FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

JUL 16 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. WARRIOR INVESTMENT COMPANY, INC., Respondent.	CIVIL PENALTY PROCEEDING: Docket No. SE 2014-388 A.C. No. 01-03419-351947 Mine: Maxine-Pratt Mine

DECISION

Appearances: Lauren A. Polk, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado for Petitioner

J.D. Terry, Esq., Warrior Investment Company, Inc., Japser, Alabama for Respondent

Before: Judge Barbour

In this civil penalty case arising under sections 105(d) and 110(i) of the Federal Mine Safety and Health Act of 1977 (Mine Act), as amended (30 U.S.C. §§ 815(d), 820(i)), the Secretary of Labor (Secretary) on behalf of his Mine Safety and Health Administration (MSHA) seeks the assessment of civil penalties for two alleged violations of mandatory safety standards for the nation's underground coal mines. The standards are set forth at 30 C.F.R. Part 75. In citing the alleged violations MSHA's inspectors made findings as to whether the violations were significant and substantial contributions to mine safety hazards (S&S violations). They also made findings regarding the violations' gravity and the negligence of Warrior Investment Company, Inc. (Warrior Investment or the company). The violations purportedly occurred at an underground bituminous coal mine owned and operated by Warrior Investment. The mine is located near Jasper, Alabama.

Following issuance of the citations, the Secretary proposed civil penalties. When the company contested the Secretary's assessments, the Secretary filed the subject petition requesting the Commission assess the penalties as proposed. The company answered, admitting it was subject to the Mine Act, but denying the violations occurred, or, if they did, stating that the proposed penalties were inappropriate. The Commission's Chief Judge assigned the case to the court, which directed the parties to engage in discussions to determine if the alleged violations could be settled. The court advised the parties that it would receive evidence and arguments

concerning allegations the parties could not settle. The parties ultimately agreed to settle one of the violations. The other violation was tried on March 18, 2015, in Birmingham, Alabama.

THE MINE and THE INSPECTION

The company's Maxine-Pratt mine contains four belt conveyers. Tr. 23. The violation that went to hearing allegedly occurred on the 15 West section. *Id.* Two conveyers are on the section, 15 West and 15-5. *Id.* The 15 West belt runs east-west, and the 15-5 belt runs north-south. Tr. 64-65. The alleged violation occurred on the 15-5 belt. Tr. 32-33.

Randall Weekly is an MSHA inspector. Tr. 108. At the time of the events in question, he had over nine years of experience with MSHA. *Id.* On the morning of March 5, 2014, Weekly traveled to the Maxine-Pratt Mine to continue an earlier inspection. Tr. 112-113. Shortly after arriving and before traveling underground, Weekly met with mine foreman Joseph Holbrook. Tr. 113. Weekly learned that earlier that morning section foreman Charles Gunroe was injured while cleaning coal and mud off part of the 15-5 conveyer belt. *Id.* Weekly also learned that Gunroe was being brought to the surface, and he briefly spoke with Gunroe about the accident and Gunroe's injury before Gunroe was taken to the hospital. Tr. 114-115. Weekly then went underground, spoke to several of the miners who worked with Gunroe, concluded the accident was the result of a violation of a mandatory safety standard, and issued Citation No. 8526289 to the company for the alleged violation.[1] The citation was issued pursuant to section 104(a) of the Act. 30 U.S.C. §814(a).

THE ALLEGED VIOLATION

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY
8526289	3/5/14	75.1725(c)	$5,961

The citation states:

> On the 15 west section on the 15-5 belt, the belt was not locked out or blocked against motion when maintenance was being performed on it on the day shift. The section [f]oreman was cleaning coal and mud off of a top roller frame when the belt started pulling his arm between the top belt and roller injuring his arm severely enough that he was transported to the hospital to receive medical treatment. If this condition is allowed to exist persons working on the belt would receive permanently disabling or fatal injuries while working on the belt.

[1] Weekly's inspection additionally resulted in the issuance of Citation No. 8529309, the citation the parties settled.

Gov't Exh. 1.

Section 75.1725(c) states:

> Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.

Charles Gunroe, the injured second shift section foreman, was called to testify by the Secretary. Tr. 16. Gunroe stated that at the time of the accident he had 14 years of mining experience. Tr. 17. On March 5, he arrived at the mine at 6:00 a.m. and proceeded to the face of the 15 West section. Tr. 25-26. Gunroe and his crew began to mine when the tailpiece of the 15-5 conveyer belt started spilling coal. Tr. 26. Gunroe instructed his men to stop mining and to adjust the tailpiece. *Id.* The belt was shut down. There were piles of coal at each end of the belt. Tr. 28. Gunroe thought that the tailpiece and rollers near it needed to be cleaned and adjusted to prevent the spillage and to keep the belt from breaking. *Id.*

As Gunroe and his crew were cleaning and adjusting a roller near the tail piece, Gunroe noticed mud on the roller. Tr. 33. Gunroe was holding a piece of wood. Tr. 34. He attempted to remove the mud, using the piece of wood. Tr. 40. Due to the low roof, Gunroe was on his knees and he bent over and toward the belt as he attempted to remove the mud. Tr. 46-47. Gunroe stuck his arm between the frame of the belt and the belt roller. Tr. 38. As he did so, a miner on Gunroe's crew turned on the belt. Tr. 48. Almost immediately, Gunroe's arm was pulled between the belt and the roller. *Id.* (Gunroe believed that the belt caught his shirt, and this caused his arm to be caught. *Id.*) The belt was quickly turned off. Tr. 49. Gunroe's crew cut him free of the belt. Tr. 49-50. Gunroe testified that he was in a lot of pain. Tr. 49. He stated he felt like an elephant was standing on his arm. *Id.* He knew he needed medical attention and began to ascend from the mine, meeting Holbrook on the way. Tr. 51. Once he reached the surface, Gunroe briefly met with Weekly before heading to the hospital. Tr. 52. A representative of the company, Bobby Meadows, accompanied Gunroe to the hospital. *Id.*[2]

THE VIOLATION

The court finds that the violation occurred as charged. The language of the standard is clear and must be applied as written. The standard pertains to machinery or equipment that is being repaired or maintained. *Walker Stone Co.*, 19 FMSHRC 48, 51 (Jan. 1997)[3]; *Jim Walter Res., Inc.*, 28 FMSHRC 983, 987-88 (Dec. 2006). The cited conveyer belt was both machinery

[2] Gunroe still had a knot in his arm at the time of hearing, but suffered no permanent damage to his arm, regaining full use of it. He was unable to work in the mine for a month after the accident, during which time he sat in the mine office or received physical therapy. Tr. 55-56.

[3] Although *Walker Stone* concerns 30 C.F.R §56.14105, the metal nonmetal standard pertaining to procedures used during repairs or maintenance of machinery or equipment, the Commission's holdings regarding interpretation of section 56.14105 and the meaning of "repair" and maintenance apply equally to similarly worded section 75.1725(c).

("all devices . . . which permit a thing to function or accomplish an end") and equipment ("the implements . . . used in operation or activity"). *Webster's Third New Int'l Dictionary, Unabridged* 768 (1986). Equally important, cleaning the mud and coal from the rollers and adjusting the tail piece were both "repair" ("to restore to a sound . . . state") and maintenance ("[p]roper care, repair, and keeping in good order"). *Webster's* at 1923 (1986); *A Dictionary of Mining, Mineral, and Related Terms* 675 (1968).

There is no doubt that the belt was not powered off or blocked against motion when Gunroe was injured. Tr. 135. The court accepts Gunroe's testimony that the belt needed to be shut down and the tailpiece cleaned to prevent the belt from breaking and to stop the spillage. Tr. 26-28. The court rejects the company's assertion that maintenance was not being performed on the belt at the time of injury, as Gunroe's act of attempting to remove the mud from the roller was part of his overall effort to "[keep the belt] in good order" and thus was clearly an act of maintenance within the meaning of section 75.1275(c). *Webster's* at 1923 (1986). Because Gunroe was performing repair and maintenance on the 15-5 belt, because the power to the belt was not locked out even though the belt was shut down, and because the belt was not blocked against motion, the company violated section 75.1725(c).

GRAVITY and S&S

As the Commission has noted, the gravity penalty criteria and a finding of S&S are not identical, but are frequently based on the same evidence. *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (Sept. 1987). The court finds Weekly's analysis of the gravity of the violation persuasive. Weekly noted that Gunroe was lucky to have survived, as accidents of this sort are often at least permanently disabling, and if Gunroe had not been quickly cut free and the power to the belt had not been quickly shut off, the result easily could have been fatal. Tr. 133. The court finds that the violation was serious.

The court further agrees with the Secretary that the violation was S&S. A violation is S&S, "if, based upon the particular facts surrounding the 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., National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, 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 in question will be of a reasonably serious nature.

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

The court believes that all four elements have been met. There was an underlying violation of a mandatory safety standard. Power to the belt was not off and the belt was not blocked while maintenance was underway, creating a discrete safety hazard. As evidenced by the fact that the accident happened, there was a reasonable likelihood that an injury would result, fulfilling the third element. Lastly, it was reasonably likely that the injury in question would be reasonably serious. Indeed, as noted above, Gunroe was lucky to survive. Tr. 133.

NEGLIGENCE

Weekly also found that the company was highly negligent in allowing the violation. Gov. Exh. 1. He noted that Gunroe was an agent of the operator as a foreman and knew what he was doing was wrong.[4] Tr. 157. While it is true, as Respondent's counsel noted, that there is an exception to imputing the negligence of a supervisor to the company, Gunroe's conduct does not fall within the exception. The exception only applies ["w]here . . . an operator has taken reasonable steps to avoid a particular class of accident and the erring supervisor unforeseeably exposes only himself to risk." *Nacco Mining Co.*, 3 FMSHRC 848, 850. In this case, neither element of the exception is satisfied.

The court recognizes the company trained Gunroe on belt safety. However, Gunroe must not have paid attention. He testified that he had cleaned the rollers in the same way before and he had witnessed other miners doing it as well. Tr. 48. In the context of continuing mining, it was not unforeseeable that the accident would happen. In addition, the company offered no evidence Gunroe received any discipline for his actions or that it took reasonable steps to avoid the type of accident that was foreseeable. Gunroe was also not the only one at risk; by not locking and tagging out the belt, the other miners were also at risk of the belt suddenly being turned on. The court concludes the unsafe practice was pervasive and the company should have known about it and taken steps beyond routine training to stop it.

High negligence is appropriate when the actor has knowledge of the violative condition and fails to act. *Deshetty, emp. by Island Creek Coal Co.*, 16 FMSHRC 1046, 1053 (May 1994). Gunroe was aware that the belt was not locked out and not blocked against motion when he attempted to clean the mud. Tr. 37. Given this and the fact that the exception to attributing the negligence of a supervisor to the company does not apply, the court agrees with the Secretary that the company was highly negligent.

OTHER CIVIL PENALTY CRITERIA

The parties stipulated that the company exhibited good faith in abating the violation. Joint Exh. 1 at 2. No testimony was given on the size of the company. Therefore, the court accepts the Secretary's findings as to the size of the company and as a result finds that while the subject mine is small, the company as a controlling entity is large. In addition, no testimony was given regarding the impact of the civil penalties assessed on the company's ability to continue in business. Therefore, the court assumes there is no impact. The Secretary submitted a printout purporting to show all violations cited and assessed at the mine that became final between

---

[4] Weekly reached the conclusion that Gunroe knew what he was doing was wrong based on Gunroe's experience, training, and position. Tr. 136-137.

September 5, 2012, and March 4, 2014. Gov't Ex. 5. There are 83 such final violations. The court finds that the company had a large history of prior violations.

ASSESSMENT OF CIVIL PENALTIES

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
8526289	3/5/14	75.1725(c)	$5,961	$5,961

The court finds that the violation was serious and the company's negligence was high. Given these findings and the other civil penalty criteria, the court assesses a penalty of $5,961 for the violation.

SETTLED VIOLATION

The parties agreed to settle one alleged violation. At the close of the hearing, counsel for the Secretary read the details of the settlement into the record. Tr. 217-221. The settlement is as follows:

CITATION NO.	DATE	30 C.F.R.§	PROPOSED PENALTY	SETTLEMENT AMOUNT
8529309	4/23/14	75.220(a)(1)	$1,026	$700

There are no modifications to the citation. However, the reasons for the settlement were explained by counsel after which the settlement was approved on the record by the court. Tr. 221.

ORDER

In view of the conclusions, findings, and approval set forth above, within 30 days of the date of this decision the company **SHALL PAY** civil penalties in the amount of $6,661 ($5,961 for the contested violations and $700 for the settled violations).[5] Upon **PAYMENT** of the penalties, this proceeding **IS DISMISSED.**[6]

David F. Barbour
Administrative Law Judge

---

[5] Payment shall be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, BOX 790390, ST. LOUIS, MO 63179-0390.

[6] This decision was prepared by Commission Intern Cole Stevens.

Distribution: (Certified Mail)

Lauren A. Polk, Esq., U.S. Department of Labor, Office of the Solicitor, 1244 Speer Blvd., Suite 216, Denver, CO 80204

J.D. Terry, Esq./Safety Director, Warrior Investment Co., Inc., 218 Highway 195, Jasper, AL 35503

/db