FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 10, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 2009-675-M A.C. No. 33-01994-192845
v.	:	
CARGILL DEICING TECHNOLOGY, Respondent	:	Mine: Cleveland

DECISION

Appearances: Patrick DePace, Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner;
Mark Savit, Donna Vetrano Pryor, Patton Boggs LLP, Denver, Colorado for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Cargill Deicing Technology ("Cargill"), 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 six violations issued by MSHA under section 104(a) of the Mine Act at the Cargill deicing salt mine (the "Cleveland Mine" or the "Mine") located in Cleveland, Ohio. The parties presented testimony and documentary evidence at the hearing held on October 14, 2010 in Cleveland, Ohio.

At the hearing, the parties agreed that four of the citations have been settled. The settlement terms were read into the record and the settlement is approved as set forth below. Two citations are left for decision, one involving ground control and one involving an electrical violation.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Cargill is the owner and operator of the Cleveland salt mine in Cleveland, Ohio. At the outset of the hearing, the parties agreed that the Mine is a mine as defined by the Act, that the

Mine is subject to the jurisdiction of the Mine Safety and Health Administration, and that the Commission has jurisdiction to hear this matter. Jt. Ex.1; (Tr. 7).

Both contested citations were issued by Inspector Jan Niceswanger of the Hebron, Ohio MSHA office. Niceswanger has been a mine inspector for six years. Prior to becoming an inspector, he worked nearly 30 years in the mining industry, most of which was spent working in coal mines. He has experience in underground and surface mines. Niceswanger has extensive training in many areas, is a certified electrician, and was hired by MSHA as an electrical inspector. (Tr. 19).

a. Citation No. 6403641

On June 2, 2009, Niceswanger issued Citation No. 6403641 to the Cleveland Mine, alleging a violation of 30 C.F.R. § 56.3200, which requires, as pertinent to this analysis, that "[g]round conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area." The citation (as amended) described the violation as follows:

> Hazardous ground conditions were present on the south rib next to the A/B Transfer power center, including a prominent overhanging bulge. A crack exceeding one inch wide ran vertically from the mine floor to as high as 12 feet. The bulge was about three feet wide and 10 to 14 inches thick. A miner would suffer major traumatic injuries from the falling ground. In addition, the energized 4160 volt cable was coiled beneath the loose slab and the power center was located only four to five feet away. Maintenance personnel, laborers, and the belt crew work and travel the area three shifts per day.

Niceswanger determined that it was reasonably likely that the violation would result in an injury or fatality, 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 $1,944.00 has been proposed for this violation.

i. <u>The Violation</u>

Inspector Niceswanger testified that, while conducting his inspection of the Mine, he noticed a bulge in the rib adjacent to the power center. Niceswanger testified that the power center, which had an energized high voltage cable attached, provided power to the conveyor belt and other parts of the mine. He described the bulge in the rib as being "separated from the original structure of the wall or rib," "uncontrolled," "overhanging," and as having "large cracks." (Tr. 22). Niceswanger took a photograph of the condition as he observed it. Gov. Ex. 3; (Tr. 22-24). The same photograph depicts the proximity of the rib bulge to the power center. *Id.* Based upon his observations, Niceswanger determined that the condition was hazardous.

Niceswanger explained that the bulge in the rib was considered a hazard due, in part, to its proximity to the power center and high voltage, energized cable laying next to it. If the rib were to fall on the cable or the power center, it is likely that it would ignite a fire. In addition, all three shifts working in the mine passed by or worked in the area of the power center and the overhanging rib. Niceswanger believed that the condition of the rib indicated that it was likely to fall. He refused to allow anyone to tap or scale the broken rib because he believed it was too dangerous, particularly given its proximity to the power center. He agreed that it would be safer to test the rib and begin scaling if the power center were moved. It was his observation that the rib was broken, loose and separated from the wall and that footprints he observed in the area indicated that miners had worked nearby. Niceswanger did not explain what it might take for the bulge to come down, and did not explain how large a piece of the wall would need to fall in order to damage the power cable or power center, thereby increasing the risk of a fire. I can only conclude from his testimony that he believed the condition to be a hazard because he expected the entire rib to fall onto the cable and power center.

John Grueber, currently the mine superintendent at the Mine accompanied Niceswanger during the inspection. Grueber disagreed with the inspector's assessment that the rib was not safe and offered to get a scaling bar to demonstrate that the rib was not loose. In Grueber's experience, simply viewing the area does not provide the information needed to determine if there is a hazard. Grueber observed the footprints in the area and also observed the 1 inch wide crack on one side of the rib. He believed that because the crack was only on one side, and not on any of the other three sides, it was safe, i.e., that it was tied in on the top and back. (Tr. 100-102).

After receiving the citation, Grueber, due to the fact that the height of the area would not accommodate the mechanical scaler, instructed the night crew to move the power center and use a front end loader and a scaling bar to take down the rib. Grueber observed the area after the work was completed. He saw that, while portions of the rib had been taken down, the entirety of the rib had not been taken down. (Tr. 102-104). Grueber later learned that, in attempting to take down the rib, the miners rammed the rib with a loader. Grueber agreed that while ramming the rib with a loader could damage the machine, it is the proper equipment to use when the mechanical scaler is not available.

Mark Khairallah, an hourly employee at the Mine, was asked by his foreman to take down the rib bulge area cited by Niceswanger. He was instructed to move the transformer and then begin the scaling. After the transformer was moved, he initially tried to use a ten foot bar to bring down the rib, but after a short time he determined that it was not effective. As a result, a loader was retrieved and another individual operating the loader began chipping away at the rib bulge with the bucket. Khairallah stood approximately 20-30 feet away from the rib while the loader operator broke off small chunks of the rib. According to Khairallah, the rib was not coming down as expected. When the initial approach of using the loader did not work, he and the other employee began using the loader to ram the wall at different angles until the material came down in chunks. In all, the assignment took 2 to 3 hours including the ten minutes to move

the transformer, the short time with the scaling bar, half an hour with the loader, and another half hour for clean up. (Tr. 119-125).

Mike Espenschied, a second hourly employee, testified about his experience working with Mr. Khairallah to remove the slab. He agreed that, first, the power center was moved, then they used a scaling bar for about fifteen minutes and, finally, moved onto the loader. He drove the loader while Khairallah directed him. He adjusted the bucket height and bumped into the rib with the bucket. He described the area as being "too tight" to get the loader at a good angle to the rib. He described the slab as coming down in chunks. (Tr. 129-131). In his view, using the scaling machine is easier because it has a pick and is designed for scaling.

Neither Mr. Khairallah nor Mr. Espenschied testified about how long it would take if the mechanical scaler was used or what the normal amount of time it had previously taken them to take down loose slabs at this mine. However, they did indicate their belief that it took an extra amount of time and effort to remove this particular slab.

Leo Van Sambeek, an expert in rock mechanics, testified on behalf of Cargill. Van Sambeek disagrees with Niceswanger that visual observation of a crack is sufficient evidence upon which to make a hazard determination. (Tr. 146-147). Dr. Van Sambeek reviewed the citation and the photographs, visited the mine after the condition was corrected, and listened to the inspectors testimony. Van Sambeek indicates that in order to make a hazard determination he would first "sound" the rib. If sounding the rib could not tell him the condition, then he would use a hammer and bolt to determine its condition. If that did not yield a result, he would next utilize a scaling bar to test the rib to determined if there is any movement. After reviewing the rib area where the bulge had been removed, Van Sambeek disagrees that a hazard existed and, instead, believes that it was safe to sound the area.

While Van Sambeek believed that the condition of the rib was such that it was safe to perform a sounding, he did not discuss the issue of the proximity of the loose rib to the power center in his analysis. He did testify that he had a concern when he first viewed the photograph of the rib prior to it being removed, i.e., Gov. Ex. 3, in that he saw a bulge that he could not explain. He explained that the photo could lead to the conclusion that there were loose slabs of rock on the rib. (Tr. 158). However, when he went underground, he determined that what looked like a bulge, was actually a mismatch of the two faces where they intersect. (Tr. 150). He testified that, because the loader hit the rib a number of times and was unsuccessful in bringing it down, he was convinced that the slab was not loose.

I cannot credit the testimony of Van Sambeek with regard to the before and after photographs and his use of such to form an opinion that what was taken down was not the area sited. The inspector observed the condition at the time of issuance, while Van Sambeek saw the area only after it had been abated. (Tr. 156). However, a portion of Van Sambeek's testimony is useful and supports the Respondent's position that the rib was not hazardous. Van Sambeek testified that he could not agree with the inspector and that he "would not characterize [the cited area] as a ground control hazard." (Tr. 160).

The primary issue is whether the ground condition, as observed by Niceswanger, was a hazard. A hazard, has been defined as a danger or risk. I have no doubt that Niceswanger had a reasonable belief, after viewing the condition of the rib, that it was a danger or risk to miners who may travel in the area, and particularly a danger or risk of rock falling on the transformer or cables. However, given that the area had to be rammed with a loader, which resulted in only small chunks of the rib being removed, it does not appear that the area created a hazard to persons. Additionally, Van Sambeek testified that the nature of the ribs in a salt mine are different than those in a coal mine. Further, when such ribs only have a crack along the side, it is not considered a hazard.

The Respondent has relied on a Commission Judge's decision in *Springfield Underground*, 17 FMSHRC 611 (Apr. 1995) (ALJ), to support its position that visually observing the cited area is not enough to support a violation. While I disagree with Cargill's reliance on that case, I do find that, in this particular case, the testimony reveals that a more thorough investigation of the condition was necessary to determine if the rib was a hazard. The witnesses indicated that it was difficult to bring down the rib. Further, there is a lack of evidence of what types of activities might cause it to come down. The Commission has discussed, in relation to another standard involving loose material, that a visual observation along with a sound test was sufficient to indicate that a roof was loose. *Amax Chemical Company,* 8 FMSRHC 1146, 1149 (Aug. 1986). However, the Commission in *Amax* refused to agree that there is *per se* rule regarding the means necessary to demonstrate that ground is loose. *Id.* There is not enough evidence here to substantiate that ongoing activity in the mine would cause the rib to fall or that such a fall would involve a slab large enough to damage the cable or the power center. The Secretary has not met her burden of demonstrating that the rib created a hazard to persons. For the foregoing reasons, the citation is vacated.

b. Citation No. 6403648

On June 9, 2009, Niceswanger issued Citation No. 6403648 to the Cleveland mine, alleging a violation of 30 C.F.R. § 57.12040, which requires that "[o]perating controls shall be installed so that they can be operated without danger of contact with energized conductors." The citation described the violation as follows:

> The main battery switches were installed inside the electrical panels on #86 and #12 locomotives with bare energized conductors. The equipment operators would reach inside the panel to operate the switches. 72 volts DC was present on the blades of the switch about two inches below the knob of the knife-blade type switch. Two other controls for the remote system were also located next to bare conductors on the #12 unit. Miners would operate these controls routinely on start up and shut down each weekend and periodically during the week, three shifts per day. The condition created a shock/burn hazard. The close proximity of

the live parts to the controls and the repetitive nature of the practice made an accident reasonably likely to occur.

Niceswanger determined that it was reasonably likely that the violation would result in an injury that would lead to lost workdays or restricted duty, 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 $334.00 has been proposed for this violation.

i. The Violation

Inspector Niceswanger testified that he conducted an inspection of the electric panels on two of the Mine's locomotives after he learned that the controls used to operate the locomotive were located in an area that would expose the operators to energized conductors. Niceswanger stated that the location of a double-hold knife switch for the main battery, which is used to put the locomotive into start-up mode, would require an operator to place their fingers "right next to energized conductors." (Tr. 37). During the inspection, Niceswanger asked one of the Mine's electricians to take a voltage reading at the knife switch depicted in Gov. Ex. 8. (Tr. 215-216). The electrician determined that voltage at the switch was 72. *Id.* According to Niceswanger, the photograph entered as Gov. Ex. 7 accurately depicts the location of the handle of the switch and its proximity to the energized conductors. (Tr. 36).

The locomotives used at the Mine are like any train locomotive. They are used to move railroad cars around the rail yard. Two locomotives, the #12 and #86, had the exposed energized conductors near or next to the main battery switch that is used by the locomotive operators. In addition, locomotive #12 had exposed parts near the remote control switch. As Niceswanger explained, "when the switch is operated, a miner's hand was immediately adjacent to the eneregized parts." (Tr. 39). Gov. Ex. 9 depicts the door that is opened to operate the control, while Gov. Ex. 10 depicts the remote control operating controls that were installed by the Mine on at least one of the locomotives. The remote controls were in close proximity to fuses and wire terminations, which were energized bare conductors, that created shock and burn hazards for the miners exposed to them. (Tr. 41-43). The energized conductors seen on the right hand side of Gov. Ex. 10 were situated such that a workers hands would be ten to twelve inches from exposed energized parts when turning on the switch.

Michael Wendell, a contractor for Cargill, testified that he has serviced the locomotives at the Cleveland Mine for 31 years. Wendell understands that miners only need to access the controller for the battery after the machine is shut down. Shutting down the battery prevents it from wearing down. The area is well lit, and he has never contacted an energized part while working. Wendell described the electrical locker on the #12 locomotive and confirmed that the photograph entered as Cargill Ex. D accurately depicted the locker. The locker contains the switches and exposed conductors that were by Niceswanger. The area marked with a number "3" in the photo is the battery disconnect switch and, according to Wendell, is not operated when the locomotive engine is running. The purpose of the switch is to isolate the batteries so they can be turned off. If the locomotive is not operating, the conductors should have 62-64 volts. The area

marked with a number "2" in the photo is the disconnect for the remote control. An operator will only touch this area if the remote control must be disconnected and, in his view, it is only disconnected for the purpose of performing maintenance. The area marked with a number "1" in the photo is the transfer valve to switch from manual to remote control. Wendell has operated the switches many times and has contacted the energized components when doing maintenance work, yet he has not been burned or shocked and, rather, has only felt a tingle. (Tr. 184).

Taimour Ahmed, the maintenance supervisor, testified on behalf of the Mine that the switches described in the citation are not operating controls. Ahmed testified that an operating control is a function of a button, or some other object that has power to it, which allow an operator to tell a machine what to do, e.g., turn signals, brakes, gears. (Tr. 204). Ahmed testified that he measured the amperage in the control box as 30 milliamp, which was far below the level of amperage that would be necessary to cause a burn to a miner. (Tr. 205). It is his view that it is not reasonably likely that a miner would inadvertently touch any component in the electrical box. He explained that it would be difficult to contact a "bare conductor" due to the distance between components in the box and the fact that not all of the components would be energized at the time a miner reaches into the box to flip the battery switch. (Tr. 207-208).

In essence, it is Cargill's position that the battery switches inside the electrical panels are not an "operating control" and, hence, it was improperly cited. Cargill relies on the fact that the panel of switches and the battery switch itself are not used to operate the locomotive, and, rather, are only used to turn off the battery. Thus, Cargill argues that the battery switch is not the operating control for the locomotive. Cargill does not cite any relevant legal authority that supports its conclusion that a breaker used to de-energize a piece of equipment is not an "operating control." It appears to be Cargill's position that the battery switches located in the electrical panel should not be considered an operating control since they are accessed only to de-energize the battery to prevent it from being drained by lights or other components that may be left on.

During normal operation of the locomotives, the battery switches at issue are thrown at least once a shift on the weekends to cut off power to the battery so as to assure that the battery does not run down. It follows that, upon start up of the locomotive, the battery switch would, out of necessity, be thrown in order to allow electricity to resume flowing to the various components so that the locomotive could be operated. Indeed, the locomotive could not operate if the battery switch were not reset. Because throwing the switch into the off position stops the operation of the battery and everything it controls, it certainly controls its operation and, accordingly, is within the purview of the term "operating controls." *TXI Port Costa Plant,* 22 FMSHRC 1305, 1312 (Nov. 2000) (ALJ) (*citing Random House Webster's Unabridged Dictionary* 1357(2nd Ed.,1999)).

The only way the battery could be de-energized and reset required a miner to open the door to the electrical panel, reach in, and throw the switch. A similar result was reached in *Nelson Quarries Inc.*, 30 FMSHRC 254 (Apr. 2008) (ALJ). In *Nelson Quarries*, circuit breakers in a cabinet were found to be operating controls that were in close proximity to exposed wires and terminals. The ALJ found that the proximity created a risk of shock for anyone who opened the

cabinet. Here, according to Niceswanger, the locomotive operator would be placing his hand into the control box often and each time he did, he would be exposed to an area of energized conductors which he could inadvertently contact. Therefore, I find that the Secretary has shown that the operating controls were not installed to prevent the danger of contact and has established that Cargill violated Section 57.12040 as alleged.

ii. Significant and Substantial

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

The Commission has explained that:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

As noted above, I find that there is a violation of the mandatory safety standard as alleged by the Secretary. I find, further, that the violation contributed to the hazard of an electrical shock. Third, the hazard contributed to will result in an injury. Finally, given the exposure to electricity, even at low levels, the injury would certainly be serious.

The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). I find that the facts of this violation clearly lead to a finding that it was a significant and substantial violation.

Niceswanger explained in detail his reasoning for designating this violation as S&S. First, he described the hazard as one of a shock or burn. He measured 74 volts in the electrical panel. Niceswanger testified that, if a miner came in contact with the bare wires or conductors that possessed 74 volts, there would be a shock hazard. In addition, the locomotive operators would need to reach in the area each time they shut down and started up the motor. Moreover, Niceswanger testified that he learned that the locomotive operators did not use gloves when reaching into the electrical panel. (Tr. 44-45). As a result, the proximity of the various exposed electrical parts to the switches, and the frequency at which the locomotive operators would need to access the area made it reasonably likely that a miner would come in contact with the bare wires or conductors.

According to Niceswanger, the amount of voltage does not change if the locomotives are running or idle. The voltage is enough to cause a burn or shock to the operator who inadvertently comes in contact with the exposed energized parts. Niceswanger did not measure the amperage, but opines that even less than 1 amp has an effect on a person who contacts the exposed parts. In addition, should a short or fault occur, there is a greater potential for a burn when operating the switch.

Ahmed and Wendall both testified that the shock from contacting a bare wire or conductor inside this box would be minimal. They also allege that the components in the box are too close together to allow contact with the bare conductors. However, I credit the testimony of Niceswanger, a certified electrician, who finds this to be a serious hazard. The Secretary has established that the violation was S&S.

c. Settled Citations

At the hearing, the parties entered into stipulations resolving the remaining four violations as follows:

Citation No. 6403643:	No changes, penalty is $100.00
Citation No. 6403644:	Vacate
Citation No. 6403645:	Vacate
Citation No. 6403646:	Reduce penalty from $150.00 to $100.00
Total penalty of settled citations:	$200.00

I accept the stipulations and the modifications made by the Secretary. Pursuant to the agreement reached by the parties, I assess a $200.00 penalty for the violations that have been settled.

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 "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 "in assessing civil monetary penalties, the Commission [ALJ] shall consider" 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).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration of the statutory criteria and the deterrent purposes of the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

As to Citation No. 6403648, I accept the stipulations of the parties that the penalty proposed will not affect the Respondent's ability to continue in business and that the violations were abated in good faith. The history shows a number of electrical violations in the twenty-four months preceding this violation. I agree that the violation demonstrates moderate negligence. Further, I find that the Secretary has established the gravity as described in the citation and discussed above. I assess a penalty of $500.00 for this citation.

III. ORDER

Based on the criteria in section 110(i)of the Mine Act, 30 U.S.C. § 820(i), I **VACATE** Citation No. 6403641, and **AFFIRM** Citation No. 6403648 and assess a penalty of $500.00. Prior to hearing, the parties reached a settlement as to the four remaining violations in this docket resulting in a $200.00 penalty. The motion to approve settlement is **GRANTED**. Cargill

Deicing Technology is hereby **ORDERED TO PAY** the Secretary of Labor the sum of $700.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

Distribution: (U.S. Certified Mail)

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