FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. GABEL STONE COMPANY, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2015-0621 A.C. No. 23-02064-387725 Docket No. CENT 2015-0630 A.C. No. 23-02064-390172 Mine: Willow Springs Quarry

DECISION

Appearances: Ms. Susan Willer, Esq., Office of the Solicitor, and Ms. Maria Rich, Mine Safety and Health Administration, for the United States Department of Labor

Mr. Justin Gabel, pro se, for the Respondent

Before: Judge Moran

Introduction

These consolidated dockets involve two notices of alleged violations, issued by MSHA Inspector Keith Markeson at Gabel Stone's Willow Springs Quarry in May and June 2015.[1] Involved in CENT 2015-0630 is Order No. 8778893, issued May 13, 2015, alleging a 30 C.F.R. § 46.8(a)(2) annual refresher training violation. The proposed assessment of civil penalty was $112.00. The other docket, CENT 2015-0621, involves Citation No. 8865801, issued June 16, 2015, alleging a 30 C.F.R. § 56.14107(a) guarding violation. The proposed assessment of civil penalty was $100.00. In sum, MSHA's proposed penalties for the two alleged violations totaled $212.00.

[1] It is determined, per 29 C.F.R. § 2700.2(b)(4), that the Conference and Litigation Representative (CLR) be accepted to represent the Secretary in accordance with the notice of limited appearance she has filed with the penalty petition. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

A hearing was held on November 1, 2016 in West Plains, Missouri, at which MSHA Inspector Keith Markeson testified on behalf of the Secretary and Mr. Gary Gabel, owner of the Willow Springs Quarry, testified on behalf of the Respondent.[2]

For the reasons which follow, the Court finds that both violations were established and, following the Commission's recent decision in *American Coal*, imposes a civil penalty in the amount of $20.00 for the violation set forth in Order No. 8778893. *Am. Coal Co.*, 38 FMSHRC 1987 (Aug. 2016). For the violation set forth in Citation No. 8865801, the Court imposes a civil penalty in the amount of $25.00.

Factual Background

Inspector Markeson has been an MSHA inspector for nine years, and has specialized training in accident investigation and mine emergencies. Tr. 25-26. He has a degree in geology, and worked as a geologist for several years before beginning his training with MSHA. Tr. 26-27. The mine at issue, Willow Springs Quarry is a small, family-owned limestone quarry in Howell County, Missouri that typically employs between five and eight people. Tr. 30; 78.[3] Gary Gabel is the owner of the mine, and also does some work there. Gabel has been a miner since 1977.[4] Tr. 94.

Markeson began conducting a routine 103(e)(1) inspection on May 13, 2015. Tr. 29. He stopped his inspection after issuing Order No. 8778893, alleging a violation of 30 C.F.R. Part 46, which pertains to training and education for miners and other persons.[5] He returned to complete the inspection on June 16, 2015. Tr. 33; 95. As noted above, Order No. 8778893 was issued on May 13, 2015 for an alleged violation of Section 46.8(a)(2), which states, "You must provide each miner with no less than 8 hours of annual refresher training… no later than 12 months after the previous annual refresher training was completed." 30 C.F.R. § 46.8.[6]

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[2] As a preliminary matter, the Court notes that the parties chose not to submit post-hearing briefs in this matter.

[3] Markeson testified regarding the plant's usual operation, and the Respondent did not dispute his account or offer any contradictory evidence. The mine is an open pit, multi-level quarry with portable equipment set up as an on-site crushing plant. Once rock has been drilled, it is transferred to the plant, where it goes through several stages of crushing and screening and it is then stocked for purchase. Tr. 30-31.

[4] Hereinafter, "Gabel" refers to the Gary Gabel and not to Gabel Stone Co., the Respondent.

[5] The education and training standards in Subchapter H are a curiosity in their wording, because the various standards found therein routinely begin with the command "You must." In fact "You" is defined within the subchapter: "*You* means production-operators and independent contractors." 30 C.F.R §46.2(p).

[6] The parties stipulated that the Respondent has never been cited for a violation of this standard before. Tr. 92-93.

Citation No. 8865801, the sole subject of Docket CENT 2015-0621,was issued during the resumption of Markeson's inspection, on June 16, 2015. It alleges a violation of Section 56.14107(a), a guarding standard. The discussion of Citation No. 8865801 follows the discussion of Order No. 8778893.

Docket No. CENT 2015-0630; Order No. 8778893: Findings of Fact and Discussion

The Secretary's Evidence

When Markeson arrived at the mine on May 13, he met with Gary Gabel and his wife Joyce Gabel. Tr. 32. The three of them talked briefly about the purpose for Markeson's presence that day. *Id.* Markeson testified that Gabel is more than an executive — he works as a foreman at the mine, and occasionally operates a front end loader or loads trucks for customers. Tr. 40.

Markeson decided to begin his inspection with the mine's paperwork, which is stored in an administrative office located about two and a half miles from the quarry itself. Tr. 34. Training records are stored there as well. When Markeson reviewed the Respondent's records, he found there was no record of annual training for Gabel himself. Tr. 32. Markeson inquired further and Gabel reputedly "mentioned to [Markeson] that he hadn't been to any refresher in probably eight or nine years, because while his crew does their annual refresher training, he goes to the quarry and loads customer trucks, so that he can keep his customers moving through the quarry." Tr. 32-33.

Markeson testified that he spoke further with Gabel to determine if he had received the annual refresher training and simply failed to document it. Tr. 33. Upon determining that it was not a recordkeeping omission and that there was an apparent violation of the training requirement, Markeson "went with Mr. Gabel over to the quarry site, so that he could get his crew lined out and assign a lead man so that his crew could keep working. We then went back to his office where [Markeson] typed up the withdrawal order." Tr. 33. Markeson then delivered the order to Mr. and Mrs. Gabel, along with a brief explanation of its effect. *Id.*

Markeson testified that he found that Gabel "had not received the MSHA required eight-hour annual refresher training within 12 months" of the previous training. Tr. 38. Markeson believed that Gabel should have been aware of the requirement because he had many decades of mining experience. Tr. 39. Because Markeson had learned that Gabel "wasn't present during annual refresher training and he didn't teach the annual refresher training," he "determined that [Gabel] hadn't had it [i.e. the required training]; and therefore, the withdrawal order was warranted." Tr. 39-40.

Markeson then testified as to the reasoning behind the gravity and injury designations in the citation. Tr. 41. He selected "fatal" because annual training is required in order "to prevent serious life threatening type injuries at a mine. The other reason is the most — the most injured groups of people at mines are brand new miners and miners with many years of experience, 20, 25 plus years, in which category Mr. Gabel falls."[7] Tr. 41-42. The Court asked Markeson why

[7] When the Court inquired if Markeson always marks violations of this sort as "fatal," Markeson replied, "if I was writing a training withdrawal order because a miner had missed *the last hour* of annual refresher [training,] I don't know that I would mark fatal." Tr. 42 (emphasis added).

Gabel's many decades of experience in mining would not undercut the "fatal" designation. Tr. 43. Markeson responded, "Well, 47 years of experience, that's a group that gets hurt a lot at mines; and being that Mr. Gabel hadn't had annual training in many years, I think if I looked at it again now, I would still mark it as fatal." *Id*.

However, inconsistently in the Court's view, Markeson designated the gravity of the alleged violation as "unlikely" to result in injury, because Gabel "has been running the quarry for many years" and he does some new miner training for his crew. Tr. 41. Markeson then testified that he designated the alleged violation as moderately negligent because,

> [Gabel] was aware that annual refresher training had to be done. He was providing it for all of his hourly miners. He just didn't believe that that training [requirement] applied to him. So while he knew that the training was required he didn't realize, I guess, that it was — that he was included in that.

Tr. 45.

As noted, Markeson then left the mine site after issuing the withdrawal order, without completing his inspection. Tr. 47. He terminated the violation the following day, after receiving records indicating that Gabel had completed eight hours of annual refresher training. *Id*. In order to remedy the alleged violation, Markeson testified, Gabel "trained himself and his wife assisted in the training." Tr. 44.

On cross-examination, Markeson agreed that the Respondent's records reflect Gabel having administered new miner training in the past. Tr. 51-52. Markeson noted, though, that the content of the new and annual trainings is different: for example, annual refresher training covers topics including training on ground conditions and control, high walls, explosives, and mobile equipment. Tr. 52-54.[8] The Court asked whether this difference doesn't make the term "annual refresher" slightly misleading, given that new miners are not trained on all of the subjects covered in the annual training. Tr. 59. Markeson answered that while Gabel Stone's new miner training plan meets the minimum requirements in federal regulations, the annual training includes *elective topics* that are chosen by the operator. Tr. 60. In theory, identical new and annual training materials could meet the regulatory standard if there were no changes in the mining environment. Tr. 60-61.

<u>The Respondent's Evidence</u>

Gabel testified that he did not feel he had violated the annual training standard. Tr. 77. Gabel gave several examples of how he has prioritized safety by being involved in a number of safety trainings from the 1970s to the present and by encouraging his employees to speak up about potential safety issues at the mine. Tr. 73-76. When the Court asked Gabel to clarify

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Therefore, practically speaking, Markeson's answer to the question was "yes," as he would only consider a designation other than fatal in extremely rare circumstances. As discussed *infra*, the Court finds the "fatal" designation to be overblown.

[8] Markeson listed a number of other topics which are included in annual refresher training, but not in new miner training, including fall prevention, working around moving objects, site-specific health and safety risks, and power haulage hazards. Tr. 58.

whether he was discussing these topics in order to demonstrate that he is a very safety conscious person, Gabel replied "yes." Tr. 76-77.

Gabel also stated that he receives his annual refresher training piecemeal, by learning about safety standards through independent reading and taking notes on safety requirements. Tr. 79-80. He described it as "a year-long process." Tr. 80. Although Gabel has some involvement in preparing the annual refresher training materials, along with his wife, he stated he doesn't know if he reviews the content of the training materials before they are approved. Tr. 86. The Secretary confirmed, upon the Court's inquiring, that there is no statutory requirement that the eight hours of annual refresher training be completed in one session. Tr. 88.

Gabel Stone employees sometimes receive annual refresher training at the mine site through a state agency, and sometimes they go to another site for the training. Tr. 84-85. When miners at the quarry attend annual refresher training on-site, Gabel informed that he "never never went through a safety training as far as going in these classes... I've sat through some of them at my own quarry, just as a witness. I did not know that I was supposed to keep records on my hours of training." Tr. 82-83. Gabel then testified that in approximately 48 years of mining experience, he has never been asked to show anyone a training certificate for his own training. Tr. 83.

Finally, Gabel confirmed that on May 14, the day after Markeson issued the withdrawal order, he completed eight hours of annual refresher training independently, by watching eight hours of safety-related film. Tr. 84. Gabel said that his wife was present for this self-training.[9] *Id*. Gabel then sent the record of this training to Markeson so he could resume working at the mine. Tr. 83.

On cross-examination, Gabel admitted that he knows that his business must keep records of annual training for all miners. Tr. 90. He also admitted that he considers himself a miner. *Id.* When asked why he did not feel it was important to have a training record for himself, Gabel responded, "I've never been asked, didn't know I was supposed to. I am very active in the safety part of it. Never crossed my mind and never [been] asked for it until [Markeson] came." Tr. 91. Gabel also agreed that, while he occasionally looks in on annual refresher training when it takes place at the mine, he generally keeps working while the annual training is taking place: "If a truck comes in, I'll run down and load the truck and come back up [to the training.] I have sat partially in these. I'm not telling you that I've been through these, but I will go in. I've done this a long time." Tr. 89

<u>Discussion</u>

In the Court's estimation, the section 104(g)(1) order, alleging a violation of 30 C.F.R. §46.8(a)(2), was established but, under all the circumstances, the violation in this instance was de minimis in nature. The reasons for this conclusion are twofold.

First, as mentioned above, the education and training standards in Subchapter H are a curiosity in their wording, because the various standards found therein routinely begin with the command "You must." In fact, "You" is defined at 30 C.F.R §46.2(p) to mean "production operators and independent contractors." Accordingly, the thrust of the Part 46 standards is

[9] Joyce Gabel did not testify.

clearly directed at ensuring that such *operators and contractors* comply with its various provisions including the training plans and their implementation, new miner training and annual refresher training, among other requirements. Each of these standards is focused on providing the various types of training for *miners* with the responsibility resting upon the operator to make sure that its miners are so trained. Accordingly the "You" in the cited standard, applies in this instance to Mr. Gabel. It is therefore understandable that Mr. Gabel thought of himself in his primary role as the mine operator, a view that no one in MSHA had disabused him of in years of previous inspections.

It is true that the term "Miner" is also a defined term within Part 46, where it is there expressed as "[a]ny person, including any operator or supervisor, who works at a mine and who is engaged in mining operations [and that] [t]his definition includes independent contractors and employees of independent contractors who are engaged in mining operations," and therefore Mr. Gabel fits the broad definition. 30 C.F.R. § 46.2(g)(1)(i). However, at age 71, Gabel's primary role at Gabel Stone is that of the production operator, that is to say, the "You," referred to in the training and retraining requirements.

The second, and independent, basis for concluding that the violation was more of a technical transgression is evidenced by the testimony of Markeson and by Gabel himself. Collectively, their testimony was largely consistent in that both witnesses agreed that Gabel has long been involved in providing training to his employees.

Bordering on a perversity, Gabel complied with his training deficiency by *training himself*. One does not usually think of self-training as the customary or typical method for overcoming a training deficiency.

That said, the Court does not adopt Gabel's contention that he fulfilled the annual refresher training requirement through periodic reading and discussion on safety matters. Accordingly, the Court was not persuaded by Gabel's assertion that he covered the required annual training materials piecemeal, through reading, taking notes, and having discussions about workplace safety throughout the year. Nor is the Court persuaded by the Respondent's suggestion, while cross-examining Markeson, that Gabel satisfied the annual training requirement by administering initial training to new miners. Although there was some mention of Gabel's role in approving the annual training materials, the Court did not have enough evidence to conclude that Gabel re-trained himself at some point in the 12 months preceding the inspection while reviewing these materials.[10]

In this instance, Gabel admitted that he mistakenly believed himself exempt from this requirement. The Court inferred from the testimony that, although Gabel is a miner, it never occurred to him, or to MSHA for that matter, that the annual refresher training standard applies to him, even though he is also the owner of the mine. As noted at hearing, the Court found Gabel's account of how he has prioritized worker safety at his mine to be credible, and it also found that he was truthful in asserting that he is a safety-conscious person. These considerations have relevance in evaluating negligence.

[10] As mentioned previously, Gabel was somewhat unclear on the extent of his involvement in this process. *Supra* at 5; *see also* Tr. 86.

Docket No. CENT 2015-0621; Order No. 8865801: Findings of Fact and Discussion

The Secretary's Evidence

When Inspector Markeson returned to Willow Springs Quarry on June 16, 2015 to continue his inspection, he issued a section 104(a) citation, Citation No. 8865801, for a guarding violation, citing 30 C.F.R. § 56.14107(a). Tr. 95-96, referencing P-2. As pertinent here, the standard cited first provides that: "Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains… flywheels… and similar moving parts that can cause injury." 30 C.F.R. § 56.14107(a). However the standard also sets forth an exception to the general guarding requirement, stating that "Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces. 30 C.F.R. § 56.14107(b).

In this instance a guard was present in front of a portable flywheel, but the inspector measured it as reaching 6 feet and 4 inches above ground level. Therefore, the flywheel was 8 inches short of meeting the "at least 7 feet away walking and working surfaces" requirement. Tr. 102. Additionally the citation stated that "a grease block was 6 ½ inches from the unguarded portion of the flywheel." Ex. P-2.

The Court then inquired about the direction the flywheel would turn when activated, with the inspector advising that it moved counter-clockwise. Tr. 104-05. The importance of this is that there was *no risk* of one's hand getting caught in the flywheel. Markeson acknowledged that was true, but added that applied only to the side of the flywheel that was cited by him. The *other side* of the flywheel would present an entanglement or a pinch point risk, but the inspector admitted that side *was fully guarded*.

In the Court's view, the inspector stretched the rationale he offered about the hazard presented by the insufficient guard. The Court pointed out to the inspector that he used the word "entanglement" in his citation, but he admitted there was no entanglement risk at least in terms of a pinch point being created. Tr. 111. To justify that claim, Markeson asserted that what he "was talking about was if one of those burrs caught your sleeve or caught your arm." *Id*. The Court continued, "[y]ou call that entanglement?" *Id*. Markeson still attempted to support his use of that word, saying,

> [w]ell, if it grabs your clothes and pulls, that's -- I mean it's not like getting pulled into a turn roller, but it is still entanglement. It's much more minor while the flywheel isn't perfectly smooth, it does have points that could cut you or catch you. It's unlikely that it's going to cause an injury, because it's turning away from you and not toward you. . . the injuries would be minor, possibly broken bones, most likely lacerations, bruising, that type of injury would be if you contacted the flywheel while it was turning.

Tr. 114.

Markeson essentially shifted his account of the citation's basis away from asserting a risk of entanglement, adding that he "felt that [the flywheel] could grab your sleeve or your arm while you were greasing," while admitting that the actual pinch point was on the other side of the flywheel, the non-cited side, which side was properly guarded. Tr. 124-25.

In the Court's estimation it is more likely that Markeson didn't think about the direction of travel for the flywheel when he issued the citation. For that reason, at the hearing he had to stretch his testimony.[11]

The Secretary presented photographs of the flywheel, in which Markeson contended that he visualized a small nick in the edge of the flywheel. Tr. 109. He testified that this contributed to his conclusion that there was a hazard of cuts or abrasions without adequate guarding. *Id*. Markeson also stated that there was roughly six and a half inches of space between the flywheel and the grease block where miners do maintenance work. Tr. 110.

There is considerable doubt that the flywheel had nicks or burrs on the surface, as claimed by the inspector. Agreeing that the Respondent's photographs were of better clarity than the government photo of the flywheel, Markeson admitted on cross examination that he could not see any burrs or nicks in those pictures. Tr. 123.

Markeson then described the conversation he had with Gabel, who was accompanying him during the inspection. Tr. 112. Gabel told Markeson that greasing is done on the flywheel while the plant is in operation. In Markeson's words, he was told "that the plant is lubricated, that it's greased, while it's in operation." Tr. 113. However, it was not clear whether greasing is done while the flywheel is moving. *Id*. Markeson noted that he was unsure how long this situation had existed, because in his experience plants with multiple portable units occasionally reconfigure their equipment. Tr. 117. Markeson remarked that Gabel said that the flywheel had been in place for 14 years: "according to my notes, he told me it had existed for 14 years." Tr. 117.

Based on this information, Markeson concluded that the hazard would likely result in lost workdays, but that such an injury was unlikely, saying,

> The main reason was because that flywheel turns away from the side that the miner is greasing it, while the flywheel isn't perfectly smooth, it does have points that could cut you or catch you. It's unlikely that it's going to cause an injury, because it's turning away from you and not towards you.

Tr. 114.

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[11] Although the following comment does not alter the Court's conclusions that both violations were established, the Respondent did raise an issue as to whether Markeson was determined to find violations, if possible. 128-30. The Respondent's concern stemmed from an earlier incident in 2015 when Markeson issued a citation for failure to notify MSHA that the mine was closed. Tr. 133. The inspector reached an incorrect conclusion– that the mine was in operation – and accordingly that citation had to be withdrawn. Without making an express finding about the Respondent's concern that the inspector was vexed by that outcome, the Court wishes to stress that all inspections should be fair-minded, focusing on genuine violative conditions and not be animated in any regard by past interactions between inspectors and mine operators. MSHA inspectors are to operate with professionalism and objectivity and approach each new inspection without regard to past conflicts.

He also marked the violation as affecting one person, because only one person is required to do the maintenance at the grease point. Markeson designated the negligence as low because,

> Mr. Gabel indicated to me that this condition had existed for a long period of time. And from the appearance of the guard, that appeared to be true. The other reason was, as I went through the plant, and Mr. Gabel's plants are older equipment, much of which probably wasn't factory guarded. His plant has lots of moving parts, lots of belts, and it's all very well guarded, and I felt that if Mr. Gabel had noticed this point, he would have guarded it. So I felt it was low negligence on Mr. Gabel's part, based on how good a job he does everywhere else. He just missed this one.

Tr. 115.

Markeson testified that the Respondent abated the condition by installing additional guarding almost immediately, the same day that the inspection took place. Tr. 90.

<u>The Respondent's Evidence</u>

The Respondent introduced additional photos of the flywheel, and Markeson admitted that he could not see any nicks in those pictures. Tr. 123. Markeson agreed that the Respondent's photographs of the flywheel were of better quality than those introduced by the Secretary. *Id*. Markeson also admitted that the back side of the flywheel, where there is a pinch point, is guarded to a height of seven feet or more. Tr. 124-25. Importantly, there was no guarding violation on that other side, where a pinch point existed.

Putting aside the misuse of the term "entanglement," the Court finds the Respondent's evidence regarding any potential injury from contact with the flywheel to be much more credible. Gabel testified that given the 6 foot and 4 inch distance from ground level, one couldn't have an elbow contact the flywheel while greasing the nearby grease block. As Gabel convincingly explained, at the flywheel's slow speed, one could lay one's hand on it and also that the flywheel's surface was smooth, without burrs or nicks. Tr. 147. The Secretary did not counter Gabel's assertion that one could place a hand on the moving flywheel without being injured, and the Respondent's photos certainly support the latter claim that the flywheel's surface was smooth and free of burrs.

At the close of the hearing, the Secretary agreed to stipulate that aside from the flywheel, there were no other moving machine parts with inadequate guarding. Tr. 143. As noted above, the inspector himself concluded that the "plant has lots of moving parts, lots of belts, and it's all very well guarded." *Id.* Gabel testified that he believed there was no hazard, because the flywheel moves relatively slowly, at 225 rotations per minute. Tr. 145-47. Gabel also argued that there was little or no risk of a miner bumping the flywheel while greasing, because there is a distance of six inches or more from the grease block to the flywheel. Tr. 147. Gabel re-emphasized that he is very committed to running a safe operation and taking proactive steps to ensure the safety of his employees. Tr. 157-58.

Discussion

In light of the evidence presented, upon applying the burden of proof[12] the Secretary must meet, the Court concludes that both alleged violations were established. For the reasons which follow, the Court finds that the guarding violation was established, but that both the gravity and negligence attendant to that violation were very low. While the violation was established, there was a fundamental flaw in the inspector's understanding of the hazard presented because he stated in the citation "[t]his condition creates an entanglement hazard to the miner." Ex. P-2. The inspector was completely wrong about his claim of an entanglement hazard.

As noted, the Court finds that the Secretary proved that this standard was violated. Both parties stipulated that the flywheel in question is a moving machine part, and "the height of the guard in question measured six feet, four inches." Jt. Ex. 1.

At the time of the inspection, miners would routinely put their hands about six inches away from the flywheel to perform maintenance while the plant was in operation. Neither party presented evidence to show whether the flywheel was typically in motion while this took place. Because of the direction in which the flywheel rotates, there was no risk of clothing or limbs becoming pinched or entangled in the machine.[13] Both parties agreed that the back side of the flywheel, where there would hypothetically be a risk of entanglement, such as a hand being pulled in, was adequately guarded. It seems that this guarding issue existed for several years, and went unnoticed by examiners both from the mine and from MSHA.

At hearing, the Secretary argued that the violation presented a hazard of cutting or abrasion, and to this end presented evidence of a nick in the edge of the flywheel. Tr.109, referencing Ex. P-3-2. The Respondent disputed this evidence, and presented evidence that the flywheel rotates at a relatively slow speed, and would therefore be unlikely to cause abrasions if a miner accidentally came into contact with it. Tr. 123, 147. The Court agrees with the Respondent's view that the risk of injuries from cuts or abrasions was low.

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[12] The Secretary is required to prove all elements of the alleged violations by a preponderance of the evidence, which requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (internal citations omitted).

[13] The text of the citation is somewhat misleading on this point. Markeson wrote, "This condition creates an entanglement hazard to the miner." Ex. P-2-7. Markeson later testified, "rather than a pinching hazard, it was more of a laceration/striking hazard." Tr. 108. The Secretary presented no evidence suggesting a risk of entanglement.

Penalty Determinations for Order No. 8778893 and Citation No. 8865801[14]

Section 110(i) of the Mine Act confers authority upon the Commission to assess civil penalties. It is well-established that the Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Musser Engineering, Inc*., 32 FMSHRC 1257, 1288-89 (Oct. 2010) (citing *Cantera Green*, 22 FMSHRC 616, 620 (May 2000)). In assessing civil monetary penalties, Section 110(i) requires that the Court consider: (1) the operator's history of previous violations, (2) the appropriateness of the penalty to the size of the operator's business, (3) the operator's negligence, (4) the gravity of the violation, (5) the operator's ability to continue in business, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation.

Penalty assessments must reflect proper consideration of the abovementioned penalty criteria. In determining the amount of the penalty, neither the judge nor the Commission is restricted by a penalty recommended by the *Secretary. Sellersburg Stone Co*., 5 FMSHRC 287, 291 (Mar. 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984).

That said, the Secretary's proposed penalty cannot be glided over, as the Commission also stated that judges "must explain any substantial divergence between the penalty proposed by MSHA and the penalty assessed… If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness." *Am. Coal Co.*, 38 FMSHRC 1987, 1994 (Aug. 26, 2016) (citing *Sellersburg Stone Co*., 5 FMSHRC 287, 293 (Mar. 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984)). The Commission requires a duality in judge's penalty analysis, stating on the one hand, that, essentially, it was "[re]affirming the right and duty of Commission Judges to make assessments independently," while, on the other hand, simultaneously requiring an "explan[ation] [for] any substantial divergence between the penalty proposed by MSHA and the penalty assessed by the Judge. *Id*. at 1997. (citing Westmoreland Coal Co., 8 FMSHRC 491, 492 (Apr. 1986).

As this Court reads the Commission's decision in *American Coal*, a judge must, on one hand, consider the Section 110(i) penalty criteria in making a de novo penalty assessment, but in doing so a judge must also explain the basis for agreement with, or any substantial divergence from, the Secretary's proposed penalty.

<u>Penalty Determination for Order No. 8778893: The Training Violation</u>

As discussed above, Gabel's failure to fulfill the annual training requirement appears to have been the result of a misunderstanding. The Court adopts Gabel's contention that if he had received information and guidance on the scope of this standard, he would have promptly fulfilled the obligation for his own annual training.

Following these precepts, and viewing the evidence in its totality, the Court finds that the operator's oversight with regard to annual refresher training was the result of very low

[14] As noted above, Order. No. 8778893, the annual refresher training violation, was initially assessed for a $112.00 penalty. Citation No. 8865801, the guarding violation, was initially assessed for a $100.00 penalty.

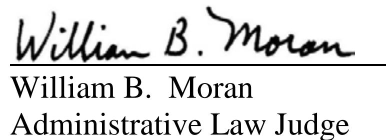
negligence. The gravity is similarly on the very low end of that criterion. Upon considering the evidence regarding negligence, gravity, the operator's virtually non-existent history of violations,[15] its small size, and its good faith in achieving very rapid compliance after being cited for the training infraction, the Court has concluded that a penalty amount of **$20.00 is appropriate and that a larger penalty is not warranted**.[16]

Penalty Determination for Citation No. 8865801: The Guarding Violation

The Court finds that the condition involving the flywheel guarding was not likely to lead to lost workdays or restricted duty in the event of an injury. Given the evidence presented regarding the condition and operation of the flywheel, and the distance between the flywheel and the grease point accessed by miners, the Court finds that the gravity of the violation was less than that alleged by the Secretary. As with the training violation, upon consideration of the entire evidentiary record, and the Court's consideration of each statutory criterion, with an emphasis on the very low gravity involved and the rapid installation of additional guarding, the Court determines that **a penalty amount of $25.00 is appropriate**.

Wherefore, it is **ORDERED** that Citation No. 8865801 be **MODIFIED** from "lost workdays or restricted duty" to "no lost workdays."

It is further **ORDERED** that Gabel Stone Company pay the Secretary of Labor a civil penalty in the total amount of $45.00.



William B. Moran
Administrative Law Judge

[15] The Secretary admitted that Gabel Stone has no history of non-compliance issues regarding miner training standards. Tr. 93.

[16] The criterion of the effect on the ability to continue in business is a non-factor under the Secretary's proposed penalty and therefore under the Court's assessment as well.

Distribution

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