FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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June 9, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2015-856 A.C. No. 04-05038-384525
v.	:	
SUTTER GOLD MINING COMPANY, Respondent.	:	Mine: Lincoln Mine Project

DECISION AND ORDER

Appearances: Daniel Brechbuhl, United States Department of Labor, Office of the Solicitor, Denver, CO, for Petitioner;

Katie Jeremiah, Jordan Ramis, PC, Lake Oswego, OR, for Respondent.

Before: Judge Miller

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act"). This docket involves four citations issued pursuant to Section 104(a) of the Mine Act with proposed penalties totaling $6,406.00. The parties presented testimony and evidence regarding these citations at a hearing held in Sacramento, California, on May 4, 2016. Based upon the parties' stipulations, my review of the entire record, my observation of the demeanors of the witnesses, and consideration of the parties' legal arguments, I make the following findings and order.

I. MSHA'S INSPECTION

The Lincoln Mine Project is an underground gold mine in Sutter Creek, California, operated by Sutter Gold Mining Company. At the time of the inspection in March 2015, the Lincoln Mine Project was non-producing but was being maintained for future production. This involved operating an underground water treatment facility and maintaining escapeways. On the date of the inspection, only one employee of Sutter Gold was working at the mine. The previous two days, several contractors had been working at the mine doing safety inspections and maintenance. The parties have stipulated that Sutter Gold is an "operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d), and is subject to the jurisdiction of the Commission. Jt. Stips. ¶¶ c, d.

On March 4, 2015, Inspector Kimberly Hakala traveled to the Lincoln Mine Project to conduct a general inspection. Hakala has been a mine inspector for approximately four years and has conducted hundreds of inspections of underground mines. Prior to becoming a mine inspector, she worked for seven years at a family-owned gypsum mine, including as a safety representative who accompanied mine inspectors.

Upon arriving at the mine, Inspector Hakala went into the mine's office and asked to see the person in charge. She was directed to Pat Carney, a consultant at the mine. Hakala recalled that on her last visit to the mine, Carney had been identified as a supervisor or foreman. Carney escorted Hakala underground to conduct the inspection. David Cochrane, Vice President for Environment, Health, and Safety at the mine, arrived at 10 a.m., after Carney and Hakala had begun the inspection. Cochrane attempted to reach Carney and Hakala when he arrived, but could not. Instead, he met with Hakala when she returned from underground to discuss the citations she had issued and advised her that Carney was a contractor and did not have the authority to act on behalf of the company. Cochrane did not ask to revisit any underground areas with Hakala.

Sutter Gold argues that its walk-around rights were violated when Hakala conducted the inspection accompanied by Carney, a contractor, instead of Cochrane. Section 103(f) of the Mine Act requires that "a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine . . . ." 30 U.S.C. § 813(f). However, the Act specifies that "Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act." *Id.* The Commission has explained that where an operator's Section 103(f) rights are violated, "the judge is permitted to consider the effect of the improper denial of the operator's walkaround rights on the operator's ability to present its case." *SCP Investments, LLC*, 31 FMSHRC 821, 822 (Aug. 2009).

At the outset, I find no problem with the actions of Inspector Hakala. She did not refuse to allow a representative to accompany her; rather, no one from management was present when she arrived at the mine. The inspector had met Carney on earlier inspections and was unaware that his position had changed from manager to consultant. She did everything she was required to do, including asking for the person in charge and going underground with someone who she thought, from previous experience, was management at the mine. Carney did nothing to indicate he was not in charge and accompanied her underground. Further, Carney was familiar with the mine and worked there regularly. I find no merit to Respondent's argument that there was an improper denial of its right to have a representative accompany the inspector.

II. PRINCIPLES OF LAW

A. Establishing a Violation

To prevail on a penalty petition, the Secretary bears the burden of proving an alleged violation by a preponderance of evidence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd* 272 F.3d 590 (D.C. Cir. 2001); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). The Secretary may establish a violation by inference in certain situations, but

only if the inference is "inherently reasonable" and there is "a rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152-53 (Nov. 1989).

B. Significant and Substantial

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

In *Mathies Coal Co.*, the Commission established the standard for determining whether a violation is S&S:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum,* the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC 1, 3-4 (Jan. 1984).

The second element of the *Mathies* test must be evaluated with respect to specific conditions in the mine. *See, e.g., McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991-92 (Aug. 2014) (finding that an accumulations violation contributed to a combustion hazard because of the extensiveness of the accumulations of coal, their highly combustible makeup, and the amount of methane liberated by the mine); *Mathies*, 6 FMSHRC at 4 (finding that a broken sander on a mantrip contributed to the hazard of a derailment or collision because of damp conditions at the mine and the steep route of the mantrip). With respect to the third element, the Commission has explained that the Secretary must "establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984). The Commission has made clear that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury," but rather that the hazard created would cause an injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *see also Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011). Finally, the Commission has held that the S&S determination should be made assuming "continued normal mining operations." *McCoy*, 36 FMSHRC at 1990-91.

C. Negligence

The Secretary's regulations categorize negligence into five categories, from "no negligence" to "reckless disregard." 30 C.F.R. § 100.3, Table X. The Commission has

emphasized, however, that these regulations apply to the Secretary's proposal of penalties only, and are not binding on the Commission. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015). The Commission instead directs its judges to "evaluate negligence from the starting point of a traditional negligence analysis . . . . Under such an analysis, an operator is negligent if it fails to meet the requisite standard of care—a standard of care that is high under the Mine Act." *Brody*, 37 FMSHRC at 1702. In evaluating an operator's negligence, the judge should consider "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.*, 36 FMSHRC 1972, 1975 (Aug. 2014).

While the Secretary's regulations focus on the presence or absence of mitigating circumstances in determining the level of negligence, 30 C.F.R. § 100.3, the Commission has indicated that Commission judges are not limited to this analysis and "may find 'high negligence' in spite of mitigating circumstances or may find 'moderate' negligence without identifying mitigating circumstances." *Brody*, 37 FMSHRC at 1702-03. High negligence is characterized by "an aggravated lack of care that is more than ordinary negligence." *Id.* at 1703.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact detailed below are based on the record as a whole and my careful observation of the witnesses during their testimony. My credibility determinations are based in part on my close observation of the witnesses' demeanors and voice intonations. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, corroboration or the lack thereof, and consistencies and inconsistencies in each witness's testimony and among the testimonies of the various witnesses. Any failure to provide detail on each witness's testimony in this decision should not be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000).

A. Citation No. 8873031

Citations 8873031, 8873032, and 8873033 relate to the water treatment area of the mine. The treatment area is accessed regularly for maintenance, and miners had been working there the day prior to the inspection.

Inspector Hakala testified that as she entered the water treatment area, she observed material on the ground and timbers being used to support the roof. Carney informed her that some material had recently fallen from the roof, and miners had scaled the area and added the timbers as additional support. He informed her that the timbers were a temporary fix until the condition could be properly addressed. Hakala conducted a visual inspection of the area and observed a fracture in the rock. She thus determined that a fall of material hazard existed. She did not sound the material, however, and testified that the timbers were stable and in good condition.

The mine's witnesses disputed Carney's assertion that a fall of materials had occurred in the area. Cole McGowan had gone to the water treatment area to check ground conditions in February 2015. He testified that he had been sent to check the area not because of a recent fall, but rather in preparation for electricians to work there. McGowan had scaled the area, but noticed some hollow-sounding rock that would not come down with a scaling bar. He thus suggested to Cochrane that they install timbers as extra support. McGowan stated that he did not believe that the hollow-sounding rock was in danger of falling, but wanted to provide extra support in case of vibrations during the upcoming electrical work. The timbers were installed on March 2 and 3. McGowan's opinion was that the timbers had fixed the problem, and the area was safe. Cochrane testified that the rock in the area was of a strong type that was unlikely to fall. Inspector Hakala agreed that the rock was of a solid type. She admitted that she did not believe that there was an imminent danger of materials falling.

Inspector Hakala cited the mine for a violation of 30 C.F.R. § 57.18002(c) based on the conditions in the water treatment area. Section 57.18002(c) requires that

> conditions that may present an imminent danger which are noted by the person conducting the [shift] examination shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected (except persons referred to in section 104(c) of the [Act]) until the danger is abated.

30 C.F.R. § 57.18002(c). The persons referred to in Section 104(c) include

> (1) any person whose presence in such area is necessary, in the judgment of the operator or an authorized representative of the Secretary, to eliminate the condition described in the order; ... and (4) any consultant to any of the foregoing.

30 U.S.C. § 814(c).

The Secretary alleges that a fall of material hazard existed in the area, and thus that the mine should have withdrawn all persons from the area. While Carney told the inspector that an imminent danger existed in the area, the Secretary presented no further evidence to support that finding. The inspector admitted at hearing that she did not believe a rock was going to fall while she was in the water treatment plant. The mine's witnesses all agreed that there may have been a "drummy" portion of the roof in the area, but that the timbers had been set as an extra precaution and that they had resolved the issue.

I find that the Secretary has failed to prove that the ground conditions constituted an imminent danger, a necessary element of the standard. Accordingly, the citation is vacated.

B. Citation No. 8873032

Citation No. 8873032 also relates to ground conditions in the water treatment area. Inspector Hakala cited the mine for a violation of 30 C.F.R. § 57.3200, which provides:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

The Secretary alleges that no warning signs or barriers were posted to warn miners of the possibility of falling materials in the water treatment area.

The mine's witnesses testified that a chain with warning signs was ordinarily in place in front of the water treatment area. Inspector Hakala recalled seeing this chain on previous inspections. *See* Gov't Ex. 2 at 8. However, it was not in place on the date of the inspection. The mine's witnesses explained that this was because the mine had held an emergency drill at the end of the shift prior to the inspection, and because miners were required to leave their work stations immediately the chain had not been replaced it at the end of the shift. Inspector Hakala believed that even if the chain had been present, the mine should have had a sign specifically referring to hazardous ground. David Cochrane also testified that there is a barrier made of a rail and 55 gallon drums several feet before the chain that impedes entry to the area.

To prove a violation of § 57.3200, the Secretary must prove first that hazardous ground conditions were present, and second that the required warning signs or barriers were not provided. The Commission has stated that a number of factors should be considered in determining whether loose ground is present in a metal mine, including, but not limited to: "the results of sounding tests, the size of the drummy area, the presence of visible fractures and sloughed material, 'popping' and 'snapping' sounds in the ground, the presence, if any, of roof support, and the operating experience of the mine or any of its particular areas." *ASARCO, Inc.*, 14 FMSHRC 941, 952 (June 1992); *Amax Chem. Corp.*, 8 FMSHRC 1146, 1149 (Aug. 1986). In *ASARCO*, the Commission found that no violation had been proven where the area had been examined and tested, testimony indicated that ground conditions were not believed to be hazardous, scaling had been performed, there were no popping or snapping sounds, and the dolomite formation in the mine was stable. 14 FMSHRC at 952-53.

I find that the Secretary failed to present sufficient evidence of a ground condition creating a hazard in this area. The inspector based her conclusion that a hazard existed on a visual inspection and information provided by Carney that may not have been accurate. She did not conduct a sounding test and did not have reliable information about past roof falls. The area had been scaled and Cochrane testified that the rock in the area was stable. While miners had found that some rock in the area was hollow sounding, they had placed timbers to support it, and there was no evidence that those would not be effective at preventing rock from falling. Before the timbers were added, the chain with warning signs was in place to impede entry. For these reasons, I find that the Secretary did not meet his burden of proof. Therefore, I vacate the citation.

C. Citation No. 8873033

While in the water treatment area, Inspector Hakala observed a number of electrical panels used to power the water treatment equipment. The seven panels were hanging by chains and not secured to the ribs. Inspector Hakala testified that the panels were 480 volts, which is considered high voltage. The panels were energized when Hakala observed them. The chains holding the panels were meant to keep them off the floor and out of the water but at a reasonably accessible height, but Hakala did not believe that the chains were sufficient to hold the panels. She observed that an S-hook connecting a chain to the wall was pulling apart and away from the wall. Several links appeared stressed and one was cracked. She believed that this was an indication that the chains were holding too much weight or had been struck. She also observed that the panels swayed when touched. Given the small size of the area, she was concerned that the panels would hit someone if they were to fall.

Cochrane pointed out that the chains were capable of holding 800 pounds and were connected to rock bolts, which were in turn connected to face plates. Cochrane believed that the chain mounting system was standard practice in many mines and was sufficient to support the weight of the panels. Randy Dutton, who had installed the panels, also testified that the chain mounting was a common practice in other mines. He believed that there was no chance that the panels would fall, and noted that blasting had occurred numerous times near the panels and they had not fallen. While there had been no blasting since the mine was put on non-producing status, the mine did not dispute or address the strength of the chains in the weakened condition observed by the inspector.

Carney informed Inspector Hakala that Cal-OSHA had advised the mine to update the chain system on a previous inspection. Carney characterized the Cal-OSHA statement as a "warning," but Cochrane described it as a "comment," saying that Cal-OSHA was merely recommending that the mine update the system to conform to the changing practice in other mines of using a solid mount. The mine had attempted to hire someone to address the condition, but the person had not yet been available to do the work. The inspector understood that several people were going in and out of the water treatment area each week. She noted that it was a tight area where workers would be very close to the hanging panels.

Inspector Hakala cited the mine for a violation of 30 C.F.R. § 57.12030, which requires that "When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized."

I credit the testimony of Inspector Hakala that there were defects in the chains that weakened their effectiveness. It was unclear from her testimony whether the damage to the chains was enough to contribute to a fall or whether some work or vibration was necessary to contribute to the failure of the chains. However, the panels were heavy and there was activity in the mine that could have loosened or weakened the chains further. I find that the Secretary has demonstrated a violation of the mandatory standard. Because the mine was aware of the condition based on the Cal-OSHA inspection but had hired someone to fix the panels, I affirm the Secretary's moderate negligence assessment.

The Secretary alleges that the violation was reasonably likely to result in an injury causing lost workdays or restricted duty and that it was S&S. The Secretary has proven that a violation occurred, satisfying the first element of the *Mathies* test for S&S.

To satisfy the second element, the Secretary must prove the existence of "a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation." *Mathies*, 6 FMSHRC at 3-4. Here, the inspector observed that the chain links supporting the electrical panels appeared stressed and the panels swayed when touched. She observed that one of the S-hooks was pulling away from the wall and one of the chains had signs of cracks. The maintenance work in the area, such as scaling and setting timbers, could create a vibration that could cause the panels to fall. Given that the panels were heavy and the ability of the chains to hold their full weight was compromised, I find that the Secretary has demonstrated that the violation created a discrete safety hazard of the panels falling. The inspector observed that conditions in the area were tight and that miners would be in close proximity to the panels. The presence of timbers for roof support made it especially difficult to maneuver in the area. While there is some dispute as to how many people routinely worked in the area, it is clear that scaling had to be done and the water treatment area maintained, indicating that someone would be in the area two to three times each week. Such a person would likely be seriously injured if a panel were to fall. Therefore, I find the violation to be S&S.

D. Citation No. 8873030

In addition to inspecting the water treatment plant, the inspector and Carney traveled the secondary escapeway. Citation 8873030 concerns conditions in the secondary escapeway at the 1100-1200 level. Carney told Inspector Hakala that the escapeway had been examined and the roof scaled on the day prior to the inspection. But Hakala observed loose and cracked material in a number of areas as she walked the escapeway, an indication to her that the roof had not been properly scaled. She believed the loose materials were obvious and should have been pried off before anyone traveled the escapeway. Some of the loose areas were as large as one and a half feet wide by two feet long. If these fell, they would be likely to cause fatal injury. While there were roof bolts in places, some of the loose materials were not near the bolts. The Secretary produced photographs showing the condition, though they were not particularly illustrative due to the dark conditions in the mine. Gov't Ex. 4 at 4-10. Hakala did not conduct sounding tests and the roof was not making any sounds, but Carney tested an area with a bar and material fell. Hakala understood that miners did not regularly access the escapeway except for maintenance, but that they should be checking it every time they went underground, approximately two to three times per week.

David Cochrane confirmed that scaling was done in the secondary escapeway on a monthly basis, and it had been done by an independent contractor the previous day. The contractor, Cole McGowan, testified that he and another contractor had spent two days scaling the secondary escapeway. Cochrane had not inspected the area because of the safety drill the previous day, but McGowan had told him he had finished. McGowan testified that he had performed the scaling thoroughly, taking down any loose ground with a scaling bar. He stated that no material was falling or obvious, but that he did bring some material down. He also brought down any material that sounded drummy, even if it was not loose. He stated that

typically he moved the material brought down during scaling to the side, but could not completely remove it because of the difficulty of getting the appropriate equipment into the area. Cochrane and Dutton testified that hard hats would be worn in the area, and any materials that would have fallen would not have been large enough to injure someone.

Cochrane testified that when McGowan scaled the area to abate the citation, he was able to bring down only a few pieces, none bigger than egg size. Randy Dutton, who also assisted with the scaling, stated that the only pieces large enough to hurt someone were low on the ribs. Inspector Hakala was not present for the termination, but believed that large pieces were brought down. The termination photos show a few large pieces, though it is unclear whether they were brought down from the roof or the ribs.[1] *See, e.g.*, Gov't Ex. 4 at 12, 17. It is also possible that the pieces were brought down in prior scaling, given that the area had not been cleaned in over a year.

Inspector Hakala issued Citation No. 8873030 based on the conditions in the secondary escapeway. The Secretary alleges a violation of 30 C.F.R. § 57.3200, which requires that:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

As stated with regard to Citation No. 8873032, the Commission has stated that a number of factors should be considered in determining whether loose ground is present, including, but not limited to: "the results of sounding tests, the size of the drummy area, the presence of visible fractures and sloughed material, 'popping' and 'snapping' sounds in the ground, the presence, if any, of roof support, and the operating experience of the mine or any of its particular areas." *ASARCO, Inc.*, 14 FMSHRC at 952; *Amax*, 8 FMSHRC at 1149.

McGowan and the inspector walked the secondary escapeway a day apart, but had differing views of the roof conditions. McGowan believed he had thoroughly scaled the area just prior to the inspection, whereas Hakala saw roof problems including cracks and loose material in a number of areas. McGowan admitted that it was possible for the ground material to have shifted overnight. In any case, I credit the inspector's testimony with regard to the roof conditions. While she did not conduct sounding tests or observe popping or snapping sounds, she noticed cracks and loose material. There were roof bolts in the area, but some loose areas were not captured by the bolts. Accordingly, I find that there was a ground hazard as alleged by

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[1] Respondent argues that evidence of termination should not be admitted because it constitutes evidence of subsequent remedial measures, which is inadmissible as proof of culpability under Federal Rule of Evidence 407. However, the policy behind the Federal Rule is to avoid discouraging safe conduct after an accident. That policy is inapplicable here, where abatement of the alleged violation is required by statute. *See* 30 U.S.C. § 814(b). Accordingly, I find that evidence of abatement measures is admissible, but I do not rely on it as evidence of the violation.

the Secretary. Because there was no barrier or warning sign in the area, the condition was in violation of § 57.3200.

The Secretary alleges that the violation was the result of moderate negligence. Because the area had been recently scaled, I agree that the negligence was moderate.

The Secretary alleges that the violation was reasonably likely to result in a fatal injury and was S&S. Respondent offered evidence that miners would be wearing hard hats and any material that fell would be small and therefore would not injure a miner. However, Hakala observed loose materials that were large enough to injure or kill a person if they fell. While the loose materials were only in some areas of the escapeway, given that miners travelled the area, it was reasonably likely that a fall would injure a miner.

Applying the *Mathies* test to this citation, the Secretary has proven that a violation occurred. The inspector observed fractures and loose materials, which indicate that the hazard of falling material was present, satisfying the second *Mathies* element. Some of the loose rocks were large and miners were frequently in the area. Even though some of the loose rocks were small, a small falling rock could still cause serious injury to a miner, even one wearing a hard hat. *See Springfield Underground, Inc.*, 17 FMSHRC 613, 620 (Apr. 1995) (ALJ) (upholding S&S for violation of § 57.3200 where only fist-sized rocks were brought down in abatement, because those could still seriously hurt someone). I find that a fall of materials would be likely to cause serious injury, satisfying the third and fourth elements. Accordingly, the citation was properly designated S&S.

IV. PENALTY

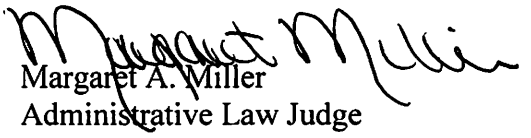
The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that in assessing civil monetary penalties, the judge must consider six statutory penalty criteria: the operator's history of violations, its size, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The Secretary has proposed a penalty of $243.00 for Citation No. 8873033, the violation related to the electrical boxes and a penalty of $807.00 for Citation No. 8873030, the violation

related to hazardous ground conditions in the escapeway. Sutter Gold is a small operator for purposes of penalty calculations. The Secretary introduced the mine's history of violations, which shows that the mine had two violations in the year prior to the inspection at issue. Gov't Ex. 7. With regard to the two violations at issue, the Secretary has proven that the operator was moderately negligent and the violations were reasonably likely to cause serious injury. The parties have stipulated that the operator demonstrated good faith in abating the violations. Jt. Stips. ¶ f. No evidence was presented that the proposed penalties would affect the operator's ability to continue in business. Accordingly, I find that a penalty of $500.00 is appropriate for Citation No. 8873033 and because the violation was extensive, I find that a penalty of $1,000.00 is appropriate for Citation No. 8873030.

V. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $1,500.00 within 30 days of the date of this decision.



Margaret A. Miller
Administrative Law Judge

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