FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th STREET, SUITE 443
DENVER, CO 80202-2536
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. WM J CLARK TRUCKING SERVICE, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2015-55 A.C. No. 04-04119-361451 Mine: Clark Pit

DECISION

Appearances: Timothy Turner, United States Department of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

William J. Clark, *pro se*, King City, California, for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of a civil penalty filed by the Secretary of Labor against William J. Clark Trucking Service, Inc., ("Clark") 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 eight alleged violations, seven of which were issued pursuant to section 104(a) of the Act, and one of which was issued pursuant to section 104(g)(1) of the Act. The Secretary originally proposed penalties totaling $8,752.00. Prior to the hearing, the parties reached a settlement of seven of the alleged violations. Respondent contests the sole remaining violation, Order No. 8703429. The parties presented testimony and evidence at a hearing held on July 30, 2015, in Monterey, California.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Order No. 8703429 was issued by MSHA Inspector Bryan Chaix on July 23, 2014, pursuant to section 104(g)(1) of the Act. The order alleges that Respondent violated 30 C.F.R. § 46.5(a) by failing to ensure that a mechanic at the mine had received new miner comprehensive training. The inspector determined that the condition was reasonably likely to result in a fatal injury, was significant and substantial, and was a result of the operator's high negligence. The Secretary has proposed a penalty of $6,624.00 for this alleged violation.

The parties have stipulated to the jurisdiction of the Mine Safety and Health Administration ("MSHA") and the Federal Mine Safety and Health Review Commission. The

parties agree that Clark is a small operator and that Secretary's Exhibit 1 accurately reflects its history of assessed violations.

The primary issue before the Court is whether a mechanic who worked at the mine on an intermittent basis is required to have comprehensive training. I find that he does, and that the Secretary has proven the violation as cited.

The Clark Pit

Wm. J. Clark Trucking Service's Clark Pit is a surface sand and gravel mine in Monterey County, California. The mine is a small operation with twelve or fewer employees. The mine does not have a full-time mechanic, but rather contracts with an independent mechanic, Hans Wittström, when repairs are needed. The mine employees perform minor maintenance on mine equipment, and Wittström is called for more complex repairs. Wittström testified at hearing that when he is working in the pit, he is always within sight of the foreman or another miner, and that if the other miner is not in his immediate presence, it is because there are no hazardous conditions present.

The Secretary introduced Wittström's work orders for jobs done for Clark in the two years prior to the violation at issue. Sec'y Ex. 25. The work orders show that Wittström worked for Clark twelve days in June 2014, the month prior to the inspection resulting in the alleged violation. Wittström worked on a crane, a scale, a scraper, a gate, a car lift, and a pickup truck that month, as well as on a Mercedes. On most of the days, he worked between six and eight hours and work was done either in the mine shop or in the pit area. In May 2014, Wittström worked fifteen days for Clark, usually between six and eight hours. He worked on a water truck, the plant gear box, a forklift, a load truck, and a cone crusher, as well as on a boat and the Mercedes. In April 2014, Wittström worked for Clark ten days on a truck as well as the boat, the Mercedes, a Land Rover, and a Porsche. In March 2014, he worked for Clark thirteen days, including on a trap wagon, several trucks, a compactor, a cone crusher, loaders, and the Mercedes. Wittström worked only one day for Clark in February 2014, and five in January 2014. This is consistent with the seasonal operation of most sand and gravel mines in the region. The remaining work orders extending back to August 2012 indicate a similar pattern of work: Wittström worked for Clark an average of thirteen days per month from April through November, and an average of three days per month from December through March. The most he worked in one month was nineteen days, in both April 2013 and October 2012. He worked zero days in January and February 2013.

The work orders along with Wittström's testimony at hearing demonstrate that the mechanic had, over the course of the past few years, worked on mobile and stationary equipment at the mine, including loaders, dozers, the crusher, guards and conveyors, as well as personal vehicles. Some of the work was done in the pit and some was done in the shop located at the mine.

MSHA's Inspection

On July 22, 2014, MSHA Inspector Bryan Chaix traveled to the Clark Pit to conduct an inspection. Chaix has been a mine inspector for eight years, and has had training and experience not only as an inspector but also as a miner. In his initial inspection, Chaix issued a number of citations for faulty equipment and withdrew three miners who had not been adequately trained. The next day, July 23, 2014, he was driving by the pit on the way to another mine when he observed a number of miners working in the pit area. Chaix decided to revisit the mine, since he did not believe the three miners could have received the required annual refresher training in the time since he withdrew them the previous day. As he approached the mine, Chaix observed a truck engaged in dumping, which the foreman later told him was recycling work. Chaix next encountered Wittström, the mechanic, working to repair the equipment that Chaix had cited the previous day. Chaix had not observed Wittström on his previous visit to the mine.

Chaix discussed with the foreman and Wittström the duties assigned to Wittström, the hazards he was exposed to, and the amount of time he spent at the mine. They informed Chaix that Wittström had received no mine safety training at all. At hearing, Chaix noted that he had cited a number of violations on mobile equipment on July 22 and testified that, in his view, the equipment was not being maintained by a person who knew and understood the requirements of the MSHA regulations. Based on his observations at the mine, Chaix issued Order No. 8703429, alleging a violation of 30 C.F.R. § 46.5(a) for failure to provide comprehensive new miner training to Wittström. According to Chaix, the mine operator was aware of the training requirement and had been cited under the same standard during a previous inspection. Chaix ordered the mine to withdraw the mechanic until he had completed new miner training.

A. Violation

The Secretary alleges that Clark violated 30 C.F.R. § 46.5(a), which requires a mine operator to provide any "new miner" with 24 hours of specified training within 90 days of his first day of work. A "new miner" is defined as "a person who is beginning employment as a miner with a production-operator or independent contractor and who is not an experienced miner." 30 C.F.R. § 46.2(i).

Clark does not argue that Wittström is an "experienced miner," but rather that he is not a "miner" at all. Persons who are present at the mine but do not fall under the definition of "miner" are subject to less demanding training requirements: they must either receive site-specific hazard awareness training or be accompanied at all times by an experienced miner. 30 C.F.R. § 46.11.

A "miner" for purposes of § 46 is defined as follows:

> (1)(i) Any person, including any operator or supervisor, who *works at a mine* and who is *engaged in mining operations*. This definition includes independent contractors and employees of independent contractors who are engaged in mining operations; and
> (ii) Any construction worker who is exposed to hazards of mining operations.

(2) The definition of "miner" does not include scientific workers; delivery workers; customers (including commercial over-the-road truck drivers); vendors; or visitors. This definition also *does not include maintenance or service workers who do not work at a mine site for frequent or extended periods.*

30 C.F.R. § 46.2(g) (emphasis added).

Here, there is no dispute that Wittström was a mechanic who regularly repaired and maintained mobile and stationary mining equipment at the mine site. Accordingly, I find that he was engaged in "mine operations," and that he was a "maintenance worker." The issue of whether he was required to have comprehensive new miner training thus turns on whether he worked "at a mine site for frequent or extended periods." 30 C.F.R. § 46.2(g).

"Frequent" and "extended" are not further defined in the regulations. The MSHA Program Policy Manual provides some guidance, defining "frequent" as "a pattern of exposure to hazards at mining operations occurring intermittently and repeatedly over time." III MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 46, at 20 (2014) ("*PPM*"). The manual defines an extended period as "exposure to hazards at mining operations of more than five consecutive work days." *Id.* The terms are also discussed in the ALJ decision *Kent Coal Mining Company*, 12 FMSHRC 126 (Jan. 1990) (ALJ).[1] In that case, the judge found that two workers who had performed most of the drilling at a surface coal mine in the previous five years, averaging three or four days per week at the mine, had worked at the mine for "frequent or extended periods." *Id.* at 131. In contrast, two workers who had drilled at the site only once prior to the violation were governed by a separate training provision for short-term workers. *Id.*

In this case, Wittström's testimony and work orders show that in the two years prior to the violation, he worked for Clark an average of thirteen days per month from April through November, and three or four days per month from December through March. He sometimes worked only a few hours, but more often worked a full day. This is the type of "intermittent and repeated" presence described in the MSHA Program Policy Manual as "frequent." *See* III *PPM*, Part 46, at 20. It is also similar in scope to the three or four days per week worked by the drillers who were found to be "miners" in *Kent Coal Mining Company.* 12 FMSHRC at 131.

Clark argues that Wittström should not be considered a miner because much of his work was done in the shop adjacent to the pit rather than in the pit itself. However, a "mine site" for purposes of the training regulations is "an area of the mine where mining operations occur." 30 C.F.R. § 46.2(f). Since the shop is used for the "maintenance and repair of mining equipment," a type of "mine operation" under the regulations, it clearly qualifies as a "mine site." 30 C.F.R. § 46.2(f), (g), (h). Clark also insists that it is impossible to tell from Wittström's work orders whether he was working at the mine or at another location, such as Clark's separate landscaping yard. However, the work orders normally indicate an alternate location when Wittström was not

[1] *Kent Coal Mining Company* was decided under the separate training requirements for surface coal mines, 30 C.F.R. § 48, but those regulations include a provision similar to the one at issue, which requires that maintenance workers "contracted by the operator to work at the mine for frequent or extended periods" obtain new miner training. 30 C.F.R. § 48.22(a)(1).

working at the Clark Pit. Jobs with those indications were not included in the calculation of Wittström's time at the mine.

Based on the above analysis, I find that Wittström worked at the mine site on a "frequent" basis and so was a "miner" under § 46 who was required to have comprehensive new miner training.

Clark additionally argues that the mine has complied with regulations by ensuring that when Wittström is at the mine, he is always accompanied by another miner. Clark directs the Court's attention to an ALJ decision in which a mine was found not to be in violation of hazard training standards where workers were accompanied by an experienced miner with knowledge of the specific hazards in the mine. *Apex Quarry LLC*, 36 FMSHRC 211 (Jan. 2014) (ALJ). But while regulations governing hazard training permit this arrangement, the new miner training provision does not: new miner training is mandatory for miners. Because I find that Wittström was a miner who was required to have but did not receive comprehensive training, I conclude that Clark violated 30 C.F.R. § 46.5(a).

B. Gravity and S&S

The Secretary asserts that Clark's violation created the reasonably likely risk of fatal injury and that it was significant and substantial ("S&S"). A "significant and substantial" 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 significant and substantial "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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained:

> 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.

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula, in which the Secretary must establish that there is a reasonable likelihood that the hazard will result in an injury. The Commission has explained that the third element of the formula "requires that the Secretary 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 discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257 (Oct. 2010) (affirming an

S&S violation for using an inaccurate mine map). The Commission clarified 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. *Id.* at 1280-81. The Commission reaffirmed its position in *Cumberland River Coal,* 33 FMSHRC 2357, 2365 (Oct. 2011).

In *Lehigh Southwest Cement*, 33 FMSHRC 3229, 3243 (Dec. 2011) (ALJ), Judge Paez upheld the S&S designation for a violation of § 46.5(a), finding that the failure to provide new miner training resulted in "the hazard of a partially-trained miner[.]" Specifically, the judge noted that the miner was working in close proximity to heavy mobile equipment, which created a reasonably likely risk that a fatal injury would occur. *Id.* at 3242. The judge also relied on a provision of the Mine Act, which recognizes that a miner who has not received the requisite safety training is "a hazard to himself and to others." 30 U.S.C. § 814(g)(1).

Applying the *Mathies* test to the case at hand, I find that the Secretary has established the first element by demonstrating the violation of a mandatory safety standard. The Secretary has also established that the failure to provide new miner training created the hazard of an untrained miner, satisfying the second element of the *Mathies* test. Here, the untrained miner was working on and around mining equipment and in the area where crushing and mining activities were taking place without understanding the attendant hazards and safety requirements. Additionally, he was responsible for repairing equipment for others to use, but had not been trained in the safety regulations applicable to that equipment. This hazard was a danger both to the miner himself and to others at the mine, and was reasonably likely to result in a serious injury, establishing the third and fourth elements of the *Mathies* test. Accordingly, I conclude that this violation was S&S.

C. Negligence

MSHA Inspector Chaix determined that the violation was a result of high negligence on the part of the operator. He based his determination on the fact that the mine had numerous prior training violations, including several under the standard at issue here. The Secretary introduced at hearing a record of a previous violation under § 46.5 from March 2013 involving two miners who had not received new miner training. Sec'y Ex. 6. Chaix further expressed that he believed training was a pervasive problem at the mine: he witnessed multiple safety violations during his inspections, including one involving a miner who claimed to have received safety training the day before. The mine foreman also admitted to Chaix that training had been a problem at the mine for several years.

In *Lehigh Southwest Cement*, Judge Paez upheld the high negligence designation for a violation of § 46.5(a) for failure to provide training to a construction worker, noting that the mine's safety director had admitted that he was familiar with the requirements of § 46 and that the status of construction workers as "miners" was clearly outlined in the regulations. 33 FMSHRC at 3243. Here, while the mine owner does not claim to have special expertise in the training regulations, the operator still had reason to know that training was required for Wittström. The operator was put on notice by its previous training violations that training was an area that needed to be addressed, and this should have led it to inquire whether training was required for all of its workers, including Wittström. While Wittström may not have been a

"miner" in the layperson's sense of the term, he was very clearly exposed to mine hazards on a regular basis. A reasonably careful mine operator would have taken note of this and provided the necessary training. I affirm the Secretary's determination that Clark was highly negligent in committing this violation.

II. 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 Act delegates the duty of proposing penalties 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 "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria which include the history of violations, the size of the operator, negligence, gravity, the ability to continue in business, and good faith abatement. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is "bounded by proper consideration of the statutory criteria and the deterrent purpose[s] . . . [of] the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence and shows a history of three training violations in the past two years for this mine. Sec'y Ex. 1. The mine is a small operator. The parties have stipulated that the penalty as proposed will not affect its ability to continue in business, and that Respondent demonstrated good faith in abating the citations and orders. Jt. Stip. ¶ 7. The gravity and negligence of the citations and orders are discussed above. I find a penalty of $6,624.00 is appropriate for Citation No. 8703429.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C.§ 820(i), I assess a penalty of $6,624.00. The other citations and orders in this docket are addressed in a separate order granting the Secretary's motion for partial settlement. Accordingly, William J. Clark Trucking Service, Inc., is **ORDERED** to pay the Secretary of Labor a total penalty of $6,624.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

Distribution:

Timothy Turner, U.S. Department of Labor, Office of the Solicitor, Cesar Chavez Memorial Building, 1244 Speer Boulevard, Suite 216, Denver, CO 80204

William J. Clark, Wm. J. Clark Trucking Service, P.O. Box 682, King City, CA 93930