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 5, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2006-227-M
Petitioner	:	A.C. No. 40-02968-87902
	:	
v.	:	
	:	
MOLTAN COMPANY, LP,	:	
Respondent	:	Mine: Moltan

DECISION

Appearances: Joseph Luckett, Esq., U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner
Larry Gurley, COO, Moltan Company, LP, Memphis, Tennesse, on behalf of the Respondent

Before: Judge Barbour

This case is before me on a petition for the assessment of civil penalties filed by the Secretary of Labor on behalf of her Mine Safety and Health Administration (MSHA) against Moltan Company, LP (Moltan or the company) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (the Mine Act or Act) (30 U.S.C. §§ 815, 820). The Secretary alleges Moltan is responsible for two violations of the Secretary's safety standards for surface metal and non-metal mines. She also alleges the violations were significant and substantial contributions to mine safety hazards (S&S) and were caused by the company's high negligence. Additionally, the Secretary deemed one of the alleged violations was the result of Moltan's unwarrantable failure to comply with the mandatory standard. The Secretary seeks penalties totaling $3,500. The company denies the allegations. The case was tried in Memphis, Tennessee.

STIPULATIONS

The parties have stipulated to the following facts:

1. This case involves a clay processing plant known as the [Moltan] plant, which is owned and operated by [Moltan];

2. [Moltan's] plant is subject to jurisdiction of the . . . Act;

3. The presiding administrative law judge has jurisdiction over this proceeding pursuant to Section 105 of the Act;

4 [Moltan's] operations affect interstate commerce;

5. A reasonable penalty will not affect [Moltan's] ability to remain in business;

6. [Moltan] has not had an accident where an employee suffered fatal injuries;

7. [Moltan] employed approximately two hundred people in 2006; and

8. [Moltan] has employees who worked approximately four hundred thousand hours in 2006.

Tr. 12-13; Gov't Exh. 1.

MOLTAN'S FACILITY, THE INSPECTION, AND THE CITATIONS

Moltan is a family owned limited partnership that has been in existence since 1978. Tr. 104. Moltan operates a large facility covering approximately twenty to thirty acres consisting of a clay mine and a clay processing plant. Tr. 17. Moltan processes the clay into products such as kitty litter and oil absorbents. *Id*.

CONTENTIONS RELATED TO CITATION NO. 6243221

In February 2006, Inspector Ed Jewell conducted a regular inspection of Moltan which lasted six days. Tr. 18. Inspector Jewell has been employed by MSHA for nine and a half years. Tr. 14-15. He is certified as an accident investigator and served four years on the national mine rescue team. Tr. 14. Prior to his employment with MSHA, Jewell held various jobs in the coal mine industry, including safety director, maintenance man, electrician, belt mechanic, general laborer, equipment operator, section foreman, and hoisting engineer. These jobs spanned a twenty-three year period. Tr. 15-17. During the inspection, Jewell was accompanied by Vicki LaRue who was being trained as a mine inspector. Tr. 18.

On February 13, while inspecting a building the company refers to as the "old coal shed," Jewell and LaRue observed miner Bobby Manley standing on a rounded cylinder, 19 inches in diameter and eighty-seven inches above a metal rectangular work platform, that in turn was located approximately ten feet above the coal shed floor. Metal railings surrounded the work platform. Tr. 19-20. The miner was not using fall protection. Jewell stated that the employee appeared to be wiring an electrical motor. Tr. 19. Inspector Jewell took a photograph of the

scene. Gov't Exh. 3. Jewell testified the photograph showed the employee being helped down from the chute. It also showed a group of 6 individuals, including the safety director and new hire trainees, on the platform. Tr. 21. The photograph was taken after the employee had come down from a higher point on the chute and was standing on the 19 inch object, but Inspector Jewell stated he would have cited the company for either occurrence as the employee was not wearing fall protection and the likelihood of falling was present in both locations. Tr. 132.

After observing the employee on the chute, Inspector Jewell orally issued a section 107(a) imminent danger order to the safety director, Dan Harder. Tr. 22. He issued the order in writing to plant manager, Jake Green, that afternoon. Tr. 26; Gov't Exh. 4. Inspector Jewell also issued Citation No. 6243221 to Green. The citation charged the company with a violation of 30 C.F.R. § 56.15005, a mandatory safety standard requiring employees to wear safety belts and lines when working where there is a danger of falling. Inspector Jewell testified that the employee should have been tied off. Jewell did not observe any place to tie off, but felt the company could have installed a wire cable to attach a lanyard or could have avoided the need to tie off altogether by placing the employee in a basket attached to a man lift. Tr. 25-26.

Inspector Jewell found there was high negligence on the part of the company for the alleged violation. He stated that the task itself carried an inherent risk and therefore a high degree of care was required by the company. Inspector Jewell did not observe any fall protection in the area which indicated to him that there was a lack of training or monitoring by the company. Tr. 75-76. Jewell also asked an employee if there was fall protection in the area and the employee said there was not. Tr. 27. Inspector Jewell determined the violation was highly likely to cause an injury. The employee was working with both hands and was standing on a narrow, rounded surface. He easily could have fallen to the metal platform. Fatal injuries could be expected from this type of fall as there have been deaths in the industry from falls of ten feet or less. Tr. 28. The employee involved was the person affected by the hazard. Jewell also found the violation was a significant and substantial (S&S) contribution to a mine safety hazard because if the alleged violation continued to exist it was likely to cause a serious injury.

Danny Stanfill testified on behalf of the company. Stanfill has been the plant manager since January 1, 2006. Tr. 105. He has approximately 35 years experience primarily in the electrical industry. Tr. 104. Stanfill has also worked in a printing plant and a hardwood flooring plant, where he eventually became maintenance superintendent. When he began at Moltan in July 2005, he was brought in as assistant plant manager to replace Jake Green who was retiring. Tr. 105.

Stanfill described the scene shown in Gov't Exh. 3. He stated the photograph depicts Bobby Manley installing or wiring up the last motor on the incline conveyor of a pellet mill. Tr. 106. The mill was new and Moltan was testing it to determine whether to make it a permanent part of the plant. (The company has since decided not to use the equipment. Tr. 107.) Stanfill also described the color-coding of hard hats depicted in the photograph. Manley was wearing a white hat which designated him as a full-time employee in maintenance. Tr. 107-108. The men wearing green hats were described as trainees by Inspector Jewell, but Stanfill

indicated the green hats designated packaging department employees. Trainees wore gray hats. Tr. 109. Dan Harder is in the picture wearing an orange hat. Stanfill stated that an orange hat indicated management. *Id.*

Stanfill testified that Manley, who has since retired, was a maintenance electrician with 28 years experience. Tr. 109. Stanfill felt that Manley could not have been standing on the 19 inch diameter cylindrical area as it would not have allowed him comfortable access to complete his task of wiring the motor on the incline conveyor. Rather, Stanfill explained, the photograph showed Manley standing on a flat area that was the inlet to the pellet mill. Tr. 100. Based on Stanfill's electrical experience, he described the photo as showing Manley in the process of wiring the motor. Stanfill did not know why Dan Harder and the other men were on the platform. However, he stated he was later told that Harder was there to give Manley a piece of flexible conduit. Tr. 111. Stanfill did not feel Manley was engaging in an unsafe practice, but rather a routine installation.

Billy Tennyson, lead electrician, testified on behalf of the company. Tennyson has been employed by the company for a little over ten years. Tr. 122. He stated that Manley was a capable electrician with good safety habits. Tr. 124. Tennyson confirmed the hard hat color-coding system that Stanfill explained. Furthermore, Tennyson felt, as Stanfill did, that Manley would not have been working up on the chute as Jewell described because it would have been difficult for Manley to get to the motor. Tr. 126. Tennyson also explained that Harder told him he was handing Manley the flexible conduit and was present when the work was being done. Tr. 127.

CONTENTIONS RELATING TO CITATION NO. 6243229

As Jewell continued his inspection on February 14, 2006, he observed a lack of proper access to an area that an employee must reach to maintain the plant's crusher. Tr. 32. He issued Citation No. 6423229 alleging a violation of 30 C.F.R. § 56.11001, a mandatory safety standard requiring safe means of access in all working areas. The crusher had twelve grease fittings that needed to be greased with a handheld grease gun every forty hours. Tr. 32-33, 35. Jewell explained an employee would need to go up onto the framework of the crusher to do that work. Tr. 32. The employee would need to hold onto the framework while he greased the fittings. Each fitting needed forty shots from the grease gun.

The crusher is located on a raised platform. The platform's height varies from eight to twelve feet from the ground. Tr. 35. Inspector Jewell measured the area where the employee would walk to reach the grease fitting and found the area was six inches wide. He estimated an employee would have to travel on the narrow area for a distance of eight to ten feet. Tr. 36. Inspector Jewell also indicated that part of the area where an employee would walk was wider than six inches. Photographic evidence was introduced depicting the crusher. Gov't Exh. 6-8. No employees were on the platform at the time of the inspection.

Jewell determined Moltan's negligence to be high as the crusher had been installed for approximately four to five months. Tr. 39, 46. He also talked to an employee, Scott Garrett,

who stated that he was given a safety award for his idea of providing better access to the grease fittings, but no action was taken by the company. Tr. 39. Garrett did not testify. Additionally, Jewell stated Garrett said his supervisor, Billy Barns, was aware of the condition and told him to "be careful." Tr. 41. Jewell further explained that even without this information obtained from Garrett he still would have found the company's negligence to be high because management was aware of the need to perform maintenance on the crusher and the mine office was located within fifty yards of the crusher. Tr. 45-46. Jewell felt the violation was obvious and the company's failure to provide safe access was unwarrantable. Jewell considered the gravity to be reasonably likely to cause an injury due to the frequency of greasing that was required. Jewell also observed spilled materials on the platform, along with mud in the very narrow area. Tr. 47-48. This made it even more likely an employee would fall.

Jewell stated that fatalities or severe injuries such as a broken neck or head injury could result from a fall of six to ten feet and he noted the presence of a concrete pillar, wooden pallets, and steel beams under and around the narrow area. Tr. 48. Jewell believed one person would be affected by the hazard. He also found the alleged violation as S&S.

Citation 6243229 was terminated when the company issued a memorandum to workers not to access the area, the crusher platform was permanently blocked off, and grease lines were extended down to the ground level. Tr. 49-50.

Stanfill testified on behalf of the company. He stated that the crusher had been in its present location for approximately seven to eight months. Tr. 115. He confirmed that greasing occurred on a weekly basis and had always been performed from the platform. Tr. 115. Stanfill did not know if the condition had been brought to the attention of a supervisor nor was Stanfill aware of a safety award being given to Garrett. Tr. 117-118.

RESOLUTION OF THE ISSUES

CITATION NO. 6243221

Citation No. 6243221 states:

> A repairman was observed working from an elevated position without wearing roper fall protection, safety belts, and lines. The area the repairmen was standing on is 87 inches above a metal flooring of a work platform for the feel conveyor at the "old coal shed." The worker was standing on a 19 inch diameter cylinder type chute. The surface the worker was standing upon is rounded and not flat. The repairman was wiring a new motor to the head drive of the conveyor. Safety belts and lines are not available at

> the work area. This condition creates a fall of person hazard.
>
> This condition was a factor that contributed to the issuance of imminent danger order No. 6243220 dated 2/13/06. Therefore, no abatement time was set.

Gov't Exh. 2.

Section 56.15005 states in pertinent part:

> Safety belts and lines shall be worn when persons work where there is danger of falling[.]

THE VIOLATION

I find the Secretary established a violation of section 56.15005. The evidence clearly shows that Manley was standing on an object 87 inches above the work platform without hand rails or anything else to contradict or to minimize the danger of falling. Jewell testified that Manley was not wearing fall protection and no witness contended otherwise.

S&S AND GRAVITY

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). 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 (April 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (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 will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (January 1984); *accord Buck Creek Coal Co., Inc.* 52 F. 3rd 133, 135(7th Cir. 1995); *Austin Power Co., Inc. v, Sec'y of Labor*, 861 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985). Further, an S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (August 1985); *U.S. Steel*, 7 FMSHRC at 1130.

Finally, the S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (September, 1996).

The Secretary has established a violation of section 56.15005. She also has established a safety hazard contributed to by the violation. Bobby Manley was working without fall protection in an area where there was a danger of falling. Without the protections required by the standard, it is reasonably likely the hazard would have contributed to an injury. Undisputed testimony was given by Inspector Jewell that fatal falls have occurred from heights of 10 feet or less. Tr. 28. There were no hand rails or anything else for Manley to hold on to. The results of a fall could have been fatal or very serious, such as broken bones or even a brain injury. These injuries were reasonably likely to occur, and therefore I conclude the violation was S&S. While I understand that some of Moltan's personnel may feel the hazard was minimized because this was a routine installation occurring in a short period of time, Manley was working without fall protection long enough for the inspector to detect the problem and photograph it, and an accident can occur in an instant.

In view of the type of injuries that were likely to happen if the hazard occurred, I also find the violation was serious.

NEGLIGENCE

Inspector Jewell believed the company was highly negligent. Gov't Exh. 2. I agree with this determination. A high degree of care was required by the company as this task carried with it an inherent risk. Based on the evidence presented, there is no doubt that Manley was standing on an object 87 inches above the platform. As previously noted, there were no hand rails nor was Manley wearing fall protection. The task was being performed in plain sight without the required fall protection. There is no evidence to suggest any safety belts or lines were in the immediate area. A serious, even fatal, hazard was present, yet plant manager Stanfill believed Manley was engaged in a "routine construction installation." Tr. 112. The company fell far short of the standard of care required, and I therefore find the company was highly negligent.

CITATION NO. 6243229

Citation No. 6243229 states:

> Safe access is not provided at the crusher drive area. The crusher operator must access the drive area to grease 12 fittings every 40 hours. The area of access is not provided with handrails, barriers, or a working platform. The area of access in some places [is] only six inches wide across the structural beams and over drive pulleys. The area of access is 8 to 12 feet in height. Forman Billy Barns, instructed employees to "be careful" while greasing. An employee stated that management was notified of the hazard via "safety suggestion box" and that the idea of providing a safe access was awarded but not acted upon. The management has also failed to provide or instruct the employees, who [grease] and [maintain] this area, to wear fall protection while performing duties. The mine operator and Forman Barns [have] engaged in aggravated conducted constituting more than ordinary negligence in that the work area is not provided with a safe means of access where regular work is required. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov't Exh. 5.

Section 56.11001 states:

> Safe means of access shall be provided and maintained to all working places.

THE VIOLATION

There has been no evidence or testimony presented to indicate the maintenance was being performed in any other manner than as described by Inspector Jewell. An employee had to travel on the narrow area at a height of eight to twelve feet off the ground while using a handheld grease gun to apply forty shots to twelve fittings at least once a week. There is no question in my mind that this was a dangerous task and that safe access was not provided to the working place by the company. I therefore find the Secretary established a violation of section 56.11001.

S&S AND GRAVITY

I also find the Secretary has established the violation was S&S. Without providing safe access to the working area as is required by the standard, it was reasonably likely the hazard would have contributed to an injury. An employee who traveled along the very narrow easily

could have fallen to the ground, onto the wooden pallets, against the concrete pillar, or against the steel bars and beams. Inspector Jewell testified that the injury could have been serious such as a broken neck or head injury, or even fatal, and I agree. Moreover, in view of the kind of injuries that were likely to result if the hazard occurred, I find the violation was serious.

UNWARRANTABLE FAILURE AND NEGLIGENCE

Unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence . . . in relation to a violation of the Act." *Emery Mining Corp.* 9 FMSHRC 1997, 2004 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or "a serious lack of reasonable care." *Id.* 2003-2004; *Rochester & Pittsburg Coal Co.*, 13 FMSHRC 189, 193-l94 (February 1991); *see also Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 157 (2d Cir. 1999); *Buck Creek Coal, Inc. v. MSHA*, 53 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). Moreover, the Commission has examined the conduct of supervisory personnel in determining unwarrantable failure, and recognized that a heightened standard of care is required of such individuals. *See Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987) (section foreman held to demanding standard of care in safety matters); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995) (heightened standard of care required of section foreman and mine superintendent). Negligence, of course, is the failure to meet the standard of care required by the circumstances.

I conclude the violation was caused by Moltan's unwarrantable failure to comply with the standard. The condition existed at this particular crusher for at least five months. The maintenance was performed in plain view and within fifty yards of the mine office. Management knew that maintenance was being performed on the crusher in this manner. The hazard posed was significant and the heightened care that was required by the hazard was totally missing. The serious lack of reasonable care reflected both Moltan's unwarrantable failure and its high degree of negligence.

REMAINING CIVIL PENALTY CRITERIA

HISTORY OF PREVIOUS VIOLATIONS

The Secretary entered into evidence the "Assessed Violation History Report." Gov't Exh. 12. The Secretary has characterized the company's history of violations as "fairly small." Tr. 101. I find, based on the record in this case, the applicable history of previous violations is small.

SIZE

The Secretary entered into evidence the "Assessed Violation History Report." Gov't Exh.

12. The parties stipulated to the fact that there were approximately 400,000 hours worked in 2006. This means Moltan's facility is characterized by MSHA as a medium mine. 30 C.F.R. § 100.3. As there is no evidence to contradict this, I find the mine to be medium in size.

ABILITY TO CONTINUE IN BUSINESS

The parties have stipulated that a reasonable penalty will not affect Moltan's ability to remain in business. Tr. 12; Stip. 5. I accept this stipulation.

GOOD FAITH ABATEMENT

The violations were abated in good faith by Moltan and in a timely manner. Gov't Exh. 2; Gov't Exh. 4.

CIVIL PENALTY ASSESSMENTS

Citation No.	Date	30 C.F.R. §	Proposed Assessment
6243221	2/13/2006	56.15005	$2,200

I have found the violation to be serious and the negligence on the part of the company to be high. Given these findings and the other civil penalty criteria, I find the penalty of $2,200 proposed by the Secretary is appropriate.

Citation No.	Date	30 C.F.R. §	Proposed Assessment
6243229	2/14/2006	56.11001	$1,300

I have found the violation to be serious and the negligence on the part of the company to be high. Given these findings and the other civil penalty criteria, I find the penalty of $1,300 proposed by the Secretary is appropriate.

ORDER

Moltan **SHALL** pay total civil penalties of $3,500 within 40 days of the date of this decision, and upon payment of the penalties, this proceeding **IS DISMISSED**.

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

Distribution: (Certified Mail)

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/sf