FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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WASHINGTON, D.C. 20001

October 17, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2001-330-M
Petitioner	:	A.C. No. 41-03894-05504
v.	:	
	:	
HAMILTON PIPELINE, INC.,	:	
Respondent	:	Plant 530

DECISION

Appearances: Christopher V. Grier, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, on behalf of Petitioner;
William H. Sommers, Esq., The Gardner Law Firm, San Antonio, Texas, on behalf of Respondent.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.
§ 815. The petition alleges that Hamilton Pipeline, Inc., is liable for 15 violations of mandatory safety and health standards applicable to surface metal and nonmetal mines.[1] A hearing was held in San Antonio, Texas. The parties submitted briefs following receipt of the transcript. Neither party submitted a reply brief. At the commencement of the hearing, the Secretary vacated two of the citations. The Secretary also modified two of the remaining citations and Respondent agreed to pay reduced penalties in the amount of $110.00. Respondent withdrew its notices of contest as to three of the remaining citations. The Secretary proposes civil penalties totaling $1,310.00 for the eight alleged violations remaining at issue. For the reasons set forth below, I find that Hamilton committed four of the alleged violations and impose civil penalties totaling $384.00.

[1] Citation No. 7896144 is listed on the assessment control sheet attached to the petition, but a copy of that citation was not included in the papers filed with the Commission. Respondent advised that that citation was not contested and had been paid, which the Secretary confirmed following the hearing. Citation No. 7896144 is not at issue in this proceeding.

Findings of Fact - Conclusions of Law

Respondent, Hamilton Pipeline Inc., operates a portable crusher, screens and related equipment, producing crushed stone for use in highway construction and other paving projects. In 1988, the equipment had been moved from Del Rio, Texas, to a site near Brackettville, Texas, to produce crushed stone for a highway paving project in that area. When that project was completed in June of 2000, the equipment was moved back to Del Rio. The crusher is operated intermittently, as product is ordered or needed, and such operations are inspected annually by the Department of Labor's Mine Safety and Health Administration (MSHA).

MSHA Inspector, Danny Ellis, arrived at the Del Rio site at approximately 8:30 a.m., on August 22, 2000, to conduct the annual inspection. A locked gate prevented access to the facility. He telephoned the corporate office, some 100 miles away, and waited until approximately 12:30 p.m., for a Hamilton employee, Carlos Caballos, to arrive and unlock the gate. Two men were working at the site that day, but there was no means to contact them. The two men at the site spoke only Spanish. Caballos spoke Spanish and limited English. Ellis spoke only English. His inquiries to the men at the site were translated by Caballos. Based upon the responses to his inquiries and his observations, Ellis concluded that the crusher had been operated for the two month period following the move from Brackettville. Respondent maintains that the plant was in the process of being set up following the move, and that Ellis' conclusion that it had been operated for two months was erroneous.

In the course of the inspection, Ellis issued sixteen citations for alleged violations of safety and health standards, which deviated markedly from the results of previous inspections. A history of violations submitted by the Secretary showed that only two, non-significant and substantial, violations had been issued to Respondent within the 24 month period preceding August 22, 2000. Ellis had inspected the crusher on three prior occasions. Some of the citations he issued on August 22, 2000, were for conditions that neither he, nor other MSHA inspectors, had cited in the past.

The citations at issue will be discussed in the order that evidence was presented at the hearing.

Citation No. 7896146

Citation No. 7896146 alleged a violation of 30 C.F.R. § 56.14112(b), which requires that guards to protect persons from moving machine parts "shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard." The conditions noted on the citation were:

> The finned tail pulley on the belt under the crusher was not guarded. The guards had been removed when the crusher was moved from the Brackettville pit approximately two months ago and not replaced. The guards were found under the crusher motor's fuel tank, in a container.

Ellis concluded that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that one person was affected and that the violation was due to the operator's high negligence. A civil penalty of $259.00 is proposed.

The Violation

Ellis issued the citation because he observed that the guard had been removed and he believed, at the time, that the crusher had been in operation for two months. He was informed that the guard had been removed when the crusher was relocated to Del Rio and had not been replaced. Tr. 46. He also had been informed that the move had taken place about two months before the inspection, and he believed that the plant had been operated during that time. He initially testified that he had been informed that "the plant had been in operation for approximately two months." Tr. 49. Those facts lead him to conclude that the violation was due to the operator's high negligence. Tr. 55, ex. P-2.

In preparation for the hearing, Ellis had an opportunity to examine records maintained by James R. Hamilton, Respondent's President, that showed that key components of the crusher equipment had been moved to the site only shortly before the inspection. Tr. 61. He did not recall the specific wording of his inquiries during the inspection, but realized at the time of his testimony that he probably had been informed only that the crusher had been at the Del Rio site for about two months -- not that the crusher had been in operation for two months. Tr. 73, 78-79, 176. However, he continued to believe that the plant had been operated for production purposes without the guard in place because of the presence of stockpiles and build-ups of material under the plant and belts. He felt that there would have been no reason for one of the men to have been shoveling in the area if there hadn't been significant spillage from operation of the equipment. Tr. 55-56.

Respondent does not contest the fact that the guard had been removed at the time of the inspection. It contends that the plant was in the process of being set up after the move to Del Rio, and that the guard had been removed to make adjustments to the pulley and conveyor belt, which was permissible under the regulation.

The crusher had been moved to the Del Rio site in late June. However, other equipment had not been relocated until shortly before the inspection. The generator, which powered the electrically driven conveyor belts, had been delivered on July 13, 2000, and a new battery was purchased for it on July 14, 2000. Tr. 255-56. The move was not completed until Saturday, August 19, 2000, just three days before the inspection. Tr. 61, 257-61. Setting-up of the equipment was delayed because of a need to modify the "rock box," a stationary funnel-like device into which rock is dumped and fed to the crusher. Modifications to the crusher, done at Brackettville, required changes at Del Rio before the crusher could be positioned under the rock box. Tr. 262-63. This work proceeded at a somewhat leisurely pace because there were adequate stockpiles of material at the site, remaining from when the crusher had last been operated there two years before, and there was no reason to hurry the installation. Tr. 250, 301-

02.

The plant consists of two main pieces of equipment -- the crusher and screens. The product, crushed stone, is moved between the equipment and to stockpiles by conveyor belts. The final set-up of the equipment is depicted in Exhibits R-1 and R-6. The heaviest piece of equipment, the crusher, must first be positioned under the rock box. The various conveyor belts and the screen are then positioned to facilitate the flow of material. The conveyor belt frames are welded in place after being leveled and positioned with relation to the crusher and screen. Tr. 263-66. The pulleys on the conveyor belts must then be adjusted so that the belt remains on the pulleys and transports the material with a minimum of spillage. James Hamilton explained that new set-ups generally require multiple adjustments to the belts, and the most efficient way to perform the adjustments is to remove the guards and adjust them sequentially, first without material and then when they are loaded. Tr. 266-70, 305-06. The guard in question, along with guards on other belts, had been removed on August 21, 2000, so that the pulleys could be adjusted. Tr. 223.

I reject the Secretary's argument that the plant had been operated for production purposes without the guard in place. Ellis admitted that his initial conclusion that the plant had been in operation for two months was erroneous and apparently had been the product of communication difficulties. His attempt to buttress his conclusion that the plant had been operated by reference to stockpiles and a build-up of material is unconvincing. He had no recollection of the size of the stockpiles that had been left at the site when the plant had been moved from Del Rio two years previously. Tr. 87. Nor did he know how much of the stockpiles remained when the equipment was moved back to Del Rio. The presence of stockpiles does not tend to prove that the plant was operated after it was moved back to the Del Rio site. As to build-up of material, Ellis first testified that the pictures taken during the inspection showed a build-up of material under the plant and belts and that some of it was shown in the picture included in Exhibit P-3. Tr. 56. However, he later conceded that there was no build-up of material shown in that exhibit, but maintained that the build-up was shown in other photographs. Tr. 68, 78-79. However, there was no testimony regarding a build-up of material depicted in other photographs taken at the time of the inspection. Those photographs appear to depict equipment and surrounding areas that are relatively clean, indicating that the crusher had not been operated.

Respondent contends that the power sources of the plant were red-tagged and locked-out of service on the day of the inspection. It is clear, however, that the plant had been operated prior to the inspection. The purchase of a battery for the generator evidences that the electrical power was functional as early as July 14, 2000, and pulleys for conveyor belts were being adjusted on August 21, 2000. Tr. 221. I find that the plant had been operated while at the Del Rio site, but only for the purpose of setting it up, not for running production. I further find that the guard had been removed for the purpose of making adjustments to the pulley, which could not be performed without removal of the guard. Accordingly, I find that the Secretary has failed to carry her burden of proving that Respondent violated the regulation, as alleged in the citation.

Citation No. 7896147

Citation No. 7896147 alleged a violation of 30 C.F.R. § 56.14107(a), which requires that "Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." The conditions noted on the citation were:

> The . . . finned tail pulley on the oversize belt was not sufficiently guarded. The guard would not prevent anyone from accidentally contacting the tail pulley. The end of the guard was almost even with where the tail pulley started. The tail pulley was at the end of the steps that lead to the belt's catwalk. There was a step that was broken that a person could slip on, propelling [him] into the tail pulley.

Ellis concluded that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that one person was affected and that the violation was due to the operator's moderate negligence. A civil penalty of $184.00 is proposed.

The Violation

The condition observed by Ellis is shown in a picture included in Exhibit P-4. A guard had been installed preventing access to the tail pulley. However, the pulley was near the end of the guard and the belt/pulley pinch point was relatively accessible. Ellis determined that a miner could encounter the pinch point accidently while servicing the pulley, cleaning up the area, or in the course of falling from adjacent steps, one of which was tilted at approximately a 45 degree angle. Tr. 100-01. He assessed the operator's negligence as moderate because he believed that the guard had likely been adequate when first installed, and that the hazardous condition developed over time as adjustments were made to the belt and pulley. Tr. 105.

Respondent's defense to the alleged violation is similar to its defense to the previous citation. Respondent elicited from Ellis on cross-examination that he did not know whether the belt had been finally adjusted at the time of the inspection, suggesting that the pulley might have been less accessible by the time the plant was operating for production purposes. Tr. 108. However, Respondent introduced no evidence that subsequent adjustments to the pulley corrected the dangerous condition, which would have supported its argument that this condition was temporary in nature, pending final adjustment of the belt. In any event, the plant was operated in this condition during the set-up process and miners were exposed to the hazard. Ellis also confirmed that he had not identified this condition as a violation in previous inspections. Tr. 109-10. However, he noted that that particular condition, which would have varied over time as the belt was adjusted and repaired, may not have existed during prior inspections. Tr. 112-13.

I find that the guard was inadequate and that the condition violated the regulation. I also concur with Ellis' determinations that the violation was a result of the operator's moderate negligence and that one person was affected.

Significant and Substantial

A significant and substantial ("S&S") violation is described in section 104(d)(1) of the 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." 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).

The Commission has explained that:

> 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.

Mathies Coal Co, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g, Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> We have explained further that the third element of the *Mathies* 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 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (Dec. 1987).

Whether this violation was S&S turns upon the likelihood of injury. It could hardly be disputed that the violation contributed to a discrete safety hazard and that an injury caused by an encounter with the pinch point of the pulley would be serious. I find that there was a reasonable likelihood that the violation would result in an injury. A miner working in the immediate area of

the pulley, cleaning up spillage from the belt, could inadvertently contact the pinch point. Ellis also postulated that inadvertent contact might occur when the pulley was serviced. While it appears that the belt would not generally be running when the catwalk was accessed, a miner could access the catwalk and the tilted stair, while the belt was running and encounter the pulley while trying to prevent a fall. I find that the violation was significant and substantial.

Citation No. 7896148

Citation No. 7896148 alleged a violation of 30 C.F.R. § 56.14112(b), *supra*. The conditions noted on the citation were:

> The guard on the finned tail pulley on the stacker belt had been removed on the side facing the road, and not replaced. The guard had been removed when the crusher was moved from the Brackettville plant approximately two months ago. The tail pulley was approximately 60 inches from the ground. A person could accidentally contact the tail pulley.

Ellis concluded that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that one person was affected and that the violation was due to the operator's high negligence. A civil penalty of $259.00 is proposed.

The Violation

Respondent's defense to this alleged violation is identical to its defense to Citation No. 7896146, i.e., that the guard had been removed so that the pulley could be adjusted during the set-up process. While Ellis was of the opinion that removal of the guard on only one side of the pulley tended to indicate that adjustments to the pulley were not being made, he conceded that it might be possible to adjust the pulley by removing only one guard. Tr. 119-20, 122-23. Hamilton explained that it was difficult to access the other side of the pulley, and it was not improper to attempt to adjust the pulley by removing the guard on only one side. Tr. 282-83.

For the reasons discussed with respect to Citation No. 7896146, I find that the guard in question had been removed for the purpose of making adjustments to the pulley and that Respondent did not violate the regulation.

Citation No. 7896149

Citation No. 7896149 alleged a violation of 30 C.F.R. § 56.14107(a), *supra*. The conditions noted on the citation were:

> The v-belt drive on the oversize belt head pulley was not guarded on the backside. The v-belt was approximately 18 inches from the end of the catwalk. A person could reach and contact the pinch points.

Ellis concluded that it was unlikely that the violation would result in an injury causing lost workdays or restricted duty, that the violation was not significant and substantial, that one person was affected and that the violation was due to the operator's moderate negligence. A civil penalty of $55.00 is proposed.

The Violation

The "oversize belt" transports material that has been screened out as being too large back to the crusher for reprocessing. A catwalk runs along the belt up to the v-belt drive pulley which is some 15 feet above ground level. The pulley is located approximately two feet beyond the end of the catwalk. It was guarded on one side, but the side nearest the conveyor belt was not guarded. Ellis estimated the distance from the end of the catwalk to the v-belt pulley to be about 18 inches and determined that it was possible for someone standing at the end of the catwalk to reach outward and down to the pinch point, i.e., where the belt engaged the pulley. He concluded that a laceration, fracture, dislocation or amputation of a finger might result, but that an injury was unlikely because the area was accessed only once per week and a miner would have to reach out to contact the pinch point to sustain an injury. Tr. 131-34; ex. P-6.

Ellis admitted that this condition had likely existed since the plant was in operation, and he conceded that he had inspected the plant, and that specific condition, on three previous occasions and had not issued a citation. Tr. 135, 138. Nor was he aware of any citation issued for that condition by other MSHA inspectors. When the plant was first set up after it was acquired several years earlier, Hamilton requested that MSHA conduct a "courtesy inspection," wherein MSHA inspects the equipment, noting any potential violations, or other matters of interest, but does not issue citations or take enforcement action. This condition was not identified as a deficiency during that inspection. Nor was the condition cited during any other formal inspection by MSHA over the 5-8 years that the equipment had been operated in its present configuration. Tr. 284-86.

In construing an analogous standard[2] in *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984), the Commission stated:

> We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot

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[2] 30 C.F.R. § 77.400

(a) Gears; sprockets; chains; drive, head, tail and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

> ignore the vagaries of human conduct. *See, e.g., Great Western Electric*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Industries, Inc.*, 3 FMSHRC 2526, 2531 (Nov. 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, *e.g.*, accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-[case] basis.

The potential hazard at issue here was 15 feet above ground and was not located near or adjacent to any work area. There was no realistic possibility of inadvertent contact. As Ellis testified, "[i]t is not something that [a miner] would accidently fall into contact with." Tr. 133. A miner would likely be in the area about once per week. However, the evidence reflects that the catwalk was used only to change the belt or service the pulley. In either case, Hamilton testified, the belt drive would be shut off and locked out. Tr. 285-87. Numerous MSHA inspectors, including Ellis, had inspected that condition on prior occasions and determined that the regulation did not require a guard to be installed on that side of the belt drive.

Considering all of the factors discussed in *Thompson Bros.*, I find that the absence of a guard on the conveyor-side of the v-belt drive was not a violation of the regulation. The virtual inaccessibility of the pinch point, and the fact that the belt drive would typically not be operating during the limited time that a miner would be at the end of the catwalk reduce the likelihood of injury well below the "reasonably possible" benchmark.

The Secretary introduced an excerpt from a publication identified as "the guarding handbook," presumably an MSHA guideline on guarding, indicating that "Where contact is possible from both sides, the belts and pulleys must be totally enclosed." Tr. 129-30; ex. P-7. An illustration depicts a v-belt drive that is at ground level with a worker servicing machinery in proximity to the unguarded side of the belt drive. Here, the belt drive was located approximately 15 feet in the air and was accessible only by a catwalk that ended approximately two feet from the drive. There is no evidence that reaching near the unguarded side of the drive was necessary to perform servicing and, in any event, the drive would not be operating when service was performed. While it is feasible that a person could lean over or through the railing of the catwalk and reach to the pinch point, there is nothing in the record to indicate that there is even a remote possibility that that would occur.[3]

Citation No. 7896152

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[3] Respondent did not specifically argue that enforcement of the regulation, as proposed by the Secretary, would contravene the fair notice concept of due process. MSHA's failure to identify the need for a guard during the courtesy inspection and numerous subsequent regular inspections could well give rise to a due process defense. *See Lodestar Energy, Inc.*, 24 FMSHRC 689, 694 (July 2002); *Island Creek Coal Co.*, 20 FMSHRC 14, 24 (Jan 1998); *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986).

Citation No. 7896152 alleged a violation of 30 C.F.R. § 56.14107(a), *supra*. The conditions noted on the citation were:

> The head pulley on the stacker belt was not guarded. The head pulley was approximately 18 inches from the end of the catwalk. A person could reach and contact the pinch point.

Ellis concluded that it was unlikely that the violation would result in an injury causing lost work days or restricted duty, that the violation was not significant and substantial, that one person was affected and that the violation was due to the operator's moderate negligence. A civil penalty of $55.00 is proposed.

The Violation

This alleged violation presents issues nearly identical to those presented with respect to Citation No. 7896149. Tr. 152. The condition cited as hazardous was inaccessible from the ground and was not located near or adjacent to any work area. A miner would have to reach from the end of the catwalk to contact the pinch point of the pulley. Tr. 146-47. There was virtually no possibility of inadvertent contact. The belt would generally not be operating during the limited time that a miner would be on the catwalk. Other MSHA inspectors, including Ellis, had inspected the condition on prior occasions and determined that the regulation did not require installation of a guard. For the reasons discussed with respect to Citation No. 7896149, I find that Respondent did not violate the regulation, as alleged.

Citation No. 7896153

Citation No. 7896153 alleged a violation of 30 C.F.R. § 56.11001, which requires that "Safe means of access shall be provided and maintained to all working places." The conditions noted on the citation were:

> The third step, top step, going to the oversize belt catwalk was broken and laying at approximately a 45 degree angle. A person could slip and fall and contact the ground approximately 3 feet [below], or could fall and contact the unguarded finned tail pulley on the oversize belt.

Ellis concluded that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that one person was affected and that the violation was due to the operator's moderate negligence. A civil penalty of $184.00 is proposed.

The Violation

The lower end of the catwalk running along the oversize belt, approximately 3-4 feet above ground level, is accessed by a set of ladder-like steps, the top of which is attached to the

catwalk by hooks. The angle of the ladder, and the treads of the steps, is adjusted by blocking at the bottoms of the side rails. The ladder is depicted in photographs included in Exhibits P-4 and P-9. Whether the step in question, the top step, was welded in place or loose, is disputed. Tr. 165, 280.

Respondent suggested that the angle of the step would have been corrected by final adjustments before operations commenced. Tr. 279-80. However, it appears that the lower steps are nearly horizontal, or at a mild slope, similar to that of the catwalk. The top step is at a significantly greater angle, and the hazard presented by it would not have been alleviated by an adjustment to the slope of the ladder. It is also apparent that the steps were used by miners while the plant was being operated during the start-up procedure, as belts were adjusted and other tasks performed. Tr. 226.

Regardless of the ladder's design or whether the top step was securely welded, it was tilted at approximately a 45 degree angle and presented an obvious slip and fall hazard to any miner accessing the catwalk. I find that the condition violated the regulation and I agree with Ellis' determinations that the condition was the result of the operator's moderate negligence, and that one miner was affected.

Significant & Substantial

Ellis testified that, in addition to typical injuries that might result from a fall, a miner might also encounter the inadequately guarded tail pulley of the oversize belt and suffer a severe injury as described in the discussion of Citation No. 7896147. However, as noted in that discussion, the oversize belt was not typically running while a miner would access the catwalk to service the head pulley or replace the belt. Consequently, there was little risk of a miner falling and encountering an operating tail pulley. Ellis testified that if the risk of severe injury from the tail pulley were eliminated, an injury caused by the violation would most likely result in lost work days or restricted duty, and maintained that the violation would still be S&S.

I disagree. The ladder was narrow, relatively short, extending only 3-4 feet up to the catwalk, and had railings on both sides. While the violation presented a reasonable likelihood that an injury would occur, the probability of a serious injury occurring as a result of the violation was too remote to render the violation S&S. I find that any injury would likely have resulted in no lost work days.

Citation No. 7896157

Citation No. 7896157 alleged a violation of 30 C.F.R. § 56.18002(b), which requires that "A record that such examinations [of working places] were conducted shall be kept by the operator for a period of one year, and shall be made available for review by the Secretary or his authorized representative." The conditions noted on the citation were:

A record that each work place is being examined at least once each shift for

conditions that may adversely affect safety and health is not being kept. This is evidenced by the numerous citations written for conditions that would adversely affect the safety of the miners.

Ellis concluded that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that one person was affected and that the violation was due to the operator's high negligence. A civil penalty of $259.00 is proposed.

The Violation

When nothing was produced in response to his request for workplace examination records, Ellis issued the citation. At the time, he was under the impression that the plant had been operating for production purposes for two months and that workplace examinations had not been conducted. Tr. 176. He candidly admitted, however, that Respondent's employees may not have understood what he had asked for, especially in light of the communication difficulty. Tr. 184-85.

Respondent introduced evidence that records of workplace examinations had been kept for January through June of 2000. Ex. R-4. Presumably, those records were available and would have been produced in response to Ellis' request, if it had been understood. It appears that Respondent was performing workplace examinations and keeping a record of them during the time that the plant was in operation at the Brackettville site. However, such examinations are to be performed, and records kept, for each shift that a miner is working, regardless of whether the plant is being operated. Tr. 182. Consequently, records of workplace examinations should have been kept for each day that miners were engaged in setting up the plant at the Del Rio site. It appears that no such records were kept. There were no work place examination records for July or August included in Exhibit R-4. When asked why there were no records for July or August, Vicente Guerrero explained that work was not performed at the plant all the time, and that he "now" keeps a record reflecting "no work" when they are not at the plant. Tr. 237. While his response does not directly address the status of records for days when men were at the plant engaged in the set-up process, he made no claim that records for the July-August period existed, and Respondent introduced no evidence of the existence of such records.

Respondent was required to maintain work place examination records for each day that miners worked at the Del Rio site, setting up the crusher, screens and conveyors. I find that no records were kept for those days and that the regulation was violated.

Significant and Substantial

Ellis' S&S determination was based upon his mistaken belief that the plant had been operated for two months, during which miners were exposed to numerous serious safety hazards. Tr. 174, 184-85. As noted above, the plant was not operated for production purposes prior to the inspection. The plant, or portions of it, were operated only for short periods on intermittent days

while it was being set up. In addition, many of the alleged violations that Ellis determined to be S&S were eventually determined to be less serious. Of the 15 citations originally at issue in this proceeding, nine were alleged to have been S&S. Of the eight other S&S violations, the Secretary vacated one citation and agreed to modify two others to non-S&S violations, and two citations are vacated and one modified to non-S&S by this Decision. One of the remaining S&S violations had nothing to do with work place examinations.[4] Consequently, only one violation that had relevance to records of work place examinations actually posed a risk of serious injury to a miner.

I find that the violation was not S&S and was unlikely to result in an injury.

Citation No. 7896159

Citation No. 7896159 alleged a violation of 30 C.F.R. § 56.12028, which requires that:

> Continuity and resistence of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistence measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative."

The conditions noted on the citation were:

> There is no record that a test has been done of the continuity and resistence of the grounding system since the plant was moved from Brackettville approximately two months ago.

Ellis concluded that it was unlikely that the violation would result in an injury that would be fatal, that the violation was not significant and substantial, that one person was affected and that the violation was due to the operator's high negligence. A civil penalty of $55.00 is proposed.

The Violation

Ellis testified that he determined that the regulation had been violated because no record of continuity and resistence testing was produced in response to his request. He admitted, however, that it was likely that Respondent's employees were not familiar with the test or records associated with it and did not understand what he had asked for. Tr. 192-94. At the hearing, Respondent produced a record of testing that had purportedly been conducted on the grounding system on August 15, 2000. Ex. R-7. That record, written on a piece of cardboard, purports to show a resistence of one ohm or less in circuits connecting 14 motors and other

[4] Respondent withdrew its contest to Citation No. 7896150, which charged an S&S violation for the failure of two employees to wear protective footwear.

electrical devices. The Secretary appears to concede that the record existed at the time of the inspection, was not produced due to the communication difficulty noted above, and would not pursue this alleged violation if the record satisfied the regulatory requirement.

The Secretary contends that the record does not satisfy the regulation because it is a record only of a continuity test between the plant's various electrical devices and the main grounding electrode. The resistence test required by the regulation is considerably more involved and is intended to demonstrate that the grounding electrode, itself, is effectively in contact with the ground, i.e., that there is a low resistence in the connection of the grounding electrode to the earth. Respondent argues that Ellis was merely speculating about the meaning of its record, and that the last entry shows the results of the ground earth resistence test, and reads "motor loop grounded." Tr. 292.

A proper resistence test of the ground-to-earth connection, as described by Ellis, involves driving metal rods at equal intervals from the grounding electrode and measuring the resistence between the various rods and the grounding electrode. The resistence at 62.5% of the longest distance should be less than five ohms. Tr. 202, 211. The entry relied upon by Respondent does not appear to reflect the results of such a test. Rather, it reflects only the results of continuity tests showing low resistence between the various electrical devices and the grounding electrode.

I find that the record maintained by Respondent of electrical testing done on August 15, 2000, did not include a record of testing the resistence of the grounding system, and that the regulation was violated. I agree with Ellis' assessment of the gravity and negligence factors.

The Appropriate Civil Penalties

Hamilton Pipeline had only two non-S&S assessed violations in the two year period preceding August 22, 2000. Respondent does not contend that imposition of the proposed penalties would threaten its ability to remain in business, and it is not disputed that Respondent demonstrated good faith in achieving compliance with the regulations. The gravity and negligence assessments with respect to each violation are discussed above.

Respondent does contend that no penalty can be imposed because the Secretary failed to introduce evidence on one of the factors required to be taken into account in the assessment of any civil penalty – " the appropriateness of the penalty to the size of the business of the operator charged." 30 U.S.C. § 820(i). However, the record does contain evidence of the size of the mine and the operator. The Del Rio plant is operated intermittently, and on days that it is operated, only two employees work for one shift. Ex. P-2. Respondent also operates one other crusher and its employees work at different sites, depending upon product demand. Tr. 221, 247-48, 304. Respondent clearly falls into the category of a small operator, the most beneficial category for purposes of penalty assessment.

Citation No. 7896147 is affirmed as a significant and substantial violation. The Secretary proposes a penalty of $184.00. Upon consideration of the factors itemized in section 110(i) of

the Act, I impose a penalty of $184.00.

Citation No. 7896153 is affirmed. However, the violation is found not to be significant and substantial. Rather, the violation is found to be reasonably likely to result in an injury resulting in no lost work days. A civil penalty of $184.00 is proposed by the Secretary. I impose a penalty in the amount of $90.00, upon consideration of the factors enumerated in section 110(i) of the Act.

Citation No. 7896157 is affirmed. However, the violation is found not to be significant and substantial. Rather, the violation is found to be unlikely to result in an injury. A civil penalty of $259.00 is proposed by the Secretary. I impose a penalty in the amount of $55.00, upon consideration of the factors enumerated in section 110(i) of the Act.

Citation No. 7896159 is affirmed in all respects. The Secretary proposes a penalty of $55.00. Upon consideration of the factors itemized in section 110(i) of the Act, I impose a penalty of $55.00.

The Settlement

At the commencement of the hearing, the parties announced that they had negotiated an agreed resolution of two of the citations and, by motion, sought approval of the settlement agreement. The Secretary agreed to modify Citation Nos. 7896154 and 7896155 to specify that an injury was unlikely to occur, that the violations were not significant and substantial and that the violations were the result of the operator's moderate negligence. It is proposed that the total penalty for those violations be reduced from $455.00 to $110.00. I have considered the representations and evidence submitted and conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

ORDER

As to the citations vacated by the Secretary, Citation Nos. 7896151 and 7896158, the petition is **DISMISSED**.

As to the citations that the parties have agreed to settle, Citation Nos. 7896154 and 7896155, the motion to approve settlement is **GRANTED**, and Respondent is directed to pay a civil penalty of $110.00 within 45 days.

The citations that Respondent no longer contests, Citation Nos. 7896145, 7896150 and 7896156, are **AFFIRMED**, and Respondent is directed to pay a civil penalty of $306.00 within 45 days.

Citation Nos. 7896146, 7896148, 7896149 and 7896152 are hereby **VACATED**, and the petition as to them is **DISMISSED**.

Citation Nos. 7896147 and 7896159 are **AFFIRMED**, and Citation Nos. 7896153 and 7896157 are **AFFIRMED**, as modified, and Respondent is directed to pay a civil penalty of $384.00 within 45 days.

Michael E. Zielinski
Administrative Law Judge

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