

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

February 11, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2008-124
Petitioner	:	A.C. No. 48-01353-127627-01 B96
	:	
v.	:	Docket No. WEST 2008-125
	:	A.C. No. 48-01353-127627-02 B96
CCC GROUP, INC.,	:	
Respondent	:	North Antelope Rochelle Mine

**DECISION**

Appearances: Gregory W. Tronson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary of Labor; Gary Klatt, Safety Manager, CCC Group, Inc., San Antonio, Texas, for Respondent.

Before: Judge Manning

These cases are before me on two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”) against CCC Group, Inc., 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”). A hearing was held in Denver, Colorado and the parties introduced testimony and documentary evidence.

Powder River Coal, LLC, operates the North Antelope Rochelle Mine, a large open-pit coal mine in Campbell County, Wyoming. CCC Group was an independent contractor performing services at the mine.

**I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**A. Citation No. 7610573, Welding Operations at Lay-Down Area.**

On August 29, 2007, Inspector Todd Jaqua issued Citation No. 7610573 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. All welding operations are stopped until shields are put in place to protect persons from contact.

The inspector determined that an injury was highly likely and that any injury would likely be permanently disabling. He determined that the violation was of a significant and substantial nature (S&S) and that the company's negligence was high. The safety standard provides that "[w]elding operations shall be shielded and the area shall be well-ventilated." The Secretary proposes a penalty of \$25,163.00 for this citation.

Inspector Jaqua saw that welding was occurring soon after he and Inspector Scott Markve entered the mine property. The inspectors stopped their vehicle to inspect the welding operation because they could not see a welding shield in place between the welder and other people in the area. The welding was taking place outside in the lay-down area. There was a conveyor on the ground nearby that was to be included in a new coal loadout facility. There were five people in the area including three CCC Group employees and two Powder River Coal employees. Two CCC Group employees were standing at a vise about 10 feet from another CCC Group employee who was welding. The employees at the vise were cutting channel iron with an electric band saw and the welder was then fabricating brackets out of the cut iron. (Tr. 11). Inspector Jaqua testified that the CCC Group employees were fabricating cable support trays and attaching them to the adjacent conveyor, which was about 20 to 30 feet away. There was a pile of channel iron near the band saw. Apparently the two Powder River Coal employees were present to determine where the brackets being fabricated should be attached to the conveyor.

Jaqua testified that the safety standard required an opaque shield be placed between the welder and the other two CCC Group employees. The shield could be made out of any kind of material, including plywood or a canvas tarp. The shield must be present to prevent employees from being exposed to the arc and flash of the welding unit. Arcs and flashes from welders can cause serious eye damage. Safety glasses do not protect employees from this hazard.

Inspector Jaqua determined that the violation was S&S because he believed that it was highly likely that someone would be seriously injured by the hazard. Based on discussions he had with the employee doing the welding, Jaqua determined that the CCC Group employees would have been exposed to the hazard for the entire 10-hour shift. (Tr. 23-24). He also determined that these employees would be working close by the welder during the shift. As a consequence, Jaqua testified that "there was no doubt in my mind whatsoever that there would have been damage to the eyes of both of the persons that were . . . working in that area . . . ." (Tr. 24). Inspector Markve testified that the citation was S&S because an eye injury was reasonably likely to occur given how close the other employees were to the welding operation. (Tr. 49).

Inspector Jaqua determined that the negligence of CCC Group was high based on a conversation he had with Jody Kaylor, CCC Group's supervisor at the site. Jaqua testified that Kaylor told him that the employee performing the welding had been trained and he was or should have been aware that a shield was required. (Tr. 18, 25). Jaqua believed that Kaylor did

not take the steps necessary to make sure that the work area was safe for welding. Because it was a clear violation of the safety standard, Kaylor should have been aware that a shield was required and he should have made sure that a shield was in place before work began.

CCC Group argues that the standard is quite vague as to when a shield is required. It also argues that its employees would not be exposed to the welding operations the entire 10-hour shift because as the parts were fabricated, the employees would be attaching the parts to the conveyor structure. As a consequence, its employees would not be looking at the arc for any length of time, if at all. Ronald Segura, a site safety supervisor for CCC Group, testified that CCC Group's employees would only have been near the welding for short periods of time. (Tr. 81). They were not going to be working "side by side within ten feet" of the welder. *Id.*

I find that the Secretary established a violation. The safety standard is broadly written to cover a wide variety of situations. It requires shielding in all situations. *See Consolidation Coal Co.*, 10 FMSHRC 1702, 1703 (Dec. 1988)(ALJ). Its application is not limited to indoor welding operations. CCC Group argues that the standard is too vague to be meaningful to mine operators. It points out that if welding were occurring a quarter of a mile away, the literal language of the safety standard would still require a screen and that cannot be the intent of the safety standard. The standard for metal/nonmetal mines provides more clarity because it states that "[w]elding operations shall be shielded at locations where arc flash could be hazardous to persons." (§ 56/57.14213). I agree that section 77.408 could be applied to situations where a serious hazard is not created, but that is not the case here. Indeed, the conditions observed by Inspector Jaqua would easily violate the metal/nonmetal standard if it were applicable to coal mines.

I recognize that the two other CCC Group employees were not going to be standing right next to the welder the entire shift. They were going to be walking around, taking fabricated components to the conveyor that was being assembled, and walking back to the vise to cut more iron. I agree with Inspector Jaqua that such a situation would seriously expose the miners to the hazards of the welding arc. (Tr. 31-32). There was nothing present to shield the miners from the arc produced by the welder.

I also find that the Secretary established 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 welding would not be performed continually for the entire ten-hour shift, welding would be occurring for a significant length of time. In addition, miners would be moving around in the vicinity of the welding operations. As a consequence, the eyes of the miners would be exposed to the hazard presented by the arc of the welder. I credit the testimony of Inspector Jaqua with respect to the serious hazard presented when the eyes of miners are exposed to the flash arc of welding. Retina damage can occur when people are exposed to welding arcs. (Tr. 44). Given these facts, I find that the Secretary established all four elements of the *Mathies* S&S test. There was a reasonable likelihood that someone would suffer an injury of a reasonably serious nature. I recognize that if the miners working around the welder studiously avoided looking at the flash arc, the likelihood that they would suffer retina damage would be reduced. (Tr. 43). Nevertheless, this safety standard was promulgated so that miners would not be exposed to the hazards associated with welding. The Secretary is not required to show that it was more probable than not that someone's eyes would be damaged that day.

The Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10<sup>th</sup> Cir. 1989). “[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty.” *Id.* at 1197. The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i). This legal standard also applies to independent contractors performing services at a mine. Inspector Jaqua based his high negligence determination on the fact that the CCC Group supervisor did not specifically tell the welder to put up a screen before he started working. Jaqua determined that the supervisor's attitude was rather cavalier because he relied on the welder to perform his job in a safe manner. The supervisor told Jaqua that the miners were trained on safe welding procedures. I find that the company's negligence was moderate. There has been no showing that CCC Group did not adequately train its welders on safe welding procedures. In addition, the welding was being performed outside where the need for a shield would not be as obvious. Moreover, Mr. Kaylor was not in the area when the welding started. The evidence in the record does not support a high negligence finding.

The penalty proposed by the Secretary is much too high for this violation, especially since I have reduced the level of negligence attributable to the company. Taking into consideration the penalty criteria set forth in the Mine Act, I find that a penalty of \$8,000.00 is appropriate for this violation.

**B. Citation No. 7610642, Welding Operations at Loadout Construction Area.**

On August 29, 2007, Inspector Scott Markve issued Citation No. 7610642 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 on the blending load out construction area located at the northwest corner of the building. A welder was welding on the staircase from the second level to the third level.

The inspector determined that an injury was unlikely but that any injury would likely result in lost workdays or restricted duty. He determined that the violation was not S&S and that the company's negligence was moderate. The Secretary proposes a penalty of \$425.00 for this citation.

CCC Group stated at the hearing that it was withdrawing its contest of this citation. (Tr. 79). CCC Group's representative stated that the company has paid the Secretary's proposed penalty of \$425.00. *Id.* The records on the data retrieval system at MSHA's website indicates that this penalty has not been paid. Consequently, I have included the penalty in the total due at the bottom of this decision. CCC Group is not required to pay the penalty twice so it should double check its records and contact MSHA if it has any questions.

**C. Citation No. 7610643, Overhead Work at Loadout Construction Area.**

On August 29, 2007, Inspector Scott Markve issued Citation No. 7610643 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 77.203 as follows:

Adequate protection was not provided for three miners working below the overhead work area above them. A miner was using a sledge hammer while setting beams on the south end of the blending loadout construction area. The miner was located at the 85 foot level. Two miners were located about 30 feet below that level and one miner was located 25 feet below those two. The sledge hammer was not on a lanyard and there was nothing to prevent the hammer from falling onto any of the miners located below the work activity.

The inspector determined that an injury was highly likely and that any injury would likely be fatal. He determined that the violation was S&S and that the company's negligence was moderate. The safety standard provides that "[w]here overhead repairs are being made at surface installations and equipment or material is taken into such overhead work areas, adequate protection shall be provided for all persons working or passing below the overhead work area in which such equipment or material is being used." The Secretary proposes a penalty of \$19,793.00 for this citation.

Inspector Markve testified that the safety standard is designed to protect miners from the hazards presented by falling objects. (Tr. 58). He stated that he saw a miner at the top of the steel structure being constructed for the coal blending loadout facility. The building was “pretty much a skeleton” at that point in time. (Tr. 59). The miner at the top of the facility was in a double-lanyard safety harness and he was setting guide bolts for steel beams that were to be added. He was straddling an I-beam at the 85-foot level. He was using a sledge hammer to install the bolts. The inspector believed that he was using a 20 pound sledge that was not tied off. The area below his work area was open to the next level of the structure. (Tr. 61). There were beams, tubes, and other components in the structure but, if he were to drop his hammer, it would go at least to the first floor above ground. *Id.*

Markve testified that there were two miners 30 feet below the miner working on the beam and one miner working 25 feet below that point. Inspector Markve believed that these miners were “pretty much all in a line,” with the result that if the miner at the top were to drop his hammer it could have hit one of the miners below. (Tr. 62, 76). He also believed that if the hammer hit an object on the way down, it could still bounce around and hit a miner below. The inspector testified that the hazard could have been avoided if the hammer had been attached to a lanyard, or a net had been installed below the miner, or all work below him had been suspended. Inspector Markve does not deny that there may have been pipes or other obstructions below the miner working on the beam but he still believes that the violation created a serious safety hazard. He testified that it was reasonably likely that someone would be seriously injured or killed by hazard. The miner working on the beam would have his hammer in one hand and a bolt in the other as he worked. (Tr. 76). He would pick up the hammer and set it down on a regular basis as he worked. The miners working below were not paying any attention to what the miner above was doing. If someone had been hit by the hammer, a fatal injury was highly likely. (Tr. 66). Fatal accidents have occurred at other mines over the years under similar circumstances.

CCC Group introduced photos of the loadout facility under construction. (Ex. R-3). The company represented that the photos were taken a day or two after the citation was issued, but the inspector thought that more construction work had been completed when the photos were taken. (Tr. 71-72, 77). Ronald Segura testified that he was with the inspector when he issued the citation. (Tr. 83). He recalls that other employees in the structure were on a lower level of the loadout facility. That is, there were no employees on an intermediate level that was 30 feet below the employee working on the beam. (Tr. 83). In addition, there were many impediments between the employee working on the beam and anyone working on the lower level, including Q-decking, walkways, piping, and various structural members. *Id.* The Q-decking was used as a base on which a concrete walkway would subsequently be poured. As a consequence, Segura did not believe that it was probable that anything accidentally dropped would hit a miner working at a lower level. (Tr. 85). In addition, nothing had fallen from upper levels of the structure as it was being constructed. Finally, the employees of CCC Group typically use sledge hammers that weigh four to six pounds because anything heavier would be too cumbersome to use. (Tr. 86). Employees put the hammer in their tool belt or pouch when not in use. He admitted that if a hammer were to fall, it could hit a structural member and then keep falling. The hammer could also land on decking or another obstruction and fall no further. (Tr. 89-90).

I find that the Secretary established a violation. I credit the testimony of Mr. Segura that the hammer weighed four to six pounds. Even though there were some obstructions below the employee on the beam, if he were to drop his hammer, it could have bounced around and hit one of the men working below. Adequate protection was not being provided for all persons working or passing below the overhead work area.

Whether the violation is S&S is a close question. I find that the Secretary did not establish the S&S nature of this violation. The inspector issued the citation after looking at the structure under construction from a significant distance. He did not closely examine the work areas to see how likely it was that a falling object would reach the lower level of the structure. He could not state with any certainty if workers were below the man on the beam. (Tr. 76). Consequently, I find that the Secretary established the first, second, and fourth elements of the Mathies S&S test but that she did not establish that it was reasonably likely that a hazard contributed to by the violation would result in an injury. I find that the violation was serious because the cited condition created a potential for a fatal accident.

I affirm the inspector's determination that the violation was the result of the moderate negligence of CCC Group. A penalty of \$5,000.00 is appropriate for this violation.

## **II. APPROPRIATE CIVIL PENALTIES**

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. CCC Group is a rather large independent contractor that worked over a million hours nationwide in 2007 and employed over 600 people in the third quarter of 2007. (Data Retrieval System at MSHA's Website). CCC Group was issued about 8 citations at coal mines and 19 citations at metal/nonmetal mines in the 24 months prior to August 29, 2007. *Id.* 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.

## V. 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 2008-124		
7610573	77.408	\$8,000.00
7610643	77.203	5,000.00
WEST 2008-125		
7610642	77.408	\$425.00
	TOTAL PENALTY	\$13,425.00

For the reasons set forth above, the citations are **AFFIRMED** or **MODIFIED** as set forth above and CCC Group, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$13,425.00.00 within 30 days of the date of this decision.<sup>1</sup>

Richard W. Manning  
Administrative Law Judge

Distribution:

Gregory W. Tronson, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202 (Certified Mail)

Gary D. Klatt, CSP, Safety, Health & Environmental Manager, CCC Group, Inc., P.O. Box 2000350, San Antonio, TX 78220-0350

RWM

---

<sup>1</sup> 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.