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October 29, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEST 2014-834-M A.C. No. 04-02542-354386 1ZU
v.	Mt. Pass Mine & Mill
CR MEYER & SONS COMPANY, INC., Respondent	

DECISION

Appearances: Abigail Daquiz, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
Eric E. Hobbs, Esq., Michael, Best & Friedrich LLP, Milwaukee, Wisconsin, for Respondent.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against CR Meyer & Sons Company, Inc., ("Meyer") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The parties presented testimony and documentary evidence at a hearing and filed post-hearing briefs. One section 104(d)(1) citation was adjudicated at the hearing. Meyer is an independent contractor that was performing work at the Mountain Pass Mine & Mill operated by Molycorp Minerals ("Molycorp").

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

On September 10, 2013, MSHA Inspector Miles D. Frandsen[1] issued Citation No. 8700228 under section 104(d)(1) of the Mine Act, alleging a violation of section 56.14105 of the Secretary's safety standards. (Ex. G-8). The citation alleges that two miners who were charged with reinstalling an out of place guard, which was designed to protect persons from moving parts on an agitator, failed to lock out and tag out the equipment before reinstalling the guard. The agitator was in operation when they reinstalled the guard. The citation further states that the

[1] Inspector Frandsen has been an inspector with MSHA for about eleven years. (Tr. 14). He is trained as an electrical inspector. Prior to his employment with MSHA he worked as a mechanic at various mines; he acquired electrical papers; and he was a maintenance supervisor and production supervisor. (Tr. 16).

violation was the result of Meyer's aggravated conduct because the foreman was aware that the agitator was not locked out or tagged out in violation of Meyer's written policy.

Inspector Frandsen determined that an injury was reasonably likely to occur, that the violation was of a significant and substantial ("S&S") nature, and that any injury could reasonably be expected to be permanently disabling. He determined that Meyer's negligence was high and that one person would be affected. Section 56.14105 mandates, in part, that "[r]epairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment is blocked against hazardous motion." 30 C.F.R. § 56.14105. The Secretary proposed a penalty of $8,000.00 for this citation under the Secretary's special assessment procedure. 30 C.F.R. § 100.5.

My findings of fact in this decision are based on the record as a whole and my observation of the witnesses. Although I have not included a summary of all the evidence presented at the hearing in this decision, I fully considered all the evidence.

Discussion and Analysis

1. Evidence

On September 10, 2013, Inspector Frandsen traveled to Molycorp's Mountain Pass Mine & Mill to conduct an inspection. Frandsen entered a building, generally known as the separations building, that contained a tank farm. (Tr. 21, 117). The tanks, which were large, vertical, and made of fiberglass, had motors on top that turned a shaft that mixed the contents of the tanks using paddles attached to the shaft. The shaft was about six to eight inches in diameter. (Tr. 52). The top of tank at issue in this case was about eight to ten feet off the floor and was approximately eight feet in diameter.[2] (Tr. 23, 121). Miners accessed the top of the tanks via a stairway onto scaffolding. (Tr. 120-121, 24). The mixing device in the tanks is often called an agitator. The inspector went up on the scaffolding for the first tank and noticed that a guard had been "flipped to the left" at the top of the tank. (Tr. 22). He issued a citation to Molycorp for this condition because the turning shaft was exposed. (Tr. 16). The guard was about 18 inches wide and 3 to 4 inches high. (Tr. 33, 55, 131). The guard was designed to be attached by two bolts to the frame holding the motor. One bolt had been removed and the guard had been flipped up and over to the left with the other bolt still attached. The guard came to rest on top of the tank in a horizontal position to the left of the opening. (Ex. G-4). The spinning shaft was behind the opening. *Id.*; (Tr. 52). The inspector believed that the condition created an obvious entanglement hazard. (Tr. 24-25). He testified that miners go up onto the scaffolding from time to time to take samples from the tank. (Tr. 23).

[2] There is some question as to whether the top of the tank was eight feet in diameter or eight feet in circumference. In response to the question, "How big aground was the agitator or the tank[,]" Berube responded "probably eight feet[.]" (Tr. 121). Given that both parties agree that the cited guard was approximately 18 inches wide, and relying on that measurement for scale when examining Exhibit R-6, I find that the tank was approximately 8 feet in diameter. If the circumference were eight feet, the diameter would be less than three feet. (Diameter = Circumference ÷ π)

Following the inspector's issuance of the citation, Molycorp called Meyer, an independent contractor at the mine, and instructed it to address the problem. Meyer is a large nationwide contractor that performs maintenance and other work for the mining industry, the pulp and paper industry, and other industries. (Tr. 19, 79). Inspector Frandsen testified that he got to know Meyer at the Mountain Pass Mine & Mill and developed respect for its safety department and its employees. (Tr. 19).

Frandsen continued his inspection of the separations building but, before he left the area, he wanted to see if the condition that prompted him to issue the citation to Molycorp had been abated. Inspector Frandsen issued other citations to Molycorp for the same violation on other tanks in the separations building. (Tr. 41-42). When he arrived back at the subject tank, he saw two people standing on top of the scaffolding leaning out over the tank. (Tr. 24-27). He asked the employees if the agitator was locked out and they replied "no." *Id.* The inspector told the two men to come down. The two men, both employees of Meyer, were foreman Robert Berube and miner Robbie Heikinnen. (Tr. 27). Berube told the inspector that he had flipped the guard back into position and that they were now going to ask Molycorp to shut down the agitator and lock it out before they secured the guard with a bolt. (Tr. 28-30; Exs. G-5, 6, 7). Frandsen told the Meyer employees that the agitator should have been shut down and locked out before the guard was flipped back into position. (Tr. 31-32). He said that the Meyer employees should not have reached out over the tank without first shutting down the equipment. (Tr. 32).

Inspector Frandsen considered this violation to be obvious. The "first step of any mechanic" is to recognize what you need to do and then "get [the] machine off" so you "can go out there safely and put the guard back in place." *Id.* According to Frandsen, Meyer should have contacted Molycorp personnel for instructions as to the proper procedure for shutting down the tank. (Tr. 34-35). By reaching over to flip the guard back into place, an employee created a risk of becoming entangled in the rotating shaft. (Tr. 32). One of the men could have slipped and accidently pushed his arm through the opening. There was spilled liquid on top of the tank, which increased the hazard. The inspector believed that the rotating shaft was very close to the mouth of the opening so that a person's arm would not have to go very far beyond the opening to come into contact with the shaft. (Tr. 32-33). Inspector Frandsen testified that someone would "probably get [his] fingers cut off if they get down in there[.]" (Tr. 41).

The inspector determined that the violation was a result of Meyer's high negligence and unwarrantable failure to comply with the safety standard. He reached this conclusion because Berube, a foreman for Meyer, was present and directing the work. (Tr. 43). According to Frandsen, a foreman is an agent of the operator and his failure to ensure that the job was completed in a safe manner demonstrates high negligence. (Tr. 43-44)

Robert Berube was a journeyman pipefitter and a foreman with Meyer on September 10, 2013. (Tr. 110). He testified that he was in Meyer's office at the mine when he was told to go look at guards in the separations building. (Tr. 118). He immediately proceeded to the separations building along with Robbie Heikinnen, another Meyer employee. *Id.* When Berube entered the building, he met a "plant guy" who took them up on the scaffolding to show Berube the subject guard. (Tr. 120). Berube testified that he "looked it over" and "flipped the guard." (Tr. 120, 125). He could not see into the opening, but estimated that the shaft for the agitator was

about four feet in front of him. (Tr. 122-23). Heikinnen was not involved and was simply standing on the scaffolding. Once the guard was in place, Heikinnen put the bolt through the hole on the right side but did not attach the nut. (Tr. 128).

Berube did not consider his act of flipping the guard back in place to be hazardous. (Tr. 129). He was not near the unguarded opening when he flipped the guard. He just put a finger under the far left side of the guard, flipped his finger up, and let gravity pull the guard down into place. (Tr. 127). He estimated that he was about two feet to the left of the opening when he flipped the guard back, and an additional 14 inches existed between the mouth of the opening and the shaft. (Tr. 129-31). Berube testified that, even if he slipped, he would not have come into contact with the shaft because he was standing on the scaffolding about two feet to the left of the unguarded opening. (Tr. 131-32).

Berube also did not consider his act of flipping the guard back in place to be "repairs or maintenance of machinery or equipment[.]" (Tr. 129). Brian Bork, Meyer's safety manager, testified that Berube's actions were more akin to housekeeping than repair or maintenance. (Tr. 98-99, 106).

2. <u>Violation</u>

I find that a violation of the cited safety standard occurred as alleged. The pertinent requirements under the cited standard are threefold. First, the standard applies only when repairs or maintenance of machinery or equipment are being conducted. Second, the operator must ensure that the machinery or equipment is powered off. Third, the operator must ensure that the machinery or equipment is blocked against hazardous motion. 30 C.F.R. § 56.14105.

I find that the act of flipping the subject guard back into place amounted to "repairs or maintenance." In *Walker Stone Co.*, 19 FMSHRC 48, 51-52 (Jan.1997) the Commission, relying upon the dictionary definitions of the terms "repair" and "maintenance," found that the operator's act of breaking up and removing rocks from a clogged crusher amounted to "repairs or maintenance." Repair was defined as "'to restore by replacing a part or putting together what is torn or broken: fix, mend . . . to restore to a sound or healthy state: renew, revivify . . . .'" *Id.* (quoting *Webster's Third New International Dictionary, Unabridged* 1923 (1986)). "Maintenance" was defined as "'the labor of keeping something (as buildings or equipment) in a state of repair or efficiency: care, upkeep . . .' and '[p]roper care, repair, and keeping in good order." *Id.* (quoting *Webster's Third New International Dictionary, Unabridged* 1362 (1986), and *A Dictionary of Mining, Mineral, and Related Terms* 675 (1968)).

Respondent argues that the work done by Meyer did not amount to either repairs or maintenance but that it was housekeeping. (Meyer Br. 9-10). I disagree. When Molycorp was cited for the lack of a guard to protect miners from the hazard of the exposed moving machine parts of the agitator, it contacted Meyer to remedy the unsafe condition. Meyer, in an effort to carry out its assigned duty, charged Berube with the task. When Berube traveled to the separations building, climbed the stairs, stood on the scaffolding, and reached over the top of the tank to flip the guard back into place, he was exposed to the same hazard that caused the inspector to cite Molycorp. Berube's actions were meant to bring the agitator back into a safe

state of repair by replacing the guard, an essential part to the safe operation of the agitator. *See Hibbing Taconite Co.*, 35 FMSHRC 3531, 3534 (Dec. 2013) (ALJ). Accordingly, I find that Berube's act of flipping the guard back into place amounted to "repairs or maintenance."

The machinery or equipment was not powered off. The inspector credibly testified that the agitator motor and shaft were "in operation." (Tr. 52). Respondent did not offer testimony disputing the Secretary's assertion. Accordingly, the work was conducted while the power was on the machinery or equipment.

The machinery or equipment was not blocked against hazardous motion. Respondent argues that, contrary to the inspector's assertion, the standard does not require the locking and tagging out of machinery or equipment. (Meyer Br. 7). I agree with Respondent that the standard does not require locking and tagging out. However, I credit the inspector's testimony that, in this instance, the most effective way to block against hazardous motion, which is required by the standard, is to lock and tag out the motor. (Tr. 31, 34, 58-59). As Frandsen explained, "there is really no other way to block the motor against motion other than [to] de-energize" and "the safest way is to lock and tag out." (Tr. 31). The evidence demonstrates that the agitator was powered on and the shaft was not blocked against motion. Accordingly, I find that the Secretary has proven a violation of the cited standard.

Respondent, relying on the inspector's testimony, argues that the cited standard applies only if miners are exposed to a hazard and that, because no hazard was present, there was no violation of the standard. (Meyer Br. 10-12). I disagree. The Mine Act imposes no general requirement that a violation of one of the Secretary's standards be found to create a hazard in order for a citation to be validly issued. *Allied Products, Inc.*, 666 F.2d 890, 892-93 (5th Cir. 1982). The Secretary need only establish that a hazard exists when the cited standard explicitly requires such a showing. Here, the pertinent language of the cited standard makes no reference to any requirement that a hazard exist. Rather, it only requires that operators, when conducting repairs or maintenance to machinery or equipment, power off the equipment *and* block it against hazardous motion. At the very least, the standard requires that the equipment or machinery be powered off. Accordingly, I reject Meyer's argument. As discussed below, I also find that miners were exposed to a hazard in this instance.

3. Significant & Substantial

I find that the violation was S&S.[3] I have already found that there was a violation of the cited safety standard. I find that a discrete safety hazard existed. I credit the inspector's

[3] An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). In order to establish the S&S nature of a violation, the Secretary 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 will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103

testimony that the failure to de-energize the agitator motor and block it against motion before replacing the guard exposed miners to the hazard of entanglement or the severing of fingers. Moreover, I note that the machinery itself was equipped with stickers in the area of the opening which warned of "Danger" and the need to "Keep Hands Clear," with an illustration showing severed fingers. (Exs. G-5 and G-6; Sec'y Br. 11-12).

Meyer, relying Berube's testimony, argues that the closest Berube got to the shaft was three to four feet. (Meyer Br. 11). I do not credit Berube's testimony regarding estimated distances. Berube, when asked on direct examination how far the "agitator machine" was from where he was standing, initially testified that it was a distance of two feet. (Tr. 122). When asked to confirm the distance of two feet, he responded "roughly," and then proceeded to ask his own counsel to clarify the question before changing his estimate of the distance to four feet. *Id.* Further, while Berube testified that the distance from the unguarded opening to the shaft was 14 inches, I find that the inspector's estimation of the distance as being only a few inches and very close to the edge of the opening to be far more accurate when examined in conjunction with Exhibit G-5. (Tr. 32-33, 129-130). Finally, Meyer argues that the inspector's failure to take measurements, or even get onto the scaffolding to examine the opening, discredits his testimony that the miners were "very close" to the hazard. (Meyer Br. 3). While Inspector Frandsen did not take actual measurements, he did ascend the scaffold and observe the missing guard prior to issuing the guarding violation to Molycorp. (Tr. 21). As a result, he was familiar with the space and I credit his distance estimates as well as his determination that Meyer's employees were in close proximity to the hazard when they were on the scaffolding.

Whether it was reasonably likely that the hazard contributed to by this violation will result in an injury is a close issue. The Commission has explained that the "reasonably likely" requirement does not require the Secretary to prove that an injury was "more probable than not." *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). In addition, the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury" but, rather, that the hazard *contributed to* by the violation will cause an injury. *Musser Engineering, Inc.* and *PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (emphasis added). As discussed above, I find that Berube was in close proximity to the unguarded opening which created the entanglement and severing hazards discussed above. I find that the Secretary established that the hazards contributed to by the violation were reasonably likely to cause an injury.

I also credit the inspector's testimony that there was a reasonable likelihood that any injury will be of a reasonably serious nature up to and including severed fingers. For these reasons, I find that the violation was S&S.

(5th Cir. 1988) (approving *Mathies* criteria). An experienced MSHA inspector's opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

4. Negligence and Unwarrantable Failure

I find that Meyer was moderately negligent and that the violation was not a result of the Meyer's unwarrantable failure to comply with the mandatory standard. Much of the Secretary's argument in support of his high negligence and unwarrantable failure designations is premised on his fact that Berube was an agent of the mine and was directly responsible for the violation. While I agree that Berube was agent of Meyer, I find that the actions of Berube and Heikinnen, were idiosyncratic and based upon a belief that they were not exposed to a hazard.

The Commission has held that "the negligence of an operator's 'agent' is imputable to the operator for penalty assessment and unwarrantable failure purposes." *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328 (Mar. 2009). The Mine Act defines an "agent" as "any person charged with responsibility for the operation of all or part of a coal or other mine or the supervision of miners in a coal or other mine[.]" 30 U.S.C. § 802(e). In determining whether an employee is an agent of the operator, the Commission has "'relied, not upon the job title or the qualifications of the miner, but upon his function, [and whether it] was crucial to the mine's operation and involved a level of responsibility normally delegated to management personnel.'" *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1560 (Sept. 1996) (*quoting U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (Oct. 1995)) (brackets in original); *See also Martin Marietta Aggregates*, 22 FMSHRC 633 (May 2000).

I find that Berube was an agent of Meyer and that his negligence may be properly imputed to Meyer. Berube testified that he was a foreman for Meyer and was responsible for ensuring that jobs were completed properly and on time. (Tr. 112). As a foreman he dealt with scheduling and worked with both Meyer's safety department, as well as the safety department of Molycorp. (Tr. 112-113). Further, Berube agreed that he was responsible in part for safety on the job. (Tr. 113, 133). I find that Berube's function was crucial to Meyer's operation at Molycorp's Mountain Pass Mine & Mill, involved a level of responsibility consistent with that of a person of management, and that he was an agent of Meyer.

The Commission has recognized that "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of that standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator has met its duty of care, the Commission considers "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Jim Walter Res. Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014) (footnote omitted).

I find that Meyer was moderately negligent. I find that, while Berube's act of flipping the guard back in place was a violation, it was idiosyncratic in nature. Neither Berube nor Bork viewed the work being done as a hazard. While I decline to credit Berube's testimony that the shaft was 14 inches away from the unguarded opening, I do credit his honest belief that he did not expose himself to a hazard when he flipped the guard back into position from where he was standing. Meyer's training materials, specifically its Employee Construction Risk Management Booklet, addresses similar situations and dictates that Meyer employees should lock and tag out

the machinery or equipment before beginning work. (Ex. R-1 p. 23). I note that Inspector Frandsen testified that, during his time at the mine site, he developed a good respect for Meyer, and felt that Meyer was a very good contractor with a good safety department. (Tr. 19). Further, Berube testified that Meyer's safety training was superb compared to training he had received at other companies and that Meyer's safety culture across its operations nationwide was good and involved a commitment to safety on behalf of senior management. (Tr. 115). Because Berube's actions were based upon the mistaken belief that a violation did not exist and given Meyer's training materials and its safety culture, I find that moderate negligence is appropriate. Accordingly, I **MODIFY** the citation to moderate negligence.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by conduct described as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2002-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has explained that whether a citation is an "unwarrantable failure" is a question that should be evaluated based on the facts and circumstances in each case, and in light of each of the following factors: (1) the length of time that the violation has existed; (2) the extent of the violative condition; (3) whether the operator has been placed on notice that greater efforts were necessary for compliance; (4) the operator's efforts in abating the violative condition; (5) whether the violation was obvious; (6) whether the condition posed a high degree of danger; and (7) the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340 (Mar. 2000); *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

It is important to put this violation into context. The guards on about 93 of the tanks in the separations building had been left in an open position like the guard on the subject tank. (Tr. 42). Berube was sent to the building to investigate the situation and to come up with a solution. After investigating the situation at the tank closest to the door, Berube determined that the guards on the tanks needed to be put back into place and secured. Inspector Frandsen testified that Berube told him that he was going to get Molycorp to shut down the agitators as his next step in the process. (Tr. 31, 64-65). Berube's mistake was that he flipped the guard back into position on the first tank before he asked that the tanks be shut down. There was no reason for him to take this action. I find that this action did not rise to the level of aggravated conduct.

In *IO Coal Co.*, 31 FMSHRC at 1352, the Commission emphasized that the length of time that the violative condition existed is a "necessary element" of the unwarrantable failure analysis. The Commission has found that a duration of a "matter of seconds" may weigh against an unwarrantable failure finding. *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3080 (Dec. 2014). Here, the violative condition existed for at most a matter of seconds between the time when Berube first touched the guard and when the guard fell into position after he flipped it up and over.

In *IO Coal Co.*, the Commission explained that the "extent of the violative condition is an important element in the unwarrantable failure analysis." 31 FMSHRC at 1351. The Commission has explained that the purpose of this element is to "account for the magnitude or scope of the violation[,]" and the judge may analyze it by looking at, among other things, the "extent of the affected area as it existed at the time the citation was issued[,]" the number of persons affected, and the time and resources required to correct the condition. *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079-3080 (Dec. 2014) (citing *E. Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010) and *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 681 (July 2002)0; *Consolidation Coal Co.*, 35 FMSHRC 2326, 2331 (Aug. 2013). In *Dawes Rigging* the Commission found that, because only one miner endangered himself by walking under a suspended boom, the violation was not extensive. *Id.* Here, only Berube was exposed to the hazard when he flipped the guard into position. While Heikinnen engaged in repairs or maintenance when he placed the bolt through the hole on the right hand side of the guard after it was flipped into place, the inspector agreed that he was not exposed to a hazard because the guard was in place. (Tr. 61-62). The violative condition was limited to conduct at this particular tank and guard. I find that the violation was not extensive.

The Commission has explained that repeated similar violations, even if those prior violations were not a result of an unwarrantable failure, and past discussions with MSHA about a problem at the mine, may serve to put an operator on notice that increased efforts to comply are necessary. *IO Coal Co.*, 31 FMSHRC at 1353-1354. Here, the Secretary presented no evidence regarding past discussions with MSHA. The body of the citation states that Meyer was not cited for a violation of this standard in the two years prior to the issuance of this citation. (Ex. G-1).

In evaluating the operator's efforts in abating the violative condition the judge should examine those abatement efforts made prior to the issuance of the citation or order. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2342 (Aug. 2013) (citing *IO Coal Co.*, 31 FMSHRC at 1356 and *Warwick Mining Co.* 18 FMSHRC 1568, 1574 (Sept. 1996)). Here, there was only a matter of seconds between when the violative condition arose and when it ended. As a result, there was no time to abate this condition. I note that Meyer had taken steps to prevent such conduct from occurring through the implementation of its Employee Construction Risk Management Booklet, which specifically required Meyer employees to lock and tag out machinery or equipment before beginning maintenance work.[4] (Ex. R-1 p. 23).

The obviousness of the violative condition is an important factor in the unwarrantable failure analysis. *IO Coal Co.*, 31 FMSHRC at 1356. In *Eastern Associated Coal Corp.*, 32 FMSHRC 1189, 1200-1201 (Oct. 2010), the Commission cited evidence that the violative conditions were not obscured from view in upholding a judge's finding that a roof control violation was obvious. Meyer argues that, because Berube credibly testified that he did not believe that he was exposed to a hazard or that a violation existed, the violation was not obvious. (Meyer Br. 15-17). I disagree. I have already determined that a hazard existed and that the

[4] Meyer's Employee Construction Risk Management Booklet states that "[e]mployees shall place a lock and tag at the point of energy isolation on any equipment or machine before performing any maintenance, adjustment, or construction to indicate that there shall not be any operation until the individual has removed the lock and tag." (Ex. R-1 p. 23).

presence of a hazard was not required for the finding of a violation. I find that the condition cited by the inspector was obvious. The agitator was in operation and Respondent's employee began repairs or maintenance without powering off the equipment and blocking it against hazardous motion.

The Commission has determined that a high degree of danger posed by a violation is an aggravating factor that supports an unwarrantable failure finding. *IO Coal Co.*, 31 FMSHRC at 1355-1356. As stated above, I find that this violation was S&S. Berube's proximity to the unguarded opening of the rotating shaft exposed him to a hazard which could have reasonably been expected to result in an entanglement type injury or severed fingers. The degree of the danger was only moderately high as opposed to extremely high.

In *IO Coal*, the Commission reiterated the well settled law that, in addition to actual knowledge, an operator's knowledge of the existence of a violation may be established where the operator "reasonably should have known of the violative condition." 31 FMSHRC at 1356-1357. Meyer should have known of the violation. Although Berube did not believe that a violation existed, Meyer's own safety material suggests that Berube and Heikinnen should have locked and tagged out the machinery or equipment before beginning work on the guard. (Ex. R-1 p. 23). Moreover, just as the cited standard did not require the presence of a hazard before powering off the agitator and blocking it against hazardous motion, the Meyer's safety policy also does not explicitly require the presence of a hazard before locking and tagging out any equipment or machinery before conducting maintenance. *Id.*

After careful consideration of each of the above factors, I find that Meyer did not unwarrantably fail to comply with the mandatory standard. While the violative condition was obvious, potentially involved a high degree of danger, and was known to the operator through its agent, it was not extensive, did not exist for significant period of time, the operator did not have notice that greater efforts were necessary for compliance, and it had taken steps towards preventing the cited conduct. In reaching this conclusion I have taken into account the Secretary's argument that "the important factor is the role that CR Meyer's foreman played in this blatant disregard for a basic safety measure." (Sec'y Br. 14). However, given the above analysis and my finding that Berube's action was idiosyncratic and without any real purpose, I find that Meyer's conduct was not aggravated or a result of its unwarrantable failure to comply with the mandatory standard. Accordingly, I **VACATE** the unwarrantable failure finding and modify the citation to a 104(a) citation.

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Meyer had a history of eight violations during the 15 months preceding the issuance of the subject citation, including one imminent danger order.[5] None of these enforcement actions were taken at the Mountain Pass Mine & Mill. Respondent is a large nationwide contractor that worked over 200,000 hours. (Exhibit A to Petition for Assessment of

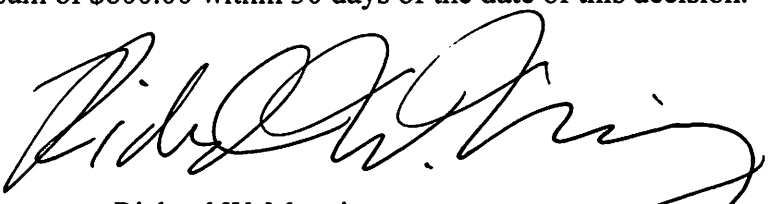
[5] The parties did not submit a history of violations. The court obtained the history data from MSHA's Mine Data Retrieval System, available at http://www.msha.gov/drs/drshome.htm.

Civil Penalty). The violation was abated in good faith. The penalty assessed in this decision will not have an adverse effect upon its ability to continue in business. (Jt. Stip. ¶ 9). The violation was serious and Meyer's negligence was moderate.

The Secretary proposed the penalty under his special assessment regulation. I have modified the citation to a 104(a) citation with moderate negligence. I find that the Secretary did not establish that this violation was "particularly serious or egregious" so as to justify the proposed special assessment of $8,000.00. *Coal Employment Project v. Dole*, 889 F2d. 1127, 1129-30 (D.C. Cir. 1989). More importantly, I am not bound by the Secretary's penalty proposal. The Special Assessment Narrative Form attached to the Petition for Assessment of Civil Penalty shows that, had this citation been regularly assessed, the penalty would have been $2,000.00. (Special Assessment Narrative Form attached to Petition for Assessment of Civil Penalty). Moreover, if Inspector Frandsen had determined that the violation was the result of Meyer's moderate negligence, the Secretary's proposed penalty would have been about $555.00, before any reduction for good faith abatement. 30 C.F.R. § 100.3. In light of my findings set forth above, I find that a penalty of $800.00 is appropriate for this violation.

III. ORDER

For the reasons set forth above, Citation No. 8700228 is **MODIFIED** to a citation issued under section 104(a) of the Mine Act and the degree of negligence is reduced to moderate. In all other respects the citation is **AFFIRMED**. CR Meyer & Sons Company, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $800.00 within 30 days of the date of this decision.[6]



Richard W. Manning
Administrative Law Judge

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