FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19TH STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5266/FAX 303-844-5268

March 11, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 2009-600-M A.C. No. 40-03012-171882
v.	:	
HOOVER, INC., Respondent	:	Mine: Lebanon Quarry & Mill

DECISION

Appearances: Matthew Shepherd, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
G. Sumner R. Bouldin, Bouldin & Bouldin PLC, Murfreesboro, Tennessee, for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against Hoover, Inc. ("Hoover"), 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"). This case involves six violations issued by MSHA under section 104(a) of the Mine Act at the Lebanon Quarry & Mill (the "mine" or "Lebanon Quarry") located in Lebanon, Tennessee. The parties presented testimony and documentary evidence at a hearing held on September 9, 2010, in Nashville, Tennessee. The parties took post-hearing deposition testimony of Respondent's mine superintendent on October 26, 2010, and submitted briefs in January 2011.

At the hearing, the parties agreed that four of the six violations had been settled. The terms of the settlement have been read into the record. As set forth below, the settlement is approved. Two citations are left for discussion, both of which involve alleged violations of the same ground control standard.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Hoover, Inc. is the owner and operator of the Lebanon Quarry & Mill, a multi-bench surface pit rock quarry in Lebanon Tennessee. The mine drills and blasts (i.e., "pulls shots" or

"shoots") material from a highwall. The material is then loaded onto CAT haul trucks by a front end loader. The trucks dump the material into a crusher where it is processed, sized, and then sold on-site.

On October 28, 2008, Vernon Miller, an MSHA inspector in the Franklin field office at the time, traveled to the mine to conduct a regular inspection. During the course of the inspection, he issued Citation No. 6084500. Miller returned to the mine on November 13, 2008, and issued Citation No. 6484505.

Miller was employed by MSHA for approximately 12 years before retiring at the end of 2009. During his time with MSHA he held positions including coal mine inspector, metal/nonmetal inspector, and metal supervisor. Between 1965 and 1996, he worked for three different coal companies and held positions including shooter at an underground coal mine, driller at a surface mine, blaster, machine operator, section foreman, assistant mine manager, mine manager, and assistant superintendent. He is currently employed at Illinois Eastern Community College and is teaching mining courses on, among other things, ground control and accident prevention. Including his time as an educational instructor, Miller has almost 46 years of experience in the mining industry.

a. Citation No. 6084500

On October 28, 2008, Inspector Vernon Miller issued Citation No. 6084500 to Hoover for a violation of section 56.3200 of the Secretary's regulations. The cited standard requires the following:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

30 C.F.R. § 56.3200. The citation described the alleged violative condition as follows:

> The South West Pit High wall had loose unconsolidated material/rock. This rock ranged in size from powder to about 4 feet by 5 feet by 3 feet. The loose rock ranged about 150 feet long. There were overhangs about 3 to 5 feet at the top of the 40 foot wall the loose was from 10 feet to 40 feet above the mine floor. This area had been loaded to the toe. This condition created a hazard of a miner being struck by falling rock.

Miller determined that a fatal injury was reasonably likely to occur, 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 $4,099.00 has been proposed for this violation.

i. Brief Summary of Testimony

Inspector Miller testified that during his inspection on October 28, 2008, he was accompanied by Bobby Lamb, the mine superintendent. (Tr. 16). While conducting the inspection Miller observed loose material near the top of the southwest bed highwall. (Tr. 18). The highwall is 40 feet tall and the loose material existed for approximately 150 feet along the wall. (Tr. 22, 24). According to Miller, the loose material included 8-10 rocks as large as three to five feet in diameter and up to two feet in thickness that were overhanging up to three to five feet, cracked, and "ready to fall". (Tr. 19, 22, 23); Sec'y Ex. 5, 6. Powdered material could be seen under some of the loose material. (Tr. 22). Miller stated that the powdered material is indicative of a lack of solid strata supporting the loose material above it. (Tr. 23). Miller testified that overhanging loose material, given its lack of support, can fall, hit the highwall below, and bounce outward. (Tr. 24). Miller testified that Sec'y Ex. 7 depicts cracks both underneath and behind a large overhang. (Tr. 25).

According to Miller, much of the loose material was near the top of the 40 foot highwall. (Tr. 25). Given the height of the loose materials, the falling object protective structures ("FOPS") on the mine equipment would be less effective in protecting those individuals in the equipment cabs from falling loose material. (Tr. 25). Moreover, Miller acknowledged that there have been instances where equipment cabs have been totally crushed by falling material. (Tr. 28). Miller observed equipment tracks which indicated that material had been "loaded to the toe", i.e., up to the face of the highwall, in the area below the loose material. (Tr. 67) He determined that a frontend loader had been operated in close proximity to the highwall. (Tr. 19, 25-27). Based on his observations, Miller concluded that the condition of the highwall created a hazard to person's working at the mine. (Tr. 27). Specifically, Miller testified that the operators of the frontend loader and haul trucks were exposed to the hazard of falling loose material coming through, or crushing, the cab of the equipment. (Tr. 27-28). While he did not observe any foot traffic in the area, a miner walking near the wall would be exposed to the hazard. (Tr. 28-29). Miller noted that it wouldn't take much to cause the loose material to fall. Bumping the highwall, inclement weather, or a blast in another area of the mine, could all cause loose material to fall. (Tr. 39).

Miller testified that, when a hazard exists such as the one described above, the cited standard requires that a berm, or some other barrier to prevent people from getting in the area, be constructed until corrective work is completed. (Tr. 29). There was no berm, barricade, or warning in the area at the time of the inspection. (Tr. 18, 29-30). Based on the above information, Miller issued Citation No. 6084500.

Miller determined that the violation was reasonably likely to result in a fatal injury due to the fact that previously shot material had been loaded to the toe under the loose material, the area had been left unbermed and, if the condition were allowed to exist, someone would be injured. (Tr. 31). He reasoned that, if the area were left unbermed, "anybody could walk out there, [and] somebody would be seriously hurt, probably killed" given the size and amount of the loose material. (Tr. 31, 33).

Miller determined that the operator's negligence was moderate because the violative condition was "absolutely" obvious, had existed for several shifts, and was in an area of the pit that would have been examined during a normal preshift. (Tr. 34). Moreover, while a berm was built after the citation was issued, the condition still had not been abated when Miller returned for a later compliance visit. (Tr. 35-36). Miller testified that he recommended to Lamb the use of CAT pads or miner ripper chains to scale the highwall, however, at some point Lamb notified Miller that the mine was not going to scale the highwall because they didn't need the material from the cited area. (Tr. 38). Miller testified that other quarries in the area utilize multiple methods to scale their highwalls. (Tr. 57). Miller subsequently returned to the mine with the intention of terminating the citation, however, he again found that the citation had not been abated and, as a result, issued a 104(b) order. (Tr. 50-51).

E.H. Hoover ("E.H."), a principal in Hoover Inc., testified that, generally, if there is very prominent loose material on the highwall the mine will try to correct the condition. (Tr. 71). However, removing loose material from the highwall is not standard procedure following the blasting of material. (Tr. 71). On cross-examination E.H. agreed that Sec'y Exs. 5 and 7 depicted loose material on a highwall, and Ex. 6 "possibly" depicted an overhang. (Tr. 80-81). E.H. acknowledged that the mine has never scaled the highwall at this mine. (Tr. 71-72). He avers that scaling is inherently dangerous and it is economically infeasible to remove all of the loose rock from the highwall. (Tr. 72-74). E.H. testified that, at one of the company's other mines in Mississippi, Hoover has an agreement with MSHA that the front loader will not load all the way to the toe, or face, and instead will only load "up to about 15 to 20 feet" from the toe. (Tr. 77). E. H. acknowledged that the Lebanon Quarry had not fully transitioned to this practice and had been loading to the toe until this violation was issued. (Tr. 77-78, 81). E.H. averred that loading to the toe takes the burden away from the face of the highwall and allows the dynamite to "do its job." (Tr. 78). However, on cross-examination he agreed that loose rock on a 40-foot-high highwall is hazardous. (Tr. 83).

Bobby Charles Lamb, the superintendent at the mine, was deposed after hearing. (Dep. 4). Lamb traveled with Inspector Miller on the day of the inspection. He testified that the bottom 35 feet of the southwest highwall was "pretty solid, while the top 5 feet was "unconsolidated," "kind of loose," and "broke[n] up more than the other 35 feet" of the highwall. (Dep. 11, 29). Some of the loose material was basketball or cantaloupe size, and the overhangs "may have been 3 feet." (Dep. 29, 30). Lamb explained that, when blasting, the drill holes are filled with explosives and then topped off with "stemming," i.e., crushed stone, for the top 4-5 feet of the hole. (Dep. 11-12). He opined that the stemming prevented the top of the highwall from breaking up, which, in turn, resulted in the overhanging material. (Dep. 12). Lamb did not believe that the condition of the highwall was "too bad" and stated that other inspectors had observed similar conditions but had never said anything about it. (Dep. 13, 14). Lamb agreed that the blasted material had been cleared to the toe, i.e., loaded to the base of the highwall, and that no warning, berm or barrier existed to impede access to the area. (Dep. 14, 30).

Lamb testified that, following the issuance of the citation, Hoover bermed the area and had its blasting contractor come out and try to remove the unconsolidated material at the top of the wall. (Dep. 15, 16). The shot failed to remove the material and, according to Lamb, Miller told him that the condition of the highwall still wasn't good enough. (Dep. 17, 20). Some time after the citation was issued, E.H. instructed Lamb to start leaving a 20 foot muck pile at the bottom of the highwall. (Dep. 18). Lamb testified that, on November 13th, Miller asked the mine to construct a berm, which it did. (Dep. 22). Miller returned again on the 18th and asked if the mine had scaled the wall, to which Lamb responded that it had not. (Dep. 22). Miller looked at the muck pile, which extended 15-20 feet out from the highwall, and told Lamb that it wasn't good enough. (Dep. 23). Lamb testified that Miller then removed the highwall from service. (Dep. 23). The highwall has been out of service since that day. (Dep. 24). Lamb stated that, in the time since the highwall was removed from service, he has observed very little material fall. (Dep. 26).

ii. The Violation

I find that the Secretary has established a violation of the cited standard. I rely primarily on the clear testimony of Inspector Miller, who observed loose, overhanging, and cracked, material on the southwest highwall. *See* Sec'y Exs. 5-7. The loose material had not been removed or supported and, based on equipment tracks in the area, it is clear that equipment had recently traveled near the highwall and under the loose material. The material was as large as three to five feet in diameter and up to two feet in thickness. Both of the Respondent's witnesses agreed that there was loose material on the highwall and that it was customary for the mine to load to the toe. Further, E.H. testified that Hoover had never scaled the highwall at this mine to remove loose material.

I also credit Inspector Miller that bumping the highwall, inclement weather, or a blast in another area of the mine could all have caused the loose material to fall. Given the size and condition of the loose material observed on the highwall, I find that the condition of the highwall presented a hazard to those individuals operating equipment at the face of, and in close proximity to, the southwest highwall. The area had not been bermed-off or barricaded, nor had any warning signs been posted.

The Respondent argues that it is difficult and expensive to scale the highwall. However, Inspector Miller provided a number of suggestions as to how other similarly situated quarries in the area scale their highwall. The mine owner testified regarding an alleged agreement with MSHA that does not require Hoover to scale at its other mines. However, it is not entirely clear what this agreement was, and there is no evidence that this agreement extended to the Lebanon Quarry. Moreover, even if the agreement did extend to this mine, the Respondent had failed to implement the allegedly agreed upon practice. Hoover also argues that a preponderance of the evidence does not exist to show that miners were at risk of injury. I find to the contrary for the reasons stated above and for the additional reasons stated in my S&S findings below.

The mine could have bermed-off or barricaded the area if it did not want to scale the highwall, however it failed to do so. I find that the Secretary has established a violation of the cited standard and that the moderate negligence attributed to the Respondent is appropriate.

iii. Significant and Substantial Violation

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).

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 a discrete hazard, i.e., the hazard of rock and loose material falling and striking persons or the equipment being operated by persons. Third, it is more than reasonably likely that the hazard contributed to will result in an injury. Finally, given the size and amount of loose material, the injury would certainly be serious and potentially fatal.

The Commission has long held that a S&S designation must be based on the particular facts surrounding the violation, and viewed in the context of continued mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). Vibrations from machinery, working on the highwall, inclement weather conditions, and explosions in other areas of the mine, all greatly contribute to the likelihood of loose material falling and causing an injury. I credit Inspector Miller's testimony that falling loose material is capable to totally crushing the cabs of the mine equipment that were in use at this mine. There is no dispute that the mine had been loading to the toe under the loose material. There is no evidence that the operator took any specific precautions to mitigate possible hazards, i.e., remove loose from the highwall, nor did it take any steps to berm off, barricade, or post

warning signs regarding the hazards on the southwest highwall. I find that, when viewed in the context of continued mining operations, it is more than reasonably likely that loose material would have fallen and struck a miner or the equipment they were operating. I credit the inspector's testimony that falling loose material may strike the longwall and bounce outwards, thereby greatly increasing the area in which loose material may land and, in turn, increase the likelihood of an injury causing event. Further, I credit Inspector Miller's testimony that the FOPS on the equipment operating in the area would not have been sufficient to protect against falling material the size of which Inspector Miller observed, i.e., up to five feet in diameter and two feet thick. I find that any injury caused by the fall of such material would have been extremely serious or even fatal.

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). Inspector Miller qualifies, without question, as an experienced MSHA inspector. I find that the facts of this violation clearly establish that it was a significant and substantial violation. This citation is assessed a $5,000 penalty.

b. Citation No. 6084505

On November 13, 2008, Inspector Miller returned to the mine and issued Citation No. 6084505 to Hoover for a violation of section 56.3200 of the Secretary's regulations, i.e., the same section under which the October 28th citation was issued. The citation described the violative condition as follows:

> The upper East High wall which had been bermed had the Berm removed and cleaned up to the toe with loose material/rock in several areas of the High wall. The High wall was about 40 feet high and the loose rocks ranged in size from about 9 inches by 3 inches to about 5 feet by 5 feet by 1 foot thick. This practice created a hazard of Miners being struck by falling rock.

Miller determined that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that one employee was affected, and that the negligence was high. A civil penalty in the amount of $6,624.00 has been proposed for this violation.

i. Summary of Testimony

During Inspector Miller's October 28th inspection, he noted that the upper east highwall, which was adjacent to the southwest highwall, also had loose material, but was properly bermed on that date. (Tr. 30). Miller returned to the mine on November 13, 2008, with the intention of terminating the citation for the southwest highwall. (Tr. 40). During his return trip, Miller noticed that the berm that had previously blocked access to the upper east highwall was no longer there, but the loose material on the highwall remained. (Tr. 40-41). Miller testified that

loose, overhanging material was present on the highwall. (Tr. 44); Sec'y Exs. 10, 11. Further, he determined that the highwall had, again, been loaded to the toe based on how little material was left against the face. (Tr. 44-45); Sec'y Ex. 12. Miller testified that the condition of the highwall had existed since his earlier trip to the mine. (Tr. 49)

The upper east highwall is roughly 40 feet tall and the loose material ranged in size from approximately nine inches in diameter, to five feet by five feet by four feet, with the larger pieces weighing over a couple hundred pounds. (Tr. 45-46). Miller determined that, like the above citation, the lack of a berm, barricade or warning, combined with loose, overhanging material, presented a hazard to anyone who went to the toe or walked in the area. (Tr. 46-47). Miller determined that the violation was reasonably likely to result in a fatal injury for the same reasons discussed above relating to the early citation. (Tr. 47). He testified that this violation was the result of high negligence because he had talked about the importance of preventing such conditions during his previous visit, yet, since then, the mine had taken down the berm that previously had kept it in compliance and then cleaned right up to the toe. (Tr. 48). Miller observed that the condition was, again, "absolutely" obvious, should have been detected on preshift, and had existed on the upper east wall since his previous trip to the mine. (Tr. 49, 50). According to Miller, Lamb told him that he had instructed the driller to clean the highwall, but had not instructed him to remove the berm or clean the area all the way to the toe. (Tr. 42). However, Miller testified that he doesn't believe that the driller would have done so without being directed to do so. (Tr. 50).

E.H.'s testimony regarding Citation No. 6084500 and the mine's practices and procedures is equally applicable to Citation No. 6084505. E.H. did testify that he agreed that Sec'y Exs. 10 and 11 showed loose rock, and Ex. 11 possibly showed an overhang. (Tr. 82).

Lamb testified that the upper east highwall was bermed off on October 28th because there was loose material on it. (Dep. 31-32). On cross-examination, Lamb stated that on the morning of November 13th the mine pulled a shot on the upper east highwall to knock down the loose. (Dep. 32-33). Further, at the instruction of Lamb, David Murphy, the mine's loader operator, removed some of the material from the shot, but did nor remove the fallen material that was under the loose material still hanging on the highwall. (Dep. 35-36). Lamb testified that, at some time before Inspector Miller returned to the Mine on November 13th, James Rogers, the mine's drill operator, used the front loader to remove the berm that blocked off the highwall. (Dep. 34-35). When presented with Sec'y Ex. 12 Lamb described the picture by stating that "[y]ou've got material in here, see. There's nothing back here." (Dep. 37). Lamb could not say for sure whether Sec'y Ex. 12 depicted the area directly under the upper east high wall. (Dep. 38). Lamb acknowledged that there were no warning signs in the area on November 13th. (Dep. 38).

Lamb testified that, just like the southwest highwall, the upper east highwall has also been out of service since Inspector Miller shut it down. (Dep. 26-27, 39). Lamb stated that the upper east highwall has been bermed off, and the loose material that has come down in the two years since it was closed is similar in size and amount to that which has fallen off the southwest

highwall, i.e., "smaller stuff, 3 inches" and some pieces as big as softballs. (Dep. 27, 39). Lamb testified that, generally, the mine pulls a shot every three days. (Dep. 40).

ii. The Violation

I find that the Secretary has established a violation of the cited standard. I again rely primarily on the clear testimony of Inspector Miller, who observed loose, overhanging, and cracked, material that created a hazard for miners working or traveling in the area below the wall. *See* Sec'y Exs. 10-12. Both of the Respondent's witnesses agreed that there was loose material on the highwall. The loose material had not been removed or supported and, based on the testimony of Miller and Lamb, equipment had been operated in close proximity to the wall. I again credit the testimony of Inspector Miller that loose material can, and does fall, strike the wall and bounce outwards. I also again credit his testimony that the FOPS on the equipment operating in the area would not have been sufficient to protect against falling material the size of the loose material that he observed, i.e., up to five feet in diameter and one foot thick. A berm that had previously blocked off the area had been removed and there was nothing to prevent miners from going under the loose material. I credit Inspector Miller's testimony and find that, despite Lamb's testimony that the entire bench may not have been loaded to the toe, at least one area underneath the loose material had been cleared to the toe. *See* Sec'y Ex. 12.

I also credit Inspector Miller that bumping the highwall, inclement weather, or a blast in another area of the mine could all have caused the loose material to fall. Given the size and condition of the loose material observed on the highwall, I find that the condition of the highwall presented a hazard to those individuals walking or operating equipment at or near the face of the southwest highwall. While a berm may have existed at a prior time, at the time of the inspection the area had not been bermed-off or barricaded, nor had any warning signs been posted.

The Respondent raises the same arguments here as it did with the earlier citation discussed *supra*. For the same reasons set forth above, I find those arguments to be without merit. I find that the Secretary has established a violation of the cited standard.

iii. Significant and Substantial Violation

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 a discrete hazard, i.e., the hazard of rock and loose material falling and striking persons or the equipment being operated by persons. Third, it is more than reasonably likely that the hazard contributed to will result in an injury. Finally, given the size and amount of loose material, the injury would certainly be serious or even fatal.

The Commission has long held that a S&S designation must be based on the particular facts surrounding the violation, and viewed in the context of continued mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). Vibrations from machinery, working on the highwall, inclement weather conditions, and explosions in other areas of the mine, all contribute to the likelihood of loose

material falling and causing an injury. The mine had been loading material to the face of the highwall. The berm that existed on October 28th had been removed by November 13th, but the loose material remained on the highwall. In addition, there was no other barricade or warning in the area. I find that, when viewed in the context of continued mining operations, it is more than reasonably likely that loose material would have fallen and struck a miner or the equipment they were operating. I credit the inspector's testimony that falling loose material may strike the longwall and bounce outwards, thereby greatly increasing the area in which loose material may land and, in turn, increase the likelihood of an injury causing event. Further, I credit Inspector Miller's testimony that the FOPS on the equipment operating in the area would not have been sufficient to protect against falling material the size of which Inspector Miller observed, i.e., up to five feet in diameter and one foot thick. The individual who cleaned the bench up to the toe was in danger of being crushed by the loose material above him. Miller was aware of other instances where loose material had fallen on equipment and caused fatal injuries. I find that any injury caused by the fall of such material would have been extremely serious or even fatal.

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). Inspector Miller qualifies, without question, as an experienced MSHA inspector. I find that the facts of this violation clearly lead to a finding that it was a significant and substantial violation.

iv. Negligence

I find that Inspector Miller appropriately designated this violation as high negligence. On October 28th, Miller discussed with the operator the exact hazard created by the condition cited on November 13th. During his inspection on the 28th, he commented to Lamb regarding the appropriateness of the upper east highwall berm that was erected at that time. When he returned on the 13th, he was surprised to see that the barricade had been removed in spite of that conversation. Moreover, in at least one area, it was clear that equipment traveled directly under the loose material and cleared the fallen material to the toe. I find that Lamb, the mine's superintendent, was obviously aware of what was required of the mine to be in compliance with the cited standard. Nevertheless, it is clear that either (1) this information was not properly communicated to the driller who removed the berm, (2) the driller was instructed to remove the berm, or (3) the mine was highly careless in failing to supervise the driller at the time the berm was removed. Given the obviousness of the condition of the highwall, the fact that the mine had been placed on notice regarding the condition, and the fact that the condition had existed for an extended period of time, each of these possibilities lends itself to a finding of high negligence. I find that this violation was the result of high negligence on the part of the Respondent.

Due to the high negligence finding and the failure to abate orders that were not considered in the Secretary's proposed penalty, I assess a penalty of $10,000.00 for this violation.

c. Settled Citations

The Respondent and the Secretary have agreed to the following settlement amounts for the remaining citations in this docket. Each of the settled violations was designated as a 104(a), non-S&S citation.

Citation No. 6084501	$334.00
Citation No. 6084502	$460.00
Citation No. 6084503	$207.00
Citation No. 6084504	$117.00
Total Settlement Amount	$1118.00

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).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size and ability to continue in business. The conditions cited in both citations were not timely abated and, as a result, two 104(b) orders were issued. Rather than abate the citations, the operator chose to leave the 104(b) orders in place and not utilize those areas of the mine affected by the orders. The history is normal for this size operator. I accept the Secretary's findings of negligence as discussed above. Further, I find that the Secretary has established the gravity as described in the citations.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of $15,000.00 for the two citations discussed above. The parties' motion for settlement is **GRANTED**. Hoover, Inc. is hereby **ORDERED** to pay the Secretary of Labor the sum of $16,118.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

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

Matthew Shepherd, Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219-2456

G. Sumner R. Bouldin, Bouldin & Bouldin, PLC, 122 North Church Street, Murfreesboro, TN 37133-0811