FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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October 18, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY & HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2009-68-M
Petitioner	:	A.C. No. 22-00582-163187-01
	:	
v.	:	Docket No. SE 2009-69-M
	:	A.C. No. 22-00582-163187-02
BLUE MOUNTAIN PRODUCTION CO.,	:	
Respondent	:	Mine: Jasper Creek

DECISION

Appearances: Melanie L. Paul, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for Petitioner;
Larry Evans, Oil-Dri Corporation, Ochlocknee, Georgia, for Respondent.

Before: Judge Miller

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Blue Mountain Production Co., pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The case involves two violations in Docket No. SE 2009-68-M with a penalty of $2,176.00, and six violations in Docket No. SE 2009-69-M with a $600.00 penalty. The citations were issued by MSHA under section 104(a) and (d) of the Mine Act at the Jasper Creek mine. The parties presented testimony and documentary evidence at the hearing held on August 26, 2010 in Memphis, Tennessee. At the conclusion of the hearing, a decision on the record was entered and is set forth in part below. Necessary edits have been made to the transcript language.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Blue Mountain Production Company ("Blue Mountain" or the "mine"), is the owner and operator of the Jasper Creek Mine located in Blue Mountain, Mississippi. Stip. 1-9; (Tr.11-13). The mine agrees that it is subject to the jurisdiction of the Mine Safety and Health

Administration and that the Administrative Law Judge has jurisdiction to issue this decision. In August, 2008, Billy Randolph, Michael Evans and Michael Smallwood, all MSHA inspectors, conducted regular inspections of the Jasper Creek Mine. As a result of the inspections, the eight citations contested herein were issued. At hearing, one citation was modified and the mine operator agreed to pay the citation as modified.

Transcript pages 209- 211:

> I make the following findings of fact and conclusions of law. I accept the parties' stipulations regarding the jurisdiction of the commission and the jurisdiction of the Mine Safety and Health Administration, and the other stipulations that are entered into the record as evidence.
>
> . . . The mine agrees that it is subject to the jurisdiction of the Mine Act and that this Court has jurisdiction to issue this decision. Two inspectors, actually three, Inspector Randolph and Inspector Mike Evans both went to the mine on Sunday, August 10th, and . . . Inspector Smallwood who went to the mine the next day on August 11, 2008. All three of these inspectors were involved in issuing the citations that are before me.
>
> I have two docket numbers. . . . [First,] I'm going to address SE 09[-]68. . . . [I]n this case[,] . . . because of the defenses raised by Blue Mountain[,] I [will] remind the parties that this is a strict liability statute.
>
> The Federal Mine Safety and Health Review Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health hazards. When a violation of the mandatory safety standard occurs in a mine, the operators automatically are assessed a civil penalty.
>
> In addition, the Secretary is not required to prove that a violation creates a safety hazard unless it is included as part of the standard that is cited [or it has been designated as S&S]. . . . The Mine Safety and Health Act imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a violation -- for a valid citation to be issued.

A. Docket No. SE 2009-68-M

This docket includes two citations, both issued by Billy Randolph on August 10, 2008.

i. Citation No. 7751837

This citation was issued for a violation of 30 C.F.R. § 56.14107(a), which requires that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." The citation described the violation as follows:

> A obvious and serious hazard existed to three employees working at ground level where an approximate 14 inch drive belt pulley was operating located waist high and easily accessed. Amputating and crushing injuries would likely result if one contacted the moving machine part. There was no guard at all on the east side of the hopper car unloading belt discharge. Foot prints were visible immediately at the unguarded discharge roller, no barricades or warning signs were posted. The belt line had operated approximately 15 minutes Friday and had operated approximately 20 minutes today and was planned to operate another two hours. The mine operator permanently removed the belt line from service. This is the forth (sic) time this standard has been cited in the past two years at this mine site. The Plant Manage[r] (Danny Yancey) engaged in aggravated conduct constituting more than ordinary negligence in that he was aware that the head pulley guard was missing and the employees worked in the area when the machinery was in motion. This violation is an unwarrantable failure to comply with a mandatory standard.

Randolph determined that the violation was reasonably likely to result in a permanently disabling injury, 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 $2,000.00 has been proposed for this violation.

a. The Violation

Transcript pages 212-214:

> [T]he primary thrust of most of the testimony today was regarding this particular violation. Inspector Randolph, who is an experienced mine inspector and a field office supervisor, along with Inspector Trainee Michael Evans, arrived at the mine on a Sunday.
>
> And together as they entered into the mine, they immediately saw four persons from the mine standing in the area of a belt conveyor. . . . Three were standing. One was on the

Bobcat.

[The inspectors] immediately saw that part of the belt was unguarded, that material was coming off the belt, that the Bobcat was operating and they could see the guards were not on the belt where they were intended to be. The belt was about 25 feet long.

Two men were standing on the side where . . . Mr. Randolph and Mr. Evans took pictures, and both [inspectors] questioned the supervisor Mr. Yancey about the missing guard. . . . Inspector Randolph and Inspector Evans testified that the workers were [near the conveyor.] Mr. Evans said six feet from the conveyor, and Mr. Randolph said anywhere from 10 to 15 feet.

Mr. Yancey . . . said a little bit farther away. [The unguarded portion was] . . . near the discharge roller, and I reference[] Exhibit 9A, which shows the unguarded portion of the conveyor.

[I]t is obvious from the photograph and from the inspector's testimony that the guard at one time was in that location guarding that tail pulley but for some reason was not [installed in place on the day of the inspection].

This particular conveyor had been borrowed from another mine and put together on Friday and operated [for] several hours [on that day] and then again on Sunday at both times without . . . any guard near the discharge portion, the discharge roller of the conveyor.

There were other unguarded parts of the conveyor as well, but the inspector testified that he -- it was his policy to cite the conveyor belt and not each individual [unguarded area]. The belt was about waist high. The inspectors could see over the guards that were already [in place and had a clear view of the area where the guards were missing].

[The inspectors] could also see tripping and slipping hazards including the soft sandy material on the ground and the pieces of wood and track that were sticking out from below the conveyor.

[Randolph and Evans observed] . . . tracks or marks on the ground near the unguarded area. There is no -- no one really knows who was standing . . . next to the unguarded area, but

> nevertheless, the important part is that it was accessible to anyone who wanted to walk up to it.

Based on his vantage point, Randolph believes that Yancey could see the guard, and was aware that the belt had been dumping. Yancey testified that he did not see the area that had the missing guard and that the inspector misinterpreted the conversation regarding the guard.

Transcript Page 211:

> [T]he commission interprets safety standards to take into consideration ordinary human carelessness. In the case of Thompson Brothers Coal, the commission held that the [guarding] standard must be interpreted to consider whether there is a reasonable possibility of contact and injury including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. [*Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984).]
>
> Human behavior can be erratic and unpredictable. So, for example, someone might attempt to perform minor maintenance or cleaning near an unguarded tail pulley without first shutting it down.
>
> In such an instance, the employee's clothing could become entangled in a moving part and a serious injury would result. Guards are designed to prevent just such an accident. The fact that no employee was in the immediate area does not take away from the violation.

Government Exhibit 9C shows the rotating shaft, which was not guarded on left side. That area, particularly the bearing, which is required to be greased, and the bolt heads, will easily catch a sleeve and pull a miner into the unguarded portion of the shaft located on the discharge pulley.

Inspector Evans testified that he observed footprints very close to the conveyor and surmised that someone had been working in the area. (Tr. 139). Mine witnesses testified that no one was in the immediate area of the unguarded pulley on the day of the inspection. Either way, the area was easily accessible and, based on the history of such injuries at plants throughout the United States, it is not a defense that no person was next to the unguarded area at the time it was observed by the inspector. "Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

Mr. Yancey and the company witnesses testified that the belt was being tested on

Sunday; however, the evidence does not support that the conveyor was in place for such a test run, nor were there barricades or signs warning individuals to stay away from the unguarded area during any test. Further, the company witnesses testified that no one had conducted an inspection of the conveyor prior to starting it up.

For the above reasons, I find that the Secretary has proven a violation of the cited mandatory standard.

b. 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." 30 U.S.C. § 814(d)(1). 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 a miner getting caught in the ungaurded areas of the belt or pulley and being pulled in or entangled. Third, the hazard contributed to will result in an injury as a result of being pulled into the belt, pulley, or the drive. As the inspectors explained, the unguarded areas were out in the open and available for anyone to approach and work around. Further, there were a number of tripping hazards adjacent to the unguarded belt. Randolph explained why the pinch point and the area missing the guard would be accessed in the normal course of mining by persons at the mine. He explained that if the bearing freezes it is necessary to get close to examine and grease the bearing, or to run water on the bearing to cool it. Further, if material is spilling off of the belt then a miner would enter the area to adjust the hopper. In his view, a number of people would be

in the area that was not guarded. Finally, entanglement in the pinch point would result in an injury that is serious and potentially fatal.

Transcript pages 215-217:

> [I]n order to establish that a violation of the mandatory safety standard is significant and substantial, the Secretary of Labor must prove first that there is a violation, which I have already indicated that there is . . . a [clear] violation of the [guarding] standard in this case, that there is -- second, a discrete safety hazard that is a major danger to safety contributed to by this violation.
>
> And the safety hazard here is unguarded moving parts that could pull someone in or otherwise injure them should they fall or become entangled in the belt. The next part of the test, part three, a reasonable likelihood that the hazard contributed to will result in injury is the most difficult part of the significant substantial [elements] for the Secretary to prove.
>
> But in this case, . . . the Secretary has met her burden. . . . [T]here was a major pinch point on top of the discharge pulley. If anyone got entangled into it, it would mean amputation or serious injury. The location of the belt was right at waist high. It was easy to access.
>
> There was nothing guarding, barricading, or blocking anyone from going toward the pinch point or the unguarded pulley. There was no -- there were three miners on foot in the area, a fourth on a piece of equipment. There had been no meeting or warnings [to] stay away from that particular part of the [belt].
>
> And it is reasonably likely that someone would walk into that area and be -- and be injured. Anyone would walk in the area to look at it to make sure it is discharging properly, to clean it up.
>
> Other[] reasons explained by Inspector Randolph [include that a miner] . . . might be in the area to run water on the area or to cool it down or to grease it, clean up the spill, adjust the hopper. So there were a number of reasons. It was easily accessible, and there were a number of reasons why someone might go in the area.
>
> [I]f they did get caught in that belt, the injury would be serious. Therefore, I find that this is a significant and substantial violation as cited by the inspector. . . . [T]he mine argues it was

> not S and S because it was not accessible [in] that no one had reason to go over [to that area], but I . . . [have] already articulated my reasons for agreeing with [the inspectors]-- I credit Inspector Randolph and Inspector Evans . . . in that regard.

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 Randolph qualifies, without question, as an experienced MSHA inspector. He described the violation as significant and substantial and explained that unguarded portions of the belt are reasonably likely to lead to an event that causes serious injury.

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 significant and substantial.

c. Unwarrantable Failure

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co*., 13 FMSHRC 189,194 (Feb. 1991). Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.,* 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC at 353.

The day the subject citation was issued, Randolph and Evans described the condition as obvious and as having existed for an extended period of time. Nothing had been done to abate the violation, no warnings or barricades had been posted and the violation posed a high degree of danger to the miners. In addition, two of the three men who were on foot observing the conveyor were supervisors.

Evans observed three men standing at the conveyor as it was operating and another man on a bobcat, all approximately 5-6 feet from conveyor. Evans learned that two of the men standing near the conveyor (i.e., Yancey, the plant manger, and Jones, a team leader) were supervisors. Further, Evans learned that the person who set up the conveyor on the previous

Friday was also a supervisor. Evans explained that he immediately noticed the missing guards, particularly the missing guard in the head area where the shaft was turning and creating an entanglement hazard. In addition Evans saw that a guard was missing on other side of the conveyor at the drive head, leaving the drive roller exposed for about five feet.

Evans asked the plant manager, Yancey, if he knew the guards were missing. Evans remembers that Yancey indicated that he was aware that the area needed to have the guards that were missing. Evans also learned that the belt had been running about 30 minutes on Sunday before the inspectors arrived, and had run several hours on Friday. Evans later took statements from both Palmer and Jones, both supervisors. He learned that neither of the two of them had performed a safety inspection nor had they directed any miner to conduct a safety inspection prior to starting up the belt.

Evans determined that the violation was the result of high negligence based on the circumstances at the time, with no mitigating factors. Yancey was in charge and another supervisor was present, yet no warnings were given to other employees to stay back from the unguarded areas, no meeting was held prior to starting up the conveyor, and no barricades were erected. When the inspectors arrived, the employees and supervisors present were facing the conveyor and looking in the direction of the head drive where the guard was missing, and should have noted the missing guard and taken some action.

Yancey testified that he was not aware that the head pulley guard was missing. He said that he didn't tell Randolph that he knew that it was a violation, or that he knew the head guard was off, nor did he tell Evans that he knew it was off. He recalls that Evans questioned him about the missing guard and whether he knew that the head pulleys on conveyors needed to be guarded. He responded that he did know that they needed to be guarded. Yancey testified that he did not inspect the conveyor prior to putting it in operation and, from his vantage point, he was not able to see the area where the guard was missing. Although Yancey testified that he did not see that the guard was missing, the inspectors saw it immediately upon leaving the office and moving into the work area. Therefore, I credit the testimony of Randolph and Evans that the missing guard was obvious to anyone who was working in the area. I find that the violation is an unwarrantable failure as designated by the inspectors and assess the proposed penalty of $2,000.00.

ii. Citation No. 7751841

This citation was issued for a violation of 30 C.F.R. § 56.12018, which requires that "[p]rincipal power switches shall be labeled to show which units they control, unless identification can be made readily by location." The citation described the violation as follows:

> A hazard exists to miners performing work on electric powered equipment and electrical circuits in that the principle power switches were not labeled to show which units they control. This is the third time that this standard has been cited in the past two years at this mine site.

Randolph determined that the violation was not significant and substantial, that one employee was affected, and that the negligence was high. A civil penalty in the amount of $176.00 has been proposed for this violation**.**

a. The Violation

Randolph credibly testified that the power switch box on the wall at the kit kat conveyor could be easily accessed by workers, maintenance persons, and contract electricians. The power switch was occasionally used to cut power to equipment in this area so that work could be performed on the equipment or as the need may arise to de-energize the belt. In failing to identify the breaker, the mine ran the risk that the wrong breaker would be thrown, thereby energizing and starting the belt or equipment without notice which would, in turn, result in a fatal accident. Randolph reviewed the records and discovered that this particular power switch box had been cited three times in the past for not having all of the switches labeled.

The operator defends this violation by asserting that the unlabeled switches were circuit breakers, not principal power switches. However, I credit Randolph's testimony that this is a central power switch by virtue of the fact that the various switches turn off power to different parts of the conveyor area. He explained that a circuit breaker also turns off the power and is a power switch.

Transcript pages 219-220:

> There's no question [the power switch] could not be identified by location based on Inspector Randolph's [unrefuted] testimony. Randolph determined that the power switch box on the wall at the kit kat conveyor did not have all of the power -- all of the switches labeled.
>
> And he testified that it was in clear violation of this mandatory standard. . . . [T]he mine's defense to this violation is that it was not a switch, not a principal power switch. [The mine] also argues that the three that were labeled . . . [to abate the violation after the citation was issued] -- at least one of them was not a principal power . . . [switch].
>
> I don't find that argument persuasive. . . . [Instead], I credit the testimony of Inspector Randolph, who is also a certified electrician that these were principal power switches [in that they could de-energize large portions of the area by throwing the switch] and that they were not labeled.
>
> . . . Inspector Randolph did not designate this as significant and substantial. One employee was affected, but he did indicate

> that the negligence was high. I agree with Inspector Randolph, that the negligence was high. He indicated that the mine had been cited for this before. It is a simple thing.
>
> The box is right there. It should have had all of the labels on it that are . . . [required]. . . . I affirm the violation, including the negligence finding of the inspector and assess a 200-dollar penalty for the violation.

B. Guarding Violations in Each Docket

Four of the six citations at issue in the docket addressed below, and one of the two citations in the docket addressed above, allege that Blue Mountain failed to adequately guard moving machine parts. Blue Mountain argues that it did not receive fair notice of MSHA's determination that its guarding was inadequate. The Jasper Creek Mine has been inspected at least annually for the past ten years. Blue Mountain contends that many of the missing guards cited by Inspector Randolph and Inspector Smallwood have been missing since MSHA began inspecting the mine. The lack of guards in the three separate areas discussed below had not been cited by any inspector until Inspector Randolph and Inspector Smallwood did so in this case.

Section 56.14107(a) provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving machine parts that can cause injury." The standard makes clear that guarding is required but leaves unanswered what is required to protect persons from coming into contact with moving machine parts. The standard was written broadly to effectuate its protective purpose and cover a wide range of moving machine parts. Blue Mountain is not arguing that the cited areas did not come within the purview of the standard.

The Secretary must provide fair notice of the requirements of a broadly written safety standard. The language of section 56.14107(a) is "simple and brief in order to be broadly adaptable to myriad circumstances." *Kerr-McGee Corp*., 3 FMSHRC 2496, 2497 (Nov. 1981); *Alabama By-Products Corp*., 4 FMSHRC 2128, 2130 (Dec. 1992). Such broadly written standards must afford notice of what is required or proscribed. *U.S. Steel Corp*., 5 FMSHRC 3, 4 (January 1983). In "order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be 'so incomplete, vague, indefinite, or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application'" *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990)(citation omitted). A standard must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (Sept.1991).

> When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, i.e., the reasonably prudent person test. The Commission recently summarized this

> test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard."

Id. (citations omitted). In other words, a safety standard cannot be construed to mean what the Secretary intended but did not adequately express. "The Secretary, as enforcer of the Act, has the responsibility to state with ascertainable certainty what is meant by the standard he has promulgated." *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976).

The mine operator argues that, with regard to the three guarding violations discussed below, the machines have not had guards for many years and have not been cited, leaving the operator to believe that it was in compliance with the applicable guarding standard. Blue Mountain argues that it is entitled to reasonable notice from MSHA of its intention to require additional guarding before civil penalties may be assessed. The Secretary contends that the citations should be affirmed because Blue Mountain did not meet the burden of proof for its fair notice defense.

Transcript page 223-224:

> The remaining violations are guarding violations. And as to those guarding violations, the mine has raised the issue of fair notice, which deserves a little discussion before we go forward with those. But let me first note on the record that Citation Number 7751843 has been modified to allege a violation of 56.1411 -- 112B. And the operator accepts it as modified, and a 100-dollar penalty is assessed as suggested by the Secretary.
>
> . . . I want to address briefly the fair notice issue that came up in the remaining guard[ing] violations. Blue Mountain argues that it did not receive fair notice of MSHA's determination that several areas, particularly three areas were not guarded that should have been guarded.
>
> And then raising the . . . fair notice issue, Blue Mountain contends that many of the guards . . . -- that these guards were seen or inspected by previous inspectors in the past 12 to 15 years, and no one has . . . [deemed them] a violation.
>
> Essentially, when a mine operator raises the issue of fair notice, it is raising the issue of whether or not the standard is specific, that it gives them notice as to what is required.
>
> The fact that other inspectors walk by it can lead them to believe that no guarding is necessary. However, the fact other

> inspectors walk by . . . [a violation without citing it] is not enough to allege a fair notice argument. Just because a mine inspector [may] walk[] by a violation [without issuing a citation] does not relieve the mine operator of its duty to follow the standard.

C. Docket No. SE 2009-69M

i. Citation No. 6133232

This citation was issued for a violation of 30 C.F.R. § 56.14107(a), which requires that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." The citation described the violation as follows:

> A hazard exist to miners working in Rotex shaker screen area. A guard was not provided to prevent crushing injuries from pinch points between the shaker screens and the hanger brackets adjacent to the travel way.

Smallwood determined that the violation was not significant and substantial and the negligence was moderate. The Secretary proposes a penalty of $100.00

a. The Violation

Inspector Smallwood arrived at the mine on Monday, August 11th. Smallwood has been an inspector for two and one-half years and has a total of 23 years of mining experience. When he first arrived at the mine, he conducted interviews regarding the unwarrantable violation issued the previous day by Inspector Randolph. He then began his inspection and observed the Rotex screening system. Smallwood testified that the machine moves rapidly and that there is a walkway next to the system which is traveled each day. In his opinion, a miner can trip or fall into the pinch point, which is easily accessible from the walkway. He opined that the violation is only obvious when the machine is on and moving. Exhibit 15(a) is photograph of the area that shows the shaker screen and support bracket. People travel in the area to do maintenance and checks.

Transcript pages 227-228:

> The guard was not provided to prevent crushing injuries from [the] pinch point between the shaker and the hanging bracket adjacent to the travel way. . . . [T]he mine said only two of the [four] -- only two were required to be guarded and that is[, according to Inspector Smallwood,] . . . because two were near a travel way . . ..
>
> Inspector Smallwood indicated that the screening system

> moves rapidly, and . . . it is next to a walkway. Trip and fall hazards would put someone right into the pinch point. And he indicated that is the reason he designated this as a violation.
>
> He did say that because there was good visibility and it may not be likely that someone would fall into this particular area, he designated it as non-S and S. And the -- the injury indicated would be primarily cuts and bruises from falling into it.
>
> He [indicated] . . . moderate negligence because it had not been brought to the attention of the mine in the past. I find that Inspector Smallwood did, based on his credible testimony, establish a violation as set forth. And in this case, his testimony was -- the important part of his testimony [for purposes of fair notice is] . . . that the hazard . . . is obvious when the machine is operating.
>
> It is not so obvious when it is not moving. In that case, a mine inspector may well walk by it if it is not moving, but the mine operator is there each and every day to see it and should be -- a reasonable person would know that these areas next to the walkway should be guarded [given the nature of the pinch points].

At this point the fair notice defense does not apply, and I find that there is a violation. The inspector has credibly testified that there are moving machine parts that may be contacted and cause injury. Hence, a violation is established. There is no evidence that an inspector has observed this screening section in operation but there is evidence that a reasonably prudent person who watches the machine operate would understand that a guard is necessary. Therefore, I find that the operator has not met his burden in asserting the defense of fair notice and assess the proposed penalty of $100.00.

ii. Citation No. 6133235

This citation was issued for a violation of 30 C.F.R. § 56.12016, which requires that:

> [e]lectrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

The citation described the violation as follows:

> The electrically powered Kat Kit conveyor was not locked and tagged out of service while repairs to the tail pulley were in process. Employees working on this equipment were exposed to the possibility of injury, if the conveyor was started without workers knowledge. The employee had a emergency stop button depressed, making the chance of an accident unlikely.

Smallwood determined that it was not significant and substantial, that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of $100.00 has been proposed for this violation.

a. The Violation

Smallwood testified that depressing the emergency stop button is not a replacement for turning off the power at the source and locking it and tagging it out of service so that it is not accidently started while work is being performed. In this case, guards were being installed on the conveyor when Smallwood observed the violation. Smallwood is aware of an accident that occurred in the weeks prior to the citation in which the emergency stop malfunctioned and equipment started inadvertently causing injuries to a miner.

The mine argues, and Yancey testified, that the emergency stop button is a way to comply with the standard based upon the fact that the emergency stop is a switch that is used to turn off/on the power. According to Yancey, the emergency stop button was depressed and the worker had the button in his sight at all times and, therefore, the chances of it starting without his knowledge were non-existent and the intent of the standard was met.

Transcript pages 221-222:

> [Citation] 6133235.
>
> . . . [This] citation was [issued] for a violation of [section] 56[-]12016, which requires electrical power equipment to be de-energized before mechanical work is done. This is essentially lock-out, tag-out standard.
>
> . . . I don't think there is any question about the facts. There was an employee working on the kit kat conveyor, which is pictured on Exhibit 11A and B. An employee was placing guards to . . . [abate another] citation, and he had stopped the belt -- the conveyor with the emergency stop button.
>
> Instead of going to the main power source locking . . . [it] and tagging out, . . . [he used the emergency stop button]. . . . [I find this to be a very serious violation.] Lock-out, tag-out is

> something that should be known by everyone at this point in the Mine Act.
>
> Inspector Smallwood indicated that the negligence was moderate and that this was not an S and S violation. There is no question that there was a violation. It was not locked-out and tagged-out. . . . [T]he mine believes that the E -- the emergency stop button was depressed [,] [s]o the belt could not possibly start, and that was an alternative to the lock-out, tag-out. I don't find that argument persuasive, and I agree with Inspector Smallwood that, in fact, it was not locked and tagged out according to the requirements and the standard, and the violations existed. And I find the gravity to be a little higher than the inspector assessed, and I assess a 300-hundred dollar penalty for this violation.

iii. Citation No. 7751838

This citation was issued for a violation of 30 C.F.R. § 56.12004, which requires "[e]lectrical conductors shall be of a sufficient size and current-carrying capacity to ensure that a rise in temperature resulting from normal operations will not damage the insulating materials. Electrical conductors exposed to mechanical damage shall be protected." The citation described the violation as follows:

> A potential shock and burn hazard existed to miners that would use the Bob Cat (250 NT) welding machine located under the Bentnoite (sic) Silo. The portable welding machine was ready to be used if needed and was not locked and tagged out of service. The electrode cable had one inch of exposed bare copper conductor that could be contacted.

Randolph determined that it was not significant and substantial, that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of $100.00 has been proposed for this violation.

a. The Violation

Randolph explained that he cited the portable welding machine due to the exposure of the copper wire conductor inside the insulating jacket of the electrode cable. The machine was ready for use. If the cable had been picked up by the exposed areas, then a short circuit would have occurred and shock and burn hazards would have existed. Randolph observed the condition shown in Government Exhibits 10(a) and 10(b). The mine operator argues that since the welder is portable, it is not subject to the standard.

Transcript pages 222-223:

> [Randolph] issued this citation and this violation because there was a nick or a cut in the [cable of the] welding machine located -- a portable welding machine located in the Bentonite silo.
>
> There is no question the photographs shows that there was a nick or a cut in the cable and that . . . the nick or cut exposed the bare copper and conductor that could be contacted by anyone picking up [the cable] to the machine.
>
> If the welding leads were energize[d] or if that cable were energized, it could result in an electrical - in an electrocution or short circuit causing injury to the person using the equipment. One inch of it was exposed. It was ready to be used, although it was not in use at the time.
>
> It could short circuit, causing shock hazard, and the injury would be very serious. But it was not -- it was the opinion of Inspector Randolph that it was not likely to happen because it was a small exposed part. He designated moderate negligence. . . .
>
> [Randolph] doesn't know when [the cut in the cable] . . . occurred, but . . .[it was easily visible]. He designated the negligence as moderate[.] . . . So I -- I credit Inspector Randolph's testimony and find that there was a violation of the standard as he cited and assess a 200-dollar penalty for the violation.

iv. Citation No. 7751840

This citation was issued for a violation of 30 C.F.R. § 56.14107(a), which requires that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." The citation described the violation as follows:

> A hazard exists to miners working on the tray conveyor located in the Kit Kat Filling area in that the drive pulley shaft was not guarded. Miners in the area are exposed to broken hand and broken arm injuries.

Randolph determined that it was not significant and substantial, that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of $100.00 has been proposed for this violation.

a. The Violation

Randolph observed the kit kat conveyor belt on the date of the inspection when it was not operating. He could see that the trays placed on the conveyor were sitting on top of moving parts. He determined that the location of the trays presented a hazard where miners' fingers could be caught as they lifted the tray to move it from the belt. The miners are told to wait until the belt stops to pick up the tray but it is possible that, when in a hurry, they will lift the tray without waiting for the belt to stop. In that case, they could easily catch their fingers or sleeves and become entangled in the belt. It is Randolph's view that it is difficult to see the pinch points unless the belt is stopped and the trays are removed, such as they were on August 11.

The mine argues that the conveyor moves slowly and the chances of getting caught in the moving parts is negligible. It also argues that the pinch points that are not covered by the trays are guarded and the other moving parts are guarded by the trays themselves. The operator's arguments do not change the fact of the violation, since the pinch points exist and workers have their hands near those points when removing trays. If the miners contact the moving belt parts under the tray, the miners would suffer an injury, possibly the loss of a finger. The arguments of the operator go to the gravity of the violation which has been marked as moderate. Finally, the mine argues that the conveyor has been without a guard for many years and has not been cited by MSHA.

Transcript pages 228-229:

> Inspector Randolph determined that the violation was not significant and substantial but that [the area under the trays] . . . needed to be guarded . . . . I don't think there is any dispute that there were guards around the tray area, but the issue was the area under the tray.
>
> When workers lift the trays off the belt, they could catch their hands or fingers in[] the pinch point below. And that is the area that he required to be guarded. Again, because this area is covered by trays and the inspector would have to be there in order to see someone lifting the tray off to know that, in fact, that there was a pinch point that could cause a problem, I do not find that fair notice applies . . . [in this instance].
>
> The mine operator is in a far better position to look at this and know, and a reasonable person should know that this area should contain a guard to protect the hands and fingers of persons lifting the trays off the conveyor.
>
> I credit the testimony of Inspector Randolph and find that there is a violation of the guarding standard and agree and assess the penalty of 100-dollars as proposed by the Secretary.

v. Citation No. 7751842

This citation was issued for a violation of 30 C.F.R. § 56.14107(a), which requires that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." The citation described the violation as follows:

> A hazard exists to miners working near the Kit Kat Feed conveyor in that a guard was not provided for a exposed rotating shaft between the speedreducer and the drive pulley. Entanglement hazards resulting in broken bones and lost work days.

Randolph determined that the violation was not significant and substantial, that one employee was affected and that the negligence was moderate. A civil penalty in the amount of $100.00 has been proposed for this violation.

a. The Violation

Randolph described this area, which is elevated, as being above the feed conveyor and accessible only by ladder. The unguarded area is shown in Government Exhibit 13(a). The location has one bearing that must be greased but it has an extended grease line that makes it possible for work to be done without getting too close to the moving part. A worker may be required to access the point to grease the machine once each month, and a worker conducting a safety inspection of the area would be required to climb the ladder and walk past the area several times each week. Due to the speed of the rotating shaft, it would quickly pull a worker who comes in contact with it into the moving parts, thereby causing severe injuries.

This case is a close call for the use of the "fair notice" defense. Yancey argues on behalf of the company that he traveled the area with mine inspectors, that the area is accessed by ladder, is hardly traveled, and that the mine has a safety device for greasing the equipment which keeps the worker away from any moving part. Two inspectors observed this violation and agreed that it was obvious and that a reasonable person should have seen the violation and provided a guard over the moving area.

Transcript pages 229-230:

> [Randolph testified] that a guard is not provided for a[n] exposed rotating shaft between the speed reducer and the drive pulley. Entanglement hazards resulting in broken bones and lost work days [would result in the event a miner came into contact with the moving machine part].
>
> The photograph of this particular violation shows that the violation -- that the unguarded place is very clear. . . . Exhibit 13A, shows that the unguarded moving portion of this machine is obvious.

> I don't know why an inspector would go by and not cite this. [However,] Mr. Yancey did testify that he personally was in this area[, which is accessed by a ladder,] with an MSHA inspector and no one mentioned to him that this particular area should be guarded.
>
> [I agree with Randolph that] . . . it should be guarded. And it does present a hazard[,] . . . [i]t has pinch points, moving parts that [could cause injury and therefore] should be guarded. This is -- this is the citation that I believe the fair notice defense would come into play.
>
> This is one of those cases where it does look obvious from the photographs . . . [yet inspectors failed to cite it for many years].

Since the area is elevated, set back from the walkway, and not traveled often, a reasonable person may not know that the area should be guarded. Given Yancey's clear and convincing testimony that he passed the position many times with an inspector and a guard was not mentioned, he understood that one was not needed. Therefore, in this case, the operator has shown the fair notice defense applies and, for that reason, I vacate the citation.

vi. Citation No. 7751843

This citation was issued for a violation of 30 C.F.R. § 56.14107(a). At hearing, I granted the Secretary's motion to amend the citation to an alternative section of the regulations. The operator agreed to the amendment and agreed to pay the violation as amended. Randolph determined that it was not significant and substantial, that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of $100.00 has been proposed for this violation. The violation has been admitted and the $100.00 penalty is assessed.

II. PENALTY

The principles governing the authority of the 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 and that the violations were abated in good faith. The history shows few violations in the past, thus justifying the low penalties in this matter. The size of the operator is large and I accept the Secretary's finding of negligence for each citation discussed above. Further, I find that the Secretary has established the gravity as described in the citations and assess the following penalties:

Citation No. 7751837:	$	2,000.00
Citation No. 7751841:	$	200.00
Citation No. 6133232:	$	100.00
Citation No. 6133235:	$	300.00
Citation No. 7751838:	$	200.00
Citation No. 7751840:	$	100.00
Citation No. 7751842:	- Vacated -	
Citation No. 7751843:	$	100.00

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. §' 820(i), I assess the penalties listed above for a total penalty of $3,000.00. Blue Mountain Production Co. is hereby **ORDERED** to pay the Secretary of Labor the sum of $3,000.00 within 30 days of the date of this decision.[1]

Margaret A. Miller
Administrative Law Judge

[1]Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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