were moist or even wet. (Tr. 162). An “ant hill” is simply a narrow area where coal fines and coal dust have accumulated under a belt from a single point. Neither the belt nor the rollers were rubbing on the accumulations. (Tr. 165, 182). He explained that the belt is equipped with water sprays and, as the belt returns back, droplets of water with coal residue fall from the belt to form the piles. He estimated that the piles were no wider than the belt itself (48 inches). He also stated that there was groundwater present in the area making the accumulations moist as well. (Tr. 164). Peterson did not observe any float coal dust that had not been rock dusted. He described the rock dust used at the mine as light gray in color and that it can become darker when wet. Peterson testified that he noted the accumulations in his personal notebook as something that needed attention, but he did not record the conditions in the official record because he did not believe that the accumulations created a hazard. (Tr. 167-68).

Peterson was involved in the cleanup process necessary to terminate the citation. He and the other miners cleaned up the ant hills, but it was not satisfactory to Inspector Durrant. (Tr. 166). He described Inspector Durrant poking his stick into the ground and if the ground wasn't hard, the inspector determined that it needed to be cleaned regardless of whether it was mud, dirt, or an accumulation. He also stated that part of the belt was in a rock tunnel. The miners were instructed by Inspector Durrant to clean the rock tunnel area even though the accumulations were mostly mud. Buckets were used to remove the material because it was sloppy and wet. (Tr. 167). Some of the coal handling equipment got plugged up because of all the mud that had to go through the system. *Id.* Randy Defa, the shift foreman, also testified on behalf of the operator and reiterated Peterson's testimony regarding the cleanup process. (Tr. 189-191). He testified that much of this material was fire clay. (Tr. 190). He believes that all of the combustible material had been removed before the section 104(b) order was issued. (Tr. 193).

Ken Defa, the mine superintendent, also testified on behalf of the operator. He believed that the accumulations cited by the inspector did not create a hazard because the majority of them were extremely wet and they all had quite a bit of moisture in them. (Tr. 216-17). The water was coming off the belts from water sprays and out of the floor from the ground. (Tr. 217, 262). He testified that the conditions were similar along the number three and five belt entries that were being inspected by another MSHA inspector. (Tr. 218). The other inspector did not issue any citations for violations of section 75.400. (Tr. 218-19). His testimony is similar to Mr. Peterson's with respect the conditions that existed when the inspector returned to the mine on

April 21. (Tr. 219-21). He said that the material that remained was mud and fire clay but that the inspector required the mine to remove it. (Tr. 221-22).

Mr. Defa also testified that he did not see accumulations of float coal dust in the area. (Tr. 223). The mine has a rock dusting program with a rock dust pipeline running down the length of the belt which periodically pumps rock dust through the belt entryway. (Tr. 224). This system was operational at the time of the alleged violation. He described the rock dust as being gray in color, similar to that of float coal dust. Defa stated that they were using this darker rock dust because the plant where they used to purchase rock dust was no longer in operation. He also stated that this dust was MSHA-approved and that other mines were also using it. Defa estimated that the top of the ant hills were at least two feet below the belt so that no moving parts would have rubbed on the accumulations to start a fire. (Tr. 225-226). In addition, all electric equipment in the area was in good condition. The belt line is equipped with an automatic fire suppression system. (Tr. 226-27).

In rebuttal, MSHA Inspector Donald Gibson testified that he accompanied Inspector Durrant and saw the accumulations. He agreed with Durrant's characterization of the conditions and testified that there was dry float coal dust on the belt structures and the speed reducer. (Tr. 279-82).

I accept the testimony of Inspectors Durrant and Gibson on this citation and affirm the citation as written. Based on Inspector Durrant's testimony and the notes from his inspection, the accumulations were extensive as they ranged from four inches to twenty-seven inches deep and from six to eight feet wide. (Tr. 26-28; Ex. G-5). Inspector Gibson also observed accumulations, including float coal dust on the belt structure, the motor, speed reducer and crosscuts. (Tr. 279). Both inspectors stated that they touched the accumulations and felt that they were dry. (Tr. 24, 279). However, both noted that not all areas were dry, but some were damp. The characterization of wet or damp accumulations, in and of itself, does not negate a violation.

The Commission has held that a construction of section 75.400 "that excludes loose coal that is wet or that allows accumulations of loose coal mixed with noncombustible materials, defeats Congress' intent to remove fuel sources from mines and permits potentially dangerous conditions to exist." *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (August 1985).

Williams Brothers Coal Co., Inc., 22 FMSHRC 57, 63 (January 2000) (ALJ).

Moreover, a sample to test for combustibility does not need to be taken under 75.400. The Commission has held that "section 75.400 does not by its terms require testing." *Harlan Cumberland Coal Company*, 20 FMSHRC 1275, 1290 (Dec. 1998). Commission precedent

holds that violations of the accumulation standard can be established by inspector observation and I find that the observations of Inspectors Durrant and Gibson established this violation.

The citation was not abated in a timely manner. The issuance of the section 104(b) order of withdrawal was reasonable as the accumulations that were not cleaned were still combustible and presented a danger to the miners. While some of the area that was required to be cleaned may, in fact, have contained mud, it needed to be cleared to assure removal of all accumulations in the area. The areas in the rock tunnel needed to be cleared for the same reason.

A violation is classified as S&S “if based upon the 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.” *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming “continued normal mining operations.” *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). 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 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, 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. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

I find that the elements of the *Mathies* test have been established by the Secretary. The underlying violation has been established above. The discrete safety hazard present is the coal accumulations that can act as a fuel for a fire. “The fact that some of the coal accumulations were wet is not determinative of whether the violation is S&S, because “damp coal dries in the presence of fire.”” *Utah Power & Light Co.*, 12 FMSHRC 965, 970 (May 1990). There were several potential sources of ignition present in the area where the fines were located including electrical equipment, conductors, power cables, electric motors, and conveyor belts. A mine fire could cause devastating injuries. The Secretary proved that there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury of a reasonably serious nature.

B. Citation No. 7282953

On April 20, 2006, MSHA Inspector Donald E. Durrant issued Citation No. 7282953 under section 104(a) of the Mine Act alleging a violation of section 75.1722(a) as follows:

An opening that measured to be about 4 inches high by 10 inches wide was present in the 2 inch mesh guarding thus exposing the output shaft of the speed reducer on the #1 drive. In addition, the

opening was only 20 inches from the walk, which was cluttered with large chunks of coal and a large turn buckle that was anchoring the unit, increasing the likelihood that a miner would come in contact with the moving parts.

Inspector Durrant determined that an injury was reasonably likely and that any injury resulting from the violation was likely to be permanently disabling. He determined that the violation was S&S and that C. W. Mining's negligence was moderate. The safety standard provides, in part, that "[g]ears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts . . .; and similar exposed moving machine parts which may be contacted by persons and which may cause injury to persons shall be guarded." The Secretary proposes a penalty of \$217.00 for this citation.

Inspector Durrant testified that he walked around the off-walk side¹ of the conveyor belt and noticed the guard was made of welded wire screening and there was an opening near the output shaft of the speed reducer measuring about four inches high and ten inches wide. (Tr. 52-53). The opening was large enough that if a miner inadvertently reached in there or stumbled, he could come into contact with the component parts. (Tr. 57). He also observed large pieces of coal on the ground and a turnbuckle that could be a trip and fall hazard to a miner. (Tr. 54; Ex. G-14). The inspector measured the distance between the walkway and the moving machine parts behind the screening at 20 inches. (Tr. 53, 60, 132-33, 146-47, 149). The moving part he was concerned about was a turning shaft that was not smooth. (Tr. 59-60).

The citation was abated within a few minutes after Inspector Durrant showed the cited condition to Ethan Tucker, an outby foreman. Tucker patched the area of the guarding. Inspector Durrant stated that Mr. Tucker agreed that a hazard was present that needed to be corrected. (Tr. 63-64)

Ken Defa, the mine superintendent, testified on behalf of the operator. Defa stated that the shaft in the area of the missing guard was a smooth shaft and did not have rough features on it that could catch a miner. (Tr. 210). It was about 20 inches between the walkway and the existing guard. *Id.* He testified that neither a miner's hand nor his clothing could become entangled in the smooth shaft. It was an additional 20 inches to the closest pinch point where the belt comes over the top of the drive pulley. (Tr. 211). As a consequence, it was about 40 inches from the walkway to a moving machine part that could cause injury to a person. The off-side walkway was four feet wide. (Tr. 213).

Inspector Gibson testified that the cited condition created a hazard because the opening was large enough for a person's extremity to pass through the opening. (Tr. 285). There were

¹ The off-walk side of the conveyor belt is the side that is closer to the mine walls or ribs. (Tr. 52-53). However, this area is still accessible to miners for maintenance and inspection purposes.

tripping hazards in the area. He thought that the moving machine part was only a few inches behind the existing guard. (Tr. 285-86).

I find that the Secretary did not meet her burden of proof with regard to this violation and the citation is vacated. The evidence presented by the Secretary is contradictory. Inspector Durrant testified that the distance between the walkway and the moving machine parts was about 20 inches (Tr. 53, 60, 132-33, 146-47, 149), but he later said it was 20 inches from the walkway to the guard and then another 20 inches from the cited opening to the moving machine part. (Tr. 148-49). While I do recognize that tripping hazards were present in the area, the evidence presented regarding the distance from the walkway to the moving parts does not adequately support the violation. It appears that the moving machine parts may have been recessed behind the existing guard to such an extent that it did not present a hazard. Therefore, I find that the Secretary did not meet her burden and the citation should be vacated.

C. Citation No. 7282959

On April 20, 2006, MSHA Inspector Durrant issued Citation No. 7282959 under section 104(d)(1) of the Mine Act alleging a violation of section 75.360(b)(10) as follows, in part:

Inadequate preshift examinations are being conducted along the belt conveyor entries Accumulations of loose coal, coal fines and float coal dust were present on numerous flights of belts, 13 permanent ventilation controls were damaged or in need of repair, fire fighting equipment at one location was not available at a permanent pump and electrical hazards were found to exist, none of which were identified by the mine examiners nor reported in the book maintained at the surface location. DT&Is that were present along the areas traveled today were inconsistent with what would be expected regarding thorough examinations. All conditions found and cited were obvious and extensive, even to the most casual of observers.

Inspector Durrant determined that an injury was reasonably likely and that any injury resulting from the violation was likely to result in lost workdays or restricted duty. He determined that the violation was S&S and that C. W. Mining's negligence was high. The safety standard provides, in part, that "[t]he person conducting the preshift examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at . . . areas where work or travel during the oncoming shift is scheduled prior to the beginning of the preshift examination." The Secretary proposes a penalty of \$3,400.00 for this citation.

Inspector Durrant stated that he examined the mine's preshift examination book and observed that none of the examinations over several shifts noted the violative conditions cited by

MSHA inspectors. He explained that the mine is a dynamic environment and the person responsible for countersigning the book should have known that the continuous use of the phrase “none observed” in that book meant there was a problem. (Tr. 86). Moreover, he expressed concern that the examiner had signed off as having examined areas within a very short time of each other and it appeared suspicious to him that the examiner would be able to do this given the distances involved. (Tr. 77-78). The citation lists twelve citations that were issued by MSHA inspectors that day. (Ex. G-7). He testified about the seriousness of these conditions and the fact that the conditions were obvious. (Tr. 66-79).

Inspector Durrant designated this violation as S&S as he felt that the numerous conditions that were cited were serious and were “basic and fundamental to mine examiners.” (Tr. 90, 91-92). Miners rely on competent and complete preshift examinations. The level of negligence was found to be high and an unwarrantable failure to comply with the standard. (Tr. 92-93). The inspector believed that “the conditions that [MSHA inspectors] found and cited demonstrated . . . a serious lack of reasonable care” on the part of the mine examiners. The conditions should have been recorded in the record book and corrected. Inspector Durrant testified that he issued C. W. Mining eight citations for violations of section 75.360 during the previous five years. (Tr. 93-97, 137-38). The citation was terminated after the operator provided additional hazard recognition training to the miners that were conducting the preshift examinations.

Patrick Peterson, the preshift examiner, testified on behalf of the operator. Peterson stated that he conducted the examination pursuant to an MSHA document, “Definition of Hazardous Condition - Workplace Examination” which contained the following information: “For the purpose of workplace examinations, hazards are considered to be conditions that are likely to cause death or bodily injury to persons exposed to such conditions. . . . Requiring the mine examiner to look for all violations could distract . . . the examiner from the more important aspects of the examination.” (Tr. 154; Ex. R-1). Peterson had been conducting preshift examinations for about six months as of April 20, 2006. He performed the preshift on a daily basis in the morning and stated that it took normally about an hour and a half to complete. (Tr. 155)

Peterson did not agree with the inspector’s findings in the citation. (Tr. 156) He stated that he felt that the conditions cited at the mine did not meet the definition of hazardous conditions that would cause bodily injury or death and therefore he was not required to note them in the book. (Tr. 153-56). He makes notes of items that he believes need to be corrected, but only records “hazards” in the official book. (Tr. 160). Peterson did notice the ventilation leaks, but stated that he felt they were really small, would not harm anyone, and were not a hazard by definition. (Tr. 177). However, he did admit that if a fire occurred it was possible smoke could get into this area depending on the location of the fire. (Tr. 157). Peterson also stated that he had noted the conditions cited in his personal notebook, but did not include them in the official examiner’s book. (Tr. 160). He also explained that some of the areas were only about 20 feet apart and that is why he initialed the tags minutes apart. (Tr. 168).

Ken Defa also testified regarding the training of Peterson. (Tr. 227-28). He stated that Peterson had been given the proper training to conduct preshift examinations. He felt that Peterson's job performance had been good thus far. Defa did not agree with Inspector Durrant that the preshift had been inadequate and agreed with Peterson that the cited conditions were not hazards requiring notation in the book. Mr. Defa further testified that some of the sealant around stoppings had come loose, but there was little if any air leaking through the stoppings. (Tr. 231-35, 240-44). There are hundreds of stoppings in the mine and having a few leaks does not create a reportable hazard. He also testified that the other conditions used to justify this citation were not as hazardous as contended by Inspector Durrant. (Tr. 236-39, 244-51; Ex. G-7). Many MSHA inspectors would not write citations for these conditions.

In rebuttal, Inspector Gibson testified that he was on the committee that helped train miners performing preshift examinations when the safety standard was amended. (Tr. 287-88). The intent was that "[a]ll violations may not necessarily be hazards but most hazards are truly violations." (Tr. 287). A condition that is not S&S can still be a hazard that must be recorded. Something that is listed in a mine's "to-do list" may also be a hazard that must be recorded. The question is whether a condition could become a hazard before it is corrected under normal mining conditions. (Tr. 290). The conditions he observed as well as the conditions observed by Inspector Durrant should have been recorded in the mine's preshift book. (Tr. 290-91, 293-302). For example, Inspector Gibson issued a citation for accumulations along the No. 3 belt. He noted that there was about an eighth of an inch of float coal dust on top of the speed reducer and the surface temperature of the speed reducer was extremely hot to the touch. (Tr. 301). The beltman told Gibson that he was in that area almost every day.

I credit the testimony of the MSHA inspectors and affirm the citation as written. The Commission has determined that preshift examinations are fundamental in assuring a safe work environment for the miners. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (January 1997); *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (January 1995). Preshift examinations have been a statutory mandate dating back to the Federal Coal Mine Safety Act of 1952, 30 U.S.C. § 471 et. seq. (1955) and is present in the current Mine Act. *See Enlow Fork* at 15. "The preshift examination is intended to prevent hazardous conditions from developing." *Id.* The preshift examiner must look for all conditions that present a hazard and this responsibility is not restricted to S&S conditions. *Id.* at 14. It is not violations that the examiner is required to find, it is conditions that present a potential hazard to miners. The types of conditions identified by the inspector and not recorded by the preshift examiner have generally been found to be hazardous. *See Id.* at 15.

I also find that this violation was properly designated as S&S. Accumulations are a hazardous condition as discussed above and could reasonably result in serious injury. Peterson missed several other conditions and his careless preshift examination could reasonably be expected to result in serious injury to the miners who depended on him to make sure their working environment was safe.

The term “unwarrantable failure” is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or the “serious lack of reasonable care.” *Id.* 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-94. A number of factors are relevant in determining whether a violation is the result of an operator’s unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator’s efforts to eliminate the violative condition, whether an operator has been placed on notice that greater efforts are necessary for compliance, the operator’s knowledge of the existence of the violation, and whether the violation is obvious or poses a high degree of danger. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

I credit the testimony of the MSHA inspectors that the conditions referenced in the citation were extensive and obvious. For example, the accumulations were 6 to 8 feet wide and 4 to 27 inches deep and little effort had been made to remove them. Clearly, this did not develop overnight and had not been noted in the preshift examination book as a condition that needed to be corrected. C. W. Mining has been issued quite a few citations under 75.400 and 75.360 in the past and should be aware that greater efforts were necessary. (*See Ex. G-11*). C. W. Mining’s conduct constituted a serious lack of reasonable care and I am affirming the unwarrantable failure designation.

D. Citation No. 7282965

On April 21, 2006, MSHA Inspector Durrant issued Order No. 7282965 under section 104(d)(1) of the Mine Act alleging a violation of section 75.360(a)(1) as follows, in part:

The preshift examination that was to be conducted and completed between the hours of 0500 and 0800 for the day shift employees on 04/21/2006 was not completed until 0930 hours, some 90 minutes late. The mine operator has established a preshift schedule based on the 8 hour intervals. The mine examiner was aware of the schedule and completion time but stated he got a late start and was unable to complete the examination in the required time. The superintendent and mine foreman knew that the examination was late yet made no effort to remove the miners from the underground workings.

Inspector Durrant determined that an injury was unlikely but that any injury resulting from the violation was likely to result in lost workdays or restricted duty. He determined that the violation was not S&S and that C. W. Mining’s negligence was high. The safety standard provides, in part, that “a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any

person is scheduled to work or travel underground. No person other than certified examiners may . . . remain in any underground area unless a preshift examination have been completed for the established 8-hour interval.” The Secretary proposes a penalty of \$3,000.00 for this citation.

Inspector Durrant stated that he and Inspector Gunderson went into the mine and noticed that several of the tags where the preshift examiner signed off had times listed after 8:00 a.m. The last time he observed was 9:30 a.m. which would have been 90 minutes after the preshift examination should have been entered into the book kept on the surface.² (Tr. 102). Inspector Durrant testified that he talked to Patrick Peterson, the preshift examiner, to determine why the examination was late. According to Durrant, Peterson replied that he had gotten a late start due to a meeting that was held to address the citations issued the previous day. (Tr. 103-04). Additionally, Durrant was told that Peterson knew he would not finish the examination by the required time. Durrant also spoke with Ken and Randy Defa regarding the late preshift examination to determine if they knew that the examination would be late. Ken replied that he realized it around 8:30 or 9:00 a.m. and that at this point it was too late to withdraw the miners. Randy said he felt by the time withdrawal of the miners occurred the preshift examination would have been completed. (Tr. 108-109). Miners had traveled underground at 7:00 a.m. and the most recent preshift examination would have been completed at midnight. (Tr. 107).

Inspector Durrant did not believe that the violation was S&S because no significant hazards were present, other than the accumulation that had not yet been totally cleaned up. (Tr. 140-44). He designated the negligence as high because the operator knew the examination was late and did nothing to withdraw the miners. (Tr. 112-113, 115). He believed that the company only offered a “lame excuse” for not completing the examination on time or removing the miners. *Id.* He determined that the operator’s conduct was aggravated negligence. The risk of injury or illness was unlikely.

Patrick Peterson testified on behalf of the operator. He stated that he conducted the preshift examination on April 21, 2006. He got a late start that morning due to a meeting. The entire crew was at the meeting to discuss safety and the actions that needed to be taken to abate the citations that had been issued the day before. (Tr. 178-80). He stated that he probably started just before 7:00 a.m. (Tr. 158-159). Peterson stated that he took longer than normal to complete the inspection as he was trying to satisfy the inspector. He did complete the examination of the areas where the miners were working by 8:00 a.m. Men were shoveling and cleaning along the one, two and four belts. (Tr. 159-60, 161). He needed to finish the tail end of three belt, five belt, and the intake coming back out. (Tr. 161). He does not believe that men were working in those areas. *Id.* When Ken Defa called him to inquire into the status of his preshift, he was almost done. (Tr. 169, 181).

² An operator has designated preshift interval times during which the preshift examination must be conducted. The interval relevant here is from 5:00 a.m. to 8:00 am. The preshift examination should be completed and logged into the book by 8:00 a.m. (Tr. 100)

Ken Defa testified that he did everything he could to remove the miners once he learned that the preshift had not been completed in the outby areas. (Tr. 253). The preshift examination had been timely completed for the working sections. (Tr. 251). When he talked to Peterson by radio, he learned that the preshift had been completed for the belts and that Peterson was examining the intakes. This final portion of the examination would take about 10 to 15 minutes. (Tr. 252). Defa called his son, Randy, and told him to get the men out of the mine. He also stated that no hazard was presented by the violation because the men were working in areas that had already been preshifted. (Tr. 254-55). Randy Defa testified that Ken Defa had radioed him to get everybody out of the mine because the preshift was not complete. (Tr. 192). Randy explained that he was not near his truck nor any of the miners, so he attempted to contact them by phone and radio but was unsuccessful.

I find that the Secretary established the violation and I affirm the citation. Peterson testified that he did not complete the examination by 8:00 a.m. as he was required to do. (Tr. 159). However, I do find that the examination of the working sections and other key areas had been completed by 8:00 a.m. I conclude that the violation was not the result of the operator's unwarrantable failure to comply with the standard. I enter a finding of moderate negligence. Peterson simply got a late start due to the safety meeting and lost track of time. Attempts were made by Ken and Randy Defa to contact the affected miners to remove them from the mine. He was not successful in doing so. This violation did not demonstrate aggravated conduct under the Commission's unwarrantable failure test.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The mine has a history of 116 paid violations in the two years prior to April 20, 2006. (Ex. G-11). The Bear Canyon #4 mine is of a medium size and C. W. Mining is a large coal mine operator. The penalties assessed in this decision will not have an adverse effect on C. W. Mining's ability to continue in business. With the exception of Citation No. 7282952, the citations were rapidly abated. My gravity and negligence findings are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

Citation/Order No.	30 C.F.R. §	Penalty
WEST 2007-241		
7282952	75.400	\$2,000.00
7282953	75.1722(a)	Vacated

WEST 2007-449

7282959	75.360(b)(10)	3,500.00
7282965	75.360(a)(1)	1,000.00
7283064	75.400	Vacated
7283065	75.380(d)(1)	Vacated

For the reasons set forth above, the citations are **AFFIRMED, MODIFIED**, or **VACATED** as set forth above and C. W. Mining Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$6,500.00 within 30 days of the date of this decision. Payment should be sent to the new address: U.S. Department of Labor, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390.

Richard W. Manning
Administrative Law Judge

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RWM