FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 15, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2012-485-M
Petitioner,	:	A.C. No. 26-02246-000278790 R83
	:	Mine: Meikle Mine
v.	:	
	:	Docket No. WEST 2012-486-M
J.S. REDPATH CORPORATION,	:	A.C. No. 26-02300-000278798 R83
Respondent.	:	Mine: Storm Exploration Decline

DECISION

Appearances: Timothy J. Turner, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, CO on behalf of the Petitioner;

Mark N. Savit, Esq. and Erik M. Dullea, Esq., Patton Boggs LLP, Denver, CO, on behalf of the Respondent.

Before: Judge Rae

This case is before me upon two petitions for civil penalties filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Administration Act of 1977, 30 U.S.C. §801 et seq. (the "Act"). A hearing was held in Sparks, Nevada.[1] Post-hearing briefs were submitted by the parties.[2]

[1] At the conclusion of the hearing, I instructed counsel for both parties to provide the court reporter with the original exhibits admitted at trial. Both counsel provided loose leaf binders to the court reporter that contained many exhibits that were not admitted into evidence. These exhibits were then mistakenly made part of the official transcript. The Secretary's exhibits properly admitted into evidence and considered by me in this decision are Exhibits 1, 2, 3, 4, 5, 7, 9, 10, 11, 12, and 16 (referred to as "Ex. S.-#"). The Respondent's exhibits properly admitted into evidence and considered by me are Exhibits 2, 7, 8, 9 and 30 (referred to as "Ex. R-#). Exhibit R-7 was not listed in the Index of the record of trial as having been admitted, however, the record reflects that the exhibit was admitted over Respondent's objection. Tr. 192.

[2] The Respondent filed a motion post-hearing to reopen for the purpose of admitting new evidence in the form of a series of emails between MSHA's Western District Manager and the Information Systems Administrator of the Nevada Mining Association. I denied the motion and found the proposed exhibit irrelevant to the issue of whether the snow fence in this instance was properly constructed to meet the requirements of 30 C.F.R. §57.8528.

Barrick Gold Corporation ("Barrick") owns the Storm Exploration Decline and Meikle Mine gold mines located in Eureka County, Nevada. Tr. 23. J.S. Redpath Corporation ("Redpath" or "Respondent") performs all mining operations for Barrick as a subcontractor. Tr. 24, 82, 167. A regular inspection was conducted at both mines in early October 2011. Two citations were issued at the Meikles Mine; one for a violation of 30 C.F.R. §57.6200 and the other for a violation of 30 C.F.R. §57.6300(b) (Docket WEST 2012-485). A third violation was issued at the Storm Exploration Decline for a violation of 30 C.F.R. §57.8528 (Docket WEST 2012-486). The Secretary proposes penalties in the amount of $12, 209.00.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Secretary and Respondent stipulated that:

1. Respondent was, at all relevant times, a contractor at the Storm Exploration Decline Mine ID: 26-02300 and the Meikles Mine, ID: 26-02246.

2. The mines listed above are mines, as defined in the Federal Mine Safety and Health Act of 1977 ("the Act").

3. Respondent is engaged in mining operations in the United States, and its mining operations affect interstate commerce.

4. Respondent is subject to the jurisdiction of the Act, 30 U.S.C. §§801-965.

5. The Federal Mine Safety and Health Review Commission and its Administrative Law Judge have subject matter and personal jurisdiction over the dispute in this case pursuant to Section 105 of the Act.

6. The citations at issue in this matter were issued on the date indicated in section one of the citations.

7. The inspector whose signature appears in block 22 of the citations at issue was acting in his official capacity and acting as an authorized representative of the United States Secretary of Labor.

8. The Secretary's proposed penalties for each citation as listed on Exhibit A to each of the petitions for penalty assessment filed in this matter and those amounts are incorporated by reference herein.

9. The proposed penalties will not affect Respondent's ability to continue in business.

10. The parties agree that electronic and/or facsimile copies may be used in the same manner as originals.

Court Exhibit A.

Docket WEST 2012-485

Inspector Joel T. Tankersley has been with MSHA for 14 years most of which has been spent as an inspector of metal/non-metal mines. He was promoted to the position of the Metal/Non-Metal Safety Specialist for the Northeast District within the past year. Tr. 77-78. He began his mining career after serving in the U.S. Army and spent a total of 15 years in the field. Tr. 79-81. He issued the following two related citations during a regular inspection of the Miekle Mine on October 6, 2011.

Citation No. 8608112

The condition or practice in this citation states:

> Upon inspection of the Redpath CLEARBAYS (Sic) it was found that the powder truck was found to be in the bay with the motor off. This is an area where simple maintenance is done, a lube, fuel or quick fix, light maintenance. This truck was loaded with explosives, boosters emulsion and Non el primers and two fuse caps. This is out of the way from the explosive storage to the blast site. Explosive material (sic) shall transported without undue delay to the storage area or the blast site.

Ex. S-9.

Tankersley marked the gravity of the alleged violation as reasonably likely to result in a fatal injury, significant and substantial affecting one person. He assessed the negligence as moderate. The Secretary proposes a penalty of $5503.00.

The regulation cited by Tankersley provides: "Explosive material shall be transported without undue delay to the storage area or blast site." 30 C.F.R. §57.6200.

Secretary's Evidence:

Tankersley testified that Redpath was doing development work on the upper and lower banshee. Tr. 82. The inspector was in the lower banshee zone where mining by means of blasting was being done in the drifts (or entries) to access the ore veins. Tr. 90. Upon his arrival on the lower zone, Tankersley observed that Redpath was either bolting or mucking out a blasted round.[3] There was no evidence that preparations were being made to ready a shot in any of the headings. Tr. 90-91. As Tankersley, accompanied by shift boss Freddy Molina and Patty Melrose from the safety department, walked down the entry and turned to the right they entered the area called the CLAIR-bay. Tr. 82-83, 91. The CLAIR-bay is a dead-end area, or crosscut, intersecting the main travelway that is used to perform light maintenance. Tr. 91. According to

[3] The mining cycle was explained by Redpath's superintendent, Theron Harper. After blasting has been done on a previous shift, the next shift mucks out the blasted material, installs ground support and then drills the face to ready another shot. The explosives are then loaded and fired and the cycle begins again. Tr. 168.

Tankersley, it can be used to do cutting and welding among other things. The mine uses mobile fuel trucks and could refuel in this area as well. Tr. 105. Although he recalled seeing basic tools including welding equipment in the CLAIR-bay, he did not recall seeing a welder. Tr. 95, 97.

As Tankersley describes the sequence of events, he and the two company representatives arrived at the CLAIR-bay where a Teledyne lift truck used to transport explosives was parked. Tr. 92. The lift truck is approximately 26 feet in length. Tr. 99. The CLAIR-bay is a crosscut that is 40 feet in length and 18 feet wide. Tr. 220, Ex. S-18. The cab of the truck has windows that are approximately 3 ½ feet by 3 ½ feet in dimension and are located at eye level to someone standing on the ground. Tr. 99. The area was well lit and completely quiet at the time of this inspection. Tr. 99-100. He walked all the way around the truck. As he did so, he did not see anyone in the cab nor did he hear the cab door open and close. Tr. 100-01. He also did not observe or hear any other vehicles approaching or departing the area. Tr. 92. On the driver's side of the powder truck, Tankersley stopped to inspect two powder boxes fully loaded with non-electrical ("non el") detonators and powder. The doors of the boxes were severely bent appearing as if someone had run into them. Tr. 93, 101. While he was on the driver's side of the vehicle facing the powder boxes, the driver of the truck came walking up approaching from the mouth of the crosscut. Tr. 103, 115. Tankersley introduced himself to the driver, Buck Slade, and had a conversation with him. Slade told the inspector that he picked up the explosives from someone else at the storage magazine and he was tasked with taking the explosives to the shot area and was to help load it. Tr. 104. He told Tankersley that when he picked up the truck he saw he was low on fuel so he went down to the CLAIR-bay to refuel. Tr. 105. When asked why the truck was not fueled before he headed out with it loaded, he did not respond. *Id.*

Based upon what transpired, Tankersley was of the opinion that Slade had proceeded with undue delay in transporting the loaded powder truck from the magazine to the shot area and issued this citation. As Tankersley testified, the regulations do not provide a definition of the term "undue delay." Tr. 108. In his opinion, it means to go from one area to another in as direct a manner as possible. Tr. 109. The operator must engage in a work practice when transporting explosives that mitigates hazards recognizing the inherent dangers of unintended detonation. *Id.* Examples of undue delay, in his opinion, would be not eliminating hazards such as fueling the truck before loading it with explosives, doing some other task rather than driving from pickup to delivery point and back, or not getting into the truck and leaving immediately after fueling was completed. Tr. 139, 136, 113. He would not consider undue delay to include stopping in case of an emergency, fueling en route when absolutely necessary to avoid running out or immediately unchocking the wheels and reentering the truck if fueling was absolutely necessary en route. Tr. 109, 112, 138, 152.

Respondent's Evidence:

The Respondent argues that there was no undue delay involved in Slade's route to and from the magazine and the blast site. He stopped momentarily at the CLAIR-bay, which is directly along the route from the face to the magazine because he needed fuel. As soon as he was done fueling, he got back in his truck and was prepared to leave the CLAIR-bay. There was so little delay, in fact, that the fuel truck had just departed the area and could be seen driving away.

Freddy Molina, Redpath's compliance supervisor, testified that as Tankersley was walking towards the CLAIR-bay, he was following at a distance of about 40 feet behind. As Tankersley was turning right from the travelway into the CLAIR-bay, Molina could see the fuel truck pulling away down the crosscut just opposite the CLAIR-bay. Ms. Melrose was with Tankersley when Tankersley entered the CLAIR-bay. Tr. 227.[4] When Molina reached the CLAIR-bay, Tankersley was on the driver's side of the cab taking notes. Melrose was on the passenger side looking at the powder boxes. Tr. 228. Molina walked from the passenger side of the truck, around the back to the driver's side, then walked back to the passenger side again to look at the powder boxes and then walked back to the driver's side where Tankersley was. Tr. 216-217, 228. In Molina's estimation it took Slade three to five minutes after Molina went back to where Tankersley was standing on the driver's side of the cab to arrive on the scene. Tr. 228.

Buck Slade, the powder truck driver, testified that he had picked up the powder truck when he arrived on shift. The truck had already been loaded with explosives. He performed his walk around inspection of the truck, noticed it was low on fuel and called the mobile fuel truck operator. He was told the fuel truck was not available so he drove the explosives to his first shot area, helped load the shot and called again for fuel. He then met the fuel truck in the CLAIR-bay on his way back to the magazine or to another shot. Tr. 232, 236, 245-46. He backed the truck into the CLAIR-bay with the cab facing the travelway. The fuel truck was positioned directly in front of the powder truck in the travelway at the mouth of the CLAIR-bay to deliver fuel. Tr. 232, 250. The fuel tank is on the driver's side in front of the cab. Tr. 250.

Slade testified at first that as Tankersley walked into the CLAIR-bay, the fuel truck was just leaving. Tr. 232. He said he saw Tankersley for the first time as he (Slade) was getting back into his truck and Tankersley was at the back of the truck writing something up. Tr. 232-33. Then Slade testified that he was in the cab about to leave and he got out upon seeing Tankersley, chocked his wheels and went back to join Tankersley. Tr. 232-33, 235. Tankersley asked him some questions and mentioned something about "undue delay" and it being a "practice." Tr. 237. Slade then testified that he assisted the fuel truck driver and then walked back to his truck. After the fuel truck pulled away, Slade walked back to his truck, he did his walk around inspection of it, unchocked the wheels and got in the cab. He then turned on the ignition and was about to test the horn when he saw Tankersley at the rear. He turned off the truck, chocked his wheels and approached Tankersley. Tr. 252, 255-56. Slade confirmed that the area was well lit but he did not see Tankersley near the truck until he was seated in the cab. Tr. 250, 253. Melrose was at the back of the truck at this time; he was not with Tankersley. Tr. 258. Slade testified that he told Tankersley when questioned as to where he had been that he was in the cab of the truck. He testified very unconvincingly as follows:

> Q. Did you tell him you were in the cab?
> A. Yeah.
> Q. You told him you were in the cab?
> A. I told him I just came from the seat.
> Q. You told him you just came from the seat?
> A. We didn't have an explicit conversation about where I was.

[4] Melrose was not called as a witness at trial.

Tr. 259-60.

Analysis

I find Molina's testimony regarding seeing the fuel truck pulling away in the crosscut unworthy of belief. According to Molina's sketch of the scene (Ex. 18) Tankersley was located immediately in front of the lift truck, directly across from the crosscut where the fuel truck was allegedly seen just pulling away. Molina was 40 feet away from the CLAIR-bay and claims he saw the fuel truck in the crosscut yet Tankersley, who was in the immediate vicinity did not see or hear a fuel truck in the area. Making this scenario even more unlikely is the fact that the fuel tank is located on the driver's side of the truck in front of the cab which means Tankersley would have had to walk right past the fuel truck as he entered the CLAIR-bay and somehow did not notice it.

The operator asserts that it is possible Tankersley was not familiar with the fuel truck and did not recognize it on the scene. Resp.'s Post-Hearing Brief. Molina testified, however, upon my questioning, that the fuel truck has reels and hoses on it and the majority of people who work underground would recognize it. From the distance at which he saw the fuel truck (40 feet), the reels were visible. Tr. 229. Tankersley has 14 years as an inspector of metal/nonmetal mines and 15 years in mining. Tr. 78-81. I find it implausible he would not recognize a fuel truck from a few feet away had one been there.

Tankersley very credibly offered many scenarios in his testimony that he would not have cited as undue delay. Tr. 110, 112, 114, 152, 133, 138. He also testified that had the powder boxes not been bent exposing the explosives, he would not have viewed the situation the same way. Tr. 138. He was concerned that there was a dangerous practice in the transportation of explosives. *Id*. He took notes contemporaneously with this inspection. Tr. 83-85, 87. Ex. S-10. I find Tankersley was unbiased and did not harbor any rancor towards the Respondent. Tankersley was more credible a witness than Molina.

I find the testimony of Slade stretches the imagination. If he were to be believed, in a well-lighted, very quiet area he managed to walk around the powder truck, un-chock his wheels, open and close the cab door, start the truck, turn it off, open and close the cab door, and re-chock his wheels as Tankersley walked right by without hearing or seeing a thing. He somehow managed to sit in a truck with 3 ½ x 3 ½ foot windows at eye-level as Tankersley walked by without being seen. Unfortunately for Slade, even Molina contradicts his story. Molina testified that Tankersley entered the CLAIR-bay before he did; he was 40 feet behind. When Molina entered the CLAIR-bay, he walked around the truck twice then joined Tankersley at the drivers' side of the truck and then three to five minutes later Slade walked up. Slade told Tankersley on the day of the inspection that he picked up the fuel truck fully loaded and went automatically to the CLAIR-bay for fuel. Tr. 105; Ex. S-10. He testified at hearing, however, that he called for fuel after he picked up the truck, then helped load a shot, called again for fuel and was headed back toward the second blast area when he met the fuel truck in the CLAIR-bay, apparently just prior to Tankersley arriving the area. Tr. 232-33. This later statement is difficult to believe when Tankersley testified that he had been to all the working headings and none of them were

ready to load explosives. In one heading, Redpath was preparing to drill holes in the face. In the other headings, they were performing ground control, bolting and mucking. Tr. 90.

I find based upon the credible testimony of record that Slade was not in the cab of the truck and had left it unattended in the CLAIR-bay for some period of time after fueling was completed.

The issue is whether this route Slade took in transporting the explosive materials, including refueling and leaving the powder truck unattended in the CLAIR-bay for a period of time, involved undue delay.

The Secretary's position is, any delay in the direct route between the storage area or blasting site that is not necessary, such as in an emergency situation, is undue delay. *Sec'y's Post-Hearing Brief.* Inspector Tankersley testified that had refueling been absolutely necessary to prevent running out of gas along the route it would not have been a violation. Tr. 109-112. Had Slade been in the process of fueling when he arrived, Tankersley would likely not have issued the citation, but again, he emphasized that this should be only in the case of absolute necessity and not a deviation from the direct route. Tr. 114, 152, 133. His primary concern in this instance was that the operator was engaging in a hazardous practice. Slade did not recognize the hazard involved in making deviations from his route to the magazine or blast site nor did he recognize the danger in transporting the explosives in powder boxes that were severely damaged exposing the explosives. Tr. 138. When Slade was questioned about the damaged powder boxes, his response was that new parts were on order and it was a judgment call between him and his shift boss to use the damaged ones in the meantime. Tr. 244. Tankersley expressed that the dangerous work practice engaged in by Redpath was poor planning and not recognizing and mitigating the hazards involved in the transportation of explosives from point A to point B. Tr. 111, 138. The refueling could have been done before the truck was loaded with explosives. Tr. 139.

Respondent argues that the CLAIR-bay was in the direct route between the blast site and the magazine. While neither the regulation nor case law defines "undue delay," momentary stops while in route are not prohibited. In the context of a request for an expedited hearing, the Commission has stated that the term "forthwith" does not require immediacy in all situations but favors discretion under the circumstances presented. *Resp.'s Post-Hearing Brief* citing *Wyoming Fuel Co.*, 14 FMSHRC 1282 (Aug. 28, 1992).

I agree that undue delay is a question of reasonableness under the circumstances. Looking to the legislative history of the cited standard, the proposed rule in 1988 used the language "without avoidable delay." The language was changed to the present "undue delay" based upon comments that every delay could be construed as avoidable. MSHA agreed to take a less stringent approach in recognizing that some delays would be justified. *53 FR 45487-01 (Nov. 10, 1988).* In determining what is reasonable under the circumstances one has to recognize the danger posed by the activity itself and measure it against the actions of the operator to determine whether those actions unreasonably or unjustifiably increased or ignored the inherent hazards.

"Historically, hazards associated with the storage, **transportation**, and use of explosive materials have caused or contributed to serious injuries and fatalities in metal and nonmetal mines. Precautions to safeguard against these hazards are an essential part of any effective mine safety program." *61 FR 36790-0 (July 12, 1996). (Emphasis added.)* Tankersley recognized not just an isolated incidence that caused him concern, but an apparent work practice that did not take circumstances into consideration. Slade was traveling with fully loaded explosive boxes that were damaged and gaping open. Management made the decision to operate with the damaged boxes while new parts were on order. Instead of minimizing the hazard this posed by either unloading the explosives and traveling to the fuel truck or having it fueled before it was loaded during the prior shift, the operator chose to refuel in route, leaving the truck unattended for an unknown period of time adding to, rather than minimizing, the hazards involved in the transportation of explosives. Tankersley was also aware that none of the headings were prepared for a shot at the time the loaded powder truck was found in the CLAIR-bay. Tr. 153-54. Tankersley concluded that, taking the totality of circumstances into account, Redpath's refueling in the CLAIR-bay was a hazardous practice that constituted undue delay in the transportation of explosives in violation of the cited standard.

The operator argues that there are always some explosive materials onboard so that refueling at any time poses the same risk. I do not agree. First, there is a difference between explosives and explosive materials. Explosive materials may be left on the truck in small quantities but they do not detonate. Explosives, which can self-detonate, are required to be returned to the magazine for safe storage after a shot has been made which presents an opportunity to refuel safely. Tr. 154-56.

The operator also raised the point that Tankersley allowed Slade to leave the CLAIR-bay to find his supervisor and this further delay was condoned by Tankersley. As Tankersley testified, he and two corporate representatives remained with the vehicle at the time. Tankersley was engaged in the investigation of the matter and Slade needed to find his supervisor so that they could take care of the powder boxes because Slade didn't know what to do on his own. Tr. 115. This was not a delay; it was a step to abate the powder box violation and the overall hazardous situation and issue the appropriate citations.

The Secretary acknowledged that there would have been instances where refueling along the route to/from the magazine and blast site would have been justified. However, those situations involve emergency situations where not doing so would have posed greater hazards such as running out of fuel and being stranded somewhere in the mine. Even in these situations, refueling should be done in the most expeditious manner possible, which would not include the driver leaving the truck unattended for some period of time with exposed explosives on board. In this instance, there were no headings ready for a shot which indicates that the driver had some considerable period of time to wait before the truck was needed at the blast site. The conclusion that he could have planned to remain in the CLAIR-bay until the shot was ready becomes apparent. Furthermore, management knowingly allowed the explosives to be transported in damaged boxes in clear violation of the regulations which is indicative of their total disregard for safe work practices. In this instance, any amount of time the truck was left unattended in the CLAIR-bay with damaged powder boxes was unjustified and constituted undue delay.

I find the Secretary's interpretation of the term "undue delay" in this instance to be consistent with the purpose of the Act and in accord with the legislative history of the cited regulation and it is entitled to deference. *Plateau Mining Corp. v. FMSHRC*, 519 F.3d 1176, 1192–93 (10th Cir. 2008) (finding that Secretary's interpretation of own regulation is entitled to deference); *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1681–82, 1685 (Dec. 2010) (examining context and comparable regulations to determine that the Secretary's interpretation of a term is reasonable). I also find that Redpath should have been on notice of being in violation of the cited standard. A reasonably prudent person familiar with the mining industry, and in particular the use and transportation of explosives, would have recognized refueling and leaving unattended a fully loaded powder truck with damaged powder boxes in the CLAIR-bay created an unjustifiable hazard and was violative conduct within the meaning of the cited regulation. *See,e.g. Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 16 (2d Cir. 1999) (A reasonably prudent mine operator would take the Mine Act's objectives into account when determining its responsibilities to comply with a regulation promulgated thereunder.).

The Secretary has established a violation of mandatory standard 30 C.F.R. §57.6200 by a preponderance of the evidence.

Significant and Substantial

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

The Commission has explained that:

> [i]n 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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133,135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc*., 9 FMSHRC 2015,2021 (Dec. 1987) (approving *Mathies* criteria).

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula. In *U.S. Steel Mining Co., Inc*., 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> 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., Inc*., 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 Co., Inc*., 6 FMSHRC 1866, 1868 (August 1984); *US. Steel Mining Co., Inc*., 6 FMSHRC 1573,1574-75 (July 1984).

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co*., 27 FMSHRC 899,905 (Dec. 2005); *U.S. Steel Mining Co.*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10FMSHRC 498 (Apr. 1988); *Youghiogheny &Ohio Coal Co*., 9 FMSHRC 2007(Dec. 1987).

I have found the violation has been established. The Secretary contends that there existed a reasonable likelihood under continued normal mining operations that delaying transportation of explosives to refuel in the CLAIR-bay when coupled with the damaged powder boxes would have contributed to the hazard of an unintended detonation of the explosives. Such an event would more than likely produce fatal injuries. I agree.

Tankersley testified that he saw welding equipment and torches in the CLAIR-bay. Tr. 88, 95-97; S-12. He further testified that although he did not see any welding taking place on the day of the inspection, it was a permissible activity in that area. Tr. 97-98. Welding, cutting or other maintenance work could produce an ignition. Tr. 162-63. Tankersley also considered the fact that when he spoke with Slade about the conditions of the boxes, he didn't seem to understand the hazard involved. Tr. 119.

While the Respondent denied that any welding was done in the CLAIR-bay, I find that there was nothing preventing it. The presence of the equipment in the area leads to the conclusion that it could be done in that area and under continued mining operations was likely to be performed there. It is also reasonably likely that other types of light maintenance regularly done in the CLAIR-bay heightened the hazards of detonation. Changes in the environment can also detonate the boosters, particularly with the explosives being improperly stored in damaged boxes.

It is clear from the circumstances here that the Respondent was aware that it was engaging in unsafe practices in the transportation of explosives by making unnecessary and undue deviations and would have continued to do so had Tankersley not issued this citation. I therefore find that with continued normal mining operations it was reasonably likely that a reasonably serious hazard would result causing serious, if not fatal, injuries to the powder truck driver. The S&S level of gravity has been established.

Negligence

The Secretary assessed the negligence involved in this citation as moderate, meaning the operator knew or should have known of the violation but there were mitigating circumstances. 30 C.F.R. §100.3(d), Table X. When Tankersley spoke with Slade about the hazards involved in making deviations from the route and using damaged boxes, he told Tankersley that he was a trainee. By that Tankersley believed the operator had in good faith given him a block of training which he found to be a mitigating factor. Tr. 119-20.

I agree with the Secretary's assessment of moderate negligence.

Citation No. 8608114

The condition or practice cited in this alleged violation is:

> Upon the inspection of the Redpath CLEARBAYS (sic) it was found (sic) an explosives truck. (Sic) The operator of this truck had received the equipment loaded with explosives for the days (sic) shot from another Redpath employee when he noticed the fuel gauge was low, he drove the explosive truck to the CLEARBAYS (sic) to get fuel. At the time of inspection the truck was not being fueled and not attended in such a manner. (Sic) There is (sic) explosives on the equipment. I ask (Sic) the operator why he did not go directly to the shot and he was unaware of the standard of 57.6200.

Ex. S-9.

The gravity of the citation is marked as reasonably likely to result in a fatal injury to one person, S&S and of moderate negligence. The proposed penalty is $5503.00.

The mandatory standard requires that "[t]rainees and inexperienced persons shall work only in the immediate presence of persons trained and experienced in the handling and use of explosive material." 30 C.F.R. §57.6300(b).

Tankersley wrote this citation in conjunction with the previously discussed citation. The focus of this was that when Slade was interviewed at the scene, his answers indicated to Tankersley that he was unaware of the blasting powder storage requirements. Slade indicated that he had been recently trained over the preceding six months by Redpath. Tr. 124. He had received his certification for handling and transporting of explosives the day before the inspection. Ex. S-16. When Slade did his walk-around inspection of the truck, he should have seen the damaged powder boxes and taken the truck back to the magazine, in Tankersley's opinion. He should have also noticed that the fuel was low. Tr. 128-29. When asked if he knew he needed to go directly to the blast site without undue delay, he did not know that either. Tr. 151-52. He testified that he could not recall if he used the term "undue delay" when questioning Slade. Tr. 152. Slade, on the other hand, recalled Tankersley talking about "undue delay" and a work procedure. Tr. 237. Tankersley admitted that the cited standard refers only to the use of explosives, not the transportation of them. Tankersley also conceded that the standard would not

require the supervisor of the trainee to ride in the truck with him while transporting explosives. Tr. 150-51. Tankersley said, "I stand corrected on the use of the standard." Tr. 151. Tankersley later checked the training record for Slade and saw that he had completed his training. He also was aware that the operator provides "toolbox" training on the standards. Ex. S-16.

Slade testified that he was provided task training by Redpath that began in August 2011 and completed in October. He then started experienced miner training in September 2011 which was completed in October as well. Tr. 241. The experienced miner training focused on the powder truck which included learning how the emulsion tanks worked, checking water pressure, knowing the blind spots, checking all the gauges for hydraulic and engine oil and operating the boom as well as doing a pre-operational safety check. Tr. 241-42. On the day of the inspection, he completed his safety check and was aware of the damaged boxes. He and his shift boss made the decision to operate with the boxes in that condition. Tr. 244.

Based upon the testimony of Tankersley and Slade as well as the training record received into evidence, I do not find this mandatory standard has been violated. Slade was adequately trained by Redpath. He may have been nervous or not understood the questions Tankersley was asking him. The decision to drive the fuel truck with damaged powder boxes and refuel while fully loaded were poor choices and exemplify the operator's unsafe work practices which caused Tankersley's concern. They do not rise to the level of proof necessary to meet the Secretary's burden to establish that Slade was not properly trained. I also find that the cited standard applies to the handling of explosives, not the operation of the powder truck. For both these reasons, I vacate this citation.

Docket WEST 2012-486

MSHA Inspector Charles Snare has five and one half years' experience as an inspector. Prior to joining MSHA, he worked in various jobs in surface and underground mines including tours as a nipper, driller and blaster in metal/nonmetal mines. Tr. 21-22. He was conducting a regular inspection on October 12, 2011 when he issued this citation.

Citation No. 8608727

The condition or practice of this alleged violation states as follows:

> The 4855 level was posted "Danger No Ventilation," "Do Not Enter," and a snow fence barrier was in place. The area was not barricaded to obstruct vehicle parking. If a miner were to unknowingly enter an unventilated area fatal injuries could be expected.

Ex. S-2.

The citation is marked as unlikely to produce an injury (fatal) and non-S&S affecting one person and the result of moderate negligence. The proposed penalty is $1203.00.

The cited mandatory standard requires that unventilated areas be sealed or barricaded and posted against entry. 30 C.F.R. §57.8528.

On the day of this inspection, Snare was accompanied by mine representative Jim Wilde, safety superintendent for Barrick. Tr. 25. When Snare entered the area known as the 4855 level, he found the cited condition. The cited area located off the End Zone ("EZ") Decline. Located at a 90 degree turn to the right off the End Zone ("EZ") Decline and up a 12% grade ramp is a second 90 degree turn to the left that leads to an area that was used for parking mine equipment such as drills, haul trucks, mucking machines, tractors and personnel carriers. Ex. R-30; Tr. 34, 176-78. Adjacent to the parking area is an entry that was no longer ventilated. Between the parking area and this entry, Snare found that Redpath had erected a barrier and warning signs. Tr. 28; Ex S-4. The barrier was constructed of one strand of rope running from rib to rib that had PVC pipe zip-tied to the inside of the rope. Tr. 30-31. Attached to the PVC pipe was orange plastic snow fence material that hung underneath the PVC piping. Tr. 31. The PVC pipe did not frame the sides of the snow fence. Snare could not recall how the rope was attached to the ribs but said normally it is attached with anything available such as loosely tying it to a rock bolt or wire. Tr. 32-33. Snare took several photographs of the barrier. Exs. S-4, 5 and 7. He described the center section of the barrier as bowed due to slack in the rope holding it up. Tr. 37, Ex. S-5. In viewing photographs of the barrier, it is apparent there was a gap between the snow fence and the rib and another one towards the center where two pieces of fencing were needed to stretch across from rib to rib. Exs. S-4 & S-7. Theron Harper, Redpath's superintendent, confirmed the same. Tr. 197-98.

Snare determined that the barrier was insufficient to meet the mandatory standard. As he explained, a barricade is defined in the regulations is designed to "prevent the passage of persons, vehicles, or flying materials." Tr. 28; 30 C.F.R. §57.2. The manner in which this barrier was constructed would have been "easily defeated." Tr. 38. To abate the citation, Redpath erected a three to four foot berm behind the existing barrier. Tr. 42. In Snare's mind, the berm would function better to impede vehicular traffic. *Id*. It would slow down a vehicle and be very obvious to the driver. It would not, however, be as effective with someone on foot. Tr. 43. The barrier on its own would not stop a miner on foot who had the intention to go through it. Tr. 44. The ideal barrier would be a wall sealing off the area completely. However, he understood that this area was on geological hold where additional work could be performed in the future. Tr. 30.

Snare was aware that Barrick had a company-wide policy at Meikle mine dictating the manner in which barriers and barricades were to be constructed. Tr. 33 Ex. R-9. Usually, it would be a double strand of rope with PVC framework along the sides and bottom as well as the top with the snow fence securely tied to it. Tr. 33-34. The rope would run through the PVC pipe to give the frame additional strength. Tr. 34. Upon issuing this citation, Snare spoke with Randy McFatridge, the mine superintendent at the time, about the condition. McFatridge commented that he missed this one and didn't follow through. Tr. 45; Ex. S-3 pg.1.

Barrick's superintendent, Wilde, made notes from the inspection, which were recorded on *Redpath's Citation Summary* sheet, Ex. R-7. His notes state that the signs and snow fence as cited by Snare was a barrier which could be made of snow fence, a warning sign or tape.

However, under the standard cited by Snare, it needed to be a barricade. The author of the Citation Summary indicated that Redpath was in agreement with the citation. Referring to Barrick's Policy and Procedures document on barricades and barriers, it states that barriers which are designed to impede unauthorized traffic can be made of various materials such as muck piles, large boulders or timbers. In contrast, barricades are designed to prevent passage of persons, vehicles or flying material and are depicted in the policy manual as being constructed as Snare described. Non-ventilated areas are listed as a hazard that requires such a barricade. Ex. R-9 (emphasis added).

Respondent argued that a proper barricade was erected. Referring to the definition of a barricade, it argues that it was not required to prevent the passage of persons, vehicles *and* flying objects. The definition is written in the disjunctive and not all three items need to be prevented from entering the area. Citing the decision in *Newmont USA Ltd.* 34 FMSHRC 146 (Jan 2011) (ALJ), it asserts that the ALJ found fault with the barricade because it did not prevent entry of any of the items listed; it did not conclude that it had to prevent two or three of them. *Resp's Post-Hearing Brief.* This argument is hinged upon the various assertions made by Snare as to why the barricade needed to be comprised of the berm and the snow fence to prevent vehicles, objects and foot traffic from entering the unventilated area.

I find this argument nonsensical. The clear and universally-understood purpose of the Act is to protect the health and safety of miners. Entry into an unventilated area poses a risk of death. Miners travel in and operate mine vehicles or are on foot in this area. The risk posed by not having a proper barricade was persons being exposed to breathing harmful gases in an unventilated area. Therefore the barricade in this instance had to be designed primarily to prevent entry of vehicles as well as miners on foot. This barrier would also not prevent the entry of objects; however, under the circumstances, that was not its main purpose. That Snare required a berm to be erected to ameliorate the hazard posed by the very poorly constructed snow fence-PVC barricade is not basis upon which I find this mandatory standard has been violated. What is determinative is the fact that the barricade as Redpath had constructed it was a sorry excuse for a barricade. It was sagging, had gaps along the ribs, was comprised of two separate pieces of fencing that did not meet or join in the middle, was not constructed with a rigid frame around all sides and was attached to the rib in a non-permanent unsecure manner. It would not have prevented the entry of persons, vehicles or objects. Clearly, management for Barrick was of the same opinion as expressed in the Wilde's notes. This barricade did not remotely resemble the barricade construction depicted in Barrick's policy manual which I would have found sufficient to meet the mandatory standard cited by Snare.

I find the Secretary has met his burden of proving the mandatory standard has been violated. I find the gravity of this violation to be of moderate severity.

Negligence

The Secretary has assessed this violation as moderate in negligence. The fact that some form of barrier had been erected with signage indicating the danger present in the area is a mitigating factor. I also find McFatridge's statement that they missed this barricade indicates

that they were aware of the issue and had not yet attended to it as a mitigating factor. I find moderate negligence is appropriate.

II. PENALTIES

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo, including proposed special assessments, for violations of the Mine Act are well established. Section 110(i) of the Act delegates to the Commission and its judges the authority to assess all civil penalties provided in the Act. 30 U.S.C. §820(i). The Act requires that in assessing civil monetary penalties, the Commission or ALJ shall consider the six statutory penalty criteria:

1. The operator's history of previous violations;
2. The appropriateness of such penalty to the size of the business of the operator charged;
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 person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

The parties have stipulated that the proposed penalties would not affect the operator's ability to continue in business. There is no dispute that the conditions were abated in good faith. I have considered the operator's history of violations which I do not consider significant. Ex. S-1. The findings with regard to the gravity and negligence involved are discussed at length above. I find the following penalties to be appropriate:

Docket WEST 2012-485

Citation No. 8608112- I find the penalty of $5503.00 proposed by the Secretary to be appropriate.

Citation No. 8608114 – For the reasons set forth above, I VACATE this citation.

Docket WEST 2012-486

Citation No. 8608727 – I find the penalty of $1203.00 proposed by the Secretary to be appropriate.

III. ORDER

Docket WEST 2012-485 Citation Number 8608112 is affirmed as written with the penalty proposed by the Secretary; Citation Number 8608114 is **VACATED**. Docket WEST 2012-486 Citation Number 8608727 is affirmed as written with the penalty proposed by the

Secretary. J.S. Redpath Corporation is **ORDERED** to pay civil penalties in the sum of $6706.00 within thirty (30) days of this decision.[5]

/s/ Priscilla M. Rae
Priscilla M. Rae
Administrative Law Judge

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[5] Payment should be sent to Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.