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SOL (MSHA) V. BLUE CIRCLE
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. CENT 88-76-M A.C. No. 34-00026-05515
v.	Tulsa Plant
BLUE CIRCLE ATLANTIC, INCORPORATED, RESPONDENT	

DECISION

Appearances: Mary Witherow, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
Robert McCormac, Industrial Relations Manager, Blue Circle Incorporated, Tulsa, Oklahoma, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). The petitioner seeks a civil penalty assessment of $147, for an alleged violation of mandatory safety standard 30 C.F.R. 56.20011, as stated in a section 104(a) "S&S" Citation No. 3061188, served on the respondent by MSHA Mine Inspector Jimmie L. Jones on November 20, 1987.

The respondent filed a timely notice of contest and answer denying the violation and a hearing was held in Tulsa, Oklahoma. The parties waived the filing of written posthearing arguments, but I have considered their oral arguments made in the course of the hearing in my adjudication of this matter.

Issues

The issues presented are (1) whether the respondent violated the cited standard, and if so, the appropriate civil penalty which should be assessed taking into account the civil penalty assessment criteria found in section 110(i) of the Act; and (2) whether the alleged violation was "significant and substantial" (S&S). Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq

2. Commission Rules, 29 C.F.R. 2700.1, et seq.

3. Mandatory safety standard 30 C.F.R. 56.20011.

Stipulations

The parties stipulated to the following relevant matters (Tr. 4-6):

1. The respondent is subject to the jurisdiction of the Act, and the alleged violation took place in or involves a mine that has products which enter or affect commerce.

2. The subject mine is located near Tulsa, Rogers County, Oklahoma, and had an annual production rate of 242,098 tons or hours worked. The size of the respondent's operation is 1,568,568 production tons or hours worked per annum.

3. The imposition of a civil penalty assessment for the alleged violation will not adversely affect the respondent's ability to continue in business.

4. The total number of inspection days for the 24-month period preceding the issuance of the subject citation is 42, and the total number of assessed violations for this time period, including single penalty assessments, is 13.

5. The citation in question in this case was immediately abated by the respondent.

Discussion

Section 104(a) "S&S" Citation No. 3061188, November 20, 1987, cites an alleged violation of mandatory safety standard 30 C.F.R. 56.20011, and the condition or practice is described as follows:

> There was no barricades or warning signs along the perimeter and approaches into the mill building where employees travel. A roofer contractor was working 75 feet above where rolls of roofing material, 5 gal. pails, large propane gas cylinders and other materials were being used and handled. The roof sloped about 3/12 and would easily allow dropped items to fall to ground level.

Petitioner's Testimony and Evidence

MSHA Inspector Jimmy L. Jones testified as to his background and experience, and he confirmed that he issued the contested citation on November 20, 1987, at the respondent's cement plant and limestone quarry site. He explained that he was at the site conducting a special investigation of a discrimination complaint, and that prior safety complaints had been made by mine personnel against the roofing contractor who was performing work at the mine. During the course of his interview with an employee foreman of the respondent on November 20, the employee advised him that he had observed the contactor's truck on the premises that day and that the contractor was there to do some work. Mr. Jones and respondent's industrial relations manager Robert McCormac then went to the mill building and went up on the roof.

Mr. Jones stated that no one was working on the roof on November 20, but that he observed some roofing material and equipment left there by the roofing contractor who was re-roofing the mill building roof. Mr. Jones stated that the roof was approximately 50 to 75 feet high and several hundred feet long. He identified exhibits P-1 and P-2 as sketches that he made of the roof area, and he described the materials which he found on the roof as rolled roofing material, 5 gallon pails of mastic material, a homemade hand-truck, a 20 pound propane bottle cylinder, and a 60 pound propane bottle cylinder. Mr. Jones confirmed that respondent's photographic exhibits J-1 and J-2, are photographs of the mill

building in question, and the roof after the re-roofing work was completed.

Mr. Jones stated that a portion of the roof work had been completed on November 20, but that the roof area where he observed the materials and equipment in question had not been finished. He stated that the 60 pound propane bottle and hand-truck were not secured or tied down, and he was concerned that the propane bottle could fall over and roll off the roof and strike a passing vehicle or service or maintenance personnel walking along the conveyor walkway below the roof. The roof peaked at the center, and had a 3/12 pitch. He believed that winds could have toppled the propane bottle and caused it to fall over and roll off the roof to the ground below. If the bottle struck a vehicle, it would cause serious damage, and if it struck anyone it would result in injury. There was also a chance of the propane bottle valve striking the ground, and if this occurred, the bottle could become airborne and cause injuries or damages if it struck personnel or vehicles (Tr. 8-24).

Mr. Jones believed that the hazard presented by the unsecured propane bottle on the roof would not be obvious to anyone travelling on foot in the area below the roof or a vehicle using the roadway. He observed no barricades or warning signs blocking off the walkway or roadway below the roof area in question. However, in another roof area where the contractor had worked on a flat-roof section removing old roofing material and concrete, and had dumped these materials off the side of the roof, the area below had been barricaded and tied off by 55-gallon drums and yellow marking tape.

Mr. Jones stated that he discussed the conditions which prompted him to issue the citation with Mr. McCormac, and that he voiced no objections with his findings.

Mr. Jones confirmed that he based his "S&S" finding on his belief that it was reasonably likely that the hazard presented would have resulted in injury because of the height of the roof, the amount of work which had been performed on the roof, and the fact that vehicles and personnel would be travelling in the area below the roof location where the materials were located. Mr. Jones also confirmed that he made a negligence finding of "moderate," and that he did so because the contractor, rather than the respondent, created the hazard, and that the respondent may not have been in the area and did not recognize the hazard. He also stated that he found no evidence that the respondent was making regular

reviews of the contractor's work while it was in progress (Tr. 24-27).

Mr. Jones confirmed that during his inspection of the roof on November 20, he found that the ladder used by him and Mr. McCormac to gain access to the roof had not been secured, and that he issued citations to the contractor for not securing the ladder and for not providing a safe means of access to the roof. He also confirmed that he had cited the contractor for other violative conditions in connection with the lack of safety lines for its personnel while working on the roof, failure to secure equipment while working on the roof, and the failure by contractor employees to wear hard hats, safety shoes and safety glasses. Mr. Jones conceded that "in hindsight," he probably should have also cited the contractor for the violation in question in this case (Tr. 27-32).

On cross-examination, Mr. Jones conceded that the prior complaints concerning the contractor's work on the roof were not reduced to writing or served on the respondent as required by section 103(g)(1) of the Act. Mr. Jones explained that he was not at the mine for the purpose of conducting a section 103 investigation or inspection, but that he was there conducting a special investigation in connection with a discrimination complaint against the respondent. He confirmed that the discrimination complaint is still in litigation, and that it was filed by an employee who alleged that some action had been taken against him for complaining about alleged contractor violations at the site.

Mr. Jones reiterated that no one was working on the roof when he inspected it on November 20. He conceded that while it was true that someone or something would have to put the materials in motion before they could fall off the roof, he believed that a wind could have toppled over the free standing 60 pound propane bottle and caused it to roll off the roof.

Mr. Jones confirmed that he was primarily concerned with the 60 pound propane bottle and the hand truck, and not the other materials on the roof. He explained that it was not likely that the rolls of roofing materials, pails, or smaller propane bottle would fall off the roof because they were stored in such a manner as to preclude this from happening (Tr. 33-53).

Mr. Jones stated that regardless of the type of inspection or investigation being conducted by an inspector at any given time, an inspector is authorized to issue citations for

violations and to use an appropriate MSHA "incidental inspection" code to identify the inspection. He reiterated that in the case at hand, the information which prompted him to visit the roof with Mr. McCormac came to his attention through his discussions with the foreman in connection with his investigation of a prior discrimination complaint (Tr. 54).

Mr. Jones confirmed that everyone he spoke with in connection with his discrimination investigation was aware of the fact that the contractor was on the roof from time-to-time performing work. He confirmed that after his inspection which resulted in the issuance of the citation in issue in this case, he returned to the mine to complete his discrimination investigation and to abate some prior citations, and he observed the contractor performing work on the roof (Tr. 55).

In response to further questions, Mr. Jones stated that the propane bottle in question "was nearly in a straight-line relationship to that conveyor" and that "My judgment was it was only reasonably likely that it could fall and it could strike either that roadway or that conveyor" (Tr. 94). In response to a question as to whether or not barricades need to be in place regardless of whether anyone is actually doing any work on the roof, Mr. Jones responded as follows (Tr. 94-95):

> MR. JONES: No. The only reason that they needed the barricaded warning sign was because of this unsecured bottle and stuff up there when no one's working up there. If they would secure that material, then they could take their barricades down.
>
> But all the time that people are working up there on that sloped roof along the perimeter, they're down on the ground. They have no idea what position these people are in. They need to have that roadway and that conveyor blockaded because you never know where the material would come from because they're working along the length of that building.

William J. Brock, testified that he is employed by the respondent as a repairman and welder, and also serves as the vice-president of the local union and representative of the miners working at the mine. Upon review of inspector Jones' sketch, exhibit P-1, he confirmed that prior to the inspection of November 20, he observed the roofing contractor working on the roof in question, and also observed the equipment and materials described by Mr. Jones. Mr. Brock also observed the

contractor performing work on the roof after the citation was issued.

Mr. Brock stated that he observed no barricades or warning signs in place on the roadway or the conveyor walkway in the area beneath the roof location where the cited materials and equipment were observed by Mr. Jones on November 20. Mr. Brock confirmed that employees and trucks would have occasion to be on the roadway and walkway in the unprotected area under the roof. He stated that a dust truck travelled the roadway every 30 minutes, and that contractor vehicles also used the roadway. In addition, respondent's loaders would also be in the roadway area working and moving material, and that mine employees would be on foot in the area of the tripper belt in the morning at the beginning of the shift, and at the end of the shift. An oiler and rock crusher operator would also be on the conveyor walkway at least once a day.

Mr. Brock stated that prior to the inspection by Mr. Jones on November 20, he had questioned the respondent about the lack of barricades at another location at the west end of the mill building where the contractor was hauling materials and equipment up to the roof. After receiving no response, Mr. Brock stated that he took it upon himself to rope the area off (Tr. 61-67).

Mr. Brock stated that the walkway located on the elevated conveyor belt is partially covered with a roof, and that individuals using that walkway would not normally be walking on the roadway below the conveyor. However, people would be on the roadway on foot occasionally (Tr. 68). With regard to the lack of any barriers on the east side of the building, Mr. Brock confirmed that he had no particular knowledge that work was being performed on the roof at that location, and that it was possible that any work on the roof was taking place on the west side of the roof apex. He confirmed that he was not on the roof at that time (Tr. 69). He also confirmed that while he was at work on the day of Mr. Jones' inspection when the citation was issued, he did not visit the cited roof area with Mr. McCormac or Mr. Jones to view the conditions (Tr. 75).

Respondent's Testimony and Evidence

Bobby McFarland, respondent's utility supervisor, testified that his duties included the supervision of the plant labor department which is responsible for cleaning the plant and insuring that work areas are barricaded as required. In those instances where it is necessary to perform cleaning on

elevated areas, and materials are thrown off the roof, the bottom wall and ground areas are barricaded. He confirmed that he was aware of the fact that Patterson Roofing Company was doing some roof work at the plant "last fall" (Tr. 76-77). His crew was assigned to keep the ground barricaded and roped off while Patterson Roofing was doing any work that presented a hazard, and that this was done "when they was there working." With regard to the day the citation was issued, Mr. McFarland confirmed that the roofing contractor was not at the plant site and that the area around the building in question was not roped off that day because no one told him that the contractor would be there (Tr. 78).

On cross-examination, Mr. McFarland confirmed that he was at work on the day the citation was issued, and although he went to the ground area of the crane storage building, he did not accompany Mr. Jones and Mr. McCormac on the roof during their inspection. Prior to this time, he was aware of the fact that the contractor had worked on the east side of the building (Tr. 79). He confirmed that when the contractor was working on the north side of the building, he barricaded the area, but not the entire perimeter of the east side (Tr. 79). The area which was barricaded was at the location where materials where being removed and thrown off the roof. He identified the area which had previously been roped off and barricaded by reference to a sketch and photograph (exhibit P-1 and J-1; Tr. 80-82). The barricades were up "probably the day before" the citation when work was taking place, but they did not remain up for the entire time the workers were on the roof working because they were taken down so that truck traffic could pass through the area. Mr. McFarland believed that the barricades were "probably taken down to the edge of the road" (Tr. 83).

Mr. McFarland explained that the barricades consisting of ropes placed around empty barrels, were put up when the roofing contractor was hoisting building materials to the top of the roof by means of a crane and a pulley rope. When asked whether or not the barricades remained in place after the materials were on the roof, Mr. McFarland responded as follows (Tr. 85-88):

> JUDGE KOUTRAS: After the materials are up on the roof and the guys start to work, what happens to the barricades?
>
> THE WITNESS: Okay, the one on the east side there gets pulled back to the road where the traffic can go through, and on the north and

south side up in front, why, they get taken down for that night. If they start to work the next morning, we put them up; if they don't work, we don't put them up.

JUDGE KOUTRAS: But if they are up there working, are the barricades still up?

THE WITNESS: They're supposed to stay up, yes sir.

* * * * * * *

JUDGE KOUTRAS: Why is that?

THE WITNESS: If you -- to keep stuff from falling, people walking under them.

JUDGE KOUTRAS: Then if for some reason the contractor decides not to work on any particular day and there is nobody up there, then the barricades are taken away; is that what you are saying?

THE WITNESS: Yes. They'll be pushed up against the building.

JUDGE KOUTRAS: Then when the contractor comes out again, they're pulled out and put up again; is that what you are telling me?

THE WITNESS: Yes, that's what . . .

JUDGE KOUTRAS: Now, on November 20th when the inspector issued this citation, were you at work?

THE WITNESS: Yes.

JUDGE KOUTRAS: Were the barricades up or against the building that day?

THE WITNESS: They was probably against the building that day because he didn't work.

JUDGE KOUTRAS: You say "probably." Do you know for a fact that they were against the building? Did you go up there?

THE WITNESS: No, I didn't go on top.

JUDGE KOUTRAS: Not on the roof, did you go to that area? Did you have any reason to be there?

THE WITNESS: Yes, I have a reason to go every day there around the building.

JUDGE KOUTRAS: Do you remember seeing any barricades there?

THE WITNESS: No.

JUDGE KOUTRAS: They were up in the roadway?

THE WITNESS: They was in the area, but they probably wasn't on that day because they wasn't working. I have a crew that puts them up when they work.

And, at (Tr. 92-93):

JUDGE KOUTRAS: So if they are up there doing work then the roadway is not blocked?

THE WITNESS: No, it's not on the back side.

JUDGE KOUTRAS: Not on the back side?

THE WITNESS: Right.

MS. WITHEROW: Is the walkway blocked off?

THE WITNESS: The walkways are covered, both of them -- all three of them are covered.

MS. WITHEROW: We have heard testimony from two witnesses that there are parts of that walkway that are not covered.

THE WITNESS: The tripper belt is covered and your clinker belt where it used to be there's a walkway that we walk through, it's also covered.

> But from going to the mill building, top of the mill building out to the footer building, it's not.
>
> * * * * * * *
>
> Q. So this walkway that Mr. Jones testified about, it was not -- it was open?
>
> A. Well, it's got covers on your belt but it don't have a cover over your -- it's not a covered walkway.
>
> Q. Fine. Were there any barricades or warning signs on that?
>
> A. On this one (pointing)?
>
> Q. On that walkway?
>
> A. No.
>
> Q. At any time?
>
> A. No, not that I know of.

John Bayliss, respondent's maintenance manager, confirmed that he was familiar with the contractor performing work on the roof of the crane storage building prior to and after the time the citation was issued, and that he was aware of the contractor's "comings and goings." Mr. Bayliss stated that the contractor was not performing any work on the roof on the day that the citation was issued. He confirmed that all roofing contractors are given safety instructions, and they are instructed to wear hard hats, glasses, and hard-toes shoes, and that in the event they needed assistance or barricades they were to come to him. When asked whether or not barricades were installed when contractors were performing work at the plant, Mr. Bayliss stated as follows (Tr. 98):

> A. Whenever they told us that they were in a problem, we installed barricades. When they were going to tear the junk -- they started off tearing the top off the roof, and then they lifted up the new supplies, and then they stuck these new supplies back on the roof. That was a job.

When they came to lift up the supplies, there were two different, separate times when they were lifting supplies up. One, they used a huge mobile crane, and the next time they used the rope down the side of the building.

> Each time when they were using these things, we put barricades up. Bob works for me, and he put barricades up.

Mr. Bayliss stated that the roofing contractor in question usually had two or three workers working at one location on the roof, and in the event they were working and handling materials at the north end of the building, it would not be logical to rope off the south end. In his judgment, the only work area that needed to be roped off would be the area directly below where the roof work was being performed (Tr. 99).

Mr. Bayliss described the propane tank used by the contractor as "a small tank" weighing approximately 20 pounds (Tr. 100). He stated that prior to the issuance of the citation, the contractor had not worked at the plant for a week because the temperature was less than 40 degrees and that "we had been in limbo for a week here, waiting for the guy to come back and get his job done" (Tr. 101). Mr. Bayliss was of the opinion that there was no likelihood that the materials on the roof would have fallen off and that it was unlikely that an accident would have happened because the east side of the building is not a place where anybody would walk and that there are "very few people on foot. This is not a traveled area at any time as far as people walking" (Tr. 101).

On cross-examination, Mr. Bayliss confirmed that although he was at work on the day of Mr. Jones' inspection, he did not accompany him to the top of the roof, nor did he go to the roof on that day. Mr. Bayliss stated that he knew what was on the roof because "what's on the roof that day was on the roof the day before, and it was on the roof ever since we'd been on the roof so I knew exactly what was on the roof" (Tr. 101). Mr. Bayliss confirmed that he was on the roof at least once a week in order to insure that the work for which the contractor was being paid was done.

Mr. Bayliss confirmed that in addition to the 20 pound propane tank, another 60 pound propane tank was on the roof on the day of the inspection, and he agreed with the inspector's testimony concerning the presence of other materials such as

pails, roofing materials, and a hand truck on the roof (Tr. 106). With regard to the inspector's assessment of the hazard presented at the time of the inspection, Mr. Bayliss stated as follows (Tr. 106-107):

> JUDGE KOUTRAS: Now you also heard the inspector testify that if a wind came along and toppled over this sixty-pound propane tank that it could possibly roll off the roof, and if it did and fell to the ground below and struck a truck, it would cause certain damages; if it struck a person, it would cause certain things; and if it landed on its valve and it was full, it would likely or at least it was a possibility of it becoming airborne or whatever.
>
> Do you differ with the inspector on that? If this propane tank toppled, would it likely roll off the roof?
>
> THE WITNESS: I believe it might.
>
> JUDGE KOUTRAS: Was the pitch of the roof such that it would roll off?
>
> THE WITNESS: Well, you can see the roof. Any pitch on anything, if you roll a -- of course, I didn't see exactly where this sixty-pound tank was actually located on this day.
>
> JUDGE KOUTRAS: Where could it be located up there? Did they have any -- he said that the roofing material was in cardboard boxes and it was either perpendicular or positioned in such a way that that wouldn't roll off, that he wasn't concerned about the pails but he was concerned about this one propane tank and the hand truck.
>
> THE WITNESS: Yes.
>
> JUDGE KOUTRAS: Particularly with the propane tank. His testimony is that if the wind toppled the propane tank, it was in such a position that it would readily roll off the roof.
>
> THE WITNESS: I believe him.

Mr. Bayliss stated that the propane tanks in question were not "tied off," that the contractor never tied them off, and that "if the inspector says it was up there when he saw it, I believe him" (Tr. 108). Mr. Bayliss agreed that the unsecured materials on the roof were left there by the contractor who intended to come back "the next day" or when "we got to some warmer weather" (Tr. 109). He confirmed that the materials were left on the roof for "a couple of weeks" and that "this job took like three months to complete" (Tr. 110).

Mr. Bayliss stated that the inspector was justified in issuing the citation and that his only difference with the inspector lies in "the likelihood of somebody getting hurt." Mr. Bayliss agreed with the inspector's view that an unsecured propane cylinder on a pitched roof could roll off, but disagreed with the inspector's belief that it was reasonably likely that it would fall off and hit someone (Tr. 112).

Petitioner's Arguments

Petitioner takes the position that the testimony in this case, including the testimony of the respondent's witness Bayliss, supports the inspector's finding that a violation of the cited standard occurred and that the propane tank located on the roof posed a hazard in that it could have toppled over and rolled off the roof. Given the inspector's testimony that the walkway was at no time barricaded, the testimony of Mr. Brock that trucks were on the roadway every 20 to 30 minutes driving along the unbarricaded roadway below the roof, and Mr. McFarland's admission that the roadway was not barricaded on the day of the inspection, petitioner concludes that it has established the fact of violation, and the fact that a hazardous condition was present at the time of the inspection and the issuance of the citation (Tr. 118-119).

Respondent's Arguments

The respondent asserted that the citation should be vacated because the inspector failed to follow the requirements of section 103(g)(1) of the Act which requires that any complaints concerning alleged violations of any mandatory safety standard be first reduced to writing and a copy furnished to the mine operator. Respondent argued that no written complaint was forthcoming at the hearing, that MSHA failed to produce any witness who may have complained to the inspector about the cited condition, and that the inspector would not have gone to the roof area but for this complaint. Respondent took the position that "everything from that point on is hearsay" (Tr. 119).

The respondent's second argument is that MSHA inspectors are issuing citations to contractors who are supposedly working at the plant, when in fact they are not present at the plant actually performing any work at the time of the inspection. Respondent's representative McCormac stated that "If we are going to have a citation written about contractors working, if the inspector does not see the work being done, then he can't write anything on them" (Tr. 113). Mr. McCormac asserted that the written condition described by Inspector Jones on the face of the citation states that the contractor "was working seventy-five feet above the ground" when in fact the contractor was performing no work on the day of the inspection (Tr. 115). Mr. McCormac concludes that the inspector's belief that the contractor was working on the day in question is based on speculation which is unsupported by any "concrete proof" (Tr. 120).

Finally, the respondent argues that with respect to the propane cylinder in question, since there was no one working on the roof, and since there was no evidence advanced with respect to any wind or adverse weather conditions which may have caused the cylinder to topple over and roll off the roof, there was no hazard. Absent any agent or event that would cause the cylinder to topple over from its upright position, respondent concludes that it was unlikely that an accident would occur. Mr. McCormac stated that in the absence of vacating the citation, it should at most be modified to a "non-S&S" citation, and he agreed that if the citation was initially classified as such "we would not be here today" (Tr. 120, 122).

Findings and Conclusions

Section 103(g)(1) Issue

Section 104(a) of the Act provides in relevant part that "if, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to the Act has violated this Act, or any mandatory health or safety standard, . . . , he shall, with reasonable promptness, issue a citation to the operator . . . . "

Inspector Jones confirmed that he visited the plant site on November 20, 1987, in his capacity as an inspector and special investigator for the purpose of conducting an investigation concerning a previously filed discrimination complaint. He explained that in the course of these duties it is not

unusual for him to receive information or complaints from employees with regard to alleged violative conditions which may be unrelated to his discrimination investigation. Unless the complaints concern an imminently dangerous condition, his normal procedure is to refer safety complaints to the inspectors who normally inspect the mine. However, since he was aware of the fact that MSHA had received prior employee safety complaints concerning the roofing contractor, and had conducted hazard inspections in response to those complaints, and since he was informed by a foreman that the contractor was working on the roof while he was there on November 20, 1987, Mr. Jones decided to inspect the roof area in question (Tr. 8-9).

Inspector Jones explained that the prior visits to the plant by other MSHA inspectors in response to written complaints concerning the contractor in question were in connection with complaints that contractor personnel were not wearing hard hats, hard-toed shoes, and glasses. The "negative findings" by the inspectors with respect to those complaints were based on the fact that the contractor was not working when the inspectors were on the site, and since the inspectors had no opportunity to observe the contractor's employees without the personal equipment in question they had no basis for supporting any citations (Tr. 36-38).

Inspector Jones confirmed that no one complained to him about any alleged violative conditions on the roof, and that he went there with Mr. McCormac after a foreman advised him that the contractor was on the mine site. The fact that Mr. Jones may have interrupted his discrimination investigation to visit the roof area is irrelevant. Mr. Jones was accompanied by a representative of the respondent and the citation which he subsequently issued was based on his personal observations of the conditions which prompted him to issue it. I find nothing onerous or procedurally defective in the action taken by Mr. Jones. As an authorized representative of the Secretary, Mr. Jones had a duty and obligation to issue the citation if in his judgment the conditions which he observed constituted a violation of the cited mandatory safety standard in question. The respondent's assertion that Mr. Jones' actions were "hearsay" because the petitioner failed to produce any written complaint or any witness who may have complained about the materials on the roof are not well taken. Mr. Jones' personal observations and testimony about the conditions which prompted him to act are not hearsay, and I accept as credible his explanation as to why he went to the roof. Under the circumstances, the respondent's arguments

that the citation is somehow defective and that Mr. Jones actions were procedurally improper ARE REJECTED.

The Inspector's Narrative Description of the Cited Conditions

The respondent is charged with a violation of mandatory safety section 30 C.F.R. 56.20011, because of its alleged failure to install barricades or warning signs along the perimeter and approaches to the building where roofing materials were located on the pitched roof. The inspector was concerned that some of the materials on the roof, and in particular a hand truck and a large propane bottle or cylinder weighing approximately 60 pounds, and which was upright and unsecured, could have toppled over and rolled down the roof to the ground below striking passing vehicles or employees traveling along a roadway and conveyor walkway. Section 56.20011, provides as follows:

Barricades and warning signs.

> Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, and display the nature of the hazard and any protective action required.

The evidence in this case establishes that work was in fact performed by the roofing contractor prior to the day of the inspection by Mr. Jones, and that it continued for some time after the issuance of the citation. The evidence also establishes that the roofing materials found by Mr. Jones on the roof were being used by the contractor who interrupted the completion of the roofing job because of outside temperature conditions. The respondent's suggestion that the citation is somehow defective because of the misleading wording of the cited conditions by the inspector on the face of the citation is not well taken. While it is true that the citation issued by Mr. Jones which states that "a roofer contractor was working 75 feet above" the perimeter and approaches to the building gives the impression that work was taking place when Mr. Jones was on the roof observing the conditions, I find nothing in the cited standard that conditions a violation on the fact that work may or may not be ongoing.

The gravamen of the requirement for barricades or warning signs lies in the existence of safety hazards not immediately obvious to employees. The critical issue is the existence of

the hazard, and the fact that no roofing work was taking place at the precise time of the inspection is irrelevant to any determination as to whether or not the affected area in question was barricaded or posted with warning signs. However, the fact that no work was taking place may or may not be relevant in any determination as to the degree of the hazard, and the likelihood of an accident occurring. Accordingly, the respondent's assertion that the "speculative" words used by the inspector conveying the impression that work was actually taking place when he viewed the conditions supports a dismissal of the citation IS REJECTED.

Fact of Violation

The unrebutted evidence in this case clearly establishes the existence of unsecured materials on the roof of the mill building. The roof was approximately 75 feet off the ground, and it was "pitched" or "peaked" as depicted by the photographic exhibits of record, and the building was several hundred feet long. The evidence also establishes that the materials which were of concern to the inspector consisted of an unsecured 60-pound propane tank or bottle, and a small unsecured hand truck, both of which remained on the roof for a relatively long period of time during which the roofing contractor performed no work on the roof because of adverse outside temperature conditions.

Inspector Jones testified that given the pitch of the roof, and the fact that the unsecured propane bottle was located "in a straight-line relationship" to an elevated conveyor located below the roof, he was concerned that if the bottle were to fall over and roll off the roof, it could strike the conveyor walkway, a portion of which was uncovered, as well as mine personnel walking along the base of the building, and vehicles passing by on a ground level roadway adjacent to and below the roof of the building. Respondent's maintenance manager John Bayliss agreed with the inspector's belief that in the event the unsecured propane bottle were to topple over, it could readily roll off the pitched roof to the ground below. He also agreed that the inspector was justified in issuing the citation. Given these undisputed facts, I conclude and find that the unsecured propane bottle and hand truck in question posed a potential safety hazard.

Although the evidence establishes that no one was working on the roof at the time of the inspection and issuance of the citation, respondent's welder and repairman William Brock testified that a dust truck travelled the roadway every 30 minutes, and that respondent's employees would occasionally

be on foot on the roadway. He also testified that respondent's employees would have occasion to walk the partially unprotected conveyor walkway during the course of their daily work shift, and that contractor vehicles would also use the roadway. Inspector Jones testified that service and maintenance personnel would have occasion to travel the conveyor walkway while servicing the conveyor systems. This testimony is unrebutted, and I conclude and find that these employees and vehicles would be exposed to the potential hazard in question.

Although Mr. Bayliss testified that he knew that the materials cited by Inspector Jones were on the roof, there is no credible evidence that any other employees were aware of the fact that these materials were there. Inspector Jones testified that employees working below the roof of the building or travelling along the conveyor belt or roadway would not be able to see the materials unless they were out for some distance away from the building, and that they would not be able to see anything rolling or falling off the roof and would have no warning if this were to occur. Given the dimensions of the building in question, the location of the materials at the apex of the roof which was approximately 75 feet off the ground, and the location of the roadway and conveyor belt at the base of the building, I conclude and find that employees on foot or in vehicles at those locations would not likely be aware of the unsecured materials on the roof and that the existing hazard presented by the unsecured propane bottle and hand truck would not be immediately obvious to them.

The undisputed evidence establishes that the roadway and conveyor areas at the base of the building and below the roof area where the unsecured propane bottle and hand truck were located were not barricaded or otherwise posted with warning signs during the time that these materials were left on the roof by the roofing contractor. Although the respondent's evidence reflects that barricades were normally erected while work was being performed on the roof or roofing materials were being hoisted to the roof, it seems clear to me that they were not in place during the existence of the hazard.

Given the existence of a safety hazard which was not immediately obvious to employees, and the fact that no barricades were erected, or warning signs posted in the areas exposed to the hazard during the time the unsecured propane bottle and hand truck remained on the roof, I conclude and find that the respondent violated the requirements of mandatory safety standard 30 C.F.R. 56.20011. Accordingly, the citation IS AFFIRMED.

Significant and Substantial Violation

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

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

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Inspector Jones confirmed that the rolled roofing materials, 5-gallon pails, and small 20-pound propane bottles which he found on the roof were adequately stored and secured and did not pose a hazard. His principal concern was the unsecured free-standing 60-pound propane bottle which was located on the sloped portion of the roof. Although Mr. Jones alluded to his concern for the unsecured hand-truck, I find no credible evidence to support a conclusion that it was reasonably likely that this truck would fall or roll off the roof and strike and injure someone.

With regard to the unsecured propane bottle, respondent's own witness John Bayliss confirmed that it remained on the roof for "a couple of weeks" when no work was in progress on the roof. Mr. Bayliss also agreed with the inspector's conclusion that given the position of the bottle on the pitched roof, if it were to topple over it would readily roll off the roof. Mr. Bayliss also confirmed that the contractor in question never tied off or secured any of its propane tanks, and Inspector Jones confirmed he cited the contractor for not securing the bottle and for several additional unsafe work practices in connection with the work being performed on the roof.

The respondent argues that in the absence of any work in progress on the roof at the time of the inspection, and the lack of any agent or event to cause the bottle to be placed in motion and roll off the roof, the violation is not significant or substantial. I disagree. In my view, the free-standing and unsecured 60-pound cylindrically shaped propane bottle located on the pitched portion of the roof which was approximately 75 feet above an unbarricaded area where employees and traffic would be present on a daily basis created an inherent and discrete potential safety hazard regardless of the presence of any independent agent or event to place the bottle in motion. The unsecured bottle was on the pitched portion of the roof for a relatively long period of time, and it was not readily observable from the ground level roadway or conveyor areas which should have been barricaded or otherwise posted with warning signs. If the bottle were to topple over, it would readily roll off the roof and possibly strike an

employee walking along the base of the building or a vehicle passing along the roadway. If this were to occur, I believe that one may reasonably conclude that serious or fatal injuries would result. Under all of these circumstances, I agree with the inspector's significant and substantial finding, and IT IS AFFIRMED.

History of Prior Violations

The parties stipulated that the respondent had 13 assessed violations for the 24-month period preceding the issuance of the citation in this case. I find that the respondent's history of compliance is not such as to warrant any additional increase in the civil penalty assessment which has been made for the violation in question.

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

Based on the stipulations by the parties, I conclude and find that the respondent is a medium-size mine operator, and that the payment of the civil penalty assessment in this case will not adversely affect its ability to continue in business.

Gravity

On the basis of my findings and conclusions affirming the inspector's "significant and substantial" finding, I conclude that the violation was serious. The unsecured propane bottle in question presented a hazard to mine employees and vehicles using the roadway at the base of the building some 75 feet below the roof where the bottle was located.

Negligence

Inspector Jones made a finding of "moderate negligence," and he confirmed that he did so on the basis of mitigating circumstances. He explained that the contractor created the hazard, and the record shows that he cited the contractor for not securing the bottle. Insofar as the respondent is concerned, although Mr. Jones believed that it had an obligation to check on the contractor to determine whether it was creating any hazards to miners, he considered the fact that the respondent did not recognize any hazard (Tr. 29-31). I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care, and the inspector's negligence finding is affirmed.

Good Faith Abatement

The parties stipulated that the respondent demonstrated good faith in immediately abating the violation. I adopt this stipulation as my finding on this issue.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment in the amount of $150 is reasonable and appropriate for the violation which has been affirmed in this case.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $150 for a violation of mandatory safety standard 30 C.F.R. 56.20011, and payment is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge