

MAR 20 2014

NOTICE

1. Enclosed is a copy of a decision by an Administrative Law Judge of the Federal Mine Safety and Health Review Commission. The issuance date of this decision appears on the first page of the Decision.

THIS DECISION MUST BE POSTED ON THE MINE BULLETIN BOARD BY THE OPERATOR.

2. You may petition for review of this decision by the Commission. A PETITION FOR DISCRETIONARY REVIEW must be received by the Commission within thirty (30) calendar days after the issuance date of the decision to be considered [29 C.F.R. § 2700.5(d) and .70(a)]. If this decision is an ORDER OF TEMPORARY REINSTATEMENT, the Petition for Review must be received within 5 days of the receipt of the order [29 C.F.R. § 2700.45(f)]. Petitions are accepted by facsimile. If you mail the petition, you should allow enough time for delivery by the thirtieth day. Petitions (original plus six copies) should be filed at:

DOCKET OFFICE
FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION
1331 Pennsylvania Ave., N.W., Suite 520N
WASHINGTON, D.C. 20004-1710
telephone No. (202) 434-9950
fax no. (202) 434-9954

3. The Federal Mine Safety and Health Review Commission's Rules of Procedure specify that a petition may be filed only on one or more of the following grounds:
 - A. A finding or conclusion of material fact is not supported by substantial evidence.
 - B. A necessary legal conclusion is erroneous.
 - C. The decision is contrary to law or to the duly promulgated rules or decision of the Commission.
 - D. A substantial question of law, policy or discretion is involved.
 - E. A prejudicial error of procedure was committed.

Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record when assignment of error are based on the record. Statutes, regulations or principal authorities shall be relied upon. Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge has not been afforded an opportunity to pass. For further details on the filing of documents and the review process, see 30 U.S.C. § 823(d) and Commission rules 5 through 9 and .70 through .78 [29 C.F.R. §2700.5-.9 and .70-.78].

4. A Petition for Review must be served on the opposing party.
5. If a petition is filed, each party will be notified of the Commission's action on the petition.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER, SUITE 290
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PITTSBURGH, PA 15220
TELEPHONE: 412-920-7240 / FAX: 412-920-8689

March 20, 2014

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

NALLY & HAMILTON ENTERPRISES,
INC.,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. KENT 2012-1031
A.C. No. 15-18986-287861-01

Mine: Balkan

Docket No. KENT 2012-1248
A.C. No. 15-19076¹-290524

Mine: Chestnut Flats

DECISION

Appearances: Joseph B. Luckett, Esq., U.S. Department of Labor, Office of the Solicitor,
618 Church Street, Suite 230, Nashville, TN for the Secretary

Stephen Thomas Hamilton, Jr., Esq., Saltsman & Willett, 212 East
Stephen Foster Avenue, P.O. Box 327, Bardstown, KY for Respondent

Before: Judge Steele

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor (the "Secretary"), acting through the Mine Safety and Health Administration ("MSHA") against Nally & Hamilton Enterprises, Inc. ("Nally" or "Respondent") at its Balkan and Chestnut Flats mines pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or "Act"). The Secretary seeks civil penalties in the amount of \$10,922.00 for three alleged violations of the Secretary's mandatory safety standards for underground, surface or other mines. The parties presented testimony and documentary evidence at the hearing which was conducted on May 29, 2013 in London, Kentucky. At the conclusion of the evidence, Respondent withdrew its contest of Citation No. 8369110 and agreed to pay \$900.00, as assessed by the Secretary. For the reasons set forth below, I vacate Citation Nos. 8369111 and 8369121.

STIPULATIONS

1. Nally & Hamilton Enterprises, Inc. is subject to the Federal Mine Safety and Health Act of 1977.

¹ When initially issued on March 19, 2014, the decision stated an erroneous Mine ID for KENT 2012-1248. This decision has been corrected to reflect the proper ID.

2. Nally & Hamilton Enterprises, Inc. has an effect upon interstate commerce within the meaning of the Federal Mine Safety and Health Act of 1977.
3. Nally & Hamilton Enterprises, Inc. is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and the presiding Administrative Law Judge has the authority to hear this case and issue a decision.
4. Nally & Hamilton Enterprises, Inc. operates the Balkan Mine, I.D. No. 15-18986.
5. The Balkan Mine had 181,090 hours worked in 2011.
6. Nally & Hamilton Enterprises, Inc. operates the Chestnut Flats Mine, I.D. No. 15-19076.
7. The Chestnut Flats Mine produced 385,017 tons of coal in 2011.
8. A reasonable penalty will not affect Nally & Hamilton Enterprises, Inc.'s ability to remain in business.

Government Exhibit 1.²

CITATION NO. 8369111

Citation No. 8369111 was issued under Section 104(a) of the Act on December 8, 2011 at 7:20 a.m. and was based upon the inspector's observation of a violation of 30 C.F.R. § 77.1607(b). This safety standard, entitled "Loading and haulage equipment; operation," states, "[m]obile equipment operators shall have full control of the equipment while it is in motion." *Id.*

In his narrative, the inspector found [All errors copied as written]:

Due to the slick haul road with 10 to 14 inches of muddy material (the determined responsibility of the operator to maintain), equipment including personnel vehicles and coal truck operator, observed hauling on the slick haul road, were not in full control while the equipment was in motion. At a test speed of 5 miles an hour a personnel vehicle slide (like a sled) thru the intersection, into oncoming traffic including Tractor and Trailer Coal Trucks and a swivel tail rock truck.

Note: This citation was one of the contributing factors that contributed to the issuance of imminent danger order #8369109 issued on 12-08-2011. therefore no abatement time was set.

GX-3.

² Hereinafter, the Secretary's exhibits will be referred to as "GX" followed by a number. Similarly, Respondent's exhibits will be referred to as "RX" followed by a number. The transcript will be referred to as "Tr." followed by the corresponding page number.

The inspector noted that the risk of injury or illness was reasonably likely and significant and substantial (“S&S”) in nature. *Id.* The injury could be reasonably expected to result in lost workdays or restricted duty and would affect one person. *Id.* The negligence was assessed as moderate. *Id.* The Citation was terminated when the road was graded and a berm of correct height was constructed. *Id.* The Secretary proposed a penalty of \$900.00 for the alleged violation.

1. The Secretary’s Evidence³

MSHA inspector John Sizemore (“Sizemore”) testified that the roadway had between ten to fourteen inches of muddy material that was very slick and extended up the road for approximately 100-150 feet. Tr. 20-21. This measurement was obtained by tape measure in four or five different locations. Tr. 21. In order to test the conditions, he decided to drive his four-wheel drive Jeep Laredo down the hill. Tr. 20-21. When he hit the brakes at a speed of five to ten miles per hour, he testified that he slid through the entire area, including a stop sign at the bottom of the hill. Tr. 21, 33.

Sizemore explained that the hazard associated with the condition is that a vehicle would try to stop and slide through the intersection at the bottom of the hill. Tr. 22. During his inspection, he observed a fully loaded back-dump⁴ hauling to and from the preparation plant to the lower level of the mine. Tr. 22-23. He testified that he stopped the driver, Herschel Collett (“Collett”), and questioned him about the road conditions. Tr. 23. According to Sizemore, Collett stated, “I look both ways before I go down that area and then I don’t touch my brakes, and that’s the way I get through there without – and maintain control.” Tr. 24. Aside from Collett, Sizemore observed several vehicles on the main road which would be used in excess of seventy-five to one hundred times a day. Tr. 23. At that time, Collett issued the citation at issue because Respondent is required to maintain the roadway so that a person could have full control of his/her vehicle. Tr. 24-25.

Sizemore determined that the condition was reasonably likely to result in a reasonably serious injury and S&S because, according to him, the roadway was very slick, and there was no control of a vehicle in this area. Tr. 25. He further testified that there was no berm on the outer

³ The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness’s testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, I have also relied on his demeanor. Any failure to provide detail as to each witness’s testimony is not to 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)(administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

⁴ According to Sizemore, a back-dump is an articulating truck used to haul materials. It appears that this refers to an articulated hauler, which is a heavy duty dump truck composed of two basic units: the front section called the tractor and the rear section called the dump body. It is typically used on rough terrain.

bank of the road, a fact confirmed by Collett. Tr. 26, 49. The haul road would likely be traveled ten or more times a day. Tr. 26. He theorized that a vehicle veering off the road was likely to result in broken bones or lacerations, which are lost workdays or restricted duty type injuries. Tr. 26. He believed that the condition was the result of Respondent's moderate negligence because the condition was in plain view, even to the casual observer. Tr. 25. Further, Sizemore testified that the gravel was located a few hundred yards from the cited area, and all of the equipment was at the preparation plant ready to be used. Tr. 36-38.

At the same time, Sizemore issued an imminent danger order under Section 107(a) of the Act because he believed that an injury would occur before the condition could be corrected.⁵ Tr. 27-28. His concerns were that the roadway was very slick, a tandem coal truck was traveling down the roadway, the berm was insufficient or nonexistent in a crucial area, and an accident could occur if travel was allowed to continue. Tr. 27-28. For this reason, Sizemore stopped the truck that was actively working and asked the driver, Hershel Collett ("Collett") to park above the slick area. Tr. 29. The citation, as well as the imminent danger order, were terminated when the mud was removed, gravel was laid and the berm was constructed. Tr. 29-30. Plant Manger Wes Thomas worked with Sizemore to abate the condition. Tr. 29, 38-39.

2. Respondent's Evidence

Hershel Collett hauls coal for Respondent, but is self-employed. Tr. 40-41. On the day that the citation was issued, he was operating his M800 tandem truck, which can haul approximately thirty-eight tons of coal at a time. Tr. 41-42. In a typical day, he makes eight to ten runs hauling coal to the preparation plant from a mine belonging to a different operator. Tr. 42.

When stopped by Sizemore, Collett estimated that he was stopped forty to fifty feet above the slick area, which he surmised was steeper than the road in question. Tr. 42-43. He did not recall telling Sizemore that the road was slick and, in fact, testified that he had made one earlier run and had no problems with sliding. Tr. 43-44. He also stated that he had not noticed as much mud on the road as Sizemore. Tr. 43. While he testified that there was gravel on the road, he stated that it had been raining for four or five days and some of the gravel had "disappeared." Tr. 43. Sizemore, on the other hand, could not recall whether it had been raining either on the day that the citation was issued or in the previous days. Tr. 36. Regardless, Collett stated that he had no trouble hauling coal or slowing down. Tr. 43-44. If he had, Collett said that he would not have hauled the coal in dangerous conditions and would have alerted Respondent to the conditions as he had in the past. Tr. 44, 47-48.

In explanation of what Collett said to Sizemore about the brakes, Collett testified that he does not touch his brakes because the truck is "geared down," and the cited area of the road is not particularly steep. Tr. 45, 49. When fully loaded, the truck typically travels at three to four miles per hour on the road. Tr. 46. He argued that he would not use the brakes even in the best possible conditions in order to prevent the brakes from getting hot. Tr. 45. According to Collett,

⁵ The specific circumstances of the 107(a) order are not at issue here, and I make no judgment as to its validity. It is only referenced to give perspective to Inspector Sizemore's observation of the conditions.

the lower the gear that the truck is in, the less the brakes are used because they become very hot and would eventually fail. Tr. 45. Further, it was unnecessary for Collett to stop at the bottom of the hill because he has the right of way and traffic proceeding from the other direction must stop. Tr. 49. Finally, he added that, the vast majority of the time, he is the only coal truck operating on the road. Tr. 46. He only asked for help when he was behind. Tr. 46.

3. Contentions of the Parties

The Secretary contends that, regardless of whether the inspector actually observed a vehicle out of control, Respondent is required to maintain the roadway in a condition allowing for full control of a vehicle. Because the roadway was slick, traveled in excess of ten times a day and no berm existed, he states the citation was correctly designated as reasonably likely to result in a reasonably serious injury and S&S. In support, the Secretary argues that if an accident were to occur, broken bones and lacerations would be the minimum injury. Finally, although the inspector did not know how long the condition existed, the Secretary states that the road was in plain view, and even the most casual observer would see the condition. Therefore, he asserts that Respondent's negligence was moderate.

Respondent argues that no evidence was presented to suggest that any of Respondent's employees or contract employees failed to maintain full control of a vehicle; therefore, the citation should be vacated. It states that the presence of ten to fourteen inches of mud on the roadway and Collett's failure to use brakes do not substantiate the Secretary's claims. In the event that the citation is found to be valid, Respondent states that the violation is not S&S because the first two prongs of the *Mathies* test have not been met.

4. Findings of Fact and Conclusions of Law

I find that the Secretary has not proven his case and, therefore, Citation No. 8369111 is vacated. Sizemore cited Respondent for a violation of 30 C.F.R. § 77.1607(b) which requires equipment and vehicle operators to maintain full control of vehicles at all times while in motion. As proof of this, Sizemore conducted his own experiment in which he testified that he lost control of *his own* vehicle. He fully admits that he never observed any of Respondent's employees on the roadway, but explains that, given the unsafe nature of the road, he did not have to actually witness a vehicle out of control. I do not, however, agree with this assessment.

The plain language of 30 C.F.R. § 77.1607(b) states that an operator shall have full control of a vehicle while it is in motion. As further evidence of the regulation's intent, it is specifically entitled "Loading and haulage *equipment; operation.*" 30 C.F.R. § 77.1607(b)(emphasis added). Other than Collett's truck, which was stopped prior to reaching the section of the road at issue, Sizemore did not observe a single vehicle operating on the roadway. At hearing, he testified that his only proof of lack of vehicle control was the operation of his own Jeep. Allowing MSHA to conduct its own experiments in the absence of any witnesses to prove the existence of violations is a dangerous course of action. Given that none of Respondent's employees were observed having difficulty with vehicle control, I find that the Secretary is unable to prove his case, and the citation must be vacated.

To be clear, I am not suggesting that slick roadbeds are not a violation of the regulations; rather, I find that slick roadbeds are not a violation of this particular standard. In the instant case, Respondent could have been cited for any of the regulations pertaining to roadway maintenance. 30 C.F.R. § 77.1605(k) requires that berms be provided on elevated roadways. Further, 30 C.F.R. § 77.1605(m) requires, among other things, that roadbeds be maintained in a manner consistent with the speed allowed and type of haulage done. While the Secretary may have been able to prove his case under either of these regulations, he did not cite Respondent for these nor did he request an amendment to the cited regulation. Given all of the information presented and the testimony at hearing, I am constrained to find that the Secretary did not prove his case.

CITATION NO. 8369121

Citation No. 8369121 was issued under Section 104(d)(1) of the Act on December 16, 2011 at 8:00 a.m. and was also based upon the inspector's observation of a violation of 30 C.F.R. § 77.1607(b).

In his narrative, the inspector found [All errors kept as written]:

The operator has not maintained the entire length of the haul road from the contract coal mine to the preparation plant. 1 to 4 inches of muddy material was present along the haul road and equipment including personnel vehicles and coal truck, were observed hauling on the slick haul road, were not in full control while the equipment was in motion. At a test speed of 10 miles an hour a personnel vehicle slide (like a sled) in straight areas and in the curves at different areas of the haul road. The operator has posted a speed limit of 35 mph. along this road.

Note: This citation was one of the contributing factors that contributed to the issuance of imminent danger order #8369120 issued on 12-16-2011. therefore no abatement time was set.

Note: This same type citation (#8369111) and resulting imminent danger order (#8369109) was issued for this same condition, at as different location, along this same haul road on 12-08-2011, and was a factor in the consideration of high negligence classification of this citation.

Note: The operator has engaged in aggravated conduct constituting more than ordinary negligence in that the operator was aware that the haul road was wet slick and muddy and that contract employees were traveling this haul road. This violation is an unwarrantable failure to comply with a mandatory standard.

GX-5.

The inspector noted that the risk of injury or illness was highly likely and S&S in nature. *Id.* The injury could reasonably be expected to result in permanently disabling injuries affecting one person. *Id.* The negligence was assessed as high, as well as an unwarrantable failure to comply with a mandatory standard ("Unwarrantable Failure"). *Id.* The Citation was terminated

when the operator applied gravel and graded the roadway from the preparation plant to the mine. *Id.* The inspector observed that the operators should not be able to maintain control. *Id.* The Secretary assessed a penalty of \$9,122.00 for the alleged violation.

1. The Secretary's Evidence

Sizemore testified although the citation was issued to a different mine, the entire road is three to four miles long and runs from the Chestnut Flats Mine to the Balkan Preparation Plant. Tr. 53-54. The road is designed to have steep inclines followed by level areas where brakes can be cooled. Tr. 54. According to Sizemore, the road had one to four inches of mud in spots, several of which were on inclines. Tr. 54-55. Again, this measurement was taken by with a tape measure. Tr. 54. The posted speed limit on the haul road was thirty-five miles per hour; however, Sizemore testified that he slid at a test speed of ten miles per hour. Tr. 55.

Sizemore asserted that the road was wet and muddy, and there was no visible gravel on it. Tr. 55. When he went around curves in the road, the truck would slide out and he'd have to employ the "turn-the-wheel-the-same-way" maneuver to get out of the spin. Tr. 55. Collett and the miners traveling to the A&M Coal Company would use this road every day. Tr. 56. By Sizemore's estimate, approximately twenty miners would access it for the day shift, eighteen to twenty for the second shift and three to five for the third shift. Tr. 56. Further, he observed a Mack truck hauling thirty to forty tons of coal down the incline. Tr. 56. When discussing the road with one of Respondent's employees, Sizemore stated that the outside man told him that he slid all the way along the road. Tr. 57. The miner also explained that Respondent graveled the haul road when it was first built, but it had not been touched since that time. Tr. 57.

Based on Sizemore's observation, he testified that Respondent violated the standard when it did not maintain the road so that the operator of a vehicle would have full control. Tr. 57. The three to four miles affected by the condition contained steep inclines and different terrain. Tr. 62. Sizemore believed it was reasonably likely or highly likely that an accident would occur if the condition was left uncorrected. Tr. 62-63. He asserted that a vehicle traveling over the embankment or colliding with another vehicle would likely result in broken bones, including the possibility of the neck or back, or lacerations, which he categorized as permanently disabling injuries. Tr. 63. Because he only saw one person on the road at the time of issuance, he believed that only one miner would be affected. Tr. 63.

Sizemore further designated the citation as high negligence and an unwarrantable failure to comply with a mandatory standard under Section 104(d)(1) of the Act. Tr. 58. He reasoned that the condition extended for three to four miles. Tr. 58. The preshift examination indicated that the haul road was slick; therefore, management knew about the condition. Tr. 60, 79; GX-6. Further, when discussing the issue with General Manager Ted Helton, Sizemore testified that Helton stated that at \$17.00 per ton, he would shut the mine down before he would gravel the road. Tr. 60-61, 78-79. Finally, he had issued a prior citation and imminent danger order to the Balkan Mine. Tr. 59, 77.

Given the conditions, Sizemore also issued a 107(a) imminent danger order to stop travel on the road. Tr. 64.⁶ When Sizemore left the mine, he used the roadway, which was in the process of being graded. Tr. 66. He did not terminate the citation and order at that time, however, because there was more work that needed to be done. Tr. 66. The citation and order were terminated later that day when Respondent graded and graveled the road. Tr. 65. Sizemore received information from an unknown source that it had taken ninety to a hundred truckloads of gravel to abate the condition. Tr. 79.

When asked at hearing whether employees of A&M Coal Company traveled the road during the inspection, Sizemore testified that he did not see them. Tr. 68, 71. He stated that only Collett asked permission to travel the haul road and Sizemore denied his request. Tr. 68-69. He further explained that in terms of A&M Coal Company employees, he worked with the owner of the mine, Mark Dotson, and informed him that the road was shut down. Tr. 70. Collett acknowledged that there was a side road that the miners typically used when entering and exiting the mine. Tr. 90, 92.

In response to the video taken by Respondent, Sizemore testified that it did not accurately depict the conditions as they existed. Tr. 113. He explained that the road was graded prior to his departure on December 16th, so the tire tracks present must have been there from vehicle travel after it was graded. Tr. 114-115.

2. Respondent's Evidence

Collett testified that the haul road had been shut down before his arrival that day, but he entered using it because he did not know that an imminent danger order had been issued. Tr. 87-88. While he admitted that it was muddy, he stated that he was not concerned for his safety while driving. Tr. 87-88. Although there was a side access road, he asserted that he saw miners entering and exiting the road and believed that Sizemore was still at the mine at that time. Tr. 89. When he was returned to his vehicle by the owner's son, they used the road and Collett did not notice anything wrong with it. Tr. 88. While Sizemore could not recall whether it was raining on that day, Collett testified that it was. Tr. 55, 93.

Respondent's Safety Coordinator Tracey Creech ("Creech") testified after receiving information about the citation and order, he arrived at the mine using the haul road between 8:00-8:30 a.m. Tr. 101. He stated that he drove his two-wheel drive truck and never slid. Tr. 97. In the afternoon, he took video of himself driving the road at approximately twenty to twenty-five miles per hour. Tr. 100; RX-1. According to Creech, even though there was a lapse in time, the road looked essentially as it did upon his arrival. Tr. 102. The gravel trucks were working, but the road had not been graded at that time. Tr. 109. Based on his experience, he did not believe that emergency vehicles would have any problem accessing the mine if needed. Tr. 103.

Creech stated that it took forty-one loads of gravel to abate the condition, not ninety to one hundred as asserted by Sizemore. Tr. 97. He further testified that this was not the first time that the road had been gravel, even by MSHA's own records; therefore, the information given to

⁶ The imminent danger order is not at issue in this case, and I make no judgment as to its validity.

Sizemore was completely false. Tr. 107-108. He also affirmed Collett's testimony that Collett alerted Respondent when the road needed to be graveled for safety reasons. Tr. 106-107. When he heard about the comments made by Helton to Sizemore, Creech contacted the vice president of operations who told him to gravel the road and Helton's comments would be addressed by management. Tr. 104-105.

3. Contentions of the Parties

The Secretary argues that Respondent has the responsibility to maintain the roadway in a condition allowing for full control of a vehicle. Observing a vehicle out of control is not a necessity. The Secretary further states that the video taken by Respondent does not depict the conditions as they existed and should not be credited. He contends that a vehicle operator was highly likely to lose control and that broken bones and cuts would be the most likely result of an accident. Given this, the Secretary argues that the violation was also S&S. Finally, he argues that Respondent's negligence was high and the violation was an unwarrantable failure because the condition was extensive, an imminent danger order had been issued on the road a short time before, and Respondent had been advised that the road needed work. The Secretary adds that the inspector had to issue an imminent danger order to prompt Respondent to abate the condition.

Respondent contends that the Secretary failed to provide any demonstrable evidence that any of its employees or contract employees operated a vehicle that was not in full control; therefore, the citation should be vacated. It states that even if a violation existed, it was not S&S because the first two prongs of *Mathies* were unproven. It further argues that even if the violation is found to be S&S, there is no evidence to support a designation of unwarrantable failure. As evidence of this, Respondent points to preshift reports in which the examiner states that everything was in good shape, but more rain was expected. It asserts that this shows its good faith belief that the condition of the road was acceptable.

4. Findings of Fact and Conclusions of Law

For the same reasons as above, I find that the Secretary has failed to prove that Respondent violated 30 C.F.R. § 77.1607(b). Sizemore admitted that he did not observe any vehicles operating on the roadway and, therefore, did not observe any equipment that was out of control. Again, I find that the Secretary may have been able to prove a violation of a standard pertaining to the maintenance of the roadbed itself, but he did not prove that vehicles were operated without full control.

Although not determinative to the outcome of this case, I would also caution the Secretary in issuing 104(d) citations based upon, at least in large part, a citation issued to a different mine. While I understand that the haul road serves two mines owned by the same operator, Section 104(a) of the Act empowers the Secretary to issue a citation to *a mine* for a violation of the Act or its standards. 30 U.S.C. § 814(a)(emphasis added). Nowhere in its language does it permit MSHA to issue more serious violations to one mine based on the aggravating circumstances found in another.

ORDER

It is **ORDERED** that Citation No. 8369110 remains as issued. It is **ORDERED** that Citation Nos. 8369111 and 8369121 are hereby **VACATED**. It is further **ORDERED** that Nally & Hamilton Enterprises, Inc., **PAY** the Secretary of Labor the sum of \$900.00 within 30 days of the date of this Decision.

William S. Steele

William S. Steele
Administrative Law Judge

Distribution:

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