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March 19, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEST 2011-1029-M A.C. No. 04-03489-253672
v.	Sierra Rock Products
SIERRA ROCK PRODUCTS, INC., Respondent	

DECISION ON REMAND

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor through the Mine Safety and Health Administration ("MSHA") against Sierra Rock Products, Inc., 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"). Following an evidentiary hearing in this and other Sierra Rock cases, I issued my decision on the merits. *Sierra Rock Products, Inc.*, 35 FMSHRC 49 (Jan 2013). The Secretary appealed my ruling on one withdrawal order to the Commission. On January 13, 2015, the Commission issued its decision. *Sierra Rock Products, Inc.*, 37 FMSHRC_____, 2015 WL 307554. The Commission remanded the case to me and, in accordance with its order, I enter the decision below.

I. INITIAL DECISION AND COMMISSION REMAND

In my decision, I modified Order No. 8561260 issued under section 104(d)(1) of the Mine Act. I affirmed the MSHA inspector's determination that the violation was serious, was highly likely to result in a fatal injury, and was of a significant and substantial nature ("S&S"). I determined that the mine operator's negligence was moderate rather than the result of its "reckless disregard" and I modified the order to a section 104(a) citation. 35 FMSHRC at 58. I reduced the penalty from $52,500, as specially assessed by the Secretary, to $6,000.

The Commission remanded the case to me "for further analysis in light of the cited standard and the relevant facts and circumstances" as discussed in its decision. *Slip op.* at 8. The Commission also vacated and remanded the penalty assessment in my decision "for reconsideration in light of any changes to the unwarrantability and negligence findings." *Id.* Only Order No. 8561260 is before me on remand. I invited counsel for the Secretary and Sierra Rock to file statements of position on these issues and I considered their arguments.

Order No. 8561260 was issued for a violation of section 56.12017, which requires that power circuits be de-energized before work is performed on such circuits. 30 C.F.R. § 56.12017. The safety standard also requires that "[s]witches shall be locked out or other measures taken which shall prevent the power circuits from being energized without the knowledge of the individual working on them." *Id.*

With respect to Order No. 8561260, I simply stated the operator's negligence was moderate and was not the result of its aggravated conduct "[f]or the same reasons as discussed above[.]" *Sierra Rock Products, Inc.*, 35 FMSHRC at 58. This reference in my decision was to my analysis for Citation No. 8561252 and Order No. 8561261, which alleged violations of section 56.12040.[1] The Commission remanded the case to me for a "separate" analysis of negligence and unwarrantable failure for Order No. 8561260, considering the facts unique to the order. *Slip op.* at 5. The Commission's decision directed me to consider several specific details on remand. These matters are discussed throughout the decision but are summarized in the penultimate paragraph as follows:

> In summary, this matter is remanded to the Judge for a separate consideration of the unwarrantability facts in light of the totality of circumstances specific to Order No. 8561260. In particular, the analysis should address: the impact, if any, of the difference in the cited standards on the various unwarrantibility factors; the impact, if any, of the morning interaction between Hatler and the inspector regarding the MCC Panel, and the inspector's instructions to de-energize before opening the panel; and whether Sierra Rock had an objectively reasonable belief, based on the above facts and circumstances, that its conduct was in compliance with the cited standard. The matter is also remanded for reconsideration of the degree of negligence attributable to Sierra Rock with respect to the conduct at issue in the order.

Slip op. at 8.

II. ANALYSIS ON REMAND

On May 18, 2010, MSHA Inspector William Edminister issued Citation No. 8561252 at an electrical panel because the door to the electrical panel had to be opened to activate or shut down the conveyors, exposing the individual using the circuit breakers to energized electrical circuits within the panel.

On May 19, 2010, the inspector returned to the quarry and inspected an electrical panel in the motor control center ("MCC room"). Jim Hatler, the owner and operator of the mine, suggested that the inspector look at this panel because it was configured the same as the first panel cited and Hatler wanted to persuade the inspector that both panels were safe. Inspector Edminister informed Hatler that both panels violated section 56.12040. Hatler informed the inspector that the panels were inspected by MSHA during previous inspections and MSHA accepted the configuration of the panels during those inspections.

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[1] That safety standard states that "[o]perating controls shall be installed so that they can be operated without danger of contact with energized conductors."

After conferring with the MSHA district office, Inspector Edminister informed Jim Hatler that he would issue Order No. 8561261 because the configuration of the second panel was the same as the panel involved in Citation No. 8561252. When Edminister communicated his decision to Hatler, he asked Hatler to return to the panel and de-energize it to allow Inspector Edminister to photograph the condition. The inspector testified that Hatler responded angrily; he "threw down some papers," "[w]ent storming out" of the office, and "was raving the entire way to the MCC room." (Tr. 50). Hatler admitted that he was angry with the inspector. (Tr. 170-71).

As Hatler and Inspector Edminister approached the MCC room, the inspector told Hatler that Hatler needed to de-energize the panel by using the main power switch located outside the panel rather than by reaching into the panel to flip the circuit breakers located 12 inches from the 480-volt electrical connection. Hatler admitted that Inspector Edminister asked him to de-energize the panel by turning off the main power switch:

> [The inspector] told me that I had to de-energize [the panel] so he could collect his evidence. So then we went over, and I went in and I went to open the door [to the panel], and he informed me that I could not open the door, that I had to turn the main off.

(Tr. 170-71)

Inspector Edminister testified Hatler then "opened up the door very quickly, reached inside and looked like he racked out the three breaker switches." (Tr. 50-51). Hatler testified that he "told [the inspector] in not such a nice tone that he had not proved to me in writing that he had – that I was in violation, and I wasn't going to lock it out. And I opened the door and I reached in and turned the breakers off." (Tr. 171). Hatler explained that he decided not to turn off the power at the main switch because he disagreed with the inspector's assessment of the violation. Inspector Edminister issued an imminent danger order and Order No. 8561260.

A. <u>Unwarrantable Failure</u>

In analyzing this case a second time at the direction of the Commission, I place more emphasis on the seriousness of the violation and I find that Order No. 8561260 was the caused by Sierra Rock's unwarrantable failure to comply with section 56.12017. I conclude that the Sierra Rock demonstrated aggravated conduct that was greater than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991). Hatler's conduct was at least a serious lack of reasonable care. I find that the violation was the result of Sierra Rock's unwarrantable failure to comply with the safety standard and that its negligence was high.[2]

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[2] Order No. 8561260 again becomes an order issued under section 104(d)(1) of the Mine Act. Because I held that the violation alleged in 104(d)(1) Citation 8561252 was not a result of Sierra Rock's unwarrantable failure, I modified it to a section 104(a) citation. As a consequence,

I analyze each of the aggravated conduct factors in turn with respect to Order No. 8561260.

1. The Length of Time that the Violation Existed

The condition did not exist for a long period of time, but the practice was long-standing. As I stated in my original decision, "Jim Hatler, in the inspector's presence, opened the [door to the] electrical panel without first de-energizing the power within the panel and flipped the breaker switches to open the circuits to the conveyors." 35 FMSHRC at 57. As a consequence, he exposed himself to live electrical components. The violation was an instantaneous action by the owner of the mine as opposed to an existing condition identified by the inspector. This was, however, a long-standing practice. Hatler was angry when he took this action and he did so after the inspector specifically asked him to de-energize the panel before he opened the circuits. I find that Sierra Rock's violation of section 56.12017 existed over an extended period of time.

2. The Extent of the Violative Condition

I find that the evidence establishes that the violation was extensive because it was a long standing practice at the plant to shut down the conveyors and restart the conveyors by opening the door to energized electrical panels and flipping the circuit breakers. I determined that the violation was serious, was highly likely to result in a fatal injury, and was S&S. Thus, Sierra Rock had a history of failing to de-energize power circuits before performing work upon the circuits in violation of section 56.12017. The violation was also extensive due to the serious hazard that was presented.

3. Whether the Operator Was Placed on Notice that Greater Efforts Were Necessary

The operator had not been placed on notice that greater efforts were necessary to achieve compliance prior to this inspection. Sierra Rock argued that it had no knowledge that the electrical panel violated any safety standards based upon previous MSHA inspections. I credit the evidence presented by Sierra Rock that Hatler genuinely believed that Sierra Rock was complying with MSHA's electrical safety standards. I do not know whether MSHA's failure to enforce sections 56.12017 and 56.12040 was because other inspectors did not believe the subject panels violated the safety standards or whether the inspectors were simply unaware of the violations. Hatler was advised the previous day that he could no longer use the circuit breakers inside the panel to activate or deactivate the conveyors if the circuits in the panel were energized. Indeed, Inspector Edminister warned Hatler immediately prior to the violation that the panel had to be de-energized before he could reach into the panel. Given that MSHA had only started to enforce the two safety standards during the subject inspection, I hold that Sierra Rock was not placed on notice that greater efforts were necessary.

104(d)(1) Order 8561257 became a section 104(d)(1) citation by operation of law and that citation is the predicate for the order at issue here.

4. The Operator's Efforts in Abating the Violative Condition

Because Sierra Rock did not believe that its practices violated the cited electrical safety standards, it took no steps to abate the conditions. Nevertheless, the inspector advised Hatler to de-energize the subject electrical panel before he flipped the circuit breakers. This case presents an unusual circumstance because Hatler opened the circuits using the circuit breakers in an effort to show the inspector that his method was both safe and in compliance with MSHA's electrical safety standards. His method, however, was dangerous, especially considering the excited manner in which he performed it.

5. Whether the Violation was Obvious or Posed a High Degree of Danger

I find that a reasonably prudent person familiar with the hazards of energized electrical circuits would know that the practice used by Sierra Rock to shut down and start up conveyors created an obvious and serious safety hazard. Hatler believed that because he and his son were the only people who operated the circuit breakers, a safety hazard was not present because they had done it for years and were careful. As the Commission has noted, however, even "a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions[.]" *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983). Even if I assume that Hatler was very conscientious when performing this function, fatigue or another distraction could easily cause him to make a fatal error. Because of the location of the electrical panel within the MCC room, the door could not be opened completely, which further contributed to the risk of an accident. I find that the violation was obvious and posed a high degree of danger.

6. The Operator's Knowledge of the Existence of the Violation

Hatler's belief that his actions did not violate the safety standard was unreasonable. The Commission held that the defense that an operator had a good faith belief that its conduct was in compliance with a safety standard requires not only a showing of good faith but also that the conduct was objectively reasonable under the circumstances. *IO Coal Co.*, 31 FMSHRC 1346, 1357-58 (Dec. 2009). Even if I assume that Hatler's actions were taken in good faith, I find that the cited procedure was objectively unreasonable given that live electrical components were 12 inches away from the circuit breakers.[3] The hasty and angry manner that Hatler acted also made his actions less reasonable and more dangerous.

B. Negligence

I find that Hatler's conduct exhibited a high degree of negligence. In assessing the negligence of a violation, the Commission considers "what actions would have been taken under

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[3] In the Commission's decision, Commissioner Robert F. Cohen stated that "[i]t is inconceivable that Hatler's angry act of putting his hand inside the electrical panel in defiance of the inspector's explicit warning, thus creating an imminent danger, could be determined to be characterized as an objectively reasonable act of good faith. *See, Consolidation Coal Co.*, 14 FMSHRC 956, 970 (June 1992) ('[N]o operator is free to take the law into its own hands by deciding for itself what the law means and how it can best be applied')." *Slip op.* at 7 n. 9.

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 Resources, Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014). I find that the evidence establishes that a reasonably prudent person would not open the door to the electrical panel in this instance without first de-energizing the panel as the inspector directed. I find that Hatler's conduct did not rise to the level of reckless disregard because he performed this task in the same manner for at least a decade without causing an injury or receiving a citation.

C. Other Matters

The Commission asked that I discuss "the impact, if any, of the difference in the cited standards on the various unwarrantibility factors." *Slip op.* at 8. Given that I have now applied a distinct aggravated conduct analysis for Order No. 8561260, this issue is moot. In addition, I already discussed the impact of the "morning interaction between Hatler and the inspector regarding the MCC panel and the inspector's instructions to de-energize before opening the panel." *Id.* Finally, I concluded that Sierra Rock did not have "an objectively reasonable belief . . . that its conduct was in compliance with the cited standard." *Id.* Sierra Rock abated the group of electrical violations by installing breaker panels outside the existing electrical panels.

D. Appropriate Civil Penalty

The violation was serious, S&S, and Sierra Rock's negligence was high. The assessed violation history report shows that Sierra Rock had a history of 13 violations in the 15 months preceding the instant inspection and that 3 of these violations were S&S. (Ex. G-11). Sierra Rock was very small. In 2010, it worked 9,461 man-hours and employed three to four people including Jim and Barry Hatler. 35 FMSHRC at 67. In my original decision I stated that I "reduced the penalties because of Respondent's small size." *Id.* The violation was abated in good faith. Sierra Rock did not establish that a reasonable penalty would adversely affect its ability to continue in business. At the hearing in this case, Sierra Rock introduced its corporate tax returns to prove that the Secretary's proposed penalties would adversely affect its ability to continue in business. In my original decision, I held that this evidence was insufficient. *Id.* 66-69.

The Secretary specially assessed the $52,500 penalty proposed for Order No. 8561260. 30 C.F.R. § 100.5.[4] In my original decision, I reduced the penalty to $6,000. I assessed a total penalty of $23,643 for all the citations and orders contested at the hearing by Sierra Rock.

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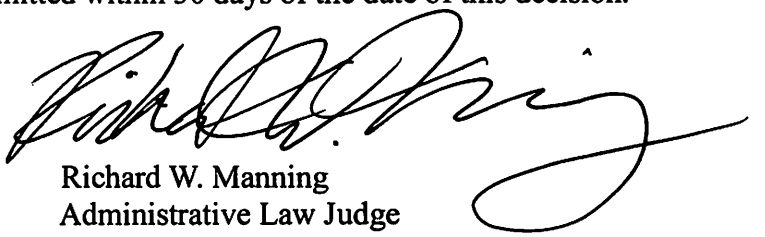
[4] The record does not state what penalty the Secretary would propose if he had used his regular assessment formula. Given the low history of previous S&S violations and the operator's small size, I believe the proposed penalty under 30 C.F.R. § 100.3 would be higher than the minimum penalty of $2,000 but less than $12,000. In *American Coal Co.*, 35 FMSHRC 1774, 1822-24 (June 2013) (ALJ), former Commission Judge Michael Zielinksi discussed the difficulty in assessing a penalty for a violation that the Secretary specially assessed. "The lack of transparency in the Secretary's special assessment process . . . coupled with the Secretary's refusal to disclose the bases for specially assessing a penalty, can frustrate" a judge's ability to explain the disparity between the Secretary's proposed penalty and the penalty assessed by the

Taking into consideration the six penalty criteria set forth in section 110(i) of the Mine Act, I assess a penalty of $9,000.00 for this violation. As before, the operator's small size was an especially important factor in the penalty reduction.

III. ORDER

For the reasons set forth above, Order No. 8561260 is **AFFIRMED** but the associated negligence is reduced from "reckless disregard" to "high." Sierra Rock Products, Inc. is **ORDERED TO PAY** the Secretary of Labor a total penalty of 9,000.00 for this order. Any unpaid portion of this penalty shall be remitted within 30 days of the date of this decision.[5]



Richard W. Manning
Administrative Law Judge

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judge. *Id.* at 1822 (footnote omitted). The Secretary's narrative findings attached to the penalty petition emphasize that he followed MSHA's special assessment procedures in this case because of the gravity of the violation and the operator's level of negligence. The Secretary has also posted at the MSHA website some general procedures that he follows when proposing a penalty that has been specially assessed. http://www.msha.gov/PROGRAMS/assess/SpecialAssess/SpecialAssessments2011.pdf. These pronouncements are not very helpful.

[5] 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.