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SOL (MSHA) V. UNC MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER

v.

UNC MINING & MILLING, RESPONDENT

CIVIL PENALTY PROCEEDINGS

DOCKET NO. CENT 80-386-M
A/C No. 29-00573-05025 F

DOCKET NO. CENT 80-387-M
A/C No. 29-00573-05026

MINE: Northeast Church Rock Mine

DECISION

APPEARANCES:

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United States Department of Labor
555 Griffin Square, Suite 501
Dallas, Texas 75202,
For the Petitioner

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For the Respondent

Before: Judge Virgil E. Vail

PROCEDURAL HISTORY

These consolidated cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. In each case, the Secretary seeks to have a civil penalty assessed for an alleged violation of a mandatory safety standard. After a date for hearing was set, the parties entered into an agreement to submit these cases on a written stipulation of facts and briefs which have now been filed.

Based upon the entire record and considering all of the arguments of the parties, I make the following decision. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

ISSUES

The principal issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties filed

in this proceeding; and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

STIPULATIONS

The parties stipulated to the following:(FOOTNOTE 1)

UNC Mining and Milling (herein UNC) operates an underground uranium mine located approximately 20 miles northeast of Gallup, McKinley County, New Mexico, on State Highway 566. The mine is designated as the Northeast Churchrock Mine. In December, 1979, the mine was operated on three 8-hour shifts a day, 6 days a week. In December 1979, 916 persons were employed. Of these, 650 worked underground.

Access to the mine was through two vertical, 14-foot diameter, 4-compartment shafts connected to two mining levels. A modified room and pillar method of mining was used in conjunction with diesel-powered trackless and track haulage systems. A blueprint of pertinent portions of the mine is attached hereto as Exhibit #1. Portions marked in red are those haulage-ways which are relevant to the instant case.

UNC maintains an extensive inspection and safety program. In December, 1979, UNC employed some twenty-eight persons to specifically administer mine safety and training, as indicated by an organizational flow chart attached hereto as Exhibit #2. This chart does not include the various superintendents, foremen and shift bosses who also are charged with responsibility for safety.

UNC issues a safety booklet to each employee. See Exhibit # 3. Alex Garcia, the employee who was fatally injured in this case, received a copy of the safety booklet. See Exhibit # 4.

As part of UNC's safety training program, employees are given training courses in mining and first aid. Employees are then tested to determine what

learning occurred. Alex Garcia after attending these training courses scored 96% on the mining examination and 90% on the first aid examination. See Exhibits # 5 and # 6. Alex Garcia also received training from his previous employer Kerr McGee. See Exhibit # 7. Additionally, Garcia had received task training as a clam operator and a triprider. See Exhibits # 8 and # 9. In December, 1979, Garcia was also in the process of being task trained as a motorman. He had completed on-the-job training, which is the method employed for task training.

UNC's task trainer is Zorro Davis. Davis had observed Garica (sic) operate the motor (underground locomotive) and determined that Garcia was a competent operator. Davis had not issued Garcia a task training certificate, although one would have been issued after testing and based on Garcia's performance.

On December 18, 1979, the following persons, among others, were employed on swing shift at UNC's Northeast Churchrock Mine.

B. J. Chavez	level foreman
George Otero	acting level foreman
James Kepler	track shift boss
Harry Morgan	track crew
Bob Masters	skip tender
Norris Ross	shift boss
Sam Sullivan	motorman
Alex Garcia	triprider

Swing shift began at 4:00 p.m. At the beginning of the shift, James Kepler instructed Sam Sullivan and Alex Garcia that they could pull any of the available raises (load loose mined ore from stock piled areas). Sullivan and Garcia pulled a couple of trips (hauled a couple of loads of ore) from the 8, 10 and 11 raises to the trench (unloading area) at the No. 1 shaft. They then went to the number 2 raise to pull a trip. This occurred before 5:30 p.m. On arriving at the number 2 raise Sullivan and Garcia could not get to the raise because ground from the top of the haulage-way had fallen on and blocked the track. Sullivan and Garcia left to pull other raises. They encountered no difficulties in driving the Clayton 225 locomotive through the haulage way between the A2-A2 1.4 switch and the A2-A2 3.8 switch.

At approximately 5:30 p.m. track shifter James Kepler walked to the number 2 raise and for the first time noticed the ground on the track. Sometime after 5:30 p.m. Sullivan and Garcia notified Kepler of the ground on the tracks. Nothing was mentioned concerning broken timber in the haulage way. There was not much ground on the track but it was enough to prevent passage.

Between 5:30 p.m. and 8:00 p.m. Kepler instructed a track crew consisting of Harry Morgan and others to clean the ground from the tracks. At 8:30 p.m. Kepler walked to the number 2 raise to ascertain whether the track had been cleared. The track crew had not yet cleared the track. As Kepler was coming from

the number 2 raise he met the track crew coming to

clear the track. Kepler did not return to the number two raise with the track crew but continued on his routine.

At approximately 10:00 p.m., the track crew notified Kepler that the track had been cleared. Kepler in turn notified Bob Masters, the skip tender (person responsible at the base of the shaft for lifting ore out of the mine), that the track had been cleared. Masters was so notified because Masters told Sullivan and Garcia where stock piled ore could be loaded.

The last time Kepler saw Sullivan and Garcia was shortly after 10:00 p.m., after he had been notified that the track near the number 2 raise had been cleared. At this time Kepler said nothing to Sullivan or Garcia.

At approximately 11:00 p.m. B.J. Chavez, the level foreman, saw Sullivan and Garcia at the trench near the No. 1 shaft. By this time, Chavez had heard that the track near the number two raise had been cleared. Chavez had heard this from Masters or others. Chavez told Sullivan he could pull the number 2 raise as the track was clear. Also at approximately 11:00 p.m. George Otero, the acting level foreman, came into the trench area. Chavez asked Otero if he had double checked the number 2 raise to make sure that the track was clear. Otero said he had not. Chavez said he would check the raise and proceeded to walk toward the raise.

As Chavez walked toward the number two raise, he passed Sullivan and Garcia at the A-1 switch where they were picking up track tools. Between the A-1 switch and the 1.8 switch Sullivan and Garcia passed Chavez. They then stopped at the 1.8 switch to unload the track tools. While Sullivan and Garcia were stopped at the 1.8 switch, Chavez passed them. Sullivan and Garcia then passed Chavez at the A1-A2 switch.

At 11:20 p.m. Chavez caught up with Sullivan and Garcia at the A2-A2 1.4 switch where the Clayton 225 motor was stopped. Norris Ross, the shift boss, was at the A2-A2 1.4 switch at this time and Ross and Chavez talked about equipment. Also, Chavez told Sullivan and Garcia not to pull the number 2 raise until he had checked the track.

While Chavez finished talking to Ross, Sullivan and Garcia proceeded from the A2-A2 1.4 switch to the A2-A2 3.8 switch with Sullivan walking ahead of the locomotive and Garcia driving the locomotive. Throughout the shift and throughout several prior shifts Sullivan and Garcia had traded off operation of the locomotive as part of Garcia's on the job training in preparation for Garcia taking over complete operation of the locomotive when Sullivan went on vacation.

Chavez finished his conversation with Ross and walked toward the A2-A2 3.8 switch. Ross went the opposite direction to the number 1 shaft.

After Sullivan reached the A2-A2 3.8 switch he walked on

ahead to the location of the ground fall. Garcia waited with the locomotive at the A2-A2 3.8 switch. Sullivan observed that the ground fall had been cleared from the track but that the wire mesh support above the track had a hole in it through

which the ground had broken and fallen on the track and that some rock was still hanging in the mesh. This had not been repaired by the track crew.

After Sullivan observed the hole in the mesh he yelled the status to Garcia. Shortly thereafter, Chavez arrived at where Garcia was stopped with the locomotive. Garcia reported to Chavez what Sullivan had reported to Garcia. Chavez directed Garcia not to pull the number 2 raise. Garcia then motioned to Sullivan to board the last car pulled by the locomotive and Garcia and Sullivan proceeded toward the A2-A2 1.4 switch.

Chavez waited for the locomotive and cars to pass him. As Sullivan passed Chavez, Chavez instructed Sullivan to pull the number 14 raise. Chavez then walked to where the ground fall had occurred and found it as described by Garcia.

As Chavez walked from the A2-A2 1.4 switch to the A2-A2 3.8 switch, he noticed no broken timber. This was the first time Chavez had been through the area on this shift. Likewise Sullivan noticed no broken timber as he walked the track from the A2-A2 1.4 switch to the A2-A2 3.8 switch at approximately 11:20 p.m. Sullivan had noticed a broken timber the week prior to December 18, 1979, but this had been replaced upon finding it broken.

After Chavez observed the area of the ground fall and the mesh, he walked past the A2-A2 3.8 switch toward the A2-A2 1.4 switch and observed for the first time one broken timber.

As Sullivan and Garcia proceeded from the A2-A2 3.8 switch to the A2-A2 1.4 switch Sullivan observed for the first time one broken timber. Garcia was operating the locomotive and Sullivan was riding in the last car. Sullivan could not at all time see Garcia. As the train approached the A2-A2 1.4 switch, Sullivan sensed something was wrong as the train appeared to be moving only at a coasting slow speed.

Sullivan, when able to do so, climbed over the cars to the locomotive. By this time, Chavez had caught up with the train and observed Sullivan climbing over the cars to the locomotive and putting the brake on the locomotive. Chavez likewise climbed over the cars to the locomotive and joined Sullivan, where they found Garcia has sustained a head injury which eventually resulted in his death.

Garcia was given first aid which included mouth to mouth respiration by Chavez, and was transported to the hospital in Gallup, New Mexico where he died at 1:05 a.m. on December 19, 1979.

At 2:00 a.m. on December 19, 1979, UNC's Manager of Safety, Kay Kofford was notified by UNC's Inspector of Mines Lolo Martinez that an accident involving Alex Garcia had occurred. Kofford immediately proceeded to the Northeast Churchrock Mine, went into the mine to the beginning of the haulage-way between

the A2-A2 1.4 switch and the A2-A2 3.8 switch and secured

the area. No one had been in the area from the time of the accident until Kofford secured the area.

At 9:00 a.m. on December 19, 1979, MSHA inspectors Charles H. Sisk, Ned D. Zamarripa, and Francis T. Csepregi arrived at the Northeast Churchrock Mine. They along with UNC employees and Charles D. Lunger from the New Mexico Mine Inspector's Office entered the mine, proceeded to the location of the accident and began inspection at approximately 10:00 a.m.

The investigation revealed that no one had been in the area since the time of the accident. The Clayton 225 locomotive was at the A2-A2 1.4 switch.

MSHA inspectors directed that measurements be taken. From the front of the locomotive to where Garcia's hard hat was found measured 231 feet. The highest point on the locomotive measured 61 inches from the track rail. The top of the locomotive is dome shaped with the sides of the top of the locomotive being less than 61 inches from the track rail. See Exhibit # 10.

The locomotive measured 42 inches wide. At the front of the locomotive is a compartment from which the motorman operated the locomotive. Within the compartment is a builtin seat. The top of the front of the locomotive measured 54 inches from the track. See Exhibit # 10. One broken timber cap was found.

At the location of the timber cab (sic), next to the broken timber cap, the haulage way measured 82 inches across the bottom, 76 inches across the top and 61 1/2 inches from the top of the rail to the top of the haulage way. The broken timber cap measured 57 inches from the track rail at its lowest point which was on the side of the haulage way. The other side of the broken timber cap measured 62 inches from the track rail. Timber caps to either side of the broken timber cap and the cap next to the broken timber cap measured greater than 62 inches from the track rail and up to 96 inches or more at the switches. The timbers were not marked with warning signs or devises (sic).

During the course of the inspection, MSHA inspectors directed Sam Sullivan to dirve (sic) the motor through the area between the A2-A2 1.4 switch and the A2-A2 3.8 switch and drop off the cars at the A2-A2 3.8 switch. Sullivan then was directed by MSHA inspectors to repeatedly drive the locomotive between the A2-A2 1.4 switch and the A2-A2 3.8 switch. MSHA inspectors and UNC supervisory personnel repeatedly walked through the area during the course of the inspection. After measurements were taken, Kay Kofford was allowed to wedge a stull (vertical support) under the broken timber so it would not drop further down. This was the first corrective action which was taken. Prior to, during and after the inspection no ground fell in the haulage-way between the A2-A2 1.4 and the A2-A2 3.8 switches. When enlargement of the haulage way began in late December no ground had fallen.

After the inspection, the area was again closed to access.

The area was opened again after the entire distance between the A2-A2 1.4 switch and A2-A2

3.8 switch was enlarged. UNC spent six months and $214,500.00 in this process. See Exhibit # 11.

Throughout this process, despite repeated requests, MSHA inspectors gave UNC personnel no indication of how large the haulage-way should have been made.

As the result of the inspection conducted by MSHA, UNC received a number of citations including citation number 152050 (A copy is attached to the complaint) for violation of 57.9-104 which requires conspicuous marking of obstructions which create a hazard. UNC paid the penalty resulting from citation 152050.

DISCUSSION

Docket No. CENT 80-386-M

On December 19, 1979, during an investigation of a fatality at the respondent's Northeast Churchrock Mine, a mine inspector for the Mine Safety and Health Administration (MSHA) issued a 104(a) citation No. 151666 which stated as follows:

> There was no safe access for the person operating a Clayton (#225) haulage locomotive through the area of low clearance between the A2-A2 1.4 switch and the A2-A2 3.8 switch on the 1700 level in that the measured height of the Clayton #225 locomotive was 61 inches from its top down to track rail and at the timber cap 45 feet north from the A2-A2 3.8 switch it was measured 61 1/2 inches over the track rail.
>
> Supervisor J. Kepler (track shifter) said he made a trip through this area at about 5:30 p.m. and also again about 8:30 p.m. the swing shift of 12/18/79 and at about 11:00 p.m. he directed trip rider Garcia (whom he also said was at the controls of the Clayton #225 motor) and motorman Sullivan to go through the area of low clearance between A2-A2 1.4 switch and A2-A2 3.8 and pull some muck from # 2 raise in A2-A2 3.8 track drift.
>
> Supervisor B. Chavez (level foreman) said he was standing near the A2-A2 1.4 at about 11:20 p.m. as Clayton # 225 motor and 4 empty mine cars went by and entered the area between A2-A2 1.4 switch and A2-A2 3.8 switch. He said he followed and went through this same area to the A2-A2 3.8 switch where this motor was setting stopped with trip rider Garcia at the controls. He said he discussed an earlier fall at # 2 raise area with motorman Sullivan. He said he then told them (Garcia) not to go through to #2 raise and just to leave the area and go back out. He said the motor and the cars went back through the low clearance area between A2-A2 3.8 switch and A2-A2 1.4 switch.
>
> The stipulated facts show that at the time of the accident

Garcia was operating the locomotive and Sullivan was riding in the last ore car as they

traveled from A2-A2 3.8 switch towards the A2-A2 1.4 switch. As the locomotive approached the A2-A2 1.4 switch, Sullivan sensed something was wrong as the train appeared to be moving at a coasting speed. Sullivan climbed over the cars to the locomotive and found Garcia had sustained a head injury which ultimately resulted in his death.

Prior to the accident Chavez had walked from A2-A2 1.4 switch to the A2-A2 3.8 switch to check on a reported ground fall and did not see a broken timber in the area. Sullivan had also walked the same area at 11:20 p.m. and had not observed a broken timber. However, as Chavez walked back past A2-A2 3.8 switch towards the A2-A2 1.4 switch he saw one broken timber. Sullivan also saw the broken timber as the locomotive and cars proceeded towards the A2-A2 1.4 switch. The broken timber cap was located 45 feet north of the A2-A2 3.8 switch and would be between that switch and A2-A2 1.4 switch.

Petitioner contends that respondent's failure to provide adequate height in the tunnel through which the haulage locomotive traveled violated 30 C.F.R. 57.11-1 which states as follows:

> Mandatory. Safe means of access shall be provided and maintained to all working places.

Respondent has challenged the citation in controversy for the following reasons: (1) that it has always provided and maintained safe passage and safe transportation of employees to and from working areas and thus could not have violated section 57.11-1; (2) that standard 57.11-1 is unconstitutionally vague; (3) that the standard is overbroad; (4) that 57.11-1 is a general standard and specific standards exist which could have been cited but were not; and (5) that respondent paid the penalty for a specific standard relating to the condition of the haulage-way between A2-A2 1.4 and A2-A2 3.8 switches and thus should not be assessed twice for the same violation. Respondent also contends that the hazard is not defined in 57.11-1 and that the violation should not have been designated as significant and substantial. Further, a claim is presented by the respondent alleging that it should be reimbursed the sum of $214,500.00 expended in reconstruction of the haulage-way as abatement of the citation.

Based upon a careful review of the stipulated facts and exhibits in this case, I reject respondent's arguments and find a violation of the cited standard occurred.

I. Respondent has always provided and maintained safe passage and transportation to and from working areas and thus could not have violated section 57.11-1.

In support of its position, respondent points out that miners Garcia, James Keller, Harry Morgan and his track crew, and Chavez had all passed through the haulage drift between the A2-A2 1.4 and A2-A2 3.8 switches, either walking or riding, without incident prior to the accident. Furthermore, miners had passed

through the area on prior shifts due to the #2 raise being an active working area of the mine from which ore was being drawn.

This argument is predicated on a false premise that because an accident or injury had not occurred in the past, no hazard existed in the passage-way due to the low clearance. The facts do not support this contention. First, the measurements taken by the MSHA inspectors following the accident involving Garcia show that at a point near the broken timber cap there was 1/2 inch of clearance between the top of the locomotive and the top of the passage-way. The locomotive at its highest point was measured to be 61 inches from the top of the rail. The front of the locomotive was 7 inches lower to allow the operator to have vision to the front. At the point where the broken timber cap was discovered, there was 57 inches clearance on its lowest side from the rail. These measurements indicate by the limited amount of clearance provided for passing locomotives and ore cars that there is no room for error or an unexpected event. The broken timber cap is an example of an event that portends the existence of a dangerous condition. The primary issue here is whether, in light of the minimum amount of clearance, "safe means of access" is provided. I find that this situation in the haulage-way of an active working area of the mine creates a hazard to the safety and health of the miners and therefore violates the provisions of standard 57.11-1. Further, the strongest support for this position is the fact that an accident did occur at this location resulting in a head injury to a motorman on the locomotive and utimately his death.

Respondent also argues that the standards under the Act applying to underground coal mines makes provisions for cabs and canopies but allows variances which permit the mining machines to operate with extremely limited clearance in mining the coal seams. I find no merit in this argument as we are not involved with the equipment used to extract coal here but rather with a haulage-way used for the movement of locomotives and ore cars from one location to another. Also, it not the purpose in deciding the facts in this case to consider them in light of the provisions that apply to underground coal mining. They are distinct and separate provisions.

2. Standard 57.11-1 is unconstitutionally vague

Respondent in his brief argues that the operator has no way of knowing what "safe means of access" requires and therefore it is vague and unclear. For example, "means of access" may be defined in terms of passage-ways themselves or in terms of conveyances which transport persons through passage-ways. In contrast, respondent alleges that sections of the underground coal standards specify certain distances concerning clearances in haulage-ways.

The Commission in a recent decision addressed the argument of a standard being unconstitutionally vague in Alabama By-Products Corporation, 4 FMSHRC 2129-2130 (December 1982), and stated as follows:

> In order to pass constitutional muster, a statute or standard thereunder cannot be "so incomplete, vague,

indefinite or uncertain that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connolly v. Gerald Constr. Co., 269 U.S. 385, 391 (1926). Rather, "laws

> [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 109, 108-109 (1972).
>
> Therefore, under 30 C.F.R. 75.1725(a) in deciding whether machinery or equipment is in safe or unsafe operating condition, we conclude that the alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation. (emphasis added). See e.g., Voegele Co. Inc. v. OSHRC, 625 F. 2d 1075 (3d Cir. 1980).

This test was applied by the Commission in U.S. Steel Corp., 5 FMSHRC 3 (January 1983), which stated that the adequacy of an operator's efforts to comply with a general standard should be evaluated by reference to an objective standard of a reasonably prudent person familiar with the mining industry and the protective purpose of the Act. Also, see Great Western Electric Company, _____ FMSHRC _____ (May 25, 1983).

I conclude from the stipulated facts presented in this case that a reasonably prudent person familiar with the pecularities of the mining industry would recognize that a hazardous condition was created by the limited clearance in the haulage-way and would increase the height of this section of the mine. As stated before, the mere existence of a 1/2 inch of clearance between the top of the locomotive and top of the haulage-way should indicate to management that the slightest deviation in the top or supports, such as timbers, or a careless mistake by a motorman or miner riding in the ore cars could cause serious injury. Based upon the criteria set by the Commission in their recent decisions and the facts presented in this case, I find that the general standard is not unconstitutionally vague.

3. The standard is overbroad.

I likewise reject the argument that the standard is so ambiguous and overbroad as to be void under the statute. Again, the Commission has stated in Alabama By-Products Corporation, supra, as follows:

> Broadness is not always a fatal defect in a safety and health standard. Many standards must be "simple and brief in order to be broadly adaptable to myriad circumstances." Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). See Ryder Truck Lines, Inc. v, Brennan 497 F. 2d 230, 233 (5th Cir. 1974).

In the present case, I find that the requirement in the standard that the operator must provide and maintain a "safe

means of access" to all working places is neither overbroad nor ambiguous. There is no question that

this particular standard can be applied to a "myriad" of different circumstances and locations in the mine. However, the requirement of a "safe means of access" in a mine must be considered to be a basic requirement for the protection of the miner's health and safety. The difficulty in application of a standard to a given situation, as is the case in many standards, is the different interpretation as to what is considered "a safe means of access." As examples, in Homestake Mining Company, 2 FMSHRC 23167 (August 1980)(ALJ), the judge decided that in a passageway where a ladder was installed for a distance of six feet a clearance of only 13 inches between the ladder and the back of the passageway was dangerous to miners climbing up and down with their equipment and did not provide a "safe means of access," and violated 57.11-1. In The Hanna Mining Company, 3 FMSHRC 2045 (September 1981), the Commission affirmed a finding that travel underneath an overhead belt by miners was an "unsafe means of access" and violated 57.11-1 as did a large ore spill in an aisle. These representative cases indicate several different types of situations where the standard 57.11-1 was applied. I see a similarity between the application of the standard in those circumstances and varied locations and the conditions in the haulage-way being considered here. First, the haulage-way is a location in the mine that must be considered a "working place" for miners. Under section 57.2, Definitions, "working place" means any place in or about a mine where work is being performed.

I conclude that the respondent has failed to establish in his arguments that the Secretary exceeded his rulemaking authority under the Act in adopting the general standard at issue requiring that a "safe means of access" be provided and maintained in the "working place" of the mine.

4. Standard 57.11-1 is a general standard and there exist specific standards which could have been cited but were not.

Respondent contends that the enforcement scheme and standards under the Occupational Safety and Health Act of 1970 (OSHAct) are similar to those of the Federal Mine Safety and Health Act of 1977 (MSHAct). Further, that it is a well established doctrine under OSHAct that if there exists an applicable specific standard and that standard is not cited because a more general standard is cited, the citation of the general standard must be vacated. Trojon Steel Company, 3 OSHA 1384 (1975). It has been held by Occupational Safety and Health Review Commission that a citation for the violation of section 5(a)(1) is invalid and will not lie where a duly promulgated occupational safety and health standard is applicable to the condition or practice that is alleged to constitute a violation of the Act. Brisk Waterproofing Company, Inc., 1 OSHA 1263 (July 1973). Respondent suggests that the Federal Mine Safety and Health Review Commission should follow this precedent in the interest of administrative and judicial economy (Resp. Br. 14).

This defense must be rejected. Admittedly, the OSHAct and MSHAct acts have similar statutory language and were enacted to protect the health and safety of certain employees in the work

place. However, there are some very

distinct differences in the two laws as adopted by Congress. One of the most noticeable differences involves the provisions of section 5(a)(1) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, et seq., 84 Stat. 1590 which is frequently referred to as the "general duty clause."(FOOTNOTE 2) This provision of the OSHAct was adopted by Congress to take effect where there was not a precise standard to cover every conceivable situation that may arise. See Senate Committee on Labor and Public Welfare, S. Rept. No. 91-1282, 91st Cong., 2d Sess (1970 at 9, 10, p. 21).

The "general" designation under which section 57.11-1 is listed in the MSHAct is for a different purpose than the respondent would contend. "General" in this instance, refers to the fact that this standard applies to both "Surface and Underground" mining under a heading of "Travelways." These titles are listed in the regulation under the heading " 57.11 Travelways and escapeways."

5. Respondent should not be required to pay twice for the same condition or violation

The facts show that respondent was also issued Citation No. 152050 in connection with the investigation of the accident in this case and citation being contested herein. Citation No. 152050 alleged a violation of standard 57.9-104 which states as follows:

> Mandatory. Warning devices or conspicuous markings shall be installed where chute lips, ventilation doors, and obstructions create a hazard to persons on equipment.

The citation reads as follows:

> "The timber caps in A2 haulage drift between A2-1.4 and A2-3.8 did not have warning devices or conspicuous markings to warn persons operating a clayton locomotive of the low clearance area. The timber caps range from 57" to 67" in height from the track rails. The clayton locomotive measures 61" from the track

rail. A2 haulage drift is the only haulage access from # 2 and # 4 ore raises in 3.8 haulage drift on 1700 level."

Respondent argues that Citation No. 152050 involves the same area, measurements and same alleged violation being considered in this case involving No. 151666. Further, respondent has paid the proposed penalty assessment involving 152050 and that it would be res judicata to retry this again.

The respondent fails in this argument for the facts show that two violations of mandatory safety standards occurred here. First, the respondent was cited for, and I find, violation of 57.11-1 requiring a safe means of access be provided and maintained to all working places. As to Citation No. 152050, the violation charged was for failure to have warning devices or conspicuous markings installed where a hazard existed. These are two separate violations. It is well settled that the 1977 Mine Act imposes a duty upon operators to comply with all mandatory safety and health standards. It does not permit an operator to shield itself from liability for a violation of a mandatory standard simply because the operator violated a different, but related mandatory standard. El Paso Rock Quarries, Inc., 3 FMSHRC 35 (January 1981), Southern Ohio Coal Company, 4 FMSHRC 1459 (August 1982).

6. The violation of Section 57.11-1 was not significant and substantial.

Respondent contends that because the standard cited here is so vague as not to define the hazard, it should not have been designated as significant and substantial.

I also reject this argument as being without merit. The standard must be given a rational and reasonable interpretation. The "safe access" referred to must be viewed in the light of the danger that exists to miners who are working in the area and in this instance traveling on the locomotive and ore cars through this area of restricted clearance. The standard must be construed to effectuate its obvious purpose - safety. To accept respondent's interpretation would be inconsistent with that purpose.

The test for a "significant and substantial" violation was laid down by the Commission in Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHRC 822, April 7, 1981, also a civil penalty case. In that case the Commission held that a violation is "significant and substantial" if: "[B]ased upon the particular facts surrounding that violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature."

From the facts before me in this case, there was a reasonable likelihood that miners traveling on either the locomotive or ore cars through the area in the haulage-way of the mine cited herein as having restricted clearance could receive injuries of a "reasonably serious nature" by having a part of his person come in contact with the top of the haulage-way. In the instant case, a miner suffered head injuries, ultimately resulting in his death. This is sufficient, as an example of the potential hazard that existed in the area, to meet the test set out by the Commission, and warrants that the violation of the standard be designated as significant and substantial.

In view of my finding that a violation of standard 57.11-1 existed as alleged in Citation No. 151666, I am not obliged to make a determination of the merits of respondent's contention that it should be reimbursed for the funds expended increasing the clearance in the haulage-way. The fact is that respondent was required to do so in abatement of the alleged violation, which ultimately was accomplished and the hazard eliminated.

PENALTY

After respondent abated the violation, the Secretary terminated the withdrawal order and proposed a civil penalty of $7,500.00 for the alleged violation.

As part of the stipulated facts in this case, it was shown that respondent's mine employed 916 persons in December 1979, operating three eight hour shifts six days a week. This would indicate a large mine operation.

No argument was advanced by respondent that payment of the proposed penalty in this case would jeopardize its ability to continue in business. Therefore, it is presumed that if a penalty is assessed, it will not do so.

The Secretary appended to his brief filed in this case a certified copy of a computer print-out showing respondent's assessed violation history beginning December 20, 1977 through December 20, 1979, the day of the accident. Respondent raised no objection to this computation of assessed violations so it is presumed that it does not disagree with the figures. The printout shows for the period covered, that respondent was assessed and has paid the penalty for 245 violations.

I find from the facts in this case that the negligence on the part of respondent was high as the restricted clearance in the haulage-way was visible to all who traveled through this area. However, the stipulated facts do not show that respondent's supervisors, or Sullivan, Garcia's partner, saw the broken timber cap before the accident occurred. I do not find that this condition of a broken timber cap was established as the direct cause of the injury to Garcia, although it may have been, but rather, find that the

restricted height in this haulage-way was the hazard and the cause of the injury to the miner.

The gravity is also high. The seriousness of the type of injury that occurred in this case should have been forseen by the respondent. Also, the lives of many miners were endangered by this condition as the haulage-way was regularly used and is an active working part of the mine.

The respondent did abate the hazard by enlarging the haulage-way and providing adequate clearance in the area. This required respondent to expend the sum of $214,500.00 plus lose some production in the mine. When assessing a penalty where there is a vacated withdrawal order, it is proper to take into account the economic loss suffered by the operator as a consequence of the order. See North American Coal Company, 1 MSHC 1131, 3 IBMA 93 (April 1974).

I conclude, based on all of the above findings and factors, that a penalty of $2,000.00 is proper in this case. I believe a reduction in the amount of the proposed penalty assessment is warranted for the reason that the respondent did pay another penalty without contest and expended a large sum of money in abatement of the violation.

DOCKET NO. CENT 80-387-M

This case involves a 104(a)(FOOTNOTE 3) Citation No. 151667 issued to the respondent alleging a violation of 30 C.F.R. 57.3-26. The condition or practice for which respondent is cited is described in the citation as follows:

> There is a damaged and broken timber cap creating a hazardous condition for haulage equipment that was directed to travel through the area between A2-A2 1.4 switch and the A2-A2 3.8 switch on the 1700 level in that one of the timber caps 41 feet north from A2-A2 3.8 switch is broken horizontally about halfway along its length and was hanging down to within 57 inches over the left side track rail (looking south).
>
> The haulage equipment (Clayton locomotive #225) directed

by Supervisor J. Kepler (track shifter) to travel through this area measured 61 inches from its top to track rail. Supervisor J. Kepler said he passed through this same area twice earlier in the shift.

30 C.F.R. 57.3-26 provides as follows:

> Mandatory. Timbers used for support of ground in active workings shall be set, blocked, or blocked and wedged so that a fit is achieved. Damaged, loosened, or dislodged timbers which create a hazardous condition shall be promptly repaired or replaced.

Without further explanation, Petitioner in his brief stated that he chose not to brief the issues surrounding 30 C.F.R. 57.3-26 but instead addressed his entire argument to standard 30 C.F.R. 57.11-1 which refers to the alleged violation contained in Docket No. CENT 80-386-M. This failure on the part of petitioner to afford the adjudicator the benefit of his arguments on the issues in this case could be construed as tantamount to an abandonment of his petition against the respondent. However, I am required to abide by the decisions of the Federal Mine Safety and Health Review Commission which holds that section 110(a) of the Act mandates an assessment of a penalty for any violation of a mandatory safety standard.(FOOTNOTE 4) Island Creek Coal Company, 2 FMSHRC 279 (February 1980), Van Mulvehill Coal Company, Inc., 2 FMSHRC 283 (February 1980). Therefore, if I find a violation of the cited standard, from the stipulated facts in this case, I will assess a penalty.

Respondent has admitted in its brief that a broken timber cap was discovered in the haulage-way at approximately the same time the accident occurred. The remaining issue to be decided is whether the broken timber cap created a hazardous condition contemplated by standard 57.3-26. Respondent argues in its brief that existence of the broken timber cap in the haulage-way between the two switches did not create a hazardous condition. The basis for this reasoning is that 57.3-26 applies to ground control or control of the top of the haulage-way and was not related to the hazard of restrictive clearance or obstructions (Resp. Br. 22-23).

I concur with respondent that this standard is included under part 57.3 of the regulation that is designated "Ground control" in "Underground" mines. The general tenor of the other standards that precede and follow 57.3-26 are directed towards support and control of ground in underground mines. The question here is what was the hazardous condition cited by the

inspector when he issued this citation? In the condition or practice section in the citation, the inspector wrote "There is a damaged and broken timber cap creating a hazardous condition for haulage equipment . . . ." There is no further statement as to whether the hazard was the possibility of a ground fall or cave-in, or rather to a locomotive or miner striking the timber in passing through the area, or both.

It is unfortunate that the Secretary elected not to brief the issues in this case as his arguments and authorities would have been most helpful. However, I am compelled to resolve the issues in spite of this. I am persuaded by a careful review of the statement of the inspector in the citation describing the conditions as he found them that he contemplated a hazard to the equipment from the broken timber falling down into the upper portion of the haulage-way. This determination is based upon the fact that included in this description is the measurements of the restricted clearance created by the broken timber described as ". . . broken horizontally about halfway along its length and was hanging down to within 57 inches over the left side track rail (looking south)."

If the above assumption is incorrect, and the inspector had intended to cite a hazard for roof control, I would have to find that there was not a violation of the standard. The facts show that the broken timber cap was first observed immediately before the accident occurred. There is no evidence in the stipulated facts to show that this condition had existed for a period of time or that respondent had prior knowledge. Further, there is no evidence that this one broken timber cap amongst the others installed in the area created a hazard of a fall or cave-in. The standard contemplates that timbers that are damaged, loosened, or dislodged and create a hazard shall be promptly repaired or replaced. The crucial word appearing in this standard is "promptly." In the case Magna Copper Company, 3 FMSHRC 349 (February 1981) (ALJ), involving standard 57.3-26 and similar facts, Judge Carlson stated in part as follows:

> Respondent is perhaps correct that a mine operator need not replace every damaged or weakened support. But if that is so, the Secretary is doubtless correct in insisting that where a damaged support in a working area of a mine is not replaced, that decision must rest on a thorough and prudent assessment of the effect of weakened support on safety.

In the above case, the damaged support existed for a year and respondent's own safety engineer believed it should have been replaced and a violation was found. That is not the case here. The evidence neither shows that the support was necessary for adequate ground control nor that it had existed for any period of time.

However, if the assumption is correct that the hazard contemplated by the inspector was a danger to the locomotive or miners passing underneath due to a restriction of clearance, then

the issue is whether the standard was the proper one to be applied in issuing the citation. In the case of Phelps

Dodge Corporation v. Federal Mine Safety and Health Review Commission, 681 F. 2d 1189 (1982), the United States Court of Appeals for the Ninth Circuit considered the same issue as presented by respondent in this case, although a different standard and unidentical facts. The Court found that the application of a regulation in a particular situation may be challenged on the ground that it does not give "fair warning" that the alleged violative conduct was prohibited. See Daily v. Bond, 623, F. 2d 624, 626-627 (9th Cir. 1980). In the Phelps Dodge case, the contention was that the standard cited was to protect against hazards of electrical shock and not hazards of removing rocks from a chute. The Court concluded and stated as follows:

> The regulation inadequately expresses an intention to reach the activities to which MSHA applied it. Therefore, we join in the observation: "If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express" (citation omitted).

The Court found that the Secretary had abused his discretion in applying the standard under electrical hazards to non-electrical hazards.

Under the doctrine adopted in the above case, I find that the standard applied in this case is unconstitutionally vague as to all hazards except when applied to the hazards associated with ground support. As I stated before, I do not find a violation of 57.3-26 as to the requirements of the standard relating to ground control and prompt replacement, or repair of broken timbers. If the Secretary had wished to cite the respondent for a broken timber cap, creating a hazard to the movement of locomotives and means through an area of restricted clearance, there are other standards he could cite. I therefore vacate Citation No. 151667.

CONCLUSIONS OF LAW

1. Respondent was subject to the provisions of the Federal Mine Safety and Health Act in the operation of the Northeast Churchrock Mine at all times pertinent hereto, and the undersigned Administrative Law Judge has jurisdiction over the parties and the subject matter of these proceedings.

2. Respondent was in violation of the mandatory standard in 30 C.F.R. 57.11-1 by reason of the fact that it failed to maintain a safe means of access to all working places in that there was limited and restrictive clearance height in the haulage-way between A2-A2 1.4 and A2-A2 3.8 switches.

3. Respondent did not violate standard 30 C.F.R. 57.3-26 and said Citation No. 151667 is vacated for the reason that the standard is unconstitutionally vague as to a hazard to miners because of restricted clearance in the haulage-way due to the broken timber cap dropping or hanging down therein.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation No. 151667 is vacated.

2. Citation No. 151666 is affirmed and respondent shall pay the Secretary of Labor the above-assessed penalty, in the amount of $2,000.00, within 40 days from the date of this decision.

Virgil E. Vail
Administrative Law Judge

FOOTNOTES STERT HERE-

1 The parties also stipulated to eleven exhibits attached to the stipulated facts filed in this case.

2 Sec. 5(a) Each employer-
(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
(2) shall comply with occupational safety and health standards promulgated under this Act.
(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

3 Sec. 104(a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

4 Sec. 110(a) The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.