FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

March 10, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2008-184
Petitioner	:	A.C. No. 11-03141-137716
	:	
v.	:	
	:	
	:	
MACH MINING, LLC.,	:	Mach # 1 Mine
Respondent	:	

DECISION

Appearances: Travis W. Gosselin, Esq., U.S. Department of Labor, Chicago, Illinois, on behalf of the Petitioner
David J. Hardy, Esq., Charleston, West Virginia, on behalf of the Respondent

Before: Judge Barbour

This case is before me upon the Petition for Civil Penalty filed by the Secretary of Labor on behalf of her Mine Safety and Health Administration ("MSHA") against Mach Mining Company ("Mach") pursuant to section 105(d) (30 U.S.C. § 815(d)) of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 801, *et seq.* The Secretary alleges that, in two instances, Mach violated mandatory safety standards for the surface areas of underground coal mines at its No. 1 Mine, an underground bituminous coal mine located in Williamson County, Illinois. The Secretary also charges that the violations were due to Mach's "high negligence." The Secretary seeks to assess Mach $550 for each alleged violation. Mach denies that it violated the standards or, if it did, that the violations were due to high negligence. The matter was heard in Carbondale, Illinois.

STIPULATIONS

At the commencement of the hearing the parties stipulated as follows:

1. Mach is an "operator" as defined in Section 3(d) of the Act.

2. The operations of Mach at its No. 1 Mine are subject to the Act.

3. [The] proceeding is subject to the Federal Mine Safety and

Health Review Commission (the "Commission") and its designated administrative law judge.

4. [The inspector who issued the citations in which the violations are alleged] was acting in his official capacity as an authorized representative of the Secretary when the citations were issued.

5. A true copy of each of the citations . . . was served on Mach as required by the Act.

6. The total proposed penalty for the citations at issue will not affect Mach's ability to continue in business.

7. The citations contain in Exhibit A attached to the petition are authentic copies of the citations at issue in this proceeding.

8. The R17 assessed violation history report is an authentic copy and may be admitted as a business record of MSHA.

9. On September 7, 2007, Mach . . . installed and was operating an energized 480-volt non[-]permissible pump in the No. 1 south shaft at the . . .bleeder shaft construction site.

See Tr. 10-12; *See also* Jnt. Exh. 1

THE PARTIES' CONTENTIONS

Prior to the testimony, counsels explained their positions. Counsel for the Secretary stated he would show that the company pumped water from a shaft at the mine using a non-permissible 480 volt submersible pump and that the pump was located below the collar of the shaft.[1] Because section 77.1914(a) requires all electrical equipment used below the collar of a shaft during excavation to be permissible, the Secretary maintained the company violated the standard as charged. Counsel stated the critical question is whether "excavation" was underway when the shaft was dewatered. He maintained that within the context of the standard, "excavation" means the entire process of bringing the shaft to the point where it can serve its purpose of ventilating the bleeder entries of the mine's underground workings. Dewatering the shaft is a necessary part of this process and, therefore, should be regarded as "excavation."

[1]The pumping process is referred to as "de-watering" the shaft.

Counsel also stated that he expected the testimony to show that on September 7, 2007, the company did not have a plan approved by MSHA to de-water the shaft. He maintained that, in addition to violating section 77.1914(a), Mach violated section 77.1900(a), which requires each operator of a coal mine to prepare and submit for the MSHA district manager's approval a plan providing for the safety of its workmen in each shaft that is constructed. Tr. 19-21.

Counsel for Mach countered that on September 7, 2007, excavation had been completed on the shaft. The shaft was sunk by Mach's contractor, North American Drillers ("North American"), and North American had moved all of its equipment to the site where it would sink another shaft.[2] Counsel admitted the pump was in fact non-permissible, but because the work of excavating the shaft was finished, electrical equipment used below the shaft's collar was not required to be permissible.

Counsel also maintained that Mach did not need a plan approved by MSHA in order to dewater the shaft. An approved plan that permitted dewatering was already in place on September 7. Once Mach decided that it would dewater the shaft, Mach's personnel used a pump that had been used in 2005 to dewater another shaft. The pump was non-permissible and MSHA had not objected when it was used in 2005. On September 7, 2007, MSHA surprised Mach by taking the position that the dewatering method had to be approved in another plan. Tr. 22. Counsel further stated that in the event MSHA was right and it needed an approved plan, the requirement was met by a provision in North American's MSHA-approved plan that stated either employees of Mach's contractor or employees of Mach could dewater the shaft. Tr. 23.

THE TESTIMONY

Dean Cripps is an electrical engineer who also works for MSHA as a coal mine electrical inspector. His duties include conducting electrical inspections of shaft construction sites. Tr. 26. Prior to September 7, 2007, Cripps inspected Mach's No. 1 Mine several times. Tr. 28-29. On September 7, Cripps was assigned to go again to the mine. He was instructed that this time his inspection should include the south shaft area.[3]

Cripps drove to the mine, parked, and walked to the mine office. At the office, Cripps informed mine management that he would be inspecting the south shaft site. Tr. 32. Cripps proceeded to the area, which was approximately five and one-half miles from the mine portal. *Id.*, Tr. 75.

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[2]The two shafts were approximately 150 feet apart. Tr. 76.

[3]The south shaft is a bleeder shaft, an air shaft that, according to Cripps, is "drilled down into the works of the mine usually at the back of a long wall panel." Tr. 33. A bleeder shaft assists in ventilating the long wall and the long wall gob. *Id.*; *see also* Tr. 40.

At the site, Cripps met Mike Jackson, a shift foreman and job supervisor for North American. North American had finished drilling the south shaft to its final depth [4]and was in the process of drilling another shaft, the north bleeder shaft (the north shaft). The north shaft was located about 550 feet to 600 feet from the south shaft. Tr. 33. North American's drilling equipment had been removed from the south shaft. The shaft had been collared and a steel grate had been installed over its mouth. Tr. 73. The south shaft was full of water. Tr. 39. Before the shaft could serve its purpose of ventilating underground parts of the mine, it had to be de-watered and lined.[5] After the shaft was de-watered and lined, Mach intended to connect the shaft to the active underground workings.[6] Tr. 39-40; 40-41.

Jackson told Cripps that the water from the south shaft would be pumped to and into the north shaft, because the water in the north shaft was "too heavy." Tr. 42. Cripps asked Jackson what he meant, and Jackson explained the "blind drilling" process to Cripps. The process was used by North American to drill both the south and north shafts. Under the process, as drilling advanced, water was allowed to fill the shaft.

Cripps described the process:

> [T]hey excavate the topsoil . . . down to the bedrock. And then they form up and pour a concrete collar at the surface . . . . And then they line the top . . . 25 feet of the shaft with steel. So you'd have . . . approximately, a 25-foot hole there, 14 feet in diameter. . . . They then set up a drilling rig. First

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[4]Cripps understood that the south shaft had been drilled through the seam of coal that Mach was actively mining and that it continued downward for approximately 100 more feet into another coal seam then being mined. The shaft "bottomed" in the second seam. Tr. 34.

[5]Mach typically contracted out such work, and in this instance, Heartland Pump ("Heartland") was hired to install de-watering pumps at the south shaft and Cowin Co. ("Cowin") was hired to line the shaft.

[6]Cripps stated:

> Once the shaft had been lined and driven to its depth . . . the mine operator would take . . . equipment . . . normally used underground . . . to excavate coal from the coal seam . . . . They would take their continuous miners and remove the coal . . . to the point [where] . . . they intersect with the shaft . . . and . . . connect the . . . coal seam with the shaft.

Tr. 40-41.

> they drill a small pilot hole . . . and they set their big drill rig up on the hole and they proceed to drill a hole[,] down into the [e]arth. As they're drilling the hole[,] the hole is filled with water the whole time and the water is used to mix with the drill cuttings . . . so . . . [the cuttings] can be pumped out of the hole as the hole [is] extended down to the [e]arth.
>
> Tr. 35.[7]

Cripps understood that water in the north shaft contained so many drill filings and other drilling residue, it was too "heavy" to be pumped to the surface and sent to the pit where it was ultimately deposited. To make the water/filings mixture "pumpable," the mixture had to be diluted with water from the south shaft. *Id.* This process was underway and a non-permissible pump was used in the south shaft to take the water from the south shaft to the north shaft.[8] Tr. 42, 74. The pump in the south shaft was fully submerged in water when it was operated. r. 74.

At the time of Cripps's inspection, only Jackson and Heartland's employees were present at the south shaft site. Tr. 75. They told Cripps the non-permissible pump had been installed in the south shaft for "a couple of weeks" Tr. 63. In addition, Heartland's employees told Cripps that, at Mach's request, they were preparing to install a second pump in the south shaft. Tr. 38, 52, 75. The second pump also would be non-permissible. *Id.*, Tr. 41. Cripps described the non-permissible pumps as cylindrical, and approximately six to eight inches in diameter and eight feet in length. Their motors were located at the bottom of the cylinders. The pumps' "intakes" were below the motors. Water and any residue in the water was taken into the pumps through the intakes and forced to the surface. The pumps were operational only when they were submerged. Tr. 37-38.

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[7]Pete Hendrick, Mach's mine superintendent, also described the process. He stated:

> . . Blind drilling is a . . . relatively new technique . . . . A . . . large bit is placed on the surface, a pilot hole is drilled and you . . . .drill it out. You float the cuttings out with heavy water and air.
>
> Tr. 99.

[8]Because drilling had been completed in the south shaft and most of the solids had been removed, the water in the south shaft contained very few filings and/or other drilling residue. Most of the residue that remained had settled to the bottom of the shaft. Tr. 123-124. The water in the south shaft was described by Hendrick as "crystal clear." Tr. 123.

Cripps testified that mandatory safety standard section 77.1914(a) requires "any electrical equipment used below the collar of the shaft or slope during excavation [to] be permissible." Tr. 37. In his opinion, Mach violated the standard because a non-permissible electric pump had been installed and used below the collar of the south shaft and a second such pump was being installed. Tr. 37. Cripps believed that Mach was highly negligent in allowing the use of a non-permissible pump. Cripps explained that his supervisor, Ron Stahlhut, told him that he, Stahlhut, had spoken with a Cowin official or officials and explained that Cowin's shaft-sinking plan had to include "how they were going to dewater [the] shaft using permissible pumps before [the] plan would be approved." Tr. 44. Although Stahlhut did not tell Cripps he had spoken with any of Mach's officials about having to use permissible pumps before a plan would be approved, Cripps believed that at least some of Mach's employees knew about Stalhut's conversation with Cowin's employees. Tr. 47. In Cripps's view, Hendrick was involved in everything at the mine, including all of the plans submitted by Mach's contractors for MSHA's approval. Although Cripps had no first-hand knowledge as to any of Hendrick's conversations, he speculated that Hendrick knew that failing to provide for permissible pumps would prevent MSHA from approving a shaft-sinking plan for the mine. Tr. 85. Therefore, Mach officials "took it upon [themselves]" to proceed without an approved plan. Tr. 48. They "contact[ed] Heartland . . . to install the non-permissible pumps in the shaft and [to] pump the water." *Id*. Cripps stated, "I made an assumption that Mr. Hendrick was aware of what MSHA had informed Cowin." Tr. 85. Therefore, in Cripps's opinion, use of the non-permissible pump was the result of Mach's "high negligence." *Id*.

With regard to the hazard posed by using a non-permissible pump, Cripps explained that because the shaft was being sunk through a coal seam, methane could be liberated and could accumulate above the water level in the shaft. Tr. 45. If the water seeped out of the shaft and the water level dropped below the level of the pump – something that could happen if there was a crack in the shaft's walls or in a coal seam the shaft penetrated – when the pump was turned on, "you would have a non[-]permissible electric motor that would no longer be covered by water and [there] could possibly be an explosive atmosphere of methane." Tr. 46. In other words, "[U]se of a non-permissible pump . . . in an atmosphere that contains methane could cause a methane . . . [ignition] or explosion." Tr. 45. The resultant heat would "at least"cause burns to miners. *Id*.

In addition to violating section 77.1914(a), Cripps believed Mach violated section 77.1900(a). He based his belief on the fact that water was being pumped from the shaft with a non-permissible pump and a shaft-sinking plan had not been approved by MSHA allowing this kind of work. Tr. 50. Cripps acknowledged that nowhere in the standard is it specifically stated that the plan must include a provision requiring the use of permissible pumps. He also agreed that in March 2004, MSHA issued a compliance guide to operators and other interested parties regarding the information that the agency required in a plan submitted for approval (Tr. 79; Resp. Exh. 1) and that the guide did not state that the method of dewatering the shaft had to be included. Tr. 78. In fact, the guide did not mention dewatering at all. Tr. 80. However, Cripps pointed out that in setting forth what must be included in a plan, section 77.1900(a)(3) requires

"[a] description of the construction work and methods . . . used in the construction of the slope or shaft," and he stated he viewed dewatering the shaft as "construction work." Tr. 92.

The only approved plan in existence on September 7, 2007, was North American's, which, according to Cripps, did not allow water to be pumped from the shaft. Tr 51. 54; Gov't Exh. 4. Although Provision 3-DV of the North American plan stated, "The finished shaft will be left full of water to be removed at a later date by either the lining contractor or mine personnel," the plan did not state how the water would be removed.[9] Tr. 76-77. Tr. 54, 76; Gov't Exh. 4.

Cripps identified an approved plan that Cowin had submitted for a shaft that was sunk earlier during the initial construction of the mine. Tr. 58-59; Gov't Exh. 6. According to Cripps, this plan approved the use of two types of pumps for de-wateriing the shaft – a submersible permissible pump and a surface, non-permissible pump.[10] Tr. 60-61. In a cover letter to Cowin approving the plan, the district manager stated, "You are reminded that all electrical equipment used below the collar of the shaft must be permissible. See §77.1914 for a reference." Gov't Exh. 6 at 1; Tr. 62. Cripps noted that although the letter was addressed to a vice president of Cowin, a copy was sent to Hendrick. Tr. 62-63.

Cripps believed that Mach was highly negligent in failing to have an approved plan. He explained that in making the finding, he relied on, "Basically, the same facts that I used in the determination of negligence on the previous citation." Tr. 64.

According to Cripps, the hazard presented by working without an approved plan was that non-permissible equipment would be used below the shaft's collar, which in turn created the possibility of a methane ignition that would cause those working at or near the head of the shaft to suffer serious burn injuries. Tr. 64-65. However, Cripps agreed that such an accident was unlikely to occur (Tr. 88) and that he had no knowledge of a methane ignition ever occurring when a submerged, non-permissible pump was used to dewater a shaft. Tr. 89.

Peter Hendrick testified for Mach. He holds a B.S. in mining engineering and has extensive practical experience in underground coal mining, including the excavations of shafts. Tr. 95-97. He has been involved in the development of approximately 20 shafts, going back to 1992 when he worked for a company other than Mach. Tr. 100.

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[9]In fact, either shortly before or shortly after the inspection, Cowin submitted a plan to the MSHA district manager, but the plan, which was dated September 4, 2007, was not received in the MSHA district office until September 27. Tr. 56; Gov't Exh. 5. The only reference to dewatering the south shaft in the plan was on page 4, where it described the shaft as having been blind drilled and dewatered. Tr. 57; Gov't Exh. 5 at 4. In Cripps's view, the Cowin plan assumed the work of dewatering and lining the shaft had been completed.

[10]Cripps stated the surface pump was not required to be permissible because "[t]he electric components of . . . [the] pump [were] on the surface . . . not below the collar of the shaft." Tr. 61.

Hendrick explained that the first shaft drilled in connection with the mine was a return shaft and that Mach's contractor, North American, submitted a plan to MSHA for developing the shaft. Tr. 100. The plan involved the blind drilling method. The plan was approved by MSHA's district manager. TR. 100-101; Resp. Exh. 2. Hendrick testified that under North American's plan, the "finished shaft" was to be "left full of water to be removed at a later date by either the lining contractor . . . or mine personnel." Tr. 101. In practice, this meant that the shaft was left full of water for several months. Tr. 102. According to Hendrick, the only job North American was hired for was to "[e]xcavate the shaft." *Id.*

Because one of the Secretary's allegations was that a non-permissible pump had been used in the shaft "during [the shaft's] excavation" and in violation of section 77.1914(a), there was much discussion at the trial regarding the meaning of the word "excavation" as used in section 77.1914(a). In Hendrick's view, the word meant "the removal of material from the hole. Plain and simple." Tr. 102. He added, "There is nothing else involved in it." *Id.* Hendrick noted that the definition of "excavation" in an online dictionary is "to engage in digging, hauling out or removing," which is entirely consistent with his understanding of the word's meaning in section 77.1914(a). Tr 103; Resp. Exh. 3.

Hendrick was asked about the process of developing the south shaft. He testified that the first step was hiring a contractor to drill the shaft. The second step was for the contractor – in this case, North American – to drill the shaft. The third step was to de-water the shaft. The fourth step was cutting into the shaft from the active workings. Tr. 136-137. The fifth step was lining the shaft. The sixth step was preparing the shaft to be used for ventilation of the mine, a process requiring the installation of manifolds and a fan at the top of the shaft. Tr. 137-138. Hendrick agreed that approved plans were needed to drill the shaft, to cut into the shaft from the mine and to line the shaft. Tr. 138-139. However, Hendrick did not think a plan was needed to dewater the shaft. Tr. 139. Although Cowin included a provision that referenced de-watering in its 2005 plan, Hendrick did not know why. Gov't Exh. 6; Tr. 139. He speculated that, "[Y]ou put stuff in your plan . . . that's not required" in order to "get your plan through." Tr. 139-140.

Hendrick had never heard that de-watering the shaft was considered "excavation." Tr. 104. Hendrick believed the requirement to use a permissible pump was an archaic leftover from the days before "blind drilling," the days when the shaft was drilled, shot and mucked out.[11] Tr. 107. Before "blind drilling," miners actually worked in the shaft. According to Hendrick, that was the reason for requiring the pump to be permissible. Tr. 108. However, with blind drilling, the only time miners entered the shaft was during the lining process, and this process took place after all of the water was removed from the shaft. *Id.*

[11]Hendrick described mucking out as the process of "pulling all the rock out in a muck bucket." Tr. 107.

Hendrick recalled that when the citations were issued, he called the MSHA assistant district manager, Dave Wickham, and complained about having to use a permissible pump to dewater the shaft and to have a provision in an approved plan requiring the use of such a pump. According to Hendrick, Wickham told him that was "just the way [MSHA] District 8 interpret[ed]" the regulations. Tr. 114. Hendrick testified that he told Wickham, "[T]hey don't even make a permissible pump that will pump at this depth . . . There is not a single pump out there that will do this job" (Tr. 114; *see also* Tr. 124-125), and Wickham replied, "[Y]ou're a smart guy, Pete, go figure it out."[12] Tr. 114. Hendrick emphasized that using a non-permissible pump was not hazardous, because the pump's motor functions only when it is under water. If the energized pump were exposed to air, the pump would automatically shut down. Tr. 117. Hendrick felt that defining dewatering the shaft as "excavation" was "really reaching." Tr. 119. Although he agreed that when the shaft was dewatered, a little of the drilling residue that had gone into suspension was removed with the water, he maintained most of the material just "settled out" (Tr. 119; *see also* Tr. 123), which was why he described the water removed from the shaft as "crystal clear." Tr. 120.

Hendrick did not think the company violated section 77.1900(a). He stated:

> I can't read any work in any of the MSHA publication[s] or the Code of Federal Regulations that requires us to have a plan to pump that water out of that hole. . . . I've never had a plan in the past to pump water out of a hole.

Tr. 118.

THE ISSUES

The issues are whether Mach violated the standards alleged in the citations, and, if so, whether the violations were caused by Mach's high negligence, and the amount of the civil penalties that must be assessed for any violations taking into consideration the civil penalty criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i).

[12]In fact, Mach dewatered the shaft by linking a series of permissible pumps and by incrementally lowering them as water was pumped from the shaft. Tr. 115.

CITATION NO. 6666936
30 C.F.R. § 77.1914(a) – THE NON-PERMISSIBLE PUMP

THE PARTIES' ARGUMENTS

THE SECRETARY

In the Secretary's view, the essential question is the meaning of the word "excavation" as it is used in the standard. The Secretary argues that the word encompasses "the entire process of constructing the shaft - up to and including when the mine is connected into the shaft and the shaft is lined." Sec. Br. 12. The Secretary states:

> The excavation of a shaft is not simply the act of digging out a hole; it is a multi-step process involving a series of distinct, but interrelated phases: drilling, dewatering, connecting, lining. The successful completion of each step is predicated on the completion of the preceding step, and all four steps must be completed before the shaft is capable of being put into service to ventilate the mine. Only then has the shaft been fully excavated.

Sec. Br. 12.

She asserts that "[d]ewatering is no more or less a process of 'removal of material from the hole' than is . . . floating out cut material." Sec. Br. 13. This is especially true since when the pump was first installed and energized[,] it removed some of the material left from the drilling process along with the water. *Id.* n. 4 (*citing* Tr. 108).

The Secretary argues her interpretation of the word "excavation" is consistent with the dictionary definition of the word as set forth in Webster's Third New International Dictionary (2002). There, the word is defined as "the action *or process* of excavating." (*emphasis added*) Sec. Br. 13. She notes that the word "process" is defined as "a progressive forward movement from one point to another on the way to completion: the action of passing through continuing development from a beginning to a contemplated end: the action of *continuously* going along *through each of a succession of acts*, events or developmental stages" (*emphasis added),* and she argues that "[t]o the extent that dewatering is part of a succession of acts directed towards completion of the shaft, it is clear that dewatering is part of the process of 'excavation' as that term is used in [s]ection 77.1914(a)." Sec. Br. 13-14. Because the parties agree that the pump used to dewater the shaft was non-permissible (Stip. 9), and because the pump was located below the collar of the shaft, Mach violated Section 77.1914(a) as charged.

The Secretary also argues that Cripps's finding of "high negligence" is fully supported by his reasonable assumption that Hendrick knew a permissible pump was required, yet Mach used a non-permissible pump. It is reasonable for Cripps to assume Hendrick knew that MSHA would require language in a shaft-sinking plan requiring the use of a permissible pump because MSHA sent Hendrick a copy of its letter to Cowin, in which it reminded Cowin that "all electric equipment used below the collar of the shaft must be permissible." Gov't Exh. 6 at 1; Sec. Br. at 15-16. Despite this knowledge, Mach had a non-permissible pump installed below the south shaft's collar and Mach used the pump. Sec. Br. at 7.

MACH

Like the Secretary, Mach asserts that the key to understanding whether or not a violation of section 77.1914(a) occurred is the meaning of "excavation" as the word is used in the standard. Mach relies on an internet dictionary definition of "excavation," which defines the word as meaning "to engage in digging, hollowing out or removing." Op Br. at 7. It argues that the record supports finding that at the time of the inspection, excavation of the shaft had been completed. North American had hollowed out the shaft all of the way to its bottom. North American had moved its equipment to another shaft, and it had placed a steel grate over the shaft, which prevented miners entering it. *Id.*

Moreover, it asserts that if a violation occurred, it was not due to Mach's "high negligence." There is no evidence of any conversations between MSHA and Mach regarding the use of non-permissible pumps for dewatering a shaft. Op. Br. at 8. Cripps's assessment of negligence was based entirely upon assumptions based on communications between MSHA and third parties. *Id.* at 8-9. Moreover, in 2005, the company used the same non-permissible pump to dewater a return ventilation shaft, and MSHA knew about it; yet the agency did not charge Mach with a violation of the standard. *Id.* at 9.

THE VIOLATION

The citation states:

> An energized 480 volt non-permissible pump is installed below the collar of the # 1 (south) bleeder shaft at the Mach # 1 mine bleeder shaft construction site.

Gov't Exh. 2

As has been stated repeatedly, section 77.1914(a) requires in pertinent part that, "Electric equipment employed below the collar of a . . . shaft during excavation shall be permissible." The parties essentially agree that the citation accurately describes the situation Cripps found at the south shaft on September 7, 2007, and that a non-permissible pump was in fact installed below the collar of the shaft. Stip. 9. They also agree the pump had been used to pump water from the

south shaft to the north shaft. *Id.*; Tr. 37, 42, 51, 74. Under the standard, the electrical equipment must be "employed." "Employed" is the past tense of the verb "employ." The verb means "to make use of." *Websters Third New International Dictionary* (2002) at 743. Obviously, the pump was made use of when it pumped water from one shaft to another. Therefore, I find the pump was "employed" within the meaning of section 77.1914(a).

The all important question is whether the pump was employed "during excavation." If so, the violation existed as charged. If not, the citation must be vacated. "Excavation" is not defined in the Act, in the standards, or in any official MSHA publication that has been brought to my attention. However, as used in the mining industry, "excavation" is recognized to mean: "The act *or process* of removing soil and/or rock materials from one location and transporting them to another. It includes digging, blasting, braking, loading and hauling either at the surface or underground." American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms*, 2nd ed. (1997) at 193 (*emphasis added)*.[13]

Although the question is close, I conclude that as used in the standard "excavation" means the "process" of removing soil and/or rock materials from one location and transporting them to another and that this process includes dewatering the shaft. I reach this conclusion based on the definitions in the *Mining Dictionary* and in *Websters* that define excavation as a process, and on testimonial evidence that the process of dewatering the shaft involved the removal of at least a small amount of suspended residue that remained from drilling the shaft. The definitions require me to look beyond the individual steps in the shaft sinking process and to regard as "excavation" all of the steps necessary to remove the rock materials resulting from the process prior to the shaft's serving its ventilation purpose. When viewed from this perspective, dewatering is a part of the shaft's excavation process and any pump used below the collar of the shaft must be permissible.

I reach this conclusion not in deference to the Secretary's view, but as a result of the plain meaning of the term "excavation" as used in the standard. While it is true that in colloquial speech the word "excavation" frequently is restricted to the actual digging out of soil and rock, the emphasis in the definitions on the "process" of excavation connotes a broader, more expansive meaning, one that, here, I find the Secretary has properly applied. The Secretary established the violation as alleged.

NEGLIGENCE

While I conclude Mach violated section 77.1914(a), I do not subscribe to the Secretary's view that the violation was due to the company's "high negligence." As the company accurately

[13]In *Webster's*, too, "excavation" is defined as an "action *or process*," and while "excavating" is defined as "[t]o hollow out: to form a cavity or [a] hole," and to "dig out and remove," it also is defined as to "[s]hape by removing material so as to leave a space." *Webster's* at 791.

points out and as the Secretary recognizes, Cripps's high negligence finding was based entirely on assumptions. Cripps believed that Hendrick knew MSHA required the use of a permissible pump because Cripps's supervisor told Cripps that he, the supervisor, had informed an official (or officials) of Cowin that a permissible pump had to be used. Tr. 44. Because Hendrick was "involved in all of the operations of [the] mine[,]" Cripps surmised that Hendrick knew of the permissibility requirement. Tr. 48. However, there is no evidence to support finding that Hendrick spoke with anyone from Cowin about the requirement to use permissible pumps below the shaft's collar. Nor is there any evidence that MSHA communicated directly either orally or in writing with any Mach official on the subject. Cripps's assumptions are reeds too slender to support his high negligence finding.

However, the fact that MSHA never communicated directly with Mach on the requirement prior to September 7, 2007, does not absolve the company of meeting the standard of care required by the circumstances. A careful reading of the standard should have revealed to company officials that excavation of the shaft included the entire process of removing material to allow the shaft to fulfill its purpose, and this process included dewatering. Although Mach's officials did not meet this standard of care, their lack of care was ordinary, not high.

CITATION NO. 6666935
SECTION 77.1900(a) - THE LACK OF AN APPROVED PLAN

THE PARTIES' ARGUMENTS

THE SECRETARY

The Secretary asserts that Mach or its contractors did not have an MSHA-approved plan in place specifying how the shaft would be dewatered.[14] The Secretary maintains it was Mach's responsibility to make sure an approved plan was in place, a plan that specified how a contractor or mine personnel would remove the water from the shaft. She further asserts that to gain approval under section 77.1900(a), the plan had to stipulate that all electrical equipment, including a dewatering pump, used below the collar of the shaft, would be permissible. In the Secretary's view, dewatering the shaft without an approved plan violated section 77.1900(a). Sec. Br. at 2.

The Secretary notes that section 77.1900(a)(3) states that all shaft-sinking plans shall include, "A description of the construction work and methods to be used in the construction of the slope or shaft, and whether part of all of the work will be performed by a contractor and a

[14]The only MSHA-approved plan that mentioned removing water from the south shaft was North American's plan. It was approved by the agency on January 8, 2005. It stated, "The finished shafts will be left full of water to be removed at a later date by either the lining contractor or mine personnel." *Id.*; Gov't Exh. 4. No language in the plan spoke to how the shafts would be dewatered. Sec. Br. 14.

description of that part of the work to be performed by a contractor." Referencing Cripps's testimony, the Secretary maintains that "construction work," as the term is used in the standard, includes the process of dewatering the shaft. Sec. Br. 18 (*citing* Tr. 83). Therefore, an approved plan needs to include language specifying how a shaft will be dewatered (including a description of the methods to be used, as well as language identifying which contractor will perform the dewatering). North American's approved plan, which states, "The finished shafts will be left full of water to be removed at a later date by either the lining contractor or mine personnel" did not meet these requirements. Sec. Br. 17-18.

The Secretary maintains that Mach was aware that MSHA required an approved plan to be in place before dewatering began. She points out that several months before Cripps's visit to the mine, his supervisor, Ron Stahlhut, told Cripps that he (Stahlhut) spoke with Cowin's personnel and told them that in order for MSHA to approve Cowin's shaft and slope sinking plan, the plan would have to include a provision that the shaft would be dewatered using a permissible pump or pumps. Sec. Br. at 7; 15. Cripps was sure Hendrick knew of this conversation.

In addition, in 2005, when MSHA approved a plan for dewatering a shaft, the agency advised Cowin's Vice President for Safety by letter that "all electrical equipment used below the collar of the shaft must be permissible," and Hendrick was sent a copy of the letter. Sec. Br. at 8 (*quoting* Gov't Exh. 6). Therefore, Cripps properly found that Mach's failure to make sure an approved plan was in place prior to dewatering the shaft represented high negligence on the company's part. *Id.*

MACH

Mach notes that section 77.1900(a) requires plans be submitted to protect the safety of workmen "[i]n each . . . shaft." Op. Br. at 10 (*quoting* section 77.1900(a); "Each operator of a coal mine shall prepare and submit for approval . . . a plan *providing for the safety of workmen in each . . . shaft* (emphasis added).) Workmen were not in the shaft during the dewatering process. Therefore, requiring a plan is inconsistent with the purpose of the regulation. Op Br. at 11-12. Mach further notes that none of the listed topics that must be included in an approved plan, topics found in section 77.1900(a)(1) through section 77.1900(a)(9), mention dewatering. *Id*. Moreover, MSHA's own compliance guide on slope and shaft sinking plans, dated March 2004, contains no mention of dewatering a shaft. *Id.* at 10-11; S*ee* Op. Exh. 1. Absent any requirement that dewatering be included in a plan, there is no basis to find that a failure to have an approved plan that includes dewatering violates section 77.1900(a).

Mach further argues that even if section 77.1900(a) is somehow construed as requiring a plan for dewatering the shaft, North American had a plan approved by MSHA which provided that the shaft would be left full of water to be removed later by either the lining contractor or mine personnel.

Finally, Mach reiterates its argument that Cripps's negligence finding cannot be upheld, because it is based solely on hearsay and assumptions. Op. Br. at 12-13.

THE VIOLATION

The citation states:

> Work is being performed at the #1 (south) bleeder shaft at the Mach #1 mine bleeder shaft construction area. Water that was left in the shaft when North American Drillers completed drilling the shaft is now being pumped out of the shaft. One submersible pump has been installed in the shaft and another is being prepared to be installed by Heartland Pump. Mach . . . does not have an approved plan to allow this work in the shaft.

Gov't Exh. 3.

Section 77.1900(a) states in part:

> Each operator of a coal mine shall prepare and submit for approval by the . . . [MSHA] District Manager for the district in which the mine is located, a plan providing for the safety of workmen in each slope or shaft . . . . The plan shall be consistent with prudent engineering design. The methods employed by the operator shall be selected to minimize the hazards to those employed in the initial or subsequent development of any slope or shaft[.]

Following section 77.1900(a), the standard sets forth nine topics the plan must include. 30 C.F.R. § 77.1900(a)(1) through (a)(9).

Cripps testified, and Mach does not dispute, that on September 7, 2007, neither Mach nor any of its contractors had a plan approved under section 77.1900(a) that required the use of permissible pumps to dewater the south shaft. Tr. 51, 54. The only approved plan, that of Mach's contractor, North American, left open the specifics of how the shaft would be dewatered. Tr. 53-55, Gov't Exh. 4. The plan simply stated, "The finished shaft will be left full of water to be removed at a later date by either the lining contractor or mine personnel." Gov't Exh. 4 at 3. North American's plan also specified, "There is no electrical equipment required below the shaft collars." *Id*. at 4.

Section 77.1900(a) states that "[t]he methods employed by the operator shall be selected to minimize the hazards to those employed in the initial or subsequent development" of a shaft. While, as Mach notes, that plan is required to provide for the safety of workman "*in* each . . . shaft," I do not subscribe to Mach's view that because workmen were not "in" the south shaft when it was dewatered, and/or when a second pump was being installed, a plan requiring the use of a permissible pump or pumps to dewater the shaft was not required, because such a plan would not have furthered the purpose of the regulation. Op. Br. 11-12. It seems clear that the phrase "in each . . . shaft" as used in the regulation pertains to the shaft construction site, not just to the shaft itself. The standard requires a description of the "construction work and methods to be used in the construction of the . . . shaft" and some of the equipment used in a shaft's construction is operated from and on the surface. The safety of the workmen operating such equipment must also be a concern of the plan. For this reason, I agree with the Secretary that the safety of those workmen on the surface above the collar who install and operate the dewatering pump or pumps must be taken into account of by any approved plan.[15]

It was incumbent on Mach as the operator of the Mach No. 1 Mine either to submit its own plan for the entire process of excavating the south bleeder shaft or to make sure its contractors had approved plans for those parts of the process that lay within their areas of responsibility. As the Secretary points out, section 77.1900(a)(3) requires inclusion in the plan of "a description of the construction work and methods to be used in the construction of the . . . shaft." Further, section 77.1900(7) makes the operator responsible for ensuring that the type of equipment used in the construction work be specified in the plan. I agree with the Secretary that, when taken together, these sections require the operator to ensure that either it or its contractors have an approved plan specifically describing how water will be removed from the shaft and specifying the equipment used to do so. It is a fact that on September 7, 2007, neither Mach nor any of its contractors had such a plan. This means that when Mach engaged in dewatering the shaft, it violated section 77.1900(a).

NEGLIGENCE

While I conclude Mach violated section 77.1900(a) as alleged, I do not find that the violation was due to the company's "high negligence." Cripps's finding of high negligence was based solely on assumptions that I have found cannot support his finding. There is no evidence that Hendrick spoke with anyone from Cowin about the requirement to use permissible pumps below the shaft's collar. Nor is there any evidence that MSHA communicated either orally or in writing with any Mach official on the subject.[16] Further, although Hendrick agreed on cross-

[15]This was certainly recognized by North American, which submitted a plan to MSHA that covered North American's "[p]re-[e]xcavation activities," activities that took place on the surface. Gov't Exh. 4 at 2.

[16]To gainsay the obvious, when seeking to ensure that a particular standard is followed in a particular way, direct, clear communication between MSHA and an operator is preferable to

examination that he knew the 2005 plan had been submitted by Cowin and approved by MSHA, he was not asked whether he read the cover letter and understood that MSHA interpreted the plan as requiring the use of permissible pumps.[17]

Negligence is the failure to meet the standard of care required by the circumstances. Here, where the hazard posed to workers was minimal (*see* discussion of the gravity criteria, *infra*), where the standard required a careful reading to determine what was required, and where MSHA's communication to the operator of the standard's requirements was indirect at best, I find Mach's failure to meet the standard of care was the result of Mach's ordinary neglect.

OTHER CIVIL PENALTY CRITERIA

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communicating through an operator's contractor via word of mouth and letter copy.

[17]The closest he came being asked is the following exchange:

> Q. [Y]ou testified that you never had to submit a plan for to dewater a shaft; isn't that right?
>
> A. Yes, sir.
>
> Q. But . . . [Cowin's approved November 2005 plan] includes the language for dewatering a shaft. Didn't you submit this plan?
>
> A. No, Cowin did.
>
> Q. And when it was approved[,] weren't you copied on it?
>
> A. Uh-huh.
>
> Q. So, you were aware that this one was out there and had been submitted?
>
> A. Yes.

Tr. 140.

In other words, Hendrick knew of the plan, but he did not testify as to his understanding of what it required insofar as permissible pumps were concerned. I find that this exchange falls short of unequivocally establishing what Hendrick knew and understood with regard to the permissibility requirement for shaft pumps.

Neither violation was serious. The hazard posed by the installation and use of a non-permissible pump below the collar of the south shaft was that the pump would ignite accumulated methane. However, and as the testimony established, the likelihood of the hazard coming to fruition was negligible. First, when pumping was underway, the underwater location of the non-permissible pump made it impossible for the pump to serve as an ignition source. Tr. 74. For the impossible to become possible, the water level in the shaft had to drop below the location of the pump, methane had to seep from the coal seams through which or to which the shaft had been drilled, and methane had to accumulate to explosive range inside the shaft at the pump's location. Tr. 45-46, 64-65. The Secretary presented no evidence that such a scenario ever had occurred at Mach's No. 1 Mine – indeed, at any mine. She also presented no evidence that water ever seeped out of the shaft, and she presented no evidence regarding methane liberation at the No. 1 Mine and in uncompleted bleeder ventilation shafts at the mine. Cripps found that the violation was "unlikely" to cause "lost workdays or restricted duty" to any of Mach's miners or to its contractors' employees, and the testimony bears him out. *See* Gov't Exh. 2.]

The hazard posed by the lack of an approved plan was that it allowed the installing and use of a non-permissible pump for use below the collar of the south shaft, and that the pump would ignite accumulated methane. Tr. 64-65. For reasons stated regarding the gravity of Citation No. 6666936, I find the likelihood of this hazard coming to fruition also was negligible and that Cripps's finding that the violation was "unlikely" to cause "lost workdays or restricted duty" is more than supported by the record. *See* Gov't Exh. 3.

Regarding other civil penalty criteria, the parties stipulated that the total proposed penalty would not affect Mach's ability to continue in business. Stip. 6. The agency's assessed violation history report (Gov't Exh. 1) indicates that in the two years prior to September 7, 2007, 57 citations and orders were issued for alleged violations of mandatory safety standards at the mine. The Secretary contends this represents a "medium" history of previous violations. Mach contends it represents a "small" history. I find that, as counsel for the Secretary maintained, given the size of the mine, this is a "medium" history, one that neither increases nor decreases the size of the penalties that must be assessed. I further find that the mine is "small" in size. Tr. 143. However, the agency's Office of Assessments' proposed assessment sheet (Petition, Exhibit A) indicates the mine's controlling entity is large. Therefore, when considering the criteria of size, I conclude it should have a medium effect on the amount of any penalty assessed. Finally, the citations were abated promptly. *See* Gov't Exh. 2, Gov't Exh. 3. Since Mach's good faith is evident, penalties otherwise assessed will not be increased.

CIVIL PENALTY ASSESSMENTS

CITATION NO.	DATE	30 C.F.R.§	PROPOSED ASSESSMENT
6666935	9/7/07	1900(a)	$550.00

I have found that the violation occurred, that it was due to Mach's ordinary negligence, and that it was not serious. Given these findings and the other civil penalty discussed above, I conclude a civil penalty of $250.00 is appropriate.

CITATION NO.	DATE	30 C.F.R.§	PROPOSED ASSESSMENT
6666936	9/7/07	1914(a)	$550.00

I have found that the violation occurred, that is was due to Mach's ordinary negligence and that it was not serious.. Given these findings and the other civil penalty discussed above, I conclude a civil penalty of $250.00 is appropriate.

ORDER

Within 40 days of the date of this decision, Mach **IS ORDERED** to pay a total civil penalty of $500.00 for the violations found above. Also, within the same 40 days, the Secretary **IS ORDERED** to modify the inspector's negligence findings in the citations from "high" to "moderate." Upon payment of the total civil penalty and modification of the citations, this proceeding **IS DISMISSED**.

David F. Barbour
Administrative Law Judge
(202) 434-9980

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