FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., NW, SUITE 520N
WASHINGTON, DC 20004
TELEPHONE: 202-434-9958/FAX:202-434-9949

August 29, 2013

THOMAS E. PEREZ,		
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),[1]	:	Docket No. LAKE 2011-71
Petitioner	:	A.C. No. 11-03141-233712
	:	
	:	Docket No. LAKE 2011-156
	:	A.C. No. 11-03141-236902
	:	
	:	Docket No. LAKE 2011-198
v.	:	A.C. No. 11-03141-238158
	:	
	:	Docket No. LAKE 2011-619
	:	A.C. No. 11-03141-250613
	:	
MACH MINING, LLC,	:	Mine: Mach #1
Respondent	:	

DECISION

Appearances: Sarah Weimer,[2] Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner

Christopher D. Pence, Esq., Betts Hardy & Rodgers, Charleston, West Virginia, for Respondent

Before: Judge Tureck

These cases are before me on four *Petitions for Assessment of Civil Penalty* filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against Mach Mining ("Respondent"), pursuant to section 105(d) of the Federal

[1]Hilda L. Solis resigned as Secretary of Labor on January 22, 2013. Thomas E. Perez was sworn in as the new Secretary on July 23, 2013.

[2]Counsel for the Secretary changed her surname from White to Weimer subsequent to the hearing.

Mine Safety and Health Act of 1977, 30 U.S.C. 815 ("Act").[3] The first, filed on March 7, 2011, was docketed as LAKE 2011-71. It alleges 11 violations of the Mine Act and assessed penalties totaling $25,651. A settlement of all but one of these citations - No. 8423584 - was approved by me on October 19, 2012. The assessed penalty for this single violation is $946. The second, filed on April 1, 2011, was docketed as LAKE 2011-156. It alleges 24 violations of the Mine Act and assessed a total of $29,915 in penalties. The October 19, 2012 settlement encompassed all but five of these citations - Nos. 8362917, 8362918, 8362923, 8362941, and 8362942. These five citations had assessed penalties totaling $4,970. The third, filed on April 20, 2011, was docketed as LAKE 2011-198. It alleges a single violation of the Mine Act and assessed a penalty of $3200. The fourth, filed on May 31, 2011, was docketed as LAKE 2011-619. It alleges 19 violations of the Mine Act and assessed a total of $25,162 in penalties. All but two of these citations - Nos. 8424580 and 8428128 - were included in the October 19, 2012 settlement. The remaining citations were assessed penalties totaling $2,942.

The Secretary contends that each of these violations was significant and substantial and involved moderate negligence. Respondent contends that Safeguard No 8423514 and the accompanying Citation No. 8423560, and Citation Nos. 8428128, 8362917, 8362918 and 8362923 should be vacated, and the gravity and negligence regarding the remaining citations should be reduced.

The four dockets were consolidated for hearing and decision. A formal hearing was held in Carbondale, Illinois from June 19-21, 2012. At the hearing, Government Exhibits 1, 2, 4, 5, 8-13, 21-25, 27-30, and 36-38, and Respondent's Exhibits 1-A, 1-B, 2, 4, 8-14, 16 and 18, were admitted into evidence.[4] Both parties then filed post-hearing briefs and reply briefs, the last of which was received on November 20, 2012.

Findings of Fact and Conclusions of Law

Mach No. 1 Mine ("the Mine") is an underground coal mine located near Johnston City, Illinois. It is operated by Mach Mining. It mines the coal using both a longwall and continuous miners, and operates on three shifts. TR 38-39. Anthony Webb is the President of Mach Mining and general manager of the mine. TR 611.

There are nine citations and a safeguard still in contention, issued by four different inspectors on nine separate dates. They will be discussed below.

LAKE 2011-71

[3]This case initially concerned the following additional dockets, which were settled prior to the hearing: LAKE 2010-789; LAKE 2011-89; LAKE 2011-252; and LAKE 2011-423.

[4]Citation to the record of this proceeding will be abbreviated as follows: GX– Government Exhibit; RX – Respondent Exhibit; TR - Hearing Transcript.

Citation 8423584

Keith Roberts worked in the coal mining business performing many different jobs from 1972 until September, 1999, when he became a coal mine inspector for MSHA. He worked for MSHA at the Vincennes, Indiana field office until June, 2006, when he transfered to the Benton, Illinois field office. He worked for MSHA until October 31, 2011, at which time he retired from MSHA and returned to the coal ming business in the private sector. He was a roof control specialist for MSHA, although he performed other inspection duties as well. TR 78-80.

On August 19, 2010, Roberts was at the Mach No. 1 Mine to take part in an EO1 inspection. On the inspection, he was accompanied by MSHA's Deputy Administrator, the District Manager, and the Field Office Supervisor, as well as Webb, the President of Respondent, and Johnny Robertson, Respondent's Mine Superintendent. TR 87. Roberts was not the regular inspector of the Mine at that time, although he had inspected the Mine previously as recently as June 22, 2010. TR 88, 91, 155.

The height of the Mine is from eight to ten feet. The roof of the Mine is composed of shale, a soft rock which has a greater tendency to break off and fall from the roof than harder rock such as limestone. TR 100. In order to prevent the shale falling from the roof from striking the miners, Respondent installed a wire mesh under the roof which catches the falling rock. Although the wire mesh covers most of the roof, there is a one to two foot space along the north rib line that the mesh does not cover. TR 103, 491. At two places during his inspection in the No. 1 and 2 entries, Roberts noticed slabs of shale approximately three feet long, two feet wide and one or two inches thick hanging over the edge of the wire mesh by the north rib line. GX 8; TR 110. He believed that subsequent rock falls onto the wire mesh could push these slabs over the edge of the mesh, where they could strike a miner who happened to be walking underneath; or another slab could fall from the roof and use a slab already on the mesh as an incline plane and fall off. TR 92-93. Roberts contended that the slabs he saw fell onto the mesh at least several hours prior to his inspection, but could have fallen as long ago as a few days. TR 117. He testified that the fallen rock was not damp, nor was it the color of freshly fallen rock. TR 117-18. He added that this condition should have been identified by the pre-shift and on-shift examiners. TR 113.

Thirty C.F.R. §75.202(a)[5] states "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." Roberts believed the overhanging rock he saw in the No.1 and 2 entries violated this section by posing a hazard to miners on foot. Accordingly, at 8:15 a.m. on August 19, 2010, he issued Citation No. 8423584. The citation notes the hazard posed by the overhanging rock; states that injury resulting in lost workdays or restricted duty was

[5]All of the regulations cited in this decision are contained in Title 30 of the Code of Federal Regulations.

reasonably likely; that the violation was significant and substantial ("S&S"); and that Respondent's negligence was moderate. A penalty of $946 was assessed.

Respondent, while not contesting that there were overhanging slabs of rock on the wire mesh in the two places indicated in the citation, argues that this condition was not hazardous and therefore unlikely to cause an injury. Accordingly, it contends that any violation was not S&S. Further, Respondent contends that its negligence was low because the condition did not exist when the pre-shift examination was conducted earlier that morning. Finally, Respondent states that only a minimal penalty should be assessed.

Roberts testified that Respondent should be "given credit" for installing the wire mesh. TR 119. Respondent's mine examiner, David Adams, testified that the wire mesh has cut injuries to miners by 98 to 99 percent. TR 489. Roberts also testified that the roof support in the Mine is very good. TR 228. Moreover, Roberts admitted that miners walking down the center of an entry would not be in danger from rocks falling off the edge of the mesh, and that miners normally walk down the center of the entry. TR 219-20, 627-28. Further, he agreed that since the cabs in most mobile face equipment are on the right side, when going inby the mesh would fully protect the operators since it goes up to the ribs on that side. Going outby, the operators are still protected by the canopies on the cabs. TR 110, 220.

Adams was working the midnight shift on August 19, 2010. He testified that he conducted the pre-shift examination for the morning shift at about 5:00 a.m. He did not observe the condition cited by Roberts; had he observed the overhanging rock discovered during Roberts's inspection during his pre-shift examination, he would either have notified the foreman or taken the rock down himself. TR 494. Further, contrary to the testimony of Roberts (*e.g.*, TR 123), both John Dotson, a section foreman at the Mine, and Anthony Webb, Respondent's President, testified that crosscut 20, where Roberts observed the overhanging rock, was outside the working section. TR 561-62, 627. If the overhanging rock was in the working section, miners were much more likely to be in the vicinity and the potential for injury would increase.

I do not know why Respondent conceded that it violated §75.202(a). It is clear that Respondent's roof control plan did an excellent job protecting the miners from injury, and that is what §75.202(a) requires. But since Respondent did concede the violation, I find that a violation occurred. However, the evidence shows that an injury is unlikely and Respondent was not negligent. The evidence establishes that the wire mesh protected miners from injury unless they were walking directly against the north ribs, which would have occurred infrequently even in the working section. Further, the chance that a large overhanging rock would not be noticed by one of the mine examiners and taken down before the rock was dislodged from the mesh by other draw rock, or having other draw rock fall directly on the overhanging rock and slide off the mesh, appears small. To have a miner coincidentally walking at that exact spot as the rock falls from the mesh raises the odds astronomically. That is not to say it would have been impossible, just extremely unlikely. Further, I accept Adams's testimony that when he conducted the pre-shift examination early that morning, there were no overhanging slabs of rock on the wire mesh; and

had there been, they would have been removed. Therefore, the citation must be modified to an injury being unlikely and no negligence.

Significant and Substantial

The Secretary further contends that Respondent's violation of §75.202(a) was significant and substantial ("S&S"). 30 U.S.C. §814(d)(i) provides:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard . . . he shall include such finding in any citation given to the operator under this [Act].

The Commission and several courts of appeals have agreed that four conditions must be met to find that a violation is S&S:

> (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. *Secretary of Labor v. Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (1984); *see also*, *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir.1988); *Consolidation Coal Co. v. Federal Mine Safety and Health Review Comm'n*, 824 F.2d 1071, 1075 (D.C.Cir.1987).

Clearly, the violation was not S&S, since there is no reasonablelikelihood that an injury would occur due to the violation.

Penalty

Finally, the amount of the penalty to be assessed must be considered. Section 110(i) of the Mine Act lists the factors to be considered in assessing a penalty. These factors are:

> the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of

the person charged in attempting to achieve rapid compliance after notification of a violation.

I find that a penalty of $100 is all that should be assessed for this violation. Injury was highly unlikely; Respondent was not negligent; and the violation was not S&S.

LAKE 2011-156

Citation Nos. 8362917, 8362918 and 8362923

MSHA coal mine inspector Dannie Lewis issued Citations 8362917 and 8262918 on September 7, 2011, and Citation 8262923 on September 8, 2011, in the course of an EO1 inspection. Lewis's permanent duty station is MSHA's Barbourville, Kentucky, district office, although he works in other locations as needed. Lewis started at MSHA in 2002. Prior to his employment with MSHA he worked as an underground coal miner for almost 23 years. TR 274-76. Much of his coal mine work was as an electrician. TR 280-81. He was at the Mach No. 1 mine assisting the Benton, Illinois district office, which was short-staffed. He was not the lead AR on this inspection, and parts of the mine had already been inspected prior to his arrival in Illinois. TR 285.

The citations allege identical violations of §72.630(b) regarding three roof bolting machines. That section of the regulations states in pertinent part that "[d]ust collectors shall be maintained in permissible and operating condition." The citations state that the dust collection system on the company # 2, #3 and #4 roof bolt machines "are not being maintained in permissible condition. When checked a considerable amount of drilled rock dust is observed behind the filter in the dust collection system" of each machine. GX 21, 22, 24. The citations state that injuries which could reasonably be expected to be lost workdays or restricted duty were reasonably likely to occur, affecting two people. Further, the violations were alleged to be S&S. A penalty of $1,026 was assessed for each citation. Respondent contends that no violation of §72.630(b) occurred and each citation should be vacated.

Although the citations only allege that the dust collection systems on the roof bolt machines were not being maintained in permissible condition, the Secretary made no attempt to prove that the dust collection systems were not in permissible condition. Rather, the Secretary completely ignored the permissibility of the roof bolt machines, arguing instead that they were not being maintained in proper operating condition. Thus a key issue in regard to these citations is the meaning of the word "permissible".

Lewis testified that maintaining the dust collection system in permissible condition means "that all the functions of the dust collection system will be frequently examined and maintained in good working order." TR 291-92. But "permissible" is a term of art under the Mine Act and the regulations, and does not accord with Lewis's definition. Although Part 72 frequently refers to "permissible" equipment, it does not contain a definition of that word. However, Section 318

of the Mine Act contains two definitions of "permissible", one covering equipment which is not electric face equipment and the other covering electric face equipment. *See* §318(c), (i). They are long definitions which need not be quoted in their entirety. But as is relevant to these citations, permissible electronic face equipment must be

> designed, constructed and installed, in accordance with the specifications of the Secretary, to assure that such equipment *will not cause a mine explosion or mine fire*, and other features of which are designed and constructed, in accordance with the specifications of the secretary, to prevent, to the greatest extent possible, *other accidents* in the use of such equipment.

§318.3(i) (emphasis added). This definition is codified in §75.2 of the regulations. Inspector Chad Lampley, who issued Citation No. 8428128, which will be discussed below, testified that "[p]ermissible is basically making electrical equipment and components of electrical equipment so that it [*sic*] can't cause an explosion or reduces the chances that you are going to cause a mine explosion. Basically limiting ignition sources in a coal mine." TR 421-22. Inspector Lewis conceded that roof bolt machines are face equipment. TR 374. He further conceded that the operation of the roof bolters which allegedly were in violation of §72.630(b) did not contribute to a fire or explosion hazard. TR 374-75.

The Secretary attempts to get around the limits of the citations by arguing that Part 72 does not define "permissible" and that, "in relation to dust collection systems" "permissible" in §72.630(b) is similar in meaning to "operating condition". Sec'y Reply Br. at 8. It is unclear how counsel can make this argument with a straight face given the definitions of "permissible" in the Mine Act. According to the Secretary, both require the system to be in "good working order". That clearly is not the case.

Of course, the Secretary could have avoided this problem simply by moving to amend the citations to allege that the dust collection systems were not being maintained in "operating condition." Mine inspectors are not lawyers, and should not be held to the drafting standards to which lawyers are held. Moreover, citations are drafted quickly and on the spot. Accordingly, motions to amend citations to more accurately reflect the violations detected, when made in a timely fashion, should be liberally granted. But the Secretary has not moved to amend the citations, choosing instead to argue a position that he knows cannot be sustained.

Therefore, I hold that the Secretary has failed to prove violations of §72.630(b), and Citations 8362917, 8362918 and 8362923 must be vacated.

Even if the citations are read to include the failure to maintain the roof bolters in operating condition as the alleged violation, the Secretary's proof is lacking. The Secretary's evidence on this issue is that, when the filters in the dust collection systems of the three roof bolt machines in question were removed, there was a handful of dust behind each. TR 297.

According to Lewis, there should not have been any dust behind the filters. The dust was getting through the filters instead of dropping down into the dust collection box, and some dust was being discharged into the mine air through the bolters' exhaust systems. TR 294, 305. He concluded from this that Respondent was not changing the bolters' filters often enough. TR 304. But Lewis did not check the inside (the clean side) of the filters to see if dust was getting through. TR 383, 412. It is the air going through the clean side of the filters that is discharged into the air. Moreover, he did not take any air readings or otherwise obtain evidence that the bolting machines were venting air that failed to comply with the Mine's ventilation plan. TR 376. He simply assumed that if there was some dust behind the filters then dust was being discharged into the air. TR 305. He testified that he had too much to do and did not want "to kill too much time" inspecting the dust collection systems. TR 412. *E.g.*, TR 298. Further, he did not see any dust on the mufflers, nor did he see any dust coming out of the machines. TR 378.

Webb testified that the dust the inspector saw when the filter was removed was generated by the act of removing the filter from the filter box. He added that if the bolter was emitting dust, it would have been visible in the air while the machine was running and it would be seen in the muffler as well. TR 635. Webb testified that he tested one of the bolting machines and found the dust collection system to be operating as it should. He stated that "the only time we could replicate what Mr. Lewis found was when we removed the dust filter . . . ." TR 636.

Accordingly, had the Secretary alleged that the dust collection systems on the roof bolt machines were not in operating condition, I would find that the Secretary failed to prove that violations of §72.630(b) occurred. The Secretary failed to prove that the dust collection systems on the bolting machines were not properly filtering the dust produced by the machines even if a handful of dust had escaped the filtration systems while the machines were operating. The inspector admitted that he failed to conduct a thorough inspection of the system. Moreover, Respondent's explanation for how the dust found by Lewis was generated is plausible. Therefore, even if I had not vacated Citations 8362917, 8362918 and 8362923 because the Secretary failed to prove that the roof bolt machines were not permissible, these citations must be vacated because there is no proof that their dust collection systems were operating improperly.

Citation No. 8362941

On September 15, 2010, as part of another EO1 inspection, Inspector Lewis issued this citation alleging a violation of §77.1607(d), which states that "[c]abs of mobile equipment shall be kept free of extraneous materials." GX 27. Lewis testified that one of Respondent's pick-up trucks which was used to haul men and equipment both underground and on the surface contained extraneous items including pipe wrenches, screwdrivers, strikers, 20 brass water sprays and a hammer. TR 343-44. The citation states that an injury causing lost workdays or restricted duty was reasonably likely; the violation was S&S; and negligence was moderate. A penalty of $946 was assessed.

Respondent argues first that this truck, which it contends was used only by two midnight shift electricians, was not "loading and haulage equipment" which is subject to §77.1607, and therefore §77.1607(d) is inapplicable. This argument is specious. The definition of "haulage" cited by Respondent in its post-hearing brief includes "movement of men . . . ." Resp.'s brief at 38. Respondent does not disagree that the truck in question was used by two electricians to travel in the mine. Further, Robertson testified that the bed of the truck carries grease and oil tanks and maintenance equipment. TR 602-03. Accordingly, it is "haulage equipment" covered by §77.1607(d).

Second, other than arguing that the truck was not loading and haulage equipment, Respondent has not contested that a violation of §77.1607(d) occurred. But Respondent contends that "the presence of these items in the cab of the electricians' truck, driven slowly in accordance with road conditions, would be highly unlikely to cause an accident or injury and the S&S designation should be vacated and the negligence level lowered." Resp.'s brief at 36. Respondent does not dispute that all of the materials listed in the citation were loose in the cab of the pick-up truck. Rather, Respondent claims that these materials did not create a hazardous situation.

Lewis testified that these materials were on the bench seat, console, floor and dashboard of the truck. TR 346, 393. He stated that these materials could roll under the brake or gas pedals, or strike the driver in the event of an accident. Of particular concern would be the 20 water sprays in the cab,[6] which Lewis testified, hyperbolically one hopes, "would have acted more or less as bullets that would beat the guy to death." TR 343. Respondent, citing the testimony of Robertson, the Mine Superintendent, argues that even if an item would lodge under the brake pedal, it would not effect the truck's braking ability because the brake pedal does not go all the way to the floor of the vehicle when stopping. Resp.'s brief at 38-39. But Robertson's testimony does not support this contention. For although Robertson testified that the brake pedal in the truck *he drives* does not go all the way to the floor to stop it, he added that he has not driven the electrician's truck and does not know whether it is true for it as well. TR 605.

As will be discussed below, Respondent has not contested that the roads in the mine can be very bumpy, requiring frequent grading. It seems likely that some of the loose materials in the cab could be jarred by an unanticipated bump or a collision even if the truck was moving relatively slowly. These materials could then strike the driver or lodge under one of the pedals. Had there not been materials on the dashboard, I would have found injury to be unlikely. But it seems inherently unsafe to keep tools and other material on the dashboard of a moving vehicle. Since the dashboard is close to head level, tools which are propelled from it are more likely to cause a serious injury than those located elsewhere in the cab. Accordingly, I find that injury was reasonably likely, as alleged in the citation. Further, such injuries could reasonably be expected to result in lost workdays or restricted duty; but it is not out of the question that a more serious

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[6]Lewis testified that the water sprays were brass, torpedo-shaped and between a half and one inch in length.

injury such as a broken bone, or even lost teeth or a serious eye injury, could occur if a hammer, pipe wrench or water spray struck the driver in the face. Finally, Lewis stated that he is unaware whether any agent of the operator knew about the materials in the truck (TR 346, 397), and therefore I would categorize Respondent's negligence as low.

Next, the Secretary contends that the violation was S&S. I have found an underlying violation of a safety standard, satisfying the first of the four parts of the *Mathies* test. Second, the violation contributed to the discrete safety hazard of the driver being struck by a tool or other item. Next, I have found that an injury is reasonably likely. Finally, I have found that there is a reasonably likelihood that the injury will be reasonably serious. Accordingly, the four tests have been met, and I conclude that the violation of §77.1607(d) is S&S.

Lastly, the amount of the penalty must be determined. The assessed penalty of $946 was based in part on the violation resulting from moderate negligence, and I have found negligence to be low. The remaining elements of the citation were upheld. Considering the criteria set out in §110(i), I conclude that a reduction in the penalty to $750 is appropriate.

Citation No. 8362942

This citation was issued by Inspector Lewis on September 16, 2010 alleging a violation of §77.505, which requires cable and insulated wires passing through metal frames to be properly fitted and substantially bushed with insulated bushings. The citation states:

> The 3 AWG electrical cable entering the bottom of the metal disconnect box labeled Refuse belt 1A #1, is not substantially bushed. When checked this cable has fallen out of the bushing and the inner leads of this cable are visible on the outer portion of the bushing.

The citation further states that an injury which could reasonably be expected to be lost workdays or restricted duty is reasonably likely to result from the violation, with one person affected. Lewis indicated that the violation comprised moderate negligence and was S&S. Respondent admits that a "technical" violation of §77.505 occurred, but argues that the violation was not S&S and negligence was low. A penalty of $946 was assessed for this violation.

Lewis testified that while walking a belt as part of the EO1 inspection on September 16, 2010, he came upon a small disconnect box which had the cable hanging out of the bottom with the inner leads exposed. He testified that the cable had been bushed, but the bushing "had backed out or came apart or wasn't tight enough when it was originally put in and the cable had fell [*sic*] out of the bushing . . . ." TR 356. He explained that the bushing (a restraining clamp) fell off the disconnect box. TR 356-57. The disconnect box is a metal box used to turn the power to the motor on and off. TR 356. Lewis stated that the danger from the cable falling out of the box was that someone could accidentally jerk the leads out of the box, which could cause the box to become energized. This would create a shock hazard or even an electrocution hazard.

TR 356, 363. But Lewis pointed out that the cable had an outer jacket covering all three leads, and each lead was covered by an inner jacket as well. Although the inner leads were exposed at the cable box, it appears from Lewis's testimony that the inner jacket covering the leads was still intact. TR 364-65. Lewis does not know how long this condition existed. TR 362.

The disconnect box was outside the mine, between 300 and 500 feet from the mine opening and about 150 to 200 yards from the preparation plant. TR 359, 637. It was connected at about eye level to the head drive of a refuse belt. TR 359-60, 362. The cable was also at eye level, not on the ground. TR 362.[7] Lewis also testified that the refuse belt is started remotely, so a miner does not have to come to the box to start the motor. TR 406. Lewis testified that there were two contractors working in the general area, although they were 50 feet from the box. TR 361-62. He stated that a miner would be in the area once a day, although he could not say what that miner would be doing in that area, and once a month an electrical inspection would occur. TR 362. Lewis rated this violation as reasonably like to cause injury rather than highly likely "because of where it was at and the fact that it was only required to be examined once every 30 days . . . ." TR 363.

Webb testified that no one worked around the belt drives in the refuse area. Two men operated bulldozers to spread out the refuse deposited by the belt. TR 638-39. They would not have occasion to go near the box. If anything went wrong with the belt, the plant foreman would be the one to go and fix it; and no work would be done until the electrical equipment was locked and tagged out. TR 639. Accordingly, the only person likely to be close to the box on some kind of regular basis would have been the person conducting the monthly electrical inspection.

Although a violation of §77.505 did occur, I find that there was no likelihood of an injury because of it. Only one person had any reason to go near the box unless it had to be repaired, and that was only once a month. Further, although the leads were exposed, their inner covering was still intact, which would appear to reduce or eliminate the possibility of the box being energized accidentally. In addition, the only people who would have had any occasion to be around the box - the plant manager and the electrical inspector - should have known to lock and tag out the power to the box prior to doing any work on it. Further, I find that Respondent's negligence in regard to this violation was low. There is no evidence that the bushing had failed at the time the last electrical inspection of the area was conducted. However, if an injury were to occur from this condition, I have no reason to question the inspector's conclusion that it would reasonably be expected to result in at least lost workdays or restricted duty.

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[7]Lewis testified that the cable at issue was at the bottom of one of the three small boxes which appear to be attached to a large vertical box with a red on/off handle near the center of the photograph in RX 11. TR 402. Since he testified that the cable was at eye level, it would appear the cable was at the bottom of the highest of the three small boxes, although it is not visible in the photo.

Since I have found that there is no likelihood of an injury, I hold that the violation cannot meet the standards required to be S&S.

Finally, in light of Respondent's low negligence and that there was no likelihood an injury would occur due to the violation, a penalty of $100 is appropriate.

LAKE 2011-198

Safeguard 8423514 and Citation 8423560

The primary area of contention in this case concerns this safeguard and the citation for allegedly violating the safeguard. Respondent contends that the safeguard should not have been issued, but even if it was properly issued no violation of the safeguard has occurred. The Secretary argued in a *Motion in Limine* that the safeguard was presumptively valid and the "condition or practice" set out in the safeguard could not be challenged in this proceeding. The Secretary moved to have any evidence regarding the condition or practice excluded from the record. Respondent opposed the motion, which I denied at the hearing. TR 7-12.[8] Therefore, both the validity of the safeguard issued on February 23, 2010, and whether the safeguard had been violated as alleged in the citation issued on June 22, 2010, are at issue.

On February 23, 2010, Inspector Roberts issued Safeguard No. 8423514 to Respondent. On that date, Roberts traveled on the main south travel road from crosscut 2 to crosscut 175. TR 144. He was accompanied on this inspection by Guy Webster, an out by supervisor at the Mine. The safeguard states as follows:

> Bottom irregularities in the form of pot holes, wash-board areas are present on the Main South travel road from XC-2 to XC-175 of Headgate #3. These same conditions along with thick mud and muddy ruts are present on the travel road in the Headgate #3 cross entries.
>
> These conditions present a distinct safety hazard to persons operating mobile equipment on these roadways in that the steering and traction control are compromised. Also, the road conditions will further exacerbate the condition of injured miners being transported out of the mine.
>
> These conditions represent a violation of Section 314(b) of the Mine Act as well as Section 75.1403. This is a Notice to Provide Safeguard(s) requiring that all travel roads and haulage ways,

[8]Due to the short time between the filing of the *Motion in Limine* and the hearing, I informed the parties via an email dated June 14, 2012, that the motion was denied and I would explain my ruling at the hearing.

including working section haulage roads, *be maintained as free as practicable from bottom irregularities, debris and wet or muddy conditions that affect control of equipment.*

GX 12, at 1-2 (emphasis added). The italicized words in the preceding paragraph are a quote from §75.1403-10(i). Roberts testified that he encountered these conditions while in a pick-up truck being driven by a Mach employee. TR 135. He stated that these hazards could cause someone in a vehicle to be "catapulted into the underside of the canopies" and make it difficult to control the vehicle unless the vehicle was being driven at "an extremely slow rate of speed." TR 135-36. The vehicle he was riding in was being driven at an extremely slow rate of speed so no problems were encountered. TR 135. Further, he did not testify to seeing any other vehicles in the mine being driven at hazardous rates of speed. *Cf.* 137. The safeguard was terminated on February 24, 2010, when "the roadways were restored to a safe, travelable condition." TR 169; GX 12, at 1.

The Mach Mine, due to its location in Southern Illinois, tends to be very dry in the winter so that the roadbed has to be watered every shift to keep down dust. TR 242-43, 495, 569. Dave Adams, one of Respondent's mine examiners, testified that when the road is damp it will get ruts in it. TR 496. Adams and Webster both stated that moving equipment such as longwall shields increases the rutting. TR 497, 577. The inspection which caused Roberts to issue the safeguard occurred in the winter. Webster testified that on February 22, 2010, the roads on which he and Roberts traveled probably had some washboard areas and potholes, since that is typical due to the traffic in the Mine. TR 573, 578. But he did not notice any unusual conditions. *Id.* The Mine is more humid in the warmer months and does not have to be watered as often. TR 242, 495.

I find that the safeguard was properly issued on February 22, 2010. There is essentially no disagreement that the conditions observed by Inspector Roberts existed; the only dispute is the extent of these conditions. Moreover, even if Respondent had reasonable explanations for the existence of the washboard roads and potholes (*e.g.*, they are unavoidable; the Mine's road grader may have been broken at the time), that does not change the fact that road conditions existed which could have resulted in injury if a vehicle was traveling faster than the road conditions would allow. Further, fault or negligence is not required for the issuance of a safeguard. The only requirement is that the safeguard "minimize hazards" with respect to transportation of men and materials. *See* §314(b) of the Mine Act.; *see also* §75.1403. Maintaining roads as free as practicable from bottom irregularities, debris and wet or muddy conditions that affect control of equipment meets this standard. Accordingly, on June 22, 2010, when Inspector Roberts revisited the Mine, the safeguard was in effect.

The remaining issue is whether the citation issued for violating the safeguard was proper.

Citation No. 8423560 states:

> Bottom irregularities in the form of pot holes and wash-board areas are present on the Main South travel road from XC-2 to XC-75 of Headgate 5 and on the Headgate 5 travel road from XC-1 to XC-105.
>
> These conditions present a distinct safety hazard to persons operating mobile equipment on these roadways in that the steering, traction control and braking are compromised. Also, the road conditions will further exacerbate the condition of injured miners being transported out of the mine.
>
> These conditions represent a violation of Section 314(b) of the Mine Act as well as Section 75.1403 and Notice to Provide Safeguard(s) No. 8423514 requiring that all travel roads and haulage ways, including working section haulage roads, be made as free as practicable from bottom irregularities, debris and wet or muddy conditions that affect control of equipment.

Gravity was listed as reasonably likely and could reasonably be expected to be lost workdays or restricted duty, and was found to be S&S with one person affected. Negligence was listed as moderate. The Secretary assessed a penalty of $3,200 for this violation. Respondent contends that even if the safeguard is valid, it did not violate it and this citation should be dismissed.

The key requirement in the safeguard is that Respondent's travel roads be "as free as practicable" from the hazardous conditions found to exist in the safeguard. The Secretary has failed to prove that Respondent did not keep the roads in question as free as practicable of washboard areas and potholes. The evidence establishes that road conditions in the Mine change frequently. TR 172, 495. Washboard areas and to a lesser extent potholes on the Mine roads are inevitable due to the movement of very heavy equipment. TR 573, 630. To keep the roads in as good condition as possible, Respondent has a road grader. TR 497. Respondent uses the grader to grade the roads in the Mine on the day shift every day, and two or three times a day when they are moving the longwall. TR 631. Roberts testified that on his visits to the Mine other than on June 22, 2010, the grader was in operation. On June 22, 2010, the road grader was out of service, and apparently had been for a few days. TR 169-70. To smooth out the roads when the grader was inoperable, Respondent would tie a six or eight inch steel I-beam behind a piece of equipment and drag it along to fill in the holes in the roadway. TR 517, 577. According to Skelton, "[i]t's not as good as a grader, but it will do until you get the grader running." TR 517. Webb testified that it is in Respondent's best interests to keep the roads in good shape. Of course, he is concerned for the safety of the miners. But in regard to coal production, a rough road is hard on their fleet of only 21 trucks, and if trucks break down it takes longer to transport the miners to the face and decreases efficiency. TR 631-32. He added that "there was nothing else I knew that I could do" to keep the roads free of bottom irregularities. TR 632. The citation was terminated on June 24, 2010, two days after it was issued, by MSHA Inspector Larry Morris.

GX 11, at 3. Morris stated that "[t[he Main South and HG#5 road ways have been graded", which Roberts takes to mean that the grader was back in service. TR 179-80.

Roberts testified that if the grader was going to be down for several days, it was up to Respondent to find other ways to maintain the roads. TR 175. He first suggested that Respondent might take a grader from another of its mines. *Id.* But he did not indicate how long that would take to transport the grader from the other mine or how the other mine was supposed to grade its roads while the Mach Mine was using its grader. Absent a grader, he stated that the most effective way would be the installation of some kind of ballast material such as gravel into the ruts and potholes. TR 170-72. But Roberts did not explain how long it would take to complete this temporary expedient or the cost involved. Obtaining the necessary gravel, delivering it to where it was needed in the Mine, and spreading it over more than four miles of road where he found bottom irregularities[9] sounds like a daunting and time-consuming task which would take longer than it took to repair the Mine's grader.

Finally, there is extensive evidence that Respondent's drivers did not operate their equipment faster than the road conditions allow for safe operation. Roberts conceded that the trucks he was being driven in on both February 23, 2010, and June 22, 2010, did not encounter any problems on the roads. TR 248-50. Further, he did not see any vehicles which were out of control. TR 250. He stated that the vehicles were traveling at very slow speed both on February 23 and June 22. TR 135, 247-49. Further, testimony from Respondent's witnesses confirms that drivers go as slow as they have to keep control of their vehicles if the road conditions are not ideal. TR 497-98, 503, 584.

I find that by using the heavy I-beam to grade the roads until the grader could be repaired, Respondent was maintaining its haulage roads as free as practicable from bottom irregularities that would affect the control of equipment. Accordingly, I hold that Respondent did not violate the safeguard, and Citation No. 8423560 must be dismissed.

LAKE 2011-619

Citation No. 8424580

Danny Ramsey is an MSHA mine inspector, ventilation specialist and roof control specialist. TR 34. He has worked in the coal mining industry since 1972. He started out as a coal miner performing various jobs for about five years. Subsequently, he was a section foreman, longwall foreman, underground mine manager, and mine superintendent, among other

[9]The distance between crosscuts in the Mach Mine was 120 feet. TR 446. Roberts found the bottom irregularities in the Main South travel road to cover a distance of 74 crosscuts, daunting and time-consuming task which would take longer than it took to repair the Mine's grader.

management positions. He began working for MSHA in September, 2003. TR 35-37. Prior to becoming a coal miner, he was a welder. TR 35.

On February 2, 2011, Ramsey was at the Mine to perform a ventilation inspection or review as part of an EO1 inspection of the mine. TR 40-41. He was accompanied on his inspection by Norman Quertermous and John Duty, who were maintenance foremen at the Mine. TR 42. They were aboveground in Duty's truck driving to the mine entrance when Ramsey told Duty to stop because he believed he saw a miner, Josh Dixon, cutting with an oxygen and acetylene torch without any eye protection. TR 45-47, 522. He issued Citation No. 8424580, alleging a violation of 30 C.F.R. 77.1710(a), which requires face shields or goggles to be worn while welding or cutting. GX 4. He found a permanently disabling injury to be reasonably likely; Respondent's negligence to be moderate; and the violation to be S&S. A penalty of $1,412 was assessed.

Ramsey testified that he was 40 to 50 feet away from Dixon when he spotted him. TR 46. He stated that Dixon was cutting a piece of channel, and had already cut two pieces off of it. Each cut probably took between 30 seconds and one minute. TR 48. Ramsey testified that he walked up to Dixon and spoke to the two foremen about safety and the use of goggles, and they in turn instructed Dixon. He did not talk to Dixon. TR 53. He did not see Dixon take off safety glasses. TR 47. He testified that if Dixon had been wearing safety glasses he probably would not have written the citation even though safety glasses provide less protection than a face shield or goggles. TR 50-53.

Both Dixon and Duty testified at the hearing. Dixon is a diesel mechanic at the mine. His job requires him to use an oxygen and acetylene torch almost every day. TR 470. He has welded since he was a boy. TR 483. He testified that he was not wearing goggles because there was a fire at the mine shop a couple of days earlier that destroyed all of his tools and those of the other diesel mechanics. TR 472. But he testified that he was wearing clear safety glasses which protected his eyes. He stated that the only difference between the safety glasses he was wearing and "cutting glasses" was that the safety glasses were clear, not dark. TR 474-77. He added that he does not weld without safety glasses because sparks can come back and hit him in the face. TR 478.

It was Dixon's testimony that Duty's truck was about 100 feet from him and Ramsey never got out of the truck. TR 476, 483. He had just finished cutting when Duty came over to talk to him and told him the inspector said he has to have goggles on. TR 475. He does not think Duty knew beforehand that he was cutting without a face shield or goggles. TR 477. When asked whether Respondent provided any training about eye protection, Duty replied "they kind of pound it into you, be sure to wear glasses, be sure you wear gloves, all your protective gear." TR 480.

Duty corroborated Dixon's testimony regarding the location of the truck when Ramsey saw Dixon and that Ramsey never got out of the truck. TR 523. Ramsey agreed to let Duty talk

to Dixon about "not wearing cutting glasses", and he did. TR 522-23. Duty does not remember whether Dixon was wearing safety glasses when he walked up to him. TR 523-24.

Respondent does not contest that a violation of §77.1710(a) occurred, since it is undisputed that Dixon was not wearing a face shield or goggles. Respondent also concedes that if Dixon was not wearing any eye protection then it was reasonably likely that a permanently disabling injury could occur. The dispute here is whether Dixon was wearing safety glasses.

Both Dixon and Duty are adamant that Ramsey never left the truck. It strikes me as odd that Ramsey would have gotten out of the truck to walk over to Dixon yet not say a word to him. Moreover, if Ramsey was even as close as 40 or 50 feet from Dixon, it is quite possible that if Dixon was wearing clear safety glasses Ramsey would not have seen them. I also have trouble believing that an experienced welder would use a torch without any eye protection.

Accordingly, I find the Secretary has established that a violation of §77.1710(a) occurred, since Dixon admittedly was not wearing a face shield or goggles. I also find that Dixon was wearing safety glasses in the brief time he was cutting with the torch.

Since a violation occurred, the other elements of the citation must be evaluated. The citation lists injury as reasonably likely and alleges that this injury could reasonably be expected to be permanently disabling. Cutting with a torch without proper eye protection would be reasonably likely to cause a permanently disabling burn injury to one or both eyes from sparks or molten metal. TR 46, 49. As stated in the citation, only one person would be affected. At his deposition, Ramsey conceded that if Dixon was wearing safety glasses Respondent's negligence would be low. TR 74. I do not agree that simply because Dixon was wearing safety glasses Respondent's negligence was low. Nor do I agree with Respondent's contention that this is simply a "technical violation" of the standard. Although safety glasses would provide some eye protection - perhaps a great degree of protection (TR 52, 477) - the standard mandates a higher level of protection, which at a minimum would be goggles. Nevertheless, I agree that Respondent's negligence was low. For one thing, Dixon used the torch for three cuts which probably took no more than a couple of minutes, and he had completed the job when Duty walked up to talk to him. TR 475. Had he been cutting or welding for a substantial period, then I would have found Respondent's negligence to be at least moderate. Moreover, there is no evidence that anyone in a supervisory position knew that Dixon was cutting without a face shield or goggles.

Significant and Substantial

The Secretary further contends that Respondent's violation of §77.1710(a) was S&S. Respondent contends that since Dixon was wearing safety glasses the violation could not be S&S. But negligence is not a factor in determining whether a violation is S&S, and I find that despite Respondent's low negligence the four conditions for a violation to be S&S are present.

First, Respondent concedes that it violated a safety standard, *i.e*., §77.1710(a). Second, the violation presents the discrete safety hazard of a serious eye injury. Third, I have found that there is a reasonable likelihood that such an injury would occur. Finally, I have found that this injury would be of a reasonably serious nature. Accordingly, the violation is S&S.

Penalty

The last element regarding this citation is the amount of the penalty to be assessed. The Secretary assessed a penalty of $1,412 for this violation. This violation was premised on the inspector's belief that Dixon had used a torch without any eye protection, which would have been extremely hazardous. This led Ramsey to find moderate negligence. But Ramsey indicated that had Dixon been using safety glasses he probably would not have issued a citation. TR 50. The Secretary did not suggest an appropriate penalty in the event I found that Dixon was using safety glasses. Respondent proposed a minimal penalty of $112.00.

The violation history provided by the Secretary (GX 2) shows no violations of §77.1710(a) going back as far as late 2007. Further, there is no contention by the Respondent that the proposed penalties are unfairly large or would affect Respondent's ability to remain in business. Next, I have found that Respondent was negligent, although its negligence was low, and the violation was S&S. The final factor appears inapplicable to the facts of this case, since Dixon had finished cutting before he was informed that Ramsey had ordered him to stop.

Neither party's proposed penalty is realistic. The violation was much less significant than the Secretary contends, but the potential for serious injury was greater than Respondent admits. Taking all of the applicable factors in §110(I) of the Mine Act into consideration, I conclude that a penalty of $500 is appropriate for this violation.

Citation 8428128

Chad Lampley has been an MSHA mine inspector since 2007. He graduated from college in 2003, and taught at a college for two years prior to working in the mining industry. TR 414. The record does not indicate the type of work Lampley performed in his short stint in the mining industry prior to becoming an MSHA inspector. On February 3, 2011, he was inspecting equipment at the Mach Mine. TR 416. A scoop was brought to him to inspect. He did not see where it was brought from or where it had been operating, but testified that the miner who brought it to him stated that it was near the stage loader area of the longwall. TR 424-25, 429, 446, 456. Lampley did not know precisely where the stage loader was located, but he believed it was about 80 to 100 feet from the face. TR 425. There is no dispute that when Lampley inspected the scoop it was outby the last open crosscut of the longwall, at which location it did

not have to meet permissibility standards.[10] The parties agree that, in this instance, the permissible zone was within 150 feet of the face. TR 431, 643.

Under §75.503,

> The operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine.

While inspecting the scoop, Lampley found that the scoop's breaker enclosure had a gap in excess of 8/1000 of an inch. TR 418. He testified that a gap of 5/1000 of an inch or greater in the breaker enclosure exceeds the requirement for permissibility of the scoop. *Id.* He also found defects in the front light of the scoop which the Secretary contends could have caused sparking and would also render the scoop impermissible. Respondent has not contested these assertions. TR 649. The issue, then, is whether the scoop was being operated in the permissible zone.

Lampley testified that the scoop in question was used at the #3 Headgate, and there were no limits on where the scoop could operate in the mine. TR 424, 426. But as was just pointed out, he has no personal knowledge of where the scoop was operating when he was inspecting the Mine on February 3, 2011. Lampley testified that the #3 headgate has three entries. TR 426-27; *see* RX 1-B. The scoop could not drive into the #1 entry because the stage loader and belt take up too much room. TR 427. But the scoop could operate in the #2 and 3 entries in the permissible zone. *Id.*

Lampley's testimony was contradicted by John Duty, the maintenance supervisor, and Webb, who testified that the scoop could not be used within the permissible zone. Duty assumes he was with Lampley during the inspection at issue but does not specifically remember what transpired (TR 525); Webb was not there when Lampley inspected the scoop. But they both testified that supplemental support, called cans, is installed as the longwall face retreats to prevent the roof from falling. TR 642-43. These cans are kept 150 feet from the longwall face, which is the boundary of the permissible zone. TR 643. The cans are deliberately set that far from the face so the equipment which sets the cans does not have to be permissible. TR 644. The scoop cannot physically move inby the cans. TR 533, 553, 649. Due to Duty and Webb's familiarity with the Mine, I credit their testimony that the scoop could not have been in the permissible zone.

Even without the testimony of Duty and Webb, the Secretary would not have proven that a violation of §75.503 occurred. For there is no competent evidence that the scoop had been operating in the permissible zone. Lampley has no direct knowledge of where the scoop was operating; he did not see the scoop in the permissible area; and the only evidence that it may have

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[10]To avoid unnecessary repetition, please see the discussion of permissible equipment in the section of this decision regarding Citation Nos. 8362917, 8362918 and 8362923 *supra*.

been in the permissible area was the imprecise comment regarding the scoop's location by an unnamed miner who apparently was not even the scoop's operator at the time. In any event, the testimony of Duty and Webb that it would have been physically impossible for the scoop to have been in the permissible zone is persuasive. Therefore, this citation must be dismissed.

Summary

In sum, I have approved the safeguard; dismissed five citations; modified four citations; and reduced the assessed penalties from $12,058.00 to $1,450.00.

ORDER

In accordance with the foregoing discussion, ***IT IS ORDERED*** that:

1. Safeguard No. 8423514 is affirmed.

2. Citation Nos. 8362917, 8362918, 8362923, 8423560 and 8428128 are dismissed.

3. Citation No. 8362941 is modified from moderate negligence to low negligence. The penalty for this violation is reduced from $946.00 to $750.00.

4. Citation No. 8362942 is modified from injury reasonably likely to injury unlikely; from moderate negligence to low negligence; and from significant and substantial to not significant and substantial. The penalty for this violation is reduced from $946.00 to $100.00.

5. Citation No. 8423584 is modified from injury reasonably likely to unlikely; from moderate negligence to no negligence; and from significant and substantial to not significant and substantial. The penalty for this violation is reduced from $946.00 to $100.00.

6. Citation No. 8424580 is modified from moderate negligence to low negligence. The penalty for this violation is reduced from $1,412.00 to $500.00.

IT IS FURTHER ORDERED that Respondent pay to the Secretary the sum of $1,450.00 within 30 days of the date of this Decision.

/s/ Jeffrey Tureck
Jeffrey Tureck
Administrative Law Judge

Distribution:

Christopher D. Pence, Esq., Hardy Pence PLLC, 500 Lee Street East, Suite 701, P.O. Box 2548, Charleston, WV 25329

Sarah Weimer, Esq., U.S. Department of Labor, Office of the Solicitor, 1999 Broadway, Suite 800, Denver, CO 80202