

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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January 10, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2009-586
Petitioner	:	A.C. No. 12-02394-189223 VPX
	:	
v.	:	Docket No. LAKE 2010-162
	:	A.C. No. 12-02394-201219 VPX
	:	
BLANKENBERGER BROS., INC.,	:	Mine: Oaktown Fuels Mine No. 1
Respondent	:	

**DECISION**

Appearances: Nadia Hafeez, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for the Petitioner  
Joseph Hensley, Safety Director for Blankenberger Bros., Cynthiana, Indiana for Respondent.

Before: Judge Miller

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Blankenberger Bros., Inc., 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”). The case involves two violations in Docket No. LAKE 2009-586 with a penalty of \$724.00 and two violations in Docket No. LAKE 2010-162 with a \$363.00 penalty. The citations were issued by MSHA under section 104(a) of the Mine Act at the Oaktown Fuels Mine No.1. The parties presented testimony and documentary evidence at the hearing held on December 2, 2010 in Evansville, Indiana.

**I. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Blankenberger Bros., Inc., (“Blankenberger” or “Respondent”) is a contractor who builds slurry ponds and lakes at various mines, including the Oaktown Fuels Mine No. 1 (the “Mine”) located in Cynthiana, Indiana. The Respondent agrees that it is subject to the jurisdiction of the Mine Safety and Health Administration and that the Administrative Law Judge has jurisdiction to issue this decision. (Tr. 5-6); Jt. Stip. 3, 4. In May and September of 2009, MSHA inspector Phillip Herndon conducted regular inspections of the Mine and its contractor, Blankenberger. As a result of the inspection, the four violations contested herein were issued. At hearing, the Secretary and the Respondent agreed to resolve the issues as to one of the citations. The settlement agreement is incorporated below. Following the testimony and presentation of evidence, a decision was issued on the record. The decision is set forth below includes necessary edits.

A. Docket No. LAKE 2009-586

This docket includes two citations, both issued by Phillip Herndon on May 19, 2009. Herndon has been a mine inspector for four years and has 28 years total mining experience. As a result of his inspection, he issued two citations, one of which is subject to a settlement agreement. The second citation, discussed below, was issued for an alleged failure to shield a welding operation.

i. *Citation No. 8415385*

The citation described the violation as follows:

Welding operations shall be shielded and the area shall be well-ventilated. There was unshielded welding being performed by Onyett Fabricating on the BBI Co. No. E32, Hitachi excavator located along the overland belt access road while work was being performed in the immediate area by other contractors and mine employees.

The standard cited by Herndon, 30 CFR § 77.408 provides that “[w]elding operations shall be shielded and the area shall be well-ventilated.” Herndon determined that it was reasonably likely that the violation would result in a serious injury, that the violation was significant and substantial, that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of \$362.00 has been proposed for this violation.

Herndon credibly testified that, while observing the welder working on the bucket of the equipment, he could see the welding flashes from his location. Moreover, the flashes could be seen by those operating heavy equipment near the location where the welding activity was taking place. Blankenberger’s welder testified that he was welding in the bucket and no one was close enough to him to suffer a flash burn or be blinded by the flash. I credit Herndon’s testimony and find that the area was not properly shielded. The flash posed a hazard to equipment operators, and any other individuals, that were nearby.

A significant and substantial violation is described in section 104(d)(1) of the Act as a violation of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard. A violation is properly designated S&S if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to

safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). I find that the facts of this violation clearly lead to a finding that it was significant and substantial. First, as discussed both above and below, the Respondent violated a mandatory standard when welding was done without any shielding. Next, the safety hazard created by the violation, i.e., the bright flash created by the welding activity, is reasonably likely to cause an injury by blinding, or temporarily blinding, equipment operators or other individuals in the area. Finally, that injury will be serious.

The Commission and courts have observed that an experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek coal Inc. v. MSHA*, 52 F.3d. 133, 135-136 (7th Cr. 1995).

[First,] citation number 841585 issued on May 19 by Inspector Herndon for a violation of 77.408, Inspector Herndon testified credibly that he observed a welder working on a bucket in an area where the flash could be seen by people[.] . . . [H]e counted at least ten contractors in the area who could see the flash of light as the welder was welding. There was no barricade, no blocking of the light from anyone. Anyone could approach the welding equipment and the welder and be subject to a flash burn . . . or the drivers on the roadway could see the flash, which would hinder their ability to drive. The primary hazard here is the temporary blinding of equipment drivers. They can see the flash up to 100 yards away, driving heavy equipment down a road nearby. There were contractors working directly across the road, at around 50 yards away. [The area where the welding was taking place] was not blocked or fenced. It was easily accessible. I find that the inspector has shown a violation of the standard. The operator contends that because the welder was inside of the bucket that shielding is not necessary. I don't find that argument to be persuasive. As long as someone can approach the welding area or it can be seen from any distance, it needs to be shielded, as the standard requires. The inspector designated this as a significant and substantial violation. I

find that there is a violation and that there is a measure of [danger to] safety to the other workers in the area, particularly those who may be blinded by the flash while they are driving or walking in the area[.] . . . [In addition, there is ] the possibility that someone might get close and suffer . . . a flash burn. Therefore, I agree with Inspector Herndon that this is a significant and substantial violation and I assess the penalty as proposed by the Secretary.

(Tr. 52-53).

*ii. Citation No. 8415383*

The citation describes a violation of 77.404(a) for an accumulation of oil on the excavator. The operator has agreed to withdraw its contest and pay the originally proposed penalty of \$362.00.

**B. Docket No. LAKE 2010-162**

This docket includes two citations issued by Inspector Herndon in September of 2009.

*i. Citation No. 8421060*

On September 3, 2009, Herndon issued a citation for a violation of 30 C.F.R. § 77.1605(k), which requires that “[b]erms or guards shall be provided on the outer bank of elevated roadways.” The citation describes the violation as follows:

The sub soil storage pile located along the overland belt area was not provided with a berm along the elevated dumping area. The area measured approximately 6 feet to 35 feet above the ground and was inclined for a distance of approximately 300 feet. Tire tracks were evident approximately 7 feet along the unconsolidated edge. Haulage was stopped immediately by the operator.

Herndon designated the violation as significant and substantial with one person affected, and moderate negligence. A penalty of \$263.00 has been proposed by the Secretary.

Blankenberger objects to this violation and opines that berms are not needed in this area. The Respondent provided photographs of a finished reclamation area that shows more gentle slopes than those observed by Herndon. Blankenberger asserts that it routinely builds this type of reclamation area. Further, it argues that, while tractors and vehicles drive up and down the slopes, the slopes are not roadways and there is no area where it could be reasonably expected that a vehicle would go over the edge. I credit the testimony of Herndon and his observations on the day of the inspection.

In *U.S. Steel Corp.* the Commission held that “the adequacy of a berm . . . under section 77.1605(k) is to be measured against the standard of whether the berm . . . is one a reasonably prudent person familiar with all the facts, including those peculiar to the mining industry, would

have constructed to provide the protection intended by the standard.” 5 FMSHRC 3, 5 (Jan. 1983). MSHA generally requires an adequate berm to be at least 50% of the height of the wheel, i.e., mid-axle height, of the largest vehicle to travel the roadway. I find that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard at issue would have recognized that the safety standard required a berm that was at least mid-axle height of the vehicles that traveled along and dumped on this elevated roadway.

For the next citation issued September 3, 2009 by Inspector Herndon, citation number 8421060, cited for an elevated roadway that did not have berms. This particular standard requires that berms or guard shall be provided on the outer bank of elevated roadways. Inspector Herndon credibly testified that this was indeed an elevated roadway, that articulated dump trucks used it regularly, as did scrapers and other equipment. He also indicated that he measured the roadway to be 35 feet above the other grade, and it went from 0 to 35 feet, which is[, by definition,] an elevated roadway . . . [and therefore] is required to have a berm. He also testified that these trucks were driving in an unconsolidated [soil] area, [with a] four to one slope, with cracks that were visible, making this a [particularly] hazardous area for someone to . . . back up and dump. I find that this is an elevated roadway, that it is required to be bermed and that the inspector has credibly testified as to all the facts in his citation and the violation is affirmed. The inspector also indicated that this was a significant and substantial violation. It is certainly something that inspectors, as he indicated, hear and see [frequently] in fatalgrams that someone has gone over the edge either backing up or driving on an elevated roadway, and those accidents do result often in fatalities, especially in big equipment. I understand that the operator indicates that he does not believe there is any danger of overturning in this, that the articulated trucks go up and down, as do the scrapers, and he disagrees that this is a roadway. I find that it is a roadway and that it is a danger and a hazard. The storage piles for dirt do have a drop off, as the inspector testified to. There is a . . . [reasonable likelihood] of a vehicle overturning, and if it does, it would result in a fatal accident. Therefore, I find the violation to be significant and substantial and the penalty as proposed by the Secretary is affirmed.

(Tr. 53-54).

*ii. Citation No. 8421067*

On September 9, 2009, Herndon issued a citation to Blankenberger for an alleged violation of 30 CFR §77.1605(d) which requires that “[m]obile equipment shall be provided with audible warning devices. Lights shall be provided on both ends when required.” The citation alleges that “[a] Blankenburger (sic) Bros. Inc. contracted articulated dump truck, Co. No. MA11, located in

operation at the spoil storage area was not provided with operational head lamps.” The operator agrees that the headlights were not working but argues that they do not need to be operational because the truck is not used at night and, therefore, the lights are not required.

Herndon designated the violation as unlikely to result in an injury with moderate negligence. A penalty of \$100.00 is proposed.

Finally, as to the last citation [8421067] issued September 9, 2009 by Inspector Herndon for a violation that requires all mobile equipment shall have lights. Lights shall be provided on both ends when required. The operator indicates that he does not believe that lights are required and therefore a violation did not occur. However, . . . the operator is confusing using the lights with being required. Any piece of mobile equipment that comes with headlights is intended to have headlights . . . . [This vehicle was] available for use at all times of the day, including during stormy weather, early in the morning, later in the evening, when lights are necessary. This piece of equipment, this dump truck, was required to have lights. Those lights are required to be maintained, and they are required to work at all times. Therefore, I find a violation as indicated by the inspector. He designated this as non S&S, and I affirm the penalty that’s been proposed by the Secretary in this case.

(Tr. 54-55).

## II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the authority to assess all civil penalties provided in [the] Act. 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that “[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider” the six statutory penalty criteria:

[1] the operator’s history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator’s ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. 820(i).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size and ability to continue in business and that the violations were abated in good faith. The history shows the past violations at this mine, including citations for the standards discussed above. The size of the operator is large. I have discussed the negligence and gravity associated with each citation above and I accept the designations as set forth in each citation. I assess the following penalties:

<i>Citation No. 8415385</i>	\$ 362.00
<i>Citation No. 8415383</i>	\$ 362.00
<i>Citation No. 8421060</i>	\$ 263.00
<i>Citation No. 8421067</i>	\$ 100.00
<b>Total:</b>	\$ 1,087.00

## **II. ORDER**

Based on the criteria in section 110(I) of the Mine Act, 30 U.S.C. §820(I), I assess the penalties listed above for a total penalty of \$1,087.00. Blankenberger Bros. Inc., is hereby ORDERED to pay the Secretary of Labor the sum of \$1,087.00 within 30 days of the date of this decision.

Margaret A. Miller  
Administrative Law Judge

Distribution: (Certified U.S. First Class Mail)

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