

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

**601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001**

June 29, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. PENN 2008-76-M
Petitioner	:	A.C. No. 36-07715-129546
	:	
	:	Docket No. PENN 2008-112-M
	:	A.C. No. 36-07715-131955-01
	:	
	:	Docket No. PENN 2008-113-M
v.	:	A.C. No. 36-07715-131955-02
	:	
	:	Docket No. PENN 2008-165-M
	:	A.C. No. 36-07715-134191-01
	:	
	:	Docket No. PENN 2008-166-M
	:	A.C. No. 36-07715-134191-02
	:	
	:	Docket No. PENN 2008-182-M
	:	A.C. No. 36-07715-136625
	:	
WALTER KUHL,	:	Fourmile Gravel Pit
Respondent	:	

DECISION

Appearances: Mark V. Swirsky, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Petitioner;
Robert J. Jeffery, Esq., Orton & Jeffery, PC, North East, Pennsylvania, on behalf of the Respondent.

Before: Judge Melick

These cases are before me upon petitions for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the “Act,” charging Mr. Walter Kuhl with violations of mandatory standards and proposing civil penalties for those violations. The general issue before me is whether Mr. Kuhl violated the cited standards and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. Additional specific issues are addressed as noted.

At hearings, the parties reported that they had reached a settlement of all but three of the

charging documents at issue and supplemented that proposed settlement post-hearing. I have reviewed the representations and documentation submitted with the proposed settlement and find that it is acceptable under the criteria set forth in section 110(i) of the Act. Accordingly an order for payment of the agreed penalty will be incorporated in this decision.

Citation No. 6045490, issued pursuant to section 104(d)(1) of the Act, alleges a “significant and substantial” violation of the standard at 30 C.F.R. § 56.3130 and charges as follows:¹

The mine operator (Walter Kuhl) has engaged in aggravated conduct constituting unwarrantable failure to comply with mandatory standard 56.3130 by continuing to disregard his own safety and his employee’s safety while mining in the active mine pit. The high wall face is approximately 30 to 40 feet high, near vertical, consisting of consolidated sand and gravel. Walter Kuhl has intentionally under-cut (approximately 3 Ft.) into the high wall near the toe. This mining practice is not conducive to maintaining the stability of the high wall and exposed his employees to entrapment/crushing injuries. A withdrawal order No. 6026012 was issued on Dec. 16, 2004, under the provisions of Section 104(d)2 of the Mine Act for violation of 56.3130 during the investigation of a fatal accident for similar mining practices at this mine site. Mr. Kuhl had his two (2) hourly employee’s working in this area of the mine until the Pennsylvania Dept. Of Environmental Protection inspectors issued a cease and desist order during their site visit the week of May 1, 2007. MSHA has issued citations on 08/03/04, 11/19/03, 07/28/03, and on 04/26/01 to the mine operator violating Part 56.3130 of the 30 CFR. This is a reckless and repeated failure to make reasonable efforts to eliminate a known violation of a mandatory safety or health standard that substantially and proximately caused, or reasonably

¹ Section 104(d)(1) provides in relevant part as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those person referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

could have been expected to cause, death or serious bodily injury.

A “subsequent action” notice issued to Mr. Kuhl on May 9, 2007, stated as follows:

The termination due date and time are being extended to allow Walter Kuhl additional time to correct the condition. Mr. Kuhl understands that MSHA will not accept berms as corrective action to terminate this citation.

The cited standard, 30 C.F.R. § 56.3130, provides as follows:

Mining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks. When benching is necessary, the width and height shall be based on the type of equipment used for cleaning benches or for scaling of walls, banks and slopes.

Richard Burkley has been an inspector for the Department of Labor’s Mine Safety and Health Administration (MSHA) for over 10 years and has an additional 26 years of industry experience as a foreman. Inspector Burkley’s testimony is largely undisputed. He testified that on May 8, 2007, he arrived at the Four Mile Gravel Pit for a regular inspection at around 8:00 a.m. Burkley explained the purpose of his visit to mine owner Walter Kuhl then proceeded to inspect the pit area. When he arrived at the pit, he observed loader operator Mike Fenno loading a dump truck located about 30 to 40 feet from the highwall. The highwall at that location was estimated by Burkley to have been 30 to 40 feet high with a concave undercut extending from the toe to one-third the way up the face. Burkley documented the condition of the highwall with photographs(See Gov’t Exhs. 1A and 1B). Fenno explained to Burkley that “Walt” dug out the undercut at the end of Fenno’s shift the day before for Fenno to load out that morning.

Burkley instructed Fenno to set up a berm or barrier at the toe of the highwall and then returned to the mine office. He told Kuhl that he was issuing a citation for undercutting the highwall and that employees were to backfill the highwall to an angle of repose. Kuhl responded that it was his mine and that he was going to mine it his way. When Burkley told Kuhl that the law prohibits undercutting the highwall to create a concave area, a void, and an overhang, Kuhl again responded that it was his property and that he would mine it his way. Upon his return to the mine the following day, May 9, 2007, Burkley found that nothing had been changed at the highwall.

On May 20, 2007, MSHA Inspector Thomas Shilling arrived at the Kuhl mine to conduct a compliance follow-up visit to see if the cited conditions had been abated. Shilling observed that the highwall was in the same condition as depicted in the photos taken by Inspector Burkley on May 8, 2007. Shilling thereupon issued Order No. 6047638 under Section 104(b) of the Act for failure to

abate the citation issued by Inspector Burkley on May 8, 2007.²

Loader operator Fenno testified at hearings that he had observed the highwall conditions to be similar to those as depicted in the Government's photographs (taken on May 8, 2007). Fenno further testified that when he came to work that morning, Walter said that he had taken the material down the night before and the material at the base of the highwall was to be loaded out that morning. In loading the material Fenno was within five to eight feet of the high wall. The same procedures had been followed on prior occasions as well. According to Fenno, Walter used an excavator to scrape the wall. Fenno told Inspector Burkley that Kuhl had a practice of digging out the material from the high wall at the end of the shift and leaving it to Fenno to dig it out the next shift in the morning.

Within this framework of credible and undisputed evidence it is clear that a reasonable person familiar with the mining industry and the purposes of the standard would have recognized that the conditions present at the subject mine on May 8, 2007, constituted a violation of 30 C.F.R. § 56.3130. See *Secretary v. Cyprus Tonopah Mining Corp.* 15 FMSHRC 367 (March 1993). A vertical highwall in excess of thirty feet in height was undercut by Mr. Kuhl at the toe creating a concave area near the base. He further directed his employee to work in the hazardous area at the toe. The mining method used did not maintain wall, bank, and slope stability in work areas, but in fact was intentionally designed to create instability. This was the same mining method that had previously caused the death of Mr. Kuhl's son three years before.

In reaching these conclusions I have not disregarded Respondent's claim that the Secretary's witness, Arnold Belz, testified that the method followed by Kuhl was a "common mining method". However, this claim is based on an obvious misreading of Belz's testimony. Belz was clearly referring only to Kuhl's use of an excavator to "scratch" at the highwall and not to Kuhl's undermining the highwall at the toe (Tr. 146-147).

The violation was also clearly "significant and substantial". A violation is properly

² Section 104(b) of the Act provides as follows:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

designated as "significant and substantial" if, based on 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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory standard is significant and substantial under *National Gypsum* the Secretary 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 injury and (4) a reasonable likelihood that injury in question will be of a reasonably serious nature.

See also Austin Powder Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

As noted above, I have found that Mr. Kuhl violated a mandatory safety standard. Mr. Kuhl himself, in creating the hazardous undercut, worked in the zone of danger and directed one of his employees, Mr. Fenno, to do so also. The hazard contributed to by Kuhl's violation of Section 56.3130 is that persons working or traveling in proximity to the highwall could be crushed by collapse of the highwall. There can be no question that an employee crushed by a collapsing highwall would sustain serious or fatal injuries. Accordingly, the violation herein was "significant and substantial" and of high gravity.

The violation was also clearly the result of "unwarrantable failure" and gross negligence. "Unwarrantable failure" has been defined by the Commission in *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), as aggravated conduct constituting more than ordinary negligence. . . . [and] is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* At 2001, 2003-2004. *See, e.g., Eagle Energy, Inc.*, 23 FMSHRC 829, 834 (August 2001); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001); *Dynatec Mining Corp.*, 23 FMSHRC 4, 15 (January 2001); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (September 1999).

In assessing whether a violation is unwarrantable, this Commission has identified a number of factors that should be considered, including: (1) the extent of the violative condition, (2) the length of time the violative condition existed, (3) whether the violation was obvious, (4) whether the condition posed a high degree of danger, (5) whether the operator was on notice that greater efforts were necessary for compliance. *Windsor Coal Company*, 21 FMSHRC at 1000; *BethEnergy*

Mines, Inc., 14 FMSHRC 1232, 1243-44 (August 1992); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984).

In this case there is no dispute that the mine owner himself, Mr. Kuhl, created a vertical highwall, undercut it at the toe and exposed both himself and one of his employees to the hazard of a highwall collapse. A supervisor's involvement in violative conduct is particularly persuasive evidence in establishing a heightened awareness of the violative condition and a conscious disregard of, or indifference toward, miner safety. A supervisor is held to a high standard of care, and evidence of a supervisor's involvement in the violation is an important factor supporting an unwarrantable failure finding. See e.g. *Consolidation Coal Co.*, 22 FMSHRC 328, 332 (March 2000); and *Lafarge Construction Materials* 20 FMSHRC 1140 at 1146 (October 1998).

The violative condition also exposed miners to a high degree of danger. Indeed, as previously noted, a fatal injury occurred at the subject mine in December 2004 as a result of the same mining methods (undercutting the highwall) at issue herein. The evidence in this case shows that Kuhl received, either individually or as an officer of the corporation charged, six prior citations or orders for violations of the same standard at issue herein i.e. Section 56.3130.³ For five of these citations or orders, Mr. Kuhl received individual penalties under Section 110(c) of the Act.⁴ Under the circumstances, I find that Mr. Kuhl was provided ample and repeated notice that the practices he followed herein were violations as charged. See e.g. *Eagle Energy* at 838.

Order No. 6054306, also issued pursuant to Section 104 (d) of the Act, alleges a violation of 30 C.F.R. § 56.12025 and charges as follows:

The 110 volt #2 off road diesel fuel pump is not properly grounded to motor frame

³ While Respondent argues that prior violations of the cited standard, issued at a time when Kuhl was operating as a corporation are not relevant hereto it may reasonably be inferred that Walter Kuhl, who owned the mine and was vice president of the corporation and actively involved in the mining operations, was aware of the prior violations (Tr. 250, 251 and 253). Indeed Kuhl admitted that he was aware that employees of the corporation had been operating in the same manner as cited herein (Tr. 257).

⁴ Section 110(c) of the Act provides as follows:

Whenever a *corporate operator* violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under Subsection (a) or Section 105(c), any director, officer, or agent of *such corporation* who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

to prevent a person from being electrocuted when making contact with the metal pump housing. The white and black insulated conductors are hanging down from the motor electrical box and plugged into a grounded extension cord. A toggle switch inside the office turns on circuit to pump. Equipment operators are exposed to this outside wet condition frequently each week as they fuel their equipment. The mine owner stated it had been like this for approximately three years. The owner has to walk past the condition numerous times daily to access his pickup truck that is parked next to the tank and pump and also to access the garage where his FEL [front end loader] that he operates is parked. No records have been documented that a grounding test has been conducted on this circuit. Walter Kuhl, Owner has engaged in aggravated conduct constituting more than ordinary negligence in that he has allowed this electrical circuit to the fuel pump not be ground and tested and that he has allowed the equipment operators to fuel the mobile equipment with such a hazard. This violation is an unwarrantable failure to comply with a mandatory standard.

The cited standard, 30 C.F.R. § 56.12025, provides, in pertinent part, that “[a]ll metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection....”

Citation No. 6054305 also issued pursuant to Section 104(d)(1) of the Act alleges a “significant and substantial” violation of the standard at 30 C.F.R. § 56.12008 and charges as follows:

The power cable to the #2 off road diesel fuel 110 volt pump is not properly bushed at the electrical compartment on the side of the pump motor. Insulated black and white conductors are hanging out from the underside of the compartment. Pump is in use frequently during the week to fuel the mine[’s] mobile equipment. Owner states that it has been in this condition for approximately three years. Owner has to walk past hazard many times daily to get into his truck that is parked next to the tank and to access the garage where his FEL that he operates is parked. Mr. Walter Kuhl, Owner has engaged in aggravated conduct constituting more than ordinary negligence in that he has not taken the appropriate action to have the fuel pump electrical circuit properly bushed at the electrical compartment and to allow the equipment operators to fuel the mobile equipment with this condition. This violation is an unwarrantable failure to comply with a mandatory standard. Photo taken.

The cited standard, 30 C.F.R. § 56.12008, provides that “[w]hen insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.”

On October 2, 2007, MSHA Inspector Russell West conducted an inspection at the subject mine. Upon arrival, he met with Walter Kuhl, who identified himself as the owner and person in charge of the mine. During his inspection, Mr. West observed a 110 volt off-road diesel fuel pump which was allegedly being operated with two electrical violations: (1) a lack of bushing at the electrical compartment on the side of the pump motor as charged in Citation No. 6054305; and (2)

a lack of grounding for the motor frame as charged in Order No. 6054306. His testimony is essentially undisputed and fully corroborated by his photographs (Gov't Exhs. 20A and 20B). The violations are accordingly proven as charged.

The violations were also "significant and substantial". Based on the undisputed evidence I find that the violation charged in Order No. 6054306 contributed to the hazard of employees being electrocuted by exposure to energized metal components of the diesel fuel pump. The injury in question would also likely be serious. In this regard Inspector West explained, without contradiction, that if the cited condition were left uncorrected during continued mining operations, the electrical conductor for the fuel pump could become damaged, thus triggering the danger of electrocution. This is especially true when the fuel pump also lacked a grounding wire. The violation charged in Order No. 6054306 was therefore clearly "significant and substantial" and of high gravity.

Based on the undisputed evidence I also find that the violation charged in Citation No. 6054305 contributed to the hazard of employees being electrocuted by exposure to energized metal components of the diesel fuel pump. The injury in question would clearly be serious. Inspector West explained that if the cited condition were left uncorrected during continued mining operations, there would be a substantial risk of employee exposure to an electrocution hazard. This is especially true when the fuel pump also lacked a bushing for the conductor wires. The violation charged in Citation No. 6054305 was therefore clearly "significant and substantial" and of high gravity.

I find that both of the violations here at issue (relating to defects on the same diesel fuel pump) were the result of the operator's "unwarrantable failure". It is undisputed that both violations had existed for about three years and that the defective wiring had been installed by Mr. Kuhl's grandson at his request. It is further undisputed that the subject diesel pump was adjacent to where Mr. Kuhl parked his truck. Mr. Kuhl would also walk past the violative condition when he went to the garage to get his front end loader. The pump was also located between the scale house trailer and the maintenance shop in an area in which all employees would frequently work and travel. I find, based on this evidence, that the violative conditions were therefore obvious. I further find that the cited conditions created a danger of electrocution. The danger was contributed to by both the bushing violation and by the lack of grounding. These violations combined to make use of the subject diesel pump an extremely hazardous activity.

Under the circumstances I find the Respondent's conduct to have been "aggravated" and demonstrated "reckless disregard", "indifference," and a "serious lack of reasonable care." The violations were therefore the result of his "unwarrantable failure" and high negligence.

In reaching these conclusions I have not disregarded Respondent's argument that the cited conditions were not obvious since they had not been previously cited despite MSHA inspections over the previous three years. While this argument is certainly entitled to significant consideration I find that it is outweighed by the operator's own duty to conduct inspections, that Mr. Kuhl himself had chosen the person (obviously not competent) to install the electrical components on the cited fuel pump and was, himself, frequently in a position to have observed the violative conditions.

Civil Penalties

Under Section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operator's ability to continue in business. The record shows that the subject mine had about 1,382 hours worked during the calendar year prior to the issuance of the subject charging documents and is therefore considered to be a small mine. The mine, since operated by Mr. Kuhl as a sole proprietor, does not have a significant history of violations but there had been repeated "knowing" violations by Mr. Kuhl of the standard at 30 C.F.R. § 56.3130. The violation charged in Citation No. 6045490 was not abated in a timely manner. Indeed the violation was not abated for nearly two months and only after a "Section 104(b)" order was issued. The two electrical violations were abated in a timely manner. The gravity and negligence findings have previously been discussed. The parties have stipulated that the penalties proposed by the Secretary would not affect the operator's ability to remain in business.

ORDER

Citation Numbers 6045490 and 6054305 and Order Number 6054306 are affirmed as written. It is hereby ordered that Respondent pay penalties totaling \$42,374.00 (\$37,800.00, \$2,000.00 and \$2,000.00 respectively for the violations charged in the above charging documents as well as penalties of \$574.00 pursuant to the settlement agreement) within 40 days of the date of this order.

Gary Melick
Administrative Law Judge
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Distribution: (Certified Mail)

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