FEBRUARY 1997

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

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Review was granted in the following case during the month of February:

Kenneth L. Driessen v. Nevada Goldfields, Inc., Docket No. WEST 96-291-DM. (Judge Hodgdon, January 13, 1997).

Review was denied in the following case during the month of February:

Consolidation Coal Company v. Secretary of Labor, MSHA, Docket No. WEVA 94-235-R. (Judge Barbour, January 3, 1997).

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

February 18, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. YORK 94-51-M
BUFFALO CRUSHED STONE, INC.	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

DECISION

BY: Jordan, Chairman[2]

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves alleged significant and substantial ("S&S") violations of three separate safety standards: 30 C.F.R. § 56.14109(a), for failure to locate an emergency stop cord along a conveyor belt so a person falling against the conveyor could readily deactivate its drive motor; 30 C.F.R. § 56.11009, for failure to provide cleats on an inclined walkway; and 30 C.F.R. § 56.11002, for failure to provide an adequate stairway handrail. Administrative Law Judge Avram Weisberger concluded that Buffalo Crushed Stone, Inc. ("Buffalo") did not violate section 56.14109(a) and that, although it violated sections 56.11009 and 56.11002, those violations were not S&S. 16 FMSHRC 2154, 2158-61 (October 1994) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review challenging these determinations. For the reasons that follow, we affirm in part, reverse in part, and remand.

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[1] Commissioner Holen participated in the consideration of this matter, but her term expired before issuance of this decision. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

[2] Chairman Jordan is the only Commissioner in the majority on all issues.

I.

Factual and Procedural Background

On December 15, 1993, Samuel Waters, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected Buffalo's Wehrle limestone quarry in Erie County, New York. 16 FMSHRC at 2154. Inspector Waters observed an emergency stop cord, strung alongside a conveyor belt, that was displaced for a length of approximately 20 feet due to a bent "standard," i.e., a vertical piece of steel with a hole through which the cord runs.[3] 16 FMSHRC at 2158; Tr. 40, 45-46. At the center of the 20-foot section, a 2- to 5-foot length of the stop cord had dropped 2 inches below the level of the conveyor belt. 16 FMSHRC at 2158; Tr. 42, 89-90, 92. The inspector determined that, at this location, a person falling on or against the conveyor from the adjacent walkway would not be able to readily deactivate the conveyor drive motor by pulling the stop cord and that injury could result. 16 FMSHRC at 2158. He issued Buffalo Citation No. 4289706, pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging an S&S violation of section 56.14109(a).[4] 16 FMSHRC at 2158-59; Tr. 46-48.

In addition, Inspector Waters observed a 16-foot-long section near the bottom of an inclined, wooden walkway that was neither nonskid nor provided with "cleats." *Id.* at 2159; Tr. 49-50. Cleats are 1-inch-square wooden boards nailed perpendicular to the walkway's edges, usually 12 to 18 inches apart. 16 FMSHRC at 2159. The walkway was located outdoors adjacent to a conveyor belt and was approximately 70 to 90 feet long. *Id.*; Tr. 51, 170. The surface of the walkway contained "compacted material" that became slippery when wet. 16 FMSHRC at 2159-60. Waters determined that the uncleated portion of the walkway presented a slipping hazard that could result in injury and issued Buffalo Citation No. 4289707, pursuant to section 104(a) of the Mine Act, alleging an S&S violation of section 56.11009.[5] *Id.*

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[3] The total length of the conveyor belt was 75 to 100 feet. Tr. 41.

[4] Section 56.14109 states, in relevant part:

> Unguarded conveyors next to the travelways shall be equipped with --
> (a) Emergency stop devices which are located so that a person falling on or against the conveyor can readily deactivate the conveyor drive motor . . . .

30 C.F.R. § 56.14109.

[5] Section 56.11009 states:

> Walkways with outboard railings shall be provided

Inspector Waters also observed a steep stairway leading to the tail of a conveyor belt. *Id.* at 2160. One side of the stairway was against a wall and the other side was provided with a handrail that varied from 18 to 21 inches in height. *Id.*; Tr. 55. The stairway extended 12 feet above a concrete surface. 16 FMSHRC at 2160. Waters determined that the handrail was too low to prevent a person descending the stairway from falling over the handrail and that injury could result. *Id.* He issued Buffalo Citation No. 4289709, pursuant to section 104(a) of the Mine Act, alleging an S&S violation of section 56.11002.[6] *Id.* at 2160-61; Tr. 59.

Following an evidentiary hearing, the judge concluded that Buffalo had not violated section 56.14109(a) regarding the emergency stop cord and dismissed the citation. 16 FMSHRC at 2159. He noted that the standard does not require the stop cord to be located at a specific height and that there was no evidence that a falling person could not readily deactivate the conveyor at the cited location by pulling the stop cord. *Id.* As to the inclined walkway, the judge concluded that Buffalo had violated section 56.11009 but that the violation was not S&S because the Secretary had failed to establish a reasonable likelihood of injury. *Id.* at 2159-60. Relying on testimony that there was no "debris" on the walkway and evidence that the greater portion of the walkway was provided with cleats, the judge found that slipping and falling in the uncleated area was not reasonably likely to occur and assessed a civil penalty of $50. *Id.* at 2160. Concerning the stairway handrail, the judge concluded that Buffalo violated section 56.11002 but that the violation was not S&S because the Secretary had failed to establish a reasonable likelihood of injury. *Id.* at 2160-61. He found that there were no specific facts in the record demonstrating that falling off the stairway was reasonably likely to occur and assessed a civil penalty of $50. *Id.* at 2161.

> wherever persons are required to walk alongside elevated conveyor belts. Inclined railed walkways shall be nonskid or provided with cleats.

30 C.F.R. § 56.11009.

[6] Section 56.11002 states, in part:

> Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition.

30 C.F.R. § 56.11002.

II.

Disposition

A. Emergency Stop Cord[7]

The Secretary argues that the administrative law judge erred when he concluded that no violation of section 56.14109(a) occurred. He asserts the judge ignored testimony that at the cited location the stop cord was not readily accessible to a person who slipped or fell onto the belt. S. Br. 2-3, 8-10. Buffalo responds that the judge correctly concluded that no evidence was presented showing the conveyor could not be readily deactivated. It points out that the standard does not specify the height of the cord relative to the conveyor and that Inspector Water's determination that a violation existed was based solely on his interpretation of the law. B. Br. at 1, 3-4.

Buffalo correctly observes that section 56.14109(a) does not specify a particular placement for the stop cord but requires that it be located so "a person falling on or against the conveyor can readily deactivate the conveyor drive motor." The core interpretive issue, therefore, is the meaning of the term "readily deactivate."

Inspector Waters explained that a stop cord is in its "correct location" when it is "stretched tightly" and is "above the belt" because "in slipping and falling . . . you want your elbow or arm to hit the stop cord before you hit the belt." Tr. 44, 116. He testified that a miner should not have to "consciously think to grab the cord and pull it to deactivate it." Tr. 116. The inspector stated that the "rule of thumb" he has been taught to apply is that the stop cord should be "nice and tight" and located from "somewhere near the side edge of the belt to as much as four inches above the side edge of the belt." Tr. 44, 115. He issued the subject citation because one of the upright steel standards which holds the cord in place was bent and had caused a portion of the stop cord to become slack and fall 2 inches below the conveyor belt. Tr. 40, 42.

It is well established that an agency's interpretation of its own regulations should be given "deference . . . unless it is plainly wrong" and so long as it is "logically consistent with the language of the regulation and . . . serves a permissible regulatory function." *General Electric Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted); *see also Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 462 (D.C. Cir. 1994). In addition, the legislative history of the Mine Act provides that "the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th

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[7] Chairman Jordan and Commissioner Marks vote to reverse the judge's determination that there was no violation of section 56.14109(a). Commissioner Riley would affirm the judge's determination.

Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 637 (1978). Here, because we conclude that the Secretary's interpretation of the stop cord standard is consistent with its language and not unreasonable, deference to that interpretation is appropriate.

Section 56.14109(a) requires the emergency stop device to be "located so that a person falling on or against the conveyor can readily deactivate the conveyor drive motor." The Secretary has interpreted this standard to require stop cords to be taut and located above the conveyor belt so that a falling person's arm or body can hit the stop cord "on the way down during the fall." Tr. 117. The Secretary's interpretation is consistent with the language of section 56.14109(a). The standard is directed at protecting someone who is "*falling* on or against the conveyor" and requires that such person be able to "*readily* deactivate the conveyor drive motor." 30 C.F.R. § 56.14109(a) (emphasis added). It is not limited to protecting persons who have already fallen onto the conveyor belt. Moreover, according to the record, conveyor belts are generally "anywhere from knee high to above waist high." Tr. 43. The Secretary asserts that someone who is "falling" toward a moving belt of this height would find it virtually impossible to locate a stop cord that is hanging even slightly below the conveyor and, therefore, would not be able to "readily" deactivate the conveyor before landing on it. In our view, the Secretary reasonably concludes that a person in the process of falling will only be able to "readily deactivate" the conveyor if he does not have to consciously look for the stop cord. By requiring the stop cord to be located where it is likely a person's arm or body will automatically deenergize the conveyor belt, the Secretary seeks to reduce the chance that a miner will fall onto that belt while it is still moving, or that a miner will suffer injury by getting an arm caught as he tries to catch himself. Tr. 44, 115, 117.

We note further that, by interpreting section 56.14109(a) in a manner that reduces the likelihood of a miner who falls coming into contact with a moving belt, the Secretary has taken an approach that is also consistent with the alternative means of compliance provided by 30 C.F.R. § 56.14109(b). Under that section, in lieu of a *stop cord*, an operator can provide protection from unguarded conveyors by installing *railings* "which are positioned to prevent persons from falling on or against the conveyor." *Id.* Railings are not directed at miners who have already fallen onto the belt; they afford protection by *preventing* persons from coming into contact with the moving conveyor. Likewise, by requiring stop cords to be located so they will deenergize the belt "on the way down during the fall," the Secretary seeks to prevent miners from coming into contact with the moving conveyor, rather than simply providing miners with a means of deactivating the belt once they have landed on it. Tr. 117.

Unable to explain why the interpretation to which we defer is unreasonable, our dissenting colleague chooses to characterize it as nothing more than the inspector's "personal belief." Slip op. at 12. Our colleague misapprehends the circumstances of this case. While we agree that operators should not be penalized on the basis of subjective or inconsistent applications of a regulatory requirement, these considerations are not present here. The interpretation of the stop cord standard is not the solitary idea of a rogue inspector. On the contrary, the Secretary, through his Solicitor, has urged this Commission to affirm the citation on

the very basis articulated by Inspector Waters. S. Br. at 8-10. Moreover, the stop cord interpretation the Secretary advances here is *identical* to his position in *Asarco, Inc.*, 14 FMSHRC 829, 831-32 (May 1992) (ALJ), a case which the Commission did not review. Furthermore, the operator makes no claim that it was unaware of MSHA's interpretation or subjected to inconsistent applications of MSHA's stop cord requirement. Indeed, the record shows it had previously been cited for a similar stop cord violation. Tr. 91. Thus, we are not confronted with the situation in which a "regulated party is not 'on notice' of the agency's ultimate interpretation . . . and may not be punished." *General Electric Co. v. EPA*, 53 F.3d at 1334.

Our colleague also contends that the interpretation advocated here constitutes an amendment of the standard, which may only be enforced after a formal rulemaking proceeding. The Secretary's parameters for compliance, however, do not offer an "interpretation that repudiates or is irreconcilable with an existing legislative rule," *see American Mining Congress v. MSHA*, 995 F.2d 1106, 1113 (D.C. Cir. 1993), so as to require formal rulemaking; they merely explain the agency's understanding of the term "readily deactivate." As such, the agency is not required to initiate APA rulemaking when it "seeks merely to clarify or explain existing law." *Drummond Co.*, 14 FMSHRC 661, 684-85 (May 1992).

In sum, we conclude that the Secretary's interpretation of section 56.14109(a) is reasonable and entitled to deference because it is consistent with the language of the standard, it furthers the safety aims of the standard, and it is in harmony with the alternative requirement pertaining to unguarded conveyors.

Applying the Secretary's interpretation to the facts of this case, we conclude that substantial evidence does not support the judge's determination that Buffalo did not violate section 56.14109(a). Here, there is no dispute that a portion of the stop cord was slack and had fallen below the conveyor belt. As such, it was not a stop device which could "readily deactivate" the conveyor drive motor. Accordingly, we reverse the judge's determination that Buffalo did not violate section 56.14109(a) and remand for determination of whether the violation was S&S and assessment of a civil penalty.

B. Inclined Walkway[8]

The Secretary argues that substantial evidence does not support the judge's conclusion that the violation of section 56.11009 was not S&S. He asserts the judge misstated testimony and ignored evidence showing that slipping and falling on the uncleated portion of the walkway was reasonably likely to occur. S. Br. 1-2, 5-6. He also contends the judge erred in relying on evidence that the greater portion of the walkway was provided with cleats. *Id.* at 5-6. Buffalo

[8] All Commissioners vote to reverse the judge's determination that the violation of section 56.11009 was not S&S.

responds that substantial evidence supports the judge's finding. It asserts that the judge properly credited evidence that the walkway did not have any tripping hazards, it was not wet or slippery at the time of the inspection, guardrails and stop cords were in place, the standard does not specify the distance between cleats, and no serious injury had resulted or would result from a person falling on the walkway. B. Br. at 1, 2-3.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on 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. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted). *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985).

The first and second elements of the *Mathies* criteria have been established: the judge found that Buffalo violated the standard and that a person traveling along the uncleated portion of the walkway would be exposed to the risk of slipping and falling. 16 FMSHRC at 2159-60. The issue on review is whether the judge erred in concluding that the Secretary failed to establish the reasonable likelihood of an injury-producing event.

In concluding the Secretary failed to establish the third *Mathies* element, the judge noted that "[a]ccording to [Buffalo employee Thomas] Rashford, there was no debris on the walkway. The greater portion of the walkway was properly provided with cleats." *Id.* at 2160. We agree with the Secretary that the judge misstated Rashford's testimony. Rashford testified that there was debris on the walkway but that it did not present a stumbling hazard. Tr. 164. Further, testimony that the material on the outside walkway became slippery when wet (Tr. 50-52, 97, 170) was not refuted. Buffalo's argument that the walkway was not slippery at the time of the inspection is not determinative because an evaluation of the reasonable likelihood of injury is to be made assuming continued normal mining operations. *U.S. Steel*, 7 FMSHRC at 1130. In

addition, the judge erred in considering that the greater portion of the walkway was provided with cleats. The fact that a portion of the walkway is cleated is irrelevant to the likelihood of slipping in the uncleated area.

Buffalo's remaining arguments are unavailing. While the standard's failure to specify the distance between cleats would be relevant to whether there was a violation, it is not relevant to whether the violation was S&S. In addition, evidence that guardrails on the walkway and stop cords on the adjacent conveyor belt were in place is not dispositive of the reasonable likelihood that slipping on the walkway surface would result in an injury. Similarly, the fact that no injuries had been reported as a result of the condition of the walkway is not determinative of a conclusion that the third *Mathies* element has not been established. *Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996).

In sum, we conclude that substantial evidence does not support the judge's determination that Buffalo's violation of section 56.11009 was not reasonably likely to result in an injury. Accordingly, we reverse the judge's holding that the violation was not S&S and remand the matter for reassessment of the civil penalty.[9]

C. Stairway Handrail[10]

The Secretary argues that substantial evidence does not support the judge's conclusion that the violation of section 56.11002 was not S&S. He asserts the judge ignored evidence that falling down the stairway was reasonably likely to occur. S. Br. 1-2, 7-8. Buffalo responds that substantial evidence supports the judge's finding. It asserts that, given the 54 degree angle of the stairway, the handrail was in the proper location to restrain a miner of average height if he slipped. B. Br. at 1, 3.[11]

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[9] Although the judge did not expressly consider the fourth *Mathies* element, the evidence establishes that an injury resulting from slipping on the walkway would be of a reasonably serious nature. Inspector Waters testified that slipping on the walkway could result in a head injury or a finger or wrist fracture. 16 FMSHRC at 2160.

[10] Chairman Jordan and Commissioner Riley vote to affirm the judge's determination that the violation of section 56.11002 was not S&S. Commissioner Marks would reverse the judge's determination.

[11] Buffalo did not, however, challenge the judge's ruling that it violated the standard. Consequently, that issue is not before us.

The issue on review is whether the judge erred in concluding that the Secretary failed to establish the reasonable likelihood of an injury-producing event, the third *Mathies* element.[12] Inspector Waters testified that the stair treads were a nonskid surface and that there were no tripping hazards on the stairs. Tr. 105. Further, Waters acknowledged that, as the steepness of a stairway increases, "the handrail should be more consistent with where [one's] hands or a comfortable position would be." Tr. 106. He conceded that a person descending the stairway would be able to hold the handrail from a standing position without bending forward (Tr. 124), establishing that the handrail was positioned consistently with the location of a miner's hand.

We therefore conclude that the judge correctly determined that the Secretary failed to prove the reasonably likely occurrence of an injury resulting from Buffalo's violation of section 56.11002. Accordingly, we affirm the judge's holding that the violation was not S&S.

III.

Conclusion

For the foregoing reasons, we reverse the judge's determinations that there was no violation of section 56.14109(a) and that the violation of section 56.11009 was not S&S, and we remand for further consideration consistent with this opinion. We affirm the judge's determination that the violation of section 56.11002 was not S&S.

Mary Lu Jordan

Mary Lu Jordan, Chairman

[12] Contrary to the Secretary's assertions, the judge expressly recognized that the stairway was steep and that one side of the stairway was against a wall. 16 FMSHRC at 2160.

Commissioner Marks, concurring in part and dissenting in part:

For the reasons expressed in the majority opinion, I concur in the conclusion to reverse the judge's negative finding of violation regarding the emergency stop cord citation. I also concur in the decision to remand this matter for the judge's determination of whether the violation was S&S and for the assessment of a civil penalty.

Regarding the inclined walkway violation, I concur in the conclusion to reverse the judge's negative S&S determination and I also concur in the determination to remand for reassessment of the civil penalty. However, in disposing of the S&S issue, my colleagues find that substantial evidence does not support the judge's determination that the violation "was not reasonably likely to result in an injury" as set forth in the Commission's so-called *Mathies* test. Slip op. at 6-8 (citing *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984)). Although I do not disagree with that finding, I continue to urge that the ambiguous language of the *Mathies* test, and in particular the third element therein, argues for Commission clarification of its interpretation of the Act's S&S language. It seems extraordinary to me that neither the Secretary nor affected operators have taken issue with the *Mathies* language which has, for 13 years, continued to cause increased litigation, time, and expense to all parties concerned in the cases brought before the Commission. Thus, for the reasons set forth in my concurring opinion in *U.S. Steel Mining Co.*, 18 FMSHRC 862, 868 (June 1996), I conclude that reliance upon the third *Mathies* element is an inappropriate basis upon which to support the S&S conclusion. In this case, the record evidence referenced in the majority opinion clearly demonstrates that the violation posed a risk of injury that was neither remote nor speculative. Therefore, on that basis, I concur in the reversal of the judge's negative S&S conclusion.

My colleagues affirm the judge's determination that the stairway handrail violation of 30 C.F.R. § 56.11002 was not S&S. Slip op. at 8-9. I disagree and therefore I dissent. Once again my colleagues' persistence in applying the *Mathies* test, and in particular the third element, results in a ruling that I believe is inconsistent with the law.

Citation No. 4289709, charging a S&S violation of section 56.11002, states:

> The stairway leading to the tail area on the No. One conveyor was not provided with an adequate handrail. On the side away from the wall, the handrail provided (one rail only) was found to be eighteen inches (18 in.) to twenty[-]one inches (21 in.) above the stair steps. The handrail was insufficiently high to protect a worker descending the stairs if he were to slip, trip, or otherwise fall. This was a potential fall of person hazard. The staircase consisted of twenty[-]one (21) steps, with an approximate fall of person height of up to twelve (12) feet to concrete below.

In concluding that the violation was proven by the Secretary, the judge determined that,

> Waters [the MSHA inspector who issued the citation and who testified] opined that the handrail at issue was too low to restrain a person who might fall using the stairway. Respondent did not impeach or contradict this opinion. It therefore is accepted.

16 FMSHRC 2154, 2161 (October 1994) (ALJ). That crucial finding by the judge, and his conclusion that the "lack of a proper handrail contributed to the hazard of a person falling off the stairway" (*id.*), coupled with testimony that the subject handrail "wasn't quite knee high," the steep 54 degree inclined stairway was frequently used by miners who routinely carried equipment and tools, and the risk involved a fall of a distance of 12 feet onto a concrete floor, causes me to conclude that the Secretary established that the violation was S&S. *See* Tr. 55, 57-59, 160, 168-171. Thus, on this record, I conclude that the violation posed a risk of injury that was neither remote nor speculative and therefore it was S&S.

Accordingly, I dissent and would reverse the contrary ruling of the judge.

Marc Lincoln Marks, Commissioner

Commissioner Riley, dissenting in part:

With regard to the emergency stop cord issue, my colleagues imagine specificity where the regulation demands flexibility. Imagination may be the soul of creativity, but it does little in this case to fill the void where the law is silent.

The judge, after hearing the testimony of the witnesses, examining the evidence, and considering the scope of the regulation, found the stop cord falling within the minimal parameters adopted by the Secretary for this regulation. I concur with his judgment.

As set forth in the facts, 30 C.F.R. § 56.14109 provides:

> Unguarded conveyors next to the travelways shall be equipped with --
>
> (a) Emergency stop devices which are located so that a person falling on or against the conveyor can *readily* deactivate the conveyor drive motor . . . .

Slip op. at 2 n.4 (emphasis added).

The inspector who issued the citation testified that he had overheard other inspectors say the stop cord should be located "somewhere near the side edge of the belt to as much as four inches above the side edge of the belt." Tr. 44-45. This, according to the record, appears to be the sum total of everything MSHA "taught" their inspectors regarding stop cord placement prior to the Secretary filing his opening brief. In this inspector's judgment the stop cord was "maybe six inches below where I would like to see [it]." Tr. 88. The inspector recognized that the regulation does not specify a height requirement. He also admitted that his issuance of the citation for the stop cord was a "judgment call." Tr. 44-45, 90, 126.

The Commission has held that a safety standard cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982) (citation omitted). Since the inspector's citation was not based on the language of the regulation, MSHA's Program Policy Manual, a program policy letter, an interpretive bulletin, or Commission precedent, it represents nothing more than his personal belief or agency lore regarding the proper height of the stop cord. To his credit, the judge declined to hold the operator to the inconsistent and subjective standard enunciated by the inspector, adopted post hoc by the Secretary (absent prior notice to the regulated community and even, according to the record, his own MSHA staff), and now affirmed by the majority.

The Secretary obviously wishes he had promulgated a more specific regulation consistent with the inspector's detailed testimony that the cord must be situated so as to automatically deenergize the conveyor if someone falls against the belt. My fellow Commissioners are

determined to make up for the Secretary's oversight by retroactively promulgating a specific regulation. No doubt there are efficiency-in-government advantages to dispensing with inconvenient and time-consuming statutory mandates like prior notice and public comment. However, the Commission should not short-circuit the legal prerequisites of formal rulemaking.

I cannot find any definition of "readily" that is synonymous with the word "automatically." Nor do I find any language to support the majority's adoption of the inspector's "not . . . consciously think" standard as the most reasonable interpretation of where and how to position a stop device. Tr. 116. It is well established that regulations should be read as a whole, giving comprehensive, harmonious meaning to all provisions. *See McCuin v. Secretary of Health and Human Services*, 817 F.2d 161, 168 (1st Cir. 1987); 2 Am. Jur. 2d *Administrative Law* § 239 (1994). "Just as a single word cannot be read in isolation, nor can a single provision of a statute." *Smith v. United States*, 508 U.S. 223, 233 (1993). Section 56.14109(a) becomes the only section of the Mine Act that I am aware of which does not require the miner to be conscious of and attentive to his surroundings!

Furthermore, I am at a loss to understand why the majority finds support for its decision in *Asarco, Inc.*, 14 FMSHRC 829 (May 1992) (ALJ). While the Secretary did raise the identical position almost 2 years earlier, the majority fails to note that the judge soundly rejected the Secretary's interpretation that the cord had to be placed where it is likely a person's arm or body will automatically deenergize the conveyor belt. The judge stated:

> This standard does not require that an operator locate its stop cords so that it guarantees that a person who falls on or against a conveyor will first fall on or through that stop cord. . . .
>
> . . . The standard does not define, mandate nor restrict the "location" of the stop cord, other than to state that it must be "readily" accessible to the person who is falling. It does not prohibit stop cords below, at, or above any particular component of a conveyor. With respect to a belt conveyor, the standard does not dictate placement vis-a-vis the floor, the upper or lower belts, the upper or lower idlers, the pulleys, or the drive motor.

Id. at 834. The judge concluded his decision with some words of advice for the Secretary:

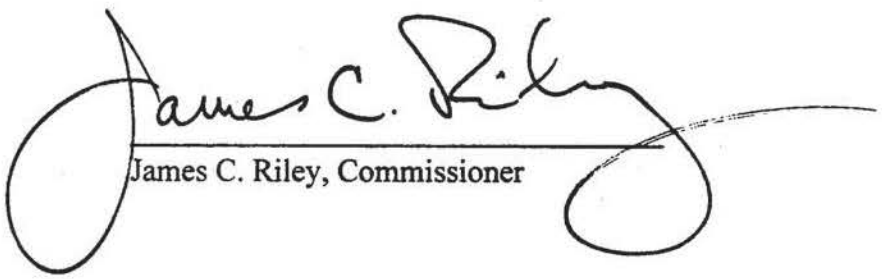
> If the Secretary truly desires to direct the specific location of stop cords and further wishes to require that a person falling on or against a conveyor first fall "through" the stop cord, then the Secretary must pursue this goal through notice-and-comment rulemaking. The Secretary should promulgate a standard to clearly and directly address not only the perceived hazard but also clearly inform the mine operator what he must do for compliance. In

> short, the Secretary's interpretation (1) contradicts the "plain meaning" of this performance standard; and (2) violates the rulemaking requirements of the Mine Act.

Id. at 836.

The majority acknowledges that the Commission did not review *Asarco*. Slip op. at 6. They omit that the Secretary did not challenge that ruling nor did he, in the interim, attempt to promulgate any different interpretation of the regulation than that to which he acquiesced by default in *Asarco*. Does the majority honestly believe that the mining community had a legal obligation to make significant changes to its stop device configurations based entirely on the Secretary's *losing* position in *Asarco*? In the instant case the parties have changed, the facts vary as well from *Asarco*, but the legal principle remains constant -- the Secretary's interpretation of 30 C.F.R. § 56.14109(a) is still contrary to the "plain meaning" of the regulation.

The majority decision arbitrarily affirms a capricious standard, which finds no foundation in the language or history of the regulation. If a conveyor belt that a person can "readily deactivate" actually means a belt that "automatically deenergizes" whenever a person approaches, the regulation should be revised by the Secretary through formal rulemaking. This process would afford MSHA an opportunity to include in the regulation an appropriate standard supported by safety engineering studies, rather than the arbitrary standard here imposed by administrative fiat without the benefit of consultation with the mining community.



James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 26, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. WEVA 93-392
MINGO LOGAN COAL COMPANY	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is whether Commission Administrative Law Judge Roy J. Maurer properly determined that mine operator Mingo Logan Coal Company ("Mingo Logan") was liable for a training violation, under 30 C.F.R. § 48.5,[2] committed by one of its independent contractors. 17 FMSHRC 156 (February 1995) (ALJ). The Commission granted Mingo Logan's petition for discretionary review. For the reasons that follow, we affirm the judge's decision.

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[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

[2] Section 48.5(a) provides in pertinent part:

> Each new miner shall receive no less than 40 hours of training as prescribed in this section before such miner is assigned to work duties.

I.

Factual and Procedural Background

Mingo Logan leases and operates the Mountaineer Mine, an underground coal mine in Mingo County, West Virginia. 17 FMSHRC at 157; Tr. 42. In 1991, Mingo Logan contracted with independent contractor Mahon Enterprises ("Mahon") for the performance of various construction services in the mine. 17 FMSHRC at 157. On March 2, 1992, Mahon was hired to construct an underground belt conveyor system. *Id.*

On August 3, 1992, Inspector Robert Rose of the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted an audit of Mahon's training records and discovered that four employees had received "newly employed experienced miner training" when, according to the records, the four employees did not qualify as "experienced miners." *Id.* Later documentation indicated that three of the miners were properly classified and that only Timothy Sargent did not meet the regulatory definition of an experienced miner and therefore received improper training. *Id.* at 158-59. Sargent should have received training for "newly employed inexperienced miners" as required by section 48.5(a). *Id.* at 158. The training for newly employed experienced miners takes approximately four hours, whereas the training for inexperienced miners lasts 40 hours and covers mining topics in much greater detail. Tr. 68-69, 157, 167-68. *Compare* 30 C.F.R. §§ 48.5 and 48.6.

Mahon was cited and paid a civil penalty for this violation. 17 FMSHRC at 158. The inspector also issued a section 104(a) citation to Mingo Logan alleging a violation of section 48.5 for failing to ensure that Mahon's employee was properly trained. *Id.* The inspector testified that he issued the citation under MSHA's policy of overlapping compliance which provides that, if employees of both the operator and the independent contractor are affected by the violation, both entities should be cited.[3] *Id.*; Tr. 60.

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[3] Volume III, Part 45 of MSHA's Program Policy Manual 6 (7/1/88 Release III-1) ("PPM") states in pertinent part that:

> "[O]verlapping" compliance responsibility means that there may be circumstances in which it is appropriate to issue citations or orders to both the independent contractor and to the production-operator for a violation. Enforcement action against a production-operator for a violation(s) involving an independent contractor is normally appropriate in any of the following situations: . . . (3) when the production-operator's miners are exposed to the hazard . . . . In addition, the production-operator may be required to assure continued compliance with standards and regulations applicable to an independent contractor at the mine.

Mingo Logan contested the violation on the grounds that the violation was committed entirely by Mahon and, contractually, Mingo Logan had no authority to hire, fire, train or supervise Mahon employees. 17 FMSHRC at 159.

Following an evidentiary hearing, the judge concluded that Mingo Logan was liable for the violation. *Id.* at 160. The judge reasoned that MSHA had the discretion to (1) hold Mingo Logan strictly liable for all violations of the Act that occur on the mine site and (2) cite both the production-operator and the independent contractor for a violation committed by one of the contractor's employees. *Id.* at 159. Relying on *W-P Coal Co.*, 16 FMSHRC 1407 (July 1994), the judge explained that the Commission reviews the Secretary's enforcement decisions for an abuse of discretion, and determined that Inspector Rose did not abuse his discretion in citing Mingo Logan for the training violation. *Id.* at 159-60. The judge concluded that the violation was not S&S and that Mingo Logan's negligence was "nil." *Id.* at 160-63. He assessed a penalty of $100. *Id.* at 164.

Mingo Logan challenged the judge's liability determination in a petition for discretionary review, which was granted by the Commission.

II.

Disposition

Mingo Logan contends that the judge erred in concluding that the Secretary's decision to proceed against Mingo Logan was not an arbitrary or capricious exercise of discretion. PDR[4] at 4. Mingo Logan also asserts that the judge erred in failing to address the Secretary's argument that his enforcement discretion is complete and unreviewable. *Id.* at 5. It contends that the Secretary's citation violates the Guidelines and that its change of compliance policy must be published in the Federal Register. *Id.* at 6-7. Additionally, Mingo Logan asserts that the judge erroneously (1) altered the Secretary's burden of proof for establishing overlapping compliance and (2) concluded that Mingo Logan employees were exposed to the alleged hazard created by an independent contractor, even though this fact was not established by substantial evidence. *Id.* at 11-12. Further, Mingo Logan argues that the Secretary's decision to pursue it for an independent contractor's training violation fails to further the protective purposes of the Act. Reply Br. at 13.

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17 FMSHRC at 158 n.1; R. Ex. 3. The policy was first set forth in the Enforcement Policy and Guidelines for Independent Contractors published at 45 Fed. Reg. 44,497 (July 1980). The PPM and the Guidelines For Independent Contractors are collectively referred to herein as the "Guidelines."

[4] Pursuant to Commission Rule 75, 29 C.F.R. § 2700.75, Mingo Logan designated its petition as its opening brief; in addition, Mingo Logan filed a reply brief to which it attached its post-hearing brief to the judge.

The Secretary responds that the judge's decision should be upheld because the Secretary has unreviewable enforcement discretion to cite a production-operator, its independent contractor, or both, for violations of the Mine Act committed by the independent contractor's employee. S. Br. at 8. In the alternative, the Secretary asserts that, even if he does not have unreviewable discretion, the judge properly concluded that the Secretary did not abuse his discretion in deciding to cite Mingo Logan. *Id.* Additionally, the Secretary contends that substantial evidence supports the judge's finding that the inspector did not abuse his discretion in deciding to cite Mingo Logan based upon one of the grounds specifically set forth in the Guidelines for citing production-operators for violations of their independent contractors. *Id.* at 8-9, 25-31. The Secretary adds that, in any event, he is not bound by the criteria set forth in the Guidelines and, thus, even if Mingo Logan were correct that substantial evidence fails to support the judge's decision that the Secretary properly applied the Guidelines, the judge correctly determined that Mingo Logan violated section 48.5. *Id.* at 9, 21-23.

The parties stipulated that Mingo Logan was the operator with the overall responsibility of running the mine. 17 FMSHRC at 156-57; Tr. 40. As the judge recognized, MSHA may hold Mingo Logan, because of its operator status, strictly liable for all violations of the Act that occur on the mine site, whether committed by one of its employees or an employee of one of its contractors. 17 FMSHRC at 159. This conclusion is clearly supported by Commission precedent. For instance, in *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354 (September 1991), the Commission held that "the Act's scheme of liability [that] provides that an operator, although faultless itself, may be held liable for the violative acts of its employees, agents and contractors." *Id.* at 1359-60. *See also Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981) ("Mine owners are strictly liable for the actions of independent contractor violations.").

The judge also properly explained that MSHA has the discretion to cite both the operator and the independent contractor for a violation committed by a contractor. 17 FMSHRC at 159. In *Consolidation Coal Co.*, 11 FMSHRC 1439, 1443 (August 1989), the Commission held that the Secretary did not abuse his discretion by proceeding against both an operator and its independent contractor. The D.C. Circuit in *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 534, 538-39 (D.C. Cir. 1986) (reversing 6 FMSHRC 1871 (August 1984)), similarly determined that the Secretary could cite both the operator and independent contractor for a violation committed by the independent contractor.

Furthermore, in *W-P*, the Commission held that, "in instances of multiple operators," the Secretary has "wide enforcement discretion" and "may, in general, proceed against either an owner-operator, his contractor, or both." 16 FMSHRC at 1411. The Commission, nevertheless, recognized that "its review of the Secretary's action in citing an operator is appropriate to guard against abuse of discretion."[5] *Id.* In that case, the Commission determined that the Secretary

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[5] A litigant seeking to establish an agency's abuse of discretion bears a heavy burden. *See, e.g., In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819,

acted permissibly in citing W-P, even though an independent contractor operated the mine. *Id.* Although it did not run the mine, W-P maintained substantial involvement in the mine's engineering, financial, production, personnel and safety affairs. *Id.* As the operator with overall responsibility of running the mine (17 FMSHRC at 156-57), Mingo Logan's involvement in day-to-day mining activities surpasses that of the operator in *W-P*.

In addition, substantial evidence supports the conclusion that the Secretary met the Guidelines' standard for enforcement action against a production-operator. According to the Guidelines, such action is appropriate "when the production-operator's miners are exposed to the hazard." R. Ex. 3; 45 Fed. Reg. 44,497. As the production-operator at the time of the citation, Mingo Logan had 160 to 170 employees working with 137 Mahon employees at the mine. 17 FMSHRC at 157; Tr. 72, 134, 197. Mahon and Mingo Logan employees were often in the same general vicinity at various locations in the mine. Tr. 60-61, 197. Mingo Logan's employees worked in close enough proximity to Mahon's employees so that an undertrained, inexperienced Mahon miner put employees of both Mahon and Mingo Logan at risk. The record revealed that, although the belt on which Sargent worked was exclusively staffed by Mahon employees, Mingo Logan employees were located in the adjoining entries and James Matthew Murray, the Safety Technician at Mountaineer Mine, testified that if Sargent lit a cigarette or created another hazard, Mingo Logan employees could be exposed to a potentially dangerous condition. Tr. 111, 153-56. These factors, along with the evidence indicating Mingo-Logan's substantial involvement in the mine's day-to-day affairs, lead us to conclude that the Secretary did not abuse his discretion in proceeding against Mingo Logan for this violation.[6]

We note that even if the Secretary had failed to abide by the Guidelines, that fact would not prove fatal to his enforcement decision. In *Cathedral Bluffs*, the D.C. Circuit squarely rejected an argument identical to Mingo Logan's here that the Secretary's decision to cite it was not in accord with the Guidelines and that, if the Secretary intends to abandon its independent contractor policy, he should do so by notice published in the Federal Register. As the court explained, even though published in the Federal Register, the Guidelines expressly warned that it was only a "general policy" that does not alter the "overall compliance responsibility of production-operators" of "assuring compliance with the standards and regulations which apply to work being performed by independent contractors at the mine." 796 F.2d at 538 (citing 45 Fed. Reg. at 44,497). In *D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (September 1996),

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1844 (November 1995), *appeal docketed*, No. 95-1619 (D.C. Cir. Dec. 28, 1995) (appellate court loath to disturb matters that are subject to review for an abuse of discretion). Abuse of discretion may be found "only if there is no evidence to support the decision or if the decision is based on an improper understanding of the law." *Utah Power & Light Co., Mining Division*, 13 FMSHRC 1617, 1623 n.6 (October 1991) (citing *Bothyo v. Moyer*, 772 F.2d 353, 355 (7th Cir. 1985)).

[6] Because we conclude that the Secretary's citation satisfied the Guidelines, we do not reach Mingo Logan's contention that the judge erred by shifting the burden of proof under them.

appeal docketed, No. 96-70877 (9th Cir. Oct. 21, 1996), the Commission recently reaffirmed that the Guidelines are non-binding on the Secretary. Consequently, the Secretary need not give notice by publication in the Federal Register in circumstances where he does not follow the Guidelines.

Finally, Mingo Logan's assertion that the citation against it fails to promote the protective purposes of the Mine Act is inconsistent with the rationale of the Ninth Circuit in *Cyprus*, 664 F.2d at 1119-1120. There the court stated that holding owner-operators liable for violations committed by independent contractors promotes safety because "the owner is generally in *continuous* control of the *entire* mine" and "is more likely to know the federal safety and health requirements." *Id.* at 1119. The court also posited that "[i]f the Secretary could not cite the owner, the owner could evade responsibility for safety and health requirements by using independent contractors for most of the work." *Id.* We agree with the Secretary that holding a production-operator liable for violations of their independent contractors, provides operators with an incentive to use independent contractors with strong health and safety records. Here, where Mingo Logan is the lessee and production-operator for the entire mine, the same considerations apply.[7]

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[7] In light of our conclusion, we do not address the Secretary's argument that he has unreviewable discretion to cite the operator, its independent-contractor or both. Accordingly, we also reject Mingo Logan's argument that the judge erred by failing to reach this issue. Because it was not a necessary basis of his holding, the judge did not need to address the Secretary's point, just as we do not reach it on review. *INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) ("As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.")

III.

Conclusion

For the foregoing reasons, we affirm the judge's determination that mine operator Mingo Logan was liable for the violation of 30 C.F.R. § 48.5(a) committed by one of its independent contractors.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

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February 28, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. KENT 93-63, etc.
SUNNY RIDGE MINING COMPANY, INC.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. KENT 94-453 KENT 94-454
MITCH POTTER and TRACY DAMRON, employed by SUNNY RIDGE MINING COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

DECISION

BY: Jordan, Chairman; and Marks, Commissioner

These civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"), raise the issues of whether Sunny Ridge Mining Company, Inc. ("Sunny Ridge") violated 30 C.F.R. § 77.405(b)[2] when miners allegedly

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[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

[2] Section 77.405(b) provides:

> No work shall be performed under machinery or equipment that has been raised until such machinery or equipment has been securely blocked in position.

worked under the unsecured, raised bed of a coal truck, and 30 C.F.R. § 77.1001[3] on three separate occasions when loose and unconsolidated material on spoil banks and highwalls allegedly had not been stripped for a safe distance or otherwise stabilized; whether civil penalties should be assessed against Sunny Ridge mine foreman Tracy Damron for his alleged knowing authorization of all four violations; and whether civil penalties should be assessed against Sunny Ridge president Mitch Potter for his alleged knowing authorization of two of the violations of section 77.1001. Commission Administrative Law Judge William Fauver found that Sunny Ridge violated the standards, that the violations were significant and substantial ("S&S"),[4] and that civil penalties should be assessed against Damron and Potter for knowing authorization of the violations. 17 FMSHRC 648, 653-59 (April 1995) (ALJ). We granted a joint petition for discretionary review filed by Sunny Ridge, Damron, and Potter challenging these determinations. For the reasons that follow, we affirm in part, reverse in part, vacate in part, and remand.

I.

Citation No. 4020202

A. Factual and Procedural Background

Sunny Ridge operates the No. 9 Mine, a surface coal mine in eastern Kentucky. Tr. 192. On August 5, 1992, while inspecting the mine, Beverly "Butch" Cure, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), noticed a fully-loaded coal truck parked outside the mine truck shop. 17 FMSHRC at 652; Tr. 14. Cure could see a group of men standing near the truck with their foreman, Tracy Damron. 17 FMSHRC at 652. Sometime later, from a distance, Inspector Cure saw that the bed of the truck, which held approximately 30 tons of coal, was raised. *Id.* at 652-53. Upon closer inspection, he discovered that the rear edge of the raised bed was resting on a stack of cribs, which had the effect of raising the left rear wheel slightly off the ground. *Id.* at 650. No chocks or blocks were present other than the cribs on which the raised bed rested. *Id.* Miners had been

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[3] Section 77.1001 provides:

> Loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection.

[4] The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations.

working on the tire, and Cure saw someone handling the lug nuts of the raised wheel.[5] *Id.* at 653. Soon after Cure approached the truck, the miners lowered the bed and Damron unsuccessfully attempted to use a 20-ton jack to raise the wheel. *Id.*

Based on his observations, Inspector Cure issued a section 104(d)(1) citation alleging an S&S and unwarrantable violation of section 77.405(b) for working under unsecured, raised equipment. *Id.* at 651; Gov't Ex. 3. The Secretary proposed a civil penalty of $3,000 for the alleged violation. Sunny Ridge challenged the proposed assessment.

Following an evidentiary hearing, the judge concluded that Sunny Ridge violated section 77.405(b). 17 FMSHRC at 652-53. The judge reasoned that miners working on the tire were "'under . . . machinery or equipment' within the meaning of the regulation because the wheel . . . was under the elevated truck bed and truck frame." *Id.* at 653. The judge also determined that the violation was S&S because he found it "reasonably likely" that a serious injury would occur if the work "continued in normal mining operations." *Id.* at 653-54. The judge found that if the raised bed had fallen, a miner could have been injured by the wheel if it was jarred loose, or by the truck frame. *Id.* at 653. The judge concluded that the violation was unwarrantable because the truck bed was not designed to lift a wheel and Sunny Ridge deliberately failed to use what the judge considered the safer method of raising the truck with jacks. *Id.* at 654. The judge assessed a civil penalty of $5,000.[6] *Id.* at 655. In its petition for discretionary review, Sunny Ridge challenges the judge's determination that it violated section 77.405(b) and that the violation was S&S. Sunny Ridge does not dispute the judge's finding that the violation was unwarrantable or his penalty assessment.

B. Disposition

Sunny Ridge argues that substantial evidence does not support the judge's finding of a violation, contending that the Secretary failed to prove that any miners actually worked under the raised truck. S.R. Br. at 5-6. Sunny Ridge also argues that, because there was no reasonable likelihood that the alleged violation would result in an injury, substantial evidence does not support the judge's S&S determination. *Id.* at 6-8.

The Secretary argues that, as to the violation, the sole issue to be decided is whether any

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[5] The terms "tire" and "wheel" are used interchangeably by the parties and judge to refer to the tire/wheel assembly on which miners were working, one of four wheels in a tandem set attached to a hub by means of lug nuts and wedges. Tr. 64-65. The wheel that is the subject of these proceedings was located on the outside of the rear pair of tandem wheels on the driver's side of the truck; it weighed approximately 250 to 300 pounds, and was 48 inches tall and 10 inches wide. Tr. 36.

[6] In his posthearing brief to the judge, the Secretary argued that his proposed penalty of $3,000 should be doubled. S. Posthearing Br. at 31-32.

miners were working under raised equipment. S. Br. at 12-14. He argues that it would be "impossible to change a tire by hand without getting under the vehicle to which it is attached." *Id.* at 16-17 & n.9. He also argues that the judge correctly construed section 77.405(b) to include a broad prohibition against working within a "sphere of danger" created by a piece of raised, unsecured equipment. *Id.* at 15 (quoting Tr. 71-72). The Secretary contends that "the judge properly deferred to the Secretary's reasonable and safety-promoting interpretation of [section 77.405(b)]" as including such a sphere of danger. *Id.* at 15-16. Finally, arguing that it was reasonably likely that, given the weight of the coal in the raised bed, the bed could fall and seriously injure a miner, the Secretary asserts that the violation was S&S. *Id.* at 18-19.

1. Violation

Commission Procedural Rule 69(a) requires that a Commission judge's decision "shall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record. . . ." 29 C.F.R. § 2700.69(a). As the D.C. Circuit has emphasized, "[p]erhaps the most essential purpose served by the requirement of an articulated decision is the facilitation of judicial review." *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092 (D.C. Cir. 1979). Without findings of fact and some justification for the conclusions reached by a judge, we cannot perform our review function effectively. *Anaconda Co.*, 3 FMSHRC 299, 299-300 (February 1981). We thus have held that a judge must analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his decision. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994). We find that the judge's decision here has "cross[ed] the line from the tolerably terse to the intolerably mute." *Anaconda*, 3 FMSHRC at 302 (citations omitted).

At issue on review is whether the judge correctly concluded that work was performed under the raised truck. The judge failed to make specific findings or credibility determinations on this issue. Instead, he simply concluded, with no elaboration or citations to the record, that work was performed under unblocked, raised equipment "because the wheel [the miner] was working on was under the elevated truck bed and truck frame." 17 FMSHRC at 653. The judge's failure to explain his conclusion in greater detail makes it impossible for us to determine whether it is either legally correct or supported by substantial evidence.[7]

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[7] The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). While we do not lightly overturn a judge's factual findings and credibility resolutions, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. *See, e.g., Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980). We are guided by the settled principle that, in reviewing the whole record,

We are unable in the first instance to determine how the judge interpreted the prohibition in section 77.405(b) against working "under" unblocked, raised machinery or equipment. During the hearing, the judge opined that section 77.405(b) prohibits work within a "sphere of danger" near unblocked, raised equipment. Tr. 71-72; *see also* S. Br. at 15 (adopting the judge's interpretation). But nowhere in his decision does the judge state whether this was the interpretation of the standard on which he based his finding of a violation.

To the extent the judge did read a "sphere of danger" into the requirements of section 77.405(b), he erred. This interpretation is at odds with the plain meaning of the standard. We have long held that "[w]here the language of a statutory or regulatory provision is clear, the terms of that provision must be enforced as they are written. . . ." *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989). The plain meaning of the term "under" as used in section 77.405(b) is "below or beneath something." *Webster's Third New International Dictionary* 2487 (1986). Nothing in the standard expressly or implicitly suggests that the Secretary intended the term to mean anything other than work below or beneath raised, unblocked equipment. Nor does anything in the regulation suggest that it reaches areas near or beside raised, unblocked equipment.[8] Since the meaning of "under" in section 77.405(b) is clear and unambiguous, we need not reach the Secretary's contention that his interpretation of the standard is entitled to deference. *Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984) (deference is considered "*only* when the plain meaning of the rule itself is doubtful or ambiguous") (emphasis in original).

Even if the judge based his decision on a finding that work was performed *under* unblocked, raised equipment (rather than within a "sphere of danger"), we are unable to determine the basis for the judge's conclusion that such a violation occurred. Nowhere in his decision does he point to any evidence of a miner working *under* the raised truck. Nor does our review of the record reveal any clear evidence of such conduct. Indeed, we cannot even determine whether the relevant tire was actually under the elevated truck bed or truck frame.

Our review has been hampered because the record is incomplete. After the hearing, the record exhibits were lost in the mail. 17 FMSHRC at 649. The parties were requested to furnish the judge with replacement copies. *Id.* But the folder in which replacements were assembled does not contain copies of any of Sunny Ridge's exhibits. The transcript reveals that when

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an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

[8] *Cf.* 30 C.F.R. § 77.413(c) (boiler blowoff valves must be "so located or protected that persons passing by, near, or under them will not be scalded"); 30 C.F.R. § 77.807-3 (high-voltage powerlines must be deenergized when any equipment passes "under or by" them); 30 C.F.R. § 77.1006(a) (persons must not work "near or under dangerous highwalls or banks"). These provisions demonstrate that, had the Secretary intended to give a broader reach to section 77.405(b), he could have easily employed the language to do so.

Sunny Ridge's counsel introduced the company's exhibits at trial, he had only one copy of each. Tr. 74, 176, 258. We are concerned that the judge did not order Sunny Ridge's counsel to provide the court, witnesses, and opposing counsel with copies of the exhibits. Our concern is heightened by the fact that among Sunny Ridge's exhibits were four pictures which depicted a truck similar to the one cited. *See* Tr. 30, 61-62, 64, 67 (descriptions of Resp. Exs. 1, 2, 3, and 4). These pictures were the only evidence from which we could have determined the physical appearance of the truck, there being no other detailed description of it in the record. Compounding this problem is the fact that the judge failed to indicate whether he relied on these lost exhibits. We are thus at a loss to determine the evidentiary basis of the judge's opinion.

Nor does the judge indicate whether he based his decision on a credibility determination. On cross examination, Inspector Cure repeatedly offered his opinion that a miner would have had to get under the truck to work on the tire. Tr. 28-33. But he never actually observed anyone *under* the truck. Tr. 29, 32. Moreover, a Sunny Ridge witness testified that "[t]here would be no need, no reason for anyone to get under raised equipment to change a tire." Tr. 60. The judge made no effort to resolve this conflicting testimony. In the absence of such findings, we cannot effectively review the judge's decision.

Accordingly, we vacate the judge's finding of a violation and remand the matter to him so he can "analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision." *Mid-Continent*, 16 FMSHRC at 1222. If the judge relied on the lost exhibits in finding a violation, we direct him to reopen the proceedings for the limited purpose of obtaining replacement exhibits.

2. S&S

In light of our determination to vacate the judge's finding of violation, we also vacate the judge's accompanying conclusion that the violation was S&S. Because the judge will have to revisit the S&S question in the event he determines on remand that Sunny Ridge violated section 77.405(b), we offer the following observations on his S&S determination.

A violation is S&S if, based on 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. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), we further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question

will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted). *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135-36 (7th Cir. 1995) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985).

Here, the judge summarily concluded that the violation was S&S because "it was reasonabl[y] likely to result in serious injury if [such a] practice of shortcutting safety devices continued in normal mining operations." 17 FMSHRC at 653-54. The judge predicated his finding of a potential hazard on the truck bed falling. *Id.* at 653. But evidence was presented at the hearing that cast some doubt on the "reasonable likelihood" of the truck bed falling, *Mathies*, 6 FMSHRC at 3-4, evidence the judge failed to analyze and weigh. Potter testified that the truck was equipped with a check valve that would have prevented the truck bed from falling suddenly, even in the event of an "unusual" accident. Tr. 69-70, 84-85. The judge also found that "[i]f the truck bed fell the wheel may have been jarred loose and fallen on [a miner]." 17 FMSHRC at 653. But Potter testified that the tire could not have been dislodged by a fall of the bed because the inside tire would have caught the weight of the fall and because such tires can be intentionally dislodged only with some difficulty. Tr. 64-65, 70. The judge considered the use of jacks a safer and preferable method of changing a coal truck tire. 17 FMSHRC at 654. But this ignored Potter's testimony that cribs are safer to use than jacks because cribs are "more capable of taking the weight than a jack." Tr. 64.

We find unacceptably terse the judge's conclusion that the violation was S&S. The judge failed to consider and weigh all of the relevant evidence on the S&S issue. If the judge considers the S&S question on remand, he must provide a full explanation of his decision. *Mid-Continent*, 16 FMSHRC at 1222.

II.

Order No. 4020210

A. Factual and Procedural Background

On August 18, 1992, during the course of a regular inspection of Sunny Ridge's No. 9 Mine, Inspector Cure observed loose and unconsolidated spoil material on the spoil side of the No. 3½ Pit. 17 FMSHRC at 655; Tr. 120. The spoil material, consisting of blasted rocks of various sizes, formed a vertical highwall approximately 25 feet high and 200 feet long. 17 FMSHRC at 655; Tr. 122, 138. Inspector Cure observed four pieces of equipment operating below the spoil bank. 17 FMSHRC at 655. Based on his observations, Inspector Cure issued a section 104(d)(1) order alleging an S&S and unwarrantable violation of 30 C.F.R. § 77.1001. *Id.* at 651, 655; Gov't Ex. 5. The Secretary proposed a civil assessment of $4,600, which Sunny Ridge challenged.

Following the hearing, the judge concluded that Sunny Ridge violated section 77.1001. 17 FMSHRC at 659. He noted that the inspector observed loose and unconsolidated material consisting of rocks and boulders on the spoil side of the highwall in the No. 3½ pit. *Id.* at 655. The spoil bank was approximately 25 feet high and 200 feet long. *Id.* Noting that the loose material "presented a hazard to the drivers of four pieces of equipment operating below the spoil bank," the judge found the cited conditions S&S because "there was a reasonable likelihood that the loose material on the spoil bank would slough or roll off striking equipment or miners and causing serious injuries." *Id.* at 655-56. He also found that, because foreman Damron's "disregard of the hazards . . . was serious and shows aggravated conduct beyond ordinary negligence," the violation was unwarrantable. *Id.* at 656. The judge assessed a civil penalty of $8,000.[9] *Id.* We subsequently granted Sunny Ridge's petition for discretionary review challenging the judge's determination that it violated section 77.1001 and that the violation was S&S, as well as his penalty assessment. Sunny Ridge does not challenge the judge's finding of unwarrantable failure.

B. Disposition

Relying on the testimony of its witnesses, Sunny Ridge argues that no hazardous materials were present on the spoil bank and that, therefore, the judge's finding of a violation is not supported by substantial evidence. S.R. Br. at 9. Sunny Ridge also argues that any violation that might have occurred was not S&S because there was very little likelihood of any serious injuries. *Id.* at 9-11. In addition, Sunny Ridge asserts that the judge's penalty assessment is inappropriate. *Id.* at 11. The Secretary does not address whether Sunny Ridge violated section 77.1001, arguing only that the judge's finding of S&S is supported by substantial evidence. S. Br. at 23-25. In support of his argument, the Secretary cites Inspector Cure's observation of miners working in close proximity to a vertical highwall consisting entirely of loose and unconsolidated spoil material, ongoing blasting at the mine that could have led to failure of the highwall, and the inspector's knowledge of other highwall failures. *Id.* The Secretary does not address the propriety of the penalty assessed by the judge.

1. Violation

Section 77.1001 requires operators to strip loose, hazardous material for a safe distance from the top of pits or highwalls. There is no dispute that loose material was present on the top and face of the highwall. 17 FMSHRC at 655. Cure testified that "the whole spoil pile itself was loose material" and that the highwall it formed was vertical. Tr. 137-38. Although Sunny Ridge's witnesses testified that the spoil material posed no hazard (Tr. 156, 193, 196), the judge implicitly credited Cure's testimony that the material was hazardous and threatened miners working underneath it, in part because both blasting and rain could have compromised its stability (Tr. 146, 150-51). 17 FMSHRC at 655.

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[9] In his posthearing brief to the judge, the Secretary argued that his proposed penalty of $4,600 should be doubled. S. Posthearing Br. at 31-32.

On review, Sunny Ridge seeks to have its witnesses credited over the Secretary's witnesses. S.R. Br. at 9. Only under exceptional circumstances do we overturn findings based on credibility resolutions. *In re: Contents of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878-81& n.80 (November 1995) ("*Dust Cases*"). We find no such circumstances in this case. We conclude that substantial evidence supports the judge's finding that Sunny Ridge violated section 77.1001, and we therefore affirm his determination.

2. S&S

We find unpersuasive Sunny Ridge's argument that the Secretary failed to prove the third *Mathies* element because there was very little likelihood of an injury. S.R. Br. at 9-11. As noted above, Cure testified that both blasting and rain could have compromised the stability of the spoil material. Tr. 146, 150-51; *see also* Tr. 169-70 (testimony of Hobart Potter that rain could adversely affect spoil bank's stability). Sunny Ridge's expert, Edward Brown, also testified that "the higher you stack the spoil, the less the angle [of the material] can be simply because it will slide." Tr. 174. There is no dispute that the spoil material was vertical and that miners worked near the spoil bank. Tr. 123, 138, 157. We thus find that substantial evidence supports the judge's S&S finding and, accordingly, we affirm the judge's determination.

3. Penalty

In support of his assessment of a penalty of $8,000 against Sunny Ridge for this violation, the judge stated that he had considered all of the criteria for civil penalties under section 110(i) of the Mine Act, 30 U.S.C. § 820(i).[10] 17 FMSHRC at 656. He did not make separate findings of fact that he tied directly to any of the criteria. However, the judge made findings on several of the criteria elsewhere in his decision. Regarding the operator's history of violations, the judge found that Sunny Ridge "had been cited for a violation of the same standard on the same highwall less than two weeks before [the instant] violation." *Id.* Regarding the operator's negligence, the judge found that the conduct of Tracy Damron, Sunny Ridge's foreman, was

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[10] Section 110(i) provides in pertinent part:

> The Commission shall have authority to assess all civil penalties provided in this [Act]. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

"aggravated . . . beyond ordinary negligence."[11] *Id.* Regarding the gravity of the violation, the judge in effect found it to be serious insofar as he found that it could have caused "serious injuries." *Id.* We can enter findings on the remaining criteria based on record evidence. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1153 (7th Cir. 1984) ("the Commission's entering of undisputed record information as findings [is] proper under the [Mine] Act"). Regarding the appropriateness of the penalty to the operator's size and the effect of the penalty on the operator's business, the parties stipulated, and we find that Sunny Ridge "is a medium-sized operator" and that its ability to continue in business would not be affected by a reasonable penalty. Joint Ex. 1 at ¶¶ 4-5. Finally, regarding whether Sunny Ridge "demonstrated good faith . . . in attempting to achieve rapid compliance after notification of [the] violation," 30 U.S.C. § 820(i), the record merely indicates that the violation was abated approximately 4 hours after the order was issued when Sunny Ridge "removed the height of the spoil material." Tr. 132; Gov't Ex. 5. Accordingly, we find that Sunny Ridge demonstrated neither good faith nor bad faith in abating the violation.

The question remains whether, in light of the above findings, the penalty assessed by the judge is excessive. The determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact, discretion bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty assessment scheme. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).[12] Although the penalty assessed by the judge exceeds that originally proposed by the Secretary before the hearing, based on the facts developed in the adjudicative record, we cannot say that the penalty is inconsistent with the statutory criteria or the Act's deterrent purposes.[13] We thus find that the judge's penalty assessment did not constitute an

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[11] As Sunny Ridge's agent, Damron's conduct may be imputed to the operator. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991) ("*R&P*").

[12] Commissioner Marks further notes that his dissenting colleague also cites *Sellersburg* in support of his determination to remand this and the following two violations cited under section 77.1001. *See* Slip op. at 23-25. However, in *Sellersburg*, the court concluded that "[t]he Commission must remand a case to the ALJ only if it 'determines that further evidence is necessary on an issue of fact.' [30 U.S.C. § 823(d)(2)(C).] Given the Commission's conclusion that uncontroverted evidence did not warrant further factual findings, such a remand was not required. . . ." 736 F.2d at 1153. For the same reason, Commissioner Marks believes that remand in the instant case is unnecessary.

[13] Litigants in many types of actions often risk increased liability when they opt to litigate rather than settle a claim, because they are faced with an independent assessment of their liability by the judge. Contrary to our colleague, we find no basis for concluding that the increase in this case was levied in retaliation against the operator for exercising its rights under the Act.

Even if, as our colleague suspects, the judge's assessment was influenced by the

abuse of discretion.

III.

Order No. 4020075

A. Factual and Procedural Background

On January 27, 1993, as MSHA Inspector Billy Damron was conducting a regular inspection of Sunny Ridge's No. 9 Mine, he observed loose, hazardous, and unconsolidated material that had not been stripped from the highwall and spoil side of the No. 2 Pit. 17 FMSHRC at 656; Tr. 218. The highwall was approximately 65 feet high. 17 FMSHRC at 656-57. Inspector Damron observed one piece of equipment operating beneath the highwall. *Id.* at 657. Based on his observations, Inspector Damron issued Order No. 4020075 under section 104(d)(2) of the Mine Act, alleging an S&S and unwarrantable violation of section 77.1001. *Id.* at 656; Gov't Ex. 8. The Secretary subsequently proposed a penalty of $7,500 against Sunny Ridge. Sunny Ridge challenged the Secretary's proposed assessment.

After the hearing, the judge concluded that Sunny Ridge violated section 77.1001. 17 FMSHRC at 659. He noted that the inspector "observed loose and unconsolidated material in the form of blasted rock, dirt and trees on the highwall and spoil bank," and that the highwall was about 65 feet high. *Id.* at 656-57. The judge stated that Sunny Ridge had recently been charged with several violations of section 77.1001, that Tracy Damron had been foreman in charge at the time these prior violations had been issued and when the instant order was issued, that Tracy Damron's disregard of the cited hazards constituted aggravated conduct beyond ordinary negligence, and that the violation was therefore unwarrantable. *Id.* at 657. The judge also stated: "The violation was reasonably likely to result in serious injury, and therefore was significant and

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Secretary's posthearing argument to double the penalties originally proposed, that does not make the penalty defective. In support of his argument, the Secretary indicated that the "[t]estimony at trial [of] Tracy Damron and Mitch Potter . . . demonstrates an indifference on the part of mine management to the health and safety of its employees." S. Posthearing Br. at 31-32. The Secretary also claimed that respondents' lack of good faith was demonstrated at the hearing when photographs of the site, offered by respondent as proof of a lack of violation, were "obviously taken after corrective measures to the cited violations had already been instituted." *Id.* at 32. Surprisingly, the Secretary's request to double the penalties is described by our dissenting colleague as "punitive," "questionable," and "retaliatory." Slip. op. at 23, 25. We do not agree. The Secretary has the obligation to vigorously prosecute violations and the duty to function as an advocate by marshaling relevant, legitimate arguments in support of penalties he deems appropriate. Consequently, it is certainly reasonable for the Secretary to adjust a proposed penalty based on information developed at the hearing.

substantial." *Id.* The judge assessed a $10,000 civil penalty against Sunny Ridge.[14] *Id.* We subsequently granted Sunny Ridge's petition for discretionary review challenging the judge's determination that it violated section 77.1001 and his penalty assessment. Sunny Ridge does not challenge the judge's findings of S&S and unwarrantable failure.

B. Disposition

Sunny Ridge argues that the judge's determination that the company violated section 77.1001 is not supported by substantial evidence because Inspector Damron did not thoroughly inspect the material he cited. S.R. Br. at 12-13. Sunny Ridge also argues that the judge should have credited the testimony of its dozer operator, Charles Clevenger, that he tested the stability of the cited highwall before the order was issued and found no problems. *Id.* Sunny Ridge also maintains that the judge's penalty assessment is not appropriate. *Id.* at 13. The Secretary argues that the record contains extensive evidence of hazardous material present on the cited highwalls, and that the judge's finding of violation is thus supported by substantial evidence. S. Br. at 28-30. The Secretary does not address the propriety of the penalty assessed by the judge.

We find that substantial evidence supports the judge's determination that Sunny Ridge violated section 77.1001 by failing to strip loose, hazardous material from the top of a highwall and spoil bank in Pit No. 2. There is no dispute that loose material was present on the highwall and spoil bank. 17 FMSHRC at 656-67. The judge implicitly rejected the testimony of Sunny Ridge's witnesses that the cited area was safe (*see* Tr. 251-54, 261), and credited Inspector Damron's testimony that the material was hazardous because it "had just been pushed over and was laying on [the] high wall," including a large fallen tree, and that the material was highly susceptible to failure because of continual blasting in the area and frequent freezes and thaws that could have further loosened it (Tr. 223-26). We find no circumstances that would warrant following Sunny Ridge's implicit suggestion that we overturn the judge's credibility determinations. *Dust Cases*, 17 FMSHRC at 1878-81& n.80. Accordingly, we affirm the judge's determination that Sunny Ridge violated section 77.1001.

As with the previous order, although the judge did not make any separate findings of fact that he tied directly to any of the statutory penalty criteria in support of his penalty assessment, findings on each of the criteria either were made by the judge elsewhere in his decision or can be entered by the Commission based on record evidence. *See Sellersburg*, 736 F.2d at 1153. The judge found that Sunny Ridge "had been issued 17 charges of violations of the same standard within about six months, and had been issued two charges for violating the same standard during the last inspection." 17 FMSHRC at 657. The judge also found that "Foreman Damron's disregard of hazardous, loose materials on the highwall and spoil bank shows aggravated conduct beyond ordinary negligence," *id.*, conduct that may be imputed to Sunny Ridge. *R&P*, 13 FMSHRC at 194. Regarding the gravity of the violation, the judge found that it could have

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[14] In his posthearing brief, the Secretary argued that his original proposed penalty of $7,500 should be doubled. S. Posthearing Br. at 31-32.

caused serious injuries. 17 FMSHRC at 657. Pursuant to the parties' stipulation, we find that Sunny Ridge "is a medium-sized operator" and that its ability to continue in business would not be affected by a reasonable penalty. Joint Ex. 1 at ¶¶ 4-5. Regarding abatement, the record merely indicates that Sunny Ridge abated the violation when it bermed off the cited area. Tr. 229. Accordingly, we find that Sunny Ridge demonstrated neither good faith nor bad faith in abating the violation.

Based on our review of the adjudicative record, we cannot say that the penalty is inconsistent with the statutory criteria or the Mine Act's deterrent purposes. We thus find that the judge's penalty assessment did not constitute an abuse of discretion.

IV.

Order No. 4020076

A. Factual and Procedural Background

On January 27, 1993, after issuing Order No. 4020075, Inspector Damron observed loose, hazardous material on the face and top of a highwall and on the spoil side in the No. 1 Pit. 17 FMSHRC at 657. The highwall was approximately 90 to 100 feet high. *Id.* at 657-58. Several pieces of equipment were operating under the highwall, and footprints indicated individuals had worked or traveled under the spoil bank. *Id.* Although Inspector Damron allowed work to continue in the center of the pit to allow Sunny Ridge to remove a quantity of coal that had already been mined (Tr. 289-90), he issued Order No. 4020076 under section 104(d)(2), alleging an S&S and unwarrantable violation of section 77.1001 based on his observations of conditions elsewhere in the pit. 17 FMSHRC at 657; Gov't Ex. 11. The Secretary subsequently proposed a civil penalty of $9,200 against Sunny Ridge, which the company challenged.

After the hearing, the judge concluded that Sunny Ridge violated section 77.1001. 17 FMSHRC at 659. He noted that Inspector Billy Damron "observed loose, hazardous material in the form of rocks and boulders on the face and top of [the] highwall," which was 90 to 100 feet high. *Id.* at 657. The judge also noted the hazardous conditions Inspector Damron observed on the spoil bank, which was approximately 60 feet high. *Id.* at 658. Finally, the judge took note of Inspector Damron's observations of work being performed under the highwall and spoil bank. *Id.*

The judge stated that Sunny Ridge had recently been charged with violating section 77.1001, that Tracy Damron had been foreman in charge at the time these prior violations had been issued and when the instant order was issued, that Tracy Damron's disregard of the cited hazards constituted aggravated conduct beyond ordinary negligence, and that the violation was therefore unwarrantable. *Id.* at 658. The judge also stated: "The violation was reasonably likely to result in serious injury, and therefore was significant and substantial." *Id.* The judge assessed

a $10,000 civil penalty against Sunny Ridge.[15] *Id.* We subsequently granted Sunny Ridge's petition for discretionary review challenging the judge's determination that it violated section 77.1001 and that the violation was S&S, as well as his penalty assessment. Sunny Ridge does not challenge the judge's finding of unwarrantable failure.

B. Disposition

Sunny Ridge argues that the judge's determination that it violated section 77.1001 is not supported by substantial evidence. S.R. Br. at 14-15. The company maintains that the judge's finding of S&S is inconsistent with Inspector Damron allowing mining to continue in the pit. *Id.* at 15-16. Sunny Ridge also argues that the judge's assessment of penalty is not supported by substantial evidence. *Id.* at 16. The Secretary argues that the record contains extensive evidence of hazardous material present on the cited highwalls, and that the judge's finding of a violation is thus supported by substantial evidence. S. Br. at 31-32. The Secretary contends that substantial evidence also supports the judge's finding that the violation was S&S, and that Inspector Damron's permitting some mining to continue in the pit is irrelevant because the area where mining continued was outside the area covered by the order. *Id.* at 33-34. The Secretary does not address the propriety of the penalty assessed by the judge.

1. Violation

We find that substantial evidence supports the judge's finding that Sunny Ridge violated section 77.1001 by failing to strip loose, hazardous material from the top of a highwall and spoil bank in Pit No. 1. The judge credited Inspector Damron's testimony that both the highwall and spoil bank contained loose, hazardous material. 17 FMSHRC at 657-58. Inspector Damron testified that "loose rock and boulders were present in the face [and] top of the high wall," and that the near-vertical spoil bank also "contained loose rock and dirt." Tr. 274, 284. The judge implicitly rejected the testimony of Sunny Ridge's witnesses that no loose, hazardous material was present. *See* Tr. 331, 336-37. No circumstances warrant overturning the judge's credibility determinations. *Dust Cases*, 17 FMSHRC at 1878-81& n.80. Accordingly, we affirm the judge's finding of a violation.

2. S&S

In what is essentially an estoppel argument, Sunny Ridge contends that the Secretary failed to prove the third *Mathies* element because, had there been any likelihood of a serious injury, Inspector Damron "would not have permitted continued mining for the remainder of the day underneath the highwall or spoil bank. . . ." S.R. Br. at 16. Equitable estoppel, however, generally does not operate against the Secretary. *King Knob Coal Co.*, 3 FMSHRC 1417,

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[15] In his posthearing brief, the Secretary argued that his original proposed penalty of $9,200 should be doubled. S. Posthearing Br. at 31-33.

1421-22 (June 1981).[16]

In any event, Inspector Damron testified that both blasting and the freeze/thaw cycle had compromised the stability of the loose material, and that, since material could have been dislodged, a serious injury was "very highly likely." Tr. 286-87. Based on this testimony, we find that the judge's determination that the violation was S&S is supported by substantial evidence. Accordingly, we affirm the judge's S&S determination.

3. Penalty

As with the previous two orders, although the judge did not make any separate findings of fact that he tied directly to any of the statutory penalty criteria in support of his penalty assessment, findings on each of the criteria either were made by the judge elsewhere in his decision or can be entered by the Commission based on record evidence. *See Sellersburg*, 736 F.2d at 1153. The judge found that Sunny Ridge "had been issued two charges of violating the same standard in the previous inspection," and that "Foreman Damron's disregard of the hazards discovered by the inspector shows aggravated conduct beyond ordinary negligence." 17 FMSHRC at 658; *see R&P*, 13 FMSHRC at 194 (Damron's conduct may be imputed to Sunny Ridge). The judge also found that the violative condition could have caused serious injuries. 17 FMSHRC at 658. Pursuant to the parties' stipulation, we find that Sunny Ridge "is a medium-sized operator" and that its ability to continue in business would not be affected by a reasonable penalty. Joint Ex. 1 at ¶¶ 4-5. Regarding abatement, Sunny Ridge's witnesses testified that mining continued in the pit, including under the highwall, after Inspector Damron pointed out the violation to company personnel. Tr. 336-37, 348; *see also* Tr. 369 (Inspector Damron's testimony that it was not his intention to allow mining to continue under the highwall). We thus find that, although the violation was abated when Sunny Ridge bermed off the cited area (Tr. 292), the company demonstrated bad faith by continuing to mine in areas of the pit where Inspector Damron had pointed out hazardous, violative conditions.

Based on our review of the adjudicative record, we cannot say that the judge's penalty assessment is inconsistent with the statutory criteria or the Mine Act's deterrent purposes. We thus find that the judge did not abuse his discretion in assessing the penalty.

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[16] Moreover, Sunny Ridge's argument rests on the mistaken assumption that Inspector Damron allowed mining to proceed *underneath* the highwall and spoil bank. In fact, Inspector Damron only allowed Sunny Ridge to remove some coal from the pit that had already been mined and that was stockpiled in an area not affected by his order. Tr. 289-90, 365, 369.

V.

Tracy Damron's Liability Under Section 110(c)

A. Factual and Procedural Background

The Secretary charged Tracy Damron with knowingly authorizing, ordering, or carrying out the alleged violations described in Citation No. 4020202 and Order Nos. 4020210, 4020075, and 4020076. The Secretary subsequently proposed penalties totaling $15,000 against Damron, which Damron challenged.

After the hearing, the judge found that Damron was liable under section 110(c) for the four violations. With respect to Citation No. 4020202 (working under unblocked equipment), the judge found that Damron attempted "to cover up his method of changing a tire" based on testimony that when Cure "approached the truck, some men scattered and [Damron] quickly had the truck bed and wheel lowered. He then got a 20-ton jack and attempted unsuccessfully to raise the rear wheel." 17 FMSHRC at 655. The judge regarded this as "strong evidence of [Damron's] knowledge of a violation." *Id.* The judge assessed a civil penalty of $2,500 against Damron. *Id.*

With respect to Order Nos. 4020210, 4020075, and 4020076 (highwall violations), the judge found that Damron was aware of hazardous highwall conditions because, in each case, he conducted daily examinations of the affected areas. *Id.* at 656, 657, 658. The judge concluded that Damron's disregard of the hazards on each occasion amounted to "aggravated conduct beyond ordinary negligence." *Id.* The judge also noted that Sunny Ridge had repeatedly been cited for similar violations, and that Damron was the company's representative upon whom the previous citations had been served. *Id.* The judge assessed civil penalties against Damron of $3,000 for Order No. 4020210, $4,000 for Order No. 4020075, and $4,000 for Order No. 4020076. *Id.* We subsequently granted Damron's petition for discretionary review challenging the judge's findings of liability and penalty assessments.

B. Disposition

Relying on the arguments advanced elsewhere in petitioners' joint brief, Damron argues that the judge's findings of liability under section 110(c) are not supported by substantial evidence. S.R. Br. at 17, 19. Citing his subjective beliefs that using cribbing to change a coal tire was safe and that all of the cited highwalls were sound, Damron argues that his conduct was not "knowing." *Id.* at 17-19. Damron also argues that none of the penalties assessed against him by the judge are appropriate or supported by substantial evidence. *Id.* at 11, 13, 16-19.

The Secretary responds that with respect to each of the section 110(c) charges brought against Damron, substantial evidence supports the judge's conclusions that Damron is liable. S. Br. at 20-23, 26-28, 30-31, 34-35. The Secretary argues that section 110(c), rather than imposing

a subjective standard, requires agents of operators to act in an objectively reasonable manner. *Id.* at 22. The Secretary contends that, with respect to each of the four charges brought against him, Damron failed to meet this standard of care. Regarding Citation No. 4020202, the Secretary asserts that Damron "was actively involved in the violative tire-changing operation, which openly and obviously involved a failure to block securely the raised equipment." *Id.* at 22-23. Regarding the three highwall violations, the Secretary argues that Damron was fully aware of the cited conditions, having inspected the cited areas on the morning of each day an order was issued. *Id.* at 26-28, 30, 34-35. With respect to Order Nos. 4020075 and 4020076, the Secretary maintains that Damron admitted that conditions were hazardous. *Id.* at 30, 35. The Secretary does not address the propriety of the penalties assessed by the judge.

1. Violation of Section 77.405(b)

Because we are vacating and remanding to the judge the issue of whether Sunny Ridge violated section 77.405(b), we vacate the judge's determination that Damron is liable under section 110(c) for this citation, and remand for further proceedings consistent with our remand of the underlying citation.

2. Violations of Section 77.1001

Section 110(c) provides that, whenever a corporate operator violates a safety or health standard, an agent of the corporate operator who "knowingly authorized, ordered, or carried out such violation" shall be subject to an individual civil penalty under the Mine Act. 30 U.S.C. § 820(c).[17] The proper legal inquiry for purposes of determining liability under section 110(c) is whether the corporate agent "knew or had reason to know" of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). To establish a knowing violation, the Secretary "must prove only that an individual knowingly acted, not that the individual knowingly violated the law." *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)).

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[17] Section 110(c) states:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this [Act] or any order incorporated in a final decision issued under this [Act], except an order incorporated in a decision issued under subsection (a) of this section or section [105(c)] . . ., any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

We have already found that substantial evidence supports the judge's conclusion that Sunny Ridge violated section 77.1001 on the three occasions in question. There is no dispute that Damron was Sunny Ridge's agent when each of the violations occurred. Damron was fully aware of each of the violative conditions since he inspected the cited areas each day the orders were issued. Tr. 124, 228, 290. With respect to Order Nos. 4020075 and 4020076, Damron admitted that the cited areas needed some corrective measures. Tr. 229, 291. In light of these facts, we find that substantial evidence supports the judge's conclusion that Damron is liable under section 110(c) for each of the highwall violations.

In assessing penalties against Damron, however, the judge failed to make all of the requisite findings under section 110(i) of the Mine Act. The judge made findings on Damron's negligence and the gravity of the alleged violations. 17 FMSHRC at 656, 657, 658. Regarding whether the violations were abated in good faith, evidence appears in the record from which the Commission could enter findings. Tr. 132, 229, 292; Gov't Exs. 5, 8, 11. But with respect to the three criteria of history of previous violations, appropriateness of the penalty based on "size," and effect of the penalty on ability to "continue in business," no evidence appears in the record, as to Damron as an individual, on which any findings could be entered either by the judge or by the Commission on review. The only record evidence on these factors relates to Sunny Ridge as an operator.

Section 110(i) of the Mine Act states that "the Commission shall consider *the operator's* history of previous violations, the appropriateness of such penalty to the size of the business of *the operator charged*, whether *the operator* was negligent, the effect on *the operator's* ability to continue in business, the gravity of the violation, and 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) (emphasis added). Although section 110(c) subjects individuals to "the same civil penalties, fines, and imprisonment that may be imposed upon" a mine operator, no separate penalty factors applying only to individuals appear in the Act. Yet, from the plain language of section 110(i), it would appear that Congress did not have *individuals* in mind when it fashioned the penalty criteria set forth in that provision.

The penalty criteria, as well as section 110(c), were carried over with no significant changes from section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977) ("Coal Act"). The legislative history of these sections provides little guidance of Congressional intent regarding how the penalty criteria be applied to individuals. The drafters of the Coal Act did, however, indicate a recognition that the criteria for penalties assessed against agents be independent of the operator criteria:

> It was ultimately decided to let the agent stand on his own and be personally responsible for any penalties or punishment meted out to him. . . . The committee does not, however, intend that the agent should bear the brunt of corporate violations.

H.R. Rep. No. 563, 91st Cong., 1st Sess. 11-12 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 1041-42 (1975). We view this as evidence that Congress did not intend the penalty criteria to be applied to individuals in the same fashion they are applied to operators. Such an approach would be unfair because it would tie the individual's liability to the operator's conduct and financial resources, and would not allow "the agent [to] stand on his own." *Id.* It could also result in inordinately high penalties being assessed against individuals, which would clearly be contrary to Congress's intention that agents not "bear the brunt of corporate violations." *Id.*

The Supreme Court has held that, in interpreting a single enactment, courts should give the statute "the most harmonious, comprehensive meaning possible." *Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 631-32 (1973). Interpreting sections 110(c) and 110(i) harmoniously, we hold that, in keeping with our prior holding that "findings of fact on the statutory penalty criteria *must* be made," *Sellersburg*, 5 FMSHRC at 292 (emphasis added), Commission judges must make findings on each of the criteria as they apply to *individuals*. The criteria regarding the effect and appropriateness of a penalty can be applied to individuals by analogy, and we find that such an approach is in keeping with the deterrent purposes of penalties assessed under the Mine Act. In making such findings, judges should thus consider such facts as an individual's income and family support obligations, the appropriateness of a penalty in light of the individual's job responsibilities, and an individual's ability to pay. Similarly, judges should make findings on an individual's history of violations and negligence, based on evidence in the record on these criteria. Findings on the gravity of a violation and whether it was abated in good faith can be made on the same record evidence that is used in assessing an operator's penalty for the violation underlying the section 110(c) liability.

Because the judge did not make any findings on Damron's history of previous violations, or on the appropriateness and effect of the penalties assessed against him, and given the lack of record evidence on which we could enter any findings on these criteria, we remand this matter to the judge so that he can make separate findings on each of the statutory penalty criteria. We direct the judge to institute further proceedings as necessary to obtain evidence that will enable him to make findings pertinent to Damron's individual liability.

VI.

Mitch Potter's Liability Under Section 110(c)

A. Factual and Procedural Background

The Secretary charged Sunny Ridge president Mitch Potter with knowingly authorizing, ordering, or carrying out (along with Tracy Damron) the alleged highwall violations described in Order Nos. 4020075 and 4020076. The Secretary proposed penalties totaling $12,000 against Potter, which Potter challenged.

The judge found that Potter was liable under section 110(c) for the violations alleged in Order Nos. 4020075 and 4020076. 17 FMSHRC at 659. The judge stated:

> Mr. Potter supervised the day-to-day operations of the corporation. He was present at Mine No. 9 on January 27, 1993, and was aware of the conditions of the highwalls involved in the two orders before the inspection. Also, Mr. Potter was aware of previous citations issued by Inspector Cure for similar violations of the same standard. I find that Mr. Potter was in a position to prevent the violations found on January 27, 1993, but failed to take action to do so.

Id. at 658-59. The judge assessed civil penalties against Potter of $6,000 for each order. *Id.* at 659. We subsequently granted Potter's petition for discretionary review challenging the judge's findings of liability and penalty assessments.

B. Disposition

Relying on the arguments advanced elsewhere in petitioners' joint brief, Potter argues that the judge's findings of violations are not supported by substantial evidence. S.R. Br. at 19. Potter also argues that his conduct was not "knowing." Citing his subjective belief that the cited highwalls were sound, Potter asserts that the Secretary failed to prove that he knew of any conditions that may have violated section 77.1001. *Id.* The Secretary responds that substantial evidence supports the judge's conclusion that Potter is liable under section 110(c) for the two alleged violations of section 77.1001. S. Br. at 30-31, 34-35. The Secretary argues that section 110(c), rather than imposing a subjective standard, requires an operator's agent to act in an objectively reasonable manner. *Id.* at 22. The Secretary contends that, with respect to each of the two charges brought against him, Potter failed to meet this standard of care. The Secretary points out that Potter testified he was at the mine on the day the orders were issued and was familiar with the cited highwall conditions. *Id.* at 31 (citing Tr. 326). The Secretary does not address the propriety of the penalties assessed by the judge.

With respect to Order No. 4020075, there is no evidence in the record that Potter actually knew of conditions in the No. 2 Pit on the day the order was issued. Nor was any evidence presented at the hearing that Potter had been informed of the conditions, or had any reason to know of the conditions. The only mention of Potter in all of the testimony on this order is Inspector Damron's statement that Potter attended a closeout conference *after* the order was issued. Tr. 243. Nevertheless, the judge found that Potter "was aware of the conditions of the highwall" cited in Order No. 4020075. 17 FMSHRC at 659.

The judge's finding, however, is not supported by substantial evidence. Although Potter was at the mine on the day in question (Tr. 325-26), this fact alone does not support the judge's finding. Because substantial evidence does not support a finding that Potter knew or should have

known about the hazardous conditions in the No. 2 Pit, we reverse the judge's conclusion that Potter is liable for the violation charged in Order No. 4020075 and vacate the $6,000 penalty assessed by the judge.

In contrast, there is no dispute that Potter was aware of the conditions in the No. 1 Pit cited in Order No. 4020076. Tr. 326. He also discussed the condition of the spoil bank in the pit with Tracy Damron and Sunny Ridge's safety director, the three of whom agreed that conditions were bad. Tr. 288, 291-92. We have held that "[i]f a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981). Potter knew about the highwall and spoil bank problems in the No. 1 Pit, yet failed to take any measures to correct those problems. We thus find that the judge properly concluded that he knowingly violated section 77.1001 with respect to Order No. 4020076.

Regarding the $6,000 penalty the judge assessed against Potter for this violation, as with the penalties he assessed against Damron, the judge failed to make any separate findings of fact on the section 110(i) penalty criteria. *See* 17 FMSHRC at 659. Findings appear elsewhere in the judge's decision on the gravity of the alleged violations (*id.* at 657-58), and evidence appears in the record on whether the violations were abated in good faith (Tr. 229, 292; Gov't Exs. 8, 11). But with respect to the four criteria concerning Potter's negligence and history of previous violations, and the appro priateness and effect of the penalty assessed against him, no evidence appears in the record on which any findings could be entered, as to Potter individually, by either the judge or the Commission. For the reasons for which we remanded the judge's assessment of penalties against Damron, we also vacate this penalty and remand for reassessment. The judge must make separate findings on each of the statutory penalty criteria, and must institute further proceedings as necessary to obtain evidence that will enable him to make such findings.

VII.

Conclusion

For the foregoing reasons, we (1) vacate and remand the judge's determination that Sunny Ridge violated section 77.405(b) and that the violation was S&S, and direct him to fully analyze and weigh the relevant testimony of record, make appropriate findings, and fully articulate the reasons and bases for his decision; (2) affirm the judge's findings with respect to each of the three alleged violations of section 77.1001 set forth in Order Nos. 4020210, 4020075, and 4020076, Tracy Damron's liability for all three violations, and Potter's liability for the violation charged in Order No. 4020076; (3) reverse the judge's determination that Potter is liable for the violation charged in Order No. 4020075; (4) vacate the judge's determination that Damron is liable for the violation charged in Citation No. 4020202, and remand for further proceedings consistent with our remand of the underlying citation; and (5) vacate and remand the penalties assessed by the judge against Damron and Potter for each of the violations for which they are liable, and direct the judge to make the necessary findings as to their individual penalty assessments and to institute further proceedings to obtain evidence that will enable him to make such findings.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

Commissioner Riley, dissenting in part:

While I am in general agreement with the majority, I am concerned about the majority's decision to affirm civil penalties ordered by the administrative law judge for three highwall violations and therefore dissent on that issue alone. I am certainly aware of and appreciate the Commission's authority to independently set appropriate penalties for violations of the Mine Act. It is simply not clear to me that is what occurred in this case.

I am troubled by the indecipherable criteria used to calculate the appropriate sanction. The judge's penalty assessment is not based on any discernable mathematical formula nor supported by any comprehensible legal rationale and is therefore unreviewable.

It is also likely, although not clear, that the judge was influenced by the Secretary's questionable posthearing argument to double the original penalties assessed against Sunny Ridge for the highwall violations. This extraordinarily punitive proposal has the appearance of retaliation for exercising and vigorously pursuing due process rights. Consequently, it must be challenged. Since the judge's decision does not allow us to determine to what extent he was influenced by that argument, his penalty assessment must be vacated and remanded for a more complete explanation.

Order No. 4020210 (August 18, 1992 Highwall Order). The inspector observed material on the side of the Number 3½ Pit consisting of blasted rocks of various sizes that formed a vertical highwall approximately 25 feet high and 200 feet long. 17 FMSHRC 648, 655 (April 1995) (ALJ); Tr. 120, 12?, 138. Inspector Cure observed four pieces of equipment operating below the spoil bank. 17 FMSHRC at 655. The Secretary's MSHA staff proposed a penalty of $4,600.

In his posthearing brief, the Secretary argued that this proposed penalty should be doubled "to reflect the lack of good faith and high level of negligence attributable to [Sunny Ridge]." S. Posthearing Br. at 31-32. The judge, noting that he had considered "all of the criteria for civil penalties" under section 110(i) of the Mine Act, but without making any separate findings of fact on the criteria, assessed a penalty of $8,000 against Sunny Ridge for violating section 77.1001. 17 FMSHRC at 656. Without commenting on the Secretary's argument for vastly increasing the penalty, or offering any other explanation, the judge assessed a penalty almost double that originally proposed by MSHA. In keeping with *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147 (7th Cir. 1984), the judge should be directed on remand to fully explain his penalty assessment.

Order No. 4020075 (January 27, 1993 Highwall Order, Pit No. 2). When MSHA Inspector Billy Damron came to the Number 2 Pit, he observed loose, hazardous, and unconsolidated material that had not been stripped from the approximately 65-foot high highwall and spoil side of the pit. 17 FMSHRC at 656-57. It is worthwhile to note that the highwall in Pit No. 2 was 2½ times as high as the August 1992 violation in Pit No. 3½ and, therefore, arguably

more dangerous. Inspector Damron observed one piece of equipment operating beneath the highwall. *Id.* Recognizing the increased risk, MSHA proposed a penalty of $7,500.

In his posthearing brief, the Secretary argued that the proposed penalty should be doubled "to reflect the lack of good faith and high level of negligence attributable to [Sunny Ridge]." S. Posthearing Br. at 31-32. The judge concluded that Sunny Ridge violated section 77.1001. 17 FMSHRC at 659. Noting that he had considered "all of the criteria for civil penalties" under section 110(i) of the Mine Act, but without making any separate findings of fact on the criteria, the judge assessed a $10,000 penalty against Sunny Ridge. *Id.* at 657.

As with Order No. 4020210, however, the judge assessed a penalty significantly higher than that originally proposed by MSHA without commenting on the Secretary's argument for a vastly increased penalty, or offering any other explanation. (The $10,000 penalty assessed by the judge is 33⅓ percent higher than the $7,500 penalty originally proposed by MSHA.) The judge should be directed on remand to provide a full explanation of his penalty assessment.

Order No. 4020076 (January 27, 1993 Highwall Order, Pit No. 1). Inspector Damron observed loose, hazardous material on the face and top of a highwall and on the spoil side in the Number 1 Pit. 17 FMSHRC at 657. The highwall was approximately 90 to 100 feet high, *id.* at 657-58, four times higher than the August 1992 violation and approximately 40 percent higher than the highwall violation in Pit No. 2 earlier on the same day. Several pieces of equipment were operating under the highwall, and footprints indicated individuals had worked or traveled under the spoil bank. *Id.*

Considering the greater threat presented by the highwall, MSHA assessed a proposed penalty of $9,200 against Sunny Ridge. In his posthearing brief, the Secretary argued that this proposed penalty should be doubled "to reflect the lack of good faith and high level of negligence attributable to [Sunny Ridge]." S. Posthearing Br. at 31-33. Noting that he had considered "all of the criteria for civil penalties" under section 110(i) of the Mine Act, but without making any separate findings of fact on the criteria, the judge assessed a $10,000 penalty against Sunny Ridge. 17 FMSHRC at 658. Again, without commenting on the Secretary's argument for greatly increasing the proposed penalty, or offering any other explanation, the judge assessed an amount higher than the civil penalty originally proposed by MSHA. This time, however, without regard to the seriousness of the violation, the judge's adjustment of the penalty was quite modest.

It is clear that as the height of each violative highwall increased, so too were MSHA's initial penalty assessments adjusted upward commensurate with the increased danger. While the height of the highwall violations increased over threefold, the penalties assessed increased twofold. Apparently not content with the results of MSHA's initial calculations which according to the Program Policy Manual and Enforcement Guidelines would have included all relevant factors including negligence, the Secretary, citing extreme bad faith, proposed in his posthearing brief to double the civil penalties yet again. The judge, however, made no specific findings on nor even mentioned the extreme bad faith issue in his decision.

This silence, however, did not stop the judge from more or less endorsing the Secretary's retaliatory posthearing brief suggestion for one violation. Without a shred of explanation, the judge increased the proposed penalty by approximately 75 percent for what was probably the least serious highwall violation. What were his reasons when, for an arguably more serious violation of the same standard, the judge, again without explanation, substantially modified the Secretary's questionable suggestion, increasing the proposed penalty by 33⅓ percent? What was the judge thinking when, for the most serious violation, he almost ignored the Secretary's punitive exhortation, increasing the proposed penalty by only 8¾ percent? His actions leave me with more questions than answers about his rationale for assessing the penalties. The judge must explain more precisely exactly what he did and why he did it.

The high level of negligence also offered in posthearing brief as the other justification for multiplying penalties was noted on the face of the citations and presumably considered by area compliance staff and at the time they determined appropriate penalty assessments for the cited offenses. I question why the Secretary's counsel did not raise this argument at the hearing. I am concerned that "rubber stamping" this maneuver to increase the exposure of operators who refuse settlement will compromise statutory due process rights afforded to all persons under our jurisdiction, including uncooperative and argumentative ones.

James C. Riley

James C. Riley, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 6 1997

PATRICIA ANN VILLINES, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. CENT 96-28-DM
COBRE MINING COMPANY, Respondent	:	SC MD 95-05
	:	Cobre Mine

DECISION

Appearances: Robert F. Turner, Esq., Deming, New Mexico, for the Complainant;
Patrick M. Shay, Esq., Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, New Mexico, for Respondent.

Before: Judge Maurer

This case is before me upon a complaint of discrimination brought by Patricia Ann Villines against the Cobre Mining Company (Cobre) under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c).

The case was heard on November 6, 1996, in Truth or Consequences, New Mexico. For the reasons set forth below, I find that Ms. Villines was not terminated for engaging in activities protected under the Mine Act and, therefore, was not discriminated against by Cobre, in violation of section 105(c).

The Complainant was hired by Cobre on March 5, 1993 and fired on July 13, 1995. At the time of her termination, she was the safety office clerk.

She claims to have had no employment-related problems until May 19, 1995, shortly after her immediate supervisor, Mike Best, was fired.

On May 19, 1995, she received a Letter of Counseling from Mr. Trujillo, who was the human resources manager at Cobre and her immediate supervisor after Best's termination. This Letter of Counseling is contained in the record as Cobre Exhibit A and it recites several instances of nonfeasance and malfeasance by Ms. Villines. Basically, Mr. Trujillo was upset with the operation of the safety department generally and Ms. Villines' work particularly.

The testimony from Mr. Trujillo and Ms. Dinwiddie (the office manager) at the hearing was all to the effect that Ms. Villines had to be constantly reminded to perform the duties of her job, and work that she did perform, was poorly done. They also testified concerning Ms. Villines' lack of skills in typing, filing, and administrative tasks generally. I note that this was the first and only clerical type job she has ever held.

Ms. Villines was given several opportunities to upgrade her skills, but she reportedly failed to take advantage of them. Specifically, for example, the office manager offered to take time to teach her the computer skills she needed to better perform her job, but she did not show up for the training.

The evidence is uncontested that the training department records were in a mess at the time Mike Best was fired, and Mr. Trujillo took over as the complainant's supervisor. The feeling was that this was the complainant's job and that Mr. Best had simply let her slide rather than insisting that she maintain these certification records in a proper manner.

Mr. Trujillo attempted to impress upon the complainant the importance of maintaining proper records within the safety department and specifically tasked her with putting these records in order. However, despite his more or less constant urging, she was not getting the work accomplished. Rather, she would find other work to do or other ways to occupy her time. Meanwhile, the federal and state mine inspectors were putting pressure on the mine management to get these records into shape for review.

Finally, after about a month of little or no progress and with the records still in extremely bad shape, the company sought the assistance of a technical specialist from the New Mexico Bureau of Mine Inspection to train the complainant along with Ms. Dinwiddie, the office manager, and Ms. Webb, the receptionist, to properly fill out and file the training records. On July 12, 1995, at approximately 8:00 a.m., the state-provided training commenced. At about 10:30 a.m., Mr. Trujillo was advised that Ms. Villines was not cooperating with the trainer. She was coming and going in and out of the room, talking on the phone, and generally just not paying any attention to the training. This apparently was the last straw. The next day, July 13, 1995, Ms. Villines' employment was terminated.

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by proving that she engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980),

rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). An operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.; Robinette*, 3 FMSHRC at 817-18; see also *Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642, (4th Cir. 1987).

The complainant's only alleged protected activity is cooperating with MSHA by talking with an investigator concerning the termination of her former boss, Mike Best. However, her statement was not favorable to Mr. Best. Her understanding of why he was fired was because he was not doing his job and that's basically what she told the MSHA investigator. She agrees the safety office was a mess at the time Mike Best was fired. Furthermore, it was Mr. Trujillo, her new supervisor that requested that the MSHA investigator interview her. It was the MSHA investigator who told her that. Mr. Trujillo corroborates that portion of her testimony as well.

It follows logically then that if the company suggested that she be interviewed by MSHA concerning Best's case, and she in fact supported their firing of Best with MSHA during that interview, they would be unlikely to take adverse action against her for cooperating with MSHA (at their request).

Simply put, there is no evidence to support a prima facie case of discrimination by Cobre against the complainant, that is, adverse action causally related to protected activity. The complainant's own lack of productivity provided ample basis for discharging her.

ORDER

Accordingly, it is **ORDERED** that the complaint filed by Patricia Ann Villines against the Cobre Mining Company for a violation of section 105(c) of the Mine Act is **DISMISSED**.

Roy J. Maurer
Administrative Law Judge

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FEB 7 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 96-327
Petitioner	:	A.C. No. 15-16482-03526
v.	:	
	:	Browns Valley Mine
WINN CONSTRUCTION CO., INC.,	:	
Respondent	:	

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
J.R. Winn, Safety Director, Winn Construction Company, Inc., Owensboro, Kentucky, for the Respondent.

Before: Judge Melick

This civil penalty proceeding is before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to challenge two citations issued by the Secretary of Labor to Winn Construction Company, Inc. (Winn Construction) and to contest the civil penalties proposed for the violations charged therein. The general issue before me is whether Winn Construction violated the cited standards and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

The two citations at issue arose from an accident at the Browns Valley Mine on March 7, 1996. A 10-foot by 10-foot steel pump house, built on four 12-foot pontoons and weighing approximately one ton, was to be moved to another work site utilizing a "cherry picker". Foreman Max Fendell was operating the cherry picker and mechanic George Townsell and miner Dewayne Pharris walked alongside prepared to steady the load as it was being moved. It was suspended by chains attached to a hook on the cherry picker boom. The load was not otherwise secured.

As the cherry picker moved across some water diversion ditches, the load began to move. Townsell and Pharris steadied the pump house with their hands. The boom of the cherry picker

then contacted the overhead high-voltage power lines, breaking one of the power lines and the ground line. Since Townsell was in contact with the metal pump house with his right hand the electrical current entered this hand and exited his right foot. He suffered burns to his fourth, middle and index fingers, two small burn holes on the ball of his right hand and a dime-sized burn on the bottom of his right foot. He received first-aid and was later transported to the intensive care unit of the Owensboro Mercy Health System for observation. He was released on the third day after the accident and returned to work on March 11, 1996.

It is undisputed that Pharris and Townsell were not watching the power lines as they walked alongside the pump house. It has also been stipulated that Foreman Fendell knew the high-voltage lines were energized, that he examined the work area before moving the pump house, that he did not consider energized lines to be a hazard, and that he thought he had lowered the boom sufficiently to clear the power lines.

Citation No. 4276841 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 77.1607(s) and charges as follows:

> The Galion model 125 company ID 301 cherry picker located at the preparation plant area was transporting an approx 12 times 12 metal pump house pontoon and the equipment was not secured. The equipment was involved in an accident March 7, 1996.

The cited standard, 30 C.F.R. § 77.1607(s) provides that "[w]hen moving between work areas, the equipment shall be secured in the travel position."

Citation No. 4276919 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 77.807-3 and charges as follows:

> The Galion model 125 Co. ID 301 cherry picker located at the preparation plant area was being operated within 10 feet of an energized overhead line and the power lines were not deenergized or other precautions taken. The cherry picker was transporting an approx. 12 x 12 foot metal pump house pontoon when the boom made contact with the energized overhead power line. One person was contacting the metal structure and received an electric shock from the 7200 volt overhead power line. The accident occurred March 7, 1996.

The cited standard, 30 C.F.R. § 77.807-3, provides that "when any part of any equipment operated on the surface of any coal mine is required to pass under or by any energized high-

voltage power line and the clearance between such equipment and power line is less than that specified in Section 77.807-2 for boom and masts, such power lines shall be deenergized or other precautions shall be taken."

The standard at Section 77.807-2 provides in part that "the booms and masts of equipment operated on the surface of any coal mine shall not be operated within 10 feet of an energized overhead power line."

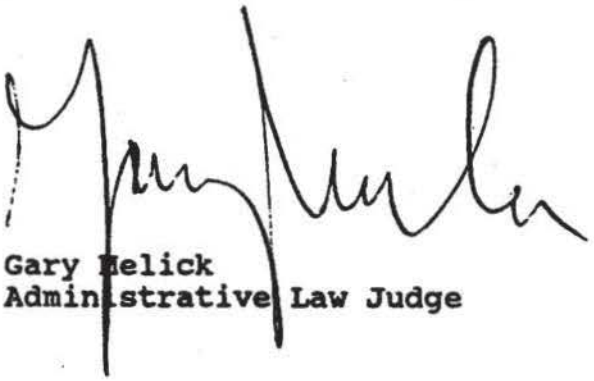
There is no dispute in this case that the violations occurred as charged, and that they were "significant and substantial" and of high gravity. Winn Construction takes issue, however, with the amount of penalty proposed by the Secretary for the violations. In determining the amount of penalty to be assessed in these cases, the degree of operator negligence is of particular importance. In this regard Inspector Michael Van Moore of the Mine Safety and Health Administration (MSHA) noted that, when issuing these citations there were mitigating circumstances which warranted his findings of moderate negligence. In particular, Moore relied upon statements to him by Foreman Fendell that although he knew the power lines were energized he tried to avoid them by suspending the pump house in a low position and that he had the other miners watch the overhead lines.

Jerry Winn, Jr., on behalf of the Respondent testified that he too had talked to Fendell and that Fendell told him that he did not specifically tell his workers to watch out for the power lines. In addition, Winn testified that Pharris reported to him that he was not told "anything in particular" regarding the power lines. Under the circumstances it would appear that Inspector Moore's conclusions that Respondent was chargeable with but moderate negligence may have been based upon less than credible and self serving statements. I do note however that Fendell was disciplined by Respondent for his negligence and received a letter of reprimand.

In any event, under all the circumstances and considering the criteria under Section 110(i) of the Act, I conclude that civil penalties of $500 for each of the violations is appropriate.

ORDER

Citation Nos. 4276841 and 4276919 are affirmed and Winn Construction Company, Inc. is hereby directed to pay civil penalties of $500 for each of the violations in the above citations within 30 days of the date of this decsion.



Gary Helick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 7 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	: CIVIL PENALTY PROCEEDINGS : : Docket No. CENT 96-124-M : A. C. No. 14-00162-05501 WZB
v.	: : Independence Quarry and Mill
WILLIAMS NATURAL GAS COMPANY, Respondent	: : : Docket No. CENT 96-158-M : A. C. No. 14-00124-05501 WZB
	: : Monarch Cement Company

SUMMARY DECISION

Before: Judge Feldman

These cases are before me for summary disposition as a result of petitions for assessment of civil penalties filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (The Act), 30 U.S.C. § 801 et seq., against the respondent, Williams Natural Gas Company (WNG). These matters were consolidated for hearing on November 8, 1996, because they involve similar facts. Consequently, the parties have agreed that, in the absence of specific factual distinctions raised by either party, the arguments made in CENT 96-124-M shall also apply to CENT 96-158-M. (Resp.'s letter dated Nov. 6, 1996).

WNG is the operator of an interstate gas pipeline system with meter buildings and pipeline facilities located within the above captioned mine properties. The Secretary seeks to impose a total civil penalty of $119.00 in these cases for two alleged nonsignificant and substantial violations of the mandatory safety standard in section 56.4101, 30 C.F.R. § 56.4101, as a result of a failure to post warning signs on WNG's meter buildings. Section 56.4101 requires that "[r]eadily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists." WNG concedes that the operators of the mines upon which the cited gas line buildings and facilities are located are its customers in that they purchase gas from Wesco, an affiliate that is managed separately from WNG. (Resp.'s Motion. P.2, n.1).

The parties have stipulated, *inter alia*, that the cited meter buildings are on mine property subject to the Act; WNG owns, operates and has sole access to, and control of, the cited meter buildings; the cited meter buildings are within a reasonable proximity to walkways, roads and/or parking facilities; there were no signs prohibiting smoking or open flames posted on the outside of the cited meter buildings at the time the citations were issued; and such signs were posted on the cited meter buildings on or before the day following the issuance of the citations.

Although WNG disagrees with the degree of the explosive hazard posed by the cited pipeline buildings because natural gas is lighter than air and purportedly rapidly dissipates in the atmosphere,[1] WNG agrees that there are no disputed issues of fact with regard to the descriptive language contained in Citation Nos. 4363655 and 4357036. (Resp.'s Opp., p.1). Consequently, the parties have filed cross motions for summary decision on the jurisdictional question of whether the respondent, as an independent contractor, is an "operator" subject to the jurisdiction of the Mine Act.

Statement of the Case

The undisputed condition cited in Docket No. CENT 96-124-M that serves as the basis for the alleged violation of section 56.4101 is detailed in Citation No. 4363655 issued at the Independence Quarry and Mill on January 23, 1996. Citation No. 4363655 states:

> There were NO signs prohibiting smoking or open flames posted on any of the (4) natural gas pipe line buildings located in the north east center of the mill. The (2) n.w. central meter houses were under the sole control of the independent contractor. The (2) n.w. central meter houses contained the main 8" natural gas pipe intake values and controls. There was dryed vegetation and other combustibles in and around the buildings. The meter houses were approximately 10 foot from a walk way and road way warning signs are needed and required to be posted to warn persons that smoking and open flame is not allowed in the main 8" natural gas pipe line buildings.

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[1] The likelihood of explosion is not in issue because the the violations in question have been designated as nonsignificant and substantial.

The undisputed condition cited in Docket No. CENT 96-158-M that was deemed to constitute a violation of section 56.4101 is contained in Citation No. 4357036, issued at the Monarch Cement Company on April 4, 1996. Citation No. 4357036 states:

> There were NO signs prohibiting smoking or open flames posted on any of the (2) natural gas pipe line buildings located in the southwest end of the employees' west parking Lot. The (2) buildings are under the sole control of the independent contractor. There was a person observed smoking in the area at the time of inspection. There are employee cars and trucks parked next to the pipe line, approximately 5' from it. Persons that [are] smoking and open flames [are] not allowed in the (8") natural gas pipe line area.

Conclusions of Law

The issue for summary disposition is whether WNG is an "independent contractor" within the meaning of the statutory definition of "operator" in section 3(d) of the Act. In addressing this jurisdictional issue, it is noteworthy that the predecessor legislation to the current Mine Act, known as the Federal Coal Health and Safety Act of 1969, 30 U.S.C. § 801 et seq., defined "operator" as "any owner, lessee, or other person who operates, controls or supervises a coal mine." Section 3(d) of the current Mine Act, adopted in 1977, expanded the definition of "operator" to include "any independent contractor performing services or construction at such mine." 30 U.S.C. § 802(d). Thus, the controlling question is whether WNG's provision of natural gas through its meter buildings and pipeline facilities located on mine property constitutes the requisite "performance of services" at a mine by an independent contractor to subject WNG to Mine Act jurisdiction.

The Federal Courts have had varying interpretations of the applicability of the expanded scope of the 1977 Act. Thus, the respondent, in its November 8, 1996, Motion for Summary Decision, urges me to adopt the more restrictive approaches with respect to Mine Act jurisdiction taken by the Third and Fourth Circuits. National Indus. Sand Ass'n v. Marshall, 601 F.2d 289 (3rd Cir. 1979) and Old Dominion Power Company v. Sec'y of Labor & FMSHRC, 772 F.2d 92 (4th Cir. 1985).

In National, the Third Circuit held dredging contractors to be "operators" subject to the Act. However, the court suggested there may be a point where an independent contractor's contact with a mine "is so infrequent or *de minimis*" that it would be difficult to find the requisite "performance of services" at a

mine in order to qualify as section 3(d) "operators." 601 F.2d at 701. Consistent with the Third Circuit's concerns, in Old Dominion, the Fourth Circuit concluded only those independent contractors involved in mine construction or the extraction process, and who have a "continuing presence" at the mine, should be considered as "operators." 772 F.2d at 97. Thus, the court determined an electric utility's meter reader, who briefly entered the premises approximately once each month, had contacts that were "so rare and remote from the mine construction or extraction process [that the utility did] not meet [the statutory] definition of 'operator'." Id. at 96, 97. Here, relying on the Old Dominion criteria, WNG argues that it is not involved in the extraction process and that it lacks a continuing presence at the subject mines. Thus, WNG asserts it, like Old Dominion Power Company, is a utility immune from Mine Act jurisdiction because it lacks a continuing presence at the cited mine facilities.

On the other hand, the Secretary, in his November 19, 1996, Cross Motion for Summary Decision, relies on the D.C. Circuit's decision in Otis Elevator Co. V. Sec'y of Labor, 921 F.2d 1285 (D.C. Cir. 1990), that broadened the Act's jurisdiction over independent contractors. In Otis Elevator, the D.C. Circuit examined the legislative history and intent of the 1977 Mine Act and concluded section 3(d) was written to be inclusive in order to encompass "any independent contractor performing services at a mine." Id. at 1290. The Secretary's cross motion also briefly referred to a recent Tenth Circuit decision, released on November 5, 1996, that followed the Otis Elevator approach of expanded contractor liability under the Act. Joy Technologies Inc. v. Sec'y of Labor, 99 F.3d 991 (10th Cir. 1996), aff'g Joy Technologies, Inc., 17 FMSHRC 1303 (August 1995).

Joy Technologies involved a company that sold and delivered a continuous miner to a mine operator in Gunnison County, Colorado in April 1992. During 1992 Joy's service representative visited the mine facility at least five times and performed a variety of services including ensuring that Joy's equipment was delivered in proper condition, advising and assisting in repairs, and procuring necessary replacement parts. Joy was held accountable under the Act after an MSHA inspector observed Joy's service representative maneuver the continuous miner in a hazardous manner.

Joy argued it did not meet the requirements for operator status under section 3(d) because it was neither sufficiently engaged in the extraction process, nor continuously present at the mine. 99 F.3d at 999. The Tenth Circuit, in concluding that these two circumstances did not exclude Joy from the definition of "an operator" under the Act, explicitly declined to adopt the restrictive Old Dominion approach. Id. Rather, the Tenth Circuit agreed with the D.C. Circuit's Otis Elevator opinion,

stating that "we think the definition of 'operator' in section 3(d) of the Mine Act is clear and means just what it says — an operator includes any independent contractor performing services . . . at [a] mine." Id.

The mine sites in these proceedings are located in the State of Kansas, within the appellate jurisdiction of the Tenth Circuit. Thus, I view the Tenth Circuit Joy Technologies decision, rather than the Old Dominion case, as the controlling case law on the instant jurisdictional question. Consequently, on December 5, 1996, I issued an Order requiring the parties to address the applicability of the Court's Joy Technologies case to the jurisdictional issue in these proceedings. The respondent's supplemental motion was filed on December 30, 1996. The Secretary's supplemental brief was filed on January 6, 1997.

Ordinarily, a threshold question would arise concerning whether the services provided to the mine operators by WNG are meaningful enough to qualify WNG as an independent contractor under the Mine Act. However, WNG undisputedly maintains meter buildings and pipeline facilities on mine property through which it provides natural gas energy to mine operators. Consequently, WNG, in its supplemental motion, admits that it is an independent contractor. Thus, on the basis of these facts alone, under Joy Technologies, WNG is an "independent contractor . . . performing services at [a] mine. 99 F.3d at 1000. WNG, therefore, is an "operator" subject to the jurisdiction of the Mine Act. Id.

The Joy Technologies and Otis Elevator decisions are consistent with Congress' intent to liberally construe the Mine Act in order to broaden its scope and accomplish its goal of protecting miner safety and health. Secretary of Labor v. Cannelton Industries, 867 F.2d 1432 (D.C. Cir. 1989). However, notwithstanding the broad approach to independent contractor liability, WNG attempts to distinguish itself from Joy Technologies by emphasizing that the Tenth Circuit predicated Joy's independent contractor status "not on the existence of a service contract or control, but on the performance of significant services at the mine." 99 F.3d at 999. Thus, WNG argues that, unlike Joy, it does not perform significant services at the cited mines.

WNG's assertion that its provision of natural gas through its pipeline facilities is not a significant service, because WNG has no "continuing presence" at the subject mines, is unpersuasive. At the outset, I note the question of "significant service" must be viewed qualitatively rather than quantitatively. The provision of mining equipment by Joy, as well as the provision of natural gas by WNG as fuel for mining operations, are significant, if not indispensable, services that are fundamental to the extraction process.

Moreover, even if the term "significant service" is viewed quantitatively, WNG has a continuing presence on mine property by virtue of its constant provision of its natural gas product. In this regard, its pipeline facilities, located on mine property, are under the exclusive control of WNG. These facilities require periodic maintenance and oversight by WNG personnel. Such a presence far exceeds the degree of contact manifested by the five visits per year by Joy's service representative that was deemed "significant service" by the Tenth Circuit. Thus, WNG's provision of natural gas through its on-site facilities constitutes the performance of "significant services at the mine" under section 3(d) under either a quantitative or a qualitative analysis.

Finally, WNG argues that, even if it is subject to the Mine Act, the Department of Transportation (DOT) regulations governing gas pipelines in 49 C.F.R. Parts 191 and 192 should take precedence over MSHA's mandatory safety and health standards. It is not uncommon for federal safety standards promulgated by different executive departments to overlap. For example, safety defects on haulage vehicles observed on mine property may constitute violations of MSHA as well as DOT safety standards. In the final analysis, the purpose of the Mine Act is to protect the safety of the nation's miners. While the cited violations were characterized as nonsignificant and substantial, in the unlikely event of an explosion, mine personnel are the potential victims.

WNG has cited no legislative history or case authority to support its assertion that MSHA's mandatory safety standards are preempted by DOT regulations. Although section 4(b)(1) of the Occupational Safety and Health Act, 29 U.S.C. § 653(b)(1), precludes OSHA from promulgating or enforcing occupational safety and health standards for particular working conditions when another federal agency exercises statutory authority over those working conditions, the Mine Act does not contain an analogous preemption provision. Columbia Gas of Pennsylvania, Inc. v. Marshall, 636 F.2d 913 (3rd Cir. 1980). Moreover, DOT has not exercised its authority with respect to the violative conditions cited by MSHA in these matters. Consequently, in the absence of a specific statutory preemption, there is no support for WNG's contention that 49 C.F.R. § 192.751 of DOT's regulations preempts MSHA enforcement.[2]

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[2] Section 192.751 of DOT's regulations requires warning signs on potentially explosive gas line facilities.

Accordingly, WNG is an independent contractor performing services on mine property. As such, WNG is an "operator" as contemplated by section 3(d) that is subject to the jurisdiction of the Act. The parties have stipulated to the fact of occurrence of the cited violations that have been designated as nonsignificant and substantial in nature. Consistent with the penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), I conclude that the $119.00 total civil penalty sought to be imposed by the Secretary, consisting of $69.00 for Citation No. 4363655 in Docket No. CENT 96-124-M, and $50.00 for Citation No. 4357036 in Docket No. CENT 96-158-M, is appropriate.

ORDER

In view of the above, the respondent's Motion for Summary Decision **IS DENIED**. The Secretary's Cross Motion for Summary Decision **IS GRANTED**. **IT IS ORDERED** that Citation No. 4363655 in Docket No. CENT 96-124-M, and Citation No. 4357036 in Docket No. CENT 96-158-M, **ARE AFFIRMED**. **IT IS FURTHER ORDERED** that Williams Natural Gas Company shall pay $119.00 in satisfaction of the citations in issue within 30 days of the date of this Decision. Upon timely receipt of payment, these cases **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

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FEB 11 1997

UNITED MINE WORKERS OF AMERICA ON BEHALF OF WILLIAM KEITH BURGESS, GLENN LOGGINS, AND DAVID MCATEER, Complainants	:	DISCRIMINATION PROCEEDING Docket No. SE 96-367-D JWR No. 4 Mine
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), MICHAEL J. LAWLESS, FRANK YOUNG, and JUDY MCCORMICK Respondents	:	
UNITED MINE WORKERS OF AMERICA ON BEHALF OF B. RAY PATE, the LOCAL UNION 8982 SAFETY COMMITTEE and others, Complainants	:	DISCRIMINATION PROCEEDING Docket No. SE 97-18-D BIRM CD 96-07
v.	:	U.S. Steel Mining Corp. Concord Prep Facilities
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), TOM MEREDITH, MICHAEL J. LAWLESS & FRANK YOUNG, Respondents	:	

ORDER OF CONSOLIDATION AND DISMISSAL

Before: Judge Bulluck

I. Motion to Consolidate

In these discrimination cases brought by the United Mine Workers of America ("UMWA") against the Mine Safety and Health Administration ("MSHA") and individual MSHA employees pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. section 801 et seq., the Respondent has

moved to consolidate and dismiss the complaints. [1]/ Inasmuch as the complaints involve resolution of the same legal issue, and the motion to consolidate is unopposed by the Petitioner, the motion is granted. For the reasons set forth below, the motions to dismiss the complaints are, likewise, granted.

II. Motions to Dismiss

The Secretary of Labor ("Secretary") moved to dismiss the complaints, essentially arguing that there is no cause of action against MSHA or its employees under section 105(c) of the Act. In support of his position, the Secretary cites the Commission's decision in Wagner v. Pittston Coal Group, 12 FMSHRC 1178 (June 1990), and the decision of the Court of Appeals for the Fourth Circuit ("the Court") in Wagner v. Secretary of Labor, No. 91-2025, 1991 U.S. App. LEXIS 26336, at *1 (4th Cir. Nov. 5, 1991), aff'g by unpublished decision 12 FMSHRC 1178 (June 1990). [2]/

In Docket No. SE 96-367-D, under the circumstances set forth below, the complainants seek to hold MSHA and MSHA employees liable for violations of sections 103(g) (in pertinent part, requiring the Secretary to delete the names of individual miners from copies of written complaints provided to operators), and 105(c)(1) of the Act (protecting miners who have engaged in protected activity from discrimination). [3]/ On or about May 24, 1996, the chairman of Local 2245's safety committee David McAteer, along with committee members William Keith Burgess and Glenn Loggins, sent a letter to MSHA District 11 manager, Michael Lawless, complaining of safety violations at the Jim Walter Resources' #4 mine and MSHA's continual grant of extensions of scheduled mine inspections. Subsequently, at an accident

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[1]/ Although the UMWA filed its complaint (Docket No. SE 97-18-D under section 105(c)(2), it is clear from the pleadings that it intended to sue under section 105(c)(3), which procedural error is without prejudice to the Secretary, and is therefore deemed immaterial.

[2]/ Dennis Wagner sought to hold MSHA employees liable for disclosing to the operator that he (Wagner) had reported a safety violation to MSHA during a mine inspection.

[3]/ Because these cases are before me pursuant to motions to dismiss, the complainants' allegations are treated as true. Goff v. Youghiogheny & Ohio Coal Co., 7 FMSHRC 1776 (November 1985).

investigation team pre-inspection meeting held at the mine site, attended by MSHA supervisors and inspectors, the mine manager and some of his subordinates, and McAteer and Burgess, a sanitized, typed version of the letter was distributed, omitting all names and references to individual miners. However, MSHA supervisor Judy McCormick verbally chastised McAteer and Burgess for their criticisms of MSHA, thereby disclosing the identity of the complainants to Jim Walter Resources management.

In Docket No. SE 97-18-D, the following circumstances gave rise to the allegation of liability of MSHA and MSHA employees for violations of section 105(c)(1) of the Act. Pursuant to various safety and health concerns raised during the spring/summer of 1996 by UMWA representatives, including Local Union 8982 president B. Ray Pate, on or about August 9, 1996, MSHA District 11 manager Michael Lawless and assistant district manager Frank Young met with UMWA representatives, including Pate, to discuss the union's complaints about MSHA District 11 staff and enforcement problems at the mines within District 11. Thereafter, on or about August 11, 1996, MSHA informed Pate that MSHA District 11 supervisor Tom Meredith would be requiring all miners at the U.S. Steel Concord Preparation Plant and associated facilities, including the local union officials and its members, to file health and safety complaints in writing by hand-delivery. This policy discontinued MSHA's previous policy of accepting complaints made by telephone to the District 11 office. Consequently, on September 19 and 25, 1996, the UMWA filed a section 105(c) complaint against MSHA employees Meredith, Lawless and Young, charging the District 11 personnel with disclosing to mine management the identity of the complaining miner representative, seeking employment with the company, and conducting negligible enforcement action at the mine. By letters dated September 23 and October 9, 1996, MSHA rejected the UMWA's complaint.

Proceedings against MSHA

In Wagner, the Commission held that ". . . MSHA is not a 'person' subject to the provisions of Section 105(c)", and dismissed the complaint that had been brought against the agency. Wagner, 12 FMSHRC at 1185. See also Nelson v. Secretary of Labor, 14 FMSHRC 337 (February 1992) (Administrative Law Judge's dismissal of the UMWA's complaint against MSHA, pursuant to the Commission's holding in Wagner).

The Commission approached the issue of MSHA's liability by analyzing the construction of the Act to determine whether the

Secretary had consented to be sued. First, in examining the words of sections 105(c) and 3(f)(defines "person" as any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization), the Commission found no reference to the government or any governmental entity in the term "person," and relied on a principle of statutory construction that common usage of "person" does not include the sovereign, and statutes using the term are ordinarily construed to exclude it. Wagner, 12 FMSHRC at 1184. In determining that there is no waiver of sovereign immunity in the Act, the Commission cited Rushton Mining Co. v. Secretary of Labor, 11 FMSHRC 759, 766 (May 1989), noting that "it is well settled that the United States, as the sovereign, is immune from suit except as it consents to be sued and that waivers of its immunity must be unequivocally expressed." Wagner, 12 FMSHRC at 1184. Consequently, the Commission concluded that, "the definitions set forth in the Act and the enforcement scheme of section 105(c) indicate that Congress regarded the Secretary and MSHA as separate and distinct from the population covered by the term 'person.'" Id. at 1185.

The complainants argue that Wagner is not applicable to the instant proceedings, in that section 103(g)(1) of the Act does not accord protection to miners who make oral complaints as in Wagner, whereas protection is accorded to the written complaints herein at issue. This argument is unpersuasive, since the language of the Act makes no such distinction, nor would such an interpretation of section 103(g)(1) be consistent with the broad protection against discrimination provided to complainants in section 105(c). While the narrow scope of section 103(g)(1) specifically prescribes procedures by which the Secretary shall maintain the confidentiality of complainants who raise health and/or safety violations in writing, the broad language of section 105(c)(1) clearly expresses Congressional intent that the universe of protected activity be inclusive of oral and written complaints: "[n]o person shall . . . in any manner discriminate against . . . any miner . . . because such miner . . . has filed or made a complaint . . . . (emphasis added)" 30 U.S.C. section 815(c)(1). [4]/

Moreover, the issue of MSHA's sovereign immunity from 105(c) liability was not before the Court in Wagner, and the Court affirmed the Commission's decision which held, in part, that

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[4]/ According to the pleadings, the Secretary did comply with section 103(g)(1), in that the letter that had been sent to MSHA had been sanitized to remove all names and references to individual miners before dissemination at the accident investigation team pre-inspection meeting.

MSHA, having not expressly waived its sovereign immunity, is not a "person," as included in section 105(c). Accordingly, as the Commission decision remains the prevailing law, it is concluded that MSHA is not a "person" subject to liability under section 105(c) of the Act, and that portion of the complaints, herein seeking relief against MSHA for alleged violations of sections 103(g)(1) and 105(c) of the Act, is hereby dismissed.

Proceedings against Individual Employees of MSHA

The Commission's holding in Wagner, that "MSHA employees and agents are not 'persons' subject to the provisions of section 105(c), and thus . . . cannot be sued individually under section 105(c)," Wagner, 12 FMSHRC at 1185, was premised upon its conclusion that, had Congress intended to render MSHA employees susceptible to section 105(c) suits, it would have expressly stated so; moreover, to hold otherwise would run afoul of the enforcement scheme of section 105(c) respecting MSHA's investigatory role/authority, as well as relief awarded and sanctions imposed for violations. Id. at 1185, 1186. This holding was upheld by the Court in Wagner, which concluded that "[f]inding no indication in the statutory framework of an intent by Congress to depart from the accepted usage of the term 'person,' . . . MSHA employees acting within the scope of their authority are agents of the sovereign, and therefore cannot be liable under section 105(c)." Wagner, at *6.

The complainants' argument that the rules of *respondent superior* under Alabama state law apply to the facts herein at issue is equally unpersuasive since, as the Commission recognizes, the cause of action, if any, does not arise under the Act. [5]/ In concluding that it finds no cause of action under section 105(c) for abuse of power by MSHA employees, the Commission notes "that an employee whose action is in violation of his or her duties is not immune from civil suit and possible punitive action. It is well settled that individuals wronged by federal agents through abuse of their power may have a cause of action for damages under state law." Wagner, 12 FMSHRC at 1186. See also Wagner, 1991 U.S. App. LEXIS 26336, at *7 (the Court recognized that claims of injury resulting from the wrongful acts or omissions of government employees acting within the scope of

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[5]/ Respondent superior: literally meaning "let the master answer," this maxim means that a master is liable in certain cases for the wrongful acts of his servent, and a principal for those of his agent. Black's Law Dictionary 1311, 1312 (6th ed. 1990).

their employment are properly brought under the Federal Tort Claims Act, and analyzed according to the rules of *respondent superior* in the state wherein the alleged wrong occurred).

In an alternative analysis, subjecting section 105 provisions to Virginia rules of *respondent superior*, the Court then examined the alleged misconduct of the MSHA employee in the case before it, and characterizing that behavior as an exercise of "poor judgment," concluded that "[i]n the absence of a statutory prohibition against such disclosure, there is no sound basis for the court to conclude that Inspector Sloce exceeded the bounds of his statutory authority by communicating Wagner's identity to Wayne Fields and Clinchfield Coal." Id. at *6, *7. The Court did not address the question of whether MSHA employees acting outside the scope of their authority are subject to suit under section 105(c), and it is unnecessary to pursue that question here, since I find nothing in the behavior of the MSHA employees in question which is materially distinguishable from the conduct in Wagner, or which would lead me to conclude that these individuals acted outside the scope of their authority. Finally, the Court made clear that it was rejecting a conclusion that Congress intended for section 105 enforcement procedures to be governed by applicable state rules of *respondent superior* under the Federal Tort Claims Act, Id. at *7, and the Court's reasoning is equally valid against the complainants' arguments in the instant complaints.

Accordingly, as held by the Commission in Wagner, and affirmed by the Court, MSHA employees cannot be sued individually under Section 105(c), and that portion of the instant complaints alleging liability of MSHA employees under 105(c) is dismissed. [6]/

Jacqueline R. Bulluck
Administrative Law Judge

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[6]/ Inasmuch as the Court's holding in Wagner is based on the sovereign immunity of MSHA and its employees, neither expressly waived by statutory construction nor legislative intent, it is unnecessary to address the remaining arguments.

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FEB 13 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 96-222-M
Petitioner	:	A.C. No. 08-00768-05519
v.	:	
	:	Fort Green
IMC-AGRICO COMPANY,	:	
Respondent	:	

DECISION

Appearances: Sharon D. Calhoun, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for Petitioner;
Patrick S. Casey, Esq., Sidley & Austin, Chicago, Illinois, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against IMC-Agrico Company (IMC) pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges two violations of the Secretary's mandatory health and safety standards and seeks a penalty of $8,000.00. For the reasons set forth below, I vacate one citation, affirm the other and assess a penalty of $500.00.

A hearing was held on November 6, 1996, in Bartow, Florida. In addition, the parties have submitted post-hearing briefs in this matter.

Background

IMC is the owner and operator of the Fort Green phosphate mine in Polk County, Florida. Phosphate is mined by 26 draglines which dig it up and unload it into a pit where it is mixed with water. The resulting mixture, called "slurry" or "matrix," is then pumped through pipes to the processing plant where it ultimately becomes fertilizer. The draglines, which have 60-yard buckets, and the pumps are electrically powered.

Because the phosphate rock is in veins of five or six feet in depth, the draglines have to be moved as the vein is followed. This in turn requires that the power lines, cables, pumps and power line poles be moved. The power lines and pumps are moved on a daily basis by electricians and linemen. The electricians are generally responsible for the power cables on the ground and the linemen take care of the power lines overhead.

On September 12, 1995, Jennings O. Gainer had been a lineman for 30 years and had worked as a first class lineman for IMC for 14 years. On that date, he was assigned to assist some electricians in attaching power cables from a pump to a disconnect switch on a power pole. To accomplish this, he placed a closed, six-foot, fiberglass, step ladder against the pole and climbed to the top of it. He then pulled himself up onto the cross arm of the pole, stood up, grabbed the ground wire with his right hand and the far left phase wire with his left hand. He was not using hot line tools. His actions resulted in his being electrocuted.

MSHA Inspector Donald Collier and his superior, Supervisory Inspector Harry L. Verdier, were assigned to investigate the fatal accident. They arrived at the mine on September 14, 1995. After interviewing witnesses and viewing the scene, four citations were issued, two of which are involved here.

Both citations state that:

> A fatal accident occurred at this operation on September 12, 1995, at about 6:10 p.m. when an employee contacted an energized 4160 volt power conductor. The employee attempted to climb on the cross arm of the power pole at the No. 4 matrix lift pump, No. 8 dragline side in order to connect the switch gear conductors to the knife blade disconnects on the power pole cross arm.

The first citation, No. 4301373, alleges a violation of section 56.12017 of the Secretary's Regulations, 30 C.F.R. § 56.12017, because "[t]he power circuit was not de-energized and locked out and hot line tools were not being used." (Govt. Ex. 1.) The second citation, No. 4301374, asserts a violation of section 56.1101, 30 C.F.R. § 56.1101, since: "Safe access was not provided. A 6 foot fiberglass step ladder leaned against the power pole had been used. The lower cross arm was about 11 feet above the ground. A bucket truck was available at the site but was not used." (Govt. Ex. 2.)

Findings of Fact and Conclusions of Law

Citation No. 4301373

Section 56.12017 provides, as pertinent to this case, that "[p]ower circuits shall be deenergized before work is done on such circuits unless hot-line tools are used . . . . Switches shall be locked out or other measures taken which shall prevent the power circuits from being energized without the knowledge of the individuals working on them . . . ." Everyone agrees that

the power line which caused Mr. Gainer's death was not de-energized and that he was not using hot-line tools. Thus, the parties argue that the issue is whether he was working "on" a "power circuit." The company contends that he was not because attaching the cables from the lift pump to the knife blade switch[1] should only have required him to attach the cables to the de-energized, bottom part of the switch. On the other hand, it is the Secretary's position that "on" in the regulation means in close proximity to an energized circuit.

IMC's interpretation of the regulation is too constricted. I find that the facts in this case do comprise a violation of section 56.12017, but not for the reasons advanced by the Secretary.

If there is any doubt as to whether a regulation provides "adequate notice of prohibited or required conduct, the Commission has applied an objective standard, i.e., the reasonably prudent person test." *BHP Minerals International Inc.*, 18 FMSHRC 1342, 1345 (August 1996). That test is "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990)." *Id.*

The regulations do not define the term "power circuit." According to the *DMMRT*, the word "power," in connection with electricity, is "[u]sed to indicate the electric current in a wire . . . ." *DMMRT* at 855. It defines the word "circuit" as: "A conducting part or a system of conducting parts through which an electric current is intended to flow." *Id.* at 210. Thus, a "power circuit" is a conducting part or a system of conducting parts through which electric current is flowing. This comports with the definition of "power circuit" offered by the Respondent's expert, Stanley S. Burns, at the hearing. He stated: "An electric circuit requires a conductor, some type of loads, pump. That's an electric circuit where the current flows." (Tr. 228.)

Where the company's argument fails, however, is in its attempt to limit application of the regulation to only those circuits through which current is flowing. Burns testified that a circuit with an open switch is no longer a power circuit because it would not have current flowing through it. In such a situation, the company maintains that the regulation does not apply because work on a circuit with an open switch would not be work on a power circuit. Such an interpretation nullifies the purpose of the regulation, which is to prevent miners from being electrocuted.

Following IMC's argument to its logical conclusion would mean that anytime a power circuit had a switch in it, the regulation could be avoided by opening the switch. However, one of the ways that the regulation prevents electrocution is by requiring that a switch be locked out

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[1] A knife blade switch is one "which opens or closes a circuit by the contact of one or more blades between two or more flat surfaces or contact blades." Bureau of Mines, U.S. Department of Interior, *A Dictionary of Mining, Mineral, and Related Terms* 614 (1968) (*DMMRT*).

to "*prevent the power circuits from being energized without the knowledge of the individuals working on them.*" Merely opening a switch would not serve this function. Accordingly, I conclude that a reasonably prudent person familiar with the mining industry would recognize that the term "power circuit" in the regulation means an electrical circuit which is capable of having current flow through it and that to work on such a circuit, the circuit must be de-energized and locked out.

Therefore, I find that Gainer was assigned to work on a power circuit within the meaning of the regulation, even though it was not energized because the knife blade switch was open. If he had remained below the open switch to connect the cable, as the job was normally performed, he probably would not have been electrocuted.[2] However, the facts of this case are that Gainer did not remain below the open switch, but climbed above it. Even the company's expert witnesses agreed that to go where Gainer went the whole system should have been de-energized.[3] Since it was not, I conclude that the company violated the regulation.

In reaching this conclusion, I am aware no one in authority had any idea that Gainer would climb up on the cross member to attach the cable and, indeed, could not reasonably have been expected to anticipate that he would do such a foolish thing. However, "the Mine Act clearly contemplates that a violation may be found where the wrongful act is performed by someone other than the operator." *Western Fuels-Utah, Inc. v. FMSHRC*, 870 F.2d 711, 716 (D.C. Cir. 1989). Thus, "the Act's scheme of liability provides that an operator, although faultless itself, may be held liable for the violative acts of its employees . . . ." *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1359 (September 1991). *Accord Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1115 (July 21, 1995). Consequently, IMC is liable for Gainer's failure to de-energize the system before climbing onto the cross member.

Significant and Substantial

The Inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

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[2] No evidence was presented as to whether the switch was locked out or not.

[3] Lee Barnes, the electrical instrumentation supervisor at Fort Green, in response to a question as to whether the system would have to be de-energized if someone was going to climb up on the cross member of the pole, stated, "[y]es, it would." (Tr. 215.) Mr. Burns, in response to a question whether he would de-energize the line coming into the top of the switch if he were climbing up on the cross bar, said, "[y]es, I would." (Tr. 250.)

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); Austin *Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

There can be little doubt that this violation was S&S. "Clearly, it was a significant contributing cause to the fatal accident." *Walker Stone Company, Inc.*, 16 FMSHRC 48, 53 (January 31, 1997). Accordingly, I conclude that the violation was "significant and substantial."

Negligence

The inspectors concluded that this violation resulted from "moderate" negligence on the part of the operator. They concluded this because Barnes closed the circuit breaker which energized the circuit and he did not instruct Gainer to make sure he used the bucket truck because the circuit was energized. Supervisor Inspector Verdier testified:

> Well, we felt after the statement that Mr. Barnes made that he wasn't sure, but felt he was the one who threw the breaker that really energized the line.
>
> Also, we didn't feel that Mr. Barnes probably told Mr. Gainer to take the bucket truck and go down there and help them and make sure you use the bucket truck and use your hot line tools. We just didn't feel there was enough instructions given.

(Tr. 92.)

The evidence does not support the inspectors' feelings. The Secretary has not shown that the operator did anything that a reasonably prudent person would not have done, or failed to do anything that a reasonably prudent person would have done. Consequently, I conclude that the operator was not negligent in this case.

The evidence is clear that Gainer was negligent, indeed, that he acted with reckless disregard. However, since Gainer was not in a supervisory position, his negligence cannot be directly imputed to the operator. *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (March 1988); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1982). Further, the evidence is uncontroverted that IMC's supervising, training and disciplining of its employees was more than adequate. Finally, no supervisor was present when the violation was committed. *Cf. Midwest*

Material Co., 19 FMSHRC 30, 35 (January 21, 1997) (foreman watched the violation being committed by an employee).

There is no evidence to support the inspectors' apparent assumption that Gainer was not aware that the power line was energized. Their accident report states that at the No. 716 substation, Gainer:

> removed his grounding jumpers and tag, then closed the disconnects above the circuit breaker.
>
> Lee Barnes, electrical foreman, who was also at the substation, instructed Gainer to return to the No. 4 matrix lift pump location with the bucket truck to assist in connecting the conductors to the bottom of the disconnects, since all that was available at the pump was a six foot step ladder. Barnes then closed the circuit breaker for Circuit A, energizing the power line, and Gainer left the substation.

(Govt. Ex. 8, p. 2.)

If this were the only evidence available, it would be unreasonable to conclude that Gainer, a lineman with 30 years experience, the last 14 of which had been at Fort Green, did not know that when he removed his jumpers and tag and closed the disconnects that the line was going to be energized. Or that he did not see Barnes close the circuit breaker. Or that telling him to take the bucket truck to assist in connecting the conductors to the disconnects because *all that was available was a six foot step ladder*, did not put him on notice that the bucket truck should be used to make the connections.[4] But this was not all of the evidence presented at the hearing.

Barnes testified that he told Gainer that he was going to close the circuit breaker and that Gainer acknowledged that he heard him. He further testified that when he closed the circuit breaker it made a "loud, mechanical-type noise" like the "[s]lamming together of contacts" and that Gainer was present when that occurred. (Tr. 200.) Barnes related that he then "asked him to take the bucket truck to assist in hooking up the rouser wires because my electricians could not reach the disconnects off of the step ladder." (Tr. 201.) He said he told Gainer to take the bucket truck "[b]ecause we couldn't reach them off the step ladder. That was the best way of getting the height we needed to hook the wires up." (*Id.*) This testimony was corroborated by Myers, who was also present at the time.

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[4] Robert E. Myers, Electrical and Instrumentation Superintendent, stated that while electricians normally connected the leads to the disconnect switch from a six-foot step ladder, "on the higher ones the line crew does." (Tr. 169-70.) In other words, the linemen were used when the connections could not be made from a ladder, but necessitated the use of a bucket truck.

Based on this evidence, I find it inconceivable that Gainer, an experienced lineman, did not know that the system had been energized or that he was supposed to use the bucket truck, which was insulated, to attach the cables to the disconnect. No one knows why he did not make the connections from the bucket truck the way he had hundreds of times in the past. Witnesses at the scene testified that there was no reason the truck could not have been used. Whatever reason Gainer decided to park the truck and climb up a ladder which he already knew was too short, and which he verified when he climbed up it, it was not the result of any negligence on the part of the operator.

I find that the operator, through Barnes, exercised diligence and could not have known what Gainer was going to do. Therefore, I conclude that there was no negligence on the part of IMC.

Citation No. 4301374

Section 56.1101 states that "[s]afe means of access shall be provided and maintained to all working places." Because this regulation is found under the general heading "Travelways," the Respondent argues that the citation should be vacated because the facts do not meet the regulations' definition of travelways. This argument is not persuasive. However, I conclude that the Secretary has not shown that the company failed to provide a safe means of access in this case.

Section 56.2 of the Regulation, 30 C.F.R. § 56.2, defines "travelway" as "a passage, walk or way regularly used and designated for persons to go from one place to another." The company maintains that a travelway is not involved here because the ladder, the pole and the cross member were not regularly used and designated for persons to go from one place to another. In the first place, not all of the regulations found in Subpart J, "Travelways," involve travelways. *See e.g.*, 30 C.F.R. § 56.11003 (Construction and maintenance of ladders), 30 C.F.R. § 56.11007 (Wooden components of ladders), 30 C.F.R. § 56.11027 (Scaffolds and working platforms). In the second place, it is undisputed that at the Fort Green mine a six foot step ladder is a way regularly used and designated for electricians to connect leads from the disconnect switch on an electrical pole. (Tr. 170.) Accordingly, I conclude that the regulation does apply to these facts.

That does not mean, however, that the company violated the regulation. The Commission, in construing identically worded regulations, has held that:

> the standard requires that each "means of access" to a working place be safe. This does not mean necessarily that an operator must assure that every conceivable route to a working place, no matter how circuitous or improbable, be safe. For example, an operator could show that a cited area is not a "means of access" within the meaning of the standard, by proving that there is no reasonable possibility that a miner would use the route as a means of reaching or leaving a workplace.

Homestake Mining Company, 4 FMSHRC 146, 151 (February 1982); *The Hanna Mining Company*, 3 FMSHRC 2045, 2046 (September 1981).

IMC provided two means of access to the electricians and linemen attaching leads to disconnect switches, a six foot step ladder and a bucket truck. In connection with the use of the ladder, the company's *Safety Manual* required that the step ladder be fully open and the spreader bars locked into place, that a safety belt be used when working at heights above eight feet and that the miner not climb higher than the second step from the top of the step ladder. (Tr. 160-61, Resp. Ex. A, pp. 7-8.)

Gainer was sent to assist the electricians with the expectation that he would use the bucket truck to make the connections. For reasons known only to him, he did not. Instead, he used a step ladder in its folded up position and resting against the pole. This violated the safety requirements set out above. Then he apparently attempted to pull himself up on the cross member.

The two means of access provided by the company, when properly used, were safe means of access. Gainer's method of access was highly improbable and against company rules. It was not a means of access within the standard, in fact the company's safety rules prohibited it as a means of access. Consequently, I conclude that the company did not violate section 56.11001.

Civil Penalty Assessment

The secretary has proposed a civil penalty of $5,000.00 for the violation of section 56.17012. However, it is the judge's independent responsibility to determine the appropriate amount of penalty, in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the criteria, the parties have stipulated that: the proposed penalty will not affect the operator's ability to continue in business; the operator demonstrated good faith abatement; the operator does not have an excessive history of prior violations; and, the size of the Fort Green mine is approximately 480,862 production tons or hours worked per year. (Jt. Ex. 1.) I further find that the company's history of prior violations is very good in that it had only received 11 non-S&S citations in the two years preceding the instant violation, (Govt. Ex. 10), and it had been awarded a *Certificate of Achievement in Safety* by MSHA under its *Sentinels of Safety Program* "for its outstanding safety record in 1994[,] 334,457 employee-hours worked without a lost workday injury," (Resp. Ex. C.). In addition, as discussed above, the violation was not caused by negligence on the part of the operator. On the debit side, the gravity of the violation was very serious in that it was not only "significant and substantial" but also resulted in the death of a miner.

The Secretary's proposed penalty apparently considered all of the above, except that the penalty assessment indicates that the violation resulted from the operator's moderate degree of negligence. (Govt. Ex. 9.) Taking the six criteria into consideration, including the finding of no negligence, I conclude that $500.00 is an appropriate penalty.

ORDER

Accordingly, Citation No. 4301373 is **MODIFIED** by reducing the degree of negligence from "moderate" to "none," and is **AFFIRMED** as modified. Citation No. 4301374 is **VACATED**. IMC-Agrico Company is **ORDERED TO PAY** a civil penalty of **$500.00** within 30 days of the date of this decision. On receipt of payment, this proceeding is **DISMISSED**.

T. Todd Hodgson
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 13 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 96-231-M
Petitioner	:	A. C. No. 24-02081-05503
v.	:	
	:	Wash Plant
K H CONCRETE,	:	
Respondent	:	

DECISION

Appearances: Gary L. Grimes, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, Denver, Colorado, for the Petitioner; Christopher A. Bowles, Esq., Ennis, Montana, for the Respondent.

Before: Judge Feldman

This matter was heard in Butte, Montana, on November 14, 1996. The parties' post-hearing briefs have been considered in the disposition of this proceeding. This matter concerns a petition for assessment of civil penalty filed by the Secretary of Labor against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a). The petition seeks to impose a civil penalty of $8,500.00 for an alleged violation of the mandatory safety standard in section 56.14107(a), 30 C.F.R. § 56.14107(a), for an inadequately guarded tail pulley that contributed to a serious accident on September 20, 1995. As a result of this accident the victim, Colleen Croy, sustained an amputation injury to her right arm. Section 56.14107(a) provides:

> Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury. (Emphasis added).

A. Statement of Facts

Kevin Hokanson owns and operates the Wash Plant for K H Concrete (KH), a sand and gravel facility located in a remote area in Ennis, in Madison County, Montana. At the time of

Ms. Croy's accident, KH employed approximately three full-time and six part-time employees. Two of these full time positions were held by Colleen Croy and her husband, Hue Croy.

Colleen Croy was hired by KH as a laborer on September 1, 1995. Ms. Croy generally arrived at the wash plant at 7:00 a.m. She worked alone at the remote wash plant site, ten to twelve hours per day, five days per week. Her only means of communication was her use of a two-way radio that was located in her pick-up truck. Her job duties included overseeing the complete operation of the wash plant. In this regard, she operated the front-end loader to dump extracted material into a hopper. She then monitored the material as it was transferred to a feed belt where it was conveyed to the wash plant for cleaning and separation into sand and various sizes of gravel.

Prior to the September 20, 1995, accident, KH had not filed a Legal Identity Report with the Mine safety and Health Administration (MSHA).[1] Consequently, Ms. Croy had not received MSHA approved training regarding safe work practices and hazard recognition. Thus, she was not familiar with the MSHA safety regulations that required her to de-energize the conveyor system prior to cleaning and adjusting the belts.

Ms. Croy testified that there were two tail pulleys at the plant. One of the tail pulleys was unguarded. The other tail pulley, the site of the accident, was partially guarded with a screen that did not completely cover the tail pulley. Ms. Croy did not believe it was necessary to de-energize the conveyor or remove the guarding while making adjustments on the pulleys. In fact, Ms. Croy's husband had instructed her to remove mud and debris from the tail pulleys while they were running by "banging the drum" with a wrench to dislodge dirt so that the pulleys would run smoothly.

Ms. Croy arrived at work at approximately 7:00 a.m. on September 20, 1995. She was scheduled to work alone throughout her shift. She began her daily routine of starting up the wash plant. Upon starting the conveyor, Ms. Croy noticed the belt on the trap was "walking" back and forth due to a damaged splice that allowed dirt to trickle through the belt into the tail pulley. Realizing she needed to correct the condition, Ms. Croy, holding a wrench in her right hand, began hitting the drum in an

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[1] Section 109(d) of the Mine Act provides, in pertinent part:

> Each operator of a coal or other mine subject to this Act shall file with the Secretary the name and address of such mine and the name and address of the person who controls the mine. 30 U.S. C. § 819(d).

attempt to clear the tail pulley of dirt. Ms. Croy was able to contact the drum with the wrench through an opening in the guarding screen.

As Ms. Croy leaned forward to bang on the drum, her shirt sleeve was caught by the moving damaged belt splice, pulling her right arm into the pinch point between the belt and the pulley, drawing her body up to the point where the conveyor belt was up to her neck. She reached in with her left arm in an effort to push the moving conveyor belt away from her right shoulder and face. As she withdrew her right shoulder away from the tail pulley, she realized her right arm had been severed. Ms. Croy then carried her severed arm to her pick-up. In her haste and apparent shock, she backed her pick-up truck into a pit. Realizing the truck was stuck in the pit, Ms. Croy radioed for help. Her transmission was received by a passing truck driver who radioed to his base station. The base station contacted the authorities and an ambulance was dispatched to the plant. In the meantime, Ms. Croy exited her truck, laid down on the ground, and waited for help to arrive.

In the days following this incident, MSHA received several telephone calls advising it of a serious accident that had occurred in a local gravel pit. However, as noted above, MSHA was not aware of the existence of the KH facility. After making several telephone inquiries, MSHA Inspector Seibert Smith determined the name and location of the mine where the accident had occurred.

On October 31, 1995, inspector Smith and Montana State Mine Inspector Joe Donaldson arrived at KH's plant to perform an accident investigation. As a threshold matter, Smith issued a citation, which is not in issue in this proceeding, for the failure of K H Concrete to notify MSHA of its intent to mine. A Legal Identity Report was subsequently filed with MSHA.

Ms. Croy's contact with the tail pulley damaged the existing guarding. Consequently, the guarding at the accident site had been replaced prior to Smith's arrival at the plant. Thus, Smith was unable to observe the guarding as it existed at the time of the accident. During the course of the investigation, interviews were conducted with Kevin Hokanson and Ms. Croy. Citation No. 4352245 was issued after it was determined that the tail pulley guard at the accident site, located on the feed conveyor to the wash plant, had been inadequate. The guard was inadequate because it did not extend a sufficient distance to cover the moving conveyor parts. Smith concluded that the cited violative condition was a major contributing factor in Ms. Croy's accident. In view of the severity of Ms. Croy's injury, the cited violation was characterized as significant and substantial and the gravity of the violation was considered to be serious.

Hokanson opined that the guarding at the tail pulley at the accident site was sufficient to prevent unintentional contact with moving parts that could occur as a result of stumbling or falling. However, he conceded that there was a space in the guard that would permit intentional contact of the drum with a wrench. (Tr. 111). After the accident Hokanson hired someone to install a guard to prevent any further access to moving parts. (Tr. 112).

B. Findings and Conclusions

1. Fact of Occurrence

The thrust of the respondent's defense to Citation No. 4352245 is that section 56.14107(a) is only intended to prevent unintentional contact with moving parts. Thus, the respondent argues that this mandatory safety standard is not violated in instances where guarding is deliberately circumvented to access a moving pulley, through a space in the guarding, for maintenance purposes.

Section 56.14107(a) requires guarding to protect persons from "moving [machine] parts that can cause injury." In analyzing the applicability of this safety standard the Commission, in dealing with a similar guarding standard governing underground mining, has stated:

> We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct. See, e.g., Great Western Electric, 5 FMSHRC 840, 842 (May 1983); Lone Star Industries, Inc., 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-basis. Thomas Brother Coal Company, Inc., 6 FMSHRC 2094, 2097, (September 1984).

In applying a case-by-case approach, I note that KH had three full-time employees at the time of the accident. The respondent admits that two of these employees, namely Mr. and Ms. Croy, routinely contacted the moving drum for maintenance purposes through a space in the guarding. Consequently, the respondent had constructive, if not actual, knowledge of this dangerous practice. The guarding in issue was installed in such a manner so as to permit this dangerous practice. Thus, the nature of the guarding, regardless of whether the space was intentionally left open, was tantamount to an attractive nuisance in that it encouraged, rather than prevented, contact with moving parts. A regulation must be interpreted to harmonize rather than conflict with its intended purpose. Emery Mining v. Sec'y of Labor, 744 F.2d 1411, 1414 (10th Cir. 1984). A guarding condition that facilitates such hazardous conduct is clearly a condition intended to be prohibited by the cited mandatory standard. Accordingly, the Secretary has established a violation of section 56.14107(a).

2. Significant and Substantial

A violation is properly designated as significant and substantial (S&S) in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury or an illness of a reasonably serious nature. Cement Division, National Gypsum, 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1 (January 1984) the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

Thus, a violation is properly designated as S&S if there is "a reasonable likelihood that the hazard contributed to will result in an event in which there is [a serious] injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). It is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. United States Steel Mining Company, Inc., 7 FMSHRC 1125 (August 1985) citing U.S.

Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984) and U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

Here, the hazard contributed to, and made possible by, the violation, i.e., contact with moving parts, resulted in an actual event, i.e., a serious accident. Accordingly, the propriety of the S&S designation is evident. Similarly, it is clear that the gravity of the violation was extremely serious.

3. Negligence

Under the penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), the degree of an operator's fault (negligence), or lack thereof, is a factor to be considered in assessing the appropriateness of a civil penalty. Asarco, Inc., 8 FMSHRC 1632, 1636 (November 1986). Ordinarily, the conduct of a rank-and-file miner is not imputable to the operator in determining negligence for penalty purposes. Southern Ohio Coal Co., 4 FMSHRC 1459, 1464 (August 1982). Rather, the operator's supervision, training, and discipline of the miner are the relevant factors. Id.; Western Fuels-Utah, Inc., 10 FMSHRC 256, 261 (March 1988). Thus, where supervision and training are lacking, a rank-and-file miner's negligence may be imputed to an operator.

In the instant case, the respondent cannot escape the inadequate training provided to Ms. Croy by simply explaining that the training was provided by another employee. As previously noted, the respondent's operation was not a labor intensive endeavor employing hundreds of people. Thus, Hokanson's assertion that he did not know that Ms. Croy was instructed to access the moving drum with a wrench is unpersuasive.

In any event, regardless of his actual knowledge, as the operator, Hokanson is responsible for the training of Ms. Croy. His failure to provide adequate training with regard to the hazards associated with moving conveyor parts provides a basis for the imputation of Ms. Croy's high negligence. Similarly, Hokanson's failure to adequately supervise Ms. Croy who, as a recent hire, was left alone at this remote work site, provides an additional basis for the imputation of the victim's negligence to the respondent.

Notwithstanding the high negligence imputed from Ms. Croy, Hokanson's own conduct is indicative of high negligence. Hokanson's failure to provide meaningful employee training and his lack of recognition of the hazards associated with inadequate guarding and unsafe maintenance practices constitutes aggravated and unjustifiable conduct.

4. Penalty Assessment

The Secretary proposes a civil penalty of $8,500.00 for Citation No. 4352245. In the event of liability, the respondent seeks a reduction in the proposed penalty.[2] In determining the amount of penalty to be imposed, I must consider the civil penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). This criteria includes considerations such as the appropriateness of the penalty to the size of the operator, the degree of the operator's negligence and the gravity of the violation. As noted above, the underlying degree of negligence attributable to the respondent in this matter is high. As the respondent acknowledges, it has "been made clear, through testimony and the nature of the accident, that the training offered by KH and Mrs. Croy's husband, a KH employee, . . . was not adequate." (Resp. post-hearing br. at p.8). With regard to gravity, the serious consequences of the cited violation are clear.

In mitigation, the respondent points out that KH is a very small operator located in the small town of Ennis, in southwestern Montana. Hue Croy is still employed by KH and the Croys are close family friends of the Hokansons. The families have agonized over Ms. Croy's injury and they must witness her overcoming her impairment on a daily basis.

I empathize with the emotional distress caused by this unfortunate accident. I also recognize that hazards are more easily perceived through the benefit of hindsight. However, in the final analysis, I am constrained to apply the applicable penalty criteria in section 110(i). The lack of supervision and training provided to Ms. Croy overshadows the mitigation sought by the respondent and precludes a large reduction in the proposed penalty. Accordingly, in recognition of the small size of the respondent's operation, the civil penalty proposed in this matter shall be moderately reduced to $6,500.00.

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[2] The respondent's contention that the $8,500.00 civil penalty proposed by the Secretary is high in relation to the maximum civil penalty of $10,000.00 specified in section 110(a) of the Act, 30 U.S.C. § 820(a), is misplaced. (Ex. R-1). Section 110(a) was amended in November 1990 to increase the maximum civil penalty for each violation from $10,000.00 to $50,000.00. Pub.L. 101-508, Title III, § 3102(1), Nov. 5, 1990, 104 tat. 1388-29.

ORDER

In view of the above, Citation No. 4352245 **IS AFFIRMED**. **IT IS ORDERED** that the respondent pay a civil penalty of $6,500.00 within 30 days of the date of this decision. Upon receipt of timely payment, this case **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

Distribution:

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/mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

FEB 14 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 94-1199
	:	A.C. No. 15-14959-03561
v.	:	
	:	Docket No. KENT 94-1200
BROKEN HILL MINING COMPANY, Respondent	:	A.C. No. 15-14959-03562
	:	
	:	Docket No. KENT 95-240
	:	A.C. No. 15-14959-03569
	:	
	:	Docket No. KENT 95-310
	:	A.C. No. 15-14959-03570
	:	
	:	Mine No. 3

DECISION

Appearances: Thomas A. Grooms, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for the Petitioner;
No appearance for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

These proceedings concern proposals for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a total civil penalty assessment of $26,300 for eight alleged violations of the mandatory safety standards found in 30 C.F.R. Part 75.

The respondent contested the violations and requested a hearing. Pursuant to notice, a hearing was convened in Paintsville, Kentucky, on January 9, 1997, and while the petitioner appeared, the respondent did not. In view of the respondent's failure to appear, the hearing proceeded without them. For reasons discussed later in this decision, respondent is held to be in default, and is deemed to have waived its opportunity to be further heard in this matter.

ISSUE

The issue presented in these cases is whether the petitioner has established the violations cited, and, if so, the appropriate civil penalty that should be assessed for the violations.

MSHA's CASE

The petitioner presented oral and documentary evidence on the record at the hearing through the inspectors who issued the citations and orders at bar. Based on all the evidence presented, I conclude and find that the violations have been established, and accordingly, the contested citations/orders are affirmed as issued.

RESPONDENT'S FAILURE TO APPEAR AT THE HEARING

The record in this case indicates that after numerous unsuccessful attempts to contact Mr. Hobart Anderson, the President of Broken Hill Mining Company, by telephone, to set-up a trial date in these matters, a Notice of Hearing dated December 19, 1996, setting these cases down for hearing in Paintsville, Kentucky, on January 9, 1997, was received by respondent on December 23, 1996. A green postal receipt card for certified mail is included in the record of this case.

Mr. Anderson has somewhat of a track record at the Commission for unceremoniously dropping out of participation in these cases short of their conclusion. Relatively recently, on May 3, 1996, the Commission had occasion to dismiss his appeal (direction for review vacated) in Docket No. KENT 94-972 for his failure to file a brief or proffer a reason for his failure to do so. Broken Hill Mining Co., Inc., 18 FMSHRC 679 (1996).

As previously stated above, the hearing proceeded in the respondent's absence after waiting an additional hour beyond the scheduled starting time. The Secretary put in his case and then by counsel, moved that a default judgment be entered against the respondent pursuant to Commission Rule 66(b), 29 C.F.R. § 2700.66(b),[1] and that the eight citations/orders at bar be affirmed and that the proposed civil penalty of $26,300 be assessed against the respondent.

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[1]/ 29 C.F.R. § 2700.66(b) provides as follows:
Failure to attend hearing. If a party fails to attend a scheduled hearing, the Judge, where appropriate, may find the party in default or dismiss the proceeding without issuing an order to show cause.

Under the circumstances in this record, I conclude and find that the respondent has waived its right to be heard further in this matter and that it is in default, and that the violations, as alleged, have been proven by a preponderance of the evidence, and that it is appropriate to assess the respondent the proposed civil penalty of $26,300.

ORDER

Respondent is **ORDERED TO PAY** a civil penalty of $26,300 to MSHA within 30 days of the date of this decision and upon receipt of payment, this matter is **DISMISSED**.

Roy J. Maurer
Administrative Law Judge

Distribution:

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Hobart W. Anderson, President, Broken Hill Mining Company, Inc., P.O. Box 356, Sidney, KY 41564 (Certified Mail)

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FEB 20 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 96-208-M
Petitioner	:	A. C. No. 42-01975-05522
v.	:	
	:	Docket No. WEST 96-209-M
LAKEVIEW ROCK PRODUCTS INC.,	:	A. C. No. 42-01975-05523
Respondent	:	
	:	Docket No. WEST 96-262-M
	:	A. C. No. 42-01975-05524
	:	
	:	Lakeview Rock Products

DECISIONS

Appearances: Ann M. Noble, Associate Regional Solicitor, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner; Gregory M. Simonsen, Esq., Kirton & McConkie, Salt Lake City, Utah, for the Respondent.

Before: Judge Koutras

Statement of The Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.S. § 820(a), seeking civil penalty assessments for fourteen (14), alleged violations of certain safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent filed timely answers and contests and hearings were conducted in Salt Lake City, Utah. The parties filed post-hearing briefs, and I have considered their arguments in the course of my adjudication of these matters.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Issues

The issues presented in these cases are (1) whether the conditions or practices cited by the inspectors constitute violations of the cited mandatory safety standards, (2) whether some of the alleged violations were "Significant and Substantial" (S&S), (3) whether some of the alleged violations were the result of an unwarrantable failure by the respondent to comply with the cited standards, and (4) the appropriate civil penalties to be assessed for the violations, taking into account the civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are discussed and disposed of in the course of these decisions.

Stipulations

1. The respondent stipulated that it is subject to the Mine Act, and with the exception of the violations that concerned equipment that was off mine property, the respondent did not dispute the fact that MSHA had jurisdiction to inspect its mine site (Tr. 6).

2. The parties stipulated to the admissibility of the petitioner's exhibits, marked P-1, through P-43 (Tr. 15-16).

Petitioner's Evidence and Testimony

Section 104(a) "S&S" Citation No. 3908559, August 30, 1995, cites an alleged violation of 30 C.F.R. 56.14100(a), and the cited condition or practice states as follows (Exhibit P-36; Docket No. WEST 96-262-M).

> The driver of the white water truck #20052 did not perform a proper safety inspection on the truck before placing it into service on day shift 8-30-95. The driver was not supplied with the company equipment safety check forms and the pit manager had no records for this truck in his files.

MSHA Inspector Ronald Pennington, testified that he issued the citation after the driver told him that he had not completed a safety check prior to starting up the truck, and he was not aware that Mr. Pennington had issued another citation five minutes earlier for an inoperative horn on the truck. The driver informed him that he basically only checked the engine oil. The driver also informed him that he had no "slips" to verify any inspection and that there were none available anywhere (Tr. 19-21).

Mr. Pennington stated that the driver was operating the truck watering the roadways. He stated that the failure to inspect the truck "makes it too easy for people to run defective equipment." There is a lot of traffic in the pit, the roads are dusty, and truck drivers are walking around. The driver did not know the horn was inoperative because he didn't check it (Tr. 23, 25).

Mr. Pennington stated that with an inoperative horn there was a good chance of an accident because there would be no means of warning anyone if the truck is running away or about to be involved in a collision. He believed that it was reasonably likely that an injury or fatality would result from these hazards, particularly with the presence of pedestrians on the roadways (Tr. 22-24).

Mr. Pennington confirmed that he reviewed the respondent's prior citation record for not performing safety checks and found at least four since 1991 (Tr. 26). He concluded that the negligence was moderate because the driver checked the oil as he was instructed to do (Tr. 27).

On cross-examination, Mr. Pennington could not recall who accompanied him on the inspection, and he did not know the driver's name and indicated that "he was new and a real young kid" (Tr. 30). The truck was moving forward at "maybe 5 to 10 miles an hour, I have no idea" (Tr. 36). He estimated that the truck was half filled with water, and the brakes were operational. He confirmed that the respondent submits quarterly reports, but could not recall seeing an inspection record for the cited truck at a prior hearing (Tr. 40-41).

Mr. Pennington stated that the mine has steep hills and grades with a lot of truck loading traffic. He described the roads as "fairly wide" at an average width of 40 to 50 feet, and they are all two-way roads. The trucks are 8 to 10 feet wide (Tr. 47-52). He did not ask the pit manager, Scott Hughes, for any records, but did ask the people who accompanied him on the inspection (Tr. 53). He extended the abatement date and was informed that a new form would be prepared for each truck with instructions to do the inspections (Tr. 57).

Section 104(a) "S&S" Citation No. 3908687, November 16, 1995, as modified, cites an alleged violation of 30 C.F.R. 56.6132(a)(6), and the cited condition or practice states as follows (Exhibit P-1; Docket No. WEST 96-208-M):

> The pit manager for Lakeview Rock Products failed to post the explosive magazine with the appropriate United States Department of Transportation placards and other warning signs that indicated the contents of the facility. Although this magazine was located on the adjacent Foss Lewis property, a delivery receipt found inside showed that explosives were delivered to Lakeview Rock Products on 10-27-95. Lakeview has

> an employee that is trained and experienced in the use of explosives, and knows how to care and maintain an explosive storage facility. Employees at the Foss Lewis Sand and Gravel state that the Lakeview pit manager and the driller blaster, regularly enter the magazine when blasting is done at the Lakeview Pit. Unknown persons were using the magazine area for rifle target practice as evidence by spent rifle cartridges found within 35 feet of the magazine. Two boxes of spent cartridges were found inside the magazine.

Section 104(a) non-"S&S" Citation No. 3908688, November 16, 1995, as modified, cites an alleged violation of 30 C.F.R. 56.6101(a), and the cited condition or practice states as follows (Exhibit P-13; WEST 96-208-M):

> A Dodge Power Wagon, 200, pick-up truck, Utah License #7771-BN, was parked within 6 feet of the explosives magazine. The bed was loaded with rubbish and combustible materials. The following items in the bed consisted of plastic oil containers, card board boxes, paper,. wood, as well as an oil storage tank on the back of the truck. This pick-up belonged to the driller/blaster who is now a full-time employee of Lakeview Rock Products, and has been cited by MSHA for violations of CFR-30, Subpart E, while doing business as an explosive contractor. The explosive magazine was located on the adjacent Foss Lewis property and the blaster was using this area to store explosives as well as a bone yard for obsolete equipment. This is an unwarrantable failure on behalf of the pit manager and the blaster for allowing rubbish and combustibles to accumulate near the explosive magazine. Foss Lewis personnel said they asked the blaster to remove the equipment months ago.

Inspector Pennington stated that he issued Citation No. 3908687, during an inspection of the Foss Lewis mine adjacent to the respondent's property. He found a 10 X 12 foot vented and grounded powder magazine with a door that was locked with two covered locks on the Foss Lewis property. He asked the pit manager, Robby Griffith, for the key, and Mr. Griffith informed him that he had no key and that the magazine belonged to the respondent and not Foss Lewis. Mr. Griffith obtained a key four hours later at 2:00 p.m. The magazine was opened, and Mr. Pennington inspected the inside and found Det Cord, ANFO (ammonium nitrate), some burning fuse, and rifle ammunition and spent cartridges (Tr. 58-62).

Mr. Pennington observed no signs or other designations in the area identifying the structure as a powder magazine (Exhibits P-2, P-4 through P-8, P-10 (Tr. 64-69)). The required signs were

almost immediately posted at 12 or 12:30 p.m., the same day by Mike Clark, a representative of Burt Explosives, a local supplier who provides explosives and magazines for mine operators in the area (Tr. 70-74; Exhibit P-9). Mr. Pennington confirmed that citations were also served on Burt Explosives because "Mr. Clark said that he was kind of like responsible for putting signs around," and on Foss Lewis because the magazine was on its property (Tr. 74).

Mr. Pennington stated that the cited pickup truck belonged to Kevin Billings, a driller and blaster who was working for the respondent. The truck was parked with no keys in it and he determined that it would not run. The Foss Lewis foreman told him that the truck had been there for "months" and that he had been after Mr. Billings to remove it. Mr. Pennington confirmed that he cited the respondent because he understood that Mr. Billings was its employee (Exhibits P-9 and P-10; Tr. 81-83).

Mr. Pennington stated that when he returned the next day, the magazine was gone but the truck was still there. He described the contents of the truck bed, and it included plastic grease and oil cans, cardboard, wood, hoses, and a diesel tank. These materials were flammable and combustible, but he did not know whether there was any fuel in the tanks (Tr. 84-86). He observed no dry grass or trees in the area, but he was concerned because he found approximately 50 spent rifle cartridges on the ground within 30 feet of the magazine and believed that someone had been shooting at the magazine and signs (Exhibit P-3). He observed cigarette butts and believed the trash was a fire hazard, and with the oil and grease around the ANFO "it becomes a bomb almost automatically" (Tr. 89-90).

Mr. Pennington stated that he issued Citation No. 3908687, as an "S&S" violation because "it was reasonably likely that an incident would occur around that particular magazine on behalf of the garbage that was around, the shooting that was going on, the smoking that was going on, and there was no signs" (Tr. 92). He also believed that it was not likely that the magazine door would be closed at all times. He "imagined" that mine employees were doing the shooting and the evidence of this was "all the brass and everything else laying around" (Tr. 92). He was concerned that the powder magazine would blow up by shooting at it with 54 bags (2,700 pounds) of ANFO stored in it (Tr. 96).

On cross-examination, Mr. Pennington believed that the respondent had some responsibility "for shooting guns and whatever" (Tr. 100). He saw no gate to the Foss Lewis property, and was aware of no agreement to allow respondent's employees to regularly enter that property. He never observed anyone shooting on either property, the magazine door was closed when he arrived, and he issued no citation for not providing a bullet proof magazine (Tr. 101). He was not aware that Foss Lewis was using the magazine, and later learned that Mr. Billings had a key at the time of the inspection. Mr. Griffith informed him that he obtained a key from the respondent's "management," but did not provide any specific name. He was told by Mr. Griffith that the

equipment around the magazine belonged to Mr. Billings (Tr. 104-105). Even though the materials were confined to the truck bed, they were still a fire hazard and clearly a violation of the 25 foot standard (Tr. 109).

Mr. Pennington confirmed that he modified the violation from a section 104(d)(2) order with high negligence to a section 104(a) citation with moderate negligence, and that this was done a day or two after the inspection. He could not state that he modified the violation because he cited the respondent "much more seriously" than Foss Lewis or Burt Explosives, and he did not have those citations with him at the hearing. He explained that his initial high negligence finding was based on the fact that Mr. Billings was employed by the respondent and had been cited on prior occasions. However, he confirmed that Mr. Billings was an independent contractor when he was previously cited, was not on the respondent's property, and he had no evidence that the respondent was aware of these prior citations (Tr. 111-117).

With regard to Citation No. 3908687, for the absence of powder magazine signs, the record reflects that Mr. Pennington also modified this violation from a section 104(d)(2) order with high negligence to a section 104(a) citation with moderate negligence. He could not recall whether Foss Lewis and Burt Explosives were also served with section 104(d)(2) orders. In response to a bench remark that respondent's counsel "is suggesting that it was and that you modified it so everybody came out even," Mr. Pennington stated "I think that's what happened" (Tr. 118).

Inspector Pennington confirmed that ANFO and slow burning fuses were stored in the magazine, but detonators and caps were not. He confirmed that ANFO, caps, fuses, and detonators are used together during actual blasting. He believed that a bullet penetrating a bag of ANFO could set it off. He assumed that pit manager Scott Hughes had custody of the magazine key (Tr. 121-122). He confirmed that he found invoices made out to the respondent as the owner of the explosives (Tr. 124). He observed no target or bullet holes, scratches, or marks on the magazine that may have been made by bullets (Tr. 125).

Mr. Pennington stated that he found one Burt Explosives invoice made out to the respondent and dated "October 16 or 17, something like that, and believed Mr. Clark was planning a delivery of explosives the next day, but he did not know how much was delivered (Tr. 134).

Robby Griffith, plant manager, safety inspector, and loader operator, Foss Lewis Sand and Gravel Company, testified that his operation is next to the respondent's property. He confirmed that the cited powder magazine was on Foss Lewis property, approximately 600 yards from the respondent's property and there is no fence separating the two operations. The magazine was used by Mr. Billings to store explosives that he used when he was drilling and blasting for Foss Lewis. When he ceased working

there, Dave Lewis, one of the owners, asked Mr. Billings to move the magazine, but he did not know if this was done (Tr. 135-137).

Mr. Griffith stated that at the time of the inspection Mr. Billings was working for the respondent and Foss Lewis had no explosives stored in the magazine at that time. He confirmed that no signs were initially posted and that he did not have a key to the cited magazine, and did not know if anyone with Foss Lewis had a key. He did not know the company that put the explosives in the magazine (Tr. 138-139).

On cross-examination, Mr. Griffith stated that Mr. Billings was a contract driller for Foss Lewis and was not one of its employees. Mr. Billings owned the explosives, and when he ceased doing work for Foss Lewis he left his materials and truck there. Mr. Billings was asked to move it "when we knew we were in violation" (Tr. 142). Mr. Griffith stated that he was present when the magazine was unlocked, and he believed that his boss obtained the key from Scott Hughes. When Mr. Billings ceased blasting for Foss Lewis he was hired by the respondent as a loader operator and kept his blasting materials in the magazine. He could not explain where the empty cartridges found at the magazine came from (Tr. 144).

James M. Clark, testified that he is employed by the W.H. Burt Explosives Company, an explosives supplier. He stated that the cited magazine is owned by his company. He was not aware of any magazine owned by Mr. Billings "because we didn't service Kevin Billings when he was there," (Tr. 146). However, Mr. Billings was purchasing explosives from his company and told him that he was employed by the respondent, and asked him to deliver a magazine, and told him where to put it. Mr. Clark did not know that he was putting it on Foss Lewis property, but later learned that it was in fact on that property (Tr. 147).

Mr. Clark did not believe that anyone from Foss Lewis asked him to move the magazine, but after the inspection, Mr. Billings asked him to move it because it was on Foss Lewis property. Mr.Clark still supplies explosives to the respondent and the magazine is now on its property. No explosives were supplied to Foss Lewis during the past year, and one of his drivers would have delivered them to the magazine. The respondent was billed for the supplies stored in the magazine, and he put the signs up on the day of the inspection (Tr. 149).

On cross-examination, Mr. Clark stated that he usually posts four signs at the time a magazine is delivered. Foss Lewis never purchased supplies from his company, and he has serviced Mr. Billings as an individual. Mr. Clark explained that another magazine supplied by another company (ICI) was at Foss Lewis when Mr. Billings provided them with blasting work, and the magazine was switched when he learned the respondent was purchasing from ICI. He then removed Burt's magazine, which had been there for over two years (Tr. 152). Mr. Clark stated that the magazine is constructed to ATF standards and is bullet resistant. A blasting

agent such as ANFO will not explode if struck by a bullet, and storing fuses with ANFO is an acceptable practice (Tr. 154).

Section 104(d)(2) "S&S" Order No. 3908679, December 12, 1995, cites an alleged violation of 30 C.F.R. 56.9301, and the cited condition or practice states as follows (Exhibit P-14; Docket WEST 96-208-M):

> The north screening plant scalper dump location was not provided with a bumper block to prevent equipment overtravel. This violation has been cited before and a hearing was held before an Administrative Law Judge where it was ruled in favor of MSHA. This is an unwarrantable failure.

MSHA Inspector Michael Okuniewicz confirmed that he issued the violation after observing that there was no berm at the scalper dump location where large wheel loaders dump materials into the top of the scalper which sizes the materials. The absence of a berm presented an equipment overtravel hazard, and a piece of equipment could strike the scalper equipment, fall into it, or overturn it. He believed that the scalper structure was being undermined in that the support timbers and cribbing were hanging out in midair after some large boulders were removed. He determined that the violation was "S&S" for the following reason (Tr. 162-163).

> A. I determined that because of the two circumstances, number one, that it was undermined. The integrity of the supports of the scalper were not known. The piece of equipment that possibly could hit it if it should let loose, the front-end loader would tip end over end, in other words, front-ways with the operator in it and fall the distance of approximately 40 to 50 feet.

The equipment was shut down when he observed it, but during normal mining operations a front-end loader may dump at the scalper every ten minutes depending on the number of loaders in use. He believed a fatality would result if the loader overtraveled and "went tumbling," particularly if the operator was not wearing a seat belt (Tr. 164).

The inspector stated that he based his unwarrantable failure determination on the previous history showing a November 3, 1993, Order No. 4120704, issued by Inspector Richard Nielsen, on the same scalper. He believed the "(d) chain" began in 1993, but did not know if there were any intervening clean inspections because "it was my first time up there, so I didn't really know the history, I was fairly new to the office" (Tr. 164). However, he reviewed his office files prior to his inspection and found no indication of any intervening clean inspections (Tr. 166).

The inspector identified Exhibit P-15 as a section 104(a) non-"S&S" Citation No. 4120692, issued by Inspector Nielsen on November 3, 1993, citing a violation of section 56.9301, because of the absence of a bumper block at the same scalper location (Tr. 166-167; 175). He based his "high" negligence finding on this prior repeat violation, but did not determine how long the cited condition in this case had existed (Exhibits P-16 and P-17; Tr. 169-171). He believed that a bumper block, rather than a berm, would be a suitable device to prevent overtravel, and he intended to note the absence of a bumper block rather than a berm on photographic exhibit P-16 (Tr. 172). Even if Mr. Nielsen's prior citation were issued at a different location, he would still have issued the unwarrantable failure violation (Tr. 177).

On cross-examination, the inspector stated that there were berms on either side of the scalper, and a berm would be permitted at the point of overtravel as long as it impeded travel and was maintained. His only concern for overtravel was in a straight through direction towards the scalper (Tr. 180). He did not know how the scalper was anchored directly under the ground in front of the scraper (Exhibit P-19). He has observed such scalpers anchored by cables, but did not know if that were the case for the cited scalper because no cable was visible, and he did not know how long it had been in place (Tr. 182-184).

The inspector did not believe that the steel beam part of the scalper shown in Exhibit P-16, would impede equipment overtravel because "you're actually striking the piece of equipment, hitting the scalper, there is nothing there to prevent the overtravel of the loader" (Tr. 188).

In response to further questions, the inspector further explained that Scott Hughes was the same pit manager in charge during the prior violation, and that it was not timely abated, resulting in a section 104(b) order by Mr. Nielsen. He did not know why the prior violation was not timely abated (Tr. 196).

The inspector confirmed that Inspector Nielsen's prior citation also referred to a weakened scalper foundation caused by undercutting, but there is no indication that this was corrected as part of the abatement (Tr. 201-203). He confirmed that even if the scalper in the instant case had not been undermined, he would still have issued a violation (Tr. 203-205).

Section 104(d)(2) "S&S" Order No. 3908680, December 12, 1995, as amended, cites an alleged violation of 30 C.F.R. 56.14112(a)(1), and the cited condition or practice states as follows (Exhibit P-18; Docket WEST 96-208-M):

> The guard on the conveyor belt tail pulley located under the orange screening plant at the north side, was not maintained in a condition which would prevent contact with the moving self

cleaning tail pulley. The guard was damaged and the north side guard was missing completely.

The tail pulley is approximately 60 inches high off the ground on the north side were the guard was missing. This is an unwarrantable failure because of this same violation has been cited before in the last inspections.

Inspector Okuniewicz stated that he issued the citation after observing that the guards were off the self-cleaning tail pulley located on the stacker conveyor belt while the belts were running. The tail pulley has sharp fins, similar to a meat grinder, and are "very dangerous when contacted" (Tr. 206). Guards were provided, but one was completely missing on the side of the pulley, and the rear guard "was torn and pulled away" (Tr. 206).

The inspector stated that no one was working in the vicinity of the conveyor while he was there, but "there appeared to be a path coming from the north direction going down along side the back of the conveyor, small path, where an employee would walk" and he observed foot prints (Tr. 207).

The inspector based his unwarrantable failure finding on the following (Tr. 207).

A. Two reasons on this. This - - well, let me explain it this way. This particular guard on this particular conveyor belt has been cited at least two to three times previous. Again, the guards were missing. The material was built up underneath where an employee would have to clean out from underneath it. There is exposure, and it was the same pit manager in charge each time the citation was issued.

Q. Who was that pit manager?

A. Mr. Scott Hughes.

The inspector could not remember the prior citations or who issued them, and believed they were issued in 1993 and 1994. The unguarded pulley presented a hazard to someone cleaning or greasing the pulley and it could grab loose clothing and pull someone into the pulley (Tr. 208). He has observed people cleaning under pulleys with shovels at other mine locations (Tr. 209). He based his high negligence finding on the fact that the condition was "very obvious" in that the guards are visible from the plant control tower and roadway and the person in charge of the pit should be making daily safety inspections (Tr. 210).

On cross examination, the inspector confirmed that pit manager Scott Hughes was not present during his inspection and that Ms. Joree Felker, the safety manager, was in charge of safety (Tr. 220). He was not aware of any accidents at the mine, or anyone contacting a tail pulley. He confirmed only two, and not three, prior pulley citations, and he had no idea how long the cited condition existed and did not inquire of any employee in this regard. He believed the footprints were freshly made. He confirmed that some effort had been made to repair the guards, and did not know whether the mine records indicated that the pulley was inspected on the day of his inspection (Tr. 224).

Section 104(d)(2) "S&S" Order No. 3908703, December 12, 1995, as amended, cites an alleged violation of 30 C.F.R. 56.14112(b), and the cited condition or practice states as follows (Exhibit P-22; WEST 96-208-M):

> The tail pulley guard located on the Fab Tec conveyor was not maintained in a good condition to prevent a person from contacting the self cleaning tail pulley. The guard had been pulled away leaving an opening of 6 inches wide by 15 inches high exposing the self cleaning tail pulley to possible contact. This same guard was written before on other inspections as not guarded and now not being maintained. This is an unwarrantable failure.

Inspector Okuniewicz, confirmed that he issued the citation because the guard was not maintained in good condition in that it was pulled away from the pulley exposing it to contact. He saw no one in the area, and estimated that the pulley was five feet, or "eye level" off the ground. If someone were greasing or adjusting the belt, "they could be pulled in." He recently confirmed that this particular pulley had not previously been cited, but others have, such as the prior violation No. 3908680. The opening in question was 6 inches by 15 inches, and an opening on the other side was also present, and it was approximately three to four inches. He believed that someone could contact the pulley fins during greasing (Tr. 232-237; Exhibit P-23).

The inspector stated that tail pulleys are typically lubricated while the equipment is running, but extended grease fittings are used as a precaution so that no one is exposed to any contact. He observed no such device on the cited pulley, or on the previously cited pulley (Tr. 238-239). He observed no walkways or tracks in the immediate vicinity of the conveyor. He stated that "it's easily accessible" in that "it's out in the open. There is nothing in there to block anyone's approach to this conveyor belt." He further stated that "if someone should happen to go over there, yes, they could contact the frame" or "get close to being in danger of contacting the pulley." He

further stated that it's possible that someone could catch their hair or clothes through the 6-inch opening by casually walking by (Tr. 243-245). He did not determine whether the conveyor had sealed bearings that did not require greasing (Tr. 246).

On cross-examination, the inspector confirmed that the 6-inch unguarded opening would be a hazard to someone walking by, and any required adjustments are made on the side where the belt guarding was down at the small 3-inch opening (Tr. 252).

Section 104(d)(2) non-"S&S" Order No. 3908704, December 12, 1995, cites an alleged violation of 30 C.F.R. 56.11027, and the cited condition or practice states as follows (Exhibit P-24; WEST 96-208-M):

> A 55 gal steel drum was used as a work platform and to provide access to the electric motor starter box located on the standard head cone and screen (#16). Was cited on previous inspection, Citation #3908551. This is an unwarrantable failure.

Inspector Okuniewicz, confirmed that he issued the citation, but did not see anyone stand on the steel drum because the plant was shut down at the time of the inspection (Tr. 253). The drum was located next to a control box for the electric motor starter box for the head cone screen. If the breaker switch were to "kickout," the control box would need to be opened to reset the switch. The switch box is elevated and located on the head cone screen frame (Exhibit P-27). The only other access to the box would be by someone walking on the I-beam shown in the photograph, but he considered this to be unsafe (Tr. 256).

The inspector stated that the drum was not secured in any way, and the top was cut off, and it was turned upside down, and he assumed that someone would stand on it to reach the control box. He believed the drum was located on unstable dirt and it was leaning to the right. He did not know how frequently the control box had to be accessed. He considered the drum to be a work platform used to open the switch box and reset or pull the switch lever (Tr. 260-261).

The inspector did not believe the drum was of substantial construction and it had no railings. One could possibly fall while opening the box and possibly hit the frame of the cone crusher. However, he cited the condition as a non-"S&S" violation (Tr. 263). He based his unwarrantable failure determination on the fact that a prior violation was issued on August 29, 1995, for using a cable spool to access the control box at the same location, and he agreed that it provided a more substantial work platform than the drum turned upside down (Exhibits P-25 and P-26; Tr. 263-264). The violation was abated

by installing a ladder mounted to the frame below the switch box to provide permanent access. If someone where to fall, they would fall 6 feet to the ground from the drum (Tr. 267).

On cross-examination, the inspector did not know if a ladder was near the switch box for the use of employees, and depending on how it was placed and secured, a ladder may have provided safe access to the box. The violation was abated when the drum was turned over and labeled "trash," but he did not know if it was used for trash on the day of the inspection (Tr. 270). He observed no footprints on top of the drum, and an injury would be less likely if someone were to fall on the fine powdery material on the ground below the drum (Tr. 272).

Section 104(d)(2) non-"S&S" Order No. 3908708, December 13, 1995, cites an alleged violation of 30 C.F.R. 56.6132(a)(6), and the cited condition or practice states as follows (Exhibit P-28; WEST 96-208-M):

> The upper pit cap and powder magazines were not posted with the appropriate warning signs that indicate the contents of the facilities. This same type of violation was cited on the previous Code 37 Inspection conducted on 11-16-95. Citation number 3908687. This is an unwarrantable failure.

The inspector issued this violation when he found that powder and cap "day box" magazines located in the upper pit area on the respondent's property were not posted with signs identifying the contents, and No Danger and No Smoking signs were posted. This violation was the same type as Citation 3908687, issued on November 16, 1995, for failing to post signs on a larger magazine (Tr. 275). The cited boxes were double locked, and they are heavy and approximately 4-feet long, 3-feet wide, and 3 to 4 feet deep. He looked inside the boxes, and determined that the cap and powder magazines were in close proximity of each other and only one set of signs was required. The boxes contained ANFO and boosters and there was nothing wrong with the contents of the boxes (Tr. 277-279). He saw no evidence of any gun firing in this area (Tr. 282).

The inspector confirmed that the violation was not "S&S" because the boxes were in a remote area of the pit and away from any active working area. He found no record of any prior citations for the two cited magazines in question. He based his unwarrantable failure finding on the fact that the prior large magazine associated with citation No. 3908687, was cited, and when it was moved to the respondent's property it was posted with signs, but the two smaller ones were not. The violation was abated when Mr. Billings posted the signs, and he was working for the respondent at that time (Tr. 284-285).

On cross-examination, the inspector did not know if the cited boxes belonged to Burt Explosives, and he did not cite that company. Mr. Billings informed him that the explosives were brought from the main magazine and placed in the smaller boxes for use on a daily basis as needed. The inspector confirmed that he cited a violation of section 56.6132, concerning magazines, rather than 56.6133, covering day boxes (Tr. 288).

Section 104(a) non-"S&S" Citation No. 3908711, December 13, 1995, cites an alleged violation of 30 C.F.R. 56.6131(b), and the cited condition or practice states as follows (Exhibit P-35; WEST 96-208-M):

> The high explosives magazine and the cap magazine that were located on the upper bench were located within 7 feet of each other which is a violation of the regulations affecting storage facilities in 27 C.F.R. Part 55 Standard 55.218, Distances for Separation of Magazines. The high explosive magazine contained approximately 500 lbs. of ANFO and a box of high explosive boosters. The cap magazine contained nonel (sic), burning fuse and electric blasting caps.

The inspector confirmed that the cited boxes were the same ones previously cited for the absence of warning signs. He determined that the boxes were approximately seven feet apart by measuring the distance with a ruler. Based on the amount of explosives in the boxes, and according to the ATF standards found at 27 C.F.R. 55.218, they should have been 58 feet apart. There was a danger in the two boxes being close together in that if one box should explode, it could ignite the other one (Tr. 290-292).

On cross-examination, the inspector stated that the boxes were constructed of steel on the outside and wood on the inside, and one of the boxes contained detonators that were separated from the explosives. He was aware of no MSHA regulation that required day boxes to be separated for a certain distance, and he explained that a day box is used to hold materials for the same day or shift it is used and not for storage (Tr. 292-294).

The inspector stated that the north box contained burning fuse, electric and non-electric blasting caps and delays, and the south box contained 500 pounds of ANFO in 50 pound bags and a box of high explosive boosters, which is much more than required for a day box (Tr. 296).

Section 104(a) non-"S&S" Citation No. 3908709, December 13, 1995, cites an alleged violation of 30 C.F.R. 56.6132(a)(4), and the cited condition or practice states as follows (Exhibit P-37; WEST 96-262-M):

> The upper pit cap magazine had bolt heads that were exposed on the inside of the magazine that could create a sparking hazard. This magazine was of metal construction on the outside with wood on the inside.

Section 104(a) non-"S&S" Citation No. 3908710, December 13, 1995, cites an alleged violation of 30 C.F.R. 56.6132(a)(4), and the cited condition or practice states as follows (Exhibits P-37 and P-39):

> The metal high explosives magazine on the upper pit bench, had bolt heads that held the wood on the inside of the magazine, exposed on the inside creating a sparking hazard.

The inspector confirmed that he issued the citations after observing a total of four "shiny regular normal carriage bolt" heads, two in each magazine, that were exposed on the inside of the magazine. The bolts were not brass or non-sparking, and they were used to bolt the plywood lid to the metal exterior. The bolt heads posed a hazard in the event of a lightning strike that could convey electricity through the bolts into the inside of the magazines (Tr. 300-303).

Section 104(a) "S&S" Citation No. 3908706, December 12, 1995, cites an alleged violation of 30 C.F.R. 56.11002, and the cited condition or practice states as follows (Exhibit P-30; WEST 96-209-M):

> The stairs leading down to the #16 Elsay cone crusher and screen plant from the control building, was not maintained in a safe manner. The top set of steps had the second from the bottom step bent, and ended at a short dirt path approximately 72 inches long with an incline that dropped approximately 30 inches to the next set of steps. The second set of steps had the handrails cut off to where the railings were extending out with the sharp cut off rail and step rail protruding outward. If a person was to slip or trip coming off the first set of steps, and having nothing there to catch themselves, they would fall directly on the protruding cut of handrails and steprail causing a serious or possible fatal accident.

The inspector confirmed that he issued the citation after he observed that the handrails on one of the cited stairways were cut off and the sharp ends of the bare pipe were protruding, and there was a sharp edge on the stair railing where it was cut off. The bottom step of the other cited stairway was bent, and he

believed that someone could trip on the moist and damp inclined pathway between the stairs and fall directly on the sharp protruding rails that were cut off. The protruding rails were visible and obvious from the control room (Tr. 313-316).

The inspector concluded that the stairways were not maintained in a safe manner because of the conditions that he observed as stated in the citation (Exhibits P-31, P-32, and P-34; Tr. 317-319). He determined that the violation was "S&S" because of a combination of factors, including the bent step, the protruding rails, the slick dirt pathway between the steps, and if someone were to slip or fall, "the only way you're going to land is right against those steps, right on those steps," and it could very well be a fatality because the sharp edges of the railings could spear someone. The pathway is used as a walkway to access the lower level (Tr. 320-321). On cross-examination, the inspector confirmed that there was a roadway that one could use in lieu of the stairways, but the stairways were the quickest way to get to the bottom of the hill (Tr. 326).

Section 104(a) "S&S" Citation No. 3908707, December 12, 1995, cites an alleged violation of 30 C.F.R. 56.9300(a), and the condition or practice states as follows (Exhibit P-33; WEST 96-209-M):

> A berm was not provided for approximately 18 feet were (sic) the case uni-loader was parked near the control room. The uni-loader was backed within 4 feet of a drop off of approximately 30 feet. A person sitting in the operator's compartment of the uni-loader could not visibly see the edge of the dropoff he or she was backing up to.

The inspector confirmed that he issued the citation after observing a Case uni-loader backed up and parked next to a steep incline and there was no berm to prevent the loader from traveling backwards down the incline of approximately 30 feet (Exhibit P-34). He stated that he entered the vehicle compartment to see if the operator would have a clear and visible view to the rear, and he determined "there was no way to see to the back of the edge of the roadway" (Tr. 335-336).

The inspector was concerned that if anyone backed up into the area where the loader was parked there would be no view to the rear whatsover and if he continued "you would definitely roll backwards over this edge or ledge approximately 30 feet" (Exhibit P-32; Tr. 337).

On cross-examination, the inspector stated that he did not know whether the area was newly constructed, but mining was taking place and "the loaders were running when we arrived on the

property, and they just parked them all around the control tower when we came up there" (Tr. 340). He determined that the area was a roadway because all of the equipment was parked around the area, and it was probably also used as a parking lot. The loader was not dumping, but vehicles travel in and out of the area. An 18-foot berm was installed to abate the violation (Tr. 341-346). He stated that the loader was parked within four feet of the edge of the incline (Tr. 347).

Section 104(a) "S&S" Citation No. 4333365, as modified, issued on March 19, 1996, for an alleged violation of 30 C.F.R. 56.14107(a), states as follows (Exhibit P-40; WEST 96-262-M):

> The guard for the self cleaning tail pulley located on the stacker conveyor belt that is located under the orange screening plant at the north side of the property was missing exposing employees to the hazard of contacting pinch points or being pulled into the self cleaning tail pulley. The tail pulley was located 39 inches above the ground on the north side, and 46 inches above the ground on the southside. Two employees were observed cleaning up spilt material in the area while the conveyor belt was running, to gain access to the tail pulley for cleaning under.

The inspector confirmed that he issued the citation and explained his reasons for doing so (Tr. 349-355). Respondent's counsel stated that after further discussions with Mr. Scott Hughes, he conceded that "this is one that shouldn't have happened. The employee was fired after this incident. * * * and we'll just give up on this one" (Tr. 356). Counsel conceded that the violation occurred and that the respondent has agreed to pay the proposed civil penalty assessment (Tr. 356). MSHA's counsel agreed to this disposition, and it was treated as a settlement motion which I approved from the bench (Tr. 360).

William Tanner, Jr., MSHA, Metal and Nonmetal Field Office Supervisor, Salt Lake City, confirmed that he is Mr. Okuniewicz's supervisor and that he accompanied him during his November 16, 1995, inspection. He also confirmed that he accompanied Inspector Nielsen during a November 1993 inspection. He did not believe that Mr. Nielsen's 1993, scalper bumper block citation was for the same location cited by Mr. Okuniewicz, but it did concern the same problem (Tr. 370-372).

Respondent's Testimony and Evidence

Scott Hughes, pit manager, identified Exhibit P-1, as a copy of a daily inspection report for the week ending September 2, 1995, for the water truck that is the subject of Citation No. 3908559. He stated that the employee who filled it out only worked for three months prior to the inspection and left his

employment at the end of 1995. The report covered the period including August 30, 1995. He stated that his employees are instructed to fill out daily inspection reports after checking their equipment. He further stated that after learning about the citation, he checked the air horn and found that it was working, but someone had pushed the cable that activates the air horn into the headliner. He simply pulled it back down (Tr. 403).

Mr. Hughes believed it was unlikely that the truck would run over anyone (Tr. 412). He confirmed that his records reflect that the cited truck was inspected before it went on shift (Tr. 414). He also confirmed that Inspector Pennington did not actually serve or hand him the citation (Tr. 415).

Mr. Hughes stated that photographic Exhibits P-2 and P-10, were taken at the Foss-Lewis sand and gravel pit at the south side of their property. The north side of that property joins Lakeview's south property line. The cited pickup truck belonged to Kevin Billings, and he used the cited magazine when he was a contractor doing blasting work for Foss-Lewis. The truck and the magazine were located on Foss-Lewis property.

Mr. Hughes confirmed that Mr. Billings stored some of Lakeview's powder in the magazine, and after he went out of business, Mr. Hughes purchased the remaining powder from him after the inspection and hired him during the spring of 1995. Mr. Hughes was not aware that Mr. Billings was placing any powder belonging to Lakeview in that magazine, and he was not aware that anyone was shooting in that area (Tr. 417-422).

Mr. Hughes stated that Mr. Billings did not use the pickup truck to perform any duties for Lakeview and that the magazine was owned by Burt Explosives. Lakeview took possession of the magazine after this incident. He did not believe that the ANFO or fuses in the magazine could be exploded by a bullet, but the dynamite and det cord could, and he was not sure whether any dynamite was stored in the magazine (Tr. 424-425).

On cross-examination, Mr. Hughes confirmed that the magazine was approximately 600 yards from his south property line, and that Mr. Billings was using the magazine owned by Burt Explosives. He believed that Mr. Billings stored some of the explosives that were used by Lakeview in the magazine but found out about it after the inspection (Tr. 425-427). He further confirmed that there was a no smoking sign on the inside of the magazine door, that blasting activities at Lakeview were not daily occurrences, and that he fired Mr. Billings (Tr. 429).

With regard to the cited screening plant scalper dump location that was cited because of the absence of a bumper block to prevent equipment over travel, Mr. Hughes explained how the scalper was anchored, and he did not believe that the condition

of the cribbing created a danger that the scalper would fall forward. He believed that Lakeview had been cited for a prior violation at the same location, and he believed that it was impossible to overtravel the scalper. The violation was abated by installing a concrete Jersey barrier in front of it, installing chains across the I-beam, and berming it in front and on either side. He confirmed that equipment has never overtraveled and no one has ever been hurt at that location (Tr. 432). He believed that the I-beam prevents any overtravel and that the large loader tires are usually 8 to 9 feet back from the scalper when the loader is dumping (Tr. 433).

On cross-examination, Mr. Hughes stated that the loader is within 3 or 4 feet of the grizzly when it starts to dump. He confirmed that he tested the I-beam by bumping it with the loader and it would not budge, and the plant has never moved in the six years it has been in operation. He visually checks the cables supporting the plant (Tr. 434-436). He stated that the loader tires are 6 ½ feet in diameter, and he did not believe the machine would overtravel the grizzly because the tires would be resting against the steel girder shown in Exhibit P-16 (Tr. 438).

Mr. Hughes agreed that the guards shown in photographic Exhibit P-19, were not where they ought to be (Order No. 3908680). He stated that the guards "rattle off now and again," and all employees are instructed to replace a guard if it is taken off. He has disciplined employees for not properly caring for the guards (Tr. 442). Mr. Hughes stated that he does not personally check the guard every day, but that the plant operator, Kevin Billings, checked it at that time (Tr. 443).

With regard to the tail pulley guard that was pulled away (Order No. 3908703), Mr. Hughes stated that the tail pulley bearings are sealed and lubricated and they are not greased. The belt adjustment is done at another location, and there would be no reason for anyone to stick their arm behind the guard, and no one usually in the area. He could think of no way anyone casually passing by would come in contact with the belt (Tr. 444-447). On cross-examination, Mr. Hughes stated that a uni-loader rake attachment is used to clean up belt spillage and there is no shoveling done under the belt (Tr. 447).

With regard to the steel drum "work platform" violation (Order No. 3908704), Mr. Hughes stated that the steel drum was supposed to be used as a garbage can, that he never told anyone to turn it upside down under the control box, and that ladders are provided for access to the box, and they are located 80 to 100 feet away. Access to the box is limited to once a month, or once every three months, and he has used a ladder to access the box (Tr. 450-452).

With regard to the magazine "day boxes," Citations (3908708, 3908709, 3908710, and 3908711), Mr. Hughes stated that they were owned by Burt Explosives, and he believed that one sign was posted 300 to 400 feet to the north on the same level as the cited boxes and that he was waiting for the rest of the signs which had not been received from Burt Explosives. The area where the boxes were located was 600 feet from the pit area, and one would have to hike up a very steep hill to get there. There are no road accesses from the back side of the property and the nearest houses are 2 ½ miles away. One would have to go down a vertical steep hill after crossing a fence to reach the area (Tr. 462-464).

Mr. Hughes stated that Burt Explosives was responsible for maintaining the boxes, and that "it's kind of the way it's always been with the explosives contractor." He was not aware that the bolts were exposed on the inside of the boxes, and he did not dispute the fact that explosives were in the boxes at the time of the inspection (Tr. 465).

On cross-examination, Mr. Hughes stated that the boxes have been in the same location "for a couple of years" and that Lakeview filled them from another magazine or upon delivery (Tr. 467).

Darren Parris, testified that he was employed by the respondent as a repairs supervisor. He was present at the site when the inspectors arrived for their inspection on December 12, 1995, and he was putting handrails on the stairways that are used to go to the plant from the control room (Exhibit P-31). The stairways were being installed for the first time, and he had completed the top stairway and was working on the bottom one. He intended to install square tubing handrails but had to stop working to accompany the inspectors. He was not with the inspectors when they cited the stairways. It would have taken him two hours to complete the work, and he could not recall having an opportunity to tell the inspectors that he had been working. He confirmed that a couple of people had started using the freshly installed stairways (Tr. 478-482).

Mr. Parris stated that he added an additional handrail between the two stairways, and also installed a cat walk and ladder to access the crusher control box as suggested by the inspector (Tr. 483). He explained the company policy and procedures for checking the equipment and guards, and confirmed that the employees are instructed in those procedures (Tr. 484).

On cross-examination, Mr. Parris stated that he was also doing other repair work during the inspection when other individuals were accompanying the inspectors. He identified the equipment checklist that was used in 1995 (Exhibit R-1), and indicated that newer ones are used at the present time. He

explained how the checklists were used, and indicated that they are completed daily and should be kept with the vehicle and turned in weekly to Mr. Hughes (Tr. 486-488).

Ralf Henkel, testified that he is an occupational safety and health consultant specializing in mine safety and health. He has thirty years of mining experience and has a degree in geology and has done engineering and masters' work. The petitioner's counsel stipulated to his expertise in safety and health (Tr. 493).

Mr. Henkel stated that he has visited the mine three or four times and has thoroughly gone through the site and familiarized himself with all of the equipment. He confirmed that he specifically examined the scalper shown in photographic Exhibit P-16, and spoke with individuals who witnessed its installation. He explained how the structure is supported and tied to the bank, and stated that it "looked pretty solid to me" (Tr. 495-496). In his opinion, the scalper does not permit overtravel and the structure "is pretty sound." A front-end loader would not roll off the edge or fall forward if it were to stop at the I-beam, and "it would have to roll a couple of more feet, at least the radius of the wheel, if even more than that," in order to fall forward if the I-beam were removed (Tr. 496-497).

Mr. Henkel stated that the purpose of having a clear area for 25 feet around an explosives magazine is to prevent a fire from propagating through dry brush or debris and touching the magazine. In his opinion, debris in the back of a pickup truck presents less of a hazard then debris scattered around the ground. He confirmed that he has observed the cited watering truck in operation and estimated that it operates "one, maybe two miles" an hour, and assuming the horn was inoperative, he did not believe it would present a reasonable likelihood of a fatality because "you could literally stop it on a dime as slowly as he's going" (Tr. 498).

On cross-examination, Mr. Henkel stated that he was not at the mine during the August, November, and December 1995, inspections (Tr. 499). He confirmed that he has observed a front-end loader run into the scalper I-beam as a "test," and the scalper "reacted solidly in my opinion." He also observed the cables anchored in concrete (Tr. 500). Had he observed the stairways with the exposed handrails he would probably have been concerned, as he would be if he also observed the tail pulley guards (Tr. 501).

Inspector Okuniewicz, was recalled by the petitioner and he confirmed that he saw Mr. Parris in the morning during his December 1995 inspection, and briefly spoke with him when he was working at the cone screen plant abating a prior citation. He did not observe Mr. Parris working on the stairways when he was in that area, but the area is not visible when coming on the

property and he may not have noticed any work taking place at that time. He stated that Mr. Parris did not accompany him on his inspection and all employees left the property at approximately 11:00 a.m., including Mr. Parris (Tr. 502-504).

Findings and Conclusions

Fact of Violation

Citation No. 3908559

The respondent was charged with a violation of section 56.14100(a), because of the alleged failure of the operator of the cited water truck to inspect the truck before placing it in operation. The cited standard requires the equipment operator to inspect the equipment before placing it in operation on his shift. In addition to the cited charge, the citation further states that the operator of the truck was not supplied with any equipment safety inspection forms, and that the pit manager had no records for the truck in his files.

Although the citation (Exhibit P-36), indicates that it was served on pit manager Scott Hughes, and states that "the pit manager had no records for this truck in his files," the evidence produced at the hearing establishes that Mr. Hughes was not present during the inspection and did not accompany the inspector because he was under a court order and injunction not to be present at the mine during any MSHA inspection (Tr. 34).

The inspector's notation that the pit manager had no record of the cited truck conveys the impression that Mr. Hughes was present during the inspection, was asked to produce the record, and could not do so. However, the evidence proves otherwise, and in response to certain bench inquiries seeking clarification of the matter, the inspector offered the following explanations at (Tr. 52-54):

> THE COURT: And that the pit manager had no records. You served this on Scott Hughes the pit manager?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: And the testimony was that Scott Hughes didn't accompany you because he was under injunction.
>
> THE WITNESS: Well, when I went there early in the morning he was there. As soon as I arrived, then he has to leave. So he being, you know, in charge at that time, you know, then we still made it for Scott Hughes.

THE COURT: You say the pit manager had no records for this truck in his files, how did you determine that that day?

THE WITNESS: We asked for them. And - -

THE COURT: Did you ask him?

THE WITNESS: A lot of times we asked for things, and Scott can be contacted by telephone.

THE COURT: My question is when you issued this citation did you ask Mr. Hughes whether he had records for this truck?

THE WITNESS: I asked the people who accompanied me on the inspection.

THE COURT: So you answer is you didn't ask Mr. Hughes?

THE WITNESS: But they still couldn't come up.

THE COURT: You didn't ask Mr. Hughes?

THE WITNESS: No, not personally.

THE COURT: You didn't ask Mr. Hughes period.

THE WITNESS: I asked for the records from the people who accompanied me.

Contrary to the information on the face of the citation, the inspector admitted that the citation was not personally served on Mr. Hughes, and that he did not ask Mr. Hughes about any truck records. I find the inspector's explanations to be somewhat evasive and lacking in candor, and I have serious doubts concerning his credibility with respect to this particular citation.

The inspector could not recall who accompanied him during the inspection, and he did not know the name of the operator of the truck. The inspector produced none of his notes relating to this citation, and the truck driver was not summoned to testify. The inspector confirmed that the driver's name was not recorded on the face of the citation because to do so would violate MSHA policy of protecting miners against retaliation (Tr. 54).

The petitioner's evidence in support of the alleged violation is the hearsay testimony of the inspector that the truck operator, who has not been identified, and who did not testify, told him that he only checked the oil, did not inspect the vehicle further, and had no inspection forms to verify any

inspection. The inspector further testified that he also cited the truck five minutes earlier for an inoperative horn that the operator was not aware of, and the inspector suggested that the defect would have been found if the pre-operational safety check were made (Tr. 19-20).

In its defense, the respondent's pit manager, Scott Hughes, produced a copy of an inspection report for the cited truck in question showing that it was inspected before being placed in operation on August 30, 1995, (Exhibit P-1; Tr. 403, 414). Mr. Hughes testified that his employees are instructed to fill out the inspection reports after inspecting the equipment, and he indicated that the operator in question worked for him for only three months and left the job at the end of 1995. He also testified that the operator was instructed on mine safety procedures, and that the inspection report in question was in his main office in North Salt Lake City at the time of the inspection (Tr. 404-405). Since he was not at the mine, he could not state whether the report was produced on the day of the inspection (Tr. 406).

With respect to the prior inoperative horn citation, Mr. Hughes testified that after learning about the citation, he checked the horn and found that it was working, but someone had pushed the cable that activates the horn into the truck cab headliner, and he simply pulled it back down (Tr. 403).

In the course of the hearing, the petitioner's counsel asserted that in a prior proceeding concerning the respondent before former Commission Judge Arthur Amchan, 18 FMSHRC 1504 (August 30, 1996) in Docket No. WEST 96-88-M, the respondent withdrew its contest of the truck horn violation (Citation No. 3908558) at the hearing and paid the $69 penalty assessment (Tr. 20).

The petitioner's counsel further asserted that in the prior proceedings before Judge Amchan, daily inspection reports was an issue, and although "a ream of inspection reports" were produced at the hearing, the August 30, 1995, inspection report for the cited truck in question was not among those reports (Tr. 406).

I have reviewed Judge Amchan's decision of August 30, 1996, and it concerns six dockets, including WEST 96-88-M. While it is true that the case included the issue of examination records, the types of records concerned examination of working places pursuant to section 56.18002(a), and record keeping for such examinations pursuant to section 56.18002(b). Thus, it would appear to me that the inspection records in issue in the prior case were not the kind of equipment inspection defect records that are required pursuant to section 56.14100(d), and did not concern equipment inspections pursuant to section 56.14100(a), the standard cited in the instant proceedings. Under the circumstances, I find that

the fact that the inspection report produced by Mr. Hughes with respect to the cited water truck may not have been previously produced during Judge Amchan's hearing is irrelevant, and does not undercut the credibility of Mr. Hughes or the evidentiary value of the report that he produced at the hearing in this matter.

After careful review and consideration of all of the evidence and testimony, and having viewed Mr. Hughes' during the course of the hearing, I find him to be a credible witness and credit his testimony over that of the inspector. I further find that the petitioner has not rebutted Mr. Hughes' testimony or the authenticity of the inspection report that he produced. In short, I conclude and find that the petitioner has failed to establish a violation of section 56.14100(a), by a preponderance of the credible evidence adduced in this case. Accordingly, the citation IS VACATED, and the proposed civil penalty assessment IS DENIED and DISMISSED.

Citation No. 3908687

The respondent was charged with an alleged violation of section 56.6132(a)(6), for failing to post warning signs at the cited explosives magazine located on the property of Foss Lewis, a mine operator located adjacent to the respondent's property.

The inspector confirmed that he also cited independent contractor Burt Explosives Company for the violation because its representative, James Clark, informed him that "he was kind of like responsible for putting signs around," and also cited Foss Lewis because the magazine was on its property (Tr. 74). The record established that Burt Explosives owned the magazine and abated the violation by immediately posting the required signs.

The petitioner stipulated that the magazine was located on the Foss Lewis mine property adjacent to the respondent's property (Tr. 77). The respondent stipulated that the cited structure was a powder magazine, that explosives were stored and retrieved from the magazine as needed for its use, and that it had access and a key to the magazine (Tr. 60, 72, 122).

Citing Otis Elevator Co. v. Secretary of Labor, 921 F.2d 1285, 1290 (D.C. Cir. 1990), and Joy Technologies Inc., v. Secretary of Labor, 99 F.3d 991 (10th Cir. 1996), the petitioner asserts that the respondent is responsible for any violation it causes or controls. In support of its argument, the petitioner argues that since the respondent admittedly stored its explosives in the magazine, and used them, it was equally responsible for making sure the required warning signs were posted.

The respondent argues that it is not liable for failing to post the signs because it did not own the magazine and it was not

on its property. Respondent advances the same arguments presented with respect to the prior pickup truck violation, and points out that it had no right of entry on the Foss Lewis property where the magazine was located, that most of the contents of the magazine belonged to Mr. Billings as a result of his contractor work for Foss Lewis, and that prior to the inspection Foss Lewis never contacted the respondent to remove the magazine. Respondent further asserts that it had no reason to know that it had explosives stored in the magazine because its practice was only to order explosives for immediate use and long term storage was generally not necessary.

Notwithstanding its assertion that it had no right of entry onto the Foss Lewis property, the respondent conceded that it had access and a key to the magazine, and that explosives were stored and retrieved from the magazine as required for its use. However, the fact remains that the magazine was not owned by the respondent and it was not located on its property. Under the circumstances, I find no credible evidence to prove that the respondent had continuous and exclusive control over the magazine to a degree that obligated it to post and maintain the required warning signs.

Burt Explosives Company representative James Clark, confirmed that as a matter of practice, the company posted the signs when the magazine is delivered, and in this case the record shows that it did in fact post the signs to abate the violation. Further, the evidence reflects that Foss Lewis, the mine operator adjacent to the respondent's property, was aware of the fact that its contractor, Kevin Billings, was keeping explosives in the magazine on its property for his use in connection with his blasting work for Foss Lewis. Foss Lewis was free to move the magazine and prior to the issuance of the violation it requested Billings, and not the respondent, to remove the magazine when he ceased performing work at its mine.

Foss Lewis manager Griffith testified that Mr. Billings owned the explosives in the magazine and used the magazine to store the explosives when he was performing contractor blasting work at the Foss Lewis mine. He also confirmed that Mr. Billings purchased and paid for the explosives used at the Foss Lewis mine (Tr. 141). Mr. Griffith believed that Mr. Billings last performed contract blasting for Foss Lewis prior to Christmas of 1994, but continued to keep his supplies in the magazine. Mr. Griffith further testified that after he ceased working at the Foss Lewis mine Mr. Billings was hired by the respondent as a loader operator and Mr. Griffith had no knowledge that he performed any blasting work for the respondent (Tr. 143-144).

The respondent's pit manager Hughes testified credibly that Mr. Billings performed contract blasting work for Foss Lewis for over two years prior to the inspection in November 1995, and used

the cited magazine located at Foss Lewis to store his supplies. Mr. Hughes further testified that after the citation was issued, the magazine was moved to his mine property and he purchased all of the remaining explosives from Mr. Billings.

Mr. Hughes further testified credibly that Mr. Billings went out of business after he completed his contract work for Foss Lewis, and that he subsequently hired Mr. Billings as a loader operator during the spring of 1995. Conceding that Mr. Billings performed occasional blasting work at that time, Mr. Hughes stated that Mr. Billings principally worked as a loader operator for the first six months after he was hired.

Mr. Hughes could not explain the October 27, 1995, invoice found in the magazine at the Foss Lewis property on November 16, 1995, by the inspector showing a delivery to the respondent's mine. However, he confirmed that Mr. Billings ordered powder, as required, for daily use at the respondent's mine, and that it was supposed to be delivered directly to the pit for use when blasting was scheduled. Mr. Hughes stated that he was unaware that Mr. Billings was ordering explosives for long-term storage in the magazine located at Foss Lewis. Mr. Hughes further confirmed that he subsequently fired Mr. Billings for a safety violation.

In the course of the hearing in this matter, petitioner's counsel asserted that all three of the entities cited for the violation were jointly and severally liable for maintaining the warning signs. Counsel conceded that the magazine was not under the exclusive control of the respondent, and that Foss Lewis could have removed it, or requested that it be removed from its property. However, counsel confirmed that Foss Lewis would not presently be cited for any violation <u>because the magazine is no longer on its property</u> (Tr. 76-77). This concession that Foss Lewis would no longer be cited or accountable for failing to post the signs because the magazine is no longer on its property undercuts the petitioner's assertion that the respondent may nonetheless be liable for the violation even though the cited magazine was not on its property.

After careful consideration of all of the evidence adduced with respect to this alleged violation, I am unconvinced and unpersuaded that the respondent is liable for the violation. I conclude and find that at most, the respondent's access to, and control over the cited magazine which it did not own, and which was located some 600 yards from its property, was sporadic and intermittent, and the respondent was not obligated to post and maintain the warning signs in question. From an enforcement perspective, I believe that justice was served by citing the owner of the magazine who supplied and delivered the explosives, and who admittedly installed the signs initially, as well as later to abate the violation, and the mine owner on whose

property the magazine was located, and who regularly used the services of a contract blaster who owned most of the explosives found in the magazine. I find no reasonable justification for citing the respondent in these circumstances.

In view of the foregoing, I conclude and find that the petitioner has not established a violation attributable to the respondent and the citation IS VACATED. The proposed civil penalty assessment IS DENIED and DISMISSED.

Citation No. 3908688

The respondent was cited for a violation of section 56.6101(a), after the inspector found an inoperative pickup truck with "rubbish and combustible materials" parked within 6 feet of an explosives magazine. The cited regulation requires areas surrounding an explosive materials storage facility to be "clear of rubbish, brush, dry grass, and trees for 25 feet in all directions."

Citing Otis Elevator Co. v. Secretary of Labor, 921 F.2d 1285, 1290 (D.C. Cir. 1990), and Joy Technologies Inc. v. Secretary of Labor, 99 F.3d 991 (10th Cir. 1996), the petitioner argues that the respondent is responsible for the violation because the owner of the cited pickup truck, Kevin Billings, was one of its employees and under its control at the time of the inspection when the citation was issued.

The respondent argues that it did not own the cited pickup truck or any of the items in the truck bed, that the truck was parked adjacent to the magazine on the Foss Lewis mine property some 600 yards from the south of its property, and that the respondent had no right of entry onto the Foss Lewis property.

The respondent further argues that the truck was owned by Mr. Billings, a contract blaster for Foss Lewis prior to his employment with the respondent. The respondent concludes that the evidence shows that the parking of the truck within 25 feet of the magazine occurred at the time and within the scope of Mr. Billings contractor arrangement with Foss Lewis and that the respondent had no control or responsibility for the situation.

In support of its argument, the respondent maintains that at the time of the inspection, Mr. Billings had not fully concluded his independent contractor status with Foss Lewis, and that his truck was located on the Foss Lewis property because he was Foss Lewis' contractor, and not because he was employed by the respondent. Further, respondent asserts that when Foss Lewis wanted the truck removed from its property, it contacted Billings, and not the respondent, because Foss Lewis understood that the items in the pickup were present because of Billings'

contractual relationship rather than his employment by the respondent.

The respondent asserts that under well established principles of agency law it can only be held accountable when its employees are acting on its behalf, either with actual or apparent authority. Respondent denies that Billings acted as its agent when it parked the truck on Foss Lewis property. Respondent cites the testimony of the inspector and Foss Lewis pit manager Griffith that the truck had been parked at the same Foss Lewis site for months, and that the truck was simply left over from the time Billings had been working as Foss Lewis' contractor.

Respondent concludes that it is clear that the truck and its contents were owned and controlled by Billings and placed at the Foss Lewis property by Billings in his independent contractor capacity with Foss Lewis, and that his later employment with the respondent was a mere fortuity giving MSHA an excuse to continue its hostile campaign against the respondent. Respondent finds it ironic that it was initially treated more severely by MSHA than Foss Lewis or Burt Explosives, and that Billings was not cited, even though his conduct stemmed from his prior independent contractor status.

Foss Lewis manager and safety inspector Robby Griffith testified that at the time of the November 1995, inspection, Mr. Billings was working for the respondent, but that he previously provided services to Foss Lewis as a contract driller and blaster (Tr. 138, 140). Mr. Griffith further stated that Mr. Billings last performed contractor work for Foss Lewis prior to Christmas of 1994, and that when he ceased working for Foss Lewis he kept his equipment and truck on Foss Lewis property adjacent to the magazine (Tr. 140-141). Mr. Griffith confirmed that Foss Lewis had requested Mr. Billings to remove his truck "a long time ago" prior to the November 1995, inspection, and that the respondent was asked to remove it only when "we knew we were in violation" (Tr. 142).

The inspector confirmed that the Foss Lewis foreman told him that the truck had been parked at the Foss Lewis property "for months," and that Foss Lewis had been "after Billings and Lakeview or anyone who was responsible for the equipment to get it out of there" (Tr. 82).

Respondent's pit manager, Scott Hughes, testified credibly that the truck was owned by Mr. Billings and that he used it when he was in business as a driller and blaster contractor working for Foss Lewis. Mr. Hughes explained that Mr. Billings went out of business and left his truck and equipment parked at the Foss Lewis property. Mr. Hughes stated that he had a need for a blaster so that he could devote more of his time to his pit

operation and hired Mr. Billings in the Spring of 1995. Mr. Hughes further stated that none of the "rubbish" in Mr. Billings' pickup belonged to the respondent and Mr. Billings did not use the truck in the performance of his duties while employed with the respondent (Tr. 420-424).

The petitioner has the burden of proving a violation by a preponderance of the probative and credible evidence presented in support of the citation. The petitioner is correct in its assertion that a mine operator is responsible for violations it causes or controls. However, based on the evidence presented with respect to this violation, I cannot conclude that the petitioner has proved that the respondent either caused or controlled the cited alleged violative condition.

There is no evidence of the existence of any brush, dry grass, or trees near the magazine, and the inspector described the "rubbish and combustible materials" that were in the truck bed as plastic oil containers, cardboard boxes, paper, wood, and an oil storage tank. There is no evidence that any of these materials belonged to the respondent or were used by Mr. Billings in the course of his duties while employed by the respondent, and I find Mr. Hughes' testimony in this regard to be credible.

With respect to the cited truck, the petitioner has not rebutted the respondent's credible evidence that the truck belonged to Mr. Billings, that it was inoperative at the time of the inspection, and that it had been parked on the Foss Lewis property, some 600 yards from the respondent's property, for several months prior to the inspection. Under the circumstances, I find it reasonable to conclude that the cited "rubbish" found in the truck was the personal property of Mr. Billings resulting from his work as a contractor performing services on the Foss Lewis property and that it was outside of the control and responsibility of the respondent.

I take note of the fact that MSHA also cited Foss Lewis for this violation. On the facts, of this case, I find that MSHA's attempts to also hold the respondent accountable simply on the theory that Mr. Billings was its employee when the citation was issued is overreaching and arbitrary.

With regard to the petitioner's reliance on the cited Otis Elevator and Joy Technologies decisions, the issue in those cases was whether or not independent contractors performing services at a mine were "operators" subject to the Mine Act. In the absence of any evidence that the respondent had other than a de minimus connection at best with the cited truck in that it was simply owned by one of its employees, I find nothing in these decisions that supports the petitioner's position. To the contrary, I conclude and find the respondent has the better part of the argument. Under the circumstances, I conclude and find that the

petitioner has failed to make a case and prove a violation. Accordingly, the citation IS VACATED, and the proposed penalty assessment IS DENIED and DISMISSED.

Order No. 3908679

The respondent was charged with an alleged violation of section 56.9301, after the inspector found that the materials dumping location at the north screening plant scalper was not provided with a bumper block to prevent equipment overtravel. The cited standard provides as follows:

> **§ 56.9301 Dump site restraints**
>
> Berms, bumper blocks, safety hooks, or similar impeding devices shall be provided at dumping locations where there is a hazard of overtravel or overturning.

The inspector stated that he cited a violation because there was no berm or bumper block at the scalper dumping location to prevent large wheeled loaders from overtraveling and colliding with the scalper structure and possibly knocking it over and causing the loader to overturn or travel 40 to 50 feet down the embankment. Although each side of the approach to the scalper was bermed, the inspector was concerned with overtravel in a "straight through" direction.

The respondent argues that it had a substantial and well constructed "similar impeding device" to prevent overtravel and that a berm was unnecessary. This "device" was the beam welded across the front of the scalper as shown in photographic exhibits P-16. In support of its argument, the respondent asserts that it presented convincing evidence that the scalper and steel beam welded in front was solidly entrenched and immovable. The respondent cites the supporting testimony of Mr. Hughes that the scalper was well enclosed and would not move, even when he ran into it with a loader as a "test," and expert safety consultant Henkel who confirmed Mr. Hughes' testimony and was of the opinion that the scalper structure itself seemed to provide all of the necessary restraint for any vehicle dumping there.

Relying on the regulatory phrase "similar impeding devices" found in section 56.9301, and the ALJ and Commission decisions in Daanen & Janssen, 18 FMSHRC 1796 (October 1996), and United States Steel Corporation, 5 FMSHRC, 3 at 6, N.6 (January 1983), holding that a berm must be capable of restraining a vehicle through reasonable control and guidance of vehicular motion and not absolute prevention of overtravel under all circumstances, the respondent concludes that the "rock solid steel beam structure" was in a position "to interfere with or get in the way of the progress of" any loaders that might otherwise overtravel

at the dump location and provided at least as good a stop as a berm.

Respondent asserts that after evidence was introduced that the steel beam was so solidly embedded that it prevented overtravel, the petitioner changed its position and its counsel sought to distance herself from the inspector's earlier admissions that a properly anchored steel beam prevented overtravel, by asserting that overtravel actually occurred before hitting the beam.

The respondent cites the further testimony of Mr. Henkel that given the size of the loader tires, the steel beam would impede the loader before it arrived at the edge, and that in order to have a hazardous overtravel the part of the periphery of the tire that is on the ground would have to overtravel the edge, and this would be impossible the way the structure was configured.

The respondent suggests that the term "overtravel" should be considered in terms of that travel which is necessary to put a vehicle in danger of falling from a roadway or going over the edge. Respondent asserts that in the case of a front end loader dumping at a grizzly the dump bucket has to hang over the edge in order to make the dump, and that under the circumstances, overtravel cannot mean that no part of the equipment hangs over an edge. Respondent believes that overtravel has not occurred as long as the vehicle tires remain with solid traction on the roadway, and if all portions of the tires that normally remain in contact with the roadway cannot leave the roadway because of the "impeding device," then that device has prevented overtravel.

The respondent concludes that since the uncontroverted evidence established that the steel beam in question would restrain the vehicle from going further then the point where any portion of the tires would lose traction with the roadway, the operator would remain in control of the vehicle and no overtravel has occurred.

In its post-hearing brief, the petitioner asserts that the violation in question is substantially the same as a prior violation issued on November 3, 1993, also citing a violation of section 56.9301, in that in both instances, there was no impediment to the dump vehicle striking the physical structure, and the cribbing below the dump area was exposed.

The petitioner points out that the scalper structure did "shake" when struck by the loader (Tr. 497), that the cribbing was clearly undermined as shown by photographic Exhibit P-17, and that the condition of the structure's stabilizing cables could not be determined because they had been back-filled (Tr. 162-167). Under the circumstances, the petitioner concludes that to

guard against a vehicle overtraveling and striking the scalper and the scalper then tumbling down the hillside with the vehicle falling afterward, a berm was required as provided for by section 56.9301.

At the hearing, the parties stated their case theories as follows at (Tr. 436-437):

> THE COURT: Are you through with this one?
> Let me ask you, counsel, if you were to argue this case to me on briefs, your conception of overtravel is that this whole plant has to be shot down over the hill, right?
>
> MR. SIMONSEN: They cited us and that's what I hear them saying to me.
>
> THE COURT: I hear them saying overtravel is when the tires go over that edge and the girder stops the machine, it's still overtravel. Pushing over comes to do with the gravity and the seriousness of it. And my conception is, if those tires on that loader go over the edge, and I'm looking at P-16, that's overtravel in MSHA's mind and that's overtravel within the concept of the standard. However, if it pushes up against the girder and knocks the whole contraption down the hill and the - - followed by the loader, then that goes to the gravity of the overtravel. Is that your understanding of that theory of the case, is that your theory of the case?
>
> MS. NOBLE: That's our theory of the case.
>
> THE COURT: Your theory of the case seems to be be that it's not overtravel unless it takes everything down.
>
> MR. SIMONSEN: No. Mr. Hughes just testified that the front tires, if - - they would prevent even from going over the edge there, because those tires are so big they hit that steel girder and prevent them from even overtraveling under their theory.

The evidence establishes that berms were provided on each side of the roadway approach to the scalper location where loads were dumped. However, with respect to the "straight-in" approach where the loader traveled and stopped to dump the loads over the edge of the scalper structure in front of the steel beam in question, there was no suitable berm, bumper blocks, or safety

hooks, and the inspector cited the violation because of the absence of a bumper block.

With respect to the issue of overtravel, I conclude and find that the evidence establishes that part of the front tires of the loader that dumped at the scalper location passed over the edge of the drop off under the structure and came to rest against the steel beam that was part of the scalper structure. Under the circumstances, I further conclude and find that this constitutes overtravel, and I reject any suggestion that the entire piece of equipment must pass over the edge of the drop off before one can conclude that it has overtraveled beyond the unprotected area.

I am not persuaded, and I reject, the respondent's argument that the steel beam which formed an integral part of the scalper structure itself, constituted an "impeding device similar" to a berm, bumper blocks, or safety hooks pursuant to, and in compliance with section 56.9301. There is no evidence that the beam was installed or intended to serve as a restraining or impeding device to address hazards associated with the overtravel of loaders at the cited scalper dumping location.

The inspector's unrebutted testimony reflects that in the normal course of daily mine production, the loaders would dump their loads at the scalper location approximately every ten minutes, and he was concerned about the integrity and undermining of the structure if it were struck by an overtraveling loader weighing 15 tons and carrying a bucket weighing seven tons (Tr. 187).

The respondent's safety expert Henkel did not share the inspector's concern, and he testified that he has observed other dumping locations where the structure itself is used in lieu of a berm, and after observing a loader strike the structure, "it shakes a little bit," but still appeared solid (Tr. 497, 500). Mr. Henkel further testified that in order to "get a better feel" for how the loader would react to "a good solid thump," the respondent ran the loader into the I-beam, and although the structure shook "a little bit," Mr. Henkel was of the opinion that "it reacted solidly" (Tr. 500). However, he also stated that he would not recommend running a front-end loader into the scalper I-beam (Tr. 500).

I find it reasonable to conclude that over a period of time, daily and constant loader overtravel and contact with the scalper will ultimately adversely affect its structural integrity and present a potential hazard to the loader operators. Indeed, the respondent's safety expert tacitly conceded as much when he recommended against the loader running into the steel beam that is part of the structure. Under the circumstances, and in the absence of an independently installed restraining device, I conclude and find that any loader overtravel, regardless of the

degree, that results in the repeated striking of the scalper structure itself presents a potential hazard to the equipment operators using the dumping facility in the event the weakened structure is knocked over, or moved off its moorings in such a way as to allow the vehicle to continue over the embankment or overturn with the structure. Under all of these circumstances, I conclude and find that a violation of section 56.9301, has been established, and IT IS AFFIRMED.

Order No. 3908680

The respondent was charged with a violation of section 56.14112(a)(1), after determining that the guard on the conveyor belt tail pulley located at the north side screening plant "was not maintained in a condition which would prevent contact with the moving self cleaning tail pulley" (emphasis added). The cited standard, section 56.14112(a)(1), provides as follows:

> (a) Guards shall be constructed and maintained to-
> (1) Withstand the vibration, shock, and wear to which they will be subjected during operation;

The respondent argues that the inspector first cited an alleged violation of section 56.14107, dealing with the danger of exposure to human beings because of missing guards, but subsequently modified the order to allege a violation of section 56.14112(a)(1). The respondent asserts that an examination of the inspector's testimony shows that he said little or nothing concerning section 56.14112(a)(1), and that the only testimony concerning the strength and resilience of the guards was the testimony of Mr. Hughes who explained that the respondent has tried several different types of guards and has used conveyor-belt type guards to preclude any welding spots breaking off.

The respondent further argues that the inspector admitted that he made a mistake, but claimed it was a misprint and that he should have indicated that he was concerned about contact by the employees with the moving tail pulley. However, the respondent maintains that it appears that the inspector tried to correct his mistake by changing the standard under which it was cited, but then tried to testify concerning employee contact. The respondent maintains that it is entitled to clearly understand the standard under which it is being cited and the grounds for the alleged violation. Since the grounds for the alleged violation and the cited standard itself do not match, the respondent believes the order should be vacated.

The inspector testified that there were four guards around the tail pulley but that the rear guard was pulled away and the side guard was completely removed and placed on top of the conveyor belt (Tr. 212). He stated as follows at (Tr. 217):

Q. Do you, as an inspector, care whether they have mesh guards or used some old belting material?

A. No, I do not, as long as an employee or persons cannot make contact with the tail pulley, and that's the main reasoning of the guarding is to make sure that that tail pulley is not accessible to contact.

In response to questions from the petitioner's counsel concerning the purpose of section 56.14112(a), the inspector responded as follows at (Tr. 229):

THE WITNESS: To bar employees from contacting the tail pulley.

Q. (By Ms. Nobel) And what is - - what is the shock, vibration and wear that you were concerned about here?

A. The shock, vibration and wear is the operation of the equipment and the guards being either ripped off or knocked off by the normal operation of the conveyor belt.

The inspector's testimony in support of the alleged violation was limited to potential hazards associated with an employee possibly contacting the exposed pulley through the opening caused by the pulling away of the guard. There is absolutely no evidence or testimony that the cited guard condition was caused by vibration, shock, or wear.

At the hearing, the petitioner's counsel asserted that the inspector testified that "the wear of the guards caused these things to be knocked over and pulled off, and that's what he was concerned about" (Tr. 230). I have reviewed the inspector's testimony and find no such testimony. The only testimony remotely resembling the suggested testimony is the inspector's opinion that "constant wear and tear probably deteriorated (the guards) to the point where something else did have to be put on" (Tr. 223). There is absolutely no credible evidence to support the inspector's speculative opinion.

I further find no credible evidence to establish a nexus between the cited conditions and the requirements of the cited standard. It seems obvious to me that the inspector simply made a mistake and cited the wrong standard, and petitioner's efforts to rehabilitate him in the course of the hearing are unavailing.

Although administrative pleadings such as civil penalty assessment proposals are easily amendable, the petitioner did not seek an amendment to cite the correct standard, even after the parties were made aware of the Court's concern that the inspector's testimony in support of the violation had nothing to do with the requirements of the cited standard (Tr. 229-230). And, at (Tr. 230), which reflects as follows:

> THE COURT: They weren't cited with people being exposed. He should have also cited, if that's the theory, 57.14107, cite both of them, but he didn't. He cited one, and then he changed it to the other.
>
> MS. NOBLE: But, Your Honor, the purpose of the Mine Safety and Health Act is to protect people not equipment.
>
> THE COURT: And the purpose of a legal proceeding is to do things legally correct.

I conclude and find that the respondent has failed to prove a violation of the cited standard section 56.14112(a)(1), and the order and violation ARE VACATED. The proposed penalty assessment IS DENIED AND DISMISSED.

Order No. 3908703

The respondent was charged with a violation of section 56.14112(b), after the inspector found that the Fab Tec conveyor tail pulley guard had been pulled away, leaving an opening of six inches wide by 15 inches high, and exposing the self cleaning tail pulley to possible contact. The cited standard required the guard to be constructed and maintained so as to not create a hazard by its use.

The respondent has not rebutted the inspector's credible testimony that the cited tail pulley guard was pulled away exposing the tail pulley, and photographic exhibit P-23, clearly shows that this was the case. I conclude and find that the condition of the guard created a hazard and that the guard was not maintained in such a manner so as to prevent the hazard of someone possibly contacting it. Under the circumstances, I conclude and find that a violation has been established, and the violation IS AFFIRMED.

Order No. 3908704

The respondent was changed with a violation of section 56.11027, after the inspector observed that a 55-gallon empty steel drum that was located under an elevated electric motor switch box was installed on the frame of a head cone screen, was

turned upside down. The cited standard requires that "working platforms shall be of substantial construction and provided with handrails and maintained in good condition."

The inspector testified that the plant was not in operation when he observed the steel drum from his vantage point in the elevated pit control booth (Photographic Exhibit P-27, Tr. 253, 257). He assumed that someone would stand on the drum to reach the switch box, and he issued the violation because he considered the drum to be a work platform that was not of substantial construction and had no railings. He also considered the fact that the drum was unsecured and was located on "unstable dirt and was leaning to the right."

The inspector confirmed that he never observed anyone stand on the drum, and he did not know how frequently the control box needed to be accessed. Although he alluded to "some kind of disturbance" in the dirt around the drum, leading him to conclude "that people have been going towards it," and agreed that the top of the drum may have been dusty, he observed no footprints on top of the drum (Tr. 259-271).

The inspector confirmed that the switch box could be reached by someone standing on the I-beam under it, but he would consider this to be unsafe (Tr. 256). Although he agreed that a ladder may have provided safe access to the switch box, the inspector did not know whether a step ladder was close by and available for use (Tr. 269).

Respondent's pit manager, Scott Hughes, testified that the drum in question was intended to be used as a garbage can and that he never told anyone to turn it upside down under the switch box in question. He further testified credibly that access to the box is limited to once every month or every three months, and that ladders located 80 to 100 feet away were provided to access the box, and that he has used a ladder to reach the switch box (Tr. 450-452).

In support of this violation, the petitioner asserts that the steel drum, which was opened on one end, was turned over so that the unopened end was available for employees to use as a platform to gain access to the control box. The petitioner points out that this same type of violation was cited during an August 1995 inspection when access to the control box at that time was gained by standing on an empty wire spool. Photographic Exhibit P-27, shows the cited drum turned upside down at the base of the control box, and Exhibit P-26, shows the empty spool and what appears to be a steel drum with the top opened next to it.

In its post-hearing brief, the respondent does not dispute the fact that the drum in question was ordinarily used for garbage, and that it was turned upside down and located under the

switch box in question. The respondent confirms that it was previously cited for using the empty wire spool to access the switch box, and it would appear that it did not contest that violation and may have paid the penalty assessment.

The respondent confirmed that it abated the violation by turning the drum over and painting "trash" on its side. The respondent points out that other than the placement of the barrel under the switch box, the inspector observed no signs that anyone was using it to access the box, and that ladders were available nearby for an employee to use to reach the box. However, the respondent primarily disputes the inspector's unwarrantable failure finding, and states that "Evidently, certain employees may have found it more convenient to grab the trash barrel than the ladder."

There is no direct evidence that the inspector personally observed anyone stand on the drum to access the switch box. However, I find it very unlikely that the inspector would ever observe anyone stand on the drum since all work was discontinued when the inspector appeared for his inspection. However, given the fact that the respondent was cited four months earlier for using the cable spool to access the switch box, and the fact that the drum which was normally used for garbage was turned upside down and placed at the same location where the spool was previously located under the switch box, there is a strong inference that the drum was also used to access the switch box when it became necessary to do so. This conclusion is supported by the respondent's tacit admission that its employees may have found it more convenient to use the drum rather than a ladder to reach the switch box. Under the circumstances, I conclude and find that the petitioner has established a violation, and IT IS AFFIRMED.

Order No. 3908708

The respondent was cited for a violation of section 56.6132(a)(6), for failing to post signs at the location where cap and powder day boxes were located at the upper pit area of the mine. Although the cited standard applies to magazines, the comparable section 56.6133(a)(2) standard requiring the posting of signs for powder day boxes is virtually identical. Further, respondent's counsel agreed that day boxes also require warning signs (Tr. 288). Under the circumstances, I cannot conclude that the use of the term magazine, rather than day box, in the citation has prejudiced the respondent or rendered the citation defective.

The respondent's post-hearing brief does not address this violation. The petitioner's credible evidence establishes that the required signs were not posted, and I find that a violation has been established. Accordingly, the citation IS AFFIRMED.

For the reasons stated in connection with citation Nos. 3908709 and 3908710, the respondent's assertion that it was not responsible for the day boxes IS REJECTED.

Citation No. 3908711

The respondent was charged with a violation of section 56.6131(b), after the inspector found that the two previously cited cap and powder magazine were located within 7 feet of each other, rather than the separation distance stated in 27 C.F.R. 55.218, a Table of distances for storage of explosive materials, a regulation of the U.S. Treasury Department's Bureau of Alcohol, Tobacco and Firearm (ATF). According to the inspector's calculations pursuant to the ATF tables, the two cited magazines should have separated by a distance of 58 feet. Further, as previously noted, the inspector characterized the day boxes as magazines (Tr. 288).

According to ATF regulation 27 C.F.R. 55.209, a "day box" or "other portable magazine" is classified as a type 3 magazine. A type 3 magazine is further described at section 55.203(c), as a "portable outdoor magazine for the temporary storage of high explosives while attended (for example, a 'day box')."

30 C.F.R. 56.6131, covers the location of explosive material storage facilities. The cited subsection (b), provides as follows:

> (b) Operators should also be aware of regulations affecting storage facilities in 27 C.F.R. Part 55, in particular, §§ 55.218 and 55.220. This document is available at any MSHA Metal and Non-Metal Safety and Health district office. (Emphasis added).

The inspector testified that he was required to follow the ATF regulations when inspecting magazines (Tr. 291). However, he further stated that apart from the ATF regulations, he was not aware of any MSHA day box regulatory standard that required them to be separated by any certain distance (Tr. 293, 299).

At the hearing, petitioner's counsel confirmed that the ATF Title 27, sections 55.218 and 55.220, have not specifically been incorporated by reference as part of any MSHA regulatory standard other than the reference made to those sections in MSHA's section 56.6131(b), regulation. However, counsel took the position that the language found in subsection (b) stating that operators "should also be aware of" the ATF regulations in question means "shall be aware of and follow" (Tr. 299).

The respondent does not address this violation in its post-hearing brief. The petitioner simply states that pit manager

Hughes, a licensed blaster, "should have been aware of the ATF standard mentioned in MSHA's section 56.6131(b) regulation and made certain that the boxes were properly separated.

The petitioner's assertion that the respondent was required to follow the ATF separation distances with respect to the cited day boxes is rejected. In my view, the language "shall be aware of" cannot be reasonably interpreted to read "shall be aware of and shall be followed" without amending the regulation. If MSHA believes that the ATF tables of separation distances are mandatory and binding on mine operators, subjecting them to civil penalty assessments for noncompliance, it should adopt and incorporate the ATF regulations, or amend its own regulations, with appropriate notice to all mine operators. Under the circumstances, I conclude and find that the petitioner has failed to establish a violation, and the citation and proposed penalty assessment ARE VACATED.

Citation Nos. 3908709 and 3908710

The respondent was charged with two violations of section 56.6132(a)(4), after the inspector found that two metal cap and high explosives magazines were constructed in part with exposed interior carriage bolts (2 in each magazine) that were not made of brass or other non-sparking material.

The cited section 56.6132(a)(4), requires that explosives magazines be "made of nonsparking material on the inside." Although the citations issued by the inspector refer to magazines, the evidence establishes that they were in fact powder chests or "day boxes" that are covered by section 56.6133(a)(1), that requires day boxes to be structurally sound, weather-resistant, equipped with a lid or cover, and "with only nonsparking material on the inside."

The inspector explained that the cited "magazines" were smaller than the larger explosives storage magazine previously cited by inspector Pennington (Citation No. 3908687), and he described them as "day boxes for the storage of explosives on a daily basis in the immediate area where they are going to be used" (Tr. 274). He estimated that they 4 feet long, 3 feet wide, and 3 to 4 feet deep, (Tr. 277). And he explained the difference between a magazine and a day box (Tr. 277, 287-288).

Although I find that section 56.6133(a)(1), covering day boxes, is the more appropriate standard that should have been cited by the inspector, I take note of the fact that both regulatory standards require that the interior of magazines and day boxes be constructed of nonsparking materials. Under the circumstances, even though the inspector acknowledged that he identified the day boxes as magazines, I cannot conclude that the respondent has been prejudiced or that the citations are

defective. Day boxes and magazines are, for all intents and purposes functionally equivalent insofar as the storage of explosive materials are concerned, and as previously noted, both regulations require nonsparking materials for interior construction.

The unrebutted credible evidence presented by the petitioner establishes that the cited boxes contained interior bolt heads that were not constructed of brass or other nonsparking material. Accordingly, I conclude and find that the petitioner has established the violations, and the citations ARE AFFIRMED.

The respondent's post-hearing brief does not address these violations. The respondent's suggestion during the hearing that it was not responsible for the violations because the cited day boxes were owned by the Burt Explosives company IS REJECTED. The boxes were on the respondent's property, and the respondent had a key to the boxes, exercised continued custody and control over the boxes, and admitted that it supplied and stored explosives and materials in the boxes for its use as required at the pit site (Tr. 465, 467, 470).

Citation No. 3908706

The respondent is charged with a violation of section 56.11002, for failing to maintain two sets of stairs "in a safe manner." The cited standard requires stairways to "be of substantial construction provided with handrails, and maintained in good condition."

The credible and unrebutted testimony of the inspector reflects that the two stairways in question were in disrepair in that one stairway had part of the handrails cut off and the sharp ends of the bare pipe were protruding, and a sharp edge existed at another location where the railing was cut off. The second cited stairway had one step that was bent. Under the circumstances, I conclude and find that while the stairways appeared to be substantially constructed, and provided with handrails, they were not maintained in good condition as required by the regulation. Accordingly, I conclude and find that a violation of section 56.11002, has been established, and the citation IS AFFIRMED.

In its post-hearing brief, the respondent argues that the cited stairs were under construction when the inspectors arrive, but they were unaware of this because pit manager Scott Hughes was required to leave the mine site. The respondent asserts that employee Darren Parris testified that he was constructing the stairs when the inspectors arrived, that his work was partially completed, and that he was compelled to leave first to accompany the inspectors, and then to work on other violations that required abatement.

While it is true that Mr. Parris testified that he was performing some work on the stairways when the inspectors initially arrived at the site, and that he interrupted his work to accompany the inspector, he confirmed that he was not with the inspectors when the stairways in question were cited, and that he did not inform them of the work that he had performed. In addition, he provided no testimony or evidence to rebut or dispute the cited stairway conditions when they were observed by the inspector. Under the circumstances, the fact that he may have performed some repair work on the cited stairs on the morning of the inspection before the arrival of the inspectors does not excuse the violation. There is no evidence that the stairways in question were barricaded, tagged, or otherwise taken out of service when the work was interrupted, and it would appear that the stairways were available and in use while in disrepair.

Citation No. 3908707

The respondent was charged with a violation of section 56.9300(a), after the inspector observed a loader parked within four feet of a drop off of approximately 30 feet at a location that contained no berm for a distance of approximately 18 feet. The cited section 56.9300(a), provides as follows:

> (a) Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.

The respondent's post-hearing brief does not address this violation. In its brief, the petitioner points out that the loader was backed up to within four feet of a steep 30-foot slope, and when the inspectors climbed into the vehicle to determine whether there was a clear view to the rear, they could not see the edge of the slope even though the loader was within four feet of the drop off.

The petitioner further asserts that the loader is an easily maneuvered vehicle that moves quickly, and it concludes that an accident could happen quickly with the vehicle located so close to the edge of the drop off and no berm to prevent it from dropping off, particularly while backing up with no clear view to the rear.

The unrebutted credible testimony of the inspector establishes that the cited loader was backed into and parked within four feet of the edge of the drop off of a 30 foot incline, and there was no berm to prevent or restrain the vehicle from traveling over the edge of the incline. I conclude and find that the absence of the berm at the edge of the drop-off at the steep incline could cause a vehicle to overturn or endanger

persons in the equipment if it were to roll over the edge and down the incline. Accordingly, I conclude and find that a violation of section 56.9300(a), has been established, and the citation IS AFFIRMED.

Citation No. 4333365

The respondent was cited with a violation of section 56.14107(a), for failing to guard a self cleaning tail pulley on the stacker conveyor belt located under the orange screening plant at the north side of the mine property. The respondent conceded the violation and agreed to pay the proposed civil penalty assessment of $111 (Tr. 356). Accordingly, the citation IS AFFIRMED.

Significant and Substantial Violations

A "significant and substantial" (S&S) violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contributed to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated 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 reasonable serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 3-4 (January 1984), the Commission explained its interpretation of the term "S&S" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - - that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in questions will be of a reasonably serious nature.

See also Austin Power, Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

The question of whether any particular violation is S&S must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1987). Youghiogheny and

Ohio Coal Company, 9 FMSHRC 2007 (December 1987). Further, any determination of the significant nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, 3 FMSHRC 327, 329 (March 1985). Halfway, Incorporated, 8 FMSHRC 8 (January 1986).

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained that the third element of the Mathies formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.' U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984).

The Commission reasserted its prior determinations that as part of his "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. Peabody Coal Company, 17 FMSHRC 508 (April 1995); Jim Walter Resources, Inc., 18 FMSHRC 508 (April 1996).

Order Numbers 3908704, 3908708, and citation numbers 3908709 and 3908710 were all issued as non-"S&S" violations. These findings of the inspectors are all AFFIRMED.

"S&S" Order No. 3908703

The respondent's post-hearing brief does not address this violation and the respondent has not rebutted the inspector's credible testimony that the Fab Tec conveyor tail pulley guard was pulled away, leaving an opening six inches wide and 15 inches high, exposing the self cleaning tail pulley to the possible hazard of someone contacting it while the belt was in operation. Indeed, respondent's expert safety witness testified that he would have been concerned had he observed the condition (Tr. 501).

Although the inspector did not determine whether the pulley had sealed bearings that requires no greasing and found no extended grease fittings, he stated that lubrication is usually done while the conveyor is in operation and someone would have easy access to the belt and tail pulley and could be close enough to contact the unguarded pulley while walking by or making belt adjustments.

Mr. Hughes stated that the tail pulley bearings are sealed and lubricated and require no greasing, and he confirmed that belt adjustments are made, but at another location. The inspector testified that there was a three to four inch opening on the side of the belt where the guarding was down and where belt adjustments were made. Although he did not include this condition in his order, his credible and unrebutted testimony that the belt is easily accessed, as corroborated by Mr. Hughes' testimony that belt adjustments, apart from any greasing, is done, supports a reasonable conclusion that someone would be in close proximity to the conveyor belt tail pulley and exposed to a potential hazard in the normal cause of mining while the belt was in operation during the time that the guarding was not maintained in such a manner so as to not present a hazard by its use.

I conclude and find that the failure to maintain the guarding provided at the cited conveyor belt tail pulley area presented a discrete hazard of someone in the affected area being exposed to the hazard of contacting the exposed pulley while making belt adjustments or otherwise working in the area. If this were to occur in the normal course of mining operations with the belt in operation, I conclude and find that it would be reasonably likely that anyone coming in contact with the operating pulley would suffer injuries of a reasonably serious nature. Accordingly, the inspector's "S&S" finding is AFFIRMED.

"S&S" Citation No. 3908706

The respondent's post hearing brief does not address the gravity of this violation concerning the cited stairways that were in disrepair. Further, the respondent has not rebutted the inspector's credible testimony that the sharp and protruding ends of the bare handrail pipes presented a hazard to anyone using the stairways in the event they were to ship or fall while descending one stairway that had a bent step, or falling on the sharp pipe ends while walking along the inclined slippery pathway between the two stairways. Indeed, the respondent's expert safety witness Henkel expressed his concern about the cited condition (Tr. 501).

I conclude and find that the failure to maintain the cited stairways in good condition, presented a discrete injury hazard if someone were to trip and fall while descending the stairways or walking from one set of stairs to the other along the inclined slippery pathway. If this were to occur, I believe it was reasonably likely that the person would fall against or impale themselves on the sharp exposed and unprotected edges of the sharp end protruding handrail pipes. Should this occur, I find it likely that the person would suffer injuries of a reasonably serious nature. Under the circumstances, the inspector's "S&S" findings IS AFFIRMED.

"S&S" Citation No. 3908707

The respondent did not address this violation in its post-hearing brief. However, I conclude and find that the absence of a berm for a distance of some 18 feet where a loader had been backed up and parked within four feet of a drop off of approximately 30 feet, and where the inspector determined that he could not see the edge of the drop off from the equipment operator's compartment, supports the inspector's unrebutted determination that the violation was significant and substantial (S&S).

I conclude and find that in the normal course of mining operations, the failure to provide a berm at the edge of a substantial drop off of some 30 feet to alert the loader operator that he was approaching the edge, or to restrain or prevent the vehicle from backing over the edge, particularly where the driver has no clear view of the edge of the drop off from his operator's compartment while backing up, presented a discrete hazard of the loader traveling over the edge of the 30 feet drop off. If this were to occur, I further conclude and find that it was reasonably likely that the vehicle would overturn and the driver would reasonably likely suffer injuries of a reasonably serious or fatal nature. Under the circumstances, the inspector's "S&S" finding IS AFFIRMED.

Order No. 3908679

The inspector testified that he based his "S&S" finding on his belief that the scalper structure was being undermined in that the support timbers and cribbing were hanging out in midair. He further stated that "the integrity of the supports of the scalper were not known" (Tr. 162-163).

The petitioner confirmed that the violation is substantially the same as a November 3, 1993, violation of section 56.9301, for the lack of a bumper block at the same scalper location that had exposed cribbing. This prior violation was a section 104(a) non-"S&S" citation (Exhibit P-15), that was assessed a penalty of $50, by Judge Amchan at the request of the petitioner in a prior proceeding, 17 FMSHRC 83, 89 (January 1995). I take note that the inspector in that instance abated the violation after "a berm was installed as a bumper block," and even though he stated on the face of the citation that the scalper foundation was weakened by undercutting, he nonetheless found that the violation was non-"S&S."

In the instant case, the inspector based his "S&S" finding on his observations that the scalper cribbing and support timbers were being undermined, and his lack of any knowledge concerning the integrity of the scalper supports. It would appear from this

that he believed that principal means of supporting the scalper was the cribbing that "stuck out," when viewed from under the structure.

Although respondent's safety consultant confirmed that he was not present during the inspections that resulted in the issuance of all of the violations, he testified credibly that he examined the cited scalper structure, observed the supporting cables that were anchored in concrete, as well as a "test" when a loader ran into the scalper I-beam to test its stability. Based on this, he concluded that the cited scalper was "solid and pretty sound" (Tr. 497, 500).

Pit manager Hughes testified credibly that he has inspected the plant for five or six years and that he can visually observe the cables from under the scalper hopper, and if they were breaking or loosening he would see some slacking of the cable. However, he testified credibly the cables were pulled tight against the plant, and he observed no evidence that the plant has moved since it was installed (Tr. 435).

Although I have concluded that continued loader contact with the scalper I-beam in question will likely over time ultimately affect its structural integrity, in the absence of any evidence that the structure's anchoring cables were damaged or weakened, or that the structure was in fact weakened by the exposed cribbing, I cannot conclude that the cribbing condition, standing alone, weakened the structure and presented a hazard if normal mining operations were to continue after the inspection. As a matter of fact, the inspector testified that the cribbing was hanging out as a result of the removal of large boulders, and there is no evidence that the cribbing condition was the result of any movement of the structure itself (Tr. 162). Further, I note the absence of any evidence that the cribbing condition observed by the inspector was required to be corrected as part of the abatement of the violation. Since it was not, there is an inference that the cribbing condition did not adversely affect the stability of the structure.

In view of the foregoing, I cannot conclude that the facts and circumstances presented at the time of the inspection, and in the context of continued mining operations, support the inspector's "S&S" finding. In short, I cannot conclude that the condition of the plant was such to support a conclusion that it was reasonably likely that the structure itself was undermined and posed a threat of collapse. My concern for any hazard associated with the violation is in the context of loader overtravel that results in repeated collisions with the structure itself, a situation that hopefully will be averted by maintaining a separate bumper block in place, coupled with regular inspections of the cables to insure the structure is securely in

place. Under all of these circumstances, I conclude and find that the violation was non-"S&S," and the inspector's initial "S&S" finding IS VACATED.

Unwarrantable Failure Violations

The Section 104(d) "Chain".

At page 10 of its post-hearing brief, the petitioner asserted that the first order in the "d series" were section 104(d)(2) Order Nos. 4120704 and 4120705, issued by Inspector Richard Nielsen during a November 3, 1993, inspection. Counsel points out that former Commission Judge Arthur Amchan affirmed both orders in a January 30, 1995, decision, Lakeview Rock Products, Inc., WEST 94-308-M and WEST 94-309-M, 17 FMSHRC 83, 88-9 (January 1995), and that there was no "clean" inspection between Inspector Nielsen's order and the orders at issue in these proceedings.

Inspector Okuniewicz testified that he relied on the prior order issued by Inspector Nielsen as the basis for his orders and confirmed that prior to beginning his inspection, he reviewed his office files regarding prior inspections and found there were no intervening clean inspections of the respondent's mine (Tr. 164-166).

The respondent does not dispute or rebut the fact that the underlying section 104(d)(2) order was procedurally correct in that no intervening "clean" took place between the issuance of the underlying supporting order and the inspections conducted in the instant proceedings. Accordingly, I conclude and find that the petitioner has established that the orders were procedurally correct.

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided under the 1969 Act, and it held, in pertinent part, as follows at 295-96:

> In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practice constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

In several decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Energy Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

> We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

> We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect or an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged), 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtless," and "inattention." Black's Law Dictionary 930-931 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

In New Warwick Mining Company, 18 FMSHRC 1568, 1573 (September 1996), the Commission affirmed former Commission Judge Amchan's finding that a coal accumulations violation of 30 C.F.R. 75.400, resulted from the mine operator's unwarrantable failure to comply with the standard. The Commission reiterated that it "has recognized that 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, and whether an operator has been placed on notice that greater efforts are necessary for compliance."

The Commission further stated its past recognition of the fact that "repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they place an operator on notice that greater efforts are necessary for compliance with a standard," citing Peabody Coal Co., 14 FMSHRC 1258, 1261 (August 1991); and Drummond Co., 13 FMSHRC 1362, 1368 (September 1991). See also: Enlow Fork Mining Company, Docket Nos. PENN 94-259 and 94-400, January 15, 1997.

In the New Warwick Mining Company case, the record reflected that during the preceding inspection ending on June 30, 1993, before the July 1993, inspection and violation of section 75.400, MSHA found 16 violations of the same standard, and that twice during the two days preceding the issuance of the violation the inspector informed the mine operator that similar accumulations were not permitted and received assurances from the operator that preventive measure would be taken to avoid unwarrantable failure violations.

In the Peabody Coal Co., case, at 14 FMSHRC 1263, the Commission took note of the fact that in finding an unwarrantable failure violation of section 75.400, the judge considered the fact that Peabody had been cited 17 times over the preceding six and a half months for similar violations, and that the cited conditions had been noted in approximately seven of the preceding preshift reports, and were obvious and extensive requiring significant abatement efforts.

I conclude and find that an operator's history of prior violations is but one factor to be considered in determining whether or not its conduct associated with those past violations demonstrates aggravated conduct. Indeed, the Commission has held that a judge should consider all operator conduct relevant to a violation in determining whether it resulted from unwarrantable failure. Helen Mining Company, 10 FMSHRC 1672, 1676 n.4 (December 1988); Emery Mining Corp., 9 FMSHRC 1997, 2004-2005 (December 1987); and Jim Walter Resources, Inc., 18 FMSHRC 508, 512 (April 1996), affirming a judge's conclusion that no inference as to gross negligence or unwarrantable failure could be drawn solely from one prior violation.

Order No. 3908679

Inspector Okuniewicz based his unwarrantable failure finding on the fact that Inspector Nielsen cited a similar scalper bumper block violation of section 56.9301, over two years earlier on November 3, 1993, when he issued a section 104(a) non-"S&S" citation for that violation. He also stated that this prior violation was not timely abated, and that Mr. Nielsen issued a

section 104(b) order. However, the inspector had no knowledge as to why the violation was not timely abated. Further, Mr. Nielsen did not testify, and there is no credible evidence of record that he in fact issued a section 104(b) order, other than the Mr. Okuniewicz's unsubstantiated recollection, and he admitted that he did not determine how long his cited condition had existed prior to his inspection.

Exhibit P-15 is a copy of Mr. Nielsen's November 3, 1993, citation, and on its face it reflects that the respondent took immediate corrective action in abating the cited condition, and Inspector Nielsen terminated the citation one-half hour before the expiration of the abatement time. Under the circumstances, I am at a loss to understand Inspector Okuniewicz's belief that the cited condition was not timely abated, and he could offer no explanation when asked about this during the hearing (Tr. 202).

In further response to questions concerning the unwarrantable failure issue, petitioner's counsel and inspector witnesses stated as follows at (Tr. 196-202):

> THE COURT: Well, what if there was some excuse, you know? Can you help me, Ms. Noble, do you know whether or not they have instructions here that you get one citation, the next one is unwarrantable?
>
> MS. NOBLE: I believe their instructions are if there is a previous violation and the same manager is in charge and if it's a fairly obvious violation that they issue an unwarrantable.
>
> THE COURT: Is that right? That's in this district right? Do you know if that's nationwide policy?
>
> MS. NOBLE: the supervisory, my inspector just whispered in my ear that that's nationwide policy.
>
> * * * *
>
> MS. NOBLE: I don't know if it's in the policy manual or not.
>
> THE COURT: Is this Mr. Tanner?
>
> MS. NOBLE: This is Mr. Tanner.
>
> THE COURT: Let me ask you, Mr. Tanner, is this somewhere a written policy? I don't want to hear about making word of mouth against - -
>
> MR. TANNER: No, it's not.

THE COURT: Is there a written policy somewhere?

MR. TANNER: We have a written policy that we have to look at the previous violations, the obvious, whether it's obvious, it reasonably could have been detected by a supervisor or a company person doing the checks, whether is should have already been taken care of and all of that. We do have one. As a matter of fact I showed it to him Monday. We've got - -

* * * *

THE COURT: You're saying that there's some policy that if there's a prior citation issued at a mine and the next inspector that goes - - the next inspection at that same mine when it's under the same management then the next violation is issued for the same standard is unwarrantable failure.

MR. TANNER: If he had reason to know, yes. If he should have seen it and taken care of it, yes, sir.

In support of the unwarrantable failure finding, the petitioner relies on the one prior non-"S&S" scalper citation issued two years earlier to support its conclusion that the respondent exhibited a "high degree" of negligence, and "deliberately took no action to place a berm at this location even though a prior citation involving substantially (sic) circumstances, had been affirmed and a penalty issued" (post-hearing brief, pg. 13).

After careful review of all of the circumstances surrounding this violation, I find no credible evidence to establish any aggravated conduct by the respondent in support of the inspector's unwarrantable failure finding.

Initially, I find that the single non-"S&S" violation issued two years earlier is too remote in time to support any conclusion that the respondent was "highly negligent" in this case. The past violation, as well as the instant one, are non-"S&S," and the inspector's assertion that he also relied on the lack of good faith compliance with respect to the prior violation is rejected as incredible.

With respect to the respondent's compliance efforts, the evidence establishes that the respondent provided berms on either side of the roadway approaches to the scalper dumping location, and the photographic exhibits (P-16), reflect that a

berm was at one time in place at the edge of the drop-off, but was apparently not maintained. I also take note of supervising Inspector Tanner's belief that an unwarrantable failure finding may be based on evidence that the operator "had reason to know and should have seen and taken care of" an alleged violative condition (Tr. 202). In my view, "should have seen" and "reason to know" are elements associated with moderate negligence rather than a high degree of negligence amounting to aggravated conduct.

In view of the foregoing findings and conclusions, I conclude and find the petitioner has not established that the cited condition resulted from the respondent's unwarrantable failure to comply with the cited standard section 56.9301. Accordingly, the inspector's finding in this regard IS VACATED, and the order IS MODIFIED to a section 104(a) non-"S&S" citation.

Order No. 3908703

With respect to the cited Fab Tec conveyor tail pulley guard that was pulled away exposing an opening of six inches wide and 15 inches high, the inspector testified that he recently confirmed that this particular guard had never been previously cited (Tr. 234, 247). The inspector offered no testimony in support of his unwarrantable failure finding and the petitioner has cited no evidence or testimony in support of such a finding other than counsel's statement at page 10 of her brief that "this was an unwarrantable failure because of the propensity of the operator to have violations involving self-cleaning tail pulleys." Under the circumstances, in the absence of any credible evidentiary support, other than counsel's argument (which is not evidence), I cannot conclude that the petitioner has made a case of unwarrantable failure in this instance and the inspector's finding IS VACATED. The section 104(d)(2) order IS MODIFIED to a section 104(a) citation.

Assuming that the petitioner's counsel intended her unwarrantable failure arguments with respect to Order No. 3908680, which I have vacated, to equally apply to Order No. 3908703, which is not clear in her brief, I would still find a lack of credible evidentiary support for the unwarrantable failure finding associated with that violation. My reasons in this regard follow.

The inspector based his unwarrantable failure finding associated with Order No. 3908680, on two prior guarding citations issued in November 1993, and April 1994, and the fact that pit manager Hughes "was in charge" on those occasions (Tr. 207; Exhibits P-20 and P-21). These exhibits are simply copies of photographs of the cited guards, and rather brief comments made by the inspector as part of his field notes. Copies of the

citations were not produced, and inspector Okuniewicz testified that he had no knowledge as to the name of the inspector who may have issued them (Tr. 208). He also confirmed that the field notes that he obtained from his office files do not contain any reference to the guarding standard that was cited, and although petitioner's counsel stated that these citations were cited in previous cases and was prepared to discuss them, and was invited to do so as part of her brief, (Tr. 218), no further arguments were forthcoming.

The petitioner's counsel acknowledged pit manager Hughes' testimony that he has disciplined employees for not taking care of the guards properly and agreed that it was important to keep the guards on the tail pulleys (post hearing brief, pg. 9). I also take note of Mr. Hughes' credible and unrebutted testimony that to avoid guarding weld points from breaking off, different types of belt guarding materials have been tried, and that all employees are instructed to replace all guards that they remove (Tr. 442). Thus, it would appear to me that the respondent has made an effort to address its guarding problems. Indeed, with respect to Order No. 3908680, the inspector testified that the respondent made an effort to repair the guards (Tr. 2224).

Citing Emery Mining Corp., 9 FMSHRC 1997, 2004-2005 (December 1987); and Drummond Company Inc., 13 FMSHRC 1362, 1368 (September 1991), the petitioner asserts that the two prior tail pulley guarding citations, coupled with pit manager Hughes' admission at (Tr. 442), that "the guards were not properly maintained and not checked daily" and that "he does not check daily to ensure that the guard is properly maintained, (post-hearing brief, pg. 9), the inspector properly determined that the violation (Order No. 3908680), was an unwarrantable failure.

With regard to Mr. Hughes' alleged admissions, I have reviewed the transcript reference relied on by the petitioner at (Tr. 442-443), and find that although Mr. Hughes admitted that he did not personally check the guard every day (Tr. 442), petitioner's counsel conveniently omitted the rest of his answer at (Tr. 443) where he further explained that the guard is checked by the plant operator Kevin Billings. Further, I find no admissions by Mr. Hughes at the transcript page cited by counsel that the guards were not properly maintained or that he failed to check the guard daily to insure that it was properly maintained. The cited record simply reflects that Mr. Hughes did not personally check the guard every day, but that "the operator checks it."

In the absence of any credible evidence that Mr. Hughes was obliged to personally check each and every guard at the mine site, his admission that he did not personally check the guard in question does not, standing alone, support any finding of aggravated conduct. In my view, an inspector is obliged to

develop credible evidentiary support to establish an unwarrantable failure finding, a rather serious charge. Cursory inspections, without developing credible evidence to support such a finding is simply inadequate to prove a violation.

With regard to the petitioner's reliance on the Emery Mining Corporation case, I take note of the fact that the Commission, with all five members in agreement, vacated a judge's finding of unwarrantable failure, and modified the section 104(a) citation 9 FMSHRC 2005. In Drummond supra, the Commission vacated a judge's finding of no unwarrantable failure and remanded the case for further consideration. I find nothing in that decision that is particularly relevant to the facts of the case at hand.

Order No. 3908704

The inspector based his December 12, 1995, non-"S&S" unwarrantable failure finding on the fact that a prior non-"S&S" violation was issued three months earlier on August 29, 1995, for a violation of section 56.11027, for using a cable spool that was admittedly a more substantial work platform to access the same control box.

The evidence established that both violations were non-"S&S," and that the cited cable spool was a more substantial work platform for providing access to the control box. There is no evidence as to how long the condition may have existed, and the inspector had no knowledge as to how frequently the control box had to be accessed.

The credible and unrebutted testimony of pit manager Hughes reflects that access to the box occurred rather infrequently once every month to three months, and that the respondent provided ladders nearby for use by employees when there was a need to reach the control box, and Mr. Hughes confirmed that he used such a ladder. Although Mr. Hughes acknowledged that certain employees may have found it more convenient to stand on the overturned drum to reach the control box handle, he confirmed that the drum was intended to be used for trash or garbage, and there is no direct evidence that anyone actually accessed the box by standing on the drum, or that Mr. Hughes was aware of, or approved of such a practice.

Taking into account all of the aforementioned circumstances surrounding this violation, I cannot conclude that the prior citation of August 1995, albeit close in time to the December 1995, violation, standing alone, supports the inspector's unwarrantable failure finding. To the contrary, I conclude and find that the absence of any evidence as to the duration of the violative condition, the fact that the violation was not extensive, and was indeed non-"S&S," the rather infrequent need

to access the box, and the furnishing of ladders by the respondent located reasonably close by for use in accessing the control box, undercuts the petitioner's argument that the past similar violation establishes that the violation "was unwarranted and hazardous" (Pg. 14, post-hearing brief).

I conclude and find that the evidence adduced with respect to this violation does not support a finding of aggravated conduct amounting to an unwarrantable failure by the respondent to comply with the cited standard. Accordingly, the inspector's finding in this regard IS VACATED, and the order IS MODIFIED to a section 104(a) non-"S&S" citation.

Order No. 3908708

The inspector based his non-"S&S" unwarrantable failure finding concerning the failure to post explosives warning signs at the locations of the cap and powder day boxes on the fact that the previously cited powder magazine located on the Foss Lewis property was not posted with warning signs. The inspector also considered the fact that when the magazine was subsequently moved to the respondent's property and posted with warning signs, no signs were posted at the location of the two cited day boxes (Tr. 284-285)

The respondent's post-hearing brief does not address this violation. However, respondent's counsel conceded that the cited day boxes required warning signs, and he confirmed that signs were posted by the respondent at the new magazine location when it was moved from the Foss Lewis property to the respondent's property (Tr. 288-289). Further, the unrebutted and credible testimony of the inspector reflects that Mr. Billings, who was then respondent's employee, posted the signs at the day box locations to abate the violation (Tr. 285).

The respondent's suggestion that Burt Explosives owned the cited boxes and was responsible for posting the warning signs is rejected. The respondent presented no credible evidence to establish that someone other than the respondent owned the boxes, the inspector had no knowledge that ownership was with someone other then the respondent, and Burt's representative, Clark, offered no testimony regarding these particular boxes.

The record reflects that the violation for the absence of warning signs at the powder magazine when it was located on the Foss Lewis property was issued on November 16, 1995, and when the magazine was moved to the respondent's property, signs were posted at the new location. Although it may have been reasonable for the respondent to believe that is was not responsible for posting the signs on the magazine that was not located on its property, once it was moved and the signs were posted, I find no reasonable or rational explanation or excuse

for the respondent's subsequent failure to also post signs at the two day box locations where the boxes had admittedly been in place for at least two years under the respondent's control, and cited less than a month later on December 13, 1995 (Tr. 467). Under all of these circumstances, I conclude and find that the respondent had more than fair warning that the cited regulation required the posting of the required signs, and that it was obliged to take notice that greater compliance efforts were required on its part to insure the posting of the signs prior to the inspection that resulted in the issuance of the violation.

In view of the foregoing, I conclude and find that the respondent's failure to post the required day box warning signs was not justified or excusable, and that the respondent's conduct in this regard was aggravated, constituted a high degree of negligence and justified the inspector's unwarrantable failure finding. Accordingly, that finding IS AFFIRMED.

Alleged Disparate MSHA Enforcement Treatment

The record reflects that the subject mine is owned and operated by Mr. Glenn Hughes and his son Scott. As a result of an incident involving supervisory inspector Tanner sometime in November of 1993, Glenn and Scott Hughes consented to a judgement entered by a U.S. District Court Judge for the Utah District, on May 11, 1994, enjoining them from interfering with MSHA inspectors or refusing to permit inspection of the mine. They were further enjoined from participating in any MSHA inspections, and were required to make available a knowledgeable and authorized person to accompany MSHA inspectors during their inspections (Exhibit P-44;) (Tr. 32-34).

Although the injunction was in effect during the inspections relevant to these proceedings, Scott Hughes is no longer subject to the court's judgment but his father is. (Tr. 256). The record further reflects that when the inspectors arrived at the mine site to conduct the inspections that resulted in the contested violations, Scott and Glenn Hughes left the premises, the operations were shut down, and the miners were also absent while the inspections were taking place. The inspectors were accompanied by a company official or its counsel (Tr. 253-257).

In the course of the hearing, the respondent's counsel suggested that as a result of the incident in November 1993, involving Mr. Tanner during the course of an inspection closeout conference at the mine, the respondent has been treated unfairly and singled out for "stepped up" and "special" disproportionate inspection treatment that has resulted in a marked increase in the number of violations issued at the mine and thousands of dollars of increased civil penalty assessments "that has just been unprecedented and driven the mine to the brink of not being able to continue to exist" (Tr. 9-14; 374-376, 380). In

response to a bench inquiry as to whether he has pursued his claim directly with MSHA, respondent's counsel responded as follows (Tr. 380-381):

> MR. SIMONSEN: Okay. We go to the district manager in Denver, and he tells us that this case has already been discussed at the highest levels of MSHA and a decision has been made that Lakeview needs to be made into an example.
>
> THE COURT: Do you have that in writing somewhere?
>
> MR. SIMONSEN: I sat there and heard it.

In support of its unfair treatment allegation, the respondent presented the testimony of June Long, a scale house employee who was present during the inspection conference at the mine in November 1993, and witnessed the confrontation between Mr. Tanner and Mr. Glenn Hughes.

Mrs. Long agreed that inspections are necessary, that corrective action was necessary when conditions are cited as violations. However, she testified that Mr. Tanner was "negative," threatened to shut down the mine, was within one foot of Mr. Hughes and "got right up in Glenn's face, and I was so surprised that words didn't fly beyond that" (Tr. 390-392). She confirmed that the inspectors have never interfered with her scale house operations and agreed that inspections were needed "but I also think that the bullying techniques don't need to be there" (Tr. 396).

With regard to the violations that were the subject of the November 1993, closeout conference incident with Mr. Tanner, the parties confirmed that they were subsequently settled prior to any hearings, and the proposed penalty assessments were reduced from $52,000 to $17,000 (Tr. 377-378).

With respect to the assertion by respondent's counsel that Mr. Tanner always accompanied the inspectors on their inspections, and a suggested inference that Mr. Tanner unduly influenced the inspectors when they issued the violations, counsel for the respondent was informed that "I can't draw an inference that Tanner went out there because he's got it in for the operator" (Tr. 386).

The respondent's allegations of disparate enforcement treatment are not further discussed in its post-hearing brief. Apart from any credibility issues that may arise as a result of the respondent's confrontation with Mr. Tanner, the parties were informed of my limited jurisdiction that does not include mediating such disputes (Tr. 384-385). The parties were further

advised that complaints concerning any inspector's conduct are best pursued with the appropriate agencies within the Department of Labor, including the Inspector General's Office, and that the respondent is free to pursue the matter further.

History of Prior Violations

Exhibit P-43 is a computer print-out listing the number of violations assessed for the period December 13, 1993, to December 12, 1995. The information reflects that 79 violations were assessed, and that the respondent paid $250, for five of the violations. The listing shows one violation of mandatory safety standard 56.9301, one violation of section 56.14112(b), two violations of section 56.11027, one violation of section 56.6132(a)(4), four violations of section 56.11002, and two violations of section 56.9300(a). The print-out further reflects that the respondent paid penalty assessments of $359, for 11 of the 24 violations listed for the period prior to December 13, 1993.

The information contained in the print-out does not include any violation numbers, dates, or any indications as to whether the violations were issued as citations or orders, or include the violations which are the subject of these proceedings. In response to a bench question concerning the print-out, petitioner's counsel agreed that "it's confusing," and respondent's counsel stated, "This has been a general education for me now" (Tr. 249). When asked about any outstanding delinquency letters, petitioner's counsel stated, "they are taking care of that," and respondent's counsel stated "we're dealing with MSHA in a responsible way with respect to the citations we've received (Tr. 249-250).

The petitioner's post-hearing brief does not discuss the respondent's history of prior violations in the context of whether any increases over the amounts initially proposed by the petitioner for the violations at issue in these proceedings are warranted. The petitioner simply notes that the penalty history was submitted without objection and constitutes sufficient evidence to meet the petitioner's burden of proof (Pg. 1, post-hearing brief).

In the absence of any further evidence, I have no basis for concluding that the respondent's history of prior violations warrants any additional increases in the civil penalty assessments that I have made for the violations which have been affirmed. Based on the record here, namely, the computer print-out submitted by the petitioner, I conclude and find that additional increased penalty assessments are not warranted.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Continue in Business

Although Inspector Okuniewicz characterized the respondent as a medium-sized mine operator, the respondent's counsel stated that the mine has 12 employees, mine production consists of 6,220 annual man hours, and the petitioner's counsel assumed that the mine is a small operation (Tr. 365-366). In her post-hearing brief, at page 7, footnote 10, counsel states that the respondent is a small operator. Accordingly, I conclude and find that the respondent is a small mine operator, and in the absence of any evidence to the contrary, I cannot conclude that the civil penalty assessments I have made for the violations which have been affirmed will adversely affect the respondent's ability to continue in business.

Negligence

The "moderate negligence" findings associated with section 104(a) Citation Nos. 3908709, 3908710, 3908706, 3908707, and 4333365, are AFFIRMED, and I conclude and find that the violations resulted from the respondent's failure to exercise reasonable care.

Based on my unwarrantable failure finding and modifications of section 104(d)(2), Order Nos. 3988679, 3908703, and 3908704, I conclude and find that the violations resulted from the respondent's failure to exercise reasonable care amounting to moderate negligence.

With regard to section 104(d)(2), Order No. 3908708, I conclude and find that the violation resulted from a high degree of negligence by the respondent.

Gravity

Based on my significant and substantial (S&S) findings with respect to the violations that have been affirmed, I conclude and find that Order Nos. 3908704, 3908708, 3908679, and Citation Nos. 3908709, 3908710, are non-serious violations.

I further conclude and find that Order No. 3908703, and Citation Nos. 3908706, 3908707, and 4333365, are serious violations.

Good Faith Compliance

I conclude and find that the respondent timely corrected all of the cited conditions and the violations were abated and terminated in good faith.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and my de novo consideration of the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the following penalty assessments are reasonable and appropriate for the violations that have been affirmed in these proceedings:

Docket No. WEST 96-208-M

Order/ Citation No.	Date	30 C.F.R. Section	Assessment
3908679	12/12/95	56.9301	$ 50
3908703	12/12/95	56.14112(b)	$150
3908704	12/12/95	56.11027	$ 50
3908708	12/13/95	56.6132(a)(6)	$400

Docket No. WEST 96-209-M

Citation No.	Date	30 C.F.R. Section	Assessment
3908706	12/12/95	56.11002	$119
3908707	12/12/95	56.9300(a)	$119

Docket No. WEST 96-262-M

Citation No.	Date	30 C.F.R. Section	Assessment
3908709	12/13/95	56.6132(a)(4)	$ 50
3908710	12/13/95	56.6132(a)(4)	$ 50
4333365	03/19/96	56.14107(a)	$111

The following alleged violations ARE VACATED and the proposed civil penalty assessments ARE DENIED and DISMISSED:

1. Section 104(a) "S&S" Citation No. 3908559, August 30, 1995, 30 C.F.R. 56.14100(a)

2. Section 104(a) "S&S" Citation No. 3908687, August 16, 1995, 30 C.F.R. 56.6132(a)(6).

3. Section 104(d)(2) non-"S&S" Order No. 3908688, November 16, 1995, 30 C.F.R. 56.6101(a).

4. Section 104(d)(2) "S&S" Order No. 3908680, December 12, 1995, 30 C.F.R. 56.14112(a).

5. Section 104(a) non-"S&S" Citation No. 3908711, December 13, 1995, 30 C.F.R. 56.6131(b).

ORDER

IT IS ORDERED AS FOLLOWS:

1). Section 104(d)(2) Order Nos. 3988679, 3908703, and 3908704 ARE MODIFIED to section 104(a) citations.

2). The respondent shall pay civil penalty assessments in the amounts shown above for the violations that have been affirmed. Payment is to be made to MHSA within thirty (30) days of the date of these decisions and order, and upon receipt of payment, these matters ARE DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

FEB 2 1 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 96-1-M A. C. No. 23-00009-05523
v.	:	
AUXVASSE STONE & GRAVEL CO., Respondent	:	Auxvasse Stone & Gravel
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 96-101-M A. C. No. 23-00009-05525 A
v.	:	
ROBERT E. KUDA, Employed by AUXVASSE STONE & GRAVEL CO., Respondent	:	Auxvasse Stone & Gravel

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Petitioner;
Terry S. Kraus, President, Auxvasse Stone & Gravel Company, St. Louis, Missouri, for Respondents.

Before: Judge Maurer

These consolidated cases are before me upon the petitions for assessment of civil penalty filed by the Secretary of Labor (Secretary) against the Auxvasse Stone & Gravel Company, (Auxvasse) and Mr. Robert E. Kuda pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege that Auxvasse violated the mandatory standard found at 30 C.F.R. § 56.14100(c) and that Mr. Kuda, as an agent of the corporate operator, knowingly authorized, ordered or carried out that violation. The Secretary seeks civil penalties of $500 against Auxvasse and $500 from Mr. Kuda.

Pursuant to notice, these cases were heard at Clayton, Missouri, on November 14, 1996.

On May 16, 1995, MSHA Inspector Robert Seelke issued section 104(d)(1) Citation No. 4329604 to Auxvasse alleging that:

> The "Old Cat" 769B, haul truck parked in the shop parking area and designated as ready for use was found to have problems with the steering. The bearing for the steering cylinder stem on the left side was missing. This created a condition of an approx 3/4" difference in the diameter of the stem eye and the holding pin. The cylinder stem eye was resting around the pin but was not securely attached to the pin. The tie rod on the right front wheel was in a similar condition with the exception that there was a portion of the broken bearing still within the rod, however, it would not hold the tie rod end securely in place. These conditions create a hazard of either the left steering cylinder or the right tie rod becoming disengaged from anchor points and causing a serious steering defect when the truck is used. It is used on various grades and various speeds to haul rock in conjunction with other mobile equipment. According to production records the truck was last operated on 5-10-95. Further investigation showed that the truck was operated on a fairly regular basis during July 94. After discussion with several employees it was determined that this condition had existed both during July 94 & May 95. It was also determined that the condition had been reported to management on several occasions during this time period. After discussion with the foreman it was determined that he was aware of this situation and had told the owner of the company. The foreman also stated that he personally did not feel that this was a serious mechanical problem. This is an unwarrantable failure.

The standard cited, 30 C.F.R. § 56.14100(c), provides as follows:

> (c) When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

Findings, Conclusions and Discussion

The mine involved in this case is an open pit limestone mine, employing 12 persons, located near Auxvasse, Missouri. On May 16, 1995, Mr. Robert E. Kuda was in charge of the operations there, as Mr. Kraus, the company president, was out of town.

Inspector Seelke testified that during a regular inspection of the mine on May 16, 1995, he inspected a Caterpillar 769B, a large haul truck. He found that the left steering cylinder stem did not have a swivel bearing in place. It was completely gone, and the steering stem was laying over the pin on the arm assembly. The problem was that there was nothing to hold the steering cylinder stem on the pin on the arm assembly. Basically, just gravity was holding the steering cylinder in place. On a typical mine haul road it could bounce off, and at that point, you could lose some steering capability. Inspector Seelke considered this to be a hazardous defect to anyone who might drive this equipment.

On the right side of the truck, the steering cylinder was in good order. But the tie rod end that goes on the steering arm was defective. A portion of the bearing was broken apart, so that the tie rod was resting against the pin, instead of the bearing in-between. Once again, the inspector considered this to be a hazardous equipment defect that could affect the steering of the truck. If you hit a bump, the tie rod could come off.

At the time the inspector observed the truck in this condition, it was setting on the ready line. It was not in use at the time he observed it, but it was on the ready line to be used if another truck went out of service. He determined that the last day the truck was used was May 10, 1995. He also determined from Auxvasse employees that the truck was in the defective condition that he found it in when it was last operated on May 10, 1995.

The inspector opined that the effect of these steering defects would create a hazard. If the steering cylinder was to come off, you could no longer turn the truck. If the tie rod end came off, the truck would be very difficult to control, in his opinion.

Inspector Seelke also opined that it was very likely that either or both of these conditions could occur, given the conditions he found and the terrain around the mine site. The

effect of a loss of control of the truck could reasonably lead to a pedestrian in the area being run over, or the truck going through a berm and over an embankment, thereby seriously injuring the driver.

The two cited defective conditions were very obvious and the inspector determined from talking with the employees that the acting foreman, Robert E. Kuda, was aware that these conditions had existed for sometime, and that no appreciable effort had been made to correct them. The miners that the inspector talked to informed him that the truck was in this condition since at least July 1994, and that it had been reported to management at that time on several occasions and nothing was done about it.

The respondents do not dispute that the truck was in the condition that the inspector found it in and as it is written up in the citation at bar. However, they argue that as to the right tie rod end defect, Mr. Kuda, and therefore the company, had no knowledge of the degree or magnitude of the defect until it was uncovered by the inspector, the picture taken, and so forth.

Mr. Kuda testified at the hearing and stated that one of the truck drivers pointed out the left steering cylinder problem to him he thought in December 1994, but then the truck was in the shop for something else and was not used again until May 1995, and even then on a very limited basis.

Mr. Kuda also disagrees with the degree of danger presented by the defects in the steering mechanism. He maintains these problems would not lead to a total loss of control of the vehicle. He states that you would still be able to drive it because there is an additional steering cylinder and tie rod to keep the steering system intact and prevent total loss of control. Also, Mr. Kuda emphasizes that this is a spare truck. It is only used once in awhile if some other truck is out of service.

Mr. Kuda also denies knowledge of the defect in the right tie rod end. Nobody ever pointed that out to him, at least not to his recollection. Further, it is stipulated by the Secretary that the employees, truck drivers, never wrote the problem up on the equipment squawk sheet, as they were supposed to do by company policy. However, he was aware that there was a rag tied over the defective tie rod end for about a year, but he never took it off to look under it to see what the problem was.

I find that a violation of 30 C.F.R. § 56.14100(c) occurred as charged. Actually, it is admitted by both respondents in the record of proceedings.

The Secretary further maintains that the violation was "significant and substantial." A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, *3* FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory standard is significant and substantial under *National Gypsum* the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation, (3) a reasonable likelihood that the hazard contributed to will result in an injury, and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

Inspector Seelke testified convincingly that it would be reasonably likely that if this truck continued to be used in normal mining operations, there would be a serious deterioration in the ability of the driver to steer it, and therefore, there would be at least a partial loss of control of the vehicle. And this is a large vehicle. It is approximately a 30 to 35-ton haul truck with tires about 5 feet high off the ground.

I credit the inspector's belief that with the two acknowledged defects in the steering mechanism it was reasonable to expect that the left steering cylinder and the right tie rod would come off in the normal use of the vehicle over the mine's rough haulage roads. The resultant loss of control could be a hazardous situation for both the driver of the haul truck and most especially for any pedestrian workers in the area. Serious or fatal injuries would be a reasonably likely result of such an occurrence.

Within this frame of reference, it is clear that this violation was "significant and substantial", and I so find.

The Secretary also maintains that the violation was the result of "unwarrantable failure." Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "lack of reasonable care." Id. at 2003-04; *Rochester and Pittsburgh Coal Company,* 13 FMSHRC 189, 193-94 (February 1991). Relevant issues therefore include such factors as the extent of a violative condition, the length of time that it existed, whether an operator has been placed on notice that it existed, whether an operator has been placed on notice that greater efforts are necessary for compliance and the operator's efforts in abating the violative condition. *Mullins and Sons Coal Company,* 16 FMSHRC 192, 195 (February 1994).

The evidence is clear that Mr. Kuda, a management employee, was aware of the defect concerning the left steering cylinder for a long time (approximately 5-6 months) before it was cited by Inspector Seelke. He nevertheless did nothing to correct this unsafe condition but rather allowed the truck to remain in service, available for use. This evidence alone is sufficient to support a finding of "high" negligence and "unwarrantable failure."

Under all the facts and circumstances present in this case, I find that the violation herein was the result of "high" negligence and "unwarrantable failure" and Citation No. 4329604 will be affirmed herein as it was written. Considering the penalty criteria found in section 110(i) of the Act, I further find that the proposed civil penalty of $500 against the corporate operator is reasonable and appropriate, and will be assessed herein.

The Section 110(c) Case

The Commission has defined the term "knowingly" that appears in section 110(c) of the Act[1] in *Kenny Richardson,* 3 FMSHRC 8, 16 (January 1981), *aff'd* 689 F.2d 623 (6th Cir. 1982) as follows:

> "Knowingly", as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence. . . . We believe this interpretation is consistent with both the statutory language and the remedial intent of the Coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.

As a management employee, a foreman, Mr. Kuda is held to a high standard of care with regard to the safety of the men who work at his direction. He knew of the violative condition and yet did not ensure its abatement, but rather allowed the equipment to remain in service in an unsafe condition. I conclude, therefore, that his failure to remove the truck from service represented more than ordinary negligence. Accordingly, I find he knowingly violated the standard.

The Secretary has proposed that Mr. Kuda pay a civil penalty of $500, the same amount as that proposed against the corporate operator. I, however, feel that this was most probably an isolated lapse of judgment on the part of Mr. Kuda for which I find a penalty of $200 will satisfy the public interest in this matter.

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[1] Section 110(c) of the Mine Act provides, in pertinent part, that: "Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties. . . ."

ORDER

1. Section 104(d)(1) Citation No. 4329604 **IS AFFIRMED.**

2. The Auxvasse Stone & Gravel Company **IS ORDERED TO PAY** a civil penalty of $500 within 30 days of the date of this decision.

3 Robert E. Kuda **IS ORDERED TO PAY** a civil penalty of $200 within 30 days of the date of this decision.

4. Upon receipt of the payments, these cases **ARE DISMISSED.**

Roy J. Maurer
Administrative Law Judge

Distribution:

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/lt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

FEB 2 1 1997

LENDON SHEPHERD, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 97-51-D
	:	BARB CD 96-18
v.	:	
	:	Wiley Surface Mine
CONSOL OF KENTUCKY, INC., Respondent	:	Mine ID 15-17664

DECISION

Appearances: Lendon Shepherd, Hueysville, Kentucky, pro se; Elizabeth Chamberlin, Esq., Consol, Inc., Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Melick

This case is before me upon the complaint by Lendon Shepherd under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," alleging that he was discharged by Consol of Kentucky, Inc. (Consol) in violation of Section 105(c)(1) of the Act.[1] In a Motion to Dismiss and

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[1] Section 105(c)(1) of the Act provides as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to Section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of

Amended Motion to Dismiss Consol notes that the Complainant was admittedly discharged on October 20, 1995, and did not file a complaint with the Mine Safety and Health Administration (MSHA) alleging that he was unlawfully discharged until September 5, 1996. Consol argues therefore that the complaint should be dismissed as untimely.

In relevant part, Section 105(c)(1) of the Act prohibits the discharge of a miner for filing a complaint notifying the operator or the operator's agent of an alleged danger or safety or health violation. *fn 1 Supra*. If a miner believes that he has been discharged in violation of the Act and wishes to invoke his remedies under the Act, he must file his initial discrimination complaint with the Secretary of Labor within 60 days after the alleged violation and in accordance with Section 105(c)(2) of the Act.[2] The Commission has held that the purpose of the 60-day time limit is to avoid stale claims, but that a miner's late filing may be excused on the basis of "justifiable circumstances." *Hollis v. Consolidation Coal Company*, 6 FMSHRC 21(January 1984); *Herman v. Imco Services*, 4 FMSHRC 2135 (December 1982). In those decisions the Commission cited the Act's legislative history relevant to the 60-day time limit:

> While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time-limit because he is mislead as to or misunderstands his rights under the Act. (citation omitted).

The Commission noted accordingly that timeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation.

Footnote 1 Continued

> miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

[2] After investigation of the miner's complaint, the Secretary is required to file a discrimination complaint with this Commission on the miner's behalf if the Secretary determines that the Act was violated. If the Secretary determines that the Act was not violated, he shall so inform the miner, and the miner then may file his own complaint with the Commission under Section 105(c)(3) of the Act.

At hearings, Mr. Shepherd testified that he and his brother, Gordon, visited the Hazard, Kentucky office of the Mine Safety and Health Administration (MSHA) in November 1995, around the tenth of the month. According to Shepherd, he met with MSHA Special Investigator Maurice Mullins who wrote what he told him on a "yellow piece of scratch paper". Shepherd further described what occurred at this alleged meeting in the following colloquy:

Q. All right. And what did you tell Mr. Mullins at that time?

A. I told him that I had been terminated after being off with an injury.

Q. You had been terminated after being off with an injury?

A. With a work-related injury. And still under a doctor's care. Not released to go back to work by that doctor.

Q. Is there anything else you told him?

A. Yeah. That the one treating physician that I had been seeing --

Q. I'm sorry. You'll have to speak up.

A. The one treating physician that I had been seeing had released me to go back to work. Another treating physician, my primary treating physician, does physicals for Consol of Kentucky, as well. And he would not release me to go to work. He told me that I was not able to return to work at that time.

Q. All right. Anything else you told him?

A. I was put through a regular prehiring physical, pre-employment physical, after 14 years of employment.

Q. This is what you told Mr. Mullins, you're saying?

A. Yes, sir.

Q. All right.

A. And I was told that I came to work on drugs. And fired for that reason.

Q. I'm sorry?

A. And fired for that reason.

Q. You said you were put through a prework physical?

A. A pre-employment physical.

Q. And what happened?

A. I was terminated.

Q. As a result of that physical?

A. They said, yeah, they told me that I came to work on drugs.

Q. Okay. And in response to that, what did Mr. Mullins tell you?

A. That he would investigate it, look into it, and get back with me.

Q. He would what?

A. He would investigate it and get back with me. Get back, contact me.

Q. And is that all that occurred then at the office at that time?

A. Yeah. During that time, the federal government shut down, is what I was told. I inquired with MSHA on several occasions, and I was told that the federal government had shut down and he was not working at that time. That's the reason for my late filing. Because I didn't sign a piece of paper or anything. You know, he said he was going to investigate this thing.

Q. Well, did Mr. Mullins get back to you at all?

A. No, sir.

According to Shepherd, Mullins never again contacted him so he filed the instant complaint in the Martin, Kentucky MSHA office on September 5, 1996. Shepherd further testified that after his discharge he conferred with 20 attorneys in 1995 alone. The record shows that an attorney for the Appalachian Research and Defense Fund, Christine Heatley, acting on behalf of Mr. Shepherd, requested on December 4, 1995, information from Consol pertaining to Complainant's positive drug tests. (Exhibit R-1). Shepherd also filed applications for unemployment insurance, worker's compensation, and for benefits under the Americans With Disabilities Act regarding his October 20 discharge.

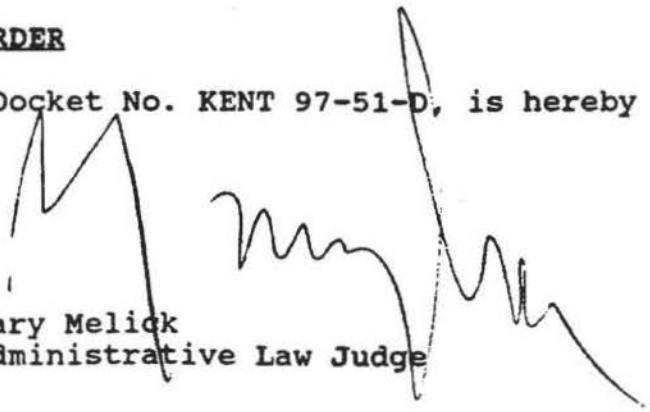
At hearing Lendon Shepherd's brother, Gordon Shepherd, testified that he accompanied Lendon to the Hazard offices in November 1995. Gordon Shepherd testified that his brother, in fact, went into Mr. Mullins's office and Mullins took notes on a note pad and said that he would investigate the complaint.

At continued hearings Maurice Mullins, the Special Investigator for the Hazard, Kentucky MSHA office, testified that he had served in that capacity since 1982. In 1995 he was the only investigator handling "Section 105(c)" cases out of the Hazard MSHA office. According to Mullins, if a person came into the MSHA office to file a complaint under Section 105(c), they were referred to "complaint processors" in the office who would type up the complaint. The complaint processor would then call the Barbourville, Kentucky MSHA office and obtain a case designator number. At that point a copy of the complaint would be retained in the office and copies would be mailed to the Complainant and to the Operator. Mullins had checked the office records and found no complaint filed by Mr. Shepherd in 1995. Mullins testified that he took a statement from Mr. Shepherd on September 16, 1996, pursuant to the instant complaint filed on September 5, 1996, and that he therefore now can identify Mr. Shepherd. He has no recollection of ever having met Shepherd prior to September 16, 1996.

I find Mr. Mullins' testimony credible regarding the standard procedures followed in the Hazard MSHA office in receiving discrimination complaints, that there was no record of Mr. Shepherd having filed any complaint with his office in 1995 and that he had no recollection of having ever met Shepherd prior to his taking his statement on September 16, 1996. Under the circumstances I do not find Shepherd's claims that he had filed his complaint in November 1995, to be credible. He does not claim that he was ignorant of the filing requirements but only that he had filed within the 60-day time-frame set forth in the Act. Under the circumstances the complaint he filed on September 5, 1996, regarding his discharge on October 20, 1995, is untimely and cannot be excused for any "justifiable circumstance". Consol's Motion to Dismiss is accordingly granted.

ORDER

Discrimination Complaint, Docket No. KENT 97-51-D, is hereby dismissed.



Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 2 4 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 96-21-M
	:	A.C. No. 44-00040-05559
v.	:	
	:	Eastern Ridge Lime Co. L P
EASTERN RIDGE LIME COMPANY, L P, Respondent	:	

DECISION

Appearances: Pamela S. Silverman, Esq., Gretchen Lucken, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the Petitioner
John F. Cowling, Esq., Armstrong, Teasdale, Schlafly & Davis, St. Louis, Missouri, for the Respondent.

Before: Judge Weisberger

I. Statement of the Case

This case is before me based upon a petition for assessment of civil penalty filed by the Secretary of Labor (Petitioner) alleging violations by Eastern Ridge Lime L.P. (Respondent) of 30 C.F.R. § 57.3360, 30 C.F.R. § 57.3201, and 30 C.F.R. § 57.14205. Pursuant to notice, a hearing was held on October 8, 1996 through October 11, 1996, and October 15, 1996 through October 16, 1996, in Salem, Virginia. On December 26, 1996, Petitioner filed a post hearing brief containing a proposed statement of facts, and Respondent filed proposed findings of fact and conclusions of law. On January 13, 1996, Respondent filed a response to Petitioner's proposed findings and conclusions.

II. Findings of Fact

1. The Eastern Ridge mine located in Ripplemead, Virginia is an underground limestone mine owned and operated by Eastern Ridge, and Mississippi Lime Company.

2. Operations of the Eastern Ridge mine are subject to the Mine Safety and Health Act of 1977, as amended, 30 §§ U.S.C. 801 et seq.

3. Limestone was extracted from the Eastern Ridge mine using a random room and pilar mining method.

4. On July 25, 1994, a mine supervisor, Barry Snider, was fatally injured, and a driller, Jeffrey Morgan, was seriously injured when a fall occurred in the 204E/11S area of the Eastern Ridge mine.

5. The July 25, 1994, roof fall occurred while Barry Snider, mine supervisor, and Jeffrey Morgan, driller, were attempting to scale loose rock with an Ingersoll-Rand, Model MHJIDV, Single-Boom Jumbo drill. The rock was located in the right rib of the 204E heading near the top.

6. A mud-filled cavity was encountered in the roof of the 204E heading in November or December 1993 during the heading advance.

7. In the Eastern Ridge mine, a cavity is an opening in the stone surface caused by solution activity in the geologic past. A joint widened by solutioning occurs when ground water seeps into the limestone and tends to move through the joints, actually dissolving part of the rock and carrying it off with it. As the process continues over periods of geologic time, the joint can be widened out, and in an extreme case form a cave.

8. A mud seam is an opening or cavity that contains mud.

9. The cavity in the roof of 204E heading started at the face of 204E, and came back about five feet towards the haul road.

10. The cavity in the roof of 204E heading extended most of the way across the face of 204E.

11. The uppermost boundary of the cavity in the roof of the 204E heading extended so far into the roof that it could not be seen from the ground or the roof line with a light.

12. The roof of 204E heading was drummy from the cavity out toward the haul road for a distance of up to sixteen feet, a condition which was reported to mine management.

13. Generally, if drummy top cannot be scaled down it is drilled and shot. This was not done in this case.

14. The roof of 204E was popping and cracking in December 1993, a condition which was reported to mine management. When a mine roof makes popping and cracking noises, it indicates that the top is not sound.

15. On numerous times between November/December 1993 and July 1994, scalers told mine management that it was not safe for anybody to go into the 204E heading, and they condemned this area.

16. Mining advance was stopped in the 204E heading around November or December of 1993 after the mud-filled cavity was encountered in the roof of 204E because the area could not be safely scaled.

17. Mining in 203, the heading adjacent to 204E/11S, was stopped prior to the advance of 204E when a mud seam was encountered in the face area of 203, and mining could not advance any further. The mud seam appeared in 203 as a mud hole in the upper left corner where the face and rib intersected.

18. The 206 heading was advanced after 204E was stopped in December 1993. Bad top was encountered in the 206 heading prior to the July 25, 1994, roof fall in 204E/11S.

19. Scalers attempted to scale the 204E heading in May or June 1994, and observed that the top of the heading was checkered with wide mud seams. Scaling could not be completed due to the unsafe ground conditions, and the area was condemned. Mine management was advised that the top of 204E was "all chopped up" and leaking mud (Tr. 400).

20. In late June or early July 1994, the 11S heading was started to the right off of 204E.

21. The left rib of 11S was situated approximately 10 to 15 feet back toward the haul road from the face of 204E.

22. The left rib of 11S, or the right rib of 204E was on a slick.

23. A slick is generally a smooth surface on stone. A slick indicates some type of discontinuity in the stone, and in some cases, it indicates that there may have been movement in the geologic past, in which another piece of stone rubbed across the plane being observed. When positioned on the rib, a slick provides no support for the top. The smooth plane of the slick can only be observed after the second piece of stone is no longer there.

24. A joint is a fracture or discontinuity in the rock; a separation between two solid portions of the rock. A joint plane can be oriented to the vertical or at some angle to the vertical. When the discontinuity intersects the surface being looked at, it generally looks like a line.

25. On Thursday, July 21, 1994, Darran Eugene Reed, a scaler/blaster observed two roughly parallel seams or joints that ran approximately 18 to 20 feet apart in the roof of the 11S heading, one on the right side of the heading, one on the left side. In the 11S heading itself, the seams were six to nine inches wide and muddy in color. As the seams traveled through 204E in the direction of the haul road, they "seized up and were more like white lines" (Tr. 567).

Robert L. Bradford, the mine Superintendent testified that prior to the development of 11S, the top of 204E to the haul road was real smooth. He indicated that on July 21, 1994, he did not recall any changes in 204E, and did not observe anything of significance.

26. On July 22, 1996, Danny Carter, a salaried supervisor, observed two mud seams in the face of 11S, each an eighth of an inch wide and ten inches apart. He said these seams "then . . . ran up to the top, then back out towards the haul road" (Tr. 914).

27. On Sunday, July 24, 1994, a one to two inch mud seam ran from the left side of the cavity in the roof of the 204E straight back toward the haul road then turned right into the 11S heading. According to Tim Belcher, a scaler, the roof of the 11S heading looked like a checkerboard of mud seams, with two or three more seams jutting off the two main seams inside the heading.

28. On Sunday, July 24, 1994, driller Milton Conley observed a one to two inch wide seam encircling the roof of the 204E heading. The seam looked like a one to two inch wide chalk line forming a twenty to thirty foot diameter circle in the entry, as shown in Government Exhibit 19. He opined that there was nothing holding the top up.

Jeffrey Morgan, a driller, testified that on July 24, 1994, there were tight joints across the top of 204, " ... but it would run into the 11 South area" (Tr. 962). He indicated that one joint "probably" ran into the left rib of 11 South (Tr. 962).

29. Several miner witnesses testified about the condition of the roof of 204E/11S at various times prior to the accident. Michael Farley, a scaler/blaster, testified that in November or December 1993, the roof was drummy about two to three feet back from the mud seam in 204E, but that the rest of the roof was "pretty solid" (Tr. 465).

Darran Reed, a scaler/blaster, stated that six months to a year prior to the accident at issue, the roof of 204E was drummy two to three feet back from the crevice near the face. Reed indicated that he tested the roof in the area of 11S on July 21, 1994, and "it sounded good." Tr. 590.

Walter L. Breeden, a scaler/blaster, stated that the last time 204E was blasted, he sounded the roof with a scaling bar, and it sounded drummy up to ten feet back from the opening of the cavity at the face.

30. On Monday, July 25, 1994, five minutes before the accident occurred, Conley took his light and showed Snider the seam encircling the roof of the 204E heading, explaining to Snider that there was no support for the roof of the heading, and that the whole roof had broken loose.

31. After talking to Conley on Monday, July 25, 1994, Snider instructed Morgan to bring the Jumbo drill to the 204E heading to knock down a loose rock near the roof at the intersection of the right rib of 204E, and the left rib of 11S. After extending the drill boom, the cab of the drill in which Morgan was seated was located approximately 40 feet outby the rock in question. Snider was standing on the ground approximately 15 to 20 feet to the left and in front of the cab of the drill. Morgan then attempted to rattle the rock loose with the Jumbo drill by allowing the drill bit to vibrate, and tap on the surface of the rock. As Morgan was attempting to rattle the rock loose, nearly the entire roof of the 204E/11S heading collapsed killing Snider, and seriously injuring Morgan.

32. No artificial ground support was used in the 204E/11S area of the Eastern Ridge mine prior to the July 25, 1994, roof fall.

33. The natural ground support in place between 204E and 11S prior to the July 25, 1994, roof fall was not sufficient to control the ground.

34. After the accident, miners and MSHA personnel observed two parallel joints, and a third intersecting joint, running from the roof of the haul road into the 204E/11S area.

35. Imposition of the civil penalties will not affect Respondent's ability to continue in business.

36. Respondent's violation history shows 70 assessed violations in 72 inspection days in the preceding 24 month period, or .97 violations per inspection day. This is a moderate violation history.

37. The violations were abated within the time set for abatement.

38. The Eastern Ridge mine is a moderate sized mine with 192,906 tons mined in 1994. Eastern Ridge is a moderate size operator with 1,939,510 tons mined in 1994.

III. Discussion and further findings

A. Citation No. 4289772

1. Violation of 30 C.F.R. § 57.3360.

On July 25, 1994, a roof fall occurred in the 204E/11S area of Respondent's Eastern Ridge Lime LP underground mine, fatally injuring a supervisor, Barry Snider and seriously injuring a driller, Jeffrey Morgan. Subsequent to an investigation, the Mine Safety and Health Administration (MSHA) issued a citation pursuant to Section 104(d) of the Act, alleging a violation of 30 C.F.R. § 57.3360. Section 57.3360, as pertinent, provides as follows: "[g]round support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary." Hence, in order to prevail, Petitioner must establish the existence, prior to the fatal accident, of ground conditions which indicated that ground support was necessary.[1] For the reasons that follow, I find that Petitioner has met this burden.

The record clearly establishes that a mud-filled cavity was encountered in the roof of the 204E heading in November or December 1993, during the heading advance. The witnesses who observed this cavity testified regarding its dimensions. Some witnesses indicated that it commenced in the roof at the face, and extended back in the direction of the haul road for a distance of only three feet, whereas others described this distance as being six feet. The weight of the evidence establishes that the cavity in the roof started at the face and extended outby about five feet. Some witnesses indicated that the cavity extended rib to rib, whereas others indicated that it did not extend that far. The weight of the evidence establishes that the cavity extended most of the way across the face of 204E.

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[1]In the alternative, Petitioner has the burden of establishing that mining experience in similar ground conditions in the mine indicated that ground support is necessary. Since, as will be hereinafter discussed (III(A),(1) infra), the record establishes that the ground conditions did indicate that ground support was necessary, there is no need to decide whether Petitioner met its alternate burden of establishing that mining experience in similar ground conditions indicated that ground support was necessary.

The testimony of all witnesses indicated that the crevice extended six feet up into the roof, and was mud filled.

It is not necessary to make a finding regarding the specific dimensions of the cavity, as the record clearly establishes its existence, and that it was considered a hazardous condition. When the mine roof was sounded with a bar, it produced a drummy sound from the cavity out toward the haul road for a distance up to 16 feet. On numerous times between November/December 1993 and July 1994, the scalers who worked in the area told mine management that the 204E heading area was not safe, and the area was condemned. The roof in 204E evidenced popping and cracking noises in December 1993, which indicated that the top was not sound. A mud hole had been observed in the upper left hand corner of the face in the adjacent 203 heading and mining was stopped there. In May 1994, scalers observed that the top of the 204E heading contained mud seams. Although the top sounded good, it was condemned.

Sometime around June or early July 1994, the 11S heading was opened up to the right of the 204E heading. Breeden who drilled the 11S heading, indicated that Snider had placed marks on the right rib of 204E, 40 feet from the face to indicate where drilling should start to open up the 11S heading. However, he did not testify specifically as to the distance between the outby edge of the cavity at the face of the 204E heading, and the left rib of the 11S heading. Bradford testified that the start of the 11S heading was probably 25 to 30 feet from the hole in the ceiling of 204E. However, Wright who blasted the 11S entry testified that the 11S left rib was approximately 10 to 15 feet from the 204E face. In the same fashion, Darran Reed, a scaler/blaster who worked in the area, indicated that the 11S heading was approximately 10 to 12 feet back from the 204E face. Significantly, Jeffrey Morgan, who testified on behalf of Respondent, stated that the left rib of 11S ". . . would have been 10, 15 feet, maybe better than that." (Tr. 957). Morgan had drilled in the 11S and was found to be a particularly credible witness.

I find that the weight of the evidence establishes that it was more likely than not that the distance from the cavity at the face of the 204E heading to the left rib of the 11S heading was approximately 15 feet.

Joseph Cybulski, Petitioner's roof control expert, proffered his opinion that the ground conditions in the 204E/11S area prior to the fatal accident, indicated that ground support was necessary. In essence, he based his opinion upon the totality of the following conditions in the area at issue: a cavity that extended rib to rib and formed an opening to eight feet from the 204E face, the existence of a drummy roof in 204E, the existence of joints running parallel to the 204E face, the presence of a

mud seam in the 203E heading, the existence of joints running parallel to 11S that were tight across 204E and then became wide and mud filled in 11S, and the proximity of the left rib in 11S to the vertical cavity in 204E. The record establishes the existence of most of these conditions, as discussed above. Thus, I find Cybulski's opinion to be well founded.

Bradford, and Respondent's expert, Jack Parker, opined, in essence, that ground support in the area at issue was not necessary. As a basis for his opinion, Parker cited only the fact that the 204E face was "stopped" when the cavity was reached and that, " . . . except for a strip four-to-ten feet wide beside the cavity the rest of 204E and 11S was good roof" (Tr. 1227). Parker offered elaborate testimony critical of Cybulski's theory that the roof fall at issue was caused by lack of support for the roof whose main support prior to the accident, consisted of cantilever type support. Parker opined that the cause of the roof fall was the existence of a cavity above the roof in the area in question, and that miners could not have been aware of this condition. However, the issue before me is not the cause of the accident, but rather whether ground conditions indicated the necessity for ground support. It is significant to note that aside from criticizing the significance of Cybulski's reliance on the existence of parallel joints in the roof, Parker did not explicitly contradict Cybulski's testimony regarding the specific conditions he cited that supported his conclusion that the need for ground support was indicated. It also is significant that miners who regularly worked in the area, expressed concerns of the various conditions encountered. Breeden was concerned about the drummy roof in 204E. Marvin Wright, a scaler/blaster, opined that the pillar between the 204E face and the left rib of 11S was too small to support the top. Belcher expressed concern about the seams in the top of 11S. Reed was concerned about turning the 11S heading to the left due to the presence of mud seams in the left rib of 11S, and the face of 204E.

For all the above reasons, I find that the record establishes that, prior to the fatal accident, ground conditions indicated that ground support was necessary.[2] There is no evidence that Respondent provided any ground support.[3] Accordingly, I find that it has been established that Respondent did violate Section 57.3360, supra.

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[2]According to Cybulski, ground support in the form of steel sets or cribs would have provided ground support.

[3]In this connection, I agree with Respondent that the ground support contemplated by Section 57.3360, supra, is artificial and not natural ground support.

2. Significant and Substantial

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated 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." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The evidences establishes that Respondent did violate a mandatory standard i.e., Section 57.3360. Also, it is clear that the essence of the violation i.e., failure to provide ground support, contributed to the hazard of a roof fall. Taking into account the combination of ground conditions as discussed above, (III)(A) infra, and considering the fact that a roof fall did occur in the area causing a fatality and seriously injuring

another miner, I conclude that the third and fourth elements set forth in Mathies have been established. For these reasons I find that the Petitioner has established that the violation was significant and substantial.

3. Unwarrantable Failure

The totality of ground conditions which indicated a need for ground support, as discussed above, III(A)(1) infra, were obvious as they had been observed by Respondent's miners. As noted by Respondent, in its Proposed Findings of Fact, its Supervisor, Barry Snider, was aware of all of the concerns the miners had regarding the area at issue prior to July 25, 1994. Indeed the 204E heading had been condemned. However, in spite of this knowledge, Respondent did not provide ground support. Accordingly I find that the level of its negligence was more than ordinary, and constituted aggravated conduct. (See, Emery Mining Corp., 9 FMSHRC 1997 (December 1987)) I thus find that it has been established that the violation herein was as the result of Respondent's unwarrantable failure.

4. Penalty

I find that the gravity of the violation was of a very high level as the violation contributed to a fatal roof fall. Also, as set forth above, (III)(A)(3) Infra, the level of Respondent's negligence constituted aggravated conduct. Respondent does not argue that any penalty to be imposed should be reduced by virtue of its affect on Respondent's ability to continue in business. Based upon the above, and taking into account the remaining factors set forth in Section 110(i) of the Act, I conclude that a penalty of $50,000 is appropriate for this violation.

B. Order No. 4289773 (Violation of 30 C.F.R. § 57.3201

1. Violation of 30 C.F.R. § 57.3201

On July 25, 1994, Morgan was instructed by Snider to use an Ingersoll-Rand Model MHJ1DV drill to remove a rock from the left rib of 11S. Morgan fully extended the boom of the drill, and remained inside the cab of the drill rig which was about 40 to 45 feet away from the rock. Snider was on the ground, and about 20 to 25 feet in front of, and to the left of Morgan, and 40 to 45 feet from the rock that was to be removed. Morgan hit the rock once with the end of the drill bit and it did not move. Morgan then drew the bit back and moved it over a few inches. Morgan then saw falling rock, and the glass in front of the cab of the drill imploded. Morgan was seriously injured, and Snider was killed.

Subsequent to an investigation, MSHA issued an order alleging a violation of 30 C.F.R. § 57.3201 which provides as follows: "Scaling shall be performed from a location which will not expose persons to injury from falling material, or other protection from falling material shall be provided."

As set forth above, III(A)(1) infra, the evidence clearly establishes that on July 25, 1994, prior to the accident, the 204E/11S area did not contain any ground support in spite of conditions which had indicated the necessity for such support. Accordingly, even though Morgan was inside a cab about 45 feet away from the rock that he was rattling, he was nonetheless exposed to the hazard of a roof fall as a consequence of working in an area that had inadequate ground support. According to Morgan, his injury was caused by rocks that were rolling towards him, rather than rocks that fell on him from the roof. However, even if Morgan was injured in this fashion, he was nonetheless exposed to the hazard of being hit or injured by rocks falling from the roof. Clearly, the cab provided some measure of protection from falling material, but there is no evidence to predicate a finding that it provided adequate protection from falling material. Also, it appears that, as part of the normal process of using a drill to remove a rock, Snider was present directing the scaling. He was situated unprotected on the ground. Hence, I find that Morgan, and Snider to a greater degree, were exposed to injury from falling material. Since scaling was performed from a location which exposed them to this hazard, I find that it has been established that Respondent did violate Section 57.3201, supra.

2. Significant and Substantial

Considering the fact that there was no support in the area in question where scaling was being performed, and taking into account the existence of a number of ground conditions that indicated the need for ground support (See, III A,(1) infra), I find that the violation was significant and substantial.

3. Unwarrantable Failure

As set forth above, III(A)(3) infra, management was aware that scaling was being performed in an area that did not have any ground support. In addition, Milton Conley showed Snider a circular seam in the ceiling of 11S five minutes before he was killed. For these reasons, I find that the performance of scaling in the area at issue under the conditions set forth above, III (A)(1) infra, constituted aggravated conduct. I thus find that the violation herein was as a result of Respondent's unwarrantable failure.

4. Penalty

Considering the fact that the Respondent's negligence reached the level of aggravated conduct, and the fact that the violation herein contributed to a fatality, I conclude that the gravity of the violation was relatively high. I find that the penalty sought by Petitioner of $35,000 is warranted under these circumstances.

B. Order No. 4289774.

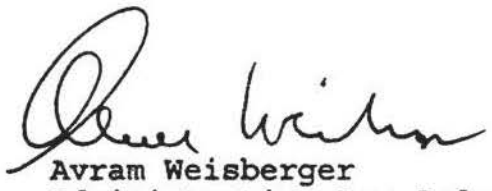
After investigation of the fatal accident, MSHA issued an order alleging a violation of 30 C.F.R. § 57.14205 which provides as follows: "Machinery, equipment, and tools shall not be used beyond the design capacity intended by the manufacturer where such use may create a hazard to persons."

Based upon the clear language of Section 57.14205, supra, it is manifest that in order to establish noncompliance with this section, the Secretary must first prove that the equipment in issue, i.e., the Ingersoll-Rand Model MHJ1DV Single-Boom Jumbo drill was used ". . . beyond the design capacity intended by the manufacturer" (Emphasis added.). The evidence is undisputed that immediately prior to the fatal accident Morgan was using the Jumbo drill, as instructed by Snider to rattle a loose rock near the roof at the intersection of the right rib of 204E and the left rib of 11S. He explained that he was using the drill to rattle the rock loose by allowing the drill bit to vibrate and tap on the surface of the rock. Petitioner did not adduce the testimony of any representative of the manufacturer who was competent to testify regarding the use of the drill "intended by the manufacturer". Instead, Petitioner relies upon the hearsay testimony of Inspector Carl Liddeke, regarding a telephone conversation that he had with Carl Nasca whom he contacted at Ingersoll-Rand. According to Liddeke, Nasca " . . . was the business unit manager of crawler drills with Ingersoll-Rand" (Tr. 810). According to Liddeke, Nasca indicated that the drill was not manufactured for other than drilling holes in a rock. No weight was accorded this hearsay testimony. Since the declarant, Nasca, did not testify, there is no evidence in the record regarding his background, and responsibilities at Ingersoll Rand which would make him competent to proffer an opinion as to the use of the drill intended by Ingersoll-Rand. Petitioner also relies on literature sent by Nasca to inspector Dennis Yesko, pursuant to Liddeke's request. The literature entitled "DESCRIPTION AND SPECIFICATIONS" in general lists specifications and features of the drill (Gov't. Exh. 43). The last page of this exhibit, contains a drawing of the drill, and lists 13 features and specifications for the drill's length, width, height, weight operating, chassis, articulations, ground clearance, gradeability, jack/stabilizers, tire size, tramming

speed, and face coverage. At the top of the page it states that the drill, "is . . . designed to drill horizontal, vertical and angle holes for underground mining production headings. It supports one hydraulic drifter and can drive headings" (Gov't Exh. 43, pg 16). I find this one sentence inadequate to satisfy the Secretary's burden of establishing that the use of the drill to rattle goes beyond the design capacity of the drill "intended by the manufacturer".[4] For all the above reasons, I conclude that Petitioner has not established that Respondent violated Section 57.14205, supra.

IV. Order

It is ORDERED that Order No. 4289773, and Citation No. 4289772 are affirmed as written, and that Order No. 4289774 shall be dismissed. It is further ORDERED that Respondent shall, within 30 days of this decision, pay a total civil penalty of $85,000 for the violations found herein.



Avram Weisberger
Administrative Law Judge

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/mh

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[4]I note that Respondent's Expert, Jack Parker, testified, in essence, that, based on his over 35 years mining experience, he is familiar with the design capacities of the drill. He opined that using it to rattle is not beyond its design capacity.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 2 4 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 96-77 A. C. No. 46-02249-03602
v.	:	
	:	No. 7 Surface Mine
HOBET MINING, INC., Respondent	:	

DECISION

Appearances: James F. Bowman, Conference and Litigation Representative, U. S. Department of Labor, Mine Safety and Health Administration, Mount Hope, West Virginia, for the Secretary;
David J. Hardy, Esq., Jackson & Kelly, Charleston, West Virginia, for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

In this case, the Secretary of Labor seeks the assessment of a civil penalty against the respondent for an alleged violation of 30 C.F.R. § 77.404(a).[1] Pursuant to notice, the case was heard in Beckley, West Virginia, and the parties have filed post hearing briefs which I have considered in the course of my adjudication of this matter.

The issues presented in this case are:

1. Whether the condition or practice cited by the inspector constitutes a violation of the cited mandatory safety standard,

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[1]/ The standard cited, 30 C.F.R. § 77.404(a), provides as follows: "(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

2. whether the alleged violation was "significant and substantial" ("S&S") and

3. in the case a violation is found, what is the appropriate civil penalty to be assessed.

STIPULATIONS

The parties stipulated to the following (Joint Exhibit No. 1):

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this civil penalty proceeding pursuant to section 105 of the Federal Mine Safety and Health Act of 1977.

2. Hobet Mining Incorporated is the owner and operator of the No. 07 Surface Mine.

3. Operations of the No. 07 Surface Mine are subject to the jurisdiction of the Act.

4. Hobet Mining Incorporated may be considered a large mine operator for purposes of 30 U.S.C. § 820(i).

5. The maximum penalty which could be assessed for this violation pursuant to 30 U.S.C. § 820(a) will not affect the ability of Hobet Mining Incorporated to remain in business.

6. The inspector was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued Citation No. 4640244.

7. A true copy of the citation listed in paragraph 6 was served on Hobet Mining Incorporated or its agent as required by the Act.

8. The citation listed in paragraph 6 is authentic and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

9. MSHA's Proposed Assessment Data Sheet accurately sets forth (a) the number of assessed penalty violations charged to the Hobet Mining Incorporated 07 Surface Mine for the period from January 1993 through July 1996 and (b) the number of inspection days per month for the period from January 1993 through January 1996.

10. MSHA's Assessed Violations History Report, R-17 report, may be used in determining appropriate civil penalty assessments for the alleged violation.

11. The platform and handrail described in the citation were not mounted on the Caterpillar D-10 equipment.

FINDINGS, CONCLUSIONS, AND DISCUSSION

On November 28, 1995, MSHA Inspector Tyrone L. Stepp issued section 104(a) Citation No. 4640244 to Hobet Mining, Inc. (Hobet) alleging that:

> The Caterpillar D 10 N (Co. No. 115959) existed with the platform & handrail missing from the left side - (mounted near the radiator).

Hobet acknowledges that the platform and handrail described in the citation were not, in fact, mounted on the subject Caterpillar D-10 equipment at the time the inspector saw it. (Joint Stipulation No. 11). They had apparently been knocked off the bulldozer at some undetermined time during the course of mining close to the highwall. There is also no dispute that the platform and handrail needed to be replaced and would have been replaced at some point, with or without the citation.

The real question in this case is what effect that has on safely operating the bulldozer in the meantime. The company's position is that the missing parts did not present a hazard per se, but rather only to those maintenance personnel who needed to stand on the platform to service the radiator. Therefore, unless and until radiator maintenance was required, the bulldozer could remain in service. At the point in time that such access to the radiator was needed, the bulldozer would then have to be taken out of service until the platform was replaced and the radiator service completed.

I do not believe there is any question that there were several safe means of getting on and off the bulldozer without the missing platform and handrails described in the subject citation. Most obviously, operating personnel could simply get on or off the equipment from the other side, the right side, for instance. Once safely aboard the bulldozer, the operator, of course, would have no use for the missing pieces and could continue to safely run the equipment. Whenever he wanted to shut down operation and get down from the bulldozer, he could depart the same way he got aboard, e.g., down the right side.

The platform and associated handrail are only required when it becomes necessary to check the radiator coolant level or otherwise examine and service the radiator. There is some dispute in the record as to when and how often this need arises. It is variously described as being as long as every 10 to 11 days or as short a time period as every other day. Whichever time period is in fact closer to the truth is not important to the primary issue in this case as I view it.

I find as a fact that the missing platform and handrail assembly from the left side of the D-10 bulldozer is primarily utilized to provide maintenance personnel with a secure place to stand while servicing the radiator. Other provisions have been made on the left and right sides of the equipment to assist in safely mounting and dismounting the dozer.

Therefore, I conclude that so long as no radiator maintenance is being attempted on the bulldozer without the required secure platform and handrail, the bulldozer is not necessarily in an unsafe operating condition simply because these parts have been knocked off the dozer and not yet replaced. For its normal intended use, i.e., "bulldozing", its "operating condition" is unaffected by their absence. Mere proof of an equipment defect does not establish a violation of 30 C.F.R. § 77.404(a).

Hobet acknowledges that these parts must be replaced before a maintenance worker attempts to access the radiator since no safe alterative means exists to work on the radiator. At that point in time, the bulldozer must be taken out of service so that the missing or damaged assembly can be replaced before the maintainer attempts to access the radiator.

There is no evidence in this record that any such attempt to service the radiator on the affected bulldozer was made with the platform and handrail missing. Conversely, there is evidence in the record that Hobet would discipline any maintainer caught utilizing such an alternative, i.e., attempting to access the radiator without first replacing the platform and associated handrail.

Accordingly, the Secretary has failed to sustain his burden of proof that any unsafe condition actually existed at the time the citation was issued and therefore, he has failed to prove a violation of 30 C.F.R. § 77.404(a).

ORDER

Citation No. 4640244 **IS VACATED**, and the Petition for Civil Penalty **IS DISMISSED**.

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 2 6 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 95-467
	:	A.C. No. 36-07172-05513
v.	:	
	:	Gentzel Quarry
BELLEFONTE LIME CO., INC., Respondent	:	

DECISION

Appearances: Allison Anderson Acevedo, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for the Petitioner;
John Snyder, Esq., McQuaide, Blasko, Schwartz, Fleming & Faulkner, Inc., State College, Pennsylvania, for the Respondent.

Before: Judge Weisberger

I. Statement of the Case

At issue in this civil penalty proceeding, is the validity of a citation issued under Section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 ("The Act") alleging a violation on March 17, 1995, by Bellefonte Lime Company, Inc. (Respondent) of 30 C.F.R. § 56.3200 at two locations at its Gentzel quarry.

Pursuant to notice, the case was heard in Harrisburg, Pennsylvania, on September 25 and 26, 1996, and October 2, 1996. Respondent filed Proposed Findings of Fact and Conclusions of Law on November 26, 1996. The Secretary (Petitioner) filed a Post-Hearing Brief on November 27, 1996. On December 17, 1996, Petitioner filed a Reply Brief, and Respondent filed a Reply to Petitioner's Post-Hearing Brief.

II. Findings of Fact

1. Bellefonte Lime Company mines Valentine limestone at the Gentzel Quarry.

2. A spoil pile located in the northwest portion of the quarry was created on or after 1982 as overburden. It was drilled, blasted, excavated, and transported from other areas of the quarry.

3. The haul trucks that hauled the overburden dumped it on top of the surface area of the pile which was accessed by use of haul road networks which were created over and about the spoil pile as part of its construction process.

4. The last time spoil was added to the pile prior to the March 17, 1995, was late 1991 or 1992. It remained undisturbed between late 1991/1992, and the time it was stripped for the mining in question.

5. The spoil pile contained lenses of compacted, interlocking, and angular limestone boulders, among other materials.

6. Pennsylvania Geological Survey aerial photographs taken in 1989 and 1994, reveal that the pile was in a stable condition, and was without any evidence of impending slope failures.

7. The northwest cut area was stripped of its overburden in preparation for mining beginning on November 9, 1994.

8. Valentine limestone was first removed from the northwest cut area on February 2, 1995.

9. As of February 21, 1995, there remained approximately 9,000 tons of Valentine limestone remaining in the northwest cut area. Under normal working conditions, approximately 3,000 tons of limestone could be extracted from an area per shift. As of March 17, 1995, only one shift's worth of limestone remained in the northwest cut area.

10. MSHA inspector Edward F. Skvarch arrived at the Gentzel Quarry at 4:00 a.m., on March 17, 1995, and inspected the northwest corner of the quarry.

11. Skvarch inspected the right bank of the spoil pile near the working area and concluded that it had a steep slope, that there were rocks near the top and the face of the pile, that there was no bench in the area, and that the cut in the area was narrow.

12. Skvarch estimated that the right bank of the spoil pile near the working area was 70 feet high, and its slope was at least 60 degrees.

13. Skvarch estimated that the second cited area, located near a turn on a haul road leading to the northwest cut, was

50 feet high, and that its slope was at least 60 degrees. The slope of the toe of this portion of the spoil bank was at a higher angle with the ground compared to the portion of the pile located above the toe. No actual measurements of the slope's steepness, or the heights or widths of the cited areas were made by Skvarch.

14. At no point in time prior to his leaving the Gentzel Quarry on March 17, 1995, did Skvarch observe any materials falling or rolling off the areas in question.

15. At no point in time did Skvarch note the existence of any precursors to a major slope failure, such as a bulging of the pile of cracks along the bank of the pile.

16. Skvarch testified that he asked Theodore Michael Lesniak, the foreman at the quarry, whether the right bank and haul road areas were safe, and Lesniak replied "not really" (Tr. 508). Lesniak testified, in essence, that he was not being truthful with Skvarch, as he did not want to argue with him. Lesniak testified that he did not believe that the cited areas were unsafe.

17. Richard Moerschbacher operated the front-end loader during the day shift for at least two weeks in February 1995. Prior to March 17, 1995, Rickey Confer operated the front end loader on day shift at the quarry. Prior to March 17, 1995, Michael Boone was the truck driver on day shift at the quarry.

18. There was no benching in either of the cited areas on March 17, 1995, the date of the inspection.

19. In order to prepare the cut area for mining operations, the cited spoil pile was stripped, and the limestone was drilled and blasted.

20. Prior to March 17, 1995, and as late as March 16, 1995, employees operated equipment in the working area within approximately 15 feet of the spoil pile. The working cut where the loader operator and truck driver worked, was approximately 30 to 40 feet wide, but widened near the working face.

21. Rocks, dirt and sand fell from the right bank of the spoil pile prior to March 17, 1995.

22. A few weeks prior to March 17, 1995, rocks fell onto the working area from the left side of the pile at issue.

23. Prior to March 17, 1995, rocks fell near the working area onto the haul road at a location where the loader operator would have to back out.

24. At the time of the March 17, 1995 citation, there was no evidence of any precursors to a circular or rotational slope failure.

25. Under continued normal mining operations, as of March 17, 1995, Respondent would have left the northwest cut area after only one more shift.

26. Haul truck operators, and front end loader operators were working in or around the cited areas during the time period in issue. The operators of haul trucks and front end loaders were seated at a height of 12 to 15 feet off the ground while operating those vehicles.

27. An optical compactor measurement of the slopes of the two cited areas, as depicted in a video tape filmed on March 1, 1995, (Exh. G-6), revealed slopes of approximately 45 degrees in the two cited areas. The tape did not reveal any precursors or indicators of slope instability.

28. Brunton compass inclinometer measurements of the haul road slope in question on September 5, 1996, revealed that the bottom portion of the slope had an angle of 53 degrees up to a height of 15 to 20 feet, and the upper portion of the slope had an angle of 45 degrees up to a height of 55 feet.

29. I find that the time of the issuance of the citation at issue, the cited areas had a slope of 53 degrees existing to a vertical height of 15 to 20 feet, and had a slope of 45 degrees from the point of slope change to the top of the spoil pile.

30. The video tape footage did not reveal any materials falling from either of the cited areas or any of the other piles shown on the video tape.

31. The spoil pile at issue consisted of soil and rock materials varying in size from coarse sand to boulders the size of refrigerators.

32. Examination of the spoil pile revealed compaction as evidenced by the embedding of the finer materials within the larger course materials. The pile also contained lenses of blocky, angular boulders.

33. By 1989, as evidenced in the oblique aerial photograph admitted as Exhibit R-3, the Gentzel Quarry had become active, and spoil materials had been placed in the area of the spoil pile in question.

34. Stereoscopic review of photographs of the quarry taken on April 15, 1994, revealed that the area of the spoil pile, the

haul road area, and the northwest cut area were stable and without precursors.

III. Additional Findings and Discussion

A. Violation of 30 C.F.R. § 56.3200.

MSHA Inspector Edward Skvarch testified that on March 17, 1995, when he inspected the subject site he observed rocks on the face of the subject pile, and rocks near the top of the pile. Skvarch also indicated that the slope of the pile was steep, and that the toe of the pile along the haul road was at a steeper angle than the remaining portion of the pile. He concluded that these conditions were hazardous, and issued a citation alleging a violation of 30 C.F.R. § 56.3200 which provides, as pertinent, as follows: "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".

Theodore M. Lesniak, Respondent's shift foreman, who was present during Skvarch's inspection, testified that he did not believe that the cited areas were unsafe. However, he did not specifically contradict the testimony of Skvarch regarding his above observations. Similarly, Robert Allan Biggans, who accompanied Skvarch at the haul road site, did not contradict this aspect of Skvarch's testimony. Nor did any other of Respondent's witnesses contradict Skvarch's testimony in these regards.

Richard D. Moerschbacher, who filled in as a front end loader operator at the subject site for two weeks in February 19, 1995, observed rocks falling from the left side of the pile, but did not see any rocks fall from the right side, which is at issue, or the haul road. Michael L. Boone, who was employed as a truck driver on the dates in issue, did not see any rocks fall from the pile in the area of the haul road. However, he testified that he observed rocks as large as a foot in diameter fall from the right bank of the area in issue prior to March 17. He also indicated that he saw material falling that was like dirt or sand. He was asked to indicate when he saw rocks falling. His response is as follows:

> Like I said, we would sit there, and the loader had to back beside us and turn. The motors are in the back end of them. It blows exhaust and then the fan out through the radiators, and would disturb some of the stuff behind because it was close (sic) (Tr. 230).

Rickey Confer, who operated a front end loader for Respondent for 15 years, testified that on a daily basis he had observed a mixture of mud and stone and rocks falling from the

areas at issue. He also had observed rocks on the floor near the base of the pile.

It appears to be Respondent's argument, in essence, that Confer's testimony should be discounted, since he never brought up any safety concerns at safety meetings in spite of the fact that Respondent's employees were requested by Biggans to report their safety concerns. I observed Confer's demeanor and found him to be a credible witness. I find that his failure to report safety concerns to Biggans has some relevance regarding Confer's reactions to being exposed to the hazard of falling rocks. However, it is insufficient, to impeach Confer's testimony regarding his observations.

Respondent also argues that a finding should be made that rocks have not fallen off the pile inasmuch as the seventeen minute video tape of various areas of Respondent's operation did not depict any materials falling from any pile. Respondent also cites the fact that Skvarch, in the more than four and a half hours that he was at various locations at the quarry, did not observe any material falling from any pile. I find these facts to be insufficient to impeach eyewitness testimony of Boone and Confer who worked in the areas in question, and observed rocks falling from the pile. James E. Peters, the quarry superintendent, indicated that he did not ever observe any hazardous conditions in the cited areas. I find that this generalized statement is insufficient to rebut the specific testimony of Boone and Confer regarding their observations. I also note Biggans' testimony that on occasions he preshifted the areas in question, and that he never observed material falling from the cited areas; nor did anyone ever tell him that they observed falling material. However, is no evidence that the preshift examinations coincided to the times falling rocks were observed by eyewitnesses. Further, in contrast to Biggans, Confer, a front end loader, actually worked in the areas in question. Thus, I place more weight on Confer's testimony regarding his observations. Based on all the above, I conclude that it has been established that it was more likely than not that rocks and other material had fallen off the cited areas prior to the inspection at issue.

Respondent did not impeach or contradict the testimony of Moerschbacher and Boone, in essence, that the work area was narrow in width in relation to the front end loader, and that the loader operated at times about ten feet away from the pile. I therefore accept their testimony and find that the work area was confined. I am cognizant of the testimony of Respondent's expert Dr. Lawrence A. Beck, who theorized that a rock falling off the pile and taking flight like a projectile, would be seven foot three inches high when it would enter the airspace over the haul road, and thus would not be able to hit the operator of a vehicle

working in the area who sits in a cab, twelve to fifteen feet from the ground. I reject this testimony and find it to be too speculative, as it is clear that the path of a rock falling off the slope could be erratic, and its height over the roadway would depend upon other factors such as whether any other objects were in its path of travel that could effect its flight through the air. Hence, the generalized theory of Beck is not accorded much probative value.

I find that the weight of the evidence establishes that rocks did fall off the pile in question at points in time not significantly remote from the cited date, and that miners working in the adjacent confined work area and haul road were exposed, in some degree, to the hazard of being hit by material falling off the slope. Also, falling material could have contributed to a vehicular accident causing an injury to a miner. Since miners were allowed to work and travel in the area on the date cited by Skvarch, and the spoil pile was not supported or taken down to prevent rocks from falling down, I find that Respondent did violate Section 56.3200, supra. [1]

---

[1] Petitioner also alleges, in essence, that the pile itself, was unstable. In this regard, Petitioner relies on the testimony of her expert, George Gardner, that, in essence, the pile was unstable since its slope was equal or more than the angle of repose, and that in the haul road area, additional instability was created as material had been removed from the toe of the pile. However, Gardner's measurement of the angle of repose was based not upon measurement obtained by a physical examination of the pile at issue, but rather upon measurements taken by freezing frames of a video tape of the subject area taken, at times, through the windshield of a truck. The person who took the tape did not testify, and there is no indication in the record of the angle of the video camera to the horizontal which might affect the measurement of vertical slope. Further, not much weight is accorded Gardner's opinion that in evaluating the stability of a pile, the most critical factor is the relationship between its slope, and the angle of repose. Gardner testified that in addition to the slope of a pile the following factors influence its stability: the composition of the material in the pile, whether the material is layered, whether the material is compact, the level of water saturation, the presence of shock waves from nearby blasting, and the removal of the toe. Gardner did not proffer any detailed explanation as to specifically why slope is the most critical factor compared to these other factors. Further, Petitioner has not adduced any evidence, based upon examination of the type of material in the pile, whether it was

B. Significant and Substantial

According to Skvarch, the violation was significant and substantial. In Mathies Coal Co., 6 FMSHRC 1 (January 1984), The Commission set forth the elements of a "significant and substantial" violation as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and, (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. (6 FMSHRC, supra, at 3-4.)

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury". U.S. Steel Mining Co., 6 FMSHRC 1834, 1336 (August 1984).

The record establishes a violation of a mandatory standard i.e., Section 56.3200, supra (III, (A) infra). Also, since rocks have fallen off the pile at issue (III (A) infra), the violation clearly contributed to the hazard of a rock fall. Hence, the first two elements of the Mathies formula have been met. At issue is the third element of the Mathies formula, the likelihood of an injury producing event, i.e., a rock fall.

Essentially, it is Petitioner's position that, accepting the testimony of Petitioner's witnesses that rocks have fallen from the pile, " . . . makes it likely that the rocks would have continued to fall in and from the pile." [2]

---

footnote 1 cont'd.

layered, whether it was compact, the level of saturation, or the presence of shock waves from blasting. Hence, I conclude that Petitioner has not adduced sufficient reliable evidence to establish that the pile at issue was so unstable as to create a hazardous ground condition.

[2]Petitioner's Post-Hearing Brief, p. 45.

Skvarch, in explaining the factors that led him to determine that the violation was significant and substantial testified as follows:

> On the condition itself, the steepness of the slope stability. Also rocks could roll, fall or bounce down. It was stated to me prior to going into the cut that, in fact, rocks had come off the wall and had to be cleaned up prior to going into the cut sometimes. (Tr. 62-63).

Skvarch continued his explanation as follows:

> In addition to the likelihood of the events and the severity of the injury, because the cut was narrow and there was no bench in either area and their close proximity to the right bank--this is when the loader is loading out the cut--and the haul truck driver's close proximity to the cut, it would make it reasonably likely that they would get struck, their equipment would get struck. And if it was a sizable rock, it could crash through the window and strike the operator, could go onto the haul road and cause the operator to react by veering the vehicle and possibly crashing or even striking the stone and suffering the type of injury that would include fractures, abrasions, bruises, injuries serious enough to lose time.
>
> The operators, again because of their close proximity of operation to both banks which had been trimmed, if a slide occurred and it was a massive slide, it could even result in a fatality (sic) (Tr. 63-64).

Hence, according to Skvarch, the S & S character of the violation at issue is based upon the occurrence of rock falls. In this connection, Skvarch testified that there were loose rocks in, and towards the top of the pile. However, he did not testify with any specificity as to the conditions he observed that led him to conclude that rocks were loose. Nor did he or any other witness testify as to the number, size, or location of any loose material.

Gardner opined that it was "very likely" that rocks would fall from the pile. He indicated that his conclusion was based upon the video tape, and the testimony of witnesses who observed rocks falling off the pile. It opined that a rock sliding off the pile would take flight like a projectile from the point on the pile where the slope steepened at the toe.

Not much weight is accorded Gardner's opinion regarding the likelihood of rocks falling from the pile, as it is based upon his observations of a video, rather than upon a physical examination of the site. Also, although two witnesses testified

to observations of rock falls, the likelihood of further rock falls depends not only on the slope of the pile. It also depends upon the amount of loose rocks on the pile. The record does not contain any evidence regarding the numbers, or extent of loose rocks in the pile. Aside from Skvarch's conclusion that there was loose material in and on top of the pile, the record does not set forth with particularity the facts taken into account by Skvarch that led him to conclude that certain material was loose. On the other hand, I take cognizance of the uncontradicted testimony of Peters that there was only approximately one shift's worth of limestone remaining in the northwest cut area to be mined. There is no evidence that, in normal operations, miners would be present in the area after the removal of the remaining material. Thus, the likelihood of an injury causing event, given continued mining, would have been mitigated to a great degree. Accordingly I find that the third element of Mathies, supra, has not been met, in that it has not been established that an injury producing event was reasonably likely to have occurred. I conclude that the violation was not significant and substantial.

C. Unwarrantable Failure

Skvarch opined that the violation herein was as the result of Respondent's unwarrantable failure. Accordingly, he issued a citation under Section 104(d)(1) of the Act. The first sentence of Section 104(d)(1) supra, provides as follows:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act (Emphasis added).

Based on the wording of the first sentence of Section 104(d)(1) supra, the finding of an unwarrantable failure shall be included by a representative of the Secretary, i.e., an Inspector, only if the Inspector finds a violation of a safety standard "and if he also finds" that the violation is significant and substantial. Accordingly, in the absence of a finding that the violation was significant and substantial, the inclusion of a finding of unwarrantable failure in a citation is not proper. In the instant case, the record fails to establish that the violation at issue was significant and substantial (III(B) infra). The Inspector's contrary finding is not supported, and shall be vacated. Accordingly, a finding of unwarrantable failure cannot be included in the citation at issue herein.

D. Penalty

I accept the basically uncontradicted testimony of Petitioner's witnesses that a rock fall resulting from the violation found herein could have resulted in a fatality. I find that the violation was of a high level of gravity.

In analyzing the level of Respondent's negligence, I note that none of Petitioners witnesses who observed falling rocks brought this hazard to the attention of Respondent. [3]

Also I note, as set forth in Respondent's Reply, that none of Respondent's witnesses observed materials falling from the cited areas, no reports concerning falling materials were ever made by the employees, no precursors to a slope failure were visible prior to the issuance of the citation, and that Respondent expected that miners would be out of the area in about one shift's time.

On the other hand, Peters indicated that it was company policy that miners not work in the cited areas when it rained. According to Peters, one of the reasons for this policy was the possiblity that rain could loosen material on the pile. In addition, five months prior to the inspection at issue, a Section 107(a) imminent danger order was issued to Respondent citing Respondent for violating Section 56.3200, supra in another part of the quarry at issue. Within this framework of evidence, I find that the level of Respondent's negligence to have been more than ordinary.

Respondent has not offered any argument that any penalty to be imposed is to be mitigated by its size, history of violations, or ability to continue in business.

For all the above reasons, I find that a penalty of $2,500 is appropriate.

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[3] Moerschbacher was asked whether he told his supervisor about rocks that fell down, and he said that he did. However his testimony regarding what he specifically told his supervisor Jim Peter's is as follows: "I told him that I thought it would be smart to try to bench that to try to make it safer" (Tr. 173). His testimony is thus somewhat ambiguous as to whether he explicitly told Peters about rocks that had fallen down. I note that Peters who acknowleged that he sent a bulldozer into the cited area at the suggestion of an employee, denied that any employee informed him that the cited areas were unsafe. I observed Peter's demeanor, and found his testimony credible on this point.

IV. Order

It is ORDERED that Citation No. 4294703 be amended to a Section 104(a) citation that is not S & S. It is further ORDERED that, within 30 days of this decision, Respondent shall pay a civil penalty of $2,500.

Avram Weisberger
Administrative Law Judge

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/mh

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

February 3, 1997

SUMMIT, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. CENT 95-108-RM
v.	:	Citation 4422929, 1/9/95
	:	
	:	Docket No. CENT 95-109-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 4422930, 1/9/95
	:	Docket No. CENT 95-110-RM
	:	Order No. 4422931, 1/9/95
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
v.	:	
	:	
SUMMIT, INC., Respondent	:	Docket No. CENT 96-45-M
	:	A.C. 39-01284-05514 X52
	:	
CHARLES ROUNDS, employed by SUMMIT, INC., Respondent	:	Docket No. CENT 97-20-M
	:	A.C. No. 39-01284-05517 A X52
	:	
TOM LESTER, employed by SUMMIT, INC., Respondent	:	Docket No. CENT 97-21-M
	:	A.C. No. 39-01284-05518 A X52
	:	
DELVIN PRICE, employed by SUMMIT, INC., Respondent	:	Docket No. CENT 97-22-M
	:	A.C. No. 39-01284-05519 A X52
	:	
	:	Open Cut - Lead Mine

ORDER DENYING MOTION FOR SUMMARY DECISION

These cases are before me on notices of contest and petitions for assessment of civil penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration

("MSHA"), against Summit, Inc., and three of its employees (the "Respondents"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (1988) ("Mine Act"). Counsel for Respondents filed a motion for summary decision pursuant to 29 C.F.R. § 2700.67. Respondents contend that (1) the citation and two orders (the "citations") fail to state violations of mandatory safety standards; (2) the citations were issued because there was a fall-of-ground rather than on evidence that hazardous conditions were present; and (3) the MSHA inspector was prejudiced against Respondents before the investigation began. Respondents move that the citations be vacated and that these proceedings be dismissed. The Secretary opposes the motion on the ground that there are numerous issues of fact that must be resolved before a decision can be rendered in these matters.

The Commission has long held that "summary decision is an extraordinary procedure." *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (November 1981). Summary decision "may be entered only where there is no genuine issue as to any material fact and ... the party in whose favor it is entered is entitled to it as a matter of law. *Id.; see also Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994); 29 C.F.R. § 2700.67(b).

For the reasons set forth below, I deny Respondents' motion. Each citation and order was issued as a result of a fatal accident that occurred as a result of a fall-of-ground in the mini-pit at the Open Cut Mine.

I.

Respondents argue that the citations fail to state violations of safety standards. They state that the citations do not set forth any "condition or act that violates the standards" and do not describe the alleged violations with particularity. (Respondents' Memorandum at 7).

Citation No. 4422929

This citation alleges that the night shift supervisor was made aware of possible hazardous conditions at the east highwall in the mini-pit and that no corrective action was taken. The highwall failed and buried the shovel. The cited standard, 30 C.F.R. § 56.3200, states that ground conditions that create a hazard to persons shall be taken down or supported before work is permitted in the affected area.

Respondents argue that the citation fails to state that a hazardous condition existed prior to the fall-of-ground and does not set forth with particularity what the hazardous condition was. They state that "there is no allegation or evidence of a

hazardous condition that a more thorough examination by the supervisor could have found." (Respondents' Memorandum at 8). Because no specific hazard was cited, Respondents maintain that the citation does not allege the existence of a violation of the safety standard.

Respondents misconstrue the Secretary's obligation to describe the nature of the alleged violation when writing citations and orders. An MSHA inspector is not required to set forth in the body of the citation all of the evidence that the Secretary may rely upon to establish a violation. Instead, he is required to briefly describe the condition or practice that he believes violated a safety or health standard and set forth the particular standard that he believes was violated. In this case, the inspector believed that management knew or should have known that the east highwall might be hazardous and also believed that management failed to take any action to identify or correct the alleged hazard. Respondents contend that it was incumbent on the inspector to describe the specific areas of the highwall that should have been taken down or supported. I disagree. Because there was a fall-of-ground, it was impossible for the inspector to personally observe the conditions at the highwall prior to the accident. Nevertheless, the Secretary may be able to present other evidence to establish a violation.

Respondents also state that the sworn deposition testimony of the inspector and an employee who raised concerns about the mini-pit show that the potential problems discussed with management concerned the height of the highwall and the narrowness of the benches not a concern that the highwall might fail. Respondents contend that the Secretary does not have any concrete evidence that anyone saw conditions along the highwall that would have alerted mine management that the highwall needed to be taken down or supported. They state that the inspector concluded that the highwall needed to be taken down or supported because it subsequently fell. The Secretary disputes these allegations in her response to the motion. The issues raised by Respondents concern the sufficiency of the Secretary's evidence and the weight I should give this evidence. I cannot evaluate this issue upon a motion for summary decision. Genuine factual issues must be resolved.

Order No. 4422930

The order alleges that mining methods at the east highwall did not maintain wall, bank, and slope stability. It states that the highwall was 80 feet high and the wall failed. The cited standard, 30 C.F.R. § 56.3130, states that mining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel.

Respondents state that the order is invalid because it does not state the manner in which management failed to use safe and proper mining methods. They state that the order fails to discuss any specific defect or deficiency in the mining method. They contend that MSHA concluded that the mining method was deficient because the highwall failed.

As stated above, the Secretary is not required to set forth in detail all of the evidence to support the alleged violation in the body of the citation. The citation must provide notice of the nature of the alleged violation. In this case, the Secretary believes that the operator was not using proper mining methods. The Secretary's response to Respondents' motion sets forth some of the evidence upon which she will rely to establish a violation. Genuine issues of material fact must be resolved before I can determine whether Respondents violated the standard.

Order No. 4422931

This order alleges that miners were allowed to work on the east highwall bench even though management failed to adequately examine ground conditions "prior to work commencing after weather conditions, prior blasting, and other conditions warranted." It further states that such an examination "would have determined that possible evidence was visible and that the east highwall was progressively deteriorating." The cited standard, 30 C.F.R. § 56.3400, states that appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions where work is to be performed prior to work commencing, after blasting, and as ground conditions warrant during the work shift.

Respondents argue that the order restates the language of the standard without providing the operator with any information as to the nature of the alleged violation. Respondents then state that "[w]hile an inadequate examination could constitute a violation of the regulation, the mere allegation that an examination is inadequate is not sufficient to meet the statutory requirements." (Respondents' memorandum at 10). They point to section 104 of the Mine Act which requires that a citation "describe with particularity the nature of the violation." Respondents believe that the order fails to meet the requirements of section 104.

I find that the order does describe with particularity the nature of the alleged violation. An MSHA inspector is not required to describe the evidence the Secretary will rely upon to prove the violation if the order is contested at a hearing. In response to the motion, the Secretary states that she intends to produce evidence at the hearing that the operator's examinations

of the highwall were inadequate. For example, she alleges that Respondents failed to examine the highwall from the top. The fact that this evidence was not summarized in the order does not invalidate the order or breach the language of section 104. I find that significant questions of fact must be resolved before I can determine whether Respondents violated the safety standard.

II.

Respondents also argue that the citations were issued because there was a fall-of-ground rather than on any evidence that there were hazardous conditions known or discoverable prior to the accident. It argues that the occurrence of the accident is insufficient evidence to support the alleged violations. As stated by Respondents, the Secretary has the burden of proof in these cases. Nevertheless, the Secretary is entitled to present her evidence at a hearing. In response to the motion, counsel for the Secretary described evidence that she will rely upon to prove the alleged violations. In particular, she stated that she will present expert testimony that falls of the magnitude involved at the mini-pit give warning signs that should have been observed by Respondents had proper examinations been conducted. I reject Respondents' contention that evidence gathered by the Secretary after the citations were issued cannot be used to support the validity of the citations because the inspector did not rely on such evidence when he issued them.

As stated above, the issues raised in Respondents' motion concern the sufficiency of the Secretary's evidence and the weight I should give this evidence. I cannot rule on such evidentiary issues in a motion for summary decision.

III.

Respondents allege that the inspector who issued the citations was prejudiced against Summit because he stated at his deposition that he will issue a citation or order whenever a highwall fails. Thus, Respondents contend that he was not an impartial investigator. I reject Respondents' argument. First, the inspector stated that he normally issues a citation or order if there has been a fall-of-ground, not that he will always do so. More importantly, the purpose of this proceeding is not to review the fairness or impartiality of MSHA's accident investigation. At the hearing, the Secretary must prove that Respondents violated the cited standards. I must determine *de novo* whether the Secretary established the violations based on the evidence presented at the hearing, not on the Secretary's investigation. If the Secretary fails to establish the violations at the hearing, they will be vacated. Because this is a *de novo* proceeding, whether the Secretary's investigation of the accident was fair and impartial is not relevant.

ORDER

For the reasons set forth above, the motion for summary decision filed by Summit, Inc., and the other respondents is **DENIED.**

Richard W. Manning
Administrative Law Judge

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RWM

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FEB 5 1997

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 94-704-D
ON BEHALF OF KENNETH H.	:	
HANNAH, PHILIP J. PAYNE	:	
AND FLOYD MEZO,	:	MSHA Case No. VINC CD 94-07
Complainant	:	Rend Lake Mine
v.	:	I.D. No. 11-00601
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

PARTIAL DECISION

This case is before me upon remand by the Commission on December 10, 1997, for the specific and limited purpose of "computation of a backpay award and assessment of a civil penalty". The parties have agreed to the amount of backpay and the amount of interest owed on the backpay through February 20, 1997. As significant issues remain to be briefed and argued concerning the assessment of a civil penalty which will not likely be resolved before February 20, 1997, a partial decision and order is being issued.

ORDER

WHEREFORE Consolidation Coal Company is directed to pay to Complainants on or before February 20, 1997, the following amounts:

	Backpay	Interest	Total
Kenneth Hannah	$2,121.42	$497.61	$2,619.03
Philip Mezo	$2,495.78	$583.18	$3,078.96
Floyd Mezo	$2,183.51	$508.02	$2,691.53

Gary Melick
Administrative Law Judge

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FALLS CHURCH, VIRGINIA 22041

February 18, 1997

LAUREL RUN MINING COMPANY, Contestants	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 94-347-R
v.	:	Citation No. 3964761; 8/1/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Docket No. WEVA 94-348-R Order No. 3964762; 8/1/94
	:	Docket No. WEVA 94-349-R Order No. 3964763; 8/1/94
	:	Docket No. WEVA 94-350-R Order No. 3964764; 8/1/94
	:	Holden 20-DB Mine Mine ID No. 46-07770
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 96-177 A. C. No. 46-07770-03575
v.	:	Holden 20-DB Mine
LAUREL RUN MINING COMPANY, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 96-176 A. C. No. 46-07770-03575A
v.	:	Holden 20-DB Mine
ERNIE WOODS, Employed by Laurel Run Mining Co., Respondent	:	

ORDER DENYING RESPONDENTS' MOTION TO DISMISS

The above captioned civil penalty proceedings were reassigned to me from Judge Maurer. These cases, which concern a fatal roof fall that occurred on July 25, 1994, were initiated by petitions for assessment of civil penalties filed on September 24, 1996, pursuant to sections 110(a) and 110(c) of the Federal Mine Safety and Health Act of 1977 (the Act). The petitions were filed against Laurel Run Mining Company (LRM) and its "agent", Ernie Woods.

On December 26, 1996, the respondents filed a Motion to Dismiss based on their assertion that the Secretary has failed to act within a "reasonable time" as required by section 105(a) of the Act. The untimeliness claim is based on the fact that MSHA did not notify the respondents of the proposed civil penalties until July 1996, although MSHA's accident investigation was completed in October 1994. The Secretary filed an opposition to the respondents' motion on January 10, 1997.

Section 105(a) of the Act, provides, in pertinent part:

> If, after an inspection or investigation, The Secretary issues a citation or order under section 104, he shall, within a reasonable time after termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under § 110(a) for the violation cited. (Emphasis added).

In support of their motion, the respondents rely on information in correspondence dated May 1, 1992, provided by Richard G. High, Jr., MSHA's Director of Assessments. In this correspondence, which concerned an unrelated civil proceeding that did not involve a 110(c) investigation, Mr. High states, "for assessment purposes, 'reasonable time' is defined as within 18 months of the issuance of the accident report."

In these proceedings, 21 months elapsed between the October 1994 release of MSHA'S accident report and the July 1996 issuance of the proposed penalty assessments against LRM and Woods. Consequently, the respondents argue the Secretary did not act within a reasonable time. In addition, the respondents assert they have been prejudiced by the Secretary's delay because memories of the witnesses have faded; several witnesses and Woods are no longer employed by LRM; the mine has closed; and the underground evidence concerning the subject roof conditions is no longer available to the respondents.

The Secretary, in his opposition, relies on Steel Branch Mining, 18 FMSHRC 6 (January 1996), wherein the Commission considered the applicability of the "reasonable time" standard in section 105(a). In examining this issue the Commission stated:

> Section 105(a) does not establish a limitations period within which the Secretary must issue penalty proposals. See Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089, 2092-93 (October 1993) (aff'd, 57 F.3d 982 10th Cir. 1995); Salt Lake County Rd. Dept., 3 FMSHRC 1714 (July 1981); and Medicine Bow Coal Co., 4 FMSHRC 882 (May 1982). In commenting on the Secretary's statutory responsibility to act "within a reasonable time," the key Senate Committee that drafted the bill enacted as the Mine Act observed that "there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceedings." S. Rep. No. 181, 95th Cong., 1st Sess. 34 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 622 (1978). Accordingly, in cases of delay in the Secretary's notification of proposed penalties, we examine the same factors that we consider in the closely related context of the Secretary's delay in filing his penalty proposal with the Commission: the reason for the delay and whether the delay prejudiced the operator. 18 FMSHRC at 14.

In Steele Branch, the Commission considered MSHA's unusually high caseload in 1992 as "constituting adequate reason for the delay" in the notification of the proposed assessment. Id. In these matters, the Secretary asserts the July 1996 notification of the proposed penalties was delayed by: the complexity of the 110(c) investigation conducted from February 15 through July 27, 1995, which followed the October 1994 completion of the accident investigation; the budget impasse that resulted in the Federal Government shutdown in December 1995 and January 1996; and the March 1996 amendments to the Equal Access to Justice Act (EAJA) that required additional policy review of all 110(c) cases.

At the outset, I note that the respondents' assertion that the Secretary did not act "within a reasonable time" is analogous to the equitable common law doctrine of laches. Ordinarily, a successful claim of laches requires an "unconscionable, undue, unexplained or unreasonable delay" manifest by a "want of activity or diligence in making a claim or moving for the enforcement of a right." Black's Law Dictionary, 1016-17 (4th ed. 1968); see also Black's Law Dictionary, 875 (6th ed. 1990). In the instant case, during the intervening period between the August 1994 citations, and the July 1996 notices of civil penalties, MSHA engaged in two investigations - an accident and a 110(c) investigation. The 110(c) investigation involved interviewing 22 witnesses and resulted in charges against Woods and MSHA's decision not to charge other LRM "agents." While it may have been possible for MSHA to complete its investigations more expeditiously, MSHA's efforts in these proceedings can hardly be characterized as inexcusable neglect.

Moreover, stays of civil penalty cases brought against operators during the pendency of related 110(c) investigations, absent extraordinary circumstances not shown here, are commonly granted. Consolidation of the operator and "agent" cases is in the interests of judicial economy and efficiency. Thus, it is not unusual for civil penalty proceedings involving personal liability under section 110(c) to be delayed.

While it may have been preferable for MSHA to notify LRM of the proposed civil penalties immediately following the completion of the October 1994 accident investigation, the civil penalty proceeding against LRM would have been stayed pending assessment in the related 110(c) case. LRM's notification of the proposed civil penalty of $108,000 in July 1996, rather than shortly after the October 1994 accident investigation, did not materially prejudice LRM's ability to participate in this litigation.

With respect to the applicable "reasonable time" standard, I am unconvinced that the 18 month period advanced by the respondents is determinative. There is a positive correlation between the complexity of a case and the time required to issue notification of a civil penalty. Although MSHA has previously exercised its prosecutorial discretion not to pursue a case that was not assessed a civil penalty within 18 months of an inspection or an investigation, it is not precluded from bringing these actions. King Knob Coal Company, Inc., 3 FMSHRC 1417, 1421-22 (June 1981).

In any event, the 18 month standard is not applicable in these matters. Rather, the operable time period in these cases is the 12 month period between completion of MSHA's 110(c) investigation in July 1995 and notification of the proposed penalties in July 1996. This 12 month period, notwithstanding purported delays caused by the intervening Government shutdown and the promulgation of the EAJA amendments, constitutes action "within a reasonable time" as contemplated by section 105(a).

Moreover, even if the July 1996 notifications of civil penalties were untimely, the respondents have failed to demonstrate they have been prejudiced by the delay. Whether the passage of time effects the weight that should be afforded to particular testimony is a matter for the trier of fact. The Secretary has the burden of proof in these matters. Thus, any alleged fading of memories would most probably inure to the benefit of the respondents. In any event, memories can be aided by statements given during the course of MSHA's investigations, and by pertinent depositions in related proceedings that have already been secured.

Finally, the respondents have not shown that the mine closure, or, the fact that Woods and other potential witnesses are no longer employed by LRM, have interfered with their ability to present their cases. Mine conditions constantly change. Thus, the respondents have failed to demonstrate their presentation of evidence concerning mine conditions at the time of the accident will be affected by the mine closure. The testimony of former employees can be obtained through the subpoena process.

Accordingly, the respondents have failed to establish that the Secretary has failed to act within a reasonable time under these circumstances. In addition, the respondents have failed to show any meaningful prejudice as a result of the Secretary's alleged delay. Consequently, the respondents' December 26, 1996, Motion to Dismiss **IS DENIED.**[1]

Jerold Feldman
Administrative Law Judge

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[1] Although the respondents' dismissal motion has been denied and the hearing will proceed, during the course of a February 14, 1997, conference call I indicated to the parties that the respondents were not foreclosed from arguing that these proceedings should be dismissed as untimely in their post-hearing briefs.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., 6TH FLOOR
WASHINGTON, D. C. 20006-3868

February 24, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. YORK 96-73-M A. C. No. 18-00581-05511
v.	:	Chase Sand Plant
REDLAND GENSTAR INCORPORATED, Respondent	:	

ORDER

Before: Judge Merlin

This case is a petition for the assessment of two civil penalties filed by the Secretary of Labor, petitioner, against Redland Genstar Incorporated, respondent, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

The matter arises from a fatal accident. Two employees of the respondent drowned after the boat they used to travel between a dredge and the shore capsized and sank. As a result of the accident the Secretary issued two citations for alleged violations of the Act.

Citation No. 4440814, dated May 6, 1996, charges a violation of 30 C.F.R. § 56.11001, for the following condition or practice:

> A fatal accident occurred at this operation on April 17, 1996, when two of three employees riding in a work boat used to travel to and from the dredge drowned when the boat sank in the dredge pond. The heavy construction of the boat and subsequent modifications made to it by the company created an unsafe means of access in that the boat was overloaded with the three men aboard.
>
> The boat measured 19½ feet by 5 feet and weighed approximately 3800 lbs. empty. It was constructed of 1/4 inch steel plates. The mine operator had added several additional steel plates to the bottom and sides of the boat to reinforce areas where the original steel had either worn or rusted through. The added weight of the steel plates made the boat list toward the bow and starboard side. The freeboard was not adequate.

Section 56.11001 provides as follows:

> Safe means of access shall be provided and maintained to all working places.

Citation No. 4440812, dated May 6, 1996, charges a violation of 30 C.F.R. § 56.15020 for the following condition or practice:

> A fatal accident occurred at this operation on April 17, 1996, when two of three employees riding in a work boat used to travel to and from the dredge drowned when the boat sank in the dredge pond. None of the employees were wearing life jackets.

Section 56.15020 provides as follows:

> Life jackets or belts shall be worn where there is danger from falling into water.

Both citations recite that the violations were significant and substantial, a fatality had occurred, and negligence was high. On June 7, 1996, the negligence rating for both violations was modified to moderate based upon evidence submitted by respondent. Thereafter, on September 12, 1996, the Secretary issued a Notice of Proposed Assessment advising that the regular formula for determining penalties had been waived and that the special assessment procedure was used to determine the proposed amounts. A penalty of $50,000 was proposed for Citation No. 4440814 and a penalty of $25,000 for Citation No. 4440812. A statement of narrative findings accompanied the proposed assessments.

Section 110 (i) of the Act, 30 U.S.C. § 820 (i), directs that six factors be taken into account by the Secretary in proposing and by the Commission in assessing penalties. The six factors are gravity, negligence, history of prior violations, operator's size, good faith abatement, and effect of the penalty upon the operator's ability to continue in business.

The Secretary's regulations regarding the criteria and procedures to be followed in proposing civil penalty assessments are set forth in 30 C.F.R. § 100.1 et seq. Section 100.3 provides that the amount of a civil penalty shall be computed in accordance with the formula set forth therein. The formula is based upon the six factors in section 110(i). Numerical values or points are assigned to the factors and the total number of points converts to a penalty amount. In addition, section 100.5 establishes a special assessment procedure which may be used instead of the formula and provides as follows:

> MSHA may elect to waive the regular assessment formula (§100.3) or the single assessment provision (§100.4) if the Agency determines that conditions surrounding the violation warrant a special assessment. Although an effective penalty can generally be derived by using the regular

> assessment formula and the single assessment provision, some types of violations may be of such a nature or seriousness that it is not possible to determine an appropriate penalty under these provisions. Accordingly, the following categories will be individually reviewed to determine whether a special assessment is appropriate:
>
> (a) Violations involving fatalities and serious injuries. ******

Respondent has filed a motion for partial summary decision and for judgment on the pleadings requesting that this matter be remanded to the Secretary for a recalculation of the proposed penalties. It is respondent's position that the Secretary has failed to follow the Act and regulations in proposing the amounts. Because negligence was found to be moderate, respondent argues that the maximum penalty cannot be imposed and that the suggested penalties are not in accord with the six criteria. Respondent further argues that the proposed assessment does not take account of prior history, size, or good faith abatement. The Secretary opposes remand.

Both parties agree that I have jurisdiction to consider the question presented. The seminal decision of the Commission is Youghioghney & Ohio Coal Company, 9 FMSHRC 673 (April 1987). In that case the operator argued that since the Secretary had not complied with the Part 100 regulations in proposing penalties, the case should be remanded for reconsideration of the penalties. The Commission held that since the administrative law judge had held a hearing on the merits, no purpose would be served by requiring the Secretary to re-propose the penalties. However, the Commission also stated:

> We further conclude, however, that it would not be inappropriate for a mine operator prior to a hearing to raise and, if appropriate, be given an opportunity to establish that in proposing a penalty the Secretary failed to comply with his Part 100 penalty regulations. If the manner of the Secretary's proceeding under Part 100 is a legitimate concern to a mine operator, and the Secretary's departure from his regulations can be proven by the operator, then intercession by the Commission at an early stage of the litigation could seek to secure Secretarial fidelity to his regulations and possible avoidance of full adversarial proceedings. However, given that the Secretary need only defend on the ground that he did not arbitrarily proceed under a particular provision of his penalty regulations, and given the Commission's independent penalty assessment authority, the scope of the inquiry into the Secretary's actions at his juncture necessarily would be limited.

Accordingly, it is permissible at this stage to consider respondent's challenge to the proposed penalties. In Drummond Coal Company, 16 FMSHRC 661 (May 1992), the Commission exercised jurisdiction prior to a hearing and upheld a challenge to a proposed penalty on the grounds that adequate notice had not been given with respect to the policy under which the proposed penalty was made. However, as Y&Q makes clear, the inquiry is very circumscribed and limited to a determination of whether the Secretary acted arbitrarily.

As already set forth, section 110(i) identifies six factors to be used in arriving at a penalty amount. The operator would have me hold as a matter of law that the Secretary cannot assess the statutory maximum where negligence is rated moderate. However, this argument is not supported by the Act which does not indicate how much weight the Secretary should give to any one factor or to all of them in concert. Certainly, the Act does not provide that the statutory maximum can be assessed only when negligence or any other factors, separately or together, are rated the highest.

The same is true of the regulations. Section 100.5, supra, authorizes the Secretary to choose the special assessment procedure in certain specified situations, one of which is violations involving a fatality or serious injury. The regulation directs that the special assessment take account of the six criteria. However, like the Act, the regulation mandates nothing further with respect to the criteria. The Secretary is not precluded from proposing maximum penalties where negligence or any other factor is moderate.

For purposes of granting a remand based upon respondent's motion, it is not enough that a proposed assessment might raise questions. For a remand to be granted, a finding must be made that the proposal is improper under all possible circumstances. In view of the latitude given the Secretary by the Act and regulations, such a finding cannot be made. To do so would be to restrict the Secretary in a manner not contemplated by the Act. When referring to the criteria respondent takes the position that in order for the statutory maximum to be assessed, findings on all six criteria must be rated at the highest level. However, the Act and regulations contain no such limitation.

Respondent's references to the penalties that could have been assessed under the formula are misplaced and I reject respondent's argument that the formula amount is the yardstick by which to measure a special assessment. The special assessment procedure was created for those situations where the formula would not produce a suitable result. This multiple fatality is one of the situations enumerated in the regulations as appropriate for special assessment. It makes little sense to compare a special assessment with the amount arrived at under the formula. If the formula were a valid basis for comparison, most special assessments would fail and the valid enforcement purposes they are meant to serve would be frustrated. The formula is irrelevant to a special assessment.

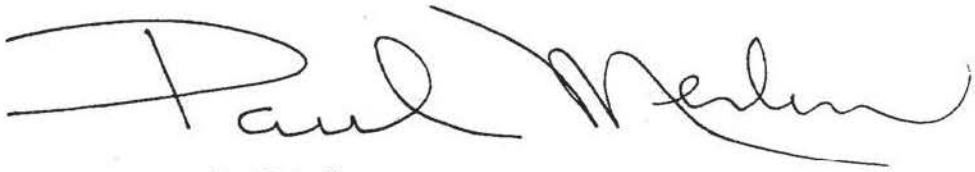
So too, the argument that remand is warranted because the Secretary failed to articulate why the regular assessment could not be used, is unfounded. The regulations specify the occurrence of a fatality or injury as one of the bases for use of the special assessment procedure. Since a double fatality is involved, a special assessment was permissible. Respondent is not entitled to the explanation it seeks.

Respondent's companion complaint that the Secretary has not explained the reasons for the assessment proposal also is without merit. The last sentence of section 110(i) provides that in proposing penalties under the Act the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the six factors. The Act does not contemplate that a justification for a proposed assessment be required at this stage of the proceedings. The regulations require only that the Secretary's findings in a special assessment be in narrative form. The "Narrative Findings for a Special Assessment" in this case satisfies that requirement. Respondent first suggests that the Secretary provide a full record to justify the proposal and then appears willing to accept a minimal explanation. Neither is required.

Speculation by respondent that the Secretary was motivated by a desire to impose a punitive penalty is without foundation. No decision could be premised upon such theorizing.

Respondent has requested remand for both penalties. Its arguments however, appear directed to the $50,000 penalty. Nothing is specifically offered with respect to the $25,000 penalty. In any event, under this decision there is no basis to remand either.

In light of the foregoing, it is ORDERED that the operator's motion is DENIED.[1]



Paul Merlin
Chief Administrative Law Judge

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[1] A hearing will be scheduled by a separate notice.