

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 4, 2009

POWDER RIVER COAL, LLC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 2007-898-R
	:	Citation No. 7610571; 08/24/2007
v.	:	
	:	Docket No. WEST 2007-899-R
	:	Citation No. 7610725; 08/24/2007
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	North Antelope Rochelle Mine
ADMINISTRATION (MSHA),	:	Id. No. 48-01353
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2008-242
Petitioner	:	A.C. No. 48-01353-130970-01
	:	
v.	:	Docket No. WEST 2008-243
	:	A.C. No. 48-01353-130970-02
POWDER RIVER COAL, LLC.,	:	
Respondent	:	North Antelope Rochelle Mine

DECISION

Appearances: Karen L. Johnston, Esq., Jackson Kelly PLLC, Denver, Colorado, for Powder River Coal, LLC;
Gregory W. Tronson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary of Labor.

Before: Judge Manning

These cases are before me on two notices of contest filed by Powder River Coal, LLC (“Powder River”) and two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”) 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”). Powder River contested eight citations in these proceedings. An evidentiary hearing was held in Denver, Colorado. The parties introduced testimony and documentary evidence and filed post-hearing briefs.

Powder River operates the North Antelope Rochelle Mine, a large open-pit coal mine in Campbell County, Wyoming. Just prior to the hearing, the parties agreed to settle four citations. The Secretary agreed to vacate Citation No. 7610571. The Secretary also agreed to reduce the gravity in Citation No. 7610570 from “fatal” to “permanently disabling” and Powder River agreed to pay a penalty of \$1,684.00. Powder River agreed to withdraw its contest of Citation Nos. 7610731 and 7610640. Finally, Powder River agreed to the terms and conditions set forth in paragraph 6 of the parties’ motion to approve partial settlement.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 7610725, Testing Conveyor Pull Cord Switches.

On August 24, 2007, Inspector Wayne Johnson issued Citation No. 7610725 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 77.502-2 as follows:

The examinations and tests required under the provision of this section 77.502 shall be conducted at least monthly. The mine has not examined and tested monthly pull cord inspections.

The inspector determined that an injury was unlikely but that any injury would likely be permanently disabling. He determined that the violation was not of a significant and substantial nature (“S&S”) and that the company’s negligence was high. Section 77.502-2 provides that the “examinations and tests” required by section 77.502 shall be conducted “at least monthly.” Section 77.502 provides, in part, that “[e]lectric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions.” The Secretary proposes a penalty of \$643.00 for this citation.

A pull cord switch is a shut off device used along conveyors. (Tr. 12; Exs. G-3, G-4). The pull cords are set up along walkways next to the conveyor and they can be activated (“pulled”) in an emergency to stop the belt from running. The switch is activated by pulling the cord. When the cord is pulled, a signal is sent to the computer in the control room and that section of the conveyor is instantly shut down. Other sections may also be sequentially shut down so that coal does not continue to run and spill off the belt. Inspector Johnson estimated that there are several hundred pull cord switches in the mine. (Tr. 14).

Inspector Johnson inspected the pull cords because a miner filed a safety complaint with MSHA. He testified that he spoke to several employees and managers regarding the allegations of the complaint. (Tr. 15). He was told that the mine only performs a visual inspection of the pull cord switches on the daily walk-around examinations and during the monthly electrical inspection. Inspector Johnson testified that a functional test must be performed in order to determine if the activating arm on the switch is operating properly. If the activating arm is frozen, the conveyor will not shut down when the cord is pulled. (Tr. 16-17). He spoke with

Donnie Blackburn, a team leader and electrician for Powder River, and was told that the mine never shuts down conveyors to test pull cord switches.

Inspector Johnson said that he discussed the methods of testing pull cord switches with several other mine operators. He testified that these operators told him that they include a monthly switch functional test in their inspection. (Tr. 19). The inspector believes that the safety standard requires that a functional test be included as part of the monthly inspection of all switches in the mine. He said that it is not necessary that the conveyor be running when the functional test is conducted. The main purpose of the test would be to make sure that the activating arms are functional and not frozen. (Tr. 21). A miner in the control room would be able to determine if the switch has been activated for a particular belt. The company's on-shift report recorded problems with pull cord switches, including stuck switches, that were repaired. (Tr. 23-24; Ex. G-5). A review of the inspection books after the citation was issued indicates that several pull cords needed to be repaired by an electrician.

The inspector determined that the violations were the result of Powder River's high negligence because mine managers were not able to recall ever conducting a complete functional test on the switches. (Tr. 26). In Inspector Johnson's opinion, a defective condition would not be discovered by a visual inspection as one could not tell just by looking at the switch whether it was working properly.

On cross-examination, Inspector Johnson discussed his interpretation of section 77.502. He stated that the term "examine" in the safety standard means a visual inspection while the term "test" means a functional test. (Tr. 34). It is his understanding that employees of Powder River walk along the conveyor systems to look at the pull cords to ensure they are connected and to look for visible abnormalities. This examination would include looking at both sides of the switch to make sure all electrical components are connected. (Tr. 38).

Blackburn testified on behalf of the company. Blackburn has been employed by Powder River for 16 years and has been the electrical team leader for one year. He is an MSHA certified electrician. His job duties include overseeing all the electrical equipment and personnel at the pit and the plant. (Tr. 88). Blackburn explained that the pull cord system at the mine is installed at unguarded portions of the conveyor and is used throughout the mine. The pull cord switches are made by different manufacturers, but they use the same general system and setup. (Tr. 91). There are approximately 35,000 feet of conveyor pull cords throughout the mine. He described the pull cord system as having two components to it: (1) the aircraft cable that runs through metal posts mounted on the conveyor, and (2) the switch. The cables loop through the indicator arm on the switch. (Tr. 93). He explained that the system is wired in a fail-safe manner. When a switch is pulled a signal is sent to the computer which instantly shuts down the conveyor. There is a redundancy built into the system.

Taking into consideration manufacturers' recommendations, the mine has the switches placed about 185 feet apart making the total number of switches in the mine between 200 and 250. (Tr. 95). Blackburn stated that the computer system monitors the circuits so if the

electrical circuit in the pull cord switch fails, then the conveyors are automatically shut down and they cannot be restarted until repairs are made. (Tr. 95).

The Conveyor Components Company is the manufacturer of the most recently installed pull cord system. It recommends testing once installation is complete to make sure that the switches are mounted correctly and operating properly. However, there is no recommended testing after that point. (Tr. 97). After the initial installation, the system was checked by physically pulling on the cord to make sure it was operating. The cables were checked to assure they were in place and that all parts were mounted correctly. The system was also checked by pulling each pull cord and matching it with the computer to show that the proper switch was tripped. Blackburn said that this test is only required when a pull cord system is first installed. (Tr. 97). He has not performed a functional test for the purposes of complying with section 77.502-2 and has not directed anyone else to perform this test. He feels that the functional test is unnecessary as the computer system monitors the electrical system 24 hours a day and there is a person in the control room at all times. (Tr. 98). He believes that Powder River complied with the standard by conducting a visual inspection. The electrical team inspects the area as do the on-shift supervisor and on-shift technician on a daily basis. Any problems are recorded in the log books. (Tr. 100). If there is a problem, a work order is generated and the problem is corrected. Blackburn stated that he has never been told by an MSHA inspector that a functional test of the pull cord system needed to be performed on a monthly basis. (Tr. 101). He has also spoken with other mines and they stated that they do not perform monthly functional tests. (Tr. 103).

Blackburn testified that Inspector Johnson permitted Powder River to conduct the test with the belts stopped as the equipment is not meant to be started so many times in a short period of time. (Tr. 108). Inspector Johnson watched in the computer room while the cords were pulled and saw that they were functioning properly. Blackburn does not feel that the system should be tested on a monthly basis as it is designed to be used in emergency situations only and the life of each switch would be shortened if it were tested monthly. (Tr. 111).

Michael Stephens, production manager for the plant, also testified on behalf of the company and he reiterated much of Blackburn's testimony. (Tr. 127-146). He has been employed by the company for 24 years and has held his current position since February 2008. Given the complexity of the conveyor system, he estimated that it would take at least one full day to test all of the pull cord switches at the mine in the manner initially required by Inspector Johnson. (Tr. 129). After negotiation with the inspector, the conveyor system was shut down and mine employees pulled each switch as someone made sure that a signal was being received by the computer in the control room. (Tr. 132).

The Secretary argues that the plain language of the safety standard requires more than a visual inspection of electrical equipment. The standard clearly provides that a "test" is required. The pull cord switches are not tested when miners merely examine them. If a switch handle is stuck in place, pulling on the cord will not activate the switch. This defect cannot always be detected by a visual inspection. She also maintains that her interpretation of the standard is

reasonable because it is consistent with the language and purpose of the standard. As such, her interpretation is entitled to deference by the Commission.

Powder River contends that it has never been advised by MSHA, during all of the years that the mine has been inspected, that it must physically pull each and every pull cord switch on a monthly basis in order to comply with the safety standard. It argues that the electrical examination standard does not apply to pull cord systems and the citation should be vacated. Powder River also argues that its method of monitoring and inspecting the pull cord system makes a functional test unnecessary. The electrical portion of the pull cord system is monitored by the computer at all times, the computer control room is manned at all times, and the mechanical portion of the pull cord system can be effectively inspected visually. The inspector failed to recognize that the “electronics” in the pull cord system is being constantly monitored by the computer and that the system shuts down if it is not working properly. (P.R. Br. 15). “The pull cord system is designed to be pulled on an as-needed basis and, much like a sprinkler system in an office building, its computer monitoring system is sufficient to advise when an electrical problem exists.” *Id.* The pull cord switches were not designed to be regularly pulled with the result that repeatedly performing the test required by the inspector would shorten their lives. The on-shift examinations performed at the mine are adequate to note any mechanical problems with the switches.

Powder River also maintains that it was not put on notice that the cited standard requires the operator to perform a functional test of the pull cord system on a monthly basis as part of the electrical equipment examination. A reasonably prudent person familiar with the mining industry and the protective purposes of the standard would not have recognized that a functional test was required. *See Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). Powder River had never been cited for a violation of the standard because it failed to perform a functional test, notwithstanding the fact that the conveyor system contains between 200 and 250 pull cord switches along 35,000 feet of cord. MSHA inspectors have also regularly reviewed the company’s record of electrical examinations. Blackburn also testified that he talked to other coal mine operators in Wyoming’s Powder River Basin and was advised that these mines also have not been required to perform functional tests on pull cord switches. Finally, Powder River contends that the placement of the safety standard within the standards for electrical equipment indicates that section 77.404 is concerned with electrical issues rather than mechanical problems with a switch.

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citations omitted); *see also Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989) (citations omitted); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). In the absence of a regulatory definition or technical usage of a word, the Commission would normally apply the ordinary meaning of the word. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff’d*, 111 F.3d 963 (D.C. Cir. 1997) (table).

If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation . . . is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation' ") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (other citations omitted)). The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation[] and . . . serves a permissible regulatory function." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citation omitted).

The safety standard provides that "[e]lectric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions." The Secretary's regulations do not define the term "electric equipment" and they do not indicate what is meant by "examined, tested, and properly maintained." As a consequence, I find that the safety standard is not clear on its face. It is particularly ambiguous when applied to pull cord switches along conveyor systems.

The next issue is whether the Secretary's interpretation of the safety standard is reasonable. As stated above, the Secretary's interpretation is reasonable if it is logically consistent with the language of the regulation and serves a permissible regulatory function. The Secretary interpreted this safety standard in her *Program Policy Manual* as follows:

For purposes of this section, "electric equipment" shall include all control circuits, control switches or devices, circuit breakers, fuses, conduits, wiring, motors, transformers, lighting equipment, hand-held tools such as drills, wrenches, and saws, etc. The tests, examinations, and proper maintenance required by this section shall include all items mentioned above and all other such equipment at the mine.

(V MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 77) (*PPM*). This interpretation is consistent with the position the Secretary took at the hearing in that "control circuits" and "control switches" are included in the definition in the *PPM*. I find that the Secretary's decision to include "switches" in the definition of electric equipment in the *PPM* is reasonable and consistent with the language of the safety standard. *See, U.S. Steel Mining Co., Inc.*, 15 FMSHRC 1541, 1543-44 (Aug. 1993). As a consequence, I also find that the subject pull switches are covered by the safety standard.

The Secretary's *PPM* does not provide any guidance with respect to the phrase "examined, tested, and properly maintained" used in the safety standard. In the present citation, there is no allegation that the switches were not properly maintained. The term "examine" is defined as "to closely inspect, to test the condition of" and the term "test" is defined as "a critical examination, observation, or evaluation." (<http://www.merriam-webster.com/dictionary>). By themselves, these definitions do not provide much guidance.

The preponderance of the evidence clearly shows that the pull switches were inspected on a daily and monthly basis by various people. Every day, the on-shift supervisor inspects the pull cord system and an on-shift plant technician performs a safety check. (Tr. 98-99, 135-38, 140-44). These inspections include a visual examination of the cable, cable attachments, and the mechanical parts of the switch. The tension on the cable tension is checked and adjusted as necessary. The electrical department also performs a visual inspection of the system on a monthly basis and documents these inspections in the electrical exam log book, as required by the safety standard. (Tr. 99-100, 136). This inspection makes sure that the pull cable is properly supported and tight, the electrical connectors going into and out of the electrical switches are properly secured, the covers on the switches are secured, and that all components are properly mounted. (Tr. 105-06). In addition, the electrical components in the pull cord system are continuously monitored by the computer system for the conveyors. If the electrical circuit for a pull cord switch fails for any reason, the conveyor belt automatically shuts down and cannot be restarted until the problem is corrected. (Tr. 93-96, 106-07, 130, 144-45). Each pull cord switch is enclosed in a sealed box so the switch itself cannot be physically examined, but the electrical system is being monitored by the computer at all times and an employee is in the control room at all times.

It is not clear that Inspector Johnson was aware that the electrical components are continuously monitored by the computer system. Nevertheless, the Secretary takes the position that each switch must be pulled into an open position to see if such action registers on the computer. She argues that the standard requires Powder River to test all 200 plus pull cord switches in this manner on a monthly basis and record the results in the electrical examination book. The Secretary argues that without a functional test, there is no way for the operator to determine if the activating arm for a switch is frozen in place, which would prevent the conveyor from shutting down during an emergency. (Tr. 17, 24). Inspector Johnson testified that he has observed activating arms that do not function because they are stuck and will not move when the pull cord is yanked.¹ (Tr. 40-41). Stephens and Blackburn acknowledged that the computer monitoring system will not detect a stuck activating arm and that a visual inspection will also not indicate if an arm is stuck. (Tr. 121, 139, 156).

I find that the Secretary's interpretation of section 77.512 requiring a monthly functional test is reasonable in this instance. Powder River "closely inspects" the pull switches on at least a monthly basis. By monitoring the electrical components, the mine's computer system "tests the condition of" the pull cord switches on a continual basis. Taken together, the daily inspections, monthly electrical inspections, and the computer monitoring system constitute a "critical examination, observation, and evaluation" of the pull cord switches. As a consequence, these switches were "frequently examined, tested and properly maintained by a qualified person to

¹ Inspector Johnson also argued that a functional test is required because, during a previous inspection of the mine, a pull cord came completely out of its attachment point when pulled. (Tr. 26). A competent visual inspection and examination would be able to detect such a defect in the pull cord system.

assure safe operating conditions,” except that the activating arms were never tested to make sure they were not stuck in place. The Secretary established that requiring the mine operator to examine and test the pull cord switches to ensure that the activating arms work “serves a permissible regulatory function” and is consistent with the purposes of the Mine Act. I need to point out, however, that Powder River may be able to determine whether the activating arms are frozen in place without having to shut down the conveyor system or perform the test in the exact manner required by Inspector Johnson.

Powder River also argues that it did not have adequate notice that the safety standard required it to perform a functional test of the pull cord system on a monthly basis as part of the electrical equipment examination. Where the imposition of a civil penalty is at issue, considerations of due process prevent the adoption of an agency’s interpretation “from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.” *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (citations omitted). An agency’s interpretation may be permissible but nevertheless may fail to provide the notice required to support imposition of a civil penalty. *See Gen. Elec.*, 53 F.3d at 1333-34; *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982); *Phelps Dodge Tyrone, Inc.*, 30 FMSHRC 646, 656 (Aug. 2008).

In order to avoid due process problems stemming from an operator’s asserted lack of notice, the Commission has adopted an objective measure (the “reasonably prudent person” test) to determine if a condition is violative of a broadly worded standard. That test provides:

[T]he alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.

Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (Dec. 1982); *see also Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992). As the Commission stated in *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990), “in interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement,” but whether a reasonably prudent person would have ascertained the specific prohibition of the standard and concluded that a hazard existed. The “reasonably prudent person” is based on an “objective standard.” *U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan. 1983).

In *Alan Lee Good d/b/a Good Construction*, 23 FMSHRC 995 (Sept. 2001) (“*Good Construction*”), the opinion of Commissioners Jordan and Beatty included the following analysis:

In applying the reasonably prudent person standard to a notice question, the Commission has taken into account a wide

variety of factors, including the text of a regulation, its placement in the overall enforcement scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with "ascertainable certainty" of its interpretation of the standard in question. Also relevant is the testimony of the inspector and the operator's employees as to whether the practices affected safety. Finally, we have looked to accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine.

23 FMSHRC 1005 (citations and footnote omitted).

To support its argument, Powder River relies on the fact that it had never been cited for not conducting a functional test. The North Antelope Rochelle Mine is one of the largest surface coal mines in the United States and it has an extremely large conveyor system. MSHA has a field office in Gillette and the mine has been inspected by MSHA on a regular basis. MSHA inspectors regularly inspected the conveyor system and reviewed Powder River's electrical examination records. Nevertheless, no MSHA official has ever mentioned that the mine was required to pull every pull cord switch in the mine as part of its monthly examination of electrical equipment. After it received this citation, Blackburn contacted electrical supervisors at several large coal mines in Wyoming's Powder River Basin. He talked to electrical supervisors at Peabody Energy's Rawhide and Caballo mines, Big Sky Energy's mine, Thunder Basin's Black Thunder Mine, and Rio Tinto Energy's mine. (Tr. 102-03). These electrical supervisors are responsible for overseeing compliance with MSHA's electrical standards and would have knowledge of electrical examination practices used at their respective mines. (Tr. 103). These individuals advised Blackburn that they did not perform functional tests of the pull cord switches as part of their monthly electrical examinations and that MSHA had never advised them that they were required to do so. Powder River also relies on the placement of the standard in the regulations dealing with electrical issues. The functional test required by Inspector Johnson is really designed to address mechanical rather than electrical problems with the pull cord switches. Finally, Powder River points out that MSHA has not issued any interpretive material that would provide notice to the regulated community that functional tests of pull cord switches is required under the safety standard.

I vacate this citation because the Secretary failed to provide fair notice of the requirements of this standard with respect to pull cord switches. Although the Secretary's broad interpretation of the standard is reasonable, she failed to give adequate notice that each pull cord must be pulled on the monthly basis to make sure that each switch is functioning properly and is not stuck in position. A reasonably prudent person familiar with the mining industry and the protective purposes of the standard would not necessarily recognize that this functional test was required, given the visual inspections that were performed and the computerized electrical monitoring system that was in use at the mine. The text of the safety standard is broadly written and does not describe what testing is required in this context. The agency's *PPM* does not

provide any guidance on this issue and the Secretary has not issued any other interpretive materials. Powder River has been mining at this location since the mid-1980s and MSHA has never advised the company that the safety standard requires a functional test of each pull switch. In addition, it appears that other mines in the area have likewise not been required to perform such tests. It appears that the Secretary has not consistently interpreted this safety standard to require a functional test of each and every pull cord switch at coal mines in the United States on a monthly basis.² Consequently, this citation is vacated.

B. Citation No. 7610727, Accumulation of Coal at the Top of a Silo.

On August 26, 2007, Inspector Wayne Johnson issued Citation No. 7610727 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 77.1104 as follows:

Combustible materials (coal fines and chunks) were allowed to accumulate where they can create a fire hazard on the S-3 belt on the West sample system, on top of silo 3. Two sets of troughing idlers were observed turning in coal. Accumulations were measured from under the rollers up to 8 inches deep for the length of two feet along the rollers. The coal was within 3 feet of the tail pulley and dry to the touch. The examinations and tests required under the provision of this section 77.502 shall be conducted at least monthly. The mine has not examined and tested monthly pull cord inspections.

The inspector determined that an injury was reasonably likely and that any injury would likely be permanently disabling. He determined that the violation was S&S and that the company's negligence was moderate. The safety standard provides that "[c]ombustible materials . . . shall not be allowed to accumulate where they can create a fire hazard." The Secretary proposes a penalty of \$1,795.00 for this citation.

Inspector Johnson observed coal eight inches deep for a length of two feet along the rollers under a sample system belt within three feet of the tail pulley. The accumulation was dry to the touch, and posed a fire and/or smoke inhalation hazard. (Tr. 28). The coal was located on top of the silos in an enclosed building. The conveyor was running at the time and the rollers were turning in the coal. This violation was designated as S&S as the inspector felt it was reasonably likely that the condition would contribute to a hazard where there is foreseeable potential for illness or injury if not corrected. Inspector Johnson was particularly concerned about a smoke inhalation hazard that could occur due to the equipment turning in the coal.

² Inspector Johnson testified that he is aware of other coal mines that perform functional tests on pull cord switches on a monthly basis, but his testimony was rather vague. (Tr. 19, 42-44). Nevertheless, even if some mines perform a functional test, it is clear that MSHA's interpretation of the standard has been neither clear nor consistent.

After the condition was discovered, Inspector Johnson spoke with Lynn Snyder, step-up supervisor, and he learned that the accumulation was present for at least three hours. He also learned from miners that they wash down the facilities every three hours. (Tr. 29). To terminate the citation, the company washed off the accumulation. (Tr. 31).

Michael Stephens, who was the production manager for the plant, testified on behalf of the company. He stated that the accumulation cited was located at the S3 belt which is the last belt in the system where a sample is taken. (Tr. 147). Before reaching this point, the coal went through a hammer mill where it was crushed to eight mesh making it between 85 and 95 percent eight mesh. Eight mesh coal is similar to the size of coffee grounds. Stephens would not characterize it as coal dust but it was similar to coal fines. He explained that generally eight mesh coal is less combustible than coal dust. (Tr. 148). He did not feel the citation was warranted as there was no heat source present. The citation alleged there were idlers present. Idlers are rollers with bearings that support the moving belt in a V position to keep the coal in the center of the belt. The belt moves at a rate of about 17 feet per minute making it a slow-moving belt. (Tr. 149). He stated that when the belt comes into contact with the idlers there is little friction created and little heat generated. He does not believe it would be enough to ignite the coal fines.

Several employees continuously wash down the three floors of the silo. These employees start at the top and work their way down to the bottom and then start over again. (Tr. 152). The cleanup cycle takes about three hours. The inspector testified that the employees had started cleaning the top level again when he issued the citation (Tr. 52).

The Secretary argues that she is only required to establish that there were sufficient accumulations present to create a fire hazard or add to a fire hazard if an ignition source were to be introduced. Here the accumulation was substantial and was near the tail pulley. The accumulation had existed for several hours and was at least partially dry. Finally, the idler rollers were turning in the accumulation, which had the potential to heat the coal dust to the ignition point.

Powder River maintains that the plain language of the standard provides that an accumulation is permitted, at least for short periods of time, as long as a fire hazard is not created. Where the Secretary is unable to establish an ignition source, there is no violation of the standard. In this instance there was no ignition source in the area. The turning idlers were not an ignition source because the belt moved so slowly that heat would not be created. There were no other ignition sources in the area. The accumulation did not create a fire hazard. In addition, the spill was partially wet and no coal dust or float coal dust was present.

I find that the Secretary established a violation of section 77.1104. The Secretary is not required to show that an ignition or explosion was reasonably likely to occur. *Pittsburg & Midway Coal Mining Co.*, 15 FMSHRC 2250 (Nov. 1993). She is only required to show that it is possible that the accumulation would create a fire. The phrase “create a fire” in the standard is best interpreted broadly because, otherwise, the Secretary will never be able to establish a

violation. I find that at least one ignition source was present and it was possible that the presence of the accumulation could create conditions in which a fire could be propagated. The term “fire” may include the smouldering of coal fines where flames are not present. *See Phelps Dodge Tyrone, Inc.*, 30 FMSHRC 646, 657, 663-64 (Aug. 2008). Although it was not reasonably likely, it was possible that the turning rollers could generate enough heat to start a fire.

I find, however, that the Secretary did not establish that the violation was S&S. A violation is classified as S&S “if based upon the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming “continued normal mining operations.” *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, 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. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). Although the Secretary established the first two elements, I find that the third and fourth elements of the *Mathies* test was not present in the case. Consequently, I modify the citation to delete the S&S determination.

I also find that Powder River’s negligence was low. The company had an established cleanup program and the cited accumulations would have been removed shortly after the inspector observed them. The accumulations had existed for less than three hours and the hazard created was not very great. Consequently, I reduce the level of negligence attributed to Powder River. A penalty of \$300.00 is appropriate for this violation.

C. Citation No. 7610574, Welding Operations That Were Not Shielded.

On August 29, 2007, Inspector Todd Jaqua issued Citation No. 7610574 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 77.408 as follows:

Welding operations were not shielded to prevent injuries to the eyes to four persons working within ten feet of this operation in progress. The operations were to be performed for a full shift of ten hours. This poses burn type injuries to the eyes from flash and/or arc exposure.

The inspector determined that an injury was unlikely but that any injury would likely be permanently disabling. He determined that the violation was not S&S and that the company's negligence was moderate. The safety standard provides that "[w]elding operations shall be shielded and the area shall be well-ventilated." The Secretary proposes a penalty of \$138.00 for this citation.

Inspector Jaqua saw that welding operations were occurring as he and Inspector Scott Markve were driving to the mine office. The inspectors stopped their vehicle to inspect the welding operation because they did not see welding shields in place between the welder and other people in the area. The welder was using a welding stand to cut support for cable struts for a new conveyor. (Tr. 60). The welding work was being performed by an independent contractor. In addition to the welder, two contractor employees were standing about 10 to 20 feet from the welding operations. (Tr. 62). In addition, two Powder River employees were about 50 feet away, over near the conveyor that was under construction. Inspector Jaqua found out from Scott Markve that the Powder River employees were there to instruct the contractors where to place the brackets on the conveyor. The conveyor was part of a new loadout facility that was being constructed.

After observing the welding operations, Inspector Jaqua questioned the welder as to whether he was aware that he was required to have a shield between him and the other people. (Tr. 63). The welder nodded indicating that he was aware and pointed the inspector in the direction of his supervisor.

Welding without a shield presents a hazard associated with flash burns to the eyes. Inspector Jaqua explained that the person doesn't even have to look directly into the welding operations or the flash arcs to be affected by the reflection. He felt that it would have been possible to have shields in the area as they are easy to install. (Tr. 66). Inspector Jaqua issued a citation to Powder River and to the independent contractor who was doing the fabricating work on the conveyor.

Dave Hendricks, plant maintenance supervisor, testified on behalf of the company. He has been employed by the company for 22 years and has held his current job for 12 years. He stated that the welding was being performed by CCC Group which is a construction company

that was installing the conveyor system. (Tr. 176). The welding was being performed in the southwest lay-down yard which is an area where all the pan sections, idlers, and iron were being stored for the new conveyor system. This area is not in an enclosed building, but rather out in the open. (Tr. 177). This area is not regularly used by Powder River employees, but the CCC contractors have done some work there.

Hendricks and Kevin Johnson, an electrical technician, went out to the southwest lay-down area around 8:00 a.m. on August 29, 2007, to take a look at the pan section and to determine where to run the electrical cable. (Tr. 177-178). They did not see the CCC Group employees welding at any time while they were in the area. (Tr. 180). Hendricks estimated that the end of the pan was about ten feet away from the CCC Group employees and the welding table was an additional ten feet away. (Tr. 184). Hendricks and Johnson were preparing to leave the area when two MSHA inspectors pulled up. Johnson and Hendricks were not supervising the CCC Group workers on that day and stated that CCC Group management was responsible for their work. Hendricks stated that he was not exposed to any potential hazards such as flash burns because welding was not being performed while he was present. (Tr. 186). Hendricks also explained that welding could have begun as he and Johnson were walking back to the truck but the conveyor pan would have been blocking their view so they would not have been exposed to any hazard. The violation was abated when the CCC Group employees put shields up without help from Powder River employees. (Tr. 187).

The Secretary argues that the safety standard is clear on its face when it states that welding operations shall be shielded. There are no exceptions to this requirement. Inspector Jaqua observed the welding and testified that there were people within 20 feet who were providing assistance to the welder. The welder told Jaqua that he was working a 10-hour shift and that he would be welding during that shift. Two Powder River employees were within 50 feet of the welding operation. The Secretary also argues that it was appropriate for Inspector Jaqua to cite Powder River for the violation. Powder River employees were in the area and these employees were management officials. One of them was the plant maintenance supervisor. Hendricks testified that, although he did not see any welding flashes, it looked like the CCC Groups employees were getting ready to weld and he did not see any shields. Hendricks should have advised the CCC Group employees that a welding shield is required. As a consequence, he contributed to the violation.

Powder River maintains that the lay-down yard is not an area where Powder River employees work on a regular basis. The area is a storage yard and an area where CCC Group occasionally works. When Hendricks and Johnson traveled to the area they walked around the pan section of the conveyor. Their position in relation to the welding work is illustrated on Ex. R-5. They did not observe any welding while they were in the vicinity of the CCC Group employees. They were near Hendricks' pickup truck when the MSHA inspectors arrived. Powder River argues that under the facts presented in this instance it was not appropriate for the Secretary to issue a citation to Powder River under her guidelines in her Program Policy Manual (III *PPM* Part 45-1). Powder River's employees were not exposed to the hazard and Powder River did not contribute to the existence of the hazard. It is clear that neither Hendricks nor

Johnson observed any welding occurring while they were in the area. In addition, they were not exposed to the hazard and they did not contribute to the hazard.

I find that the Secretary established a violation and that it was appropriate for the Secretary to cite Powder River as well as CCC Group for the violation. I have no difficulty finding that a shield was required under the safety standard. I note that the Secretary has broad “discretionary authority to cite the owner operator, the independent contractor, or both for contractor violations.” *Sec’y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 152 (D.C. Cir. 2006). The guidelines set forth by the Secretary in the PPM are not binding on the agency. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986). As a consequence, I examine the Secretary’s decision to cite Powder River using an abuse of discretion standard. As stated above, the Secretary contends that Powder River violated two of the guidelines because its employees were exposed to the potential hazard and Hendricks contributed to the violation by failing to make sure that the welding operations were shielded. I find that the Secretary did not abuse her discretion when she determined that Powder River should also be cited for the violative condition.

The Secretary determined that it was unlikely that an employee of Powder River would be injured by the violation. The two Powder River employees were to be in the lay-down area for a short period of time and they were not directly involved in the fabricating activities. As a consequence, I find that Powder River’s negligence should be reduced slightly. A penalty of \$130.00 is appropriate for this violation.

D. Citation No. 7610576, Frayed Cable on Back of a Haul Truck.

On August 29, 2007, Inspector Todd Jaqua issued Citation No. 7610576 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 77.210(a) as follows:

Hitches and slings used to hoist materials [were] not suitable for handling the types of materials being hoisted on the Caterpillar 793 haul truck. The two inch safety bed cable attached to the rear of the box was severely frayed at the cast eyelet. The truck was located in camp #4 fuel station.

The inspector determined than an injury was unlikely but that any injury would likely be fatal. He determined that the violation was not S&S and that the company’s negligence was moderate. The safety standard provides that “[h]itches and slings used to hoist materials shall be suitable for handling the type of materials being hoisted.” The Secretary proposes a penalty of \$425.00 for this citation.

During his inspection, Inspector Jaqua observed a Caterpillar 793 haul truck located at the Camp Four fuel station with a frayed cable attached to the box of the truck. The cable was present so that the dump box could be secured when in a raised position in the event the hydraulics failed during repairs. When attached between the box and the frame of the truck, the

cable would prevent the box from falling. (Tr. 68). The truck was not tagged out for repair. The cable was severely frayed.

Dave Wickett, safety supervisor, testified on behalf of the company. At the time of the inspection, the haul truck was not under repair and was not being used in a way that the cable would be needed. (Tr. 167). Instead, the truck was hauling dirt when the inspector asked to inspect the truck. The safety cable is never used while the haul truck is in production and it does not have anything to do with the operation of the equipment. Indeed, the driver of the haul truck would have no way to get to the cable because it is too high off the ground. A maintenance employee would inspect the cable before using it during repairs at the shop. This policy is in the company's safety handbook. (Ex. R-4). The cable would never be used to support the dump box in the field. (Tr. 169). Because the cable serves no function while the truck is in production, company policy now provides that the cable be removed at the shop once all repairs are completed.

I vacate this citation for two reasons. First, the cable was not a "hitch or sling used to hoist materials." It was a safety device used at the shop when the dump box needed to be in a raised position during repairs. This safety device secures the dump box so that it does not fall in the event the hydraulic system and other safety devices fail while the box is raised during repairs. There is no evidence that the cable was ever used to hoist materials. Second, there is no evidence that the cable was used as a safety device while it was in the condition observed by the inspector or that it would ever be used in that condition. Mr. Wickett credibly testified that the cable is now removed from the back of the dump box before the truck leaves the shop because the movement of the truck causes the cable to bang against the truck thereby damaging it. This banging action may have frayed the cable in this instance. I credit Wickett's testimony that the mechanics in the shop would have used a different cable if the dump box needed to be kept in a raised position during repairs. This citation is vacated.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. Powder River is a large mine operator and its parent company (Peabody Energy) is also large. The record shows that the North Antelope Rochelle Mine was issued about 35 citations and orders in the 24 months prior to late August 2007. (Exhibit A to Petition for Penalty). The citations at issue in this case were rapidly abated in good faith. The penalties assessed in this decision will not have an adverse effect on the operator's ability to continue in business. My gravity and negligence findings are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
WEST 2007-898-R, WEST 2007-899-R, WEST 2008-242		
7610570	77.205(b)	\$1,684.00
7610571	77.516	Vacated
7610725	77.502-2	Vacated
7610727	77.1104	300.00
7610731	77.1104	362.00
WEST 2008-243		
7610640	77.1110	\$127.00
7610574	77.408	130.00
7610576	77.210(a)	Vacated
TOTAL PENALTY		\$2,603.00

For the reasons set forth above, the citations are **AFFIRMED**, **MODIFIED**, or **VACATED**, as set forth above and Powder River Coal, LLC, is **ORDERED TO PAY** the Secretary of Labor the sum of \$2,603.00 within 30 days of the date of this decision.³

Richard W. Manning
Administrative Law Judge

³ 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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RWM