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

OZARK-MAHONING COMPANY,
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. LAKE 88-128-RM
Citation No. 3260151; 3/4/88

Annabel Lee Mine
Mine ID 11-02780

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

v.

OZARK-MAHONING COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. LAKE 88-108-M
A.C. No. 11-02780-05507

Annabel Lee Mine

DECISION AND ORDER OF DISMISSAL

Appearances: Victor Evans, General Manager, Ozark-Mahoning
Company, Rosiclare, Indiana, for the
Contestant/Respondent;
Miguel J. Carmona, Esq., Office of the
Solicitor, U.S. Department of Labor, Chicago,
Illinois, for the Respondent/Petitioner.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a proposal for
assessment of civil penalty initiated by the petitioner (MSHA)
against the Ozark-Mahoning Company (hereinafter respondent),
pursuant to section 110(a) of the Federal Mine Safety and Health
Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty
assessment in the amount of \$74 for an alleged violation of
mandatory safety standard 30 C.F.R. 57.12015, (Docket No. LAKE
88-108-M). Docket No. LAKE 88-128-RM, concerns a separate

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contest filed by the Ozark-Mahoning Company challenging the validity of the citation.

A hearing was convened in Evansville, Indiana, and the parties appeared and participated fully therein. The parties waived the filing of written posthearing arguments. However, they were afforded an opportunity to present oral arguments at the conclusion of all testimony, and I have considered the arguments in the course of my adjudication of this matter.

Issues

The issues presented in these proceedings are (1) whether the conditions or practices cited by the inspector constituted a violation of the cited mandatory safety standard, (2) the appropriate civil penalty assessment to be made for the violation taking into account the civil penalty assessment criteria found in section 110(i) of the Act, and (3) whether the violation was "significant and substantial." 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, Pub. L. 95-164, 30 U.S.C. 801 et seq.

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

Stipulations

The parties stipulated to the following (Joint exhibit 1):

1. The mine involved in this case is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

2. The administrative law judge assigned to this case has jurisdiction in this matter.

3. The MSHA inspector who issued the citation involved in this case was a duly authorized representative of the Secretary of Labor at all times relevant to this matter.

4. From March 4, 1986 through March 4, 1988, respondent committed three (3) MSHA violations at its Annabel Lee Mine.

5. During the calendar year preceding the issuance of the citation involved in this case the operator accumulated a total of 55,837 hours of work at its Annabel Lee Mine.
6. During the calendar year preceding the issuance of the Citation involved in this case the Ozark-Mahoning Company accumulated a total of 232,648 hours of work at all the mines under its control.
7. The Ozark-Mahoning Company demonstrated its good faith by abating the condition involved in the Citation in this case within the time granted by the MSHA inspector.
8. Payment of the penalty assessed for the citation involved in this case will not affect the mine operator's ability to remain in business.

Discussion

The section 104(a) "S&S" Citation No. 3260151, in issue in these proceedings was issued on March 4, 1988, and it cites an alleged violation of mandatory safety standard 30 C.F.R. 57.12016, and the cited condition or practice states as follows:

An employee was observed working in the skip under the man cage in the main hoist shaft without de-energizing the power for the hoist and locking the switch out. The hoist operator was sitting at the hoist controls.

Petitioner's Testimony and Evidence

MSHA Inspector Gene Upton, testified as to his experience and training, and he confirmed that he inspected the mine on March 4, 1988, and issued the citation in question (exhibit P-1). Mr. Upton confirmed that he issued the citation after observing work being performed inside the skip bucket located beneath the man cage used to carry men up and down the mine shaft. The bucket is used to transport ore from the mine. Since the hoisting electrical system was energized and not locked out as required by section 57.12016, he issued the violation.

Mr. Upton agreed that the skip bucket was approximately 4 feet high and that it moved up and down the shaft with the man cage. He stated that the individual inside the bucket was performing some metal patch work at the bottom of the skip using welding and acetylene torch equipment, as well as other tools. He considered the work being performed as "mechanical work" within the meaning of the standard. The individual performing the work was being assisted by another individual who was outside the cage, and he was being used to bring supplies to the area where the work was being performed.

Mr. Upton stated that the control booth which contained the controls for operating the hoist and skip was located approximately 200 feet away from the skip and that the hoist operator was at the controls while the work was being performed. Mr. Upton also stated that the main disconnect switch which should have been used to deenergize the hoist was located outside of the control booth approximately 15 to 20 feet away. He found that the operator's hoist control switch located inside the control booth and the main disconnect switch were not deenergized and locked out.

Mr. Upton stated that the failure to deenergize and lock out the hoist and skip presented a hazard in that in the event of any inadvertent movement move of the skip up or down the individual performing the work in the skip could have been "banged around" or suffered burns from the welding torch he was using, or he could have been entangled in the welding cables and hoses. He was also concerned that a mix-up in any signals between the hoist operator in the control room and the person doing the work in the skip may have caused the skip to move up or down since it was still energized, and if this occurred, the individual could fall out of the skip. If he did, it was reasonably likely that he would sustain injuries of a reasonably serious nature. He also believed that it was reasonably likely that in the event of any movement of the skip while the individual was inside performing work, the individual could be injured.

Mr. Upton stated that he based his "significant and substantial" finding on the fact that the individual working inside the skip had to rely on someone other than himself to signal the hoist operator who was in the booth, and in the event of any mixed signals, it was reasonably likely that the hoist would have moved at any time.

Mr. Upton confirmed that he made a negligence finding of "moderate" because the skip operator was at the controls holding the hoist brake, and the respondent knew or should have

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known that it was required to use its lock out procedures while the work was being performed inside the skip. He also confirmed that the violation was timely abated within 10 minutes by shutting off and locking out the power switch and hoist controls.

On cross-examination, Mr. Upton confirmed that his mining experience does not include any shaft work or work as a skip operator or attendant. Upon review of the language found in section 57.12016, he stated that he was not familiar with the intent of the standard, and that other than deenergizing and locking out the hoist, he was not aware of any exceptions or "other measures" which would allow mechanical work to be performed without locking out the equipment. He confirmed that the hoist in question was not an "automatic" hoist, and that it required someone to manually and physically be present to operate and move it.

Mr. Upton stated that he has inspected similar hoists in the past, and that such an inspection would include an examination of the drums, wire cables and ropes, head shafts and cables, upper and lower lines, the "dead man" braking switch, and all hoist controls. He confirmed that during the course of testing the hoist cables, wire ropes, and drums, he uses a guage which requires him to touch the cables and ropes, and that the drums are turning. He confirmed that during these tests, the hoist is not deenergized or locked out because the hoist must be moved to facilitate the testing. However, someone is at the hoist controls while this is being done. Mr. Upton also confirmed that while inspecting the hoist shaft cables and guides, he needs to ride the skip and it is not deenergized or locked out.

Mr. Upton confirmed that the hoist in question was equipped with two sets of brakes, a "dead-man" braking switch and device which is activated by foot pressure inside the hoist. The hoist can be energized if foot pressure is applied to this device, but as soon as the pressure is taken off, the hoist will deenergize.

Mr. Upton also confirmed that the hoisting system included an emergency stop switch and a brake safety lever. He agreed that in the event all of the aforementioned safety features provided for the hoisting system were activated and in use, if someone were to throw the main switch to the "on" position, the hoist should not move. He conceded that it was unlikely and unreasonable to expect that the hoist would move given the use of these devices.

Mr. Upton agreed that the skip was raised above the level of the shaft while the work was being performed, and that the individual performing the work inside the skip was not required to wear a safety belt or line. He agreed that the skip landing was provided with hand rails and that the hoistman who was at the skip controls had a fairly clear visible view of the individual performing the work inside the skip. He also confirmed that pursuant to the hoisting procedures and MSHA's safety standards the individual at the hoist controls cannot move the hoist without an appropriate signal.

Mr. Upton stated that it was his opinion that the failure to deenergize and lock out the hoist was inadvertent, and he asserted that when he spoke to the hoistman in the control booth the hoistman advised him that he was not comfortable being at the hoist controls without the main power switch deenergized and locked out. Mr. Upton also confirmed that the hoistman was not supervising the work taking place in the skip, and that the decision not to deenergize and lock it out was apparently made by the individual supervising the work.

Respondent's Testimony and Evidence

Gary Austin respondent's maintenance supervisor, testified that he has worked for the respondent for 20 years, and that he is responsible for all of the mechanical maintenance work done on the hoist and skip. He confirmed that he has moved and re-installed the hoist on at least two occasions. He stated that the hoist is equipped with two brakes capable of holding the hoist under a full load and under full power. He also stated that the hoist is equipped with a dead man's switch which is activated by foot pressure on a button. This switch requires that the power be on in order to operate, and when the foot pressure is released, the brakes are automatically set. The hoist system also has a safety stop switch, and a regulator to control the air supplied braking systems.

Mr. Austin confirmed that he was in charge of the work being performed in the skip, and that the individual performing the work was installing a water seal on the bottom of the skip. He stated that this individual had full control of the work and the skip through the established signaling system, and that he was in the view of the hoist control operator.

Mr. Austin stated that the hoist was not locked out because the hoist and skip needs to be moved during the course of any mechanical work, particularly when welding equipment and acetylene hoses are used. This movement is necessary so as to prevent the acetylene hoses from being caught, and to

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provide a safe distance between the acetylene tanks and the individual performing the work. Requiring the hoist power to be locked out under these circumstances would be impractical, particularly when the individual doing the work is within the view of the hoist operator and proper signalling measures are being used.

Mr. Austin stated that the brake handle purportedly being held by the hoistman was in fact a small lever approximately 5 to 6 inches long which was engaged and locked out by means of a notch on the lever. The lever was located on the hoist operator's control panel, and he was not required to physically hold any brake handle for the approximate 30 minutes it took to complete the work on the skip.

On cross-examination, Mr. Austin stated that the respondent does have equipment lock out procedures in effect but that it was his decision not to lock out the hoist in question because he did not believe it was necessary. He pointed out that mandatory safety standard section 57.14029, which requires the blocking of machinery to prevent movement and the turning off of the power before any work is performed, provides an exception where machinery motion is necessary to make adjustments.

Mr. Austin confirmed that the hoisting system in question was not an automatic system which can be turned on and off automatically and inadvertently by someone out of sight of the individual performing any work on the hoist.

Mr. Austin confirmed that he had the only hoist lock out key in his possession on the day in question, and in the event of any emergency underground, he would not want to be delayed by going to the main switch to turn the power back on. Although another hoist was available, it was diesel powered and slow, and the hoist in question would be the quickest way of travelling down the 1,000 foot shaft in the event of an emergency.

Mr. Austin confirmed that at the time the work was being performed on the skip, the hoistman was at the controls and had a clear view of the individual doing the work. The hoist had a voice box and bell signalling device for signalling the hoistman, and the law prohibits the hoistman from starting or moving the hoist unless he receives a signal to do so by the person doing the work.

The parties waived the filing of written posthearing briefs, but were afforded an opportunity to present the following oral arguments in support of their respective positions.

Petitioner's Argument

Petitioner's counsel asserted that there is sufficient evidence which establishes that the work being performed on the electrically powered hoist was in fact mechanical work. He argued that the evidence clearly establishes that the appropriate lock out procedures were not followed while this work was being done, and that the hoist was energized and that the power switch was not shut off and locked out.

Counsel asserted further that the inspector believed that the "other measures" provision referred to in the cited section 57.12016, did not apply in this case, and that the hazard presented concerned the possibility of a misunderstanding during the exchange of signals between the individual doing the work and the hoistman at the controls, and that in the event of such a misunderstanding, the individual doing the work would be exposed to the additional hazards testified to by the inspector.

Respondent's Argument

Respondent's representative argued that its evidence has established that the electrically powered hoisting system was provided with two braking systems consisting of a dead man's switch inside the hoist which automatically sets the brake when no one is in the hoist and is not applying any foot pressure to the activating switch, and an emergency stop switch and brake safety lever located in the control room which was locked out. He also pointed out that with all of these systems engaged and operational at the time the work was being performed on the hoist, and with the main power switch in the "off position," even if the hoistman were to leave the control booth for any reason, anyone deliberately or inadvertently turning the power on would not cause the hoist to move.

Respondent's representative argued further that the second sentence of section 57.12016, contains an alternative, and an exception, to the requirement that power switches be locked out, and that this alternative does not require any lock out of the hoist power switch as long as other measures are taken to prevent the hoist from being energized without the knowledge of the individuals working on it.

Respondent's representative asserted that the un rebutted evidence and testimony adduced in this case establishes that the individual performing the work on the hoist skip with the assistance of a helper was within visual sight of the hoist control operator and that appropriate signals were available and in use, and the hoist operator was prohibited by law from moving the hoist unless given an appropriate signal from the individual performing the work. Since the individual performing the work was in complete control of the situation, and given the existence of the aforementioned hoist braking and stopping devices which were clearly in place and operational, and which prevented any inadvertent movement of the hoist by someone engaging the hoist power switch without the knowledge of the individual performing the work in the skip, respondent's representative concluded that the other measures referred to in section 57.12016 were clearly present, and that under these circumstances, a violation has not been established.

Respondent's representative also pointed out that Inspector Upton conceded that when he was required to inspect the hoist, skip, and shaft, the hoist was not locked out. Respondent also pointed out that pursuant to mandatory standard section 57.14029, repairs or maintenance on machinery may be performed without turning the power off and blocking the machinery against movement as long as movement is necessary to make adjustments. In the instant case, respondent's representative maintained that some movement of the hoist was required in order to facilitate the work being performed.

Findings and Conclusions

Fact of Violation

Section 104(a) "S&S" Citation No. 3260151, 30 C.F.R.
57.1201

The respondent is charged with a violation of section 57.12016, for failing to deenergize the power and locking out the power switch for the man cage skip in question while work was being performed on the equipment. The cited mandatory safety standard in question provides as follows:

Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the

power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

On the basis of the un rebutted credible testimony of the inspector, I conclude and find that the hoist in question was an electrically powered piece of equipment, that the skip bucket was an integral part of the hoist, and that the work being performed inside the bucket by the employee in question was mechanical work within the intent and meaning of the cited standard. I also conclude and find that the conditions cited by the inspector fall within the scope of the cited standard.

The failure by a mine operator to deenergize electrically powered equipment and to lock out power switches before any mechanical work is done on the equipment has been consistently held to constitute a violation of mandatory safety standard 30 C.F.R. 57.12016, and the identical standard section 56.12016, applicable to surface metal and nonmetal mines. See: MSHA v. Adams Stone Corporation, 7 FMSHRC 692, 706-707, (May 1985); MSHA v. FMC Corporation, 4 FMSHRC 1818, 1821-22 (October 1982), petition for Commission review denied, November 16, 1982; MSHA v. Greenville Quarries, Incorporated, 9 FMSHRC 1390, 1428 (August 1987).

In the FMC Corporation case, supra, the operator argued that the power switch for the equipment being worked on was deenergized by the worker by using an "off" switch which was always in his view while he worked 4-1/2 feet away. Judge Morris rejected this defense, and found that simply turning the switch to the "off" position did not totally deenergize the unit being worked on and that the failure to deenergize the equipment established a violation.

In North American Sand and Gravel Company, 2 FMSHRC 2017 (July 1980), the judge affirmed a violation of section 56.12016, after finding that a mine operator simply removed fuses when electrical equipment was down for repairs, and had no lock-out procedure to insure that anyone working on the equipment would not be injured by someone inadvertently starting the equipment. Likewise, in Brown Brothers Sand Company, 3 FMSHRC 734 (March 1981), a violation was affirmed where it was found that an employee working on a pump deenergized the equipment by opening the power "knife" switch, but failed to lock out the switch to prevent it from being energized without his knowledge.

In Price Construction Company, 7 FMSHRC 661 (May 1985), a welder with 25 years experience lost a leg when he was injured by the rollers of a crusher he was working on. The accident occurred when the plant foreman misunderstood the welder's instructions and engaged a switch which had not been locked out and simply left in the "on" position. The plant superintendent admitted that he did not require padlocks to lock out roller switches, and the existing "lock-out" procedures were accomplished by merely turning off the generator and cutting the switches. The judge found a violation of section 56.12-16, and found that the company safety director admitted that he knew that a padlock had to be used on the roller switch to conform with the required lock-out procedures, and that it is a generally understood practice in the mining industry that a "lock-out" requires the use of a padlock.

In my view, the primary intent of section 57.12016 is to insure that all electrically powered equipment is deenergized before it is worked on. This is accomplished by deenergizing, or shutting down, any main power switch that supplies power to the equipment. A secondary intent of the standard is to insure that the equipment is not inadvertently energized while the work is being performed by someone turning the power switch back on, and this is accomplished by requiring the physical locking out of the switch by an appropriate lockout device. In the case at hand, the inspector alluded to two hoist power switches, one of which was the main power switch located outside of the hoist operator's control room approximately 15 to 20 feet away, and a second power switch located inside the room on the hoist control panel. Both switches were neither deenergized or locked out.

Although I find some merit in the respondent's argument that the language found in the second sentence of section 57.12016, provides for an alternative method of insuring against any inadvertent energizing of the equipment while it is being worked on, short of locking out the power switch, I believe that this language only comes into play once the requirements found in the first sentence for completely deenergizing the equipment is complied with, and that any alternative "other measures" for insuring against the inadvertent energizing of the equipment while it is being worked on may be considered in mitigation of any hazard, but may not serve as a defense to the requirement found in the first sentence that all such equipment be initially deenergized.

The respondent argues that it has not violated section 57.12016, because it complied with the second sentence of the standard which it views an exception to the requirement that

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power switches be locked out. This defense is rejected. The clear and unambiguous requirements of the first sentence of section 57.12016, mandates that electrically powered equipment be deenergized before any mechanical work is done on the equipment. I find no exceptions in the first sentence, and the inspector's credible and un rebutted testimony establishes that the hoist main power disconnect switch, which was located outside of the control room, and some 15 to 20 feet away from where the hoistman was located inside the booth, as well as a second power switch inside the room, were not deenergized or locked out during the time work was being performed on the hoist skip bucket. Under these circumstances, I conclude and find that the failure to deenergize and lock out these switches constitutes a violation of section 56.12016, and the citation IS AFFIRMED.

The respondent's defense that mandatory safety standard 30 C.F.R. 57.14029, permits maintenance work to be performed without turning of the power and blocking machinery against movement is rejected. The respondent is not charged with a violation of section 57.14029, and that standard makes no mention of electrically powered equipment, the language found in the cited section 57.12016.

The respondent's assertion that Inspector Upton conceded that he did not deenergize or lock out the power when he conducts inspections of hoist equipment, is rejected as a defense to the citation. While this may be true, I find a distinction between an inspection of a hoist that necessarily requires movement of the equipment in order to determine whether it is functioning properly, and the welding work being performed in this case. Notwithstanding the respondent's practicality arguments to the contrary, I am not convinced that the welding work being performed on the hoist, which took approximately 30 minutes to complete, required the movement of the hoist while the work was being performed. Further, insofar as the respondent's argument raises an inference of some form of estoppel, it is rejected. See: Emery Mining Corporation v. Secretary of Labor, 3 MSHC 1585 (10th Cir. 1984), affirming the Commission's decision in Secretary of Labor v. Emery Mining Corporation, 5 FMSHRC 1400 (August 1983).

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

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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).

Maintenance Supervisor Gary Austin's credible and un rebutted testimony reflects that the hoist in question was equipped with several operational braking devices and safety mechanisms which precluded any inadvertent movement of the hoist, and that the hoist control operator was physically holding the brakes in place by hand. In fact, the brakes were locked out by a lever at the control panel where the hoist operator was stationed. Inspector Upton agreed that with all of these braking devices in use, it was unlikely and unreasonable to conclude that the hoist would move, even if the power switch were thrown to the "on" position. The hoist was not controlled "automatically," and someone would have to manual activate the controls to cause it to move (Tr. 23).

Although Mr. Upton believed that the hazard presented by the violation involved a possible misunderstanding in signals between the hoist operator and the individual doing the work inside the bucket, Mr. Austin's un rebutted testimony reflects that the hoist was equipped with a voice box and bell signalling devices for signalling the hoistman, and that the hoistman is prohibited from starting or moving the hoist without receiving an appropriate signal. Inspector Upton confirmed that this was the case.

Mr. Austin, an experienced maintenance supervisor with 20 years of experience working for the respondent, including hoist removal and replacement work, testified that the individual doing the work inside the hoist bucket had full control of the work he was performing through the established signaling system. Although Inspector Upton believed that the individual doing the work had to rely on a helper who was bringing him supplies to signal the hoistman, the evidence shows that the helper was within 5 feet of the work which was being performed, and Inspector Upton confirmed that the hoistman had a fairly clear visual view of the hoist bucket at the time the work was being performed (Tr. 27-28). Neither the individual doing the work or his helper, or the hoistman, testified in this case, and I find no evidence or testimony to support any conclusion that the helper was in fact giving any signals to the hoistman, or that any of these individuals were ignorant of the appropriate signals or use of the signaling devices. In short, I find no credible or probative evidence to support any conclusion that there was a potential for any misunderstanding in the signals or signaling procedures which may have been in effect or in use at the time of the inspection. Further, as confirmed by the inspector, it was unlikely and unreasonable to expect that the hoist would move even if the power switch which was not locked out were thrown to the "on" position. Under all of these circumstances, I cannot

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conclude that the violation was significant and substantial, and the inspector's finding in this regard is rejected and vacated.

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-sized mine operator, and that the particular mine in question was a small-to-medium size operation. I also conclude and find that the payment of the civil penalty which has been assessed for the violation in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

Based on the stipulations by the parties, which reflects that three violations were committed at the mine during the period March 4, 1986 through March 4, 1988, I conclude and find that the respondent has a good history of prior compliance at this mine and this is reflected in the civil penalty assessed for the violation in question.

Good Faith Compliance

The parties stipulated that the respondent demonstrated good faith by abating the cited condition within the time fixed by the inspector, and the record shows that abatement was achieved within 10 minutes by shutting off the power switch and locking it out. I conclude and find that the respondent demonstrated rapid compliance, and I have taken this into account in the civil penalty assessment for the violation in question.

Negligence

The inspector made a negligence finding of "moderate," and he confirmed that the failure to deenergize and lock out the hoist was inadvertent. I conclude and find that the violation resulted from the respondent's failure to take ordinary care, and the inspector's "moderate" negligence finding is affirmed.

Gravity

Notwithstanding my finding and conclusion that the violation was not significant and substantial, I find that the failure to deenergize and lock out the power switches in question was serious, particularly with respect to the main switch

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which was located outside of, and approximately 15 to 20 feet from the hoist operator's control room. While it may be true that the movement of the hoist was unlikely, even if the switch were "on," since it was not within the immediate control of the hoist operator, anyone could have had access to this switch, and it posed a potential, albeit not likely hazard.

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 \$25 is reasonable and appropriate for the violation in question.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of \$25 in satisfaction of the section 104(a) Citation No. 3260151, March 4, 1988, for a violation of mandatory safety standard 30 C.F.R. 57.12016, 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.

In view of the disposition of the civil penalty case, IT IS FURTHER ORDERED that the respondent's contest filed in Docket No. LAKE 88-128-RM, IS DENIED AND DISMISSED.

George A. Koutras
Administrative Law Judge