JULY 1994

COMMISSION DECISIONS AND ORDERS

07-05-94	Walter Kuhl and Son	PENN 93-449-M	Pg. 1405
07-15-94	W-P Coal Company	WEVA 92-746	Pg. 1407
07-20-94	Energy West Mining Company *ALJ Decision published in this issue*	WEST 92-819-R	Pg. 1414
07-20-94	Keystone Coal Mining Corp.	MASTER 91-1	Pg. 1422
07-27-94	Bixler Mining Company	PENN 93-68	Pg. 1427

ADMINISTRATIVE LAW JUDGE DECISIONS

08-10-93	Energy West Mining Company	WEST 92-819-R	Pg. 1429
07-06-94	Peabody Coal Company	KENT 94-268	Pg. 1436
07-07-94	Peabody Coal Company	LAKE 93-234	Pg. 1437
07-07-94	Mechanicsville Concrete	VA 93-98-M	Pg. 1444
07-13-94	Beech Fork Processing, Inc.	KENT 93-406	Pg. 1461
07-13-94	Mission Valley Concrete	WEST 92-702-M	Pg. 1462
07-13-94	AMI Construction	WEST 93-604-M	Pg. 1465
07-14-94	Kenny Bowman, employed by M.H.Coal	SE 94-7	Pg. 1467
07-25-94	Dave Brown d/b/a Whatcom Skagit Quarry	WEST 94-298-M	Pg. 1470
07-25-94	Larry W. Lineweaver, Sr. v. Riverton Corp.	VA 94-46-DM	Pg. 1476
07-26-94	Ronald Mullins employed by Teanik Coal	WEVA 93-260	Pg. 1486
07-26-94	Old Ben Coal Company	WEVA 93-362	Pg. 1488
07-27-94	Leeco Incorporated	KENT 93-540	Pg. 1496
07-28-94	Peabody Coal Company	KENT 93-812	Pg. 1505
07-28-94	Jim Walter Resources, Inc.	SE 94-244-R	Pg. 1511
07-28-94	Port Costa Materials, Inc.	WEST 93-108-M	Pg. 1516

ADMINISTRATIVE LAW JUDGE ORDERS

07-14-94	Old Ben Coal Company	WEVA 93-442	Pg. 1583
07-15-94	Amax Coal Company	LAKE 94-74	Pg. 1585

JULY 1994

Review was granted in the following cases during the month of JuLY:

Secretary of Labor, MSHA v. BHP Minerals International, Docket No. CENT 92-329, CENT 93-272. (Judge Amchan, May 23, 1994)

Secretary of Labor, MSHA v. Walter Kuhl and Son, Docket No. PENN 93-449-M. (Chief Judge Paul Merlin, Default Decision of April 25, 1994 - unpublished)

Consolidation Coal Company v. Secretary of Labor, MSHA, Docket No. WEVA 94-235-R. (Judge Amchan, June 1, 1994)

Secretary of Labor, MSHA v. Bixler Mining Company, Docket No. PENN 93-68. (Judge Weisberger, Default Decision of April 26, 1994 - unpublished)

There were no cases in which review was denied.

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 5, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 93-449-M
WALTER KUHL and SON	:	

BEFORE: Jordan, Chairman; Backley, Doyle and Holen, Commissioners

ORDER

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. (1988). On April 25, 1994, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Walter Kuhl and Son ("Kuhl") for its failure to answer the Secretary of Labor's proposal for assessment of civil penalty or the judge's December 29, 1993, Order to Show Cause. The judge ordered the payment of civil penalties of $364.

In a Motion to Reopen the Record dated May 19, 1994, and received by the Commission on May 26, 1994, the Secretary states that, in response to the December 29 order to show cause, he received an answer from Kuhl, which was addressed to "Mr. Paul Merlin." The Secretary erroneously assumed that the answer had also been forwarded to the Commission. Attached to the Secretary's motion is a letter from Kuhl dated January 20, 1994, asserting that no violations had been committed. The Secretary requests that the case be reopened and Kuhl's answer be placed in the record.

The judge's jurisdiction over this case terminated when his decision was issued on April 25, 1994. Commission Procedural Rule 69(b), 29 C.F.R. § 2700.69(b)(1993). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). The Commission received the Secretary's motion 31 days after the issuance of the judge's decision. The Commission did not act on the May 26 motion within the required statutory period for considering requests for review and the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1). In the interest of justice, we reopen this proceeding, deem the Secretary's motion to be a petition for discretionary review, excuse its late filing and grant the petition. See, e.g., Kelley Trucking Co., 8 FMSHRC 1867, 1868-69

(December 1986).

Relief from a final Commission judgment or order on the basis of inadvertence, mistake, surprise or excusable neglect is available to a party under Fed. R. Civ. P. 60(b)(1). 29 C.F.R. § 2700.1(b)(Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); Lloyd Logging, Inc., 13 FMSHRC 781, 782 (May 1991). It appears from the record that Kuhl wished to pursue its contest of the alleged violations and that it attempted to respond to the judge's order to show cause. On the basis of the present record, however, we are unable to evaluate the merits of the Secretary's motion. We remand the matter to the judge, who shall determine whether default is warranted. See Hickory Coal Co., 12 FMSHRC 1201, 1202 (June 1990).

For the reasons set forth above, we reopen this matter, vacate the judge's default order, and remand for further proceedings.

Mary Lu Jordan, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

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Chief Administrative Law Judge Paul Merlin

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 15, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 92-746
W-P COAL COMPANY	:	

BEFORE: Backley, Doyle and Holen, Commissioners[1]

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), presents the issue of whether the Secretary of Labor acted permissibly in citing W-P Coal Company ("W-P") for an alleged violation of a mandatory safety standard by its contractor, Top Kat Mining, Inc. ("Top Kat"). Administrative Law Judge Gary Melick concluded that the Secretary's enforcement action against W-P was improper and dismissed the proceeding. 15 FMSHRC 682 (April 1993)(ALJ). For the reasons that follow, we reverse and remand.

I.

Factual and Procedural Background

Under a 1969 lease with the owner, Cole and Crane, W-P holds the mining rights to the No. 21 Mine, a deep coal mine in Logan County, West Virginia. Originally, W-P operated the mine but, in 1988, shifted to contract mining.[2] In December 1989, W-P entered into a contract with Top Kat, under which Top Kat extracted the coal in return for royalty payments from W-P based upon the number of tons of clean coal produced. 15 FMSHRC at 683. Top Kat registered

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[1] Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three members to exercise the powers of the Commission. Chairman Jordan has recused herself in this matter and took no part in the consideration of this decision.

[2] W-P's general business operations consist of buying coal from contract mining companies, processing the coal at its preparation plant, and then selling it. At the time of the alleged violation, W-P had under lease the mining rights to six deep coal mines in Logan County and had mining contracts with five separate mining companies. 15 FMSHRC at 683.

with the Department of Labor's Mine Safety and Health Administration ("MSHA") as the mine's operator. G. Exs. 4, 5.

The agreement between W-P and Top Kat identified Top Kat as an independent contractor responsible for controlling the mine, hiring miners and complying with mine safety and health laws. 15 FMSHRC at 683; R. Ex. 3, Art. IV. A. 1. & 7. The contract obligated Top Kat to indemnify W-P for losses and liabilities, including penalties assessed against W-P for violations of the Mine Act. R. Ex. 3, Art. X. B. Top Kat leased its mining equipment from W-P and was to obtain mining engineering services from W-P. 15 FMSHRC at 684; R. Ex. 3, Art. IV. E. 4. & N. W-P's engineering personnel prepared the mine plan and prepared and updated the mine maps for Top Kat; in connection with those services, they visited the mine on a weekly basis. 15 FMSHRC at 684. During the term of the agreement, Top Kat experienced serious financial problems and W-P provided loans and advances and waived fees. Id.

During 1990 and 1991, MSHA conducted many inspections at the No. 21 Mine and issued to Top Kat numerous citations and withdrawal orders. 15 FMSHRC at 685. W-P participated in discussions with MSHA personnel about enforcement. Id. at 685-86. On September 4, 1991, an MSHA inspector issued to Top Kat a citation alleging a violation of 30 C.F.R. § 77.200 for failing to properly maintain the bathhouse floor. G. Ex. 10. The mine was placed on a "special emphasis" inspection program on October 10, 1991, because of its safety and health problems. Shortly thereafter, W-P terminated Top Kat's contract, shut down the No. 21 Mine, and submitted to MSHA an identification form listing Bear Run Coal Company ("Bear Run") as the succeeding contractor-operator.

On November 14, 1991, MSHA modified the bathhouse citation to name W-P as the "co-operator" of the mine and also issued a withdrawal order, pursuant to section 104(b) of the Mine Act, 30 U.S.C. § 814(b), alleging failure by W-P to abate the cited condition. MSHA subsequently served W-P with the modified citation and the failure to abate order, and filed a civil penalty petition against W-P and Top Kat as "co-operators" and against Bear Run as successor-in-interest.[3] 15 FMSHRC at 682, 687. W-P contested the citation and order, and an evidentiary hearing was held before Judge Melick. The judge dismissed the petitions against Top Kat and Bear Run because those parties had not been served, and only W-P's liability remained in issue. Id. at 682-83.

The judge rejected the Secretary's argument that W-P was liable as a "co-operator," concluding that liability must first rest upon W-P's identity as an "operator," as that term is defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d). 15 FMSHRC at 687. Although he determined that W-P was a statutory operator, the judge held that the Secretary had acted impermissibly in proceeding against W-P. Id. at 687-89. Invoking Phillips Uranium Corp., 4 FMSHRC 549 (April 1982), the judge stated that enforcement actions against an

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[3] This case involves one of some 138 civil penalty petitions filed by MSHA against W-P for alleged violations at the No. 21 Mine during the time Top Kat was the contract miner. The other cases were stayed pending resolution of the common issue of whether W-P could properly be cited for those alleged violations.

operator for its contractor's violations should be based on such factors as the size and mining experience of the independent contractor, which party contributed to the violation, and which party was in the best position to eliminate the hazard and prevent its recurrence. Id. at 688. The judge concluded that these factors did not support the enforcement action against W-P, and that the Secretary had proceeded against W-P only to collect civil penalties from a "deeper pocket." Id. at 688-89. The judge concluded that the Secretary's enforcement action was impermissibly based on "administrative convenience" rather than the protective purposes of the Act. Id. Accordingly, he vacated the citation and order and dismissed the civil penalty proceeding.[4] Id. at 689.

The Commission granted the Secretary's petition for discretionary review and permitted amicus curiae participation by the American Mining Congress ("AMC") in support of W-P and by the United Mine Workers of America ("UMWA") in support of the Secretary. Oral argument was heard.

II.

Disposition

The Secretary contends that the judge erred in rejecting his contention that W-P was a "co-operator" under the Mine Act and therefore liable for the violations. He asserts further that substantial evidence demonstrates that W-P exercised significant control and supervision over the mine. The Secretary argues that, in any event, his decision to cite an owner-operator or contractor-operator for a violation at the owner's mine is within his broad enforcement discretion, and that such enforcement action is "virtually unreviewable." S. Br. at 17-22. He argues further that, even if judicial review of enforcement discretion were proper, Phillips Uranium no longer represents "current and controlling law." Id. at 28 n.13. Maintaining that every owner-operator exercises primary control over its mine, because each has the power to choose its contractor and to determine how the contractor will operate the mine, the Secretary notes that the Commission and courts have held that an owner-operator may be held liable for its contractor's violations and may also be passively liable for a contractor's violations even if it did not exercise significant supervision over the mine. Id. at 33-34. He contends, moreover, that "administrative convenience" and a "deeper pocket" are permissible factors in the exercise of enforcement discretion. Id. at 27-29. The Secretary additionally contends that the Commission's jurisdiction to review questions of "policy or discretion" under sections 113(d)(2)(A)(ii) & (B) of the Act, 30 U.S.C. §§ 823(d)(2)(A)(ii) & (B), is narrowly confined and does not extend to examination of the Secretary's enforcement decisions. S.

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[4] The judge did not reach W-P's other arguments that the Secretary's enforcement action was an unfair departure from its past practice of regulating the West Virginia contract mining industry; that W-P was deprived of its constitutional rights when it was not accorded the procedural due process attendant to MSHA inspections; that the Secretary failed to issue the citation with reasonable promptness; and that the section 104(b) order was improperly based on a terminated citation. See W-P Br. at 6-7.

Reply Br. at 8-21.

Amicus UMWA submits that the judge erroneously applied the principles in Phillips Uranium. UMWA Br. at 3-7. The UMWA states that an owner-operator may be held responsible without fault for violations committed by its independent contractor, and that the Commission has reviewed the Secretary's enforcement actions in this context by determining whether the Secretary's decision to cite an owner-operator was made for reasons consistent with the purposes and policies of the Mine Act. Id. at 3. The UMWA argues that the Secretary's decision to cite W-P after Top Kat went out of business was reasonable and that the judge's conclusion was improper since it permitted the mine owner to avoid liability for numerous violations. Id. at 6.

W-P and amicus AMC essentially argue that the judge properly dismissed the proceeding because the Secretary's decision to cite W-P was based solely on administrative convenience rather than on concern for the health and safety of miners. They assert that W-P did not control or supervise the mining activities in question, and that the judge correctly applied the Phillips Uranium factors. In the event the Commission reverses the judge, W-P requests remand for consideration of its other defenses.

With regard to the threshold issue raised by the Secretary as to Commission jurisdiction, the Commission has previously held that it is not required to defer to the Secretary's interpretation of Commission jurisdiction. Drummond Co., Inc., 14 FMSHRC 661, 674 n.14 (May 1992); Jim Walter Resources, Inc., 15 FMSHRC 782, 787 (May 1993). The Secretary did not appeal Drummond. The Secretary's reliance on Martin v. OSHRC, 499 U.S. 144 (1991), to support his jurisdictional argument is misplaced. That decision does not address an agency's interpretation of its own jurisdiction. Martin v. OSHRC addresses whether a reviewing court owes deference to the Secretary's or to the Occupational Safety and Health Review Commission's interpretation of ambiguous regulations issued by the Secretary. Furthermore, the decision specifically limits its holding to the "division of powers ... under the [Occupational Safety and Health] Act." 499 U.S. at 157. We note that in Thunder Basin Coal Co. v. Reich, 510 U.S. ___, 127 L. Ed. 2d 29 (1994), the Supreme Court recognized the Commission's general policy jurisdiction and its role as an independent reviewing body in developing a comprehensive body of law under the Mine Act. 127 L. Ed. 2d at 38 n.9, 42-43.

We reject the Secretary's argument that review of MSHA's enforcement decisions is precluded by well established judicial precedent to the effect that government agencies have virtually unreviewable enforcement discretion. The cases relied on by the Secretary, such as Heckler v. Chaney, 470 U.S. 821 (1985), do not address whether an agency may have exceeded its statutory enforcement authority, but are limited to "an agency's decision not to prosecute or enforce." 470 U.S. at 831 (emphasis added).

We agree with the Secretary that the judge erred by relying solely on Phillips Uranium. That case, decided in 1982, was directed to the Secretary's earlier policy of pursuing only owner-operators for their contractors' violations. Subsequently, the Secretary's policy has been broadened to include pursuit of independent contractor-operators in some instances. It is

now well established that, in instances of multiple operators, the Secretary may, in general, proceed against either an owner-operator, his contractor, or both. Bulk Transportation Services, Inc., 13 FMSHRC 1354, 1360 (September 1991); Consolidation Coal Co., 11 FMSHRC 1439, 1443 (August 1989). The Commission and courts have recognized that the Secretary has wide enforcement discretion. See, e.g., Bulk Transportation, 13 FMSHRC at 1360-61; Consolidation Coal, 11 FMSHRC at 1443; Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 538 (D.C. Cir. 1986). Nevertheless, the Commission has recognized that its review of the Secretary's action in citing an operator is appropriate to guard against abuse of discretion. E.g., Bulk Transportation, 13 FMSHRC at 1360-61; Consolidation Coal, 11 FMSHRC at 1443.

Turning to the facts at hand, we conclude that substantial evidence does not support the judge's conclusion that W-P was only superficially involved in Top Kat's operation. Indeed, many of the judge's factual findings are inconsistent with that conclusion. The record reveals substantial W-P involvement in the mine's engineering, financial, production, personnel and safety affairs. W-P prepared the mine plan, calculated mining projections, prepared and updated mine maps, contacted and visited the mine frequently to discuss production and other matters, waived certain fees owed by Top Kat, advanced funds to Top Kat, met with MSHA personnel regarding mine conditions and enforcement activity, participated in an inspection of the mine, and even arranged and attended a meeting of MSHA and Top Kat to discuss the increasing number of citations, inspections, and orders. See 15 FMSHRC at 684-86. Thus, the record reveals that W-P was sufficiently involved with the mine to support the Secretary's decision to proceed against W-P.

Nonetheless, we reject the Secretary's "co-operator" theory of liability. That term does not appear in the statute and existing case law adequately addresses liability issues where owner-operators and independent contractors are involved. See Bulk Transportation, 13 FMSHRC at 1359-61; Consolidation Coal, 11 FMSHRC at 1442-43. Moreover, at oral argument the Secretary's counsel explained that "co-operator" is merely a term of administrative convenience designed to focus the Secretary's enforcement efforts. Oral Arg. Tr. at 6-8. We agree that, contrary to the judge's suggestion (15 FMSHRC at 688), it was not necessary for the Secretary to establish that W-P was "co-equal" with Top Kat in the operation of the mine.[5]

Accordingly, we conclude that the Secretary's enforcement action against W-P was proper and we reverse the judge's decision. We remand for a determination of the remaining liability issues, including resolution of the other constitutional and statutory defenses raised by W-P (n.4, supra).

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[5] In view of W-P's considerable involvement, we do not reach the Secretary's alternate argument that an operator only passively involved with a mine is properly cited for a contractor's violation. Nor do we reach amicus AMC's contention that the Secretary improperly raised this argument for the first time on review.

III.

Conclusion

For the reasons set forth above, we affirm the judge's determination that W-P is an "operator" within the meaning of the Mine Act, reverse his determination that the Secretary acted impermissibly in citing W-P, reinstate this proceeding, and remand for determination of outstanding issues.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 20, 1994

ENERGY WEST MINING COMPANY	:	
	:	
v.	:	Docket Nos. WEST 92-819-R
	:	WEST 93-168
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

BEFORE: Backley, Doyle and Holen, Commissioners[1]

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"). The issue is whether former Administrative Law Judge Michael A. Lasher, Jr. erred in entering a summary decision in which he concluded that Energy West Mining Company ("Energy West") violated a condition set forth in a decision of the Assistant Secretary of Labor for Mine Safety and Health ("Assistant Secretary") granting modification of a mandatory safety standard.[2]

The Commission granted Energy West's petition for discretionary review, which challenged the judge's decision on procedural and substantive grounds, and heard oral argument. For the reasons that follow, we conclude that there were genuine issues of material fact and that, accordingly, the judge improperly disposed of this matter through summary decision. We vacate the judge's decision and remand for appropriate proceedings.

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[1] Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three members to exercise the powers of the Commission. Chairman Jordan has recused herself in this matter.

[2] The judge's August 10, 1993, decision was not published in the Commission's reports.

I.

Factual and Procedural Background

Energy West owns and operates the Cottonwood Mine, an underground coal mine in Emery County, Utah.[3] Pursuant to the modification process in section 101(c) of the Mine Act and the Secretary of Labor's implementing regulations at 30 C.F.R. Part 44, the Assistant Secretary issued the Decision and Order ("D&O") underlying this case on July 14, 1989. Utah Power & Light Co., Mining Div., Docket No. 86-MSA-3.[4] The D&O granted a modification of 30 C.F.R. § 75.326 (1991),[5] permitting the operator to employ a two-entry mining system

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[3] This summary is based on the parties' motions and briefs, the official file, and the judge's decision because this matter was decided without an evidentiary hearing. (See also n.8 below.)

[4] Under section 101(c) of the Act, an operator or representative of miners may petition the Secretary of Labor to modify the application of any mandatory safety standard in a mine on the grounds that "an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine." 30 U.S.C. § 811(c). Section 101(c) requires the Secretary to publish notice of such petition, investigate it, provide opportunity for public hearing, publish proposed findings, and ultimately issue a decision disposing of the petition. (For the specific rules, see 30 C.F.R. Part 44.) The Commission is not directly involved in the modification process. See generally Clinchfield Coal Co., 11 FMSHRC 2120, 2129-31 (November 1989).

The petition for modification was originally filed in 1985 by Utah Power & Light Co., Mining Division, the previous operator of the mine. The Administrator for Coal Mine Safety and Health ("Administrator") issued a Proposed Decision and Order ("PDO")(see 30 C.F.R. § 44.13) granting the petition based on his determination that longwall development and retreat mining in compliance with section 76.326 would diminish safety and that the proposed alternate two-entry system would guarantee no less than the same level of protection. The United Mine Workers of America ("UMWA") objected to the PDO and requested a hearing. See 30 C.F.R. § 44.14. Following the hearing, the Department of Labor administrative law judge denied the petition, concluding that application of section 75.326 would not diminish safety and that the proposed alternate method would not guarantee the same measure of protection. The operator and the Administrator appealed to the Assistant Secretary (see 30 C.F.R. §§ 44.33 & .34), who issued the D&O reversing the judge and granting the petition. See 30 C.F.R. § 44.35. The D&O was not appealed to a United States Court of Appeals.

[5] Former section 75.326, entitled "Air courses and belt haulage entries," restated the statutory underground coal mine ventilation standard at section 303(y)(1) of the Act, 30 U.S.C. § 863(y)(1). On May 15, 1992, section 75.326 was renumbered as section 75.350 but was otherwise unchanged in the

with the belt entry serving as a return air course during longwall development and retreat mining. As relevant here, section 75.326 required that entries used as intake and return air courses be separated from belt haulage entries and that belt entries not be used to ventilate a mine's active working places.

The D&O imposed upon the operator a number of additional terms and conditions. See 30 C.F.R. § 44.4(c). Condition III(c)(4), the requirement in issue, is contained under the heading "Requirements Applicable to Both Development and Retreat Mining Systems" and provides:

> No later than two years from the date of this Order, and pursuant to a schedule developed by the petitioner and approved by the District Manager, all diesel-powered equipment operated on any two-entry longwall development or two-entry longwall panel shall be equipment approved under 30 CFR Part 36.[6]

On September 2, 1992, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") cited Energy West, alleging a violation of section 75.326 as modified by the D&O, for failure to comply with Condition III(c)(4) in that three unapproved diesel-powered trucks were being used in the mine. It is undisputed that the trucks had not been approved under Part 36, that miners were working in the 9th Left two-entry panel preparing for installation of the longwall equipment, and that the cited trucks were being used to transport miners and construction equipment to and from that section. See E.W. Br. at 4-5; S. Br. at 3-4.

Energy West contested the citation, the contest was consolidated with the subsequent civil penalty proceeding, and the UMWA was permitted to intervene.

On December 2, 1992, Energy West filed a motion for summary decision with the administrative law judge under former Commission Procedural Rule 64, 29 C.F.R. § 2700.64 (1992)("Rule 64"), seeking vacation of the citation on the grounds that there was no genuine issue of material fact and that it was entitled to summary decision as a matter of law.[7] In support of its motion,

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Secretary's revised underground coal ventilation standards. See 30 C.F.R. Part 75, Subpart D (1993).

[6] 30 C.F.R. Part 36 ("Part 36") contains the Secretary's regulations for use of mobile diesel-powered transportation equipment in gassy noncoal mines and tunnels.

[7] In relevant part, Rule 64, entitled "Summary decision of the Judge," provided:

> (a) Filing of motion for summary decision. At any time after commencement of a proceeding and before the scheduling of a hearing on the merits, a party to the proceeding may move the Judge to render summary

Energy West attached various exhibits, including documents received from the Secretary in discovery and an affidavit from the chief safety engineer at Cottonwood. Essentially, the operator contended that Condition III(c)(4) covered only development and retreat mining, whereas the work in question, installation of longwall equipment, was a separate phase of mining being performed after development was complete and before retreat mining commenced. E.W. Motion for Summary Decision at 1, 5-8.

The Secretary opposed Energy West's motion and filed a cross-motion for summary decision. He argued that the central factual issue was, in fact, in dispute. S. Cross-Motion for Summary Decision at 5. The Secretary contended that, contrary to Energy West's assertions, there were only two stages in the two-entry longwall mining process, longwall development and retreat mining, and that the installation of longwall equipment was inseparable from the development and retreat mining phases. Id. The Secretary argued alternatively that he was entitled to summary decision because his interpretation of the D&O, requiring use of diesel equipment, approved pursuant to Part 36, during all facets of two-entry mining, was proper as a matter of law and entitled to deference. Id. at 8-32. Intervenor UMWA responded in support of the Secretary's position.

The judge denied Energy West's motion for summary decision. Agreeing that the "majority" of material facts were not disputed, the judge found that

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> decision disposing of all or part of the proceeding.
>
> (b) Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) That there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law.
>
> * * *
>
> (d) Case not fully adjudicated on motion. If a motion for summary decision is denied in whole or part, and the Judge determines that an evidentiary hearing of the case is necessary, he shall, if practicable, and upon examination of all relevant documents and evidence before him, ascertain what material facts are actually and in good faith controverted. He shall thereupon make an order specifying the facts that appear without substantial controversy, and direct such further proceedings as appropriate.

In 1992, Rule 64 was reissued as Rule 67, but the criteria for summary decision remain the same. See 29 C.F.R. § 2700.67(b)(1993). Fed. R. Civ. P. 56(c) sets forth these same criteria for summary judgment.

the "most crucial" fact at issue was "hotly contested," i.e., whether, at the time of citation, development of the longwall panel was complete and retreat mining not yet begun. Decision at 3, 4. He noted the operator's contention that the cited work of installing the longwall equipment was neither development nor retreat mining but instead represented a third phase of the operation, "construction" or "set up" work. Id. at 2-3. Referencing the Secretary's position that installation of longwall equipment was an "integral facet" of two-entry longwall development and retreat mining, the judge concluded that these differences "establish a factual dispute between the parties as to whether the installation of longwall machinery constitutes a phase of 'longwall development' and/or 'retreat mining.'" Id. at 4. On that basis, he denied the operator's motion.

Nonetheless, the judge granted the Secretary's cross-motion for summary decision. He concluded that the Secretary's contention that Energy West must use diesel equipment approved pursuant to Part 36 during "all facets" of its two-entry mining was "consistent" with both the "language and intent" of the D&O and section 101(c) of the Act. Decision at 6. The judge asserted that he could grant the Secretary's cross-motion based on interpretation of the D&O; in contrast, the operator's motion depended on drawing inferences from the evidence referenced in its motion. Id. He opined that the Secretary's cross-motion was "well-reasoned and persuasive" and, by reference, incorporated some 25 pages of it into his decision. Id. Citing the UMWA's response, he reasoned that acceptance of the operator's position would necessitate interpreting the D&O to protect miners from diesel equipment ignition hazards only while coal was being extracted. Id. The judge concluded that "[t]he term 'development' ... is broad enough to encompass the entire process of preparing to retreat mine the longwall panel" and "include[s] the activity of setting up longwall equipment...." Id.

Accordingly, the judge granted summary decision in the Secretary's favor, affirmed the citation based on the other undisputed facts, and assessed the $50 penalty proposed by the Secretary.

II.

Disposition

Energy West argues that the judge's interpretation of the D&O was legally erroneous and that, alternatively, if the Commission agrees with the judge that there was a disputed material fact as to the nature of its development/retreat mining operations, summary decision was inappropriate and the case should be remanded for factual resolutions. PDR at 5-10. The Secretary argues that summary decision was proper because the issue of whether installation of longwall equipment constitutes a phase of longwall development or retreat mining subject to Condition III(c)(4) is a question of law, not of fact, and the judge's resolution of that question was legally correct. S. Br. at 8-9, 16-20. The Secretary also notes, however, that, if the Commission agrees with the judge that there was an issue of material fact, "the appropriate recourse" is remand for an evidentiary hearing. Id. at 8-9 n.6. The UMWA rests on its response below.

We conclude that summary decision was inappropriately entered in this case. The Commission has long recognized that:

> Summary decision is an extraordinary procedure .... Under our rules, ... 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.

Missouri Gravel Co., 3 FMSHRC 2470, 2471 (November 1981). See also, e.g., Clifford Meek v. Essroc Corp., 15 FMSHRC 606, 615 (April 1993). In construing Fed. R. Civ. P. 56, the Supreme Court has indicated that summary judgment is authorized only "upon proper showings of the lack of a genuine, triable issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

Energy West's motion for summary decision was premised on its factual assertion that longwall installation work is distinct from development and retreat mining and that, at the time of citation, the former had been completed while the latter had not commenced. The Secretary vigorously contested these asserted facts, arguing that equipment installation is an integral phase of development and retreat mining and that development was not complete at the mine. Thus, the parties disagree as to whether Condition III(c)(4) was intended to apply to installation or set-up operations. Without a determination of that issue, it cannot be determined whether Energy West was in violation of Condition III(c)(4).[8]

The judge recognized that these facts were disputed and, accordingly, denied the operator's motion. He nevertheless granted the Secretary's cross-motion for summary decision. Once the judge found that the central facts were disputed, he was compelled by Rule 64 to deny summary decision and to conduct an appropriate hearing. Because other facts relevant to the question of violation were undisputed, the hearing could have been limited pursuant to Rule 64(d).[9]

---

[8] Given our resolution of this matter, we need not reach Energy West's assertion that the judge committed prejudicial error by incorporating into his decision the Secretary's brief below. We note, however, that wholesale incorporation of a litigant's brief is a questionable judicial practice.

In deciding this case, we have not considered a Proposed Decision and Order regarding another mine, which Energy West's counsel referenced at oral argument and subsequently submitted to the Commission. The Secretary objected to the Commission's consideration of the document, which was not part of the record.

[9] Former Rule 64(d) has since been revised (see 29 C.F.R. § 2700.67(d) (1993)), but not in any material way that would have affected the instant case.

III.

Conclusion

For the foregoing reasons, we vacate the judge's decision and remand this matter to the Chief Administrative Law Judge for assignment to a judge for appropriate proceedings consistent with this opinion.[10]

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

[10] Judge Lasher has since retired from the Commission.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 20, 1994

IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS	:	MASTER DOCKET No. 91-1
KEYSTONE COAL MINING CORPORATION	:	
v.	:	Docket Nos. PENN 91-451-R through PENN 91-503-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. PENN 91-1176-R through PENN 91-1197-R
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. PENN 91-1264
	:	Docket No. PENN 91-1265
v.	:	Docket No. PENN 91-1266
KEYSTONE COAL MINING CORPORATION	:	Docket No. PENN 92-182
and	:	Docket No. PENN 92-183
UNITED MINE WORKERS OF AMERICA (UMWA)	:	

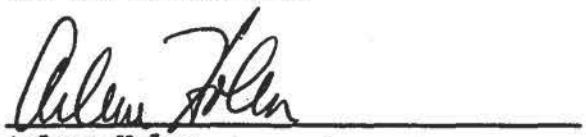
ORDER

On June 15, 27 and 30, 1994, the Commission received motions to intervene in this proceeding filed by Jim Walter Resources, Inc. and five groups of mine operators headed by Amax Coal Co., Glamorgan Coal Corporation, Cyprus Coal Company, Doverspike Brothers Coal Company, and Canterbury Coal Company ("Intervenors"). The Secretary of Labor does not oppose these motions.

The Commissioners have been polled. Upon consideration of the motions, they are granted. Intervenors may address issues posed by Administrative Law Judge James A. Broderick's common issues decision of July 20, 1993, 15 FMSHRC 1456 (ALJ), and by his other rulings involving all operators in Master Docket No. 91-1.

By separate order issued this date, the Commission has established a briefing schedule reflecting the Intervenors' participation. Intervenors are encouraged to avoid duplication of arguments in their briefs.

For the Commission:*



Arlene Holen
Commissioner

* Chairman Jordan has recused herself in this matter.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 20, 1994

IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS	:	MASTER DOCKET No. 91-1
KEYSTONE COAL MINING CORPORATION	:	
v.	:	Docket Nos. PENN 91-451-R through PENN 91-503-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. PENN 91-1176-R through PENN 91-1197-R
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. PENN 91-1264
	:	Docket No. PENN 91-1265
v.	:	Docket No. PENN 91-1266
KEYSTONE COAL MINING CORPORATION	:	Docket No. PENN 92-182
and	:	Docket No. PENN 92-183
UNITED MINE WORKERS OF AMERICA (UMWA)	:	

ORDER

On June 23, 1994, Counsel for the Secretary of Labor filed a motion with the Commission requesting a six-month extension of time to file an opening brief and proposing a briefing schedule extending for more than one year. Under the Commission's briefing procedure, the Secretary's opening brief was due to be filed by June 27, 1994. See 29 C.F.R. § 2700.75. On June 29, 1994, the Commission received a response from Keystone Coal Mining Corporation ("Keystone") opposing the motion and proposing that the Secretary be granted an extension of 34 days to file his opening brief.

The Commissioners have been polled. Upon consideration of the Secretary's motion and Keystone's response, we grant the Secretary a 90-day extension of time from June 27, 1994, the original date due, to file his

opening brief and we establish the briefing schedule set forth below.[1] By separate order issued this date, the Commission has granted motions to intervene filed by a number of mine operators; the briefing schedule reflects their participation.

Secretary's brief is due September 26, 1994.

Keystone's response is due 45 days after the filing of the Secretary's brief.

Intervenors' briefs are due 15 days after the filing of Keystone's brief.

Secretary's reply brief is due 30 days after the filing of intervenors' briefs.

Further requests for extension of time will not be favored.

For the Commission:[2]

Arlene Holen
Commissioner

[1] Commission Rule 2700.8, 29 C.F.R. § 2700.8 (1993), applies to computation of time periods.

[2] Chairman Jordan has recused herself in this matter.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 27, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 93-68
BIXLER MINING COMPANY	:	

BEFORE: Jordan, Chairman; Backley, Doyle, and Holen, Commissioners

ORDER

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. (1988). On April 26, 1994, Administrative Law Judge Avram Weisberger issued a Default Decision to Bixler Mining Company ("Bixler") for failing to comply with a prehearing order or with the judge's April 4, 1994, Order to Show Cause. The judge assessed a civil penalty of $50.

On May 27, 1994, the Commission received from the Secretary of Labor a Motion to Vacate Default Decision, Vacate Citation and Dismiss Civil Penalty Proceeding. In his motion the Secretary explains that, after the judge issued the default decision, but before the parties received it, the Secretary agreed with Bixler to vacate the citation and dismiss the civil penalty proceeding.

The judge's jurisdiction over this case terminated when his decision was issued on April 26, 1994. Commission Procedural Rule 69(b), 29 C.F.R. § 2700.69(b)(1993). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d); 29 C.F.R. § 2700.70(a). The Commission received the Secretary's motion 31 days after the issuance of the judge's decision. The Commission did not act on the May 27 motion within the required statutory period for considering requests for review and the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1).

Relief from a final Commission judgment or order on the basis of inadvertence, mistake, surprise, excusable neglect or other reasons justifying relief is available to a party under Fed. R. Civ. P. 60(b)(1). 29 C.F.R. § 2700.1(b)(Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); Lloyd Logging, Inc., 13 FMSHRC 781, 782 (May 1991). In the interest of justice, we reopen this proceeding, deem the motion to be a request for relief from a final Commission decision incorporating a late-filed petition for discretionary review, excuse its late

filing and grant the petition. See, e.g., Kelley Trucking Co., 8 FMSHRC 1867, 1868-69 (December 1986).

The Commission has concluded that the Secretary has unreviewable authority to vacate or withdraw his own enforcement actions. RBK Construction, Inc., 15 FMSHRC 2099, 2101 (October 1993). Thus, sufficient reason has been presented to justify relief from default and we grant the Secretary's request for vacation of the citation and dismissal of the proceeding. We remind the Secretary, in the future, to file the appropriate stipulations of dismissal as explained in RBK, 15 FMSHRC at 2101 n.2. We note that, although the Secretary's motion was not signed by Bixler, the operator has not filed any opposition to the motion.

For the reasons set forth above, we reopen this matter, vacate the judge's default order and dismiss this proceeding.

Mary Lu Jordan, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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AUG 10 1993

ENERGY WEST MINING COMPANY Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEST 92-819-R Citation No. 3851235; 9/2/92
	:	Cottonwood Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 93-168 A.C. No. 42-01944-03613
v.	:	Cottonwood Mine
ENERGY WEST MINING COMPANY, Respondent	:	

DECISION

Before: Judge Lasher

This matter is before me on Contestant's Motion for Summary Decision and Respondent MSHA's Opposition thereto and Cross-Mo-Motion for Summary Decision. The general issue arises out of the applicability of a requirement contained in a "Decision and Order Granting Petitions for Modification," dated July 14, 1989 (Modification Order) resolving Contestant Energy West's petition to modify the application of 30 C.F.R. § 75.326 to its Cottonwood Mine. United Mine Workers of America, as intervenor, filed a motion in support of Respondent MSHA's position. The parties agree to consolidation of these two proceedings for decision.

The contest proceeding challenges Citation No. 3851235 issued to Contestant on September 2, 1992, because Contestant was using unapproved diesel-powered trucks in its two-entry mining operation. The Citation charges:

> The Petition for Modification, Docket No. 86-MSA-3 was not being complied with in the 9th left Two Entry Panel. The belt was in the No. 2 Entry. The longwall is being set up for pillar retreat. 9th Left is the headgate entries. There were three diesel Isuzu trucks that were not approved under 30 C.F.R. Part 36. This is required on page 41(C)(3).

The Citation was modified on October 1, 1992, to change the requirement of the Modification Order allegedly violated from 41 (C)(3) to 41(C)(4).[1] Section 41(C)(4) reads: "... all diesel-powered equipment operated on any two-entry longwall development or two-entry longwall panel shall be equipment approved under 30 C.F.R. Part 36."

Contestant concedes that at the time the Citation was issued, three Isuzu trucks were being used in the 9th Left two-entry panel to transport miners and equipment to and from the section. It also appears that at that time the Citation was issued coal was not being extracted in 9th Left.[2] I accept as an undisputed fact that the three Isuzu trucks were not "approved." Even though Contestant does not expressly concede such, such is implied from its contest, since otherwise there would be no issue here. (See fn. 5, at page 5 of Respondent's Cross-motion).

Contestant maintains that there is a third phase of operation, besides the two mentioned in the approved Modification Order. Spelled out clearly, this argument goes:

1. At the time the Citation was issued, Contestant was engaged in "construction work," i.e., preparing to "set up" longwall equipment on the 9th Left longwall panel.

2. This "set-up" work is neither "development" or "longwall retreat mining,"

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[1] This provision appears in the Modification Order (Ex. B to Contestant's Motion) at page 41. In its Motion, Contestant refers to this requirement, and others, as "Conditions."

[2] A major dispute of fact, however, occurs as to Contestant's assertion in its motion that "Development of the longwall panel was complete and longwall retreat mining had not commenced." (See "Undisputed Facts," No. 7, at page 6 of Contestant's Motion.)

neither of which was going on when the Citation was issued.[3]

3. Part III of the Modification Order (See p. 39 of Ex. B to Contestant's Motion) under which paragraph (C)(4) is found relates only to these two activities: "Development" and "Retreat Mining" since it comes under the Heading "Requirements Applicable to Both Development and Retreat Mining Systems."

The Respondent contends that Contestant is not entitled to summary decision because there are disputed issues of material fact (explained below) which are both in dispute and critical to Contestant's Motion, and further that Respondent's interpretation of the Modification Order is proper and should be affirmed on summary decision.

Respondent also argues that Contestant is incorrectly using this contest proceeding before the Commission to amend the Modification Order to enable it to use unapproved diesel-powered equipment during the installation of longwall mining equipment, rather than proceeding as it should to seek amendment of the Order pursuant to 30 C.F.R. § 44.53, under which the Secretary could consider whether such an amendment would result in a dimunition of safety. (See fn.4 at p. 3 of Respondent's Cross-Motion).

Upon consideration of the briefs, evidence and arguments submitted, I find the position of Respondent meritorious and it is here adopted.

ORDER DENYING CONTESTANT'S MOTION FOR SUMMARY JUDGMENT

At pages 1 and 4-6 of its motion, Contestant maintains that there are no material issues of fact.

Respondent, however, points out that there are significant issues relating to facts upon which Contestant's motion is based. Thus, Contestant is not entitled to summary decision because such a ruling would require that this tribunal resolve issues in dispute between the parties. While Respondent acknowledges many of the facts that Contestant claims to be undisputed, the fact most crucial to the resolution is hotly contested. Moreover, Respond-

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[3] It is Respondent MSHA's position that installation of longwall equipment is an integral facet of two-entry longwall mining, inseparable from the development and the retreat mining phases.

ent challenges assumptions that Contestant Energy West draws from material facts that are not in dispute, as well as Contestant's interpretation of statements used in support of its position.

Summary judgment is appropriate only where a tribunal "is satisfied that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Celotex Corporation v. Catrett, 477 U.S. 317, 330 (1986), quoting, F.R.C.P. 56(c). It is the burden of the party moving for summary judgment to prove that there exists no genuine issue of material fact.

Contestant attempts to meet its burden by offering seven paragraphs of "material facts" about which there is allegedly "no genuine dispute." While Respondent accepts the majority of such as undisputed, it contends Contestant inaccurately alleges agreement regarding the central fact at issue in this matter-that "[d]evelopment of the longwall panel was complete, and longwall retreat mining had not commenced." (Motion at 1, 5-6.) Indeed, Respondent's position is directly contrary to Contestant's. Respondent's position is that installation of longwall equipment is an integral facet of two-entry longwall mining, inseparable from the development and the retreat mining phases. Respondent's Answers to Contestant's Request for Admissions, pages 2 and 3 (attached as Respondent's Exhibit G), and the attached affidavits of Fred Marietti and Robert Ferriter (attached as Respondent's Exhibits H and I, respectively), which support Respondent's position, clearly establish a factual dispute between the parties as to whether the installation of long-wall machinery constitutes a phase of "longwall development" and/or "retreat mining." [4]

Contestant attempts to establish that it "was not engaged in either development or retreat mining, " as those terms are used in the Order by (1) attaching to its Motion an affidavit from Randy Tatton, their Chief Safety Engineer and (2) referring to an MSHA publication on new ventilation standards. However, neither of these sources demonstrate the existence of undisputed fact.

Mr. Tatton states that "[d]evelopment ... was completed on August 18, 1992." Tatton Affidavit at ¶ 3 (attached as Secretary's Exhibit J). However, Mr. Tatton's statement does not pro-

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[4] Even if Respondent were to concede, for the purposes of Contestant's motion, that there are no undisputed facts at issue, the Motion must be denied since the parties disagree on the inferences which may be reasonably drawn from those facts. See Central National Life Insurance Company v. Fidelity and Deposit Company of Maryland, 626 F.2d 537 (7th Cir. 1980). While Respondent concedes that no coal was being produced on the 9th Left Longwall panel at the time the Citation was issued, the parties disagree on whether this fact enables Contestant from complying with the terms and conditions of the Order.

vide sufficient detail to conclude that even he believed that they had completed the process of "develop(ing) the two-entry system," as that term is used in the Order. (Respondent's Ex. B at 37 and 39). Mr. Tatton's statement may mean nothing more than that Contestant had finished cutting the entryways needed to perform longwall mining. However, since Contestant was actively engaged in setting up the longwall mining equipment, Motion at 5-6, there is no basis for concluding that Mr. Tatton believed that they were finished with the development of the "two-entry system."

Even if Mr. Tatton's statement achieved the necessary degree of precision, his opinion cannot suffice as a basis for summary judgment. Opinions do not generally provide sufficient basis for summary judgment. Elliott v. Massachusetts Mutual Life Insurance Co., 388 F.2d 362, 365 (5th Cir. 1968). Moreover, MSHA experts disagree with his assessment; they believe that the development of the two-entry development had not been completed when the Citation was issued. See, Respondent's Exhibits H and I. Further, Mr. Tatton's application of the conditions at the mine to the terms and conditions of the Order is not a fact that he can definitely establish for the purposes of summary decision. Indeed, that is the province of the tribunal after reviewing evidence and applying such evidence to the provision of the Order.

The MSHA report cited by Contestant also fails to prove that the central material fact is undisputed.[5] Motion at 7-8, referring to MSHA Ventilation Questions and Answers, November 9, 1992. The report was developed to provide information on new MSHA ventilation standards. Applying the statements to this case is not valid since the questions and answers are directed toward ventilation practices, not the use of diesel-powered equipment in mines. Also, the answers are premised upon standard mining practices and do not assume a modification of mining practices that limit egress from the mine, thus demanding compliance with rules more stringent than those contained in the Code of Federal Regulations.

Accordingly, Contestant's Motion for Summary Decision is denied.

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[5] Even were it definitive support for Contestant's position, the report cannot serve as a basis for establishing undisputed facts regarding MSHA's position because the report is not an official policy document and not intended to be enforced as such. See, Ventilation Questions and Answers, November 9, 1992, Introduction (attached as Secretary's Exhibit K).

ORDER GRANTING RESPONDENT'S CROSS MOTION FOR SUMMARY JUDGMENT

It is concluded that Respondent's contention that Complainant must use diesel equipment approved pursuant to 30 C.F.R. Part 36 during all facets of its two-entry underground mining is consistent with the language and intent of the Modification Order, as well as the legislative mandate pursuant to which the Order was entered. In contrast to Contestant's Motion for Summary Decision, Respondent's motion for such can be affirmed based upon interpretation of the Order. Respondent's position is not dependent on inferences from evidence submitted with its motion.

Respondent's Brief in support of its Motion is well-reasoned and persuasive. It is based not only on the literal language of the Order itself, but also on the nature of two-entry mining, prior understanding of the parties and analysis of the sources upon which Respondent relied in incorporating the various requirements (Conditions) into the Modification Order. In view of the thoroughness and length of Respondent's position together with its supporting points and authorities which appear at pages 9 through 32 of its Cross-motion and Brief, such is here incorporated by reference.

CONCLUSION

Contestant Energy West contends that it is bound by the subject requirement (Condition) only when coal is actually being extracted. The essence of Contestant's premise is that the term "development" as used in the Modification Order and the applicable requirement refers only to actual mining of the development entries and cannot include installation of equipment necessary to extract the coal outlined by such development entries.

As pointed out by UMWA in its Response in support of Respondent's position ... "... in order to adopt the construction urged by Energy West, this Court would have to conclude that the Secretary deliberately chose to protect miners from a potential fire source only while coal was being extracted."

It is concluded that the term "development" does include the activity of setting up longwall equipment, i.e., the activity which was ongoing when the subject citation was issued, and that this term is broad enough to encompass the entire process of preparing to retreat mine the longwall panel.

ORDER

1. Contestant's Motion for Summary Decision in Docket No. WEST 92-819-R is **DENIED**. Respondent's Cross-motion for Summary

Decision therein is **GRANTED**, Citation No. 3851235 is **AFFIRMED**, and this contest proceeding is **DISMISSED**.

2. In Docket No. WEST 93-168, the single penalty assessment of $50 sought by MSHA is **ASSESSED** for Citation No. 3851235.

Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 6 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 94-268
	:	A.C. No. 15-08357-03752
v.	:	
	:	Camp No. 11 Mine
PEABODY COAL COMPANY, Respondent	:	

DECISION

Appearances: Anne T. Knuaff, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
David Joest, Esq., Peabody Coal Company, Henderson, Kentucky, for the Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearing, Petitioner filed a motion to approve a settlement agreement and to dismiss the case. Respondent has agreed to pay the proposed penalty of $288 in full. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of $288 within 30 days of this order.

Gary Melick
Administrative Law Judge

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JUL 7 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 93-234
Petitioner	:	A.C. No. 11-02440-03695
v.	:	
	:	
PEABODY COAL COMPANY,	:	
Respondent	:	Marissa Mine
	:	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois, for Petitioner;
David R. Joest, Esq., Henderson, Kentucky, for Respondent.

Before: Judge Amchan

ISSUE

The issue in this matter is whether MSHA should have issued a section 104(b) order to Respondent when it determined that a non-significant and substantial violation had not been corrected within the one hour abatement period specified, or whether the abatement period should have been extended. I conclude that, under the circumstances, the abatement period should have been extended. I, therefore, vacate the order but affirm a $200 civil penalty for the underlying citation.

Factual Background

On Friday, April 16, 1993, Ronald Hutson was conducting an MSHA inspection of Respondent's Marissa mine in Washington County, Illinois. He noticed an accumulation of coal and coal dust under the rollers of the mine's first subeast conveyor belt leading to mechanized mining unit #4 (Tr. 11-12, 16, 67-68). Inspector Hutson did not issue a citation but asked Respondent's walkaround representative, Compliance Manager Ervin "Butch" Shimkus, to have the area cleaned up (Tr. 11-12, 67-68). Shimkus inadvertently noted the location of the accumulation as the second subeast conveyor belt and, thus, Respondent sent its personnel to clean up a different area (Tr. 12, 16-17, 67-69).

Monday morning, April 19, 1993, Hutson continued his inspection. At about 9:20 a.m.[1] he passed the same area again and noticed that the coal and coal dust had not been cleaned up, and, in fact, the accumulations were somewhat more extensive than on the preceding Friday (Tr. 12-13). They were between 6 and 18 inches in depth and extended over an area approximately 360 feet in length (Tr. 13). However, the coal and coal dust accumulation was not continuous. It consisted of piles underneath the rollers of the conveyor which were 10 - 12 feet apart (Tr. 22, 43). None of the piles touched the bottom rollers of the conveyor which were approximately 2 feet above the floor (Tr. 26-27).

Hutson informed Shimkus that he would issue a citation for the accumulation (Tr. 12-13). Shimkus immediately attempted to contact James Glynn, the mine manager, who would be responsible for getting personnel to clean up the coal and dust (Tr. 69).[2] Inspector Hutson informed Shimkus that Respondent had 45 minutes to terminate, or abate the cited condition (Tr. 22). Mr. Shimkus expressed doubts that 45 minutes would be sufficient (Tr. 32). Hutson replied that he would be flexible if employees were in the process of cleaning up when the 45 minute period expired (Tr. 32, 77-78).

The conversation between Hutson and Shimkus regarding the abatement period may have occurred after Shimkus spoke to Glynn (Tr. 73-74, 85). In any event, Glynn was not informed as to the time period allowed for abatement until the section 104(b) order was issued later in the day (Tr. 96). The record is unclear as to whether it would have been possible for Shimkus to notify Glynn of the abatement period until they saw each other approximately two hours later (Tr. 76-77).

The inspector proceeded about 300 feet further towards the working face when he observed additional accumulations of coal and coal dust underneath a belt drive (Tr. 22, 25-26, 73). He

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[1]Inspector Hutson may have observed the accumulated coal and coal dust in this area and initially informed Respondent of the citation somewhat earlier than 9:20 (Tr. 105).

[2]When he arrived at the mine surface later in the day Hutson wrote citation 4050582 which noted the time of violation as 9:20 a.m. (Tr. 24-25). The citation alleges a violation of 30 C.F.R. § 75.400, which requires that:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

informed Shimkus that this area was included in the citation (Tr. 73-76). Hutson also extended the abatement period to one hour, from 9:20 to 10:20 (Tr. 22). Half of that period may have already run at the time of this conversation (Tr. 84).

Shimkus called Kevin Lynn, the section foreman for unit 4, who was responsible for the area added to the citation. Shimkus told Lynn that he had 45 minutes to clean up the area (Tr. 75). Lynn sent 3 miners to the belt drive and they cleaned up the coal and coal dust accumulations in about 10 - 15 minutes (Tr. 85-86).

After receiving Mr. Shimkus' call, Mine Manager Glynn had to travel 2 miles to get 2 miners to clean up the first area cited by Hutson (Tr. 92-93). He dropped the men off and instructed them to work towards the belt drive. He left for 20 minutes and, when he returned, the employees had cleaned up 150 feet of the accumulated coal and coal dust and were still shoveling (Tr. 93-94).

Glynn left the area again and encountered Inspector Hutson. In response to the inspector's inquiry, Glynn told Hutson that the cited area was being cleaned (Tr. 94)[3]. The mine manager returned to the belt ten minutes later and found that the miners had left the area (Tr. 94-95). He found the men eating their lunch on a trolley vehicle and told them that the area was under citation and that they had to finish cleaning it up immediately (Tr. 94-95). By the time that Glynn and the two employees arrived back at the belt, Hutson had returned to the area. When the inspector arrived at 12:05 p.m., he found that nobody was working there and that only 1/4 to 1/3 of the area had been cleaned up (Tr. 17-19, 59, 93-94).[4]

Shimkus and/or Glynn explained to Inspector Hutson that the employees who had been cleaning the cited area had taken a lunch break (Tr. 79-80, 95-96). Hutson informed Glynn and Shimkus that he was issuing Respondent a withdrawal order pursuant to section 104(b) of the Act (Tr. 80)[5]. The inspector placed a closure tag

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[3]Hutson understood Glynn to say that the area had been cleaned (Tr. 103).

[4]At Tr. 20-21 Hutson testified that 2/3 of the area had been cleaned up. This testimony is obviously not what the inspector meant to say. This is not consistent with his testimony that the amount of clean-up constituted only a "token effort", or that an area 2 crosscuts in length, out of 8, had been cleared (Tr. 17-19).

[5]Order No. 4050583 was written out when Hutson returned to the mine surface later that afternoon. It is not clear whether Hutson issued the order before or after he received Respondent's

on the conveyor belt which required Respondent to stop the belt (Tr. 50). With the conveyor stopped, there was no way for Peabody to send coal out to the surface from mechanized mining unit #4. Therefore, unit 4 shut down and employees working at the face came out to the belt to help clean up the area (Tr. 50, 86, 97). Within 30-45 minutes, approximately ten employees cleaned up the area (Tr. 54, 86-87, 97). The withdrawal order was then terminated and the belt was allowed to operate again.

A civil penalty of $724 was proposed for citation No. 4050582 and order 4050583. This penalty was contested by Respondent and a hearing was held in this matter on April 19, 1994, in Mt. Vernon, Illinois.

THE ABATEMENT PERIOD FOR CITATION NO. 4050582 SHOULD HAVE BEEN EXTENDED AND ORDER 4050583 SHOULD NOT HAVE BEEN ISSUED.

Section 104(b) provides

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation . . . has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering such area until an authorized representative of the Secretary determines that such violation has been abated.

In Mid-Continent Resources, Inc., 11 FMSHRC 505 (April 1989), the Commission held that, if the Secretary establishes that the violation of the underlying section 104(a) citation existed at the time of the section 104(b) withdrawal order, it has established a prima facie case that the 104(b) order is valid. There is no dispute that such is the case in the instant matter.

Respondent seeks to rebut the prima facie case by arguing that the abatement period set in the underlying citation was unreasonable and/or that inspector Hutson should have extended the abatement period at mid-day on April 19, 1993. Although I

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fn 5 cont'd.

explanation for the employees' absence (Tr. 79-80, 96).

can empathize with the inspector's frustration upon first finding that the accumulations had not been cleaned up on April 16, and then finding nobody engaged in clean-up on April 19, I agree with Respondent on both counts.

Inspector Hutson conceded that walkaround representative Shimkus immediately expressed doubts as to whether 45 minutes was sufficient time to abate the cited condition, and that he responded by promising flexibility if Respondent was having difficulties getting people to abate the violation (Tr. 32, 78). His decision not to extend the abatement period appears to have been influenced primarily by the fact that the two miners had decided to take a break just before he arrived at the belt, that he understood Mine Manager Glynn to have represented that the condition was completely abated, and the fact that the accumulations had not been cleaned up on April 16 (Tr. 44-45, 78, 103).[6]

I find that Mine Manager Glynn acted in a reasonable manner in getting two employees to clean-up the accumulated coal and coal dust. In the past, Respondent has most often been given until the end of the shift to correct similar violations (Tr. 99). The fact that Glynn was not aware of the original 45 minute abatement period, later modified to one hour, may be due to a communication breakdown between Glynn and Shimkus. On the other hand, it may have been impossible for Shimkus to have contacted Glynn with the information about the abatement period, which he may not have had when he talked to Glynn (Tr. 74-77). Nevertheless, nothing in this record indicates that the cited condition, a non significant and substantial violation, warranted heroic abatement efforts (Tr. 81). Indeed, Inspector Hutson concedes that this was not a particularly serious violation (Tr. 37).

The record establishes that two employees could have cleaned up the accumulations underneath the belt rollers in about 3 hours (Tr. 60). After Shimkus contacted him, Glynn immediately got two employees and took them to the cited area. They began working between 11:00 and 11:30 a.m. and, thus, should have completed their abatement efforts by 2:30 or 3:00 p.m. at the latest--even allowing a half-hour lunch break (Tr. 60, 100). Although, the

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[6]Hutson testified that he "possibly" would have issued the 104(b) order even if the employees had been working when he arrived. He stated that he may have issued the order anyway because the work hadn't progressed very far (Tr. 107). He also testified that Respondent's failure to clean up the coal and coal dust on April 16, 1993, had nothing to do with his decision to issue the 104(b) order (Tr. 108). The undersigned infers, however, that this was a factor in the inspector's decision to issue the withdrawal order.

area could have been cleaned up much faster by assigning more employees to the clean-up task, there is nothing in this record that indicates that Respondent was acting unreasonably in not doing so.

The Secretary is justified in requiring Respondent to allocate resources to the abatement effort beyond those the operator would normally utilize--if the conditions warrant it. The fact that Peabody had only 1 or 2 employees on each shift designated as belt shovelers does not necessarily mean that Respondent may not be required to use other employees to abate a citation[7]. However, in the instant case there appears to be no reason for the extremely short abatement period--other than the fact that Inspector Hutson may have been somewhat irritated that the coal and dust accumulations had not been cleaned up on April 16 (Tr. 44-45).

One cannot fault Inspector Hutson for being upset in finding the violation unabated with nobody engaged in the clean-up effort. However, he is required to be reasonable in deciding whether to extend the abatement period or issue a section 104(b) order, United States Steel Corporation, 7 IBMA 109 (1976). I conclude that it was not reasonable for the inspector to cause unit 4 to be shut down under the circumstances.

The factors that make it unreasonable to issue the 104(b) order rather than extend the abatement period are: the degree of hazard presented by extending the abatement period; the short abatement period originally set, the fact that work on the abatement had obviously started, and, as Respondent explained, had not stopped. I conclude also that Hutson should have considered Respondent's immediate response in abating the violation at the belt drive. Given these factors, Inspector Hutson should have extended the abatement period.

For the reasons stated above, I vacate order No. 4050583. However, it is undisputed that Respondent violated 30 C.F.R. § 75.400 as alleged in citation No. 4050582. Considering the six factors enumerated in section 110(i) of the Act, I assess a $200 penalty for this violation. Peabody is a large operator, whose ability to continue in business is obviously not compromised by such a penalty. I find nothing in Respondent's prior history of violations that influences my assessment one way or another. The most critical factors are the gravity of the violation, which was, I consider, fairly low, and Respondent's negligence, which I consider to be relatively high.

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[7]The record indicates that it would take 2 employees 3 hours to abate the violation herein, and 5-6 employees 1 hour (Tr. 60).

Anyone can make a mistake, as did Mr. Shimkus, in writing down the wrong location for the conveyor belt on April 16, but I conclude that the penalty assessed should be somewhat higher than otherwise because of this mistake. On the other hand, given the fact that gravity of the violation was relatively low and that I conclude that Respondent acted in good faith in trying to achieve compliance, I conclude that $200 is an appropriate civil penalty.

ORDER

Order No. 4050583 is VACATED. A $200 civil penalty is assessed for citation No. 4050582. This penalty shall be paid within thirty (30) days of this decision.

Arthur J. Amchan
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUL 7 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 93-98-M A.C. No. 44-06701-05503
v.	:	
	:	Docket No. VA 93-155-M A.C. No. 44-06701-05504
MECHANICSVILLE CONCRETE, Respondent	:	Docket No. VA 94-14-M A.C. No. 44-06701-05505
	:	Pit No. 1
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION Petitioner	:	Docket No. VA 93-105-M A. C. No. 44-06591-05503
v.	:	Docket No. VA 93-145-M A.C. No. 44-06591-05504
MECHANICSVILLE CONCRETE T/A MATERIALS DELIVERY, Respondent	:	Docket No. VA 93-153-M A.C. No. 44-06591-05505
	:	Docket No. VA 93-168-M A.C. No. 44-06591-05506
	:	Branchville Plant

DECISION

Appearances: Javier I. Romanach, Esq., Office of the Solicitor, Arlington, Virginia, for Petitioner; Arthur A. Lovisi, Esq., Office of the General Counsel, Mechanicsville Concrete, for Respondent.

Before: Judge Amchan

Overview of the Cases

These seven cases involve 27 citations issued to Respondent [1] during the course of six inspections of 2 of its sand and gravel pits in the State of Virginia between January 6, 1993 and September 15, 1993. Respondent's primary business is the manufacture and sale of ready-mix concrete. Up until 1992 it purchased the sand and gravel used in its concrete from other companies. In 1992 it acquired several sand and gravel pits to supply its needs[2].

As a result of its entry into the business of extracting sand and gravel, Respondent began to experience inspections by MSHA inspectors. In June 1992, MSHA Inspector Charles Rines visited the company's King William pit northeast of Richmond and issued several citations, including one for the absence of toilet facilities and an inoperable reverse signal alarm on a front end loader, Materials Delivery, 15 FMSHRC 2467, 2469 (ALJ December 1993), appeal docketed sub nom. Mechanicsville Concrete Inc., T/A Materials Delivery v. Secretary of Labor and F.M.S.H.R.C., No. 94-1222 (4th Cir. February 23, 1994).

On January 6, 1993, Inspector Rines visited Respondent's Branchville pit in Southampton County, Virginia, only a few miles north of the Virginia/North Carolina border. He issued one citation giving rise to Docket No. VA-93-105-M. Two weeks later he inspected Respondent's Darden pit, also in Southampton County and issued 7 citations which were affirmed by the undersigned on December 7, 1993, see Materials Delivery, supra.

On March 23, 1993, MSHA Inspector Carl Snead visited the King William site (Docket VA 93-98-M), and returned to perform a follow-up investigation on April 15, 1993 (Docket VA 93-155-M). On May 10, 1993, Inspector Rines returned to the Branchville pit and issued the citations that gave rise to the citations in Dockets VA 93-145-M, 93-153-M, and 93-168-M. A follow-up inspection by Rines on May 24, 1993, resulted in the issuance of 3 orders alleging a failure to timely abate violations cited on May 10 (Docket VA 93-153-M). The last docket in this matter, VA 94-14, arises from citations issued by Inspector Snead at the King William pit on September 15, 1993.

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[1] Respondent in all seven dockets herein is the same company (Exh. P-1, P-22). At hearing the caption in Dockets VA 93-105-M, 93-145-M, 93-153-M, and 93-168-M, was amended to list the company as Mechanicsville Concrete, Inc., T/A Materials Delivery, rather than Materials Delivery.

[2] Respondent also sells approximately $30,000 worth of sand annually to homebuilders in southeastern Virginia (Tr. II: 195-196).

Jurisdiction

Respondent's main contention in contesting the civil penalties proposed in these cases is that it is not subject to MSHA jurisdiction because it is not engaged in interstate commerce. As far as the instant record shows, Respondent does not buy sand from outside of Virginia for use in its concrete production business and does not sell sand and gravel to customers outside Virginia (Tr. II: 170-72, 195-96). There is also no indication that any of Respondent's concrete is sold or transported outside of Virginia. The record does establish, however, that the heavy vehicles used by Respondent at its sand and gravel pits, which are in fact involved in many of the citations, were not manufactured in Virginia (Tr. I: 32-38, II: 27-28).

It is black letter law that Congress intended to exercise its authority to regulate interstate commerce to the "maximum extent feasible" when it enacted section 4 of the Mine Act. Jerry Ike Harless Towing, Inc. and Harless Inc., 16 FMSHRC 683 (April 1994); U. S. v. Lake, 985 F.2d 265, 267-69 (6th Cir. 1993). Thus, if Respondent's sand and gravel pits fall within the commerce clause of the Constitution, they are subject to MSHA jurisdiction.

Respondent, in 10 pages of its brief, attempts to distinguish many of the cases holding that a variety of economic enterprises fall within the ambit of the commerce clause. What is most significant is that it can cite only one case, Morton v. Blum, 373 F. Supp. 797 (W.D. Pa. 1973), in which a court intimated that a business was outside the commerce clause (although strictly speaking the decision can be read as turning upon a reading of section 4 of the 1969 Coal Act). Furthermore, the Blum case is inconsistent with the overwhelming weight of precedent since 1942 regarding the reach of the commerce clause.

Indeed, applying that precedent, it is hard to conceive of an economic enterprise outside the bounds of the commerce clause. The case law supports the proposition that use of equipment manufactured outside the state in which it is used is sufficient to bring a business within the purview of the commerce clause, United States v. Dye Construction Company, 510 F.2d 78, 83 (10th Cir. 1975). It is hard to imagine a business in this country that does not utilize supplies or services that do not originate in a state other than the one in which it operates.

Further, I am aware of no case in which the Commission or any of its judges has ever held a mine to be outside the commerce clause, See, e.g., F & W Mines, Inc., 12 FMSHRC 885 (ALJ Maurer April 1990); Mellott Trucking and Supply, Company, Inc., 10 FMSHRC 409 (ALJ Melick March 1988). Many of the operations added

to the reach of the Mine Safety and Health Act by the 1977 amendments are very similar in geographical scope to Respondent's sand and gravel pits.

A purely local activity falls within Article I, Section 8, Clause 3, of the Constitution if it affects interstate commerce, See Wickard v. Filburn, 317 U. S. 111 (1942). Indeed, Congress can regulate an individual enterprise solely on the basis that the class of activities in which it engages affects commerce, Perez v. United States, 401 U. S. 146 (1971), U.S. v. Lake, supra.

Mining obviously affects interstate commerce and, therefore, under Perez Respondent's activities are almost irrelevant to the analysis of coverage under the commerce clause. However, if Respondent did not operate the sand and gravel pits at issue in this case, it would have to buy sand and gravel from other businesses. To the extent that Mechanicsville Concrete can mine its own sand and gravel, it competes with other mines, including those beyond the borders of Virginia.

Furthermore, there is an effect on interstate commerce if part of the reason that it is cost-effective for Mechanicsville to mine its own sand is that it saves money by skimping on safety and health expenditures that other potential sources must make to comply with the Act. Hazardous conditions may result in injuries and illness to Respondent's employees, which impose a substantial burden upon interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments, section 2(a) of the Occupational Safety and Health Act, 29 U.S.C. 651(a).

I will resist the temptation to base my decision on the fact that the Branchville pit is located only a few miles from the North Carolina border and the fact that this record establishes that a potential source of sand and gravel for Respondent's concrete business operates just on the other side of the state line (Tr. I: 157, II: 68). I would find Respondent subject to the commerce clause if its only operation was located at the geographical center of Virginia, or any other state. Although the Supreme Court before World War II may have indicated otherwise, there is no substantial support since 1942 for the proposition that Respondent is not subject to the commerce clause[3]. Therefore, it is also subject to MSHA jurisdiction.

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[3]I note, however, that Chief Justice Rehnquist may well agree with Respondent as evidenced by his concurrence in Hodel v. Virginia Surface Mining & Reclamation Association, 452 US 264, 69 L Ed 2d 1, 36-39 (1981). On the other hand, the majority opinion by Justice Marshall in that case provides a sufficient basis to dispose of Respondent's claim that Federal regulation of its sand

The January 6, 1993 Inspection (Docket VA 93-105-M)

On January 6, 1993, Inspector Charles Rines went to the Branchville pit and asked Gene Snead[4], Respondent's foreman, for the company's quarterly reports, MSHA form 7000-2 (Tr. I: 40). These reports indicate the number of employees on the site, the number of hours worked, and the number of reportable accidents (Tr. I: 41).

Snead told Inspector Rines that the reports were not at site but were at the company's Franklin, Virginia office (Tr. I: 40). He produced the reports the next day (Tr. I: 43). Rines issued Respondent citation No. 4083504, alleging a violation of 30 C.F.R. § 50.40. That regulation provides:

> (b) Each operator of a mine shall maintain a copy of each report submitted under section 50.20 or section 50.30 at the mine office closest to the mine for five years after submission...

The MSHA form 7000-2 is required to be submitted to the MSHA Health and Safety Analysis Center in Denver, Colorado pursuant to section 50.30. Thus, it is a report falling within the requirements of section 50.40. Respondent contends that it complied with the regulation because it had no office at the Branchville pit and that it kept the reports at the mine office closest to Branchville, which was in Franklin. The Secretary contends that a shipping container at the Branchville site was where Respondent in fact kept records and reports, and, therefore, was the closest office within the meaning of the regulation (Tr. I: 52, 73-74).

Mechanicsville notes that the shipping container had no phone connection and no office personnel worked in the container,

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fn 3 cont'd.

and gravel pits violates the Tenth Amendment to the United States Constitution. The court observed,

> The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers.

69 L Ed 2d 1, at 25.

[4]Gene Snead, Respondent's foreman, should not be confused with Carl Snead, the MSHA inspector who conducted three of the inspections at issue in this case.

although it had a table (Tr. I: 61-62, 74). The company further notes that the language of the regulation, "office closest to the mine", suggests that these reports need not be kept at the mine site. Indeed, there is a Commission judge's decision, Sierra Aggregate Company, 9 FMSHRC 426, 430 (ALJ March 1987), which stands for this proposition.

I decline to follow Sierra Aggregate because I agree with the Secretary that section 50.40 must be interpreted in conjunction with section 109(a) of the Act. Section 109(a) requires that an office be maintained at every mine. Thus, I find that the shipping container was an "office" within the meaning of section 50.40 and that the MSHA Form 7000-2 is required to be maintained at each mine site. I, therefore, affirm citation No. 4083505.

MSHA proposed a $100 civil penalty for this violation which I consider much too high given the statutory criteria in section 110(i) of the Act. I assess a $10 penalty. I see no impact on employee safety or health arising from the violation. Even though Mr. Rines had previously informed Foreman Snead that the reports had to be maintained at the mine site, I think a very low penalty should be assessed, given the fact that the company provided reports the next day, and obviously was not trying to conceal any information or impede MSHA in performing its duties by keeping the reports in Franklin.

The May 10, 1993 Inspection

Docket VA 93-145-M

On May 10, 1994, at about 1:50 in the afternoon, Inspector Rines returned to the Branchville pit (Tr. I: 84-88). A dragline was extracting material from the pit and 2 front end loaders were feeding material to the screening and washing plant (Tr. I: 84). When Respondent's employees recognized the inspector, they stopped working (Tr. I: 87-88). One of the employees, Timmie Young, left the site. Another, John Gunnels, told Rines he'd been instructed to shut down his equipment if Rines showed up (Tr. I: 87-88).

Inspector Rines asked the two employees if they would accompany him on his inspection; they told him that they had no authority to do so (Tr. I: 88-89). The pit remained shut down for several hours until Foreman Snead arrived at the site about 4 p.m. (Tr. I: 88-91). As a result of these events, Rines issued Respondent citation No. 4084520, alleging a violation of 30 C.F.R. § 56.18009. That regulation provides:

> When persons are working at the mine, a competent person designated by the mine operator shall be in attendance to take charge in case of an emergency.

Rines inferred that, if none of the employees had authority to accompany him on the inspection, then they also had no authority to take charge in an emergency. I draw the same inference and affirm the citation. Considering the statutory criteria in section 110(i), I assess the $50 penalty as proposed by the Secretary.

The Michigan 125 Front End Loader

On May 10, 1994, Inspector Rines found that one of the two front end loaders used at the Branchville pit, a Michigan model 125 had numerous defects. The windshield and right side glass were broken (Tr. I: 92-95). The sole windshield wiper arm and blade that comes with the machine was missing (Tr. I: 104-05). The parking brake was inoperable, the horn was inoperable and the back-up alarm was inoperable (Tr. I: 109-10, 118-19, 132-33).

Rines issued five separate citations for these defects. Citation No. 4085281 was issued, alleging a violation of 30 C.F.R. § 56.14103(b) for the broken windshield and side glass. Citation No. 4085282, alleging a violation of section 56.14100(b), was issued for the missing wiper blade and arm. Citation No. 4085283 was issued, alleging a violation of section 56.14101(a)(2) for the parking brake. Citation No. 4085284 was issued alleging a violation of section 56.14132(a) for the horn. Citation No. 4085285 was issued alleging a violation of section 56.14132(a) for the back-up alarm. Each of these citations alleged that the violations were "significant and substantial" except that the wiper blade violation was cited as non "S&S" due to the fact that it was not raining on the day of the inspection (Tr. I: 105-06)[5].

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[5]The cited standards provide:

56.14103(b)(2): If damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed...

56.14100(b): Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.

56.14101(a)(2): If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels.

56.14132(a): Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.

I affirm all five of the cited violations. As to the shattered windshield and broken glass on the right side of the loader, I credit the testimony of Inspector Rines that damaged glass obscured the operator's visibility in a manner that compromised safe operation of the vehicle (Tr. I: 92-101). With regard to citation No. 4085282, I find that absence of the wiper arm and blade affected safety and was not corrected in a timely manner. In so doing, I credit Inspector Rines' testimony that sand and gravel operations do not shut down due to rain (Tr. I: 105) and conclude that a wiper had been missing for 4-5 weeks, as related to Rines by one of Respondent's employees (Tr. I: 106-107).

The parking brake on the Michigan 125 front end loader violated section 56.14101(a)(2) because the pins from the brake mechanism to the handle that is pulled to activate the brake was missing (Tr. I: 110). Although the terrain at the Branchville pit is generally flat, there are some sloping surfaces in the pit area and Mr. Rines observed the loader parked on a grade (Tr I: 110-112). I find that Respondent violated section 56.14132(a) both with regard to the inoperable horn and inoperable back-up alarm on the front-end loader.

Contrary to Respondent's argument at page 7 of its brief, I conclude that the horn is provided at least, in part, as a "safety feature" within the meaning of the standard. I have previously rejected Respondent's contention that the standard requires only that either the horn or back-up alarm be functional, but not both, Material Delivery, supra, 15 FMSHRC 2467 at 2472. I conclude that Respondent was properly cited for both devices.

All five of the violations on the Michigan 125 front end loader are properly characterized as "significant and substantial." To establish an "S&S" violation, the Secretary must show 1) a violation of a mandatory safety standard; 2) a discrete safety hazard; 3) a reasonable likelihood that the hazard contributed to will result in an injury in the course of continued normal mining operations; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature, Mathies Coal Company, 6 FMSHRC 1 (January 1984); U. S. Steel Mining Co., Inc., 6 FMSHRC 1573 (July 1984).

The standards cited for these alleged violations are mandatory safety standards. The violations pose hazards to employees that are reasonably likely in the course of continued normal mining operations to result in injuries that are reasonably likely to be serious. The hazards are that the front end loader is more likely to run into other equipment or hit pedestrians due to the violations than if the violations did not exist. Truck drivers coming to the plant get out of their vehicles and walk around (Tr. I: 97). Inspector Rines observed

pedestrian traffic in the area in which the front end loader operated (Tr. I: 134). If a person was struck by this vehicle, it is reasonably likely that their injuries would be serious enough to require hospitalization.

Inspector Rines did not characterize the windshield wiper violation as "S&S" because it was not raining the day of the inspection. Since the record establishes that the loader may operate in the rain in continued normal mining operations, I find that this citation is properly characterized as "significant and substantial" as well (Tr. I: 105). As Section 105(d) of the Act gives the Commission the authority to affirm, modify, or vacate a citation after hearing, I conclude that I have the authority to find an "S&S" violation sua sponte when the record, as it does in this case, clearly establishes one.

It is also clear that the Commission assesses civil penalties pursuant to the criteria in section 110(i) of the Act, without being bound by the penalties proposed by the Secretary, U. S. Steel Mining Co., 6 FMSHRC 1148 (May 1984). The Secretary proposed a $147 penalty for each of the "S&S" citations on the loader and a $50 penalty for the windshield wipers. I assess a $200 civil penalty for each of the citations ($1,000 for the five combined).

The gravity of the violations were "high", particularly in view of the fact that so many things were wrong with the vehicle and several of them adversely affected the operator's ability to avoid hitting pedestrians and other equipment. The fact that the there were so many defects and that some of them had existed for as much as several weeks establishes a high degree of negligence as well.

Respondent's previous history of violations also warrants assessment of a significant penalty. In January at its Darden pit, the company had been cited for having an inoperable horn and inoperable back-up alarm, Materials Delivery, supra. This imposed a higher duty on Respondent to maintain its equipment in a safe condition.

The parties have stipulated that the total penalties proposed in this case will not compromise Respondent's ability to stay in business (Tr. I: 15). Respondent abated these violations within the time period set by the Secretary and, even assuming that the company is a small operator, I conclude that a $200 penalty per violation is appropriate within the criteria set forth by section 110(i).

Toilets, Potable Water, and Quarterly Reports

On May 10, 1994, Inspector Rines issued Respondent citation No. 4085286 alleging a violation of section 56.20008(b), because

the portajohns at the site had no chemicals to treat human waste and no toilet paper. The facts of the violation are uncontroverted. The citation is affirmed and the proposed $50 penalty is assessed (Tr. I: 141-45).

The inspector also discovered that Respondent did not provide potable drinking water to its employees, but required them to bring their own drinking water to the site (Tr. I: 149-51). He, therefore, issued citation No. 4085287, alleging a violation of section 56.20002.

While the testimony at hearing focuses on whether there is any danger that an employee may bring impure water from home (Tr. I: 202-203), I conclude that the real hazard, with respect to this violation, is that employees may not bring enough water, or forget to bring water at all, and be subject to the danger of heat stress. Moreover, if one employee forgets to bring water and shares another's employee's thermos, or water bottle, there may be a hazard of transmitting disease. I, therefore, affirm the citation and assess the $50 penalty proposed by the Secretary.

Rines also requested Respondent to provide him the MSHA Form 7000-2 on May 10. While Respondent was able to produce the 1992 reports from the shipping container it had on site, the report for the first quarter of 1993 was at the Franklin office (Tr. I: 260-265). The inspector issued Mechanicsville Concrete citation No. 4085233 (Docket No. VA 93-168-M), alleging a violation of section 50.40. Inspector Rines rated Respondent's negligence as "high" due to the fact that he had cited the company for the same violation in January (citation No. 4083505 herein). MSHA proposed a $200 civil penalty.

I affirm citation No. 4085233 for the same reasons that I affirmed citation No. 4083505. I conclude that the regulation requires that the MSHA Form 7000-2 be maintained at the mine site. However, I assess only a $10 civil penalty for this violation. I conclude that employee safety was not compromised at all and Respondent had complied substantially with its obligations in maintaining the 1992 reports at the worksite. Given the fact that the company apparently willingly produced the missing report in a timely fashion, I believe that application of the criteria in section 110(i) mandates a token penalty.

The Galion Road Grader (Docket VA 93-254-M)

While inspecting the Branchville site on May 10, 1994, Inspector Rines observed a Galion Road Grader that was parked with the wheels blocked (Tr. I: 276-278). The parking brake, the service brakes and the back-up alarm on this vehicle were all inoperable on that date (Tr. I: 232, 245, 255-56). Rines issued Respondent citation No. 4085289, alleging a violation of section

56.14132(a) with respect to the back-up alarm. He issued citation Nos. 4085290 and 4085291 for the parking brake and service brakes. These citations alleged violations of section 56.14101(a)(2) and (a), respectively. All three citations set May 20, 1994, as the date by which the violations had to be corrected.

When Rines returned to the site on May 24, 1994, none of the cited conditions on the road grader had been corrected (Tr. I: 241, 254-56). The vehicle was parked in a somewhat different location than on May 10 (Tr. I: 242). It apparently had been moved, but not used (Tr. I: 242-43, 281). It was not tagged out but Rines did not determine whether the vehicle was capable of being operated (Tr. I: 242, 246)[6].

Rines issued Respondent order Nos. 4085293, 4085294, and 4085295, pursuant to section 104(b) of the Act, alleging a failure to abate the citations issued with respect to the road grader on May 10. Respondent has not offered any significant defense to the citations or the failure to abate orders. Foreman Snead told Rines that the company had not decided whether to fix the grader or remove it from the worksite (Tr. I: 242). However, Snead never told the inspector that the vehicle could not be operated (Tr. I: 248).

The record establishes that there was at least a possibility that the road grader might be used in its defective condition. When Inspector Rines arrived at the site on May 10, the roads leading to the plant area were fairly smooth, thus, indicating that the grader had been used recently (Tr. I: 243). When he returned to the site on May 24, the roads were very rough (Tr. I: 243). Although this indicates that the grader had not been used in the interim, it also indicates that there was an increasing need to smooth out the road.

In the absence of any evidence that the grader was not tagged out or otherwise effectively taken out of service, or that it could not have been used, one must conclude that there was a potential that Respondent's employees would use the road grader before the defects cited on May 10 had been repaired, Mountain Parkway Stone, Inc., 12 FMSHRC 960 (May 1960). Given the additional factors that the roads were in need of grading and that the record does not reflect that any other piece of equipment could have been used to perform this task, the inference that the Galion road grader could have been used in its defective condition is even stronger.

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[6]Section 56.14100(c) requires such defective equipment either to be tagged out or placed in a designated area which has been posted to indicate that the equipment has been taken out of service.

I, therefore, affirm three citations issued on May 10, and the three 104(b) orders issued on May 24. Inspector Rines characterized the citations as significant and substantial due to the hazards to pedestrians and the danger of collision with other vehicles (Tr. I: 237-238). I affirm that characterization for the same reasons as I determined the front-end loader defects to be "S&S."

As for the penalties, I assess a $500 penalty for the citation and order regarding the service brakes, $400 for the back-up alarm, and $400 for the parking brake. I deem the gravity of the violations to be very high, particularly with regard to the absence of properly functioning service brakes. Respondent's failure to take any steps to either repair the vehicle or assure that it would not be used in a defective condition also warrants a penalty of the magnitude assessed. None of the other section 110(i) criteria warrants a lower civil penalty.

The March 1993 Inspection at the King William Pit (VA 93-98-M)

On March 23, 1993, MSHA Inspector Carl Snead visited Respondent's sand and gravel mine in King William County, Virginia, northeast of Richmond (Tr. II: 24, Exh. P-22). When inspecting the washing and screening plant, he observed an unguarded pinch point on the head pulley of a conveyor that was 4 1/2 feet above and 1/2 feet horizontally from a work platform (Tr. II: 28-37, Exh. P-25). He issued citation No. 4084534 to Respondent, alleging a violation of section 56.14107(a), which requires guards to protect persons from contact which pulleys and other moving parts.

Inspector Snead also issued Respondent citation No. 4084535 due the fact that there was no railing across the end of the work platform (Tr. II: 41-43). Although employees would rarely need to be on the platform, Snead was told that, on occasion, they did use the work platform to inspect the screens while the conveyor was running (Tr. II: 81-82). Thus, employees were potentially exposed to the unguarded pinch point and a 15 foot fall off the unguarded end of the platform (Tr. II: 42-43, 81-82).

Given the fact that employees did not normally go to the end of the platform to inspect the screens (Tr. II: 87-88), and that contacting the unguarded pulley was fairly unlikely, these violations were properly characterized non significant and substantial. Applying the criteria in section 110(i), I assess a $100 civil penalty for each of these violations.

On March 23, Snead also issued citation No. 4084536 because the horn on a Caterpillar Front-End Loader did not work (Tr. II: 44). Given the fact that Respondent had been cited for having an inoperable horn on two front-end loaders on January 20,

1993, at the Darden pit, Materials Delivery, supra, I assess a $400 penalty in accordance with the criteria in section 110(i).

The April 15, 1993 Inspection at King William (VA 93-155-M)

Inspector Snead returned to the King William pit on April 15, 1993 to perform a follow-up inspection. Snead noticed that no toilet facilities were available for employees on the site (Tr. II: 52-54). There had been no such facilities on March 23, but Snead did not issue a citation because foreman Pat Kenney assured him that they were in the process of being moved from another site (Tr II: 52-54). On April 15, Snead issued citation No. 4084546, alleging a violation of section 56.20008.

The Secretary has proposed a $252 civil penalty for this violation. I assess a $500 civil penalty. Respondent was previously cited for failure to provide toilet facilities at this site in June 1992, and at the Darden pit in January 1993, Materials Delivery, supra, 15 FMSHRC at 2470. Given these two prior citations, and the fact that the company had not had toilet facilities at King William for three weeks, even after the inspector had questioned Foreman Kenney about their absence, a significant penalty is warranted. Section 110(i) requires consideration of an operator's history of previous violations in assessing penalties. If this provision means anything, it means that when an operator repeatedly ignores a requirement of the MSHA standards of which it has been made aware, the civil penalty should be significant enough to goad the operator into compliance in the future.

During this follow-up inspection, Snead also observed a fan inside the cab of a front-end loader which was missing a guard for its blades (Tr. II: 56-60). Snead asked the driver to turn on the fan which was located within the operator's arm reach, 6 inches from the rear view mirror (Tr. II: 59, 100). The fan blades rotated (Tr. II: 57).

Respondent's evidence to the contrary provides an excellent example of why I have credited the testimony of the two MSHA inspectors in toto in deciding these cases. The only witness testifying on behalf of the company was John Boston, the Chief Financial Officer of Mechanicsville Concrete (Tr. II: 167). With regard to individual citations, Respondent introduced exhibit R-1, a document whose preparation was supervised by Mr. Boston (Tr. II: 181-187).

In this exhibit Respondent states that the cited fan was inoperable (Exh. R-1, p. 28, paragraph 36). On cross-examination, Mr. Boston, who was not at the King William site on the day of the inspection, and who has no first hand knowledge as

to whether the fan was operable or not, testified that he acquired his knowledge from Hank Neal, a company supervisor (Tr. II: 191, 204).

At the time of the hearing in this matter, Mr. Neal was Respondent's supervisor at the King William pit. However, that was not the case at the time of the inspection. Mr. Neal was not present at the site on April 15, 1993, and has no more first hand knowledge with regard to the violation than Mr. Boston (Tr. II: 204-205). According to Mr. Boston, Neal acquired his information by talking to an employee, whose name Boston does not know (Tr. II: 209). Given the fact that Respondent's evidence with regard to the facts of the individual violations ranges from second hand to fourth hand, I accord it absolutely no weight.

With regard to the civil penalty, I assess a $100 penalty. I deem the gravity of having an unguarded fan to be quite high. The record, however, gives no indication as to whether Respondent's supervisory personnel should have been aware of this violation prior to its detection by Inspector Snead. Therefore, I conclude that the company's negligence warrants no higher penalty.

The September 15, 1993 inspection (VA 94-14-M)

On September 15, 1993, Carl Snead conducted another inspection of the King William pit (Tr. II: 108-09). He saw the same Caterpillar front-end loader that he cited for an inoperable horn in March and found that the back-up alarm didn't work (Tr. II: 113). He, therefore, issued citation No. 4287124, alleging a non-significant and substantial violation of section 56.14132(a).

Given my view that the regulations require self-propelled mobile equipment to have both a functioning horn and back-up alarm, I affirm the citation. Although not cited as "S&S", the record establishes that this violation meets the criteria set forth in aforementioned caselaw. There was foot traffic in the area in which the vehicle operated (Tr. II: 111). Therefore, I conclude that in the normal course of continued mining operations, an accident resulting in serious injury was reasonably likely.

The driver told Inspector Snead that the alarm had worked the day before (Tr. II: 116). Nevertheless, the record indicates that a substantial civil penalty is warranted for this violation. Section 56.14100(a) requires a pre-shift examination of such equipment. Section 14100(c) requires that equipment that continues to pose hazards to employees be taken out of service until defects are corrected.

Nothing in this record indicates that Respondent had any program to assure that safety defects would be detected by its employees. Thus, I consider Respondent's negligence to be fairly high. Also given the significant number of prior violations involving the use of vehicles with safety defects, I find that $400 is an appropriate civil penalty pursuant to section 110(i).

Inspector Snead also observed an unguarded belt drive on the pond pump at the site (Tr. II: 117-18). Employees came within close proximity of the pump (Tr. II: 120-22, 151-53). I, therefore, affirm citation No. 4287125 and assess a $300 civil penalty, giving particular consideration to the gravity of the violation.

Similarly, I affirm citation No. 4287126, which Snead issued for an incompletely guarded head pulley of the main feed conveyor of the wash plant. The circumstances of this violation are essentially the same of those regarding citation No. 4084534, which was issued by Snead on March 23 (Tr. II: 124-29). I, therefore, assess a $100 penalty, as I did for the March violation.

In the cab of the Caterpillar front-end loader Snead found a fire extinguisher whose gauge indicated it had been discharged (Tr. II: 130-32). The inspector issued citation No. 4287127, which requires the replacement or recharging of extinguishers after discharge. Although the company contends through third-hand evidence that it has no record that the extinguisher was discharged (Tr II: 202-203), I infer that it had been discharged in the absence of any evidence that gauge was not functioning properly. I assess a $100 penalty for this violation.

The same vehicle had a build-up of oil and grease on the ladders and platform leading to its cab. This exposed the driver to the danger of slipping and falling 6 to 8 feet (Tr. II: 133-39). Inspector Snead issued citation No. 4287128, alleging a significant and substantial violation of section 56.11001. That regulation requires that a safe means of access be provided to all working areas.

I affirm the citation and conclude that, if the condition continued to exist in the normal course of mining operations, an accident and serious injury was reasonably likely to occur. I assess a civil penalty of $300, taking into account the criteria in section 110(i), particularly what I deem to be high gravity of the violation.

Finally, Inspector Snead issued citation No. 4287129, alleging a violation of section 56.20003(a), which requires workplaces to be clean and orderly. The citation was based on his discovery of a substantial amount of trash and bottles inside the cab of Mack haul truck (Tr. II: 140-42). Respondent's only

defense to the citation is that the violation was the fault of the driver (Exh. R-1, p. 30, paragraph 45). Under the Mine Safety and Health Act, an operator is strictly liable for safety and health violations and cannot avoid responsibility by blaming its employees. I affirm the citation and assess a $25 civil penalty.

ORDER

All citations and orders issued in these matters are affirmed as discussed herein. The following civil penalties are assessed and shall be paid within 30 days of this decision:

Citation/Order	Civil Penalty
Docket VA 93-105-M	
4083504	$ 10
Docket VA 93-145-M	
4084520	$ 50
4085281	$200
4085282	$200
4085283	$200
4085284	$200
4085285	$200
4085286	$ 50
4085287	$ 50
Docket VA 93-153-M	
4085289/4085294	$400
4085290/4085293	$400
4085291/4085295	$500
Docket VA 93-168-M	
4085288	$ 10
Docket VA 93-98-M	
4084534	$100
4084535	$100
4084536	$400
Docket VA 93-155-M	
4084546	$500
4084547	$100

4087124	$400
4087125	$300
4087126	$100
4087127	$100
4087128	$300
4087129	$ 25

Total Penalties: $4,895

Arthur J. Amchan
Administrative Law Judge

Distribution:

Javier I. Romanach, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Blvd., Rm. 516, Arlington, VA 22203 (Certified Mail)

Arthur A. Lovisi, Esq., Mechanicsville Concrete, Inc., Office of the General Counsel, 33211 Lees Mill Rd., Franklin, VA 23851 (Certified Mail)

/jf

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUL 13 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 93-406
	:	A. C. No. 15-16162-03576
v.	:	
	:	No. 1 Mine
BEECH FORK PROCESSING, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Hodgdon

This case is before me on a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The parties have filed a motion to approve a settlement agreement. A reduction in penalty from $4,547.00 to $3,692.00 is proposed. Having considered the representations and documentation submitted, I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act, 30 U.S.C. § 820(i).

Accordingly, the motion for approval of settlement is **GRANTED** and it is **ORDERED** that Respondent pay a penalty of $3,692.00 within 30 days of the date of this order. On receipt of payment, this case is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215

Mr. Link Chapman, Safety Director, Beech Fork Processing, Inc., P.O. Box 190, Lovely, KY 41231

/lbk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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JUL 13 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 92-702-M
	:	A.C. No. 24-01427-05506
v,	:	Docket No. WEST 92-703-M
	:	A.C. No. 24-01427-05507
MISSION VALLEY CONCRETE, Respondent	:	Docket No. WEST 92-704-M
	:	A.C. No. 24-01427-05508
	:	Mission Valley Concrete Pit

DECISION APPROVING SETTLEMENT AFTER REMAND

Before: Judge Cetti

On May 2, 1994, the Commission remanded the above penalty cases to the undersigned to determine whether the Order of Default issued March 31, 1994, was warranted. Respondent in its request for reconsideration alleged there had been on-going settlement discussions with the attorney representing the Secretary of Labor and that Respondent was waiting for a further response from the Secretary before responding to various orders including the Order to Show Cause.

It now appears that the parties have completed their settlement discussions and have reached an amicable settlement of all issues. Petitioner on June 20, 1994, filed a motion to approve the settlement agreement pursuant to 29 C.F.R. § 2700.31 and to order payment of proposed and amended proposed penalties in the sum of $1,462.00 within 40 days of the filing of an order approving settlement.

Under the proffered settlement, the Respondent agrees to pay in full MSHA's initial proposed penalties of certain citations as follows:

Citation No.	Proposed Penalty
Docket No. WEST 92-702-M	
4122794	$ 50.00
41222795	50.00
4122796	50.00
4122799	50.00
4122800	50.00
4123154	50.00
4123155	50.00
Docket No. WEST 92-703-M	
4123156	$ 50.00
Docket No. WEST 92-704-M	
4122798	50.00

Respondent also agrees to pay the Secretary's amended proposed penalties as follows:

Citation No.	Proposed Penalty	Amended Proposed Penalty
Docket No. WEST 92-702-M		
4122781	$ 75.00	$ 53.00
4122782	111.00	78.00
4122783	75.00	50.00
4122784	75.00	53.00
4122785	111.00	78.00
4122786	75.00	50.00
4122787	75.00	53.00
4122788	81.00	50.00
4122789	111.00	78.00
4122790	75.00	50.00
4122791	111.00	78.00
4122792	111.00	78.00
Docket No. WEST 92-703-M		
4123157	$ 81.00	$ 57.00
4123158	111.00	78.00
4123160	111.00	78.00
Docket No. WEST 92-704-M		
4123159	$ 60.00	$ 50.00

In addition, under the proffered agreement, modifications are proposed for certain citations as follows:

Citation Nos. 4122783, 4122786, 4122788 and 4122790: The gravity of the violations be modified to "unlikely" and the citations redesignated as non-significant and substantial.

Citation Nos. 4122781, 4122784 and 4122787: The gravity of the violations be modified to reflect expected injuries to be "lost workdays or restricted duty."

Citation Nos. 4122782, 4122785, 4122789, 4122791 and 4122792: The negligence of the operator was less than originally assessed.

Petitioner states that Citation No. 4122797 was previously vacated by MSHA on September 28, 1992.

I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**; the citations shall be modified in accordance with the approved agreed modifications shown above and Respondent is **ORDERED TO PAY** to the Secretary of Labor the approved civil penalties in the sum of $1,462.00 within 40 days of this decision. Upon receipt of payment these cases are **DISMISSED**.

August F. Cetti

August F. Cetti
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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JUL 13 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 93-604-M A.C. No. 26-00672-05502 IWG
v.	:	Colado Mine
AMI CONSTRUCTION, Respondent	:	

DECISION AFTER REMAND

Before: Judge Morris

This case is before me upon a petition for assessment of the civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Act").

The parties filed a motion seeking to settle the two citations, originally assessed for $1,700.00, for the sum of $1,200.00.

In support of the motion, the parties further submitted information relating to the statutory criteria for assessing civil penalties as contained in 30 U.S.C. § 820(i).

I have reviewed the proposed settlement and I find it is reasonable and in the public interest. It should be approved.

Accordingly, I enter the following:

ORDER

1. The settlement is **APPROVED**.

2. The citations and the amended penalties are **AFFIRMED**.

3. Respondent is **ORDERED TO PAY** to the Secretary of Labor the sum of $1,200.00 within 30 days of the date of this decision.

John J. Morris
Administrative Law Judge

Distribution:

Susanne Lewald, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson Street, Suite 1110, San Francisco, CA 94105-2999

Mr. Les Warr, Contract Administrator, AMI CONSTRUCTION, P.O. Box 2030, Winnemucca, NV 89446

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUL 14 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 94-7
	:	A. C. No. 40-02370-03541A
v.	:	
	:	Mine No. 10
KENNY BOWMAN, employed by, M. H. COAL, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Edward H. Fitch, IV, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Petitioner; Kenny Bowman, Dunlap, Tennessee, pro se.

Before: Judge Maurer

This case is before me upon a petition for assessment of a civil penalty under section 110(c) of the Federal Mine Safety and Health Act of 1977 (the Act). An evidentiary hearing in this matter was held on June 7, 1994, in Crossville, Tennessee. At the conclusion of that hearing, the parties filed a motion to approve a settlement agreement and to dismiss this case. A reduction in penalty from $4,500.00 to $1,200.00 is proposed. The citations/orders, initial assessment, and the proposed settlement amounts are as follows:

Citation/ Order No.	Proposed Assessment	Proposed Settlement
3395205	$ 800	$ 0
3395174	$ 500	$ 0
3395175	$ 500	$ 400
3395176	$ 500	$ 200
3395177	$ 800	$ 600
3395178	$ 400	$ 0
3395206	$ 500	$ 0
3395207	$ 500	$ 0
Total	$4,500	$1,200

I have considered the representations and documentation submitted in this case, as well as the testimony contained in the record of proceedings and I conclude that the proffered settlement

is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that respondent pay a penalty of $1,200 in accordance with the payment schedule set forth below:

DATE	PAYMENT
July 20, 1994	$100
August 20, 2994	$100
September 20, 1994	$100
October 20, 1994	$100
November 20, 1994	$100
December 20, 1994	$100
January 20, 1995	$100
February 20, 1995	$100
March 20, 1995	$100
April 20, 1995	$100
May 20, 1995	$100
June 20, 1995	$100

Payments shall be made by certified or cashier's check made payable to "The U.S. Department of Labor - MSHA," and mailed to Mine Safety and Health Administration, P.O. Box 360250M, Pittsburgh, PA 15251-6250. Each payment instrument shall include the relevant docket number, SE 94-7, and the Assessment Control Number, 40-02370-03541-A. Compliance with this payout scheme requires respondent to have his monthly payments deposited in the U.S Mail by the dates above listed.

In the event of respondent's default on any of the above recited installments, the total amount of the proposed penalties as amended, less any monies paid before respondent's default, shall become due and payable and interest shall be assessed against such remaining unpaid balance at a rate provided by 28 U.S.C. § 1961 from the date of default until the total amount is paid in full. Furthermore, respondent shall be liable for all court costs, attorney fees, and other expenses reasonably incurred by the U.S. Department of Labor in pursuing the recovery of the remaining unpaid balance plus any interest assessed thereon.

Upon payment in full, this proceeding is DISMISSED.

Roy J. Maurer
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUL 25 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 94-298-M
	:	A. C. No. 45-02184-05503
v.	:	
	:	Whatcom Skagit Quarry
DAVE BROWN, d/b/a WHATCOM SKAGIT QUARRY, Respondent	:	
	:	CONTEST PROCEEDING
DAVE BROWN, d/b/a WHATCOM SKAGIT QUARRY, Contestant	:	
	:	Docket No. WEST 94-511-RM
v.	:	Order No. 4341707; 6/29/94
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Whatcom Skagit Quarry
	:	Mine ID 45-02184

DECISION

Appearances: William W. Kates, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington for Petitioner/Respondent
Robert A. Carmichael, Esq., Simonarson, Vissar, Zender & Thurston, Bellingham, WA for Contestant/Respondent.

Before: Judge Weisberger

I. Introduction

Dave Brown, doing business as Whatcom Skagit Quarry, ("Operator") owns and operates a quarry known as Whatcom Skagit Quarry. The quarry produces stones (decorative rocks) that are sold for use in decorative landscaping rocks. On December 15, 1992, Walter E. Turner, an MSHA supervisory inspector, issued a citation alleging a violation by the operator of 30 C.F.R. § 56.14130(a)(3) based on his observation that a Caterpillar 980 B-front end loader was not equipped with a roll-over protective structure (ROPS). Turner set January 15, 1993 as the date for the operator to abate the violation. Dennis D. Harsh, an MSHA inspector, inspected the subject site on March 29, 1994, and extended the abatement to June 1, 1994. On June 29, 1994 when Harsh reinspected the subject site, he observed the subject loader still was not equipped with any ROPS. He issued an Order under Section 104(b) of the Federal Mine Safety and Health Act of 1977 ("the Act").

On April 22, 1994, the Secretary of Labor ("Secretary") filed a Petition for Assessment of Civil Penalty concerning the citation that had been issued on December 15, 1992. (Docket No. WEST 94-298-M). On July 5, 1994, the Operator filed a Request for Temporary Relief (Docket No. 94-511-RM). On July 7, 1994, in a telephone conference call that I initiated with counsel for both parties, it was agreed that the Request for Temporary Relief be consolidated with the civil penalty proceeding, and that both matters shall be heard in Seattle, Washington on July 13, 1994. At the hearing, Turner, Harsh, and Brown, testified for the Secretary, and Brown testified on behalf of the Operator. The parties waived their right to file post-hearing briefs, and in lieu thereof presented closing oral arguments.

At the hearing, the parties agreed that a resolution of the issues presented by the Petition for Assessment of Civil Penalty, will be dispositive of the Request for Temporary Relief.

II. Jurisdiction

In disposing of the issues presented by the Petition for Assessment of Penalty, it must be initially decided whether MSHA has jurisdiction over the subject quarry. In this connection, Section 4 of the Act, provides that each mine ". . . the operations or products of which affect commerce," shall be subject to the Act.[1] Dave Brown, the sole owner and operator of the subject quarry is the only person who works there. The quarry, which is located in Skagit County in the state of Washington, produces decorative landscape stone. According to Brown, the stones produced at the quarry are sold to landscapers, the majority of whom are located in Whatcom County and adjoining Skagit County. The Operator introduced in evidence affidavits from 15 of his customers. The affidavits contain statements indicating that these customers have used the decorative rocks purchased from the Operator exclusively within the state of Washington, and either in Skagit or Whatcom Counties or in adjacent counties. According to Brown, due to the expense involved in trucking landscape stones, the stones that he produces are not transported to customers more beyond a 100 mile radius of the quarry. Brown testified that, in general, this is the practice in the industry. He also indicated that he does not know of any of his products being shipped to another state. He

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[1] In its petition the Secretary alleged that, in essence, jurisdiction attaches since the Operator's products affects commerce. At the hearing, the parties proceeded to address the issue of whether the Operator's operations affect commerce. At the conclusion of the hearing, the Secretary moved to amended his pleadings to conform to the proof, and to allege that the Operator's operations affect commerce. The Operator opposed the motion, but did not allege any legal prejudice. After hearing argument on the motion, the motion was granted.

indicated that there are two other stone quarries in Skagit and Whatcom Counties, and that neither he nor these other quarries ship their products to Canada due to the bother of having to pass through customs.

Trucks that haul the Operator's quarried products travel over public roads. The various mobile equipment that operate at the quarry site are powered by diesel fuel, which is delivered to the site by a Chevron supplier. Explosives used on the site in the excavation of stone are delivered by a firm located in the state of Washington. Materials used to service and maintain equipment located at the quarry are supplied by firms located in Skagit County.

In **Jerry Ike Harless Towing, Inc., and Harless, Inc.**, (16 FMSHRC 683 (April 11, 1994)), the Commission analyzed the scope of the Commerce Clause of the Constitution as follows:

> The Commerce Clause of the Constitution has been broadly construed for over 50 years. Commercial activity that is purely intrastate in character may be regulated by Congress under the Commerce Clause, where the activity, combined with like conduct by others similarly situated, affects commerce among the states. Fry v. United States, 421 U.S. 542, 547 (1975); Wickard v. Filburn, 317 U.S. 111 (1942) (growing wheat solely for consumption on the farm on which it is grown affects interstate commerce). Congress intended to exercise its authority to regulate interstate commerce to the "maximum extent feasible" when it enacted Section 4 of the Mine Act. Marshall v. Kraynak, 604 F.2d 231, 232 (3d Cir. 1979), cert. denied 444 U.S. 1014 (1980); United States v. Lake, 985 F.2d 265, 267-69 (6th Cir. 1993). In Lake, the mine operator sold all its coal locally and purchased mining supplies from a local dealer. 985 F.2d at 269. Nevertheless, the court held that the operator was engaged in interstate commerce because "such small scale efforts, when combined with others, could influence interstate coal pricing and demand." Id. Harless, supra at 686.

In essence, it is the Operator's position that Lake, 985 F.2d supra, does not control. The Operator argues that although the coal produced by the operator in Lake, supra, was sold only intrastate, in general, coal is sold interstate. The Operator argues that, in contrast, decorative rocks are not commonly transported in interstate commerce, and are sold within a radius of only 100 miles from where their are quarried. These two assertions are based solely on the testimony of Brown. I do not accord much weight to the testimony of Brown on these matters. I find his opinion testimony conclusory, as there were insufficient facts adduced to support these conclusions. Browns' testimony is insufficient to support a conclusion, that, nationally, decorative rocks are sold only intrastate. Clearly, stones mined at a quarry may be sold for uses other than for decorative landscaping. Also, even if quarried decorative rocks are, in general, shipped no more than a 100 mile radius from the

quarry, it is clear, that, such a distance might encompass another state or states. I thus find, under the broad principles enunciated by the Commission in Harless Towing supra, and based upon the authority of the Sixth Circuit in Lake, supra, that the Operator's operations did affect interstate commerce.[2]

III. Violation of 30 C.F.R. § 56.14130(a)(3).

The front end loader in question was manufactured on May 20, 1971. Brown did not contradict or impeach the testimony of Turner, and Harsh, that this vehicle was not equipped with a ROPS. In essence, Brown testified that the vehicle would have to undergo major modifications in order for a ROPS to be installed. On January 5, 1993 Brown received a letter from J.C. Barton, of Caterpillar, Inc., which states as follows: "The 9K2670 ROPS mounting conversion group for the tractor and the associated 9K7240 overhead structure group are discontinued and are no longer available. Third-party suppliers may or may not be able to provide and certify a ROPS field conversion for the tractor, but we have no recommendation." Brown also indicated that he spoke to a person who performs maintenance on his equipment, and

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[2] In support of its argument, Contestant relies on Morton v. Bloom, 373 F.2d 797 (1973) (W. D. Pa) wherein the District Court held that it could not conclude that a one-man coal operation whose products were sold only in intrastate would substantially interfere with the regulation of interstate commerce. Morton, supra, has not been followed as precedent for later decisions. Hence, I choose not to follow it. Instead, my decision in this matter is based upon the subsequent decisions of the Commission in Harless Towing, supra, and the Circuit Court of Appeals in Lake, supra. Also, I choose to follow the following decisions of Commission judges: Sanger Rock and Sand, 11 FMSHRC 403, 404 (March 22, 1989) (Judge Cetti) (In holding that a sound and gravel operation affected interstate commerce, Judge Cetti remarked as follows: "It may reasonably be inferred that even intrastate use of the gravel would have an affect upon interstate commerce"); Mellott Trucking and Supply Co., Inc., 10 FMSHRC 409, 410 (March 24, 1988) (Judge Melick) (In holding that a sand operation affects commerce based on evidence that the operator was using equipment manufactured outside its home state, Judge Melick reasoned as follows: "In addition, although the evidence shows that the sand extracted, processed and sold by the Mellott facility was used only intrastate, it may reasonably be inferred that such use of the mine product would necessarily impact upon the interstate market. See, Fry v. United States, 421 U.S. 542, 547 (1975)"); Jefferson County Road and Bridge Department, 9 FMSHRC 56 (January 9, 1987) (Judge Morris). (A gravel operation was held to affect commerce where the extracted gravel was not sold, but was used exclusively to surface county roads). There are no decisions by Commission Judges holding that a mine operation whose products do not enter interstate commerce does not affect commerce.

who also had worked for Caterpillar. Brown stated that this individual told him that he knew of no one who could instill a ROPS on the vehicle in question.

As long as Section 56.14130(a)(3) supra remains in effect, and not modified to suit Browns' equipment, it must be complied with. Based on the uncontradicted testimony of Turner, and Harsh, I find that Brown did violate Section 56.14130(a)(3).[3]

I find that a penalty of $50.00 is appropriate for this violation.

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[3] Based on my finding that Brown did violate Section 56.14130, supra, the Request for Temporary Relief is DENIED.

Additionally, at the hearing the parties, jointly requested that I make findings regarding the propriety of the Section 104(b) order issued by Harsh on June 29, 1994.

According to Harsh in March 1994, in preparation for his inspection of subject site, he checked with Medford Steel whose representative informed him that a ROPS for the cited vehicle was not in stock but they had the blue prints, and could manufacturer one to fit this loader. He was informed that this procedure could take four to six weeks. In addition, Harsh indicated that a Caterpillar dealer in Salt Lake City, Utah told him that he had ROPS in stock. On March 29, Harsh met with Brown the latter and showed him a letter that he had received from Caterpillar indicating that ROPS for the vehicle in question was no longer available (Exhibit O-21). Brown told Harsh that, due to the cost of installing the ROPS, he was not going to have one installed. Harsh extended the abatement time to June 1, 1994.

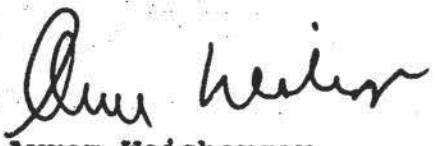
When Harsh inspected the site on June 29, 1994, he observed that the cited vehicle still was not equipped with a ROPS. Harsh then issued a Section 104(b) order.

Section 104(b) of the Act provides that an inspector shall issue a withdrawal order if he finds (1) that a cited violation has not been abated within the period of time originally fixed or subsequently extended and, (2) the time for abatement should not be further extended.

I find that, considering the above summarized evidence, Harsh did not abuse his discretion in not extending the abatement, and in issuing the Section 104(b) order.

ORDER

It is Ordered that, within 30 days of this decision, the operator shall pay a civil penalty of $50. It is further ordered that Docket No. WEST 94-511-RM be DISMISSED.



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Administrative Law Judge
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JUL 25 1994

LARRY WAYNE LINEWEAVER, SR., Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. VA 94-46-DM
	:	MSHA Case No. NE MD 94-01
RIVERTON CORPORATION, Respondent	:	Riverton Plant

DECISION

Appearances: Larry Wayne Lineweaver, Sr., Pro Se, Front Royal, Virginia, on his own behalf;
Dana L. Rust, Esq., McGuire, Woods, Battle & Boothe, Richmond, Virginia, for the Respondent.

Before: Judge Feldman

This case is before me based upon a discrimination complaint filed on November 10, 1993, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) (the Act) by the complainant, Larry Wayne Lineweaver, Sr., against the Riverton Corporation.[1] This case was heard on May 24, 1994, in Winchester, Virginia.

At trial, the parties stipulated that Lineweaver was hired in 1973 and discharged by Riverton effective September 15, 1993, and, that Riverton is an operator subject to the jurisdiction of the Mine Act (Tr. 12). Lineweaver's direct case consisted of his testimony and the testimony of his wife, Betty Jane Lineweaver, as well as the testimony of nine former colleagues at the Riverton Corporation. The respondent called four witnesses including its Manager of Operations John Earl Gray. The respondent, through counsel, filed proposed findings of fact and

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[1] Lineweaver's complaint which serves as the jurisdictional basis for this case was filed with the Secretary of Labor in accordance with section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). Lineweaver's complaint was investigated by the Mine Safety and Health Administration (MSHA). On January 10, 1994, MSHA advised Lineweaver that its investigation disclosed no section 105(c) violations with respect to Lineweaver's termination of employment from the Riverton Corporation. On February 4, 1994, Lineweaver filed his discrimination complaint with this Commission which is the subject of this proceeding.

conclusions of law on June 30, 1994. Lineweaver filed a response to the respondent's proposed findings and a brief in support of his discrimination complaint on July 11, 1994. For the reasons discussed below, Lineweaver's discrimination complaint against the Riverton Corporation is dismissed.

Lineweaver's Section 105(c) Complaint

Lineweaver worked approximately 20 consecutive hours on June 28 and June 29, 1992, providing emergency supervisory coverage following the breakdown of a pump at Riverton's quarry. Upon completing his shift, Lineweaver returned home whereupon he suffered a seizure. Lineweaver was hospitalized for 3 days from June 29 through July 1, 1992. Lineweaver's physician cleared him to return to work on or about July 10, 1992. Lineweaver returned to work on July 13, 1992, and continued to work for the company until his termination on September 15, 1993. Shortly after Lineweaver returned to work in July 1992, the Riverton plant reorganized and assigned additional supervisory responsibilities to Lineweaver. After this reorganization, Lineweaver's wife became concerned that her husband was working too hard and that the extensive nature of her husband's job responsibilities was adversely affecting his health.

On January 12, 1993, Mrs. Lineweaver telephoned John Gray, Manager of Operations, because she felt Gray was "pushing [her husband] to the point of total exhaustion" (Tr. 60). Mrs. Lineweaver told Gray that she had called several agencies to complain about Gray's treatment of her husband. Mrs. Lineweaver made several calls to the Mine Safety and Health Administration in Beckley, West Virginia and Criderscore, Pennsylvania, on January 12, and January 14, 1993. (Tr. 67; Complainant's Ex. No. 1).

Lineweaver was terminated on September 15, 1993. Lineweaver's discrimination complaint is based on his assertion that his termination was motivated by the fact that his wife had called the Mine Safety and Health Administration to complain about his job related stress and its effects on his and his subordinates' safety.

The Respondent's Defense

The respondent denies any knowledge of Mrs. Lineweaver's telephone calls to the Mine Safety and Health Administration. Rather, the respondent asserts that Lineweaver was terminated on September 15, 1993, after a company investigation determined that Lineweaver had exposed it to possible civil and criminal liability. This allegedly occurred after Lineweaver provided underweight bags of cement to his brother-in-law, George Cline, who then attempted to sell the underweight cement to a local

retailer. Lineweaver was authorized to use the underweight bags of cement for his personal use only.

Preliminary Findings of Fact

The complainant, Larry Lineweaver, was hired by the Riverton Corporation in 1973. Riverton manufactures stone, cement, and mortar products at two quarries located in Front Royal, Virginia. These products are used in the construction and agricultural industries. (Tr. 87, 370-371).

Riverton is regulated by the Virginia Bureau of Weights and Measures, a division of the Virginia Department of Agriculture and Consumer Services. This agency inspects manufacturers to determine if their goods meet various specifications, including weight and volume specifications. (Resp. Ex. 8). In 1983, the Bureau of Weights and Measures inspected Riverton's masonry products and determined that they were underweight. Riverton received an official notice of violation from this agency in August, 1983. In 1984 and 1986, the Bureau of Weights and Measures inspected Riverton's Front Royal quarry and found additional underweight bags of masonry products. Lineweaver was present for and participated in the 1984 inspection. On May 9, 1986, the Bureau of Weights and Measures initiated an enforcement proceeding against the Riverton Corporation because it had permitted underweight product to enter commerce on several occasions.

Riverton was informed that the Bureau of Weights and Measures could close its cement quarry if other violations occurred. (Tr. 334). Consequently, to avoid the imposition of future sanctions, Riverton purchased electronic checkweighers and other equipment designed to ensure that Riverton products were packaged at the proper weight. (Tr. 322, 332-333). Riverton also instituted new quality control procedures, effective September 30, 1987, that required supervisors to monitor packing crews to achieve proper bag weight control. (Tr. 333; Resp. Ex. 9). Denton Henry, Riverton's production manager from 1977 to 1990, explained the new operating procedures to Riverton's supervisors, including Lineweaver, when they were implemented. (Tr. 333).

Lineweaver admitted that it was critically important that the company's cement and mortar products be packaged at the proper weights. Numerous witnesses, including Lineweaver, testified that the sale of underweight cement to retailers could expose the company to liability and the employees responsible to serious discipline. (Tr. 102, 111-113, 141, 276-277, 322-323, 334).

Lineweaver opined that during his 20 years of employment at Riverton, he never had any problems working for plant managers

until John Earl Gray was hired as the Manager of Operations at the Riverton plant in September 1991 (Lineweaver posthearing brief). Lineweaver felt that Gray did not have any background in running a cement plant. Lineweaver considered himself to be Gray's teacher. However, Lineweaver reported that Gray attempted to discredit him and refused all of his suggestions concerning the operation of the plant. (Resp. Ex. No. 2; Lineweaver posthearing brief).

On June 29, 1992, Lineweaver returned home after working approximately 20 consecutive hours as a result of a breakdown of a pump in the Riverton quarry. Shortly after returning home, Lineweaver suffered a seizure and was hospitalized for 3 days. Lineweaver's physician released him to return to work without any restrictions with the exception that he should avoid heights. Lineweaver returned to work on July 13, 1992. (Complainant's Ex. No. 2).

Although Lineweaver returned to work approximately 2 weeks after his seizure, Lineweaver claimed that Gray and other company officials were concerned that he could no longer perform his supervisory duties due to his seizure condition. (Tr. 14-15; 243-244). At the time of his seizure, Lineweaver was the first shift supervisor in the pack house. Shortly after his return to work, the positions of Lineweaver and fellow supervisor, Larry Lineberry, were reorganized as a result of the retirement of Paul Huff, quarry superintendent. Lineweaver's supervisory responsibilities were extended to include the premix facility, including the preparation plant. Laborers, who had previously reported directly to Lineweaver, were transferred to the supervision of Lineberry whose supervisory responsibilities were expanded to include supervision over the maintenance shop and the laborers. (Tr. 349-350).

Lineberry testified that, after the reorganization, it was difficult to perform the supervisory jobs correctly because of the distances between the pack house, premix plant, prep plant, and maintenance facilities. (Tr. 181-182). Lineberry testified that the reorganized supervisory duties were "too much" to do the job correctly. (Tr. 181). However, Lineberry testified that, although he and Lineweaver were pretty good friends, Lineweaver never told him that the reorganized supervisory responsibilities were affecting his health. (Tr. 182). Lineberry and David Taylor, accounting supervisor, testified that Lineweaver liked to work overtime and that he requested overtime both before and after his seizure. (Tr. 89, 191, 201).

After the reorganization, Mrs. Lineweaver became concerned that her husband's job responsibilities were adversely affecting his health. On January 12, 1993, Mrs. Lineweaver telephoned Gray to express her concerns about her husband's health. She threatened to call several agencies because she believed the job

demands placed on her husband were unfair. She made several calls to the Mine Safety and Health Administration during the period January 12 through January 14, 1993. (Tr. 60, Complainant's Ex. No. 1).

Riverton denies that it had any knowledge of Mrs. Lineweaver's contacts with MSHA. Lineweaver admitted that he had no conversations with anyone at the company about his wife's phone calls to MSHA after January 12, 1993. (Tr. 39, 232, 236-237). Lineweaver's co-workers had no knowledge that either Lineweaver or his wife had ever contacted MSHA. (Tr. 103-104, 113-114, 142, 170, 190, 387).

On April 20, 1993, checkweighers in the premix plant, which Lineweaver supervised, began to malfunction. Gray instructed employees to continue production, but to spot check the bag weights to determine if they were underweight. (Tr. 193-194, 351-356). On April 22, 1993, Lineberry discovered that cement had accumulated on the checkweigher scales, causing them to malfunction. Lineberry corrected the malfunction by using an air hose to blow the accumulations off the checkweighers scales and recalibrated the equipment. (Tr. 187, 351). Lineberry testified cleaning the checkweighers was a standard procedure. (Tr. 188). Gray met with Lineweaver and explained this procedure to him, but did not discipline him. (Tr. 217-218).

On April 23, 1993, company officials conducted an internal audit and determined that approximately 13,000 bags of underweight cement, sand and mortar mix had been produced in the premix area between April 20 and April 23. (Tr. 201, 352-353). The company segregated the underweight material in its warehouse to prevent it from being shipped to Riverton's customers. (Tr. 352). Over the next several months, the company recycled a portion of the underweight cement. (Tr. 353).

On July 31, 1993, Gray met with Lineweaver and Lineberry before leaving for a vacation. Approximately 5,000 bags of underweight cement remained in the warehouse which could no longer be recycled. (Tr. 358). Lineberry suggested that the cement be given to employees. (Tr. 189). Under company policy, employees may take underweight scrap material after obtaining a bill of lading. However, to avoid sanctions by the Virginia Bureau of Weights and Measures, employees must maintain control over the underweight product to ensure that it does not enter the stream of commerce. (Tr. 102-103, 112-116, 141-142, 189, 320-321). George Gordon, Fred Lentz, Jerry Estes, Bud Lipscomb and Anthony Staubs, who all testified on behalf of Lineweaver, confirmed that employees who permitted underweight cement to be sold on the retail market could be subject to serious discipline, including discharge. (Tr. 102-103, 115-142, 168-169, 323-324).

On July 31 and August 2, 1993, Lineweaver released over 1,000 bags of underweight cement to his brother-in-law, George Cline. (Resp. Ex. 5,6; Tr. 403-404).[2] Thomas Campbell, Manager of H.L. Borden Lumber Company, a building supply retailer located in Front Royal, testified that he received a telephone call from an individual identifying himself as George Cline on August 2 or August 3, 1993. Cline offered to sell Campbell cement mix for $1.00 per bag. The wholesale price for this product is approximately $2.50 per bag and the cement retails for $4.25 per bag. Cline gave Campbell his phone number and asked him to call if he had any questions. (Tr. 415, 418; Resp. Ex. 10). The following day, Cline visited Campbell at H.L. Borden's lumber yard and renewed his offer to sell cement at $1.00 per bag. Cline told Campbell that the bags were surplus cement from a large construction job in Winchester. (Tr. 371, 416). Campbell described Cline at the hearing as approximately 6 feet tall and heavy set.

Campbell declined to purchase the cement from Cline because he thought it was stolen merchandise. (Tr. 417). Campbell informed Ron Brown, a Riverton sales representative, about Cline's offer. Brown informed Mark Everly, Riverton's controller, who was informed by a co-worker that George Cline was Lineweaver's brother-in-law. Everly inspected copies of the shipping and receiving reports to determine if Lineweaver had taken possession of underweight cement. Everly confirmed that Lineweaver and Cline had signed for and received approximately 1,000 bags of underweight cement. (Tr. 403-404; Resp. Exs. 5, 6). Everly immediately terminated the distribution of underweight cement to employees. (Tr. 403-404).

On August 9, 1993, Gray returned to work following his vacation. On August 10, 1993, Gray spoke to Lineweaver who admitted that he had given Cline underweight cement and that Cline was his brother-in-law. (Tr. 360). Lineweaver stated that Cline told him that he was going to use the cement for a barn floor. (Resp. Ex. 10). On August 11, Gray met with Ron Brown who informed him that Cline had sold some cement to Brown's son-in-law, a local contractor for 50 cents per bag. (Tr. 364; Resp. Ex. 10).

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[2] Lineweaver admits that Cline obtained approximately 700 bags of cement from the company but contends that Cline did not receive the remaining 300 bags of cement. (Tr. 25). In his posthearing brief, Lineweaver admits that Cline received approximately 500 cement bags. The precise number of bags obtained by Cline is not material in that it is undisputed that Cline acquired a significant quantity of cement.

Gray and Lineweaver met with Cline at his house on August 11, 1993. Cline admitted that Lineweaver had given him underweight cement but denied attempting to sell it. Cline claimed he had given cement to friends and neighbors. He also stated that some of the cement was located on other property he owned in Front Royal. Cline showed Gray several pallets of concrete mix, but Gray was only able to account for approximately 200 bags of cement. (Tr. 367-369).

On August 12, 1993, Gray met with Tom Campbell at H. L. Borden and confirmed that an individual identifying himself as George Cline had attempted to sell concrete mix on August 2 or August 3, 1993. Campbell described Cline for Gray. According to Gray, Campbell's description accurately described Lineweaver's brother-in-law. (Tr. 455).

Gray completed his investigation on August 18, 1993. (Resp. Ex. 10). After discussions with Toby Mercuro, President of Riverton Corporation, and Dan Hudak, Riverton's Chief Financial Officer, it was determined that Lineweaver should be terminated because he was responsible for his brother-in-law's attempts to sell the underweight cement to local retailers. Lineweaver's termination was effective September 15, 1993. (Tr. 373-374,393; Resp. Exs. 10, 13). While Lineweaver's termination was primarily based on this incident, Gray and Mercuro also considered Lineweaver's past performance, including probation for excessive tardiness in April 1992 and a December 1992 unsatisfactory performance evaluation. (Tr. 318, 375-380, 386-387; Resp. Exs. 7, 11, 12).

Further Findings and Conclusions

Lineweaver, as the complainant in this case, has the burden of proving a *prima facie* case of discrimination under section 105(c) of the Mine Act. In order to establish a *prima facie* case of discrimination, Lineweaver must prove that he engaged in protected activity, and, that the adverse action complained of, in this case his September 15, 1993, discharge, was motivated in some part by that protected activity. See Secretary on behalf of David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980) rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Thomas Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981).

Riverton may rebut a *prima facie* case by demonstrating either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n.20. Riverton may also affirmatively defend against a *prima facie* case by establishing that it was also motivated by unprotected activity and that it would have taken the adverse action for the unprotected activity alone.

See also Jim Walter Resources, 920 F.2d at 750, citing with approval Eastern Associated Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

A threshold question in this case is whether Lineweaver engaged in protected activity and whether the respondent corporation knew or had reason to know of this protected activity. A miner and his agent have an absolute right to make good faith safety related complaints about mine conditions which they believe present hazards to the miner's health or well being. Such complaints, whether to the operator or to MSHA, constitute protected activities under section 105(c) of the Act.

Here, Lineweaver has documented through telephone records two phone calls on January 12, 1993, and one call on January 14, 1993, to the Mine Safety and Health Administration. These calls were made by Mrs. Lineweaver as a representative of her husband. The complaints concerned Mrs. Lineweaver's belief that the demands placed upon her husband by Gray were subjecting her husband to an unreasonable degree of stress which was adversely affecting his health. Although these complaints do not identify a cognizable safety risk, Lineweaver and his wife, as his representative, have an absolute unqualified right to seek the advice of MSHA officials to determine if there are actionable hazardous conditions or practices at the mine. Consequently, while the substance of Mrs. Lineweaver's complaint was not a complaint contemplated to be protected under section 105(c) of the Act, the phone calls to MSHA were protected activities.

The next question to be determined is whether the respondent corporation knew or should have known about the protected MSHA phone calls. Although the respondent denies actual knowledge of Mrs. Lineweaver's phone calls, Gray admits that Mrs. Lineweaver threatened to contact the appropriate authorities. Therefore, the Riverton Corporation had reason to know that Mrs. Lineweaver had already contacted MSHA when she called Gray on January 12, 1993, or, that she intended to do so. Consequently, Lineweaver has prevailed on the issue that he engaged in protected activity and that his employer knew or should have known about such activity.

However, Lineweaver falls short of establishing a *prima facie* case if he fails to demonstrate by a preponderance of the evidence that his September 15, 1993, discharge was in any way motivated by the January 1993 protected telephone calls. In analyzing whether his termination was influenced by his protected activity, it is important to consider 1) whether the protected activity and the alleged discriminatory conduct are contemporaneous; and 2) whether there is any event during the

interim period between the protected activity and the alleged discriminatory act that provides an independent basis for the adverse action complained of.

Addressing the first question, it is difficult to identify a nexus between Mrs. Lineweaver's January 1993 telephone calls and Lineweaver's discharge eight months later in September 1993. Regarding the second question, it is well documented that Riverton had past difficulties with the Virginia Bureau of Weights and Measures. It is also apparent that Riverton personnel, including Lineweaver, were aware of the importance of preventing the unauthorized resale of underweight cement and that such activities could result in serious discipline, including termination of employment.

It is undisputed that Lineweaver obtained a large quantity of underweight bags of cement which he placed in the possession of his brother-in-law, George Cline. Lineweaver's assertion that an imposter posed as his brother-in-law at H. L. Borden is unconvincing and inconsistent with his own statements. At the outset, I note that Lineweaver failed to call George Cline as a witness to refute Campbell's testimony. (TR. 71-75). Moreover, Lineweaver refused to provide Cline's address to the respondent so that Cline could be subpoenaed to appear in this proceeding. (Resp. Ex. 4; tr. 342-348). Lineweaver's failure to call Cline as a witness and his failure to facilitate the respondent's attempt to subpoena Cline warrant the adverse inference that Cline's testimony would be detrimental to the complainant. See NLRB v. Laredo Coca-Cola Bottling Co., 613 F.2d 1338 (5th Cir. 11980); NLRB v. Dorn's Transportation Co., 405 F.2d 706 (2nd Cir.). Finally, Lineweaver conceded that Cline had sold underweight cement in his February 4, 1994, discrimination complaint which serves as the basis for this proceeding wherein he stated, "[t]he relative decided to sell part of his pickup for a total of $91.00." (Resp. Ex. 3).

Thus, given Lineweaver's failure to rebut Campbell's testimony concerning his solicitation by Cline, there is ample evidence to support the Riverton Corporation's conclusion that Cline had attempted to wholesale the underweight cement. Such action by Cline could subject the Riverton Company to administrative or criminal penalties and constitutes a significant intervening event between the protected MSHA phone calls and Lineweaver's discharge.

I do not find Lineweaver's assertion that he did not know of his brother-in-law's intention as a mitigating circumstance. Having given Cline control over a large quantity of underweight cement, Lineweaver assumed the responsibility for ensuring that this cement was not placed in commerce in violation of known company policy. Accordingly, Lineweaver is responsible for Cline's activities. It is clear, therefore, that the

unauthorized sale or attempted sale of underweight cement provides an independent and reasonable basis for Lineweaver's discharge.

While I have concluded that Cline's activities provides a basis for Lineweaver's discharge, I am not unmindful of the animus between Lineweaver and Gray. However, there is no evidence that their conflict was attributable to any protected activity under the Act in that their conflict pre-existed Mrs. Lineweaver's telephone calls to MSHA. The Mine Act is a safety rather than an employment statute. Jimmy R. Mullins v. Beth Elkhorn Coal Corporation, et al., 9 FMSHRC 891, 898 (May 1987); Jimmy Sizemore and David Rife v. Dollar Branch Coal Company, 5 FMSHRC 1251, 1255 (July 1983). Thus, adverse action influenced by employee-management conflict, in the absence of pertinent protected activity, does not give rise to a discrimination complaint under Section 105(c).

Thus, I conclude that Lineweaver has failed to present a *prima facie* case in that he has failed to establish that his discharge was in any way motivated by the telephone calls to MSHA that occurred approximately eight months prior to his termination. Consequently, Lineweaver has failed to demonstrate that he was the victim of a discriminatory discharge.

ORDER

In view of the above, the discrimination complaint by Larry W. Lineweaver, Sr., against the Riverton Corporation in Docket No. VA 94-46-DM IS DISMISSED.

Jerold Feldman
Administrative Law Judge

Distribution:

Mr. Larry Wayne Lineweaver, Sr., 103 Scott Street, Front Royal, VA 22630 (Certified Mail)

Dana L. Rust, Esq., McGuire, Woods, Battle & Boothe, One James Center, 901 East Cary Street, Richmond, VA 23219-4030 (Certified Mail)

Mr. John Gray, Plant Manager, Riverton Corp., P.O. Box 300, Riverton Road, Front Royal, VA 22630 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JUL 2 6 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 93-260 A.C. No. 46-07721-03547-A
v.	:	
	:	Mine: No. 18
RONALD J. MULLINS, employed by: TEANIK COAL, INC., Respondent	:	

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;

Before: Judge Fauver

This is an action for civil penalties under § 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The case was called to hearing at Logan, West Virginia, on July 6, 1994, pursuant to a Notice of Hearing served upon the parties.

Counsel for the Secretary appeared with witnesses and documentary evidence. Respondent did not appear, and therefore was held in default.

Testimony and documentary evidence were received from the government. Based upon the evidence, a bench decision was entered finding Respondent in default, finding facts as to each of the alleged violations, entering conclusions of law and finding Respondent in violation as charged, and assessing civil penalties based upon the criteria for civil penalties in § 110(i) of the Act.

This decision confirms the bench decision.

ORDER

WHEREFORE IT IS ORDERED that, within 30 days of the date of this decision, Respondent shall pay civil penalties of $1,000.00 for the violations found in the bench decision on July 6, 1994.

William Fauver
Administrative Law Judge

Distribution:

J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, 4th Floor, Arlington, VA 22203
(Certified Mail)

Mr. Ronald J. Mullins, P.O. Box 322, Mallory, WV 25634
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/lt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUL 26 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 93-362
	:	A. C. No. 46-02052-03689
v.	:	
	:	Docket No. WEVA 93-479
OLD BEN COAL COMPANY, Respondent	:	A. C. No. 46-02052-03694
	:	
	:	Docket No. WEVA 94-38
	:	A. C. No. 46-02052-03696
	:	
	:	Docket No. WEVA 94-72
	:	A. C. No. 46-02052-03698
	:	
	:	Mine No. 20

DECISION

Appearances: Pamela S. Silverman, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Petitioner;
Thomas L. Clarke, Esq., Old Ben Coal Company, Fairview Heights, Illinois for Respondent.

Before: Judge Hodgdon

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor against Old Ben Coal Company 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 six violations of the Secretary's mandatory health and safety standards. For the reasons set forth below, Citation No. 3570901 and Order No. 4190960 are affirmed, Citation Nos. 3999419, 3991939, 4187917, and 4190585 are vacated and Old Ben is assessed a civil penalty of $6,498.00.

A hearing was held in these cases on May 3, 1994, in Williamson, West Virginia.[1] Inspectors Vicki L. Mullins and Ernie Ross, Jr. and Richard A. Skrabak, of the Mine Safety and Health Administration (MSHA), testified for the Secretary.

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[1] A hearing was also held in Docket No. WEVA 93-442 which was consolidated with the captioned cases for hearing. Because proceedings on one of the citations in that docket are being stayed, the docket was severed from the consolidated cases and a partial decision was issued on July 14, 1994.

James C. Downey, Jr., G. Franklin Foster, Gregory M. Chandler, Peter R. Eisenman and Tommy L. Dempsey testified on behalf of Old Ben. The parties have also filed briefs which I have considered in my disposition of these cases.

SETTLED VIOLATIONS

At the beginning of the hearing, the parties advised that they had reached a settlement agreement concerning four of the infractions in these cases. The agreement provides that Old Ben will pay the assessed penalties for Order No. 4190960 in Docket No. WEVA 94-38 and Citation No. 3570901 in Docket No. WEVA 93-479. (Tr. 8-11.) In addition, the Secretary agreed to vacate Citation No. 3999419 in Docket No. WEVA 93-362 and Citation No. 3991939 in Docket No. WEVA 94-72. (Tr. 9-10.)

Having considered the representations and documentation submitted, I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act, 30 U.S.C. § 820(i). Accordingly, approval of the settlement agreement is granted and its provisions will be carried out in the order at the conclusion of this decision.

CONTESTED VIOLATIONS

Summary of the Evidence

The two remaining citations, Citation No. 4187917 in Docket No. WEVA 94-72 and Citation No. 4190585 in Docket No. WEVA 93-479, involve assertions that the automatic emergency-parking brakes on two shuttle cars were not adequate, thus violating Section 75.523-3(b)(1) of the Regulations, 30 C.F.R. § 75.523-3(b)(1). (Gt. Exs. 2 and 4.) The first alleged violation, Citation No. 4187917, occurred on July 1, 1993, in the West Mains Section of Mine No. 20. Inspectors Mullins and Ross both inspected the mine on that day, but split up and conducted separate inspections after arriving at the section.

Inspector Mullins testified that she inspected a shuttle car after the operator informed her that he was having some problems with his brakes. To test the automatic emergency-parking brake, she had the operator tram the unloaded shuttle car a distance and then hit the "panic bar" (emergency deenergization device). She related that "[w]hen he hit the panic bar, I listened for a noise to know that the system had been activated. And it rolled approximately twenty feet before I heard the noise, and then it rolled approximately twenty more feet before the machine actually come [sic] to a stop." (Tr. 21.)

The inspector maintained that Frank Foster was the company representative accompanying her during this brake test. She stated that she was sure that she had discussed the brake problem with him at that time, but could not remember what either of them had said.

Contrarily, Mr. Downey, the General Mine Manager, testified that while Mr. Foster had originally accompanied Ms. Mullins to the section on July 1, after he (Downey) arrived at the section, he stayed with Inspector Mullins and Foster went with Inspector Ross. Downey contended that he arrived as Inspector Mullins was talking to the shuttle car operator. He agreed that the inspector had conducted a test of the automatic emergency-parking brake, but stated that Foster was not present when it occurred.

According to Mr. Downey, the test and its results ensued as follows:

> We were located in a crosscut between number two and number three heading. We were approximately a hundred and fifty feet inby the feeder. The shuttle car was loaded and it was traveling toward the feeder. The shuttle car was operating at or near full speed.
>
> When he got to the reference point which is the crosscut we were standing in, his instructions were to hit his panic bar so we could demonstrate whether the panic bar worked.
>
> . . . .
>
> We were standing at approximately the center of the intersection. The intersection was typically twenty feet in width. The shuttle car came to a stop before it reached the outby corner of the intersection which is a distance of approximately eight feet.

(Tr. 131-32.)

Foster, the Safety Manager, testified that he did not view the test. He said that after the conversation with the shuttle car operator, "Mr. Downey arrived on the section and we split up. I got with Mr. Ross. And Mr. Downey got with Ms. Mullins." (Tr. 235.)

The second citation was issued on July 6, 1993. Inspector Ross testified that he had the shuttle car operator "start the machine, tram a certain distance, and then hit the panic bar." (Tr. 50.) He said that when this was done, the shuttle car traveled six to eight feet before it came to a full stop.

He further recounted that he then had the operator tram the shuttle car and then turn the machine off. He asserted that when that was done the vehicle also traveled six to eight feet before coming to a complete stop.

The inspector testified that after observing no difference between the two stops he went to the shuttle car where he could observe the pressure gauge for the automatic emergency-parking brake system. He narrated that:

> I had the operator start the machine. While observing the gauge, I had him hit the panic bar. And I observed the drop on the pressure gauge which was just a gradual drop. There was no immediate dumping of the hydraulic fluid in the pressure system.
>
> Then I had him restart the shuttle car, and then just normally turn it off with the switch. And it reacted exactly the same way. There was no differential in the pressure drop.

(Tr. 51.) Inspector Ross did not testify concerning over what period of time the gradual drop occurred.

Once again, it was Mr. Downey who accompanied the inspector during the inspection of the shuttle car. While he concurred with the inspector's testimony about the distance it took the shuttle car to stop, he had this to say about the pressure gauge:

> Q. And what were your observations of what happened with that pressure gauge after the panic bar was struck?
>
> A. As soon as the panic bar was hit, it de-energized [sic] the machine. It also triggered the dump valve for the braking system at the same time. And the system pressure immediately started to fall toward zero.
>
> Q. Was that a rapid fall, a steady, slow fall? What kind of fall was it, as indicated by the gauge?
>
> A. It just immediately dropped, within a second or less.

(Tr. 141.)

Ironically, with all this contradictory testimony, the expert witnesses, Mr. Skrabak, an engineer with MSHA, and Mr. Chandler, an engineer with Joy Technologies, were in essential agreement. They agreed that there would be an observable difference between the dropping of the pressure gauge after the panic bar was hit and the dropping of the pressure gauge on deenergization (turning the machine off), with the former being less than a second and the latter being between two and a half and four and a half seconds. They agreed that in the laboratory the activation time for the Joy automatic emergency-parking brake system was between .55 seconds and .7 seconds. Finally, they agreed that a stopping distance of six to eight feet in mine conditions was reasonable.

In addition, Mr. Chandler gave the following testimony concerning the stopping distance of a shuttle car after hitting the panic bar:

> A. I would expect a typical stopping distance, under factory test conditions, to be in the neighborhood of four to six feet with an empty car.
>
> Q. Do you have any idea what you would expect under loaded conditions in a mine environment?
>
> A. The stopping distance can vary considerable [sic] depending on conditions; the mine load on a car, the mine bottom, whether there is a grade involved or not. You know a load or a grade will definitely extend that stopping distance.
>
> Q. Is there any range that you would consider to be acceptable, if the parking brake was functioning properly?
>
> A. That is difficult to answer, depending on the conditions I've talked about.
>
> Q. Is it safe to say it would be more than the four to six feet that you observed in the laboratory?
>
> A. I would expect it to be, yes.

(Tr. 171-72.)

Discussion

Section 75.523-3(b)(1) provides that:

(b) Automatic emergency-parking brakes shall--

(1) Be activated immediately by the emergency deenergization device required by 30 CFR 75.523-1 and 75.523-2;

The term "activated immediately" is not defined in the Regulations. Nor are there any Commission decisions defining it.

Webster's Third New International Dictionary (Unabridged) 21 (1986) defines "activate" as "to make active or more active." It contains two definitions for "immediately," but only the second "without interval of time : without delay" seems pertinent to this case. Id. at 1129. Based on the testimony of the two experts it is apparent that the brakes cannot be made active without interval of time, therefore, the plain meaning of the regulation is that the brakes be made active without delay.

How can the inspector in the mine determine whether or not the automatic emergency-parking brakes on a shuttle car are made active without delay? Mr. Skrabak suggested two methods. The first way, would be to observe how far the shuttle car travels after the panic bar has been actuated before coming to a stop. The second, would be to watch the pressure gauge and observe how fast the needle goes down when the panic bar is hit.

Applying these two tests to the cases at hand, I conclude that in neither instance does the evidence show that the automatic emergency-parking brake failed to function in accordance with the regulation. When the best stopping distance achieved for a shuttle car in the laboratory is four to six feet, I agree with the two experts that a stopping distance of six to eight feet is an acceptable demonstration that the automatic emergency-parking brakes have activated immediately.

Citation No. 4187917

Turning to the citation on July 1, 1993, it is obvious that if the shuttle car traveled twenty to forty feet before it stopped, the brakes had not activated immediately and the regulation was violated. On the other hand, if it stopped in eight feet, there was no violation. Clearly, determining whether a violation occurred depends on whether one accepts the testimony of Inspector Mullins or the testimony of Mr. Downey. Their testimony is irreconcilable.

There was nothing about the way each witness testified, either in their demeanor or manner of testifying, that indicated a lack of forthrightness. However, based on the entire record, I

am constrained to credit the testimony of Mr. Downey over that of Inspector Mullins for the reasons in the following paragraphs.

Four witnesses to the incidents on July 1 were present in the courtroom: Mullins, Ross, Downey and Foster. Mullins testified that Foster was present during the test of the shuttle car, although she later indicated that he may not have been there the whole time. (Tr. 223.) Downey and Foster both agreed that Foster left before the test and that only Downey was present during the test.

Inspector Ross was present in the courtroom during this controversy. but was not recalled even though the Secretary's counsel talked to him in the courtroom before resting. Based on this failure to recall him, I conclude that his testimony would not have corroborated Inspector Mullins. This conclusion is somewhat supported by the inspectors' notes.

Inspector Mullins' notes state that she was accompanied by Jim Downey and Frank Foster as company representatives. (Gt. Ex. 1, p. 1.) They later state: "On section split up. I traveled with Frank Foster." (Gt. Ex. 1, p. 3.) However, when the inspection of the shuttle car is documented, there is no mention as to who was present or what was said. (Gt. Ex. 1, p. 5.) Inspector Ross' notes, which are generally much more detailed than Mullins', state that he was accompanied only by Frank Foster as company representative during his July 1 inspection. (Gt. Ex. 3, p. 1.)

Based on the testimony of Mr. Downey, I find that the shuttle car stopped in eight feet.[2] Consequently, I conclude that the Respondent did not violate Section 75.523-3(b)(1) on July 1, 1994, as alleged.

Citation No. 4190585

Although the evidence concerning the July 6 violation involves some disparate testimony, it is not necessary to resolve the discrepancy to decide this citation. Every one agrees that the shuttle car stopped in six to eight feet. However, Inspector Ross stated that when he observed the pressure gauge, the needle dropped gradually. He asserted that the drop was the same whether the panic bar was hit or the machine was just turned off. On the other hand, Mr. Downey maintained that the needle dropped within a second when the panic bar was hit. He did not testify about its drop when the machine was turned off.

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[2] The evidence indicates that this shuttle car also stopped in eight feet when re-inspected on July 8, 1994, and that nothing had been done to it in the interim. (Tr. 160-61, 203.)

If Inspector Ross' testimony is correct, it results in the paradoxical situation of one test indicating that the brakes were activated immediately, the stopping distance, and one test indicating that they did not activate immediately, the pressure gauge. Nevertheless, since it is evident that the purpose of the regulation is to stop the shuttle car as quickly as possible in an emergency, I conclude that in a circumstance where the two tests are in apparent conflict, such as this, the stopping distance is a better indication that the system activated immediately than is the pressure gauge.

Accordingly, I find that the six to eight feet in which every one agrees that the shuttle car stopped indicates that the automatic emergency-parking brake did activate immediately. Therefore, I conclude that the Respondent did not violate Section 75.523-3(b)(1) on July 6, 1993, as alleged.

ORDER

Citation Nos. 3991939 and 4187917 in Docket No. WEVA 94-72 and Citation No. 3999419 in Docket No. WEVA 93-362 are **VACATED** and the civil penalty petitions are **DISMISSED**. Citation No. 4190585 in Docket No. WEVA 93-479 is **VACATED**. Citation No. 3570901 in Docket No. WEVA 93-479 and Order No. 4190960 in Docket No. WEVA 94-38 are **AFFIRMED**. Old Ben Coal Company is **ORDERED** to pay civil penalties in the amount of $6,498.00 within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

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Thomas L. Clarke, Esq., Old Ben Coal Company, 50 Jerome Lane, Fairview Heights, IL 62208 (Certified Mail)

/lbk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 27 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 93-540
	:	A.C. No. 15-12941-03655
v.	:	
	:	No. 60 Mine
LEECO INCORPORATED, Respondent	:	

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Edward H. Adair, Esq., Leona A. Power, Esq. (on the Brief), Reece and Lang, P.S.C., London, Kentucky, for the Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," charging Leeco, Incorporated (Leeco) with five violations of mandatory standards and seeking civil penalties of $18,250 for those violations. The general issue is whether Leeco violated the cited standards and, if so, what is the appropriate civil penalty to be assessed. Additional specific issues are addressed as noted.

At hearing the Secretary filed a motion for approval of settlement of Citation Nos. 3212149 and 3214717 proposing a reduction in penalties from $1,250 to $610. I have considered the representations and documentation submitted in support of the proposed settlement and conclude that the settlement is acceptable under the criteria set forth in Section 110(i) of the Act. The order accompanying this decision will accordingly incorporate this approved settlement.

The remaining citation and orders arose out of a fatal electrical accident on November 27, 1991, in an underground working section at the Leeco No. 60 Mine. It appears that the victim, Electrician Wayne Howard, was working on a continuous miner near its left side scrubber blower motor when he was

electrocuted. Citation No. 3215664, issued pursuant to Section 104(d)(1) of the Act, alleges a violation of the mandatory standard at 30 C.F.R. § 75.514 and charges as follows:[1]

> The splice in the green lead for the left side blower motor on the Joy 14CM9 continuous miner located on the 004 working section was not reinsulated at least to the same degree of protection as the remainder. About 2 laps of glass tape and about 3 laps of plastic tape was used.

The cited standard provides, in relevant part, that "[a]ll electrical connections or splices in insulated wire shall be reinsulated at least to the same degree of protection as the remainder of the wire."

There appears to be no dispute that a section of draw rock fell onto the subject Joy continuous miner at approximately 2:30 p.m. on November 27, severing one of the left side blower motor conductors. Electrician Wayne Howard was called to repair the miner. It is essentially undisputed that Howard spliced the green conductor by joining the severed parts (Joint Exhibit No. 1) with a split bolt (Joint Exhibit No. 2) and by covering the splice with 2 or 3 laps of glass tape and 2 or 3 laps of plastic tape (Respondent's Exhibit Nos. 15 and 16, respectively).

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[1] Section 104(d)(1) of the Act 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 con tribute 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. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

The original and unaffected areas of the wire were insulated by approximately 1/16 inch thick insulation plus 5/32 inch thick outer jacket and a 5/32 inch thick conduit (Joint Exhibit No. 1). As is readily apparent from observation of the severed conductor and split bolt (Joint Exhibit Nos. 1 and 2, respectively), the tape-covered split bolt would necessarily have protruded significantly beyond the original insulation. I find that this splice was not reinsulated to afford the same degree of protection as the remainder of the wire and, indeed, seriously compromised the insulating ability of the tape.

In this case there is general agreement that the electrocution of Howard was the direct result of the metal lid to the blower motor coming down upon the protruding bolt thereby creating a hole in the insulating tape and allowing electrical current to pass through the power conductor to the mining machine and through Howard as Howard's elbow touched the mining machine. Within this framework of evidence I have no difficulty finding that the cited splice in the green conductor did not afford the same degree of protection as the remainder of the wire and, accordingly, the violation is proven as charged. In reaching this conclusion I have not disregarded Respondent's argument that the term "insulation" refers only to the dielectric capacity of the material and not to any physical separation and protection it provides. However, even the definition of the term "insulation" cited by Respondent requires a "separation ... by means of a nonconducting barrier." See A Dictionary of Mining, Mineral, and Related Terms, U.S. Dept. of the Interior, 1968. If the "barrier" is inadequate to prevent penetration and compromise of its insulating qualities, as the tapes were in this case, it is clear that regardless of the dielectric capacity it did not provide the same degree of protection as the remainder of the original insulation.

The violation was also "significant and substantial" and of high gravity. 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 (1981). In Mathies Coal Co., 6 FMSHRC 1,3-4 (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 (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., 6 FMSHRC 1834, 1836 (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 1473, 1574 (1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (1986) and Southern Oil Coal Co., 13 FMSHRC 912, 916-17 (1991).

In this case there is no dispute that the subject splice was a direct cause of Howard's electrocution. I find that it was reasonably likely for such a fatality to have occurred under the circumstances and that the violation was therefore "significant and substantial" and of high gravity.

The Secretary further charges that the violation was the result of Leeco's high negligence and "unwarrantable failure." "Unwarrantable failure" has been defined as conduct that is not "justifiable" or is "inexcusable." It is aggravated conduct by a mine operator constituting more than ordinary negligence. Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007 (1987); Emery Mining Corp., 9 FMSHRC 1997 (1987). The Secretary suggests through the testimony of his inspector that such findings are justified on the grounds that the victim, Mr. Howard, was a certified and trained electrician and, accordingly, "should have known" that the manner in which he spliced the green conductor at issue did not meet the requirements of the cited standard. The Secretary also apparently relies upon this evidence for his findings of high negligence for purposes of evaluating the amount of civil penalty.

On the facts of this case, I agree with the Secretary that Howard, as an experienced certified electrician, should have known that the use of the subject tape over the splicing bolt was not adequate under the circumstances and that he was, therefore, negligent. However, the "should have known" standard is not sufficient to establish that the violation was the result of Howard's "unwarrantable failure". It is not, in itself evidence of gross negligence or aggravated conduct sufficient to meet the "unwarrantable failure" standard. In Secretary v. Virginia Crews Coal Co., 15 FMSHRC 2103 (1993), the Commission specifically rejected the use of a "knew or should have known" test by itself in determining whether a violation was the

result of unwarrantable failure for the reason that it would be indistinguishable from ordinary negligence. Under the circumstances, Citation No. 3215664 must be modified to a citation under Section 104(a) of the Act.

It must next be determined whether the section electrician was an "agent" for purposes of imputing his negligence to the operator for civil penalty purposes. In Secretary v. Southern Ohio Coal Co., 4 FMSHRC 1459 (1982), the Commission held that the negligence of an operator's agent may be imputed to the operator for civil penalty and unwarrantable failure purposes. In Secretary v. Rochester and Pittsburgh Coal Co., 13 FMSHRC 189 (1991), the Commission found that a rank-and-file miner who was charged by the mine operator with the responsibility of performing weekly examinations required under the Act was an "agent" within the meaning of the Act and his negligence was imputable to the operator. In reaching this conclusion the Commission observed that an agent is one who is authorized by another, the principal, to act on the other's behalf. I conclude herein that when Leeco assigned certified electrician Wayne Howard its responsibility to conduct and perform electrical inspections and repairs within the framework of the Act and related regulations, Howard became an agent of Leeco for those purposes. In Secretary v. Mettiki Coal Corp., 13 FMSHRC 760 (1991), the Commission, applying the Rochester and Pittsburgh case, similarly found the negligence of an electrical examiner imputable to the operator.

Imputing the electrician's negligence is particularly warranted on the facts of this case because the electrician herein was given complete discretion to act on the operator's behalf as to how, when and where to perform his work subject only to a management veto of his priorities. The electrician's managerial-like authority in this mine is well illustrated by his directing the mine foreman to remain at the power center and by directing him to plug and unplug the cathead at his command.

Order No. 3215663, also issued pursuant to Section 104(d)(1) of the Act, fn. 1, supra, alleges a violation of the mandatory standard at 30 C.F.R. § 75.511 and charges that "the disconnecting device for the Joy 14CM9 continuous miner located on the 004 working section was not locked out and suitably tagged by the persons splicing a lead to the left side blower motor."

The cited standard provides, in relevant part, as follows:

> Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons who installed

them or, if such persons are unavailable, by persons authorized by the operator or his agent.

Leeco does not dispute this violation and takes issue only with the Secretary's "significant and substantial" and "unwarrantable failure" findings in the order. Thus, it is established that while Howard was splicing the green conductor to the blower motor of the cited continuous miner he was doing so at a time when the disconnect device for the continuous miner cable was neither locked out nor suitably tagged.

According to Leeco witness Donny Collins, who was then Leeco's general mine foreman, as he approached the power center, the "lolo" man (miner helper) told him to watch the cathead, which was then "out" (disconnected). Collins testified that Howard subsequently told him (Collins) that he would tell him when to put the power back on. Howard then proceeded about 150 to 180 feet to the damaged mining machine. According to Collins, 10 to 15 minutes later, Howard called to "put the power on." Thereafter Collins connected and disconnected the cathead several times based upon various communications from Howard. Collins acknowledged that several times he had difficulty hearing Howard's commands because of the nearby operation of a roof bolter and it was necessary to then relay the messages from Howard through another miner, James Lowe. On at least one occasion, in deciding whether to connect or disconnect the cathead Collins relied upon what he construed to be an affirmative nod from Howard detected by observing his cap light in motion some 150 to 180 feet away.

I find that the admitted violation was "significant and substantial." The cited regulation requires that persons performing electrical work must lock out and suitably tag the disconnect. By retaining the key to the lock, an electrician is thereby assured that power will not accidentally be engaged. There is no dispute that the voltage to the subject mining machine was sufficient to cause electrocution and that Howard was performing such electrical work, i.e., splicing a power conductor that exposed him to imminent electrocution should power have been engaged. Under the circumstances and based upon the makeshift and flawed communication method used by Howard and Collins, I conclude that there was a reasonable likelihood for miscommunication and therefore, for death by electrocution.

In determining whether this violation was the result of Leeco's "unwarrantable failure," the Secretary again apparently relies on the inspector's testimony that Howard, as Leeco's certified and trained electrician, was negligent because, in essence, he "should have known" that his failure to follow lock-out procedures was violative of the regulations. As previously noted, the Commission has rejected the ordinary negligence standard expressed by the "should have known" test

as the sole basis for determining "unwarrantable failure." Virginia Crews, supra. Under the Secretary's theory, Howard's negligence was therefore at worst ordinary negligence.

I find, however, that General Mine Foreman Collins is chargeable with an aggravated omission constituting "unwarrantable failure." Although Collins testified that he did not know that Howard was performing electrical work, I do not find under the circumstances that this testimony is credible. In any event, I find that Collins, in his capacity as general mine foreman and under the circumstances of this case, had a duty to know what his electrician was doing. See Secretary v. Roy Glenn, 6 FMSHRC 1583 (1984). In the Glenn case, the Commission stated that supervisors "could not close their eyes to violations, and then assert lack of responsibility for those violations because of self-induced ignorance." This is particularly true under the circumstances of this case where Collins himself was asked by his electrician to connect and disconnect the power cable while Collins knew Howard was working on electrical equipment. Even assuming, arguendo, therefore that Collins may not have had actual knowledge that Howard was performing electrical work, the circumstances were such that Collins, in essence, closed his eyes to the violation and then asserts lack of responsibility because of self-induced ignorance. Under the circumstances, I conclude that Collins' inaction constituted an aggravated omission and "unwarrantable failure." Moreover, Collins' aggravated omission is imputable to the operator since he was then the general mine foreman. Southern Ohio Coal Co., supra.

Since the precedential citation, No. 3215664, has been modified to a citation under Section 104(a) of the Act, the instant order must be modified to a citation under Section 104(d)(1) of the Act.

Order No. 3215665, also issued pursuant to Section 104(d)(1) of the Act, fn. 1, supra, alleges a violation of the standard at 30 C.F.R. § 75.509 and charges as follows:

> The Joy 14CM9 continuous miner located on the 004 working section was not deenergized while troubleshooting or testing the left side blower motor. It was not necessary to have the miner energized.

The cited standard provides that, "[a]ll power circuits and electric equipment shall be deenergized before work is done on such circuits and equipment, except when necessary for trouble shooting or testing."

It is undisputed that at the time Howard was electrocuted, he was performing work on the mining machine described by Government witness Oscar Farley as "digging" or "wiggling something" and "picking" on the blower motor compartment with

a crescent wrench. Farley was then on the opposite side of the mining machine across from Howard.

Experienced electrician and mechanic for Joy Technologies, George Lowe, is familiar with the type of Joy mining machine at issue. Based on Farley's description of Howard's activities at the time of his electrocution, Lowe concluded that Howard was "trouble shooting." According to Lowe, this activity would also commonly be known in the mining industry to be "trouble shooting." I accept this credible testimony and find that indeed Howard was "trouble shooting" within the meaning of the cited standard. Lowe also testified and agreed with the testimony of MSHA Inspector and former electrician Howard Williams that it was not necessary for the miner to have been energized while performing this "trouble shooting." Particularly considering Lowe's expertise in the mining industry and familiarity with Joy mining equipment, I give this testimony particular and decisive weight. Under the circumstances, the violation is proven as charged.

The violation was also "significant and substantial." The cited activity was a direct cause of the fatality in this case. I conclude that it is also reasonably likely for such activities to cause fatalities.

In support of his finding of high negligence and "unwarrantable failure," the Secretary again apparently relies upon a presumption that Howard, as a certified and trained electrician, "should have known" that he was violating the cited standard. Again, while such evidence may be sufficient to support a finding of ordinary negligence, it is not sufficient alone to establish the aggravating circumstances necessary for an "unwarrantable failure" finding. Virginia Crews, supra. Based on prior reasoning, I do, however, impute Howard's negligence to the mine operator for the purposes of civil penalty assessment. Under the circumstances, however, Order No. 3215665 must be modified to a "significant and substantial" citation under Section 104(a) of the Act.

ORDER

Citation No. 3215664 and Order No. 3215615 are hereby modified to citations under Section 104(a) of the Act. Order No. 3215663 is hereby modified to a citation under section 104(d)(1) of the Act.

Considering the criteria under Section 110(i) of the Act, the following civil penalties are deemed appropriate and Leeco, Incorporated is directed to pay such civil penalties within 30 days of the date of this decision.

Citation No. 3212149	$ 210
Citation No. 3214717	$ 400
Citation No. 3215663	$5,000
Citation No. 3215664	$4,000
Citation No. 3215665	$2,000

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 28 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 93-812 A. C. No. 15-11012-03525
v.	:	
	:	Camp No. 9 Prep Plant
PEABODY COAL COMPANY, Respondent	:	

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner;
Carl B. Boyd, Esq., Meyer, Hutchinson, Haynes & Boyd, Henderson, Kentucky, for Respondent.

Before: Judge Maurer

This case is before me based upon a petition for assessment of a civil penalty filed by the Secretary of Labor (Secretary) against the Peabody Coal Company (Peabody) seeking a civil penalty of $50 for an alleged nonsignificant and substantial violation of 30 C.F.R. § 77.516. [1]

Pursuant to notice, the case was heard before me on March 17, 1994, in Owensboro, Kentucky. Both parties have filed posthearing briefs with proposed findings of fact and conclusions of law and I have considered them in the course of my adjudication of this matter.

The citation at bar, Citation No. 3859515, was issued by Inspector Michael V. Moore of the Mine Safety and Health Administration (MSHA) as a result of an inspection at the Camp No. 9 Preparation Plant on March 23, 1993. The citation was issued pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., and charges as follows:

---

[1] 30 C.F.R. § 77.516 provides, in pertinent part:

> All wiring and electrical equipment installed after June 30, 1971, shall meet the requirements of the National Electric Code in effect at the time of installation.

> The area enclosed on top of the five coal storage silos is not meeting Article 500-4(b) of the 1968 National Electrical Code. Three 4160 Volt 600 H.P. motor electrical installations and three start/stop enclosures are not meeting the Class I, Division II rating of the 1968 National Electrical Code. The start/stop switches are located at the 600 H.P. motors.

Inspector Moore was the Secretary's only witness. He testified that he is employed by MSHA as an electrical specialist and has been so employed for the last 14 years. He has a BS degree in electrical engineering technology and has worked in the coal industry as an electrician prior to his present government service.

The citation concerned the enclosed areas on top of the five coal storage silos. The silos themselves are made from concrete and are approximately 200 feet high. They were built along with the entire preparation plant in the late 1970's. The enclosed areas on top contain electrical installations, including electrical motors, switches and wiring.

Inspector Moore testified that originally the enclosed area was regarded as a Class I, Division 1 location when the plant was built. Peabody disputes that and there is really no evidence of that, save the inspector's recollection. But, in any event, MSHA, by letter of September 5, 1985, relaxed the standard to the Class II, Division 2 level, contingent on a methane monitor and ventilation being used to meet that classification. The letter specifically warns that "[a] failure of either ventilation or methane monitor will cause the area to revert back to a Class I, Division 1 [location]." This would mean that all of the electrical installations on top of the silos would have to be reclassified Class I, Division 1, which is a more restrictive classification.

The National Electric Code (NEC) defines Class I, Division 1 locations as:

> Locations (1) in which hazardous concentrations of flammable gases or vapors exist continuously, intermittently, or periodically under normal operating conditions, (2) in which hazardous concentrations of such gases or vapors may exist frequently because of repair or maintenance operations or because of leakage, or (3) in which breakdown or faulty operation of equipment or processes which might release hazardous concentrations of flammable gases or vapors, might also cause simultaneous failure of electrical equipment.

The NEC defines Class II, Division 2 locations as:

> Locations in which combustible dust will not normally be in suspension in the air, or will not be likely to be thrown into suspension by the normal operation of equipment or apparatus, in quantities sufficient to produce explosive or ignitible mixtures, but (1) where deposits or accumulations of such dust may be sufficient to interfere with the safe dissipation of heat from electrical equipment or apparatus, or (2) where such deposits or accumulations of dust on, in, or in the vicinity of electrical equipment might be ignited by arcs, sparks or burning material from such equipment.

One difficulty with the 1985 MSHA letter to Superintendent Wes Shirkey is that it only speaks of "a methane monitor and ventilation", period, but the Secretary, through the opinion testimony of Inspector Moore, expands on these requirements a good deal. The Inspector interprets these requirements to mean an interlocked system in which the methane monitor deenergizes the electrical equipment at a two percent concentration of methane, and a positive pressure ventilation system.

On the day of his inspection, Inspector Moore found the methane monitor in place and working, but it was not, nor in his opinion, was it ever set up to deenergize the electrical equipment on top of the coal storage silos if the methane concentration had reached two percent in the enclosed areas. The Inspector further opined that this "interlocked" system is a common mining practice throughout MSHA's District 10, where the prep plant is located and Peabody knew it.

On the other hand, Peabody asserts, through the testimony of Wes Shirkey, the addressee of the 1985 letter, that the requirement for a methane monitor only related to a heater that was once installed in the area and that after the heater was removed, there was no need for the methane monitor anymore. Also, Mr. Shirkey points out that the letter merely states "ventilation". It says nothing about a positive ventilation system being required.

But, the Secretary produced an internal memorandum dated November 6, 1992, (GX-1) from the District Manager to Mr. Jerry Collier, a Supervisory Electrical Engineer, that discusses ventilation methods and states, inter alia, that: "For example, an enclosed area on top of a silo would need a positive pressure system within the area." The company had a copy of this memorandum since January of 1993, some two months

after it was written and at least a month before the citation at bar was issued.

A positive pressure ventilation system is one in which the air from the outside, which is the clean atmosphere, is forced inside the enclosed area. The atmosphere in the enclosed area would have clean air from the outside forced in that would flush out any hazardous concentrations of gas.

When Inspector Moore saw the area on March 23, 1993, the ventilation system was exhausting. This is described by the Inspector as the exact opposite of a positive pressure system, which MSHA has reportedly informed Peabody on more than one occasion is required for this area on top of the silos.

The thrust of Peabody's defense, however, is that the area on top of the silos is improperly classified. It is their position that this area is not a hazardous location, and therefore the electrical requirements they were cited for in the NEC simply do not apply to this location. They, of course, seek the vacation of the citation at bar.

Class I locations are those in which flammable gases or vapors are or may be present in the air in quantities sufficient to produce explosive or ignitable mixtures.

In the case of methane, an explosive concentration would be 5% to 15%. There has been no evidence of any hazardous concentration (5% to 15%) of methane. Inspector Moore testified that by putting an eight foot probe into chute openings, he had secured readings of .5% to 1.1%, but his readings around the motors in question were 0%. Larry Cleveland and Randy Wolfe testified that all readings they had taken or observed in the general air body of the sheltered area were 0%. The evidence was also to the effect that the on-shift readings taken day after day in the enclosed areas have never reported any methane.

Randy Wolfe testified concerning the tests he had conducted inside the silos, where he had gotten .7% as the highest reading, a reading which had dropped off to .4% near the top of the silos where the vents running into the open air has a diluting effect.

With regard to the adequacy of the ventilation system used by Peabody, the enclosed areas were constructed with at least four louvered vents, each having an open area of 32 square feet, six fan openings in the roof and, since the door blew off, there has also been a 15 foot by 30 inch opening in one wall. In addition, there are beltway openings to the outside, one of which (the clean coal belt to the plant) makes a natural chimney for fresh air drafts. The video shown at the hearing amply demonstrated adequate ventilation to me as a practical matter.

The Inspector even acknowledges it is "breezy" inside the enclosed areas (Tr. 44). And he himself testified at Tr. 36:

> Q. In your estimation, was the natural ventilation system in the enclosed area sufficient to prevent the methane content from exceeding one percent?
>
> A. It appeared that way.

The long and short of it is that this is a relatively large area, with a lot of air moving around in it, and no one has ever found any methane out in the general air body outside of the silos and chutes or around the motors. Furthermore, no one has ever found methane even approaching 2%, let alone 5%, in the silos or chutes adjacent to the areas in question. Finally, the only evidence concerning methane readings in the vicinity of the electrical installations in question is that those readings were always 0%.

The Secretary's case, although it was well presented at trial, started from the faulty proposition that the areas in question were properly classified by MSHA and that was the end of the matter. The enforcement action by the inspector proceeded from there with that much taken as a given.

But Peabody, at least from the time of the hearing in this matter, has objected to that threshold issue of classification and indeed, in my opinion, has mounted a successful legal challenge to it. The record evidence in this case is simply insufficient to conclude that the cited areas on top of these silos were hazardous locations due to explosive or ignitable concentrations of methane. I therefore find that they were not Class I locations and I will vacate Citation No. 3859515.

ORDER

Citation No. 3859515 **IS VACATED** and this proceeding **IS DISMISSED.**

Roy J. Maurer
Administrative Law Judge

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JUL 28 1994

JIM WALTER RESOURCES, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. SE 94-244-R
	:	Citation No. 3182848; 1/31/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 7 Mine
	:	I.D. No. 01-01401

DECISION

Appearances: J. Alan Truitt, Esq., Maynard, Cooper And Gale, P.C., Birmingham, Alabama, and R. Stanley Morrow, Esq., Jim Walter Resources, Inc., Brookwood, Alabama, for the Contestant; William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, Respondent.

Before: Judge Melick

This case 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, upon the contest of Jim Walter Resources, Inc. (JWR) to challenge a withdrawal order issued by the Secretary of Labor for an alleged accumulation of combustible materials.

The order at issue, No. 3182848, issued on January 31, 1994, pursuant to Section 104(d)(2) of the Act[1], charges a

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[1] Section 104(d) of the Act 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. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation,

violation of the standard at 30 C.F.R. § 75.400 and alleges that "[c]ombustible material, paper bags, rags, 5 wood pallets, 5 foot diameter cable spools and paper boxes were allowed to accumulate in the No. 3 entry on the No. 1 longwall section beginning 125 feet inby spad 9883 and extending inby for a distance of approximately 250 feet."

The cited standard requires that "coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein." The term "active workings" is defined as "any place in a coal mine where miners are normally required to work or travel." 30 C.F.R. § 70.2(b).

It is undisputed that accumulations existed as cited on January 31, 1994, both inby and outby a check curtain identified on Government Exhibit No. 1, with the date "1-31-94." According to issuing Ventilation Specialist Thomas Meredith of the Mine Safety and Health Administration (MSHA) this check curtain separated the active outby area from the inactive inby area. At that time, the inactive inby area was admittedly not an area where miners typically worked or normally traveled. Under the circumstances, the inactive inby area cited in the order was not within the "active workings" and the accumulations located therein were therefore not in violation of the cited standard.

According to Ventilation Specialist Meredith, the accumulations in the active outby area consisted of an uncertain number of paper bags (rock dust bags), some sandwich bags, some cardboard boxes and a plastic garbage bag containing some oily rags and sandwich wrappers. While it may reasonably be inferred from that evidence that these were indeed combustible materials in violation of the cited standard, there is insufficient evidence that these materials constituted a "significant and substantial" violation or that their existence was the result of "unwarrantable failure."

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fn. 1 (continued)
an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

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 (1981). In Mathies Coal Co., 6 FMSHRC 1,3-4 (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 (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., 6 FMSHRC 1834, 1836 (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 1473, 1574 (1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (1986) and Southern Oil Coal Co., 13 FMSHRC 912, 916-17 (1991).

The Government's evidence on this issue referenced the massive accumulations in the inactive area and evidence was not elicited as to whether the few combustible items found in the active area at issue constituted a "significant and substantial" violation. Accordingly, I cannot find that the Secretary has met his burden of proof on this issue. Indeed, Mr. Meredith acknowledged that the garbage bag, one box and one rock dust bag would not even constitute a violation of the cited standard. Under the circumstances, I find that the violative condition in the active area was of only moderate gravity.

In addition, in the absence of specific evidence as to when these few cited items in the active area were placed there (other than some time after January 24 and before they were cited on January 31) and/or the circumstances under which they were placed there, it is impossible to find the aggravated negligence necessary to support an unwarrantable failure finding. "Unwarrantable failure" has been defined as conduct that is "not justifiable" or is "inexcusable." It is aggravated conduct by a mine operator

constituting more than ordinary negligence. Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007 (1987); Emery Mining Corp., 9 FMSHRC 1997 (1987). The few items found in the active area at issue herein could very well have been inadvertently placed where they were found without the knowledge of any responsible official and only shortly before discovery by the inspector.

In finding that the Secretary has not met his burden of proof on this issue, I have not disregarded the implication by the Secretary that a previous order issued on January 24, 1994, in another entry, shows that the operator was on notice of particular problems with accumulations in this mine. However, on the facts of this case, wherein only a few combustible items were found in the active area of a different entry and which could have been placed there inadvertently without the knowledge of a responsible official only a short time before discovery, no inference can be drawn from this prior violation alone sufficient to support a finding of gross negligence or unwarrantable failure.

The Secretary also argues that a statement to Meredith by longwall coordinator James Brooks (that he did not know why material had not been cleaned up and that he had not had outby people for over a week) is evidence of "unwarrantable failure." However, even assuming the accuracy of the statements, they are too ambiguous to allow the inference necessary to warrant the "aggravated conduct" findings upon which "unwarrantable failure" must depend.

Under the circumstances, the order at bar must be modified to a non-significant and substantial citation under Section 104(a) of the Act. Considering the criteria under Section 110(i) of the Act, I find a civil penalty of $250 to be appropriate.

ORDER

Order No. 3182848 is modified to a citation under Section 104(a) of the Act and Jim Walter Resources, Inc. is directed to pay a civil penalty of $250 for the violation charged therein within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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JUL 28 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 93-108-M
	:	A.C. No. 04-00599-05541
	:	
	:	Docket No. WEST 93-109-M
	:	A.C. No. 04-00599-05542
v.	:	
	:	Docket No. WEST 93-110-M
	:	A.C. No. 04-00599-05543
	:	
PORT COSTA MATERIALS, INC., Respondent	:	Docket No. WEST 93-353-M
	:	A.C. No. 04-00599-05544
	:	
	:	Docket No. WEST 93-366-M
	:	A.C. No. 04-00599-05545
	:	
	:	Docket No. WEST 93-428-M
	:	A.C. No. 04-00599-05546
	:	
	:	Docket No. WEST 93-435-M
	:	A.C. No. 04-00599-05548
	:	
	:	Docket No. WEST 93-485-M
	:	A.C. No. 04-00599-05548
	:	
	:	Port Costa Materials

DECISION

Appearances: William W. Kates, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
Mr. Ross Gephart, President, PORT COSTA MATERIALS, INC., Port Costa, California, and
Mr. Robert Stewart, Corporate Vice President, PORT COSTA MATERIALS, INC., Port Costa, California, for Respondent.

Before: Judge Morris

The Secretary of Labor charges Respondent Port Costa Materials, Inc., ("Port Costa") with violating 73 safety regulations promulgated under the authority of the Federal Mine Safety and Health Review Act of 1977, 30 U.S.C. § 802, et seq. (the "Act").

STIPULATION

At the hearing, the parties stipulated as follows:

> The citations and notification of proposed penalty were served upon the Respondent.
>
> The Respondent timely contested both the citations and the proposed assessments of penalty, and therefore, the Federal Mine Safety and Health Review Commission has jurisdiction to hear and decide these matters.
>
> Respondent in these proceedings is Port Costa Materials Incorporated, a corporation. And, further, it has products that enter into commerce and is therefore an employer subject to the Act.

BACKGROUND

Port Costa is a light aggregate mining facility in Port Costa, California.

The first of three separate MSHA inspections was conducted by Inspector Michael Brooks from August 27 through September 9, 1992; the second was conducted by Inspector Arthur Carisoza from January 7 through January 10, 1993; the third was conducted by Inspector Brooks from March 25 through March 26, 1993.

The citations/orders issued during those three inspections and the resultant proposed penalty assessments therefor were timely contested by Port Costa and were docketed by the Federal Mine Safety and Health Review Commission under the docket numbers listed above.

The decision is so structured so as to review the relevant evidence in the numerical sequence of the citations. The citations also follow the transcript. The inspections are designated as Brooks I, Carisoza, and Brooks II.

THRESHOLD ISSUES

Port Costa contends MSHA violated Section 104(a) of the Act and its Program Policy Manual ("PPM"). Specifically, Port Costa argues a portion of MSHA's citations are duplicative and should be dismissed.

The PPM provides, in part, as follows:

104(a) Citations and Orders

> **Section 104(a) is a major tool for obtaining compliance with the Act, and the mandatory health or safety standards, rules, orders, or regulations. Violations shall be cited by the inspector, giving the operator time for abatement of the violation(s). The citations shall be issued under Section 104(a) or, as appropriate, under Section 104(d) of the Act. After the inspection, the inspector shall meet with the operator or his agent to discuss the violation.**
>
> **Separate citations shall be issued for: violations of separate standards on one piece of equipment; violations of separate standards in a distinct area of a mine; identical violations on separate pieces of equipment; and, identical violations in distinct areas of a mine. For example, if two haul trucks each have the same violation, there will be two separate violations cited. Likewise, if two distinct areas of a mine have loose rock in the roof or back, there will be two separate violations cited.**
>
> **However, where there are multiple violations of the same standard which are observed in the course of an inspection and which are all related to the same piece of equipment or to the same area of the mine, such multiple violations should be treated as one violation, and one citation should be issued. For example, "Loose roof or ground was observed in four places along the haulageway between 3 switch and No. 4 X-cut" or, "At the crusher power control panel, insulated bushings were not provided where insulated wires entered five of the metal switch boxes."** (Ex. R-2). (Emphasis added.)

Port Costa contends that there are four separate "areas" of its facility as that term is used in the PPM. Port Costa identified the four areas of its plant as the quarry, prep plant, kiln, and load out. (Exhibit R-1 shows the areas.)

Port Costa further asserts the term "area" should be defined in its usual common sense dictionary manner, namely, "a particular extent of space or surface or one serving a specific function; the scope of a concept, operation, or activity (citing Webster's Dictionary).

Prep Plant: This plant is a single interlocking system consisting of 30 conveyor belts that feed, crush, screen, and recirculate material. If a single belt stops, the entire system shuts down. Therefore, Port Costa argues the Prep Plant is a distinct and separate area of the plant. (Tr. 729). Eight citations involve the absence of guards in the Plant. These citations are numbered: 3913806, 3913807, 3913808, 3913809, 3913810, 3913812, 3913813, and 3913815. Each of these citations constitutes multiple violations of the same standard. Therefore, it is argued that only one citation should have been issued for the Prep Plant.

Kiln Area: In this area, two citations, numbered 3913817 and 3913818, were issued. Both citations arose not only out of a single area but involved the same piece of machinery. It is claimed these citations are duplicative and violate Section 104(a) of the Act.

Load Out Area: In this area, citations numbered 3913824, 3913825, 3913826, 3913827, 3913832, 3913834, 3913835, and 3913838 were issued. Each of the citations in this area involves the alleged inadequacy of machine guards. Therefore, Port Costa argues that only a single citation should be issued.

Also, in the load-out area three additional citations were issued. Those are numbered 3913828, 3913829, and 3913837. Each of these citations involves a violation of 30 C.F.R. § 56.12032.

Discussion

Port Costa's arguments lack merit for several reasons. The operator would have the Commission dismiss or combine what it claims are duplicative violations of the same standard on the same piece of equipment or in the same area of the mine. Such a dismissal would conflict with Section 110(a) of the Mine Act which provides that "each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense." 30 U.S.C. § 820(a). Tazco, Inc., 3 FMSHRC 1895, 1897 (August 1981); Spurlock Mining Company, Inc., 16 FMSHRC 697, 699 (April 1994).

I agree with the Secretary that MSHA's "grouping" represents a reasonable and lawful exercise of the Petitioner's prosecutorial discretion under the Act. It balances in a practicable manner the need to identify and seek the correction of the various hazards disclosed during an inspection with an avoidance of needless and redundant paperwork.

The thrust and purpose of the policy is to focus upon the individual and discrete hazards presented at the worksite. Such particularity and specificity in the issuance of citations is required under Section 104(a) of the Act. That statutory re-

quirement, as well as the Petitioner's grouping policy, further serve the obvious and beneficial purpose of identifying through the citation process the individual and discrete abatement efforts needed to eliminate the presented hazards.

If, for example, machine guarding hazards are present on two separate machines, two separate guarding efforts will be required to eliminate the hazards. This is so whether the guarding violations are identical in nature (and therefore violations of the same standard) or are different in nature (and therefore violations of different standards). Similarly, if two different types of guarding violations are presented on one machine, two separate types of abatement effort will be required to eliminate the two different hazards. On the other hand, if identical hazards (and therefore multiple violations of the same standard) are present on the same machine, the same type of abatement effort on the same machine will be required to eliminate both hazards, and little purpose would be served through the issuance of multiple citations requiring the same abatement effort. The same analysis is equally applicable in the case of the same or different areas of the mine facility. The same effort in the same area is but one abatement effort. Different efforts in the same area remain two abatement efforts.

The Secretary has properly applied his own grouping policy with respect to the citations involved in this proceeding.

In sum, penalties may not be eliminated because the Mine Act requires that a penalty be assessed for each violation. Further, I decline to dismiss or combine the citations herein.

SIGNIFICANT AND SUBSTANTIAL

Whether a violation is S&S will be discussed in the citations where S&S is alleged. In such circumstances, the Judge will follow the existing case law.

The Commission has ruled that an S&S violation is a "significant and substantial" violation described in Section 104(d) 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:

> 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:

> 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). (Emphasis in original).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation. Secretary of Labor v. Texasgulf, Inc., 110 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). In addition, any determination of the significant nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, at 239. Halfway, Inc., 8 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC supra, at 1130 (August 1985).

As hereafter noted, the S&S allegations in some citations have been stricken. This occurred because the Secretary's expert witness was of the opinion that an accident was "unlikely." Such an opinion eliminated the S&S designation. Further, surrounding facts do not rise to the level of establishing an S&S violation in the absence of expert testimony.

BROOKS I INSPECTIONS

Michael Brooks, an MSHA federal mine inspector, is stationed in the Vacaville, California, office. (Tr. 102).

In August 1992, Mr. Brooks inspected Port Costa which is located in Contra Costa County, California. (Tr. 104). Upon arriving at the plant, he was met by Lee Allen, foreman - Production Manager, and Martin De Toro, Jr., miners' representative. (Tr. 106-107).

Docket No. WEST 93-109-M

Citation No. 3913802

This citation alleges a violation of 30 C.F.R. § 56.14130(g) which, in pertinent part, states that "seat belts shall be worn by the equipment operator" ... .

Inspector Brooks observed that an employee was not wearing his seat belt while pushing material with a dozer. He was working in the clay storage area. (Tr. 112).

The equipment operator acknowledged he knew he was to wear his seat belt. Management also instructed the dozer operator to wear his seat belt.

Inspector Brooks believed that an injury was unlikely, but a fatality could occur. Such a fatality could result from a head injury. (Tr. 123, 127).

CIVIL PENALTY CRITERIA

The operator's negligence should be considered "moderate." The company offered no mitigating circumstances why its equipment operator was not wearing a seat belt.

Gravity should be considered "low" since an accident was unlikely because the dozer was operating on flat, non-elevated, fairly smooth roadways. (Tr. 242-243).

Port Costa is entitled to statutory good faith since it promptly abated the violative conditions in all Brooks I citations. Abatement will not be discussed further but it is considered in assessing all Brooks I citations.

Discussion

Port Costa contents (Brief at p. 7) that it is not liable since the company's Safety and Procedure Manual requires all employees to wear seat belts. Therefore, any violation of MSHA regulations is beyond the operator's control.

Port Costa's argument is **REJECTED.**

The Commission and various appellate courts have recognized that the Mine Act (as well as its predecessor, the Coal Act) impose liability without fault. Asarco, Inc. - Northwestern Mining v. FMSHRC and AMC, 8 FMSHRC 1632 (1986), 868 F.2d 1195, 1197-1198, 10th Cir. 1989; Western Fuels Utah, Inc., v. FMSHRC, 870 F.2d 711, D.C.C.A. 1989; Bulk Transportation Services, 13 FMSHRC 1354 (September 1991).

On the credible evidence, Citation No. 3913802 is **AFFIRMED.**

Docket No. WEST 93-108-M

Citation No. 3913803

This citation alleges an S&S violation of 30 C.F.R. § 56.14107(a) relating to moving machine parts. The regulation provides:

> **§ 56.14107 Moving machine parts.**
>
> (a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, fly-wheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

Inspector Brooks issued this citation when he observed that the self-cleaning tail pulley on the No. 5340 conveyor was not guarded. (Tr. 139, 140). Production Manager Lee Allen identified the conveyor by number.

The equipment was in the scalping tower area of the kiln deck. The exposed tail pulley was 2.5 to 3 feet from the work area. Mr. Brooks did not see any employees in the area; however, any employees in the plant would be exposed to the hazard.

The Inspector considered an injury was reasonably likely since access to the moving parts could be gained by the spillage pile. Contacting exposed parts and resulting injury was reasonably likely.

A self-cleaning tail pulley cleans itself of foreign material. There are steel flutes on the pulley. A worker could contact the pinch points and become entangled. An amputation could result. The conveyor was 36 inches wide. (Tr. 144).

Mr. Brooks could not say if the conveyor was running but the company representative did not deny that there was access to the exposed parts. Access could be gained by climbing up on the spillage pile or going under the tail pulley.

A Bobcat usually moves the spoil pile.

It was stated in Mr. Brooks' notes that the company should have known of the violation. The condition was terminated by guarding.

Inspector Brooks opined the violation was S&S because an injury was reasonably likely and there was exposure to a permanently disabling injury.

Since this condition was open and obvious, the operator's negligence should be considered "moderate." The company did not present any evidence to justify low negligence.

Access to the conveyor can be by the spillage pile. In view of this fact, gravity should be considered "high" since entanglement with unguarded machine parts can be permanently disabling, Such an entanglement can also cause severe injuries including amputation of an arm. It could also have been abated by removing the spillage.

The evidence is essentially uncontroverted. Citation No. 3912803 is **AFFIRMED.**

Docket No. WEST 93-109-M

Citation No. 3913804

This citation alleges a violation of 30 C.F.R. § 56.12028. The regulation provides:

> **§ 56.12028 Testing grounding systems.**
>
> Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative.

Inspector Brooks issued this citation when he learned from Lee Allen that the electrical system had not been tested since September 1990 [the citation was issued on August 31, 1992]. This was the last record Inspector Brooks saw. (Tr. 166). Testing must be done annually. (Tr. 167).

The hazards involve electrical shock. Most plants are 480 volts A.C. Inspections are required annually due to the harsh environment of mining.

Inspector Brooks considered that an injury was unlikely. However, if a fault occurred, an accident could possibly be fatal.

An issue arose in connection with this citation as to whether another MSHA inspector indicated the electrical system had been tested in January 1992. (Tr. 178-182).

The above evidence is not persuasive since the regulation requires that a record of testing shall be made available to the Secretary or his representative.

Under the conditions noted in the regulation and annually an operator in the regular course of business should test the grounding systems. Failure to do such testing and failure to present evidence of such testing indicates the operator was moderately negligent.

Inspector Brooks considered that what he saw from the previous records and in view of the condition of the mine, he believed it unlikely that an accident could occur. (Tr. 168-169). However, if a fault did occur, the result could be a fatality. In view of the ultimate possibilities, I consider the gravity to be "high."

On the credible evidence, Citation No. 3913804 is **AFFIRMED.**

Docket No. WEST 93-108-M

Citation No. 3913805

This citation alleges an S&S violation of 30 C.F.R. § 56.12035. The regulation provides:

> **§ 56.12035 Weatherproof lamp sockets.**
>
> Lamp sockets shall be of a weatherproof type where they are exposed to weather or wet conditions that may interfere with illumination or create a shock hazard.

Inspector Brooks observed that a 110-volt A.C. light did not have a weatherproof type lamp socket and it was exposed to the outside weather conditions. (Tr. 183). The light in the vicinity of the head pulley 2300 conveyor was used on the night shift to illuminate the hopper area.

The light was not permanently fixed and an electrical shock was a reasonably likely hazard. A fatality could occur. Morning fog frequently occurs in this area. The operator should have known of the condition but no mitigating circumstances were presented.

This condition was open and obvious. Accordingly, the operator's negligence should be considered "moderate." There

were no mitigating circumstances presented to reduce the negligence to "low."

Since an electrocution could occur, gravity should be considered "high," although MSHA does not contend the light was not grounded.

Discussion

Port Costa contends the cited area was not an outdoor facility but was under a roof. (Tr. 759; Ex. R-4). As a result, a waterproof light fixture was not necessary.

I disagree. Morning fog often occurs in this area and weatherproof sockets are required where there is exposure to weather or wet conditions.

Citation No. 3913805 is **AFFIRMED.**

Docket No. 93-108-M

Citation No. 3913806

This citation alleges an S&S violation of 30 C.F.R. § 56.14107(a) (Moving machine parts, supra).

In the Prep Plant, Inspector Brooks observed that the head pulley and the keyed shaft equipped on the No. 3110 conveyor were not guarded. (Tr. 194). The unguarded part of the head pulley was located on the north side of the conveyor. The hazards were 68 to 78 inches above the walkway level. A walkway provided access to the hazards.

The hazards were moving machine parts. An accident could occur if employees reached into the hazard areas and were pulled into the conveyor. Mr. Brooks believed that a permanently disabling injury could occur. The company should have known of this condition and no mitigating circumstances were presented.

Inspector Brooks considered this to be an S&S violation because a permanently disabling injury was reasonably likely to happen to an employee. (Tr. 196-202).

The head pulley and key shaft were in plain view. In the absence of mitigating circumstances, I concur with the Inspector's opinion that the operator's negligence was moderate. No mitigating circumstances were involved. Exposure to moving machine parts involves high gravity.

On the credible evidence, Citation No. 3913806 is **AFFIRMED.**

Docket No. WEST 93-108-M

Citation No. 3913807

This citation alleges an S&S violation of 30 C.F.R. § 56.14107(a) (Moving machine parts, supra).

In the Prep Plant, the bottom side of the tail pulley on the No. 3315 conveyor was not properly guarded. This exposed a pinch area measured to be 6 feet 7 inches (79 inches) above the catwalk. The hazard of the pinch point area is where the conveyor meets the tail pulley. The hazard could be contacted as it was immediately adjacent to the walkway. (Tr. 205).

In Inspector Brooks' opinion, an injury was reasonably likely because of employee exposure to the pinch areas. In addition, such an injury could be permanently disabling and could involve an amputation.

This was an S&S violation because of the exposure. Employees travel through the area on a regular basis and there is access to the hazard.

The tail pulley was in plain view and the operator's negligence is considered "moderate." Exposure to moving machine parts involves high gravity due to the potential for severe injury.

On the credible evidence, Citation No. 3913807 is **AFFIRMED.**

Docket No. WEST 93-108-M

Citation No. 3913808

This citation alleges an S&S violation of 30 C.F.R. § 56.14107(a) (Moving machine parts, supra).

Inspector Brooks observed the head and drive pulleys on the #3260 Conveyor were not properly guarded. There was a 26- and 12-inch horizontal measurement from the north and south side on the walkway to the pinch hazard area.

There was a guard on the north side, but it should have been extended since the pinch area remained exposed. There was no guard on the south side of the pulley. Workers had access to the north and south sides of the pulley. The distance from the walkway to the unguarded drive pulley was 36 inches.

The head pulley was about 65 inches above the ground; the height of the head pulley on the south side would be basically the same.

Inspector Brooks would expect permanently disabling injuries such as amputations to occur. Because of the access and exposure, such an accident was reasonably likely and an employee could be permanently disabled. The criterion is that an accident was reasonably likely. Further, it would involve lost work days or restricted duty.

The operator's negligence is "moderate." The unguarded condition was obvious. Exposure to moving machine parts involves high gravity due to the potential for severe injury.

On the credible evidence, Citation No. 3913808 is **AFFIRMED.**

Docket No. WEST 93-108-M

Citation No. 3913809

This citation alleges an S&S violation of 30 C.F.R. § 56.14107(a) (Moving machine parts, supra).

Inspector Brooks issued this citation when he observed the No. 3245 conveyor in the Prep Plant was not properly guarded. The bottom side of the tail pulley was exposed and the pinch area was 32 inches above the walkway level. Employees use this area on a regular basis for observation, maintenance, and clean-up.

Due to the exposure of workers, Mr. Brooks considered that an injury was reasonably likely and such an injury could be permanently disabling.

This condition was open and obvious. The operator's negligence should be considered "moderate."

On the credible evidence, Citation No. 3913809 is **AFFIRMED.**

Docket No. WEST 93-108-M

Citation No. 3913810

This citation alleges an S&S violation of 30 C.F.R. § 56.14112(b). The regulation provides:

> **§ 56.14112 Construction and maintenance of guards.**
>
> (a) Guards shall be constructed and maintained to--
>
> (1) Withstand the vibration, shock, and wear to which they will be subjected during normal operations; and

(2) Not create a hazard by their use.

(b) Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard.

In the Prep Plant Inspector Brooks observed that a door acting as a guard had been removed. The guard appeared to be a hopper over a screw conveyor with a door to open for observation.

The absence of the door exposed a rotating screw which was 17 inches behind the missing door and 24 inches above the walkway level. (Tr. 261). A worker's hand could enter the two-foot opening and his hand could be mangled or amputated. An employee did not know why the door had been removed but it had been off "over the weekend." (Tr. 264). The door could serve as a guard but it was not in place.

Based on his experience, Mr. Brooks considered the violation "S&S." He observed employees in the area. He further believed an injury was reasonably likely and such an injury could be permanently disabling.

The operator's negligence is moderate. A maintenance program could have corrected the violative condition.

Gravity could be considered "high" since a rotating screw could cause disabling injuries.

On the credible evidence, Citation No. 3913810 is **AFFIRMED**.

Docket No. WEST 93-109-M

Citation No. 3913811

This citation alleges an S&S violation of 30 C.F.R. § 56.11012. The regulation provides:

§ 56.11012 Protection for openings around travelways.

Openings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.

In the Prep Plant area the No. 3470 conveyor moves on its track. For 110 feet there is a 10-inch-wide opening between the rails. There is minimal lighting in the area. The openings are 10- to 15-feet deep. Lee Allen stated there were workers in the area on a regular basis. (Tr. 275).

Mr. Brooks opined that an injury was reasonably likely and lost workdays or restricted duty could result.

The operator's negligence was moderate. This condition was open and obvious for 110 feet.

Gravity should be considered "moderate" since lost workdays or restricted duty could result.

On the credible evidence, Citation No. 3913811 is **AFFIRMED.**

Docket No. WEST 93-109-M

Citation No. 3913812

This citation alleges an S&S violation of 30 C.F.R. § 56.14107(a) (Moving machine parts, supra).

In the Prep Plant the head pulley and drive pulley on the pellet silo No. 1 feeder were not guarded properly. The head pulley did not extend back far enough to cover the pinch areas. On the drive pulley, the back side was not guarded; it was 44 inches from the drive-pulley walkway to the pinch points. The pulleys were 64 inches above the walkway. Workers using the area were exposed on a regular basis. (Tr. 288-290).

Mr. Brooks indicated an injury was reasonably likely. He believed any accident would be serious. Accordingly, he concluded the violation was "S&S."

The operator's negligence was moderate. It should have known the existing guards were insufficient.

Exposure to moving machine parts involves a situation of high gravity. Such parts have the potential to cause a permanently disabling injury.

On the credible evidence, Citation No. 3913812 is **AFFIRMED.**

Docket No. WEST 93-109-M

Citation No. 3913813

This citation alleges an S&S violation of 30 C.F.R. § 56.14107(a) (Moving machine parts, supra).

In the Prep Plant the head pulley and drive pulley on the pellet silo No. 2 feeder No. 3735 was not guarded properly. The guards on the head pulley did not extend back far enough on the north and south sides to cover the pinch areas. The guard on the drive pulleys did not cover the pinch points. It was 45 inches to the bottom side and 64 inches to the top of the pinch points.

The conditions on No. 3735 and No. 3725 were comparable. Guards were within one to two inches of covering the pinch points. The configuration was the same on both sides. It was 36 inches from the walking level to the pinch points. On the south side there was a 19-inch reach to the hazard; the distance on the north side was 15 inches. (Tr. 304-307).

Inspector Brooks considered the violation to be S&S. If the condition was not corrected it was reasonably likely that an accident could occur. Amputation could result if an accident occurred. Workers use this area to go from one side to the other. There are 42 workers at the plant.

The operator's negligence is moderate as the inadequate guards were obvious. Gravity is "high" since entanglement in moving machine parts can cause disabling injuries or an amputation.

On the credible evidence, Citation No. 3913813 is **AFFIRMED.**

Docket No. WEST 93-109-M

Citation No. 3913814

This citation alleges an S&S violation of 30 C.F.R. § 56.12030. The regulation provides:

> **§ 56.12030 Correction of dangerous conditions.**
>
> When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.

Inspector Brooks observed several exposed energized conductors at pellet silos No. 1 and No. 2. (The wires were not terminated at the ends or the power was not off to eliminate the voltage hazard.) One such exposed conductor was four to five feet off the ground. Mr. Brooks determined the power with a voltmeter; it was 110 volts. Electrocution is possible with an exposed energized conductor especially if moisture, fog, or rain are present. (Tr. 322-323).

Based on the facts he found, Mr. Brooks concluded an injury was reasonably likely. Further, based on his experience, such an injury could be fatal.

The operator's negligence was moderate. This condition could have been discovered. Gravity was high since a fatality by electrocution could occur.

On the credible evidence, Citation No. 3913814 is **AFFIRMED.**

Docket No. WEST 93-109-M

Citation No. 3913815

This citation alleges an S&S violation of 30 C.F.R. § 56.14112(b). The regulation provides:

> **§ 56.14112 Construction and maintenance of guards.**
>
> (b) Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard.

In the Prep Plant Inspector Brooks observed that the head pulley on conveyor No. 3695 was not properly guarded. (Tr. 333). There was a guard within inches of the head pulley but it did not cover the pinch points. The distance from the ground to the pinch points measured 48 inches. The pinch points were adjacent to the walkway and not recessed. At the west side there had been a guard. Part of a guard was found on the walkway; it was replaced in five minutes. Mr. Brooks was told that workers come into this area once a shift. (Tr. 337).

Mr. Brooks considered an injury was reasonably likely and employees could become entangled and suffer severe injuries.

The operator's negligence was moderate as the unguarded condition was open and obvious. Gravity was high since exposure to unguarded equipment can result in severe and disabling injuries.

On the credible evidence, Citation No. 3913815 is **AFFIRMED.**

Docket No. WEST 93-109-M

Citation No. 3913816

This citation alleges an S&S violation of 30 C.F.R. § 56.9200(d). The citation was issued as an imminent danger order under Section 107(a) and as a Section 104(a) violation.

The regulation provides:

> **§ 56.9200 Transporting persons.**
>
> (d) Outside cabs, equipment operators' stations, and beds of mobile equipment, except when necessary for maintenance, testing, or training purposes, and provisions are made for secure travel. This provision does not apply to rail equipment.

Inspector Brooks observed a front-end loader trainee riding on the outside of the cab of a 966 E front-end loader in the quarry area. He was on the level where you enter the cab. (Tr. 344).

James Shellhorn, driving the loader, was instructing the trainee (Ramon Deltaro) in its operation. Production Manager Lee Allen was upset over the situation and the trainee stated he knew no one should ride on the outside of the cab. The trainee was not wearing a harness but was riding the loader for a short period of time in a large flat area of the quarry. The imminent danger order was terminated in five minutes.

In Mr. Brooks' opinion, it was highly likely the trainee could be killed by being thrown eight to ten feet to the ground.

The operator's negligence should be considered "high". The trainee knew he was not supposed to ride on the outside of the cab. The cab operator himself should have known of such a prohibition. Gravity should be considered "high" since a fatality could occur under those circumstances.

Discussion

Port Costa states its manual specifically prohibits such action of its employees. This argument was previously discussed and it is again rejected.

The operator further argues that Section 107(a) defines an imminent danger as a "condition or danger that cannot be immediately stopped or arrested." Therefore, since Inspector Brooks ordered the employee to stop riding on the vehicle the classification of this as an "imminent danger" was improper.

I disagree. Port Costa has misread the Mine Act. Section 3(j), 30 U.S.C. § 802(j), of the Act states:

> (j) "Imminent danger" means the existence of any condition or practice in a coal or other mine which could reasonably be expected

to cause death or serious physical harm before such condition or practice can be abated:

On the credible evidence, Citation No. 3913816 is **AFFIRMED.**

Docket No. WEST 93-109-M

Citation No. 3913817

This citation alleges an S&S violation of 30 C.F.R. § 56.14107(a) (moving machine parts, supra).

Inspector Brooks observed that the Bull Gear and the Pinion Gear on the rotary kiln were not guarded as required. (Tr. 357).

The cylindrical kiln which rotates was 100 feet long and several feet in diameter. Mr. Brooks did not know the rotating speed of the kiln. The hazard was the exposure to the Bull and Pinion gears which meet 36 inches above the walkway. Persons could be pulled into the hazard by the gears. A walkway with a railing was adjacent to the Bull Gear.

Since the machine is serviced every two days, it is likely that an accident could occur. However, the area was roped off. (Tr. 360).

The operator's negligence was "moderate" since the unguarded gears should have been observed and corrected. Gravity is high since entanglement with moving machine parts can cause disabling injuries or an amputation. (Tr. 368).

On the credible evidence, Citation No. 3913817 is **AFFIRMED.**

Docket No. WEST 93-109-M

Citation No. 3913818

This citation alleges an S&S violation of 30 C.F.R. § 56.14112(b). The regulation provides:

> **§ 56.14112 Construction and maintenance of guards.**
>
> (b) Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard.

In the Kiln Deck area, Inspector Brooks observed that the guard for the DC drive output shaft was lying on the walkway. The shaft is located at the Kiln Bull gear area. Maintenance is required around this area every two days.

The unguarded portion of each shaft measured 24 inches; the shaft was 30 inches immediately above the walkway. (Tr. 365, 366; Ex. P-2).

The Inspector believed an accident was reasonably likely and it could be a serious injury.

The operator's negligence was "moderate" since the unguarded gears could have been observed and corrected. Gravity was high since entanglement with an unguarded shaft could cause serious injuries.

Port Costa's Witness Lee Allen indicated the DC Drive output was 10 or 12 feet north of the bull gear for the rotary kiln. The guard was lying next to the shaft. This was the guard for the regular drive motor.

On the uncontroverted evidence, Citation No. 3913818 is **AFFIRMED.**

Docket No. WEST 93-109-M

Citation No. 3913819

This citation alleges an S&S violation of 30 C.F.R. § 56.11002. The regulation provides:

> **§ 56.11002 Handrails and toeboards.**
>
> Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

In the Load Out area, no hand railings were provided behind the No. 5385 tail pulley; about 39 inches of railing was missing. The walkway is about 80 feet from the ground level. (Tr. 374).

The Inspector believed an accident was unlikely because this was an isolated area. However, if a fall occurred, it could be fatal. (Tr. 376).

The operator's negligence was "moderate" since this condition could have been seen and corrected. Gravity is "high" since a worker could fall 80 feet.

The company witness Lee Allen, testifying for the company, indicated that at this point the tail section of the No. 5385 conveyor and the tail pulley come up through the walkway. A person could not go over the edge. Where the conveyor protruded up to the walkway deck level there was no handrail. The citation was terminated when the operator installed a handrail. (Tr. 795). This is not a very traveled area. (Tr. 796).

Discussion

The inspector opined that an accident was unlikely. In view of this fact, the S&S allegations are **STRICKEN.**

Mr. Allen's testimony fails to establish a defense. Even though a portion of the conveyor and the tail pulley come up through the walkway "railing," apparently this did not exist at all times.

On the credible evidence, Citation No. 3913819 is **AFFIRMED.**

Docket No. WEST 93-109-M

Citation No. 3913820

This citation alleges an S&S violation of 30 C.F.R. § 56.14201(b). The regulation provides:

> **'§ 56.14201 Conveyor start-up warnings.**
>
> (b) When the entire length of the conveyor is not visible from the starting switch, a system which provides visible or audible warning shall be installed and operated to warn persons that the conveyor will be started. Within 30 seconds after the warning is given, the conveyor shall be started or a second warning shall be given.

Inspector Brooks found that the startup alarm for the No. 5575 conveyor was not functioning as required. The conveyor started without sounding an alarm. The operator said the alarm was not operating. It was, in fact, inoperable. (Tr. 379).

Inspector Brooks opined that, because of the confined space, an accident was unlikely. (Tr. 381). However, workers could fall into the conveyor and an amputation could occur. When the alarm was installed, it could not be heard the length of the conveyor.

The operator's negligence was "moderate"; the company could have seen and remedied this condition. Gravity is "high" because a fatality could result.

Discussion

Port Costa argues that its daily inspection report requires an examination of the start-up alarm. (Brief at 9). Since it was not mentioned in the report nor known to the company representative Port Costa could not have been aware of the violation. This argument was raised in connection with Citation No. 3913802, supra, and it is again **REJECTED**. In short, the Mine Act imposes strict liability.

Inspector Brooks testified that an accident was unlikely. This testimony fails to support the S&S allegations and that portion of the Citation is **STRICKEN**.

Citation No. 3913820, as modified, is **AFFIRMED**.

Docket No. WEST 93-109-M

Citation No. 3913821

This citation alleges an S&S violation of 30 C.F.R. § 56.12025. The regulation provides:

> **§ 56.12025 Grounding circuit enclosures.**
>
> All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.

Inspector Brooks found that the 440-volt A.C. drive motor on the No. 5810 conveyor was not properly grounded. (Tr. 385). The motor was a three-phase 7.5 H.P., 440 VAC. The cable size was a three-conductor, size 12. Mr. Brooks did not test the equipment but he indicated there was no ground conductor.

The Inspector believed an accident was unlikely but an injury could be fatal if there was a fault.

Port Costa should be considered "moderately negligent" as it should have known of the violative condition. Gravity should be considered "high" since an electrocution could occur.

Discussion

Port Costa argues (Brief at 8, 9) that the Inspector did not test or examine the motor to determine if it was grounded. (Tr. 798).

I agree. Mr. Brooks did not test the motor but he visually ascertained it was not grounded. He stated, "There was no ground

conductor equipped at the motor. It was using a size 12-3 cable with no ground conductor and no conduit." (Tr. 385).

The operator was negligent; the condition could have been discovered and remedied. The gravity should be considered "high" since there was potential for a fatality.

Under the circumstances here, Inspector Brooks believed an accident was "unlikely." In view of such evidence the S&S designation is **STRICKEN**.

The Citation, as modified, is **AFFIRMED**.

Docket No. WEST 93-109-M

Citation No. 3913822

This citation alleges an S&S violation of 30 C.F.R. § 56.12041. The regulation provides:

> **§ 56.12041 Design of switches and starting boxes.**
>
> Switches and starting boxes shall be of safe design and capacity.

Inspector Brooks found the disconnect breaker for the container filler conveyor was not functioning. The handle/switch was broken off. The voltage inside the box was 440. The conveyor was not operating since the disconnect switch had disconnected the power. The breaker itself was broken. (Tr. 389, 390).

An accident was reasonably likely to occur and a fatality could result. If a person put a lock on the outside of the box, no one would know the handle was broken.

The operator's negligence should be considered "moderate" since it should have known the breaker switch was broken. Gravity should be considered "high" since a fatality could occur. (Tr. 392).

Company Representative Allen testified the conveyor did not have a number. (Tr. 799).

The switch was broken off inside the box. It was not reported to management.

Exhibit R-5 was identified as Port Costa's lockout procedures.

On the uncontroverted evidence Citation No. 3913822 is **AFFIRMED**.

Docket No. WEST 93-109-M

Citation No. 3913823

This citation alleges an S&S violation of 30 C.F.R. § 56.12030. The regulation provides:

> **§ 56.12030 Correction of dangerous conditions.**
>
> When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.

Inspector Brooks observed several exposed bare wires in the 110-volt A.C. circuit located in the air compressor room. (Tr. 398). The conductors were exposed because the door was off the electrical box. Workers had access to the air compressor room; electrical shock was the hazard.

Mr. Allen didn't remember if the exposed wires were energized nor did he recall if Mr. Brooks had tested them for power. (Tr. 802, 803).

The operator's negligence is "moderate" notwithstanding the fact that the violative condition was in an isolated area. The condition could have been discovered. The gravity is "high" since a fatality could occur.

The Inspector believed an accident was unlikely. In view of this conclusion and the lack of persuasive evidence, the S&S allegations are **STRICKEN.**

Citation No. 3913823, as modified, is **AFFIRMED.**

Docket No. WEST 93-109-M

Citation No. 3913824

This citation alleges an S&S violation of 30 C.F.R. § 56.14107(a) (Moving machine parts, supra).

According to Inspector Brooks the tail pulley of the No. 5537 silo feeder conveyor was not properly guarded. This was in the Load Out Area. The pinch point area was located about six feet above ground level in a travel area. Workers could be exposed to an unguarded tail pulley. (Tr. 404).

The Inspector believed an entanglement was likely if an accident occurred. In sum, if the condition was not corrected a disabling accident could result.

The operator's negligence should be considered "moderate" since the violative condition was apparent. Gravity should be considered "high" since a disabling injury could occur.

On the uncontroverted evidence this citation is **AFFIRMED.**

Docket No. WEST 93-109-M

Citation No. 3913825

This citation alleges an S&S violation of 30 C.F.R. § 56.14107(a) (Moving machine parts, supra).

In the Load Out Area Inspector Brooks issued a citation because a tail pulley on the No. 5542 silo feeder conveyor was not properly guarded. The bottom side of the tail pulley exposed pinch points where the conveyor and tail pulley met about six feet above the ground. (Tr. 409).

This conveyor was adjacent to the conveyor mentioned in Citation No. 3913824. A worker could contact the pinch points by placing a hand into the hazard area. If this occurred, a mangled hand or an amputation could result.

Mr. Brooks believed an injury was reasonably likely and, as noted, the injury could be permanently disabling.

The operator's negligence should be considered "moderate" since the violative condition was apparent. Gravity is "high" due to the potential for severe injury.

Mr. Allen indicated the company was cited for the same basic condition as involved in the previous citation. (Tr. 806).

In order to terminate the citation, a piece of expanded metal was put underneath the tail pulley section.

On the uncontroverted evidence, Citation No. 3913825 is **AFFIRMED.**

Docket No. WEST 93-109-M

Citation No. 3913826

This citation alleges an S&S violation of 30 C.F.R. § 56.14107(a) (Moving machine parts, supra).

In the Load Out Area the head pulley and the tail pulley on the No. 5410 feeder conveyor were not properly guarded. The head pulley, two feet above the walkway, was not properly guarded on both sides. (Tr. 414). There were exposed pinch points. The

tail pulley had a guard but there was no guard on the bottom. The exposed pinch points were measured at a height of 58 inches above the floor. Workers in the vicinity have access to the hazard. An accident could result in an amputation.

Mr. Brooks opined that if the condition were not corrected, an injury was reasonably likely. Further, the resulting injury would be permanently disabling.

The operator's negligence should be considered "moderate" as the violative condition was apparent. Gravity was "high" since a permanently disabling injury could occur.

Mr. Allen testified for Port Costa that this condition was terminated by putting expanded metal on the sides of the head pulley and the bottom of the tail pulley. (Tr. 807, 808). This area is inspected by a worker in the swing and graveyard shifts. (Tr. 808, 809).

On the uncontroverted evidence, this citation is **AFFIRMED**.

Docket No. WEST 93-109-M

Citation No. 3913827

This citation alleges an S&S violation of 30 C.F.R. § 56.14112. The regulation provides:

> **§ 56.14112 Construction and maintenance of guards.**
>
> (b) Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard.

Inspector Brooks testified the head pulley and the tail pulley of the No. 5410 feeder conveyor were not properly guarded. Pinch areas were exposed 58 inches above the spillage pile. (Tr. 414).

In Mr. Brooks' opinion, an injury was reasonably likely if the hazard were not corrected. Workers could become entangled by placing their hands in the chain and sprocket.

The operator's negligence was "moderate" since the violative condition was apparent. Gravity was "high" since workers could become entangled.

Mr. Allen testified this conveyor was not in operation at the time of the inspection.

The old guard had been damaged and a new one was being fabricated. (Tr. 809, 810). Mr. Allen believed the old guard was inadequate from the start. (Tr. 810).

Discussion

Mr. Allen's testimony is uncontroverted that a new guard was being fabricated. This constitutes "making adjustments" within the meaning of the regulation.

On the credible evidence, this citation is **VACATED**.

Docket No. WEST 93-109-M

Citation No. 3913828

This citation alleges an S&S violation of 30 C.F.R. § 56.12032. The regulation provides:

> **§ 56.12032 Inspection and cover plates.**
>
> Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

Inspector Brooks issued this citation when he saw there was no junction box for the winch motor at the No. 5900 stacker boom. (The function of a junction box is to furnish access, to exclude dust and moisture, and to insure conductivity.)

Mr. Brooks considered that severe burns or electrocution could occur. However, he did not consider that an accident would be likely. (Tr. 428, 429).

The operator's negligence was "moderate" since the missing junction box was obvious. The gravity was "high" since, if an accident occurred, a fatality could result.

Discussion

Mr. Brooks testified he did not believe an accident was likely. His testimony and the total evidence fails to confirm the S&S designation and such allegations are stricken.

Citation No. 3913828, as modified, is **AFFIRMED**.

Docket No. WEST 93-110-M

Citation No. 3913829

This citation alleges a violation of 30 C.F.R. § 56.12032. The regulation provides:

> **§ 56.12032 Inspection and cover plates.**
>
> Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

In the Load Out Area Inspector Brooks observed that three electrical junction boxes containing energized conductors lacked covers. The boxes were located in an isolated area; the workers did not enter this area on a regular basis. (Tr. 434, 435).

The operator was negligent since the missing covers should have been readily apparent. The gravity was "high" since a fatality could occur.

Witness Allen indicated the area cited was on the same piece of equipment cited in the previous citation. (Tr. 813).

On the uncontroverted evidence, Citation No. 3913829 is **AFFIRMED.**

Docket No. WEST 93-485-M

Citation No. 3913830

This citation alleges an S&S violation of 30 C.F.R. § 56.11001. The regulation provides:

> **§ 56.11001 Safe access.**
>
> Safe means of access shall be provided and maintained to all working places.

Inspector Brooks issued this citation upon observing that there were no handrails or walkways leading from the No. 5800 to the No. 5900 stacker boom area. A worker would enter this area to start the conveyor or rotate the shaker. The elevated area contained openings and tripping hazards. Access usually was gained by climbing over openings of the No. 5900 stacker boom. Due to the hazard, a worker could fall 25 to 30 feet to the ground. (Tr. 439, 443).

Willie Davis, an MSHA supervisor, accompanied Inspector Brooks into the No. 5900 stacker boom area. He would not cross

the open area at the end of the walkway. (Tr. 492-493). He further agreed with the Inspector's evaluation. (Tr. 499).

Inspector Brooks testified an accident was reasonably likely. Lost workdays or restricted duty could be the result. (Tr. 442, 443).

The operator's negligence was "moderate" since the violative condition was apparent. Gravity was "high" since a fall of 25 to 30 feet could result in a disabling injury.

On the uncontroverted evidence Citation No. 3913830 is **AFFIRMED.**

Docket No. WEST 93-435-M

Citation No. 3913831

This citation alleges an S&S violation of 30 C.F.R. § 56.11002. The regulation provides:

> **§ 56.11002 Handrails and toeboards.**
>
> Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

Inspector Brooks observed there were no handrails provided on the elevated walkway of the No. 5800 conveyor. Also, there were no handrails on the south outbound side of the walkway for about 150 feet in length. The outbound side was 20 feet above the ground. Employees use this area on a regular basis. (Tr. 448).

In Mr. Brooks' opinion, an injury was reasonably likely if the violative condition were permitted to continue.

The operator's negligence was "moderate" since the violative condition was apparent and could have been corrected. Gravity was "high"; if a worker fell 20 feet, he could easily sustain fractures or more severe injuries.

Mr. Allen indicated the No. 5800 conveyor was located in the Loadout area.

This condition existed since 1973 and no other inspector has cited it.

Because of the machine itself, it took some engineering to abate the citation. Fold down/up handrails were installed. Inspector Brooks terminated the citation with such insulation.

In January 1993, another inspector concluded the fold down/up handrails were a hazard themselves. (Ex. R-6 to R-10, Tr. 831-842).

Discussion

The defense here raises estoppel issues against MSHA. However, estoppel does not lie in these circumstances.

Citation No. 3913831 is **AFFIRMED.**

Docket No. WEST 93-110-M

Citation No. 3913832

This citation alleges an S&S violation of 30 C.F.R. § 56.14112. The regulation provides:

> **§ 56.14112 Construction and maintenance of guards.**
>
> (b) Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard.

In the Load Out Area, Inspector Brooks observed the drive belts and pulleys at the No. 5390 head pulley conveyor were not properly guarded. (Tr. 457). The guard was lying on the walkway. The unguarded belt was 44 inches above the walkway. Pinch points created by the belts and pulleys presented a hazard. Workers could contact the area and an amputation was likely. (Tr. 458).

Mr. Brooks expressed the view that an accident was reasonably likely to occur if the condition were not corrected. Further, such an injury could result in an amputation.

The operator was negligent since it could have observed and remedied this condition. Gravity was "high" in view of the potential for severe injuries resulting from an entanglement.

Mr. Allen was not present when this citation was issued. He knows nothing about the condition. (Tr. 814).

On the uncontroverted evidence, Citation No. 3913832 is **AFFIRMED.**

Docket No. WEST 93-110-M

Citation No. 3913833

This citation alleges an S&S violation of 30 C.F.R. § 56.11099. The regulation provides:

> **§ 56.11009 Walkways along conveyors.**
>
> Walkways with outboard railings shall be provided wherever persons are required to walk alongside elevated conveyor belts. Inclined railed walkways shall be nonskid or provided with cleats.

Inspector Brooks testified the inclined wooden walkway along the No. 5390 conveyor had several missing cleats. The walkway was 80 to 100 feet long and at an angle of 25 to 30 degrees. About 15 feet lacked cleats which should have been 16 to 18 inches apart. The walkway was on the top of a silo of the highest places in the plant. It was 80 to 100 feet above ground level. The hazard was a possible trip and fall. (Tr. 463).

In Mr. Brooks' opinion, an accident was reasonably likely. A resulting injury could be a bruised knee, sprain, or bruises.

The operator was moderately negligent. The violative condition could have been observed and remedied. The gravity was "high" in view of the possibility of a severe fall.

Mr. Allen indicated the walkway is used only rarely. A more convenient way was available to go to the lightweight silos. The walkway was not dangerous.

Discussion

I reject Mr. Allen's testimony that this walkway was not dangerous. A worker could fall 80 to 100 feet to the ground. This was an S&S violation.

On the credible evidence, Citation No. 3913833 is **AFFIRMED**.

Docket No. 93-110-M

Citation No. 3913834

This citation alleges an S&S violation of 30 C.F.R. § 56.14107(a) (Moving machine parts, supra).

Inspector Brooks testified the drive pulleys at the No. 5520 Symon Screen were not properly guarded. The screen was used at

the top of the silo to size products coming onto the conveyor. The back side of the pulleys, two feet from the walkway, were not guarded. Workers were in the immediate area and fingers and hands could be caught in the pinch points. (Tr. 469, 470).

Inspector Brooks indicated it was reasonably likely that an injury would occur if the condition were not corrected. Such an accident could reasonably be permanently disabling.

The operator was moderately negligent; it could have observed and remedied these conditions. Gravity was "high" since fingers and hands could be caught in the pinch points.

Mr. Allen indicated he was not present when the citation was issued. (Tr. 814).

Based on the uncontroverted evidence, Citation No. 3913834 is **AFFIRMED.**

Docket No. WEST 93-110-M

Citation No. 3913835

This citation alleges an S&S violation of 30 C.F.R. § 56.14107(a) (Moving machine parts, supra).

In the Loadout Area Inspector Brooks cited the self-cleaning tail pulley on the No. 5521 conveyor. The tail pulley, 30 inches above the spillage level, was not properly guarded. On the sides of the pulley there was some guarding but some of it contained openings large enough to put a fist through.

Mr. Brooks' notes indicate there were holes but the notes do not reflect their size. He would not write a citation if there had only been grease holes. Employees travel by the area on a regular basis to service the equipment. (Tr. 474).

Inspector Brooks testified an accident was reasonably likely in these circumstances. If it occurred, the equipment could mangle a hand or an arm.

The operator was moderately negligent; it could have observed and remedied this condition. Gravity was "high" since a hand or an arm could become entangled in the moving machine parts. There was also the potential of tripping and falling to the ground.

Mr. Allen testified he was not present when this citation was issued. (Tr. 818).

Based on the uncontroverted evidence, Citation No. 3913835 is **AFFIRMED.**

Docket No. WEST 93-110-M

Citation No. 3913836

This citation alleges an S&S violation of 30 C.F.R. § 56.20003. The regulation provides:

> **§ 56.20003 Housekeeping.**
>
> At all mining operations--
>
> (a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly.

Inspector Brooks observed that there were several work places on the 100-foot by 30-foot tops of the LWA (lightweight aggregates). The silo work places were not being kept clean and orderly. (Tr. 577).

The No. 5510 screen deck had several six-foot by six-foot pieces of screen lying on the walkway creating a hazard. In some areas, spillage had accumulated within 20 inches of the tops of the handrails. Two or three silos and maybe six or eight were involved. The hazards also involved spillage and unsafe access since pieces of screen presented a tripping hazard. It was 80 feet to ground level. (The silos can be seen in approximately the center of Exhibit R-1.)

In Mr. Brooks' opinion, an injury was reasonably likely if the condition continued unabated. If workers fell, they could spain ankles and wrists as well as break bones. A fatality could happen if a worker fell 80 feet to the ground.

The operator was moderately negligent; the violative condition was obvious. Gravity was high due to the potential of an 80-foot fall.

Mr. Allen was not present when this citation was issued. (Tr. 818).

On the uncontroverted evidence, Citation No. 3913836 is **AFFIRMED.**

Docket No. WEST 93-110-M

Citation No. 3913837

This citation alleges an S&S violation of 30 C.F.R. § 56.12032. The regulation provides:

§ 56.12032 Inspection and cover plates.

> Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

Inspector Brooks issued this citation when he observed a junction box with several exposed energized conductors. The 8-by 12-inch opening lacked a cover. It was located at the top of No. 2 silo, alongside the No. 5521 conveyor. The Inspector was not able to determine if workers were in the area. The hazard involved the exposed internal conductors. Most of the plant had 440 volts A.C. but the Inspector did not know the voltage of the exposed conductors. (Tr. 599).

The Inspector considered an accident to be unlikely because the junction box was situated at below the working level at the top of No. 2 silo. However, if an accident occurred, a worker could sustain burns or electrocution. (Tr. 602).

The operator was moderately negligent since the company could have observed and remedied this condition. Gravity was "high." Although an accident was not likely, if it did occur, it could cause a fatality.

Mr. Allen testified he was not present when this citation was issued. (Tr. 819, 820).

Discussion

Since there is no evidence that an accident was reasonably likely, the S&S allegations are **STRICKEN**.

On the credible evidence, Citation No. 3913837 is otherwise **AFFIRMED**.

Docket No. WEST 93-110-M

Citation No. 3913838

This citation alleges an S&S violation of 30 C.F.R. § 56.14107(a) (Moving machine parts, supra).

Inspector Brooks issued this citation when he observed the self-cleaning tail pulley on the No. 5575 conveyor was not guarded as required by regulation.

Employees work around the pulleys on a regular basis and they were exposed to the rotating fins of the pulley. There was a 12-inch horizontal reach to the hazard and a 28-inch reach from

the back side. The hazards were below the seven-foot limit. (Tr. 605, 606).

Workers could sustain cuts or be mangled if entangled with the metal flutes on the stationary part of the pulley. Workers clean the tail pulley once each shift, according to Foreman Jasso.

Inspector Brooks indicated an accident was reasonably likely if the condition were not corrected in a timely manner. Such an accident would result in a permanent injury.

The operator was moderately negligent. It should have observed and corrected the violative condition. Gravity was "high" since there was a potential for entanglement and a severe injury.

Mr. Allen did not offer any contrary evidence on behalf of the operator. (Tr. 820).

On the uncontroverted evidence, Citation no. 3913838 is **AFFIRMED.**

Docket No. WEST 93-110-M

Citation No. 3913839

This citation alleges an S&S violation of 30 C.F.R. § 56.9300(a). The regulation provides:

> **§ 56.9300(a) Berms or guardrails.**
>
> (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.

Inspector Brooks observed the "main haul road" located on the south side of the plant lacked berms as required. The roadway is 20 feet wide and curves slightly. (Tr. 615). Alongside the roadway was a 20-foot dropoff at an angle of about 90 degrees for a distance of 150 feet. The roadway is at a five degree angle. Commercial trucks and a 966 front-end loader use the road. The "main haul road" was a company designation. [Inspector Brooks marked the road on Exhibit R-1.]

The hazard involved here was the possibility of a vehicle overturning. If this occurred, head injuries and a possible fatality could occur.

Inspector Brooks further concluded that an accident was reasonably likely if the condition were not corrected.

The operator was moderately negligent; the violative condition could have been corrected.

The gravity is "high" since head injuries and/or a possible fatality could occur.

On the uncontroverted evidence, Citation No. 3913839 is **AFFIRMED.**

Docket No. WEST 93-108-M

Citation No. 3913840

This citation alleges a violation of 30 C.F.R. § 56.14132(b). The regulation provides:

> **§ 56.14132 Horns and backup alarms.**
>
> (a) Manually operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.
> (b)(1) When the operator has an obstructed view to the rear, self-propelled mobile equipment shall have--
> (i) An automatic reverse-activated signal alarm;

Inspector Brooks asked the operator of a White Freightliner vacuum truck to back up the vehicle. He then found the vehicle had no backup alarm. (Tr. 631, 632). An alarm serves to warn any person behind the vehicle.

There was not much traffic in the area nor did the Inspector see any employees in the vicinity.

Mr. Brooks considered that a fatality could result from this condition but, in his opinion, the violation was not S&S.

The operator was moderately negligent since it could have discovered this violative condition.

Gravity should be considered "high" since a fatality could result from the violative condition.

On the uncontroverted evidence, Citation No. 3913840 is **AFFIRMED.**

CARISOZA CITATIONS

THRESHOLD ISSUES

The threshold issue is whether an MSHA Inspector's notes are admissible in an enforcement proceeding as direct evidence of a violative condition.

ART S. CARISOZA, a former MSHA Inspector, issued 27 contested citations involving Port Costa. At the commencement of the hearing, Counsel for the Secretary represented that Mr. Carisoza was no longer an MSHA employee. He had been subpoenaed as a witness but the Secretary declined to move for enforcement of the subpoena. (Tr. 35-38). Counsel for the Secretary also filed three letters concerning Mr. Carisoza (Exs. J-1, J-2, and J-3).

In his initial response to the subpoena [on February 8, 1994], Mr. Carisoza stated seven reasons why he could not appear as a witness. On February 9, 1994, Counsel for the Secretary replied to Mr. Carisoza's letter. On February 10, 1994, Mr. Carisoza, by letter, moved to quash the subpoena because of hardship, excessive travel (Seattle to Southern California), lack of agreement with MSHA on compensation, and possible conflict of interest. (See Exs. J-1, J-2, J-3).

Port Costa objected to the use of the Inspector's notes and objected to the failure of the Secretary to produce Mr. Carisoza since the Administrative Procedure Act grants a party the right of cross-examination.

In the absence of a motion to enforce the Carisoza subpoena, the Judge ordered the hearing to proceed.

WILLIE J. DAVIS was called as a witness. He testified that he has been an MSHA Supervisory Mine Inspector since 1988 and in MSHA's employ since 1978. (Tr. 42-43). If an MSHA Inspector observes a violation of federal law, he notes the violations on his safety field notes, MSHA Form 4000-49. When he leaves the site, these notes contain all of the pertinent information to issue the appropriate action as to observed violations.

It is MSHA's procedure that a Form 4000-49 should be filled out with respect to each condition noted by the Inspector. A blank copy of MSHA's Form 4000-49 was identified. (Tr. 45).

Mr. Davis further identified Exhibit P-1 as a copy of Mr. Carisoza's original field notes.

Mr. Carisoza's inspection at Port Costa began as an inspector on January 7, 1993. Subsequently, he reviewed his notes with Mr. Davis.

This discussion was at the completion of the regular inspection and before Mr. Carisoza returned to the mine site for a closing conference. (Tr. 46). Mr. Davis did not attend the closing conference. (Tr. 48).

Mr. Carisoza's 27 citations are now docketed under WEST 93-353-M, WEST 93-366-M, WEST 93-428-M, WEST 93-435-M, and WEST 93-485-M.

Exhibit P-1, the Inspector's field notes on MSHA Form 4000-49, contain places to identify the Inspector, the mine, the date, and time, as well as the operator, its I.D. number, and location. In addition, the form identifies the persons accompanying the Inspector. A space on the form is available for any Citation/Order number. In addition, there are categories such as condition or practice; area or equipment (Machine Number/Description), Hazard, Exposure (Number of men), Location (Measurements), Employee Comments. (Ex. P-1).

Discussion

Port Costa strenuously objected to the use of Mr. Carisoza's notes. While the Judge expressed some reservations as to the admissibility of such field notes, he concluded such documents were admissible. The Commission has always expressed the view that hearsay is admissible in its administrative proceedings.

A number of the Carisoza citations are alleged to be S&S. As to such allegations, I agree with the Secretary that "consideration of whether or not something is S&S necessarily involves much more of whether or not there is a particular box on an official form that has been checked." [Section II, Inspector's evaluation under 10(c) of the field notes contains a "yes" or "no" box for "Significant and Substantial."]

I further concur with the Secretary that "the [S&S] determination flows from the facts and the reasonable inferences from the facts that can be drawn." (Tr. 61).

The issue now presented is whether records of regularly conducted activity are admissible in evidence. Rule 803(6) of the Federal Rules of Evidence provides:

> **(6) Records of regularly conducted activity.**
>
> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by a person with knowledge, if kept in the course of regularly conducted business activity, and if it was the regular practice

> of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

If such a report is admissible in evidence, the availability of the declarant is immaterial. In re King Enterprises, Inc., 678 F.2d 73, (8th Cir. 1982); Kuhlman, Inc. v. United States v. Fendley, 522 F.2d 181 (5th Cir. 1975), Lewis v. Baker, 526 F.2d 470 (2d Cir. 1975).

On the basis of Mr. Davis's testimony, it follows that Exhibit P-1 was admissible and it was received in evidence. Further, Port Costa's objections were **OVERRULED.**

In transcribing Mr. Carisoza's notes to this decision, certain spaces were left blank with an underline because the missing word or words were not legible to the Judge. In addition, Mr. Carisoza's notes are not handwritten but printed. The printing in this decision follows the line format used by Mr. Carisoza in his field notes.

Docket No. 93-353-M

Citation No. 3636548

This citation alleges in part that the main electrical substation at the quarry operation did not have the dry vegetation removed from inside the fence surrounding the substation to minimize a fire hazard potential.

It is alleged these conditions constitute a non-S&S violation of 30 C.F.R. § 56.4130(b). The regulation provides:

> **§ 56.4130 Electric substations and liquid storage facilities.**
>
> (b) The area within the 25-foot perimeter shall be kept free of dry vegetation.

Mr. Carisoza's field notes (Ex. P-1, pp. 24, 25) as to condition state as follows:

> ELECTRICAL SUB AT QUARRY
> DRY WEEDS INSIDE FENCE

BEEN HERE LONG TIME
RAIN TODAY
DEAD GRASS-WEEDS

The notes also indicated the location of a

6-FOOT INSIDE FENCE

Mr. Carisoza's notes indicate the operator was moderately negligent. Further, it was noted the condition should have been seen every day.

The occurrence of the event under gravity was rated "unlikely." The injury resulting, as contemplated by the occurrence, was "lost work days or restricted duty." "Burns" were also noted.

Discussion

The evidence indicates the area within the 25-foot perimeter of the electrical substation was not kept free of dry vegetation. This constituted a violation of the regulation.

On the credible evidence, Citation No. 3636548 is **AFFIRMED.**

Docket No. 93-353-M

Citation No. 3636549

This citation alleges, in part, that the portable extension light (drop light) used at the No. 3115 conveyor location over the bunker of silos did not have a guard protecting the exposed light bulb (flood-lamp type) that was energized.

It is further alleged these conditions constituted an S&S violation of 30 C.F.R. § 56.12034 which provides:

> **§ 56.12034 Guarding around lights.**
>
> Portable extension lights, and other lights that by their location present a shock or burn hazard, shall be guarded.

Mr. Carisoza's field notes (Ex. P-1, pp. 26, 27) state:

> ELECTRICAL SUB AT QUARRY
> USED AT THE 3115 CONVEYOR
> Location over bunker DID NOT
> have a guard protecting the
> exposed light-bulb flood-lamp
> type.

Mr. Carisoza's notes under gravity classify the occurrence of the event as "reasonably likely." Further, the injury resulting as contemplated by the occurrence was "lost work days or restricted duty."

Mr. Carisoza's notes indicate Port Costa was moderately negligent. It was further noted that the condition should have been seen.

Discussion

Mr. Carisoza's notes indicate the violative condition was "located waist-high" at the No. 3115 conveyor. Further, it is indicated that the hazard was burn or shock.

The facts in the notes establish the S&S allegations.

Citation No. 3636549 is **AFFIRMED.**

Docket No. 93-353-M

Citation No. 3636550

This citation alleges, in part, that the portable 110-volt extension light (floodlight) used at the No. 3275 transfer chute area of the mill did not have a guard over the unprotected bulb to reduce a shock or burn hazard potential.

It was further alleged that these conditions constituted an S&S violation of 30 C.F.R. § 12034 which provides:

> **§ 56.12034 Guarding around lights.**
>
> Portable extension lights, and other lights that by their location present a shock or burn hazard, shall be guarded.

Mr. Carisoza's notes described the condition as:

> EXTENSION CORD DROP-LIGHT
> KILN 1 FLOOD LAMP
> 3275 TRANSITION CHUTE
> NO PROTECTION SET OVER HANDRAIL
> CAN BE CONTACTED BURN/SHOCK
> CATWALK AREA - MOVED MANUALLY

Mr. Carisoza's notes described the gravity as "reasonably likely." It was further noted that there was wet weather and the

light was ungrounded and energized. The notes also described a possible injury as "fatal."

The notes identify Port Costa as being "moderately negligent."

Discussion

The notes indicate that a drop-light flood-lamp can be contacted and a worker burned or shocked. The S&S allegations are **AFFIRMED.**

Citation No. 3636550 is **AFFIRMED.**

Docket No. 93-353-M

Citation No. 3636551

This citation alleges, in part, that the portable extension light at the No. 3275 transition chute area of the mill was not grounded to reduce the shock hazard potential.

It is further alleged the described conditions constituted an S&S violation of 30 C.F.R. § 56.12025 which provides:

> **§ 56.12025 Grounding circuit enclosures.**
>
> All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.

Mr. Carisoza's field notes (Ex. P-1, pp. 30, 31) indicate the following:

> DROP LIGHT AT 3275 TRANSITION CHUTE - NOT GROUNDED - EXTENSION CORD GAD PRONG MISSING - LIGHT UNGROUNDED ALSO - HANDLED MANUALLY - COMMON PRACTICE - WET CONDITIONS

It was further noted that the 15 or 20 men in the mill were exposed to the hazards of burns and 110-volt shock.

Mr. Carisoza's notes under "gravity" indicate the occurrence of the event was "reasonably likely." Further, the resulting injury was noted as "permanently disabling." In addition to the unprotected lights, wet conditions were involved.

The operation was "moderately" negligent as this condition should have been seen. It was also commonplace throughout the plant.

Discussion

No evidence established that these were "all metal enclosing or encasing electrical circuits." This is an essential item of proof in connection with this regulation.

Citation No. 3636551 is **VACATED.**

Docket No. 93-428-M

Citation No. 3636552

This citation alleges there was an excessive buildup of spilled material around the tail pulley walkway and in the west walkway of the No. 3450 conveyor. The area was not clean to minimize a slip/trip hazard potential. It is alleged those conditions were an S&S violation of 30 C.F.R. § 56.20003(a), which provides:

> **§ 56.20003 Housekeeping.**
>
> At all mining operations--
>
> (a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly.

Mr. Carisoza's notes (Ex. P-1, pp. 32, 33) describe the following condition:

> EXCESSIVE SPILLS - BUILT UP AROUND WALKWAYS OF NO. 3450 CONVEYOR SLIP/TRIP PRESENT - SPILLS UP TO TOP HANDRAILS PACKED DOWN FROM WALKING OVER IT - WET MUDDY - RAIN

Employee comments on the form were: "Allen agreed, said spills BAD. NO EXCUSE."

Under "gravity" of Mr. Carisoza's notes it is indicated that the occurrence of the event was "reasonably likely." The condition was also described as "wet muddy." In the event of an injury as contemplated by the occurrence, "lost workdays" or "restricted duty" could result.

The notes classify the operator's negligence as "moderate" because this condition should have been seen. It was further indicated that it "should have been seen during daily exams."

Discussion

While Mr. Carisoza marked the box to show this was an S&S violation, no evidence was introduced to show how this hazard could result in an injury of a reasonably serious nature. Accordingly the S&S allegations are **STRICKEN.**

Citation No. 3636552, as modified, is **AFFIRMED.**

Docket No. 93-353-M

Citation No. 3636553

This citation alleges that the 440-volt 4 conductor S/O cable to the shop-long saw had been spliced with twist tape connectors and then taped. The tape had unwrapped itself. The splice did not protect against moisture, was not mechanically strong, and did not provide insulated protection to that of the original cover jacket. It is alleged that the described condition was a violation of 30 C.F.R. § 56.12013 which provides:

> **§ 56.12013 Splices and repairs of power cables.**
>
> Permanent splices and repairs made in power cables, including the ground conductor where provided, shall be:
> (a) Mechanically strong with electrical conductivity as near as possible to that of the original;
> (b) Insulated to a degree at least equal to that of the original, and sealed to exclude moisture; and
> (c) Provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket.

Mr. Carisoza's field notes (Ex. P-1, p. 34) do not identify this citation by number. The notes concerning the condition state:

> 440-volt _____ S/O CABLE TO _____ -
> _____ - SPLICED WITH TWISTERS AND _
> _____ TAPE PULLED APART
> CONNECTORS VISIBLE - METAL DROPPED.

Discussion

The failure to identify his field notes to the particular citation and the vagueness of the description cause me to con-

clude that the evidence as to this particular citation is not reliable.

Accordingly, Citation No. 3636553 is **VACATED.**

Docket No. 93-428-M

Citation No. 3636554

This citation alleges in part that the main 225-A circuit breaker for the circuit breaker panel was removed and the multiple 30-amp individual breakers were utilized for overload protection only. It is alleged this condition violated 30 C.F.R. § 56.12001 which provides:

§ 56.12001 Circuit overload protection.

Circuits shall be protected against excessive overload by fuses or circuit breakers of the correct type and capacity.

Mr. Carisoza's field notes (Ex. P-1, p. 36BB) appear in sequence. As to condition it reads:

THE CIRCUIT BREAKER PANEL FOR THE SHED DID NOT HAVE THE _____ IN PLACE TO PROTECT AGAINST ACCIDENTAL CONTACT WITH THE EXPOSED BUSS BARS.

Discussion

The citation and the regulation address overload protection. However, the only available evidence deals with accidental contact with exposed buss bars.

The Secretary failed to prove his case and Citation No. 3636554 is **VACATED.**

Docket No. 93-353-M

Citation No. 3636555

This citation alleges in part that the portable extension light at the blending bins did not have a guard. It is alleged this condition violated 30 C.F.R. § 56.12034 which provides:

§ 56.12034 Guarding around lights.

Portable extension lights, and other lights that by their location present a shock or burn hazard, shall be guarded.

Mr. Carisoza's field notes (Ex. P-1, pp. 43, 44) as to condition read:

> DROP LIGHT AT TOP OF BLENDING BIN (12) _____ NOT PROTECTED - 110-VOLT YELLOW DROP CORD ACCIDENTAL CONTACT WITH THE

Mr. Carisoza's notes also show 12 men were exposed to the hazard of burn/shock - 110 v.

Discussion

The notes basically state that the drop light was not protected. Further, 12 men were exposed to the burn/shock hazard.

Citation No. 3636555 is **AFFIRMED.**

Docket No. 93-353-M

Citation No. 3636556

This citation alleges in part that the cover plate for the electrical control junction box at the front of bin 12 was off while the 110-v electrical power was energized. It is alleged this condition violated 30 C.F.R. § 56.12032 which provides:

> **§ 56.12032 Inspection and cover plates.**
>
> Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

Mr. Carisoza's field notes (Ex. P-1, p. 45, 46) as to condition read:

> _____ _____ _____ (top line illegible). Bin 12 11-v NOT PROTECTED - 110-VOLT LYING ON _____

The Secretary failed to present sufficient facts to establish a violation of the present regulation.

Citation No. 3636556 is **VACATED.**

Docket No. 93-353-M

Citation No. 3636557

This citation alleges in part that the door to the main circuit breaker panel was left open. A small fan was positioned to blow air on the breaker. It is alleged this condition was an S&S violation of 30 C.F.R. § 56.12032. The regulation provides:

> **§ 56.12032 Inspection and cover plates.**
>
> Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

Mr. Carisoza's field notes (Ex. P-1, pp. 47, 48) describe the following condition:

> M 5030 I.D. FAN MAIN BREAKER PANEL
> 480-VOLT CIRCUIT HEATING UP - DOOR
> OPEN
> USING FAN TO COOL UNIT

Under "gravity" in Mr. Carisoza's notes the occurrence of the event was shown as "reasonably likely." Further, it was indicated people were in the room on a daily basis and a flash had occurred previously. The injury resulting, as contemplated by the occurrence, could be fatal. Also, a 480-volt shock as well as a fire and burn were noted as possible.

Mr. Carisoza's notes classified the operator's negligence "moderate." The violative condition was in plain view as it should have been noted during daily checks.

Discussion

A fan cooling a unit through an open door certainly indicates the cover plate was "not kept in place at all times," as provided in the regulation.

Citation No. 3636557 is **AFFIRMED.**

Docket No. 93-428-M

Citation No. 3636558

This citation alleges the MCC room that houses major electrical equipment was not posted with danger warning signs. It is

alleged this condition violated 30 C.F.R. § 56.12021 which provides:

> **§ 56.12021 Danger signs.**
>
> Suitable danger signs shall be posted at all major electrical installations.

Mr. Carisoza's field notes (Ex. P-1, p. 50) contain the second page of MSHA Form 4000-49. However, the first page of the form is missing.

Since there was a failure of proof, Citation No. 3636558 is **VACATED.**

Docket Nos. 93-428-M, WEST 93-485-M

Citation Nos. 3636559, 3636560, 3636561, 3636569, 3636575, and 3636576

These six citations allege the catwalks, travelways, work decks, and stairways [at various identified areas] within the milling facility were not being kept reasonably clean to reduce or minimize potential slipping, tripping, and stumbling hazards created by the conditions presented. It is alleged these conditions were an S&S violation of 30 C.F.R. § 56.20003(a) which provides:

> **§ 56.20003 Housekeeping.**
>
> At all mining operations--
> (a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly;

Mr. Carisoza's field notes (Ex. P-1, pp. 79AA, 80AA, 81, 82, 83AA) involve six housekeeping citations at locations inspected between 0919 hours and 1215 hours (p. 80AA). The notes relate to all citations in which he described the following conditions:

> HOUSEKEEPING HAZARDS NOTED DURING
> INSPECTION - WHILE DOING INSPECTION
> IT WAS NOT THAT WORKERS WERE NOT
> PICKING UP ITEMS AFTER REPAIR OF
> MAJOR SPILLS PLANTWIDE

Page 80AA of the notes contains 13 lines. The legible items include:

> SPILLS - BIG SPILLS
> CATWALK _____
> PIPES OF _____

PALLETS
SHOVELS

Further, Mr. Carisoza's notes indicate that 25 men were exposed to slip/trip, stumbling hazards. In addition, it was indicated this condition was plantwise. Employees' comments stated "all agreed housekeeping a problem plantwise." (Ex. P-1; p. 78AA).

Mr. Carisoza's notes under "gravity" indicated that the occurrence of the event was "reasonably likely." Further, it was noted that the major cause was LTA's poor housekeeping practices. A resulting injury as contemplated by the occurrence would be "lost work days" or "restricted duty." (Ex. P-1, p. 79AA).

The notes at page 79AA indicate the operator was moderately negligent. Further, the company should have set priorities.

Discussion

The Carisoza notes received in evidence establish violations of the regulation.

Citation Nos. 3636559, 3636560, 3636561, 3636569, 3636575, and 3636576 are **AFFIRMED.**

Docket No. 93-353-M

Citation No. 3636562

This citation alleges in part that two portable extension lights used at the extruder screw did not have guards over the lights to protect a person against a burn or shock hazard potential from the unprotected lights. It is alleged these conditions were an S&S violation of 30 C.F.R. § 56.22034 which provides:

> **§ 56.12034 Guarding around lights.**
>
> Portable extension lights and other lights that by their location present a shock or burn hazard, shall be guarded.

The top two lines of Mr. Carisoza's notes (Ex. P-1, pp. 51 and 52) are legible. These indicate:

> DROP LIGHTS 110-V USED PANEL 480-
> VOLT EXTRUDER - NOT GUARDED

The field notes also show five men were exposed to fire/burn.

The field notes in relation to gravity state that the occurrence of the event was "reasonably likely." Further, "a wet area" and "continued practice plantwide" were noted. Mr. Carisoza's notes also reflect that the injuries resulting, as contemplated by the occurrence, were "lost work days or restricted duty."

The field notes indicate the operator was moderately negligent. This was also identified as "common practice plantwide."

Discussion

The Carisoza notes indicate a drop light was not guarded and five men were exposed to fire/burn.

Citation No. 3636562 is **AFFIRMED.**

Docket No. 93-366-M

Citation No. 3636563

This citation alleges in part that the cover that holds 110-volt bin indicator bell in place at the extruder control panel was off, exposing the conductors inside the box to accidental contact. It is alleged this condition violated 30 C.F.R. § 56.12032 which provides:

> **§ 56.12032 Inspection and cover plates.**
>
> Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

Mr. Carisoza's notes (Ex. P-1, pp. 53, 54) as to the violative condition are all essentially illegible. Due to a failure of proof, Citation No. 3636563 is **VACATED.**

Docket No. 93-428-M

Citation No. 3636564

This citation alleges in part that the two water/shower-eye washing stations at the scrubber area of the mill where caustic waters are used did not work when checked. It is alleged these conditions violate 30 C.F.R. § 56.15001 which provides:

> **§ 56.15001 First-aid materials.**
>
> Adequate first-aid materials, including stretchers and blankets, shall be provided at

places convenient to all working areas. Water or neutralizing agents shall be available where corrosive chemicals or other harmful substances are stored, handled, or used.

Mr. Carisoza's notes (Ex. P-1, pp. 55, 56) describe the following condition:

> SCRUBBER AREA BATH-EYE WASHING STATION DO NOT FUNCTION
>
> [The final two lines are illegible.]

The form further indicates four or more men in the scrubber area were exposed to the hazard of burn to eyes/face.

Mr. Carisoza's notes further indicated the operator's negligence was "high." The notation states "Mgmt knew they were here and not hooked up." Gravity indicated as "unlikely" and a "minimum hazard."

Discussion

The facts from Mr. Carisoza's notes indicate water and neutralizing agents were not available. Further, workers were exposed to the hazard of burns to eyes and face.

Citation No. 3636564 is **AFFIRMED.**

Docket No. 93-485-M

Citation No. 3636565

This citation alleges in part that the low and restricted head clearances at the top of the No. 5510 area silos (Lightweight Silo Area) were not posted with warning signs to alert employees of the restricted clearances. It is alleged these conditions violate 30 C.F.R. § 56.11008 which provides:

> **§ 56.11008 Restricted clearance.**
>
> Where restricted clearance creates a hazard to persons, the restricted clearance shall be conspicuously marked.

Mr. Carisoza's notes (Ex. P-1, pp. 57, 58) under "condition" indicated the following:

> PVC
> PIPE ACROSS STAIRWAY AND LOW
> CROSSBEAM BRACE _____ _____

OF STAIR _____ _____ _____-

_____ _____ _____

Discussion

The evidence by Mr. Carisoza's notes failed to establish a violation of the regulation. However, additional evidence was involved here. In his failure to abate the order (No. 3636785), Inspector Brooks testified the company was cited because of the "areas on top of the lightweight silos with low and restricted head clearances with no warning signs to alert employees to these types of areas." Further, Inspector Brooks observed "there were no signs posted to warn persons of the crossbeams, pipes, and braces where people travel." (Tr. 694).

On the uncontroverted evidence, Citation No. 3636565 is **AFFIRMED.**

Docket No. 93-435-M

Citation No. 3636566

This citation alleges in part that the No. 5930 conveyor belt at the top area of the lightweight silos was not equipped with emergency stop cords or guardrails along the unprotected side to protect a person from falling onto or into the moving conveyor. It is alleged these conditions constitute an S&S violation of 30 C.F.R. § 56.14109 which provides:

> **§ 56.14109 Unguarded conveyors with adjacent travelways.**
>
> 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 activate the conveyor drive motor; or
> (b) Railings which--
> (1) Are positioned to prevent persons from falling on or against the conveyor;
> (2) Will be able to withstand the vibration, shock, and wear to which they will be subjected during normal operation; and
> (3) Are constructed and maintained so that they will not create a hazard.

Mr. Carisoza's notes (Ex. P-1, pp. 59, 60) under "condition" indicate:

> 5930 NO STOP CORD
> [not legible]

SIDES. 30 FT LACK HORIZONTAL
24" WIDE MODERATE SPEED
OTHERS IN AREA HAVE
INSTALLED/CHANGED

The notes also indicate three men were exposed to the "hazard of a fall onto moving belt."

Mr. Carisoza's notes under "gravity" indicate the occurrence of the event was "reasonably likely."

Mr. Carisoza's field notes describe the operator's negligence as "moderate." The operator's other belts have cords. Further, this violative condition should have been seen during daily checks. As to gravity, Mr. Carisoza indicated a fatality was "unlikely." However, cuts and bruises can be reasonably serious injuries.

Discussion

The notes fail to establish that the unguarded conveyor was next to a travelway. The location of the travelway in such a position is critical with this regulation.

Citation No. 3636566 is **VACATED.**

Docket No. 93-428-M

Citation No. 3636570

This citation alleges in part that the No. 5415 inclined conveyor at the fine ground area of the milling facility was not equipped with emergency stop cords or guardrails along the traveling areas around this conveyor. It is further alleged these conditions constitute an S&S violation of 30 C.F.R. § 56.14109. The regulation regarding "Unguarded conveyors with adjacent travelways" is set forth in the previous citation, No. 3636566.

Mr. Carisoza's notes (Ex. P-1, pp. 63, 64, 65) are essentially illegible as to the "condition." They do not assist the Judge in arriving at a conclusion in this matter.

Due to a failure of proof, Citation No. 3636570 is **VACATED.**

Docket No. 93-428-M

Citation No. 3636571

This citation alleges in part that the side guards of the No. 5320 hot belt tail pulley at the rotary kiln area were damaged and contact could be made with the moving pulley and

conveyor belt nip points. It is further alleged these conditions constitute an S&S violation of 30 C.F.R. § 56.14112(a) which provides:

> **§ 56.14112 Construction and maintenance of guards.**
>
> (a) Guards shall be constructed and maintained to--
> (1) Withstand the vibration, shock, and wear to which they will be subjected during normal operation; and
> (2) Not create a hazard by their use.

Mr. Carisoza's notes (Ex. P-1, pp. 66, 67, 68) read:

> GUARDS EXPANDED METAL ON TAIL PULLEY OF
> NO. 5330 _____ BELT DAMAGED
> _____
> _____ _____ _____ _____
> _____
> TO PROTECT AGAINST _____ WITH NIP
> _____

A drawing of the Carisoza notes (on page 68 of Exhibit P-1) contains the comment:

> GUARD BELT - OUT OF POSITION

In considering gravity, the notes (at p. 67, Ex. P-1) stated that the occurrence of an event was "reasonably likely." Further, the injury resulting, as contemplated by the occurrence, could be "permanently disabling." The notes further reflect "loss of body parts or fatal."

Mr. Carisoza's field notes indicate the operator was moderately negligent. Further, the condition was in plain view and it should have been seen during daily exams.

Discussion

Mr. Carisoza's notes contain insufficient facts to establish a violation of 30 C.F.R. § 56.14112.

Citation No. 3636571 is **VACATED.**

Docket No. 93-435-M

Citation No. 3636572

This citation alleges in part that the sides, sprockets, and pulleys of the No. 5890 bucket elevator at the V-7 area of the milling facility were not guarded where contact could be easily made from both ground level and from the work deck. It is further alleged these conditions constituted an S&S violation of 30 C.F.R. § 56.14107(a) (Moving machine parts), supra.

Mr. Carisoza's notes (Ex. P-1, pp. 69, 70, 71) as to "condition" read:

> #5890 BUCKET ELEVATOR BELT
> SPROCKETS,
> PULLEYS - NOT GUARDED
> GAD _____ CONTACT CAN BE MADE
> TOP OF BIN-HEAD EXPOSED
> _____ SIDES _____ _____
> _____
> ACCESS AROUND UNIT

The hazard was described as:

> CONTACT MOVING PART EXPOSED
> LOSS OF BODY PART

In considering gravity, Mr. Carisoza's notes indicate the occurrence of an event was "reasonably likely." Further, employees were seen walking around the area. It was further noted that the injury resulting, as contemplated by the occurrence, would be "permanently disabling." In addition, there could be loss of body parts.

The notes indicate the operator was "moderately negligent." The condition was in open view and it should have been seen during daily checks.

Discussion

The field notes establish the belt sprockets and pulleys were not guarded.

Citation No. 3636572 is **AFFIRMED.**

Docket No. 93-428-M

Citation No. 3636573

This citation alleges that the V-belt drives of the No. 5880 conveyor belt were unguarded thereby violating 30 C.F.R. § 56.14107(a) (Moving machine parts, supra).

Mr. Carisoza's notes (Ex. P-1, pp. 72, 73, 74) describe the following condition:

> V-BELTS AND PULLEY AT NO. 5880 BELT TO BUCKET _____ NOT GUARD - MOVES FAST 6 FT HIGH OR HEAD HIGH - SPILLS IN AREA PUT IT WITHIN CONTACT - MEN SEEN IN AREA MEN SEEN WORKING

The hazard was described, in part, as:

> LOSS OF HAND - FINGERS

Mr. Carisoza's notes classify the operator's negligence as "moderate." It was also indicated the condition was in an open area and should have been seen on daily checks. In considering "gravity" the notes reflect the occurrence of the event was "unlikely." However, the injury, as contemplated by the occurrence, could be "permanently disabling."

Discussion

The notes indicate the No. 5800 V-belt and pulleys were not guarded.

Citation No. 3636573 is **AFFIRMED.**

Docket No. 93-435-M

Citation No. 3636574

This citation alleges the metal guard for the V-belt drive of the No. 5890 bucket elevator was lying on the work deck thereby violating 30 C.F.R. § 56.14112(b). The regulation reads:

> **§ 56.14112 Construction and maintenance of guards.**
>
> (b) Guards shall be securely in place while machinery is being operated, except when

testing or making adjustments which cannot be performed without removal of the guard.

Mr. Carisoza's notes (Ex. P-1, pp. 75, 76, 77) describe the following condition:

> METAL GUARD OFF OF BUCKET
> DRIVE BELT - LYING ON DECK
> BELT RUNNING - WORK DECK
> AROUND HEAD PULLEY AREA & V-BOLT
> SPILLS ON DECK - MODERATE SPEED OF
> BELT
> PULLEY FAST

The hazard was described as:

> _____ UNGUARDED V-BELTS
> POSITION
> NECK HIGH OR SO

The notes classify the operator's negligence as "moderate." The condition was in plain view and in a work area. As a result, they should have been seen. In considering gravity, Mr. Carisoza's notes indicate the occurrence of the event "unlikely." However, an injury resulting could be permanently disabling. Loss of hand/fingers was further noted.

Discussion

The notes indicate the metal guard was off the bucket drive belt.

Citation No. 3636574 is **AFFIRMED.**

BROOKS II

104(a) Citation and 104(b) Orders

Inspections by Michael Brooks were also conducted in March 1993. On that occasion he issued one citation and seven orders for failure to abate.

A failure to abate order is issued under Section 104(b) of the Act. For an analytical frame of 104(b) orders, see Mid-Continent Resources, Inc., 11 FMSHRC 505 (April 1989).

Docket No. WEST 93-485-M

Order No. 3636782

On March 25, 1993, Inspector Brooks issued Order No. 3636782 under Section 104(b) of the Act when he observed that safe access had not been provided to the No. 5900 stacker boom. (Tr. 645). Nothing had changed from when he issued Citation No. 3913830 on September 8, 1992. (Tr. 647).

The order was subsequently terminated on April 2, 1993. At that time, the company removed the controls that rotate the stacker boom. This provided safe access. (Tr. 648).

Discussion

On the credible evidence, Order No. 3636782 is **AFFIRMED.**

Docket No. WEST 93-435-M

Citation No. 3636783

This citation alleges an S&S violation of 30 C.F.R. § 56.14107(a) (Moving machine parts, supra).

During his inspection on March 25, 1993, Inspector Brooks noticed the third bin pulley on the No. 5800 conveyor take-up area was not properly guarded. The existing guarding did not provide enough protection to comply with the regulation. It was 44 inches (vertically) from the metal walkway to the pinch area, and a 15-inch horizontal reach. (Tr. 676).

In Inspector Brooks' opinion, a disabling type of injury could occur to a worker if he were pulled into the machine parts. Further, it was reasonably likely that such an accident could occur if this condition were not corrected in a timely fashion.

On the credible evidence, Citation No. 3636783 is **AFFIRMED.**

Docket No. WEST 93-435-M

Order No. 3636784

This Order was issued under Section 104(b) of the Act. The order alleges the operator failed to abate Citation No. 3636566 issued by Inspector Carisoza.

The Judge overruled the operator's continuing objections that were previously considered in relation to Mr. Carisoza's evidence.

The Carisoza evidence failed to establish a violation.

Although Inspector Brooks testified as to the issuance of the order, no evidence was offered to prove that the unguarded No. 5930 conveyor was next to a travelway. (Tr. 683-693).

In sum, the evidentiary failure of evidence in connection with Citation No. 3636566 was not remedied.

Due to a failure of proof, Order No. 3636784 is **VACATED.**

Docket No. WEST 93-485-M

Order No. 3636785

This Order was issued under Section 104(b) of the Act. The order alleges the operator failed to abate Citation No. 3636565 issued by Inspector Carisoza.

Inspector Brooks testified as to his order. (Tr. 693-696). He observed that no signs had been posted to warn persons of crossbeams and the like where they travel. (Tr. 694).

Based on the credible evidence, Order No. 3636785 is **AFFIRMED.**

Docket No. WEST 93-485-M

Order No. 3636786

This Order was issued under Section 104(b) of the Act. The order alleges the operator failed to abate Citation No. 3636569 issued by Inspector Carisoza.

Inspector Brooks went to the tops of the lightweight silos to investigate and terminate the Carisoza citation. (Tr. 698).

He found there were still tripping and stumbling hazards on top of the silo areas. There were large amounts of spillage, discarded parts, belting, metal parts, and a ladder in the walkway. (Tr. 699).

The order was terminated the day of the inspection.

Housekeeping problems might occur on a recurrent basis. It would take a matter of time for the accumulation to occur.

Order No. 3636786 is **AFFIRMED.**

Docket No. WEST 93-435-M

Order No. 3636787

This Order was issued under Section 104(b) of the Act. It alleges the operator failed to abate Citation No. 3636572 issued by Inspector Carisoza.

During his inspection, Mr. Brooks checked to determine whether the operator had complied with the regulation. Mr. Brooks found the sides, sprockets, and pulleys of the No. 5890 bucket elevator had not been guarded. (Tr. 707). The sprockets on pulleys were within seven feet of the ground.

The order was terminated the following day when the guards were installed. (Tr. 709).

On the credible evidence, Order No. 3636787 is **AFFIRMED.**

Docket No. WEST 93-435-M

Order No. 3636789

This Order was issued under Section 104(b) of the Act. It alleges the operator failed to abate Citation No. 3636574 issued by Inspector Carisoza.

In the area of the No. 5890 bucket elevator, Inspector Brooks found no apparent effort had been made to put the V-belt back on. The guard was lying adjacent to the V-belt drive. Further, the equipment was in operation. (Tr. 711).

The order was terminated the following day.

On the credible evidence, Order No. 3636789 is **AFFIRMED.**

Additional Port Costa Evidence

The company's evidence does not address the issues of whether a violation occurred but its evidence is generally admissible under the broad umbrella of statutory good faith.

GARY SILVEIRA, a Port Costa maintenance mechanic testified that in the last two years there has been an abrupt change in the company's maintenance efforts. The catwalks had been replaced, new guarding fabrication has been done, and lighting has improved. (Tr. 536-568).

EDWARD MOAN, operations manager for ECCO Engineering, confirmed they started working at the Port Costa plant in February 1992. He described various work at the plant. (Tr. 593-595).

LARRY E. MORRISON, business agent for International Longshoreman Warehouse Men's Union, Local 6, has been the business agent for Port Costa.

In May 1992, Port Costa contracted major capital improvement work. The company also brought in contractors to expedite safety work in the plant. (Tr. 569-574).

ERNST F. VORHAUER of ECCO Engineering confirmed that he did a lot of in-house safety training at Port Costa.

Mr. Vorhauer also did not know of any injuries at Port Costa. (Tr. 596-598).

LEZLEE WILES handles public relations and accounts receivable for Port Costa.

In September 1992, Mr. Willie Davis called Mr. Stewart. At the time, Mr. Stewart was at the plant and Ms. Wiles asked if she could take a message. Mr. Davis said, "if he had to come out to our plant to go over citations, he would write us up for any violation he found at that time." Ms. Wiles considered his statement unfriendly and somewhat threatening." (Tr. 880-881).

The statements attributed to Mr. Davis might be considered to show prejudice or bias against Port Costa. However, he basically stated his duties as a federal compliance officer.

Ms. Wiles' testimony as to the truck traffic on Carquinez Scenic Drive at Port Costa adds nothing to the merits of the cases. (Tr. 881-887).

LEE ALLEN also testified for Port Costa. His testimony has been reviewed in connection with some citations.

He has been in the employ of Port Costa for 20.5 years. His current position is Production Manager. As such, he is responsible for all production personnel, shipping and receiving. (Tr. 719).

Prior to 1992, the plant was pretty well run-down. Mr. Allen was aware of violations by the plant even though he didn't go on MSHA inspections.

Mr. Allen was not aware of any employee being injured by an inadequate guard or by an electrical shock. (Tr. 721).

Mr. Allen identified the four general areas of the plant. (Tr. 722). He further identified Port Costa's material flow sheet. (Ex. R-3; Tr. 723).

Mr. Allen accompanied Inspector Brooks in August 1992 for four days. (Tr. 726, 727). The flow of materials starts with the lowest No. 2150. From there the numbers increase. (Tr. 728). The equipment is all interlocked.

In Mr. Allen's opinion, the guarding in place was adequate. The guard passed prior inspections. (Tr. 731).

After the first two of days of his inspection, Mr. Brooks seemed to get a little frustrated.

As to some of the guards, he said they didn't extend back far enough. It seemed to Mr. Allen that it was Mr. Brooks' discretion as to the reach. (Tr. 732, 733).

Mr. Allen identified the No. 5900 stacker conveyer. Before Mr. Brooks' visit, a worker could come up a stairway, then go along No. 5610 and across the No. 5615. Then he can get a stairwell that goes up from No. 5800. He then walks down the No. 5800 (there are a couple of steps up). He walks around the mid-pulleys of the No. 5800 and then another stairwell that goes back down the No. 5800 conveyer catwalk. He walks across the catwalk and then up another stair to get to a stairwell and then he steps onto the stacker boom. (Tr. 734).

In the position it was, there was no ladder for a worker to climb upon. The stacker belt is one unit even though it has two numbers on it. (Tr. 735). The stacker system is like a tractor on a big rig with the trailer behind it. (Tr. 735).

Moving the electrical boxes off the tower made access more difficult because you had to have the stacker in one position to access it. (Tr. 737).

Additional Civil Penalty Criteria

Certain civil penalty criteria have been previously discussed. Additional criteria include the operator's history of previous violations, the size of the business of the operator, the effect of the penalties on the operator's ability to continue in business, and the good faith of the company.

Port Costa's history of previous violations is contained in Exhibit P-3. The first inspections were conducted by Mr. Brooks beginning August 27, 1992. Port Costa's history by the Secretary's computer printout indicates Port Costa received a total of

145 citations before Inspector Brooks' initial inspection. The Judge further recognizes that some of the prior history occurred before the present management of Port Costa assumed responsibility for the company's activities.

Mr. Ross Gephart testified as to the effect of the penalties on the company's ability to continue in business. He took over as President of Port Costa Materials in January 1992. At that time, the three main areas of safety concern were electrical safety, catwalks, and truck traffic safety. (Tr. 892-909).

The witness introduced certain financial statements of PLA Holdings, the parent company of Port Costa Materials. (Ex. R-16 through R-21; Tr. 893). The Judge received the documents in camera. They were sealed and can only be opened by the Presiding Judge or the Commission. They are part of the record, but the Judge indicated that by the time the case is heard on appeal, the release of the propriety information at that time should not adversely affect the company. (Tr. 895).

In sum, the evidence also shows that Port Costa Materials contributed a substantial portion of the holding company's losses in 1991. (Tr. 897; Ex. R-16, R-17).

Mr. Gephart further submitted the company's 1992 OSHA/MSHA form of reportable injuries. Mr. Gephart's opinion, none of the reported injuries were a result of a mechanical condition.

Both Messrs. Gephart and Stewart share MSHA's view that it was not a safe plant. (Tr. 912).

A $4,000,000 plus capital plan is in temporary limbo for two reasons: (1) the expiring union contract and (2) the multiple citations from MSHA for 1993 for $154,000. The company does not have the money to pay the MSHA fines. (Tr. 913, 914).

Mr. Gephart believes the letter written by the Acting Assistant Secretary of Mine Safety and Health, Mr. Edward Hugler, is inaccurate in stating that conditions [at Port Costa] have deteriorated in the last two years. On the contrary, Mr. Gephart believes the conditions have improved. (Tr. 914-915). Further, safety is one of the company's stated goals. (Tr. 920). Mr. Gephart indicated PLA Holdings is a very small business. (Tr. 900-901).

Through 1993, safety improvements on the capital side cost $571,000. (Tr. 901). Routine repair work for correcting MSHA deficiencies are not reflected in the company documents. (Tr. 901). The company spent in excess of $1,000,000 on safety in the last two years in the Port Costa plant. (Tr. 902).

In the last two years, the company's insurance or experience modification factor has been reduced from 142 percent to 115 percent. Also, workmen's compensation insurance was reduced over 50 percent. In dollar terms, this reduction is approximately $10,000 a month. (Ex. R-20; Tr. 906).

After he took over as president in 1992, Mr. Gephart focused on workman's compensation and other priority issues.

In 1992, they were inundated with MSHA safety violations. Mr. Gephart felt Port Costa is fortunate that a serious accident has not occurred.

Discussion

I agree with Port Costa that it has been fortunate that no serious injuries had occurred at its plant.

Port Costa's evidence shows it has incurred substantial losses in 1991 (Tr. 894), and while 1993 earnings are not complete, further losses are indicated. (Tr. 899).

However, the Commission has held that civil penalties may not be eliminated because the Mine Act requires that a penalty be assessed for each violation of 30 U.S.C. § 820(a). Tazco, Inc., 3 FMSHRC 1895, 1897 (August 1991). Further, the Commission has noted that financial statements showing a loss are not sufficient to reduce penalties. Peggs Run Coal Co., 3 IBMA 404, 413-414 (November 1974); Spurlock Mining Co., Inc., 16 FMSHRC 697 (April 1994).

In the instant case, the evidence is insufficient to establish that the imposition of penalties will cause Port Costa Materials to discontinue in business. The company appears to have a substantial cash flow at this time.

Port Costa demonstrated statutory good faith in abating the Brooks I citations.

Concerning the operator's size: the record reflects that Port Costa has 28 production workers; 4 supervisors; 3 administrators and 8 maintenance workers. (Tr. 179).

Considering all of the statutory criteria for assessing civil penalties, the Judge believes the penalties assessed in the order of this decision are appropriate.

The citations listed in the left-hand column have been affirmed or vacated. If affirmed, the civil penalties listed after such citation are appropriate and they are assessed. If the citations are vacated, the word "vacate" will appear in the right-hand column.

ORDER

BROOKS I INSPECTION

Citation/Order No.	Penalty Assessed
3913802	$350.00
3913803	$400.00
3913804	$350.00
3913805	$525.00
3913806	$400.00
3913807	$400.00
3913808	$400.00
3913809	$400.00
3913810	$350.00
3913811	$450.00
3913812	$400.00
3913813	$400.00
3913814	$450.00
3913815	$350.00
3913816	$600.00
3913817	$400.00
3913818	$350.00
3913819	$200.00
3913820	$300.00
3913821	$200.00
3913822	$300.00
3913823	$200.00
3913824	$400.00
3913825	$400.00
3913826	$400.00
3913827	Vacate
3913828	$350.00
3913829	$350.00
3913830	$500.00
3913831	$300.00
3913832	$350.00
3913833	$300.00
3913834	$400.00
3913835	$400.00
3913836	$350.00
3913837	$350.00
3913838	$400.00
3913839	$350.00
3913840	$300.00

CARISOZA CITATIONS

Citation/Order No.	Penalty Assessed
3636548	$100.00
3636549	$300.00
3636550	$300.00
3636551	Vacate
3636552	$100.00
3636553	Vacate
3636554	Vacate
3636555	Vacate
3636556	Vacate

Citation/Order No.	Penalty Assessed
3636557	$300.00
3636558	Vacate
3636559, 3636560 [1]	$600.00
3636561, 3636569	
3636575, 3636576	
3636562	$250.00
3636563	Vacate
3636564	$300.00
3636565	$300.00
3636566	Vacate
3636570	Vacate
3636571	Vacate
3636572	$300.00
3636573	$300.00
3636574	$300.00

[1] The Secretary followed the grouping of citations and the civil penalty of $600 is for the six housekeeping violations.

BROOKS II

104(a) Citations and 104(b) Orders

3636782	$1000.00
3636783	$ 300.00
3636784	Vacate
3636785	$1000.00
3636786	$1000.00
3636787	$1000.00
3636789	$1000.00

John J. Morris
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 14 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 93-442
Petitioner	:	A. C. No. 46-02052-03693
v.	:	
	:	Mine No. 20
OLD BEN COAL COMPANY,	:	
Respondent	:	
	:	

PARTIAL DECISION

Appearances: Pamela S. Silverman, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Petitioner;
Thomas L. Clarke, Esq., Old Ben Coal Company, Fairview Heights, 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 against Old Ben Coal Company pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § § 815 and 820. The petition alleges three violations of the Secretary's mandatory health and safety standards.

A hearing was held in this case, which was consolidated for hearing with Docket Nos. WEVA 93-362, WEVA 93-479, WEVA 94-38 and WEVA 94-72, on May 3, 1994, in Williamson, West Virginia. At the hearing the parties stated they had agreed to settle Citation Nos. 3999416 and 3999417 and that Citation No. 3747181 was to be stayed pending the completion of a special investigation. (Tr. 9-11.)

The settlement provides that the "significant and substantial" designation for Citation No. 3999416 be deleted and the proposed penalty reduced from $506.00 to $50.00. It further provides that the Respondent pay the $50.00 proposed penalty for Citation No. 3999417.

ORDER

Accordingly, it is **ORDERED** that this case is **SEVERED** from the dockets it was consolidated with for hearing by orders dated January 27 and February 10, 1994; that Citation No. 3999416 is **MODIFIED** to delete the "significant and substantial" designation and **AFFIRMED** as modified; that Citation No. 3999417 is **AFFIRMED**; that Old Ben Coal Company **PAY** a civil penalty in the amount of $100.00 within 30 days of the date of this decision; and that further proceedings concerning Citation No. 3747181 are **STAYED** until October 31, 1994, or the completion of the special investigation, whichever comes first.

T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 15 1994

SECRETARY OR LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 94-74 A.C. No. 11-00877-04033
v.	:	
	:	Wabash Mine
AMAX COAL COMPANY, Respondent	:	

DECISION DENYING MOTION FOR SUMMARY DECISION

This is a civil penalty case under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. It involves three § 104(d)(2) orders for alleged violations of 30 C.F.R. § 75.400.

Respondent has moved for summary decision as to one of the orders (No. 405043), which alleges an accumulation of combustible materials in active workings of the Wabash Mine, specifically on a diesel ram car.

The cited regulation is a statutory mandatory safety standard, which is provided in § 304(a) of the Federal Mine Safety and Health Act of 1969. The statutory standard was designated in the Secretary's regulations of 1970 as 30 C.F.R. § 75.400. The standard provides:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

Respondent contends that the standard does not apply to non-electrical equipment in active workings. It points to the definition of "active workings," which is "any place in a coal mine where miners are normally required to work or travel" (30 C.F.R. § 75.2) and to the Commission's statement that "active workings generally are areas or places in a mine, not equipment" (in holding that coal conveyor belts are not in and of themselves "active workings" and thus subject to preshift examinations). Jones & Laughlin Steel Corp., 5 FMSHRC 1209, 1212 (1983), rev'd on other grounds sub nom. UMWA v FMSHRC and Vesta Mining Co., 731 F.2d 995 (DC. Cir. 1984), aff'd on remand, 8 FMSHRC 1058 (1986).

The Secretary contends that, while stressing the prohibition of accumulations on electrical equipment, the standard does not restrict the phrase "active workings" to exclude accumulations on non-electrical equipment.

In Black Diamond Coal Mining Company, Volume No. 2, FMSHRC 1117, 1120 (1985), the Commission discussed the clear Congressional intent to eliminate fuel sources of explosions and fires in active workings of underground coal mines:

> * * * We have previously noted Congress' recognition that ignitions and explosions are major causes of death and injury to miners: "Congress included in the Act mandatory standards aimed at eliminating ignition and fuel sources for explosions and fires. [Section 75.400] is one of those standards." Old Ben Coal Co., 1 FMSHRC 1954, 1957 (December 1979). We have further stated "(i)t is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe." Old Ben Coal Co., 2 FMSHRC 2806, 2808 (October 1980). The goal of reducing the hazard of fire or explosions in a mine by eliminating fuel sources is effected by prohibiting the accumulation of materials that could be the originating sources of explosions or fires and by also prohibiting the accumulation of those materials that could feed explosions or fires originating elsewhere in a mine.

The standard reflects a strong Congressional intention to prohibit combustible accumulations anywhere in active workings, while stressing the prohibition of accumulations on electrical equipment. Similarly, the standard prohibits the accumulation of float coal dust anywhere in active workings, while stressing that the prohibition includes "float coal dust deposited on rock-dusted surfaces." Given the crucial purpose of removing fuel sources of fires and explosions, the standard would be self-defeating if it permitted combustible accumulations on non-electrical equipment. The emphasis on accumulations on "electrical equipment" and "float coal dust deposited on rock-dusted surfaces" should be read as particulars without restricting the broader term "active workings."

Accordingly, I find that 30 C.F.R. § 75.400 applies to the diesel equipment cited in Order No. 405043. The motion for summary decision is therefore DENIED.

William Fauver
William Fauver
Administrative Law Judge

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