FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 19, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2008-397-M
Petitioner	:	A.C. No. 15-16138-132556 -01
v.	:	
	:	Docket No. KENT 2008-463-M
DIX RIVER STONE, INC.,	:	A.C. No.: 15-16138-134706-01
Respondent	:	
	:	Dix River Surface

DECISION

Appearances: Jennifer D. Booth, Esq., (at October 14, 2009, hearing) and Willow Fort, Esq., (at March 10, 2010, hearing), Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner,
Tommy Owens, President, Dix River Stone Inc., Stanford, Kentucky, for the Respondent.

Before: Judge Weisberger

Statement of the Case

These cases are before me based upon Petitions for Assessment of a Civil Penalty filed by the Secretary of Labor, ("Secretary") seeking the imposition of civil penalties for the alleged violation by Dix River Stone, Inc., ("Dix River") of various mandatory standards and set forth in Title 30, Code of Federal Regulation. Subsequent to notice, these matters were scheduled to be heard in Lexington, KY on October 14, 2009. At the hearing, the following citations were litigated: Nos. 7765946, 7765949, and 7765950.[1] Due to scheduling conflicts, Citation Nos. 7765947 and 7765593 were rescheduled based on the parties' agreement, and heard on March 10, 2010, in Richmond, Kentucky.

I. Docket No. Kent 2008-463

A. Citation No. 7765946

At the conclusion of the hearing on October 14, 2009, a bench decision was rendered which, aside from the correction of non-substantive matters, is set forth below.

[1]Subsequent to the hearing, the Secretary vacated Citation No. 7765950.

On September 11, 2007, MSHA Inspector Richard Jones inspected Dix River's surface quarry ("the quarry"). He observed an employee on an elevated belt guard that was approximately ten feet off the ground. Jones testified that the employee was not tied off, and was not wearing a safety belt. He issued a citation alleging a violation of 30 CFR § 56.15005.[2]

1. Violation of Section 15005, *supra*

a. Respondent's Position

The Respondents' defense is based upon a number of contentions. It is argued, that there was a greater danger to the use of a belt and tie line in circumstances where the work being performed was only ten feet above the ground. Owens explained that if a person is tethered at this height and falls, he would lose control of the motion of his body, and could be bumped against some dangerous materials causing severe injuries.

In essence, Respondent argues that if the Section 56.15005, *supra* is applied to the situation presented herein, the result would be a diminution of safety. Commission case law has established the principle that it can not entertain this argument. Rather, it must first be presented in a modification, and that it can not be raised before the Commission as a defense. *Clinchfield Coal Co.,* 11 FMSHRC 2120, 2130 (1989); *Otis Elevator Co.*, 11 FMSHRC 1918, 1923 (1989)

Next, Respondent argues, in essence, that the cited condition was not dangerous, as it did not expose the observed employee to any danger. Owens opined that if the employee would have lost his balance, he could have landed on a platform that was four feet below the platform he was working on, and protruded approximately four feet beyond it. He said that a tank was located below the work platform, and partially protruded beyond it. Also, Owens maintained that the cited conditions, and manner of operation have existed for ten years, and they have not led to any accidents or injuries.

b. Discussion

I note that the following particulars of the inspector's testimony have not been contradicted or impeached: that the employee was not tied off, and was not wearing a safety belt, that he was working on a platform that was approximately ten feet off the ground, and that while the employee was sitting on a belt guard at the edge of the platform, he was leaning over, picking up fist-sized stones, and throwing them down to the ground. Jones opined that the employee could lose his balance and fall to the ground below which was composed of various sized stones.

[2] Section 56.15005, *supra*, provides as follows, "Safety belts and lines shall be worn when persons work where there is a danger of falling."

Based on Jones' testimony, I find that one of Dix River's employees was working on an area ten feet above the ground, but he was not wearing a safety belt or line. Also, that he was sitting on a belt guard close to the edge of the platform, leaning over, picking up and throwing stones to the ground. Hence, there was a danger of falling. I'm not quantifying the danger, but certainly there was a danger of falling, especially considering that there weren't any rails. I thus find the Respondent violated Section 56.15005 which requires the wearing both a safety belt and lines where there is a danger of falling.

2. Significant and Substantial

In essence, Commission case law provides that a violation is "significant and substantial" if "based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish that a violation of a mandatory safety standard under the Federal Mine Safety and Health Act of 1977 ("Mine Act") is significant and substantial, the Secretary must prove: 1) the underlying violation of the mandatory safety standard; 2) a discreet safety hazard 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 will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984).

As set forth above, the evidence clearly establishes the first two criteria. I find that the record establishes the existence of the following facts: (1) the employee observed by Jones was on a platform that was 10 feet above the ground; (2) the employee was observed throwing stones off the platform; (3) the employee was picking up and throwing stones; (4) there were not any rails on the platform; and (5) the employee was not wearing a safety belt or a line. Based on a combination of these facts, I conclude that the third and fourth of the above criteria have been established. I thus find that the violation was significant and substantial. (*See*, *Mathies*, *supra*)

3. Penalty

Pursuant to Section 110(i) of the Mine Act, in determining the penalty to be assessed upon a mine operator, the following six factors must be considered: 1) the operator's history of previous violations; 2) the appropriateness of the penalty to the size of the business of the operator; 3) whether the operator was negligent; 4) the effect on the ability of the operator to continue in business; 5) the gravity of the violation; and 6) whether good faith was demonstrated in attempting to achieve prompt abatement of the violation.

I find that the gravity of the violation was relatively high for the reasons set forth above, (I)(A)(2) *infra*. I do not find anything in the operator's history of previous violations or the size of the operator's business that justifies an increase or decrease of a penalty. Dix River is a small operator. The history of violations neither warrants increasing or decreasing the penalty. The evidence appears to indicate that abatement was done in a reasonably timely fashion.

The following testimony of Jones is instructive regarding the level of the operator's negligence:

> And I figured that if the operator had provided him with proper fall protection, the training how to wear it, a good place to store it, then I felt the operator . . . had some sort of an attempt to provide this person with the fall protection that they needed . . . and the training to know when to use the equipment . . . even though the operator is not there standing there telling him to put it on, that he would know to put it on himself. (Tr. 30).

Based on all the above, I find that Dix River's negligence is mitigated to some extent.[3]

The mine operator has the burden of showing that the penalty will have a detrimental effect on its ability to continue in business. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983); *Buffalo Mining Co.*, 2 IBMA 226 (1973). Respondent's representative has submitted evidence showing that Dix River Stone, Inc. was merged with Owens Chevrolet, Inc., a used Chevrolet dealership owned by the subject quarry's owner. He also submitted various bank statements, loan balances, and a judgment by a Kentucky Circuit Court ordering payment by Owens Chevrolet of taxes, penalties, interest and fees. These documents indicate that Owens Chevrolet, Inc. incurred losses in the previous years. However, Respondent did not offer any evidence of the quarry's assets and liabilities and provided only an estimation of the assets owned by Owens Chevrolet.[4] The documents provided by Respondent fall short of the kind of

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[3]The bench decision did not make any determination the remaining penalty criterion set forth in Section 110(i) of the Act, i.e., the effect of the imposition of a penalty on the ability of the operator to remain in operation. The record was kept open to allow Dix River to proffer documentary evidence on this issue. Subsequent to the hearing, Dix River filed Exhibits C1-9, G-A, G-1-11, H, I, J, K, L, M, N-1, N-2, O, P-1, Q, R, S, and T-1. In conference calls on September 11, 2010, and April 30, 2010 the Secretary did not object to their admission, and they were admitted.

[4]Section 110 (a)(1) of the Act provides, as pertinent, as follows:

> The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provisions of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $50,000 [currently $70,000] for each such violation. (emphasis added)

evidence which allows a reduction in a penalty due to the operator's inability to continue in business. *See, Spurlock Mining Co., Inc.*, 16 FMSHRC 697, 700 (April 1994)(the operator introduced its tax returns, balance sheets, and tax liens. It was held that the operator "failed to introduce specific evidence to show that the penalties would affect their ability to resume operations and continue in business"); *Ron Coleman Mining, Inc*., 21 FMSHRC 935 (Aug. 1999)(ALJ). (mine's tax returns indicating a loss, was held to tend to indicate a negative impact on its ability to continue in business). *See also*, *Bob Bak Construction*,19 FMSHRC 1791 (Nov. 1997)(ALJ).

Within the above context, I find that Respondent has not provided specific evidence to show that the penalties would affect its ability to continue operations and continue in business.

Considering all the above factors set forth in Section 110 (i) of the Act, especially the low level of negligence, I find that a penalty of $1,000 is appropriate.

B. Citation No. 7765947[5]

1. Introduction

On September 11 and 12, 2007, Jones conducted an inspection of the quarry. Jones observed a Thomas ProTough 900 brand skid steer loader ("loader" or "skid steer loader") parked on the quarry premises. The loader was not marked as defective and was not parked in an area specially designed for defective equipment. During his inspection, Jones spoke to an employee whom he identified as the "plant operator" (Tr. 187.) Jones said the latter indicated that he was the "normal" operator of the loader. (*Id*) Jones "had him" raise the safety bar ("seat bar") "all the way" to the "up" position (Tr. 188). Jones indicated he observed that the operator lifted the seat bar to its "full upright position" which should have "locked" all the controls (Tr. 188-89). The employee operating the loader was able to use the controls to raise the bucket while the seat bar was in the raised position. (Tr. 189-90.)

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[4] cont'd Section 110(i) of the Act provides that if the penalty amount assessed by the Secretary is challenged, the Commission is required to assess a penalty. The Commission is mandated to consider, inter alia, the operator's ability to continue in business (*Sellersburg Stone, supra*). Section 3(d) of the Act, defines an "operator" as the owner, or other person who operates controls, and supervises ". . . a coal or other mine." (emphasis added.) Thus, reading together all these sections, it is clear that for the purpose of assessing a penalty, the consideration of its effect is limited to the operation of a mine, rather than the financial condition of the non-related businesses of the owners of the mine. Therefore, not much weight was placed on the evidence adduced by Dix River related to the operation of Owens Chevrolet.

[5]This matter was heard on March 10, 2010. The date for the parties to file post briefs was extended to August 20, 2010, based on the granting of numerous requests made by the parties. The date to file responses was extended to August 30, 2010. The Secretary filed a brief on August 2, 2010. To date, Dix River has not filed a brief, or argument.

Jones subsequently issued citation No. 7765947 alleging a violation of 30 C.F.R. §56.14100(c), which states as follows:

> When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective item shall be used to prohibit further use until the defects are corrected.

2. Violation of 30 C.F.R. §56.14100(c)

To show a violation of Section 56.14100(c) *supra*, the Secretary must establish 1) the existence of a defect, that 2) makes continued operations hazardous to persons, and 3) the machine was not taken out of service. Since both parties agree that the loader was not taken out of service, only the first two elements are presently at issue.

a. The Existence of a Defect

i. The Parties' Evidence

Jones testified that a typical skid steer loader is equipped with a seat bar safety device which, when raised to the upright position, locks the machine's controls so that the machine cannot move. Jones testified that an employee he identified as the plant manager told him that he was the normal operator of the skid steer loader. Jones asked the employee to enter the cab of the loader, and start it. Jones observed the employee lift the seat bar safety device to its full upright position. While the seat bar was raised, Jones observed the employee attempting to move the loader with the tram controls in the cab, but it did not move. Jones observed that the employee was able to raise the bucket on the loader, even though the safety bar was in the full upright position.

Owens did not impeach Jones' testimony. However, he asserted that the loader did not have any defect. Owens testified that the loader was equipped with a button which, when pushed in, would deactivate the loader's controls. According to Owens, the button was designed to be pushed in by the seat bar when the seat bar was raised. He indicated, in essence, that his testimony in these regards is based upon the safety instruction booklet that he read. Owens testified that the day the loader was cited, an 80-year old employee, whom he referred to as Clarence, was the only employee at the quarry who was not "up front" with him. (Tr. 272.) Owens opined that Clarence was directed to operate the loader. According to Owens, Clarence was not trained to operate it, and due to his age and medical condition, was not allowed to get on it. Owens opined that Clarence must not have fully raised the safety bar. As such, the button had not been pushed in to de-activate the controls.

Owens testified that a technician inspected the machine shortly after Jones issued the citation and found nothing wrong with the loader's safety device.

ii. Discussion

The Commission has defined a "defect" as "a fault, a deficiency, or a condition impairing the usefulness of an object or a part." *Allied Chemical Corp.*, 6 FMSHRC 1854, 1857 (Aug. 1984) (citing *Webster's Third New International Dictionary* 59 (1971); U.S. Dept. Of Interior, Bureau of Mines, *Dictionary of Mining, Mineral and Related Terms* 307 (1968)). According to Jones, he observed the bucket move while the seat bar safety device was in the full upright position. As such, it can be reasonably inferred from the inspector's observation that the safety device was deficient, as it did not prevent movement of the bucket while the seat bar was in the upright position. In other words, the usefulness of the loader's safety mechanism was impaired to some degree.

Owens did not observe the operator of the loader rasing the safety bar. Thus, Owens does not have any personal knowledge as to how far the operator raised the safety bar. It is significant to note that Respondent did not call this employee to testify.

I note Owens' testimony that the day after the citation was issued a "technician" checked it out and "there was nothing wrong with the machine." (Tr. 273-274.) There is not any evidence that Owens had personal knowledge as to specifically what the technician did. It is significant to note the Respondent did not have the technician testify.

For all the above reasons, I find that Owens' conjectures as to what individuals might have done are insufficient to rebut the direct evidence adduced by the Secretary, consisting of Jones' testimony based on his observations. I therefore conclude that the Secretary has established the existence of a defect.

b. Continued Operations Hazardous to People

i. Testimony

According to Jones, he was told by quarry employees that the loader was used almost every day, and had been used that day prior to Jones' arrival at the quarry. Jones testified that ". . . [he's] seen it commonly done where [operators] would leave the cab and leave the machine operating . . . [and] the safety bar would be in the upright position . . . ." (Tr. 199.) Jones indicated that the loader "could very well be used" when there were employees nearby (Tr. 198.) He testified that he has seen it "commonly done where [operators] would leave the cab and leave the machine running." (Tr. 199.) Jones concluded that the safety defect on the skid steer loader constituted a hazard to the loader operator and other quarry employees.

According to Owens, the quarry had not been running on the day the citation was issued. However, Andrew Works, a foreman, testified that the loader is used even when the quarry is not running.

ii. Discussion

The descriptive term "hazardous" denotes a measure of danger to safety or health. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC at 827. I note Jones' testimony that, in essence, given the defective operation of the safety bar as observed by him, an individual could have been struck by the bucket if its controlling levers were unintentionally moved while the bar was in an upright position. Based on this testimony that was not impeached or contradicted, I find that the defect constitutes a measure of danger to the safety of quarry workers. Therefore, I find the Secretary has established that the defect makes continued operations of the loader hazardous to people.

For all the above reasons, I find that Respondent violated Section 56.14100(c), *supra*.

3. Significant and Substantial

As set forth above, the condition of the loader violated a mandatory standard i.e., Section 56.14000(c), *supra*. Also, the violation contributed, in some degree, to a safety hazard. Hence, I find that the first two elements of *Mathies supra*, have been meet.

The third element set forth in *Mathies, supra*, requires that the Secretary establish a reasonable likelihood that the hazard will contribute to an injury-producing event. *U.S. Steel Mining Co.,* 6 FMSHRC 1834, 1836 (August 1984). In the case at bar, in order for the safety defect on the loader to contribute to an injury-producing event, a number of events must occur. First, the operator of the skid steer loader would have to raise the seat bar safety device. Next, the operator would have to exit the machine while the machine was still running. Finally, the operator must inadvertently hit the controls of the skid steer loader, causing the machine to move and strike a quarry worker. Jones testified that it is common for an employee operating a skid steer loader to raise the seat bar safety device and exit without turning the machine off. However, the Secretary did not adduce any evidence to establish that the inadvertent contact with the controls by the operator was reasonably likely to have occurred.[6]

Thus, I find that the Secretary has not established that there was a reasonable likelihood of an injury–producing event, i.e., a person being hit by the bucket.

[6]There is not any evidence of the inner dimensions or the cab of the spatial relationship of operator's seat, and the controls. Indeed, Inspector Jones stated he did not know where the controls on the skid steer loader were located. He also did not remember if he could see the operator moving the controls.

Accordingly, it is concluded that the Secretary has not established that the violation was significant and substantial. (*See, Mathies, supra*).

4. Penalty

As discussed above, inadvertent movement of the bucket as a consequence of the violation, was not reasonably likely to have occurred. However, if, as a consequence, the bucket had hit a person, serious injuries could have resulted.

I find that the penalty is appropriate when considered in the context of the size of the operator's business. The analysis of the effect of a penalty on the operator's ability to remain in operation is the same as set forth above, I (A)(3), *infra*. I find nothing in the operator's history of previous violations to justify either an increase or decrease in penalty.

I find that Respondent, in good faith, attempted to achieve prompt abatement of the violation. Since the defect would become apparent only if the controls for the bucket were activated while the safety bar was in an upright position, I find that the violative condition was not obvious.

The safety bar was intended to prevent movement both of the loader and the bucket. When Jones tested its functioning, only the bucket could still be moved. I find that the violative condition was not extensive. There is not any evidence as to how long the violative condition had existed prior to its being cited by Jones on September 11, 2007. There is not any evidence that Respondent had either knowledge or notice of the violative condition. I thus find that the level of Respondent's negligence was low.

Taking into consideration all of the above, especially the low level of negligence, and the fact that the violative condition was neither extensive nor obvious, I find that a penalty of $700 is appropriate.

C. Citation No. 7765953

1. Introduction

On September 12, Jones inspected the quarry's pug mill. Jones observed three distribution boxes which controlled the electrical circuits to the pug mill. The distribution box on the right controlled the right paddle of the pug mill, and the box in the middle controlled the left paddle. The box on the left was the main disconnect for the pug mill.[7]

[7]According to Jones, ". . . [if the main disconnect] is shut off, there's not power to either of the other two boxes." (Tr. 334.)

The distribution boxes controlling the paddles had black markings on the exterior of the boxes. The distribution box for the main disconnect did not have any markings, but had a manufacturer's label on the front of the box.

Inspector Jones issued citation number 7765953, alleging a violation of 30 C.F.R. §56.12006, which states as follows:

> Distribution boxes shall be provided with a disconnecting device for each branch circuit. Such disconnecting devices shall be equipped or designed in such a manner that it can be determined by visual observation when such a device is open and that the circuit is de-energized, the distribution box shall be labeled to show which circuit each device controls.

2. Violation of Section 56.12006, *supra*

a. The Parties' Evidence

According to Jones, the distribution box in the middle (center) controlling the left paddle, "has some sort of writing on it that you could make out part of it but not entirely" (Tr. 333.) Jones testified that the box on the right, controlling the right paddle was not labeled at all, and the left box controlling the man disconnect did not have any markings on it regarding the circuit it controls. Jones concluded that the boxes were inadequately labeled. In support of his conclusion, Jones stated that:

> there is some portion, part, piece of labeling, but for the person who is under a stressful situation or something similar to that; or if a person wants to make absolutely sure that they lock out the proper circuit, you've got to be able to absolutely make positively sure that it is the circuit that you want locked out." (Tr. 367.)

Owens testified that the distribution boxes controlling the pug mill's left and right paddles were labeled, and the labeling was faded but readable. Owens also testified that the distribution box for the main disconnect had a factory label on the front of the box. According to Owens, the factory label included the words "main disconnect." (Tr. 375.) Respondent also provided a photograph of the distribution boxes taken within a week after the citation was issued, and after the boxes had been re-labeled.

b. Discussion

Section 56.12006, *supra*, requires that each distribution box be labeled in order to show which circuit it controls. Thus, in order to establish a violation of Section 56.12006, *supra*, the Secretary need only show that one distribution box was not adequately labeled.

Government Exhibit 14A, and Respondent Exhibit F, appear to indicate that the distribution box located in the middle of the three boxes, was somewhat labeled to show it controlled the left paddle. I note Owens' testimony that the distribution box controlling the main disconnect had a factory label that said "main disconnect" in fine print. (Tr. 375.) On the other hand, Jones testified that this box did not have any markings on it regarding the circuit it controls. I examined Exhibits 14A and F and I find that they do not corroborate Owens' testimony in that the words "main disconnect" can not be ascertained. Further, according to Jones' testimony, the box on the right did not have any markings regarding the circuit it controls. A photograph of the boxes taken on the day he issued his citation, appears to corroborate his testimony regarding the lack of labeling.

I note that Respondent proffered photographs depicting the boxes in issue, and the following is written in black on the right distribution box "right side paddle." (Ex. F1 and F2.) However, the record fails to establish that these pictures were taken on the date the conditions were observed and cited by Jones. Owens testified that he took them "within probably a week [after they were cited on September 11]" (Tr. 374), and after the boxes at issue had been labeled. In follow-up testimony he said that he "[did not] know if that was before or after, . . . but it was shortly after *** we did this like the very same day he did the inspection." (Tr. 375.) I find this testimony unclear and confusing. I therefore accord more weight to Jones' pictures as depicting the condition of the labeling of the boxes when they were cited. In this connection , I note that in Exhibit 14A, taken on September 11 by Jones, the left and right boxes are not depicted with any writing or other labeling to indicate the circuit each controlled.

Based on all the above, I find that the left and right boxes were not adequately labeled to indicate the circuit controlled by each box. Thus, I conclude that the Secretary has established that at least one distribution box was inadequately labeled. Accordingly, I find that it has been established that Respondent violated Section 56.12006, *supra*.

3. Penalty

As set forth above, I (A)(3), I conclude that nothing in the operator's history of previous violations or size leads me to increase or decrease the penalty. I also found that Dix River has not provided specific evidence to establish that the penalties would affect its ability to continue in business. If find that Respondent, in good faith, attempted to achieve prompt abatement of the violation. Jones testified that the violative conditions could have resulted in electrocution, or a fatal injury. This testimony was not refuted by Respondent. Accordingly, I find the gravity of the violation to be relatively high.

I find that the violative conditions, affecting only two distribution boxes, were not extensive. Based on Jones' photograph of the outside cover of the box on the right side, I find that the lack of labeling was obvious.

The operator promptly abated the situation by re-labeling the distribution boxes.

Respondents negligence regarding the lack of labeling on the left is mitigated somewhat by
Owens' testimony that a factory label on the box indicated "main disconnect in 'fine print'" (Tr 375.) The Secretary did not establish how long these conditions had existed. Therefore, I conclude the operator's negligence to have been only moderate.

Considering all the above criteria set forth in Section 110(i) of the Act, I find that a penalty of $200 is appropriate.

II. Docket No. Kent 2008-463

A. Citation No. 7765949

At the conclusion of the October 14, 2009 hearing a bench decision was issued which, except for the correction of non-substantive matters, is set forth below as follows:

On September 12th, 2007, MSHA Inspector Richard Jones inspected Dix River's above ground crushing operation. He specifically inspected a rock-breaker platform that was elevated approximately 20 feet from the ground. There were two parallel rails on three sides of the platform. The highest rail was approximately four feet off the ground and the rail below was at an equal distance between the top rail and the platform.

According to the inspector, men needed to access the platform to perform maintenance and repair work on various hydraulic lines, motors, and equipment. He indicated that it would be extremely hazardous for a person to access the platform from a platform located adjacent that was approximately a foot and a half higher because of the presence of rails on three sides and the presence of a series of rebar bars closing off the fourth side. Jones testified that a person could lose his balance and trip while climbing over the rails and fall 20 feet. He was told that Dix River had some type of man-bucket to transport a miner to the platform at issue in order to perform maintenance and repairs. However, he was concerned about the hazard of climbing from the man-bucket over the rails to get onto the platform. Also, he noted that the previous day he issued a citation because he had observed an employee working on a piece of equipment that was approximately ten feet off the ground, and that employee did not have either a safety belt or was not tied off. He was concerned that a person attempting to access the platform at issue from a man-bucket would also not be tied down.

30 CFR § 56.11001 provides as follows, "Safe means of access shall be provided and maintained to all working places." (Emphasis added.) 30 CFR § 56.2 provides that a "working place" means any place in or about the mine where work is being performed.

The plain wording of Section 56.11001 *supra*, requires the provision of a safe means of access; it does not require the safest means of access. Also, the plain language of Section

56.11001 *supra*, does not state that only safe ambulatory access satisfies its requirements.

Owens testified that the company had a "bucket-truck"(Tr. 125-26), that allowed a person to enter a bucket, and then be transported right up to that platform. He also indicated that he is familiar with this operation, that he has been in the bucket, and that it can be placed flush against the rail. He also indicated that the height of the rail is less than the height of the bucket. Thus, to access the platform safely one would have to climb out of the bucket and then just step down onto the platform; it is not necessary to climb over any rail. I find Jones' testimony credible based on my observations of his demeanor, and the fact his testimony in these regards was not impeached or contradicted. Therefore, I find that safe access to the platform was provided.

For all the above reasons I find that it has not been established that the operator did not comply with Section 56.11001, *supra*.

B. Citation No. 7765950

After this matter was heard on October 14, 2009, the Secretary vacated this citation, therefore, it is dismissed.

ORDER

It is **Ordered** that Citation Nos. 7765949 and 7765950 be **DISMISSED**.

It is further **Ordered** that, within 30 days of this decision, Respondent shall pay a total civil penalty of $1,900 for the violations found herein.

Avram Weisberger
Administrative Law Judge

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