

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 14, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2008-1585
Petitioner	:	A.C. No. 48-01694-162385
	:	
v.	:	
	:	
ARCH OF WYOMING, LLC,	:	Elk Mountain Mine
Respondent	:	

DECISION ON CROSS-MOTIONS FOR SUMMARY DECISION

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (the "Act"). The Secretary filed a motion for summary decision under Commission Procedural Rule 67, 29 C.F.R. § 2700.67. In response, Arch of Wyoming, LLC ("Arch") filed a cross-motion for summary decision. Both parties briefed the issues.

On January 10, 2008, Inspector Richard Dickson with the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Citation No. 7622039 under section 104(a) of the Act alleging a violation of 30 C.F.R. § 77.1605(k). The citation alleges:

The upper and lower drill benches, located in the North Elk Mtn. Pit area, and being approximately 300' and 200' respectively, were constructed without necessary berms on the outer edges. The vertical drop from the top bench to the lower bench was estimated to be 20'. The vertical drop from the lower bench to the natural ground was estimated to be 12' tapering to 0'. Drillers and blasters and their vehicles are required to travel these drill benches extensively and frequently, which exposes them to the hazard of overtravel and overturning from these benches. Very high wind conditions and lack of visibility also exist in this pit area.

Inspector Dickson determined that it was reasonably likely that the cited condition would injure a miner and that the violation was significant and substantial (“S&S”). He also determined that Arch’s negligence was high. The safety standard provides that “[b]erms or guards shall be provided on the outer bank of elevated roadways.” 30 C.F.R. § 77.1605(k). The Secretary proposed a penalty of \$2,106.00 for the citation.

Inspector Dickson also issued Citation No. 7622040 alleging a violation of section 77.1713(a) because he believed that the conditions cited in the previous citation “should have been noticed and corrected by a certified person during the pre-shift examination of the pit and surrounding areas.” He determined that it was unlikely that the cited condition would injure a miner and that the violation was not S&S. He determined that Arch’s negligence was high and the Secretary proposed a penalty of \$224. The standard provides that “[a]t least once during each working shift . . . each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions shall be reported to the operator and shall be corrected by the operator.” 30 C.F.R. § 77.1713(a).

The parties stipulated to key facts and also introduced other documents as attachments to their briefs. The stipulations are as follows:

1. Respondent Arch of Wyoming, LLC (“Arch”) owns the Elk Mountain Mine (Mine ID 48-01694) (the “Mine”).
2. Arch is engaged in mining operations in the United States, and its mining operations affect interstate commerce.
3. The ALJ has subject matter and personal jurisdiction over the dispute in this case.
4. Arch is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-965.
5. The Elk Mountain Mine is a surface coal mine.
6. Elk Mountain utilizes an open pit mining method and uses drill benches to create blast holes.
7. The drill benches are constructed using a Caterpillar D-10N bulldozer.
8. The benches are built to provide the drill with a safe and flat working surface on which to drill.
9. Once the drill benches are constructed, the shot pattern is then “staked” out in the field on a grid pattern with each blast hole at the desired “burden and spacing” (length and width); in this case, on a 25-foot x 25-foot grid.
10. The shot pattern is designed based on a desired pit width and anticipated length of shot which is determined by experience of drill pattern time.

11. The blast hole drill then begins drilling out the “gridded” pattern in a logical sequence that will enable the shooting crew to load each hole with explosives following the drill.
12. It is at this time that the shot pattern is barricaded and “signed” so that only authorized personnel can enter the shot pattern.
13. The signs read “DANGER – Blasting Area – Authorized Personnel Only.”
14. In order to load these holes, the ANFO truck needs to travel the line of blast holes to load the ANFO into the hole from an auger-fed tube.
15. The ANFO truck travels hole to hole at an obvious slow rate of speed since it only travels 25 feet, stops, loads the hole, and then travels to the next hole.
16. The shooters walk on the ground and load primers, delays, and shooting cord in each hole prior to the ANFO loading procedure.
17. Once a hole is loaded with primers, desired delays, shooting cord and ANFO they can be backfilled with “stemming” which is usually the drill hole cuttings.
18. This stemming will fill the remaining hole void once all explosives are in the hole so that it is filled to the ground surface and no “void” exists.
19. In most cases, a skidder is used to perform this backfill operation.
20. This is done in a sequence where there are a logical number of holes to be backfilled at the same time to allow for room for the skidder to work and not interfere with the drilling or loading operations.
21. This backfilling is performed so that no loaded blast hole is open at a shift’s end.
22. Once the entire shot pattern is completely loaded it is ready for detonation.
23. All equipment and personnel, with the exception of the shooting crew, are removed from the area.
24. The shooting crew then ties all of the loaded holes together with shooting cord and delays to blast the desired result.
25. The entire shot pattern is then detonated from a safe distance.

26. The foreman will enter the area at least once each shift during the entire process as outlined above to check on the drill, shooters, and inspect the area.
27. The shooters seldom, if ever, enter the area in their vehicle (pick-up truck) since everything they need is usually in the ANFO truck.
28. Traffic is kept to a minimum in an active drilling/blasting pattern.
29. The upper drill bench was approximately 300 feet long; and
30. The lower drill bench was approximately 200 feet long.
31. The vertical drop from the upper drill bench to the lower drill bench was approximately 20 feet tapering to 0 feet.
32. The vertical drop from the lower drill bench to the natural ground was approximately 12 feet, tapering down to where the lower drill bench sloped into the natural ground.
33. The benches varied in width from 35 feet to 45 feet.
34. Neither bench had berms at its outer edges.
35. Arch was responsible for building and maintaining the drill benches at this location.
36. Both the upper drill bench and the lower drill bench were divisions in the coal seam formed by the process of cutting coal from the earth.
37. [At] approximately 12:30 p.m. on January 10, 2008, the Mine Safety and Health Administration ("MSHA") inspected the Mine.
38. Richard Dickson inspected the Mine for MSHA.
39. On January 10, 2008, there were two drill benches above the North Elk Mountain mining pit at the Mine.
40. MSHA issued Citation No. 7622039 to Arch on January 10, 2008, alleging a violation of 30 C.F.R. § 77.1605(k).
41. Citation No. 7622039 terminated at 3:13 p.m. on January 10, 2008 after Arch constructed a berm, approximately 2.5 feet high, along the front edge of both the upper and lower drill benches.

42. MSHA also issued Citation No. 7622040 to Arch on January 20, 2008, alleging a violation of 30 C.F.R. § 77.1713(a) because the record showing the on-shift examination did not note the absence of berms on the drill benches.
43. Arch was responsible for conducting the daily on-shift examinations at the Mine's active working areas.
44. Arch was also responsible for maintaining the record of the daily on-shift examinations conducted at the Mine's active working areas.
45. Citation No. 7622040 terminated at 3:30 p.m.
46. The parties now dispute whether a drill bench at a surface mine is an "elevated roadway" under 30 C.F.R. § 77.1605(k).
47. Arch has never built berms on its drill benches.
48. MSHA has never previously issued Arch any citations for berms or failing to identify lack of berms at Elk Mountain.
49. There has never been a piece of equipment of any kind falling or driving off a drill bench at Elk Mountain.

II. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS

A. Secretary of Labor.

The Secretary contends that the issue in this case is relatively simple: whether a drill bench at a surface coal mine is an "elevated roadway" under section 77.1605(k). She maintains that a drill bench is such an elevated roadway and that, as a consequence, Arch was required to install berms on the outer banks of the drill benches at the Elk Mountain Mine. The Secretary argues that the Commission has previously determined that a drill bench is an elevated roadway under the similar safety standard applicable to metal and nonmetal mines. *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35 (Jan. 1981). Several Commission administrative law judges have reached the same conclusion. The Secretary states that, when she promulgated that safety standard, she did not exempt drill benches from the scope of the standard. Finally, the Secretary maintains that her determination that a drill bench is an elevated roadway is reasonable and is entitled to deference by the Commission. The fact that Arch's drill benches had not been previously cited for the lack of berms should not affect the validity of the citation.

B. Arch of Wyoming.

Arch maintains that drill benches are not elevated roadways. The Secretary has not defined the term “elevated roadway” in her regulations. MSHA’s “Haul Road Inspection Handbook” defines elevated roadways to include roads used “to transport coal, equipment, or personnel.” At least one Commission administrative law judge has determined that a bench is not an elevated roadway provided that no vehicles transport coal, equipment, or personnel on the bench. *Peabody Coal Co.*, 6 FMSHRC 2530 (Nov. 1984) (ALJ). The drill benches at Arch are distinguishable from the benches discussed in *El Paso Rock Quarries*. Access to the benches at Arch is controlled and limited. Haulage vehicles and through traffic are prohibited. Only the drill, the explosives truck, and the skidder regularly travel on the drill benches. As a consequence, the drill benches are working places and not roadways. The Commission should not defer to the Secretary’s interpretation of the safety standard because the plain language of the standard makes clear that it applies only to roadways and not to working places. Finally, it argues that the citations should be vacated because the Secretary did not provide adequate notice of her interpretation of the standard to Arch and other mine operators.

II. ANALYSIS WITH FINDINGS AND CONCLUSIONS

Section 2700.67 of the Commission’s Procedural Rules sets forth the grounds for granting summary decision, as follows:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

I find that there is no genuine issue as to any material fact and that the Secretary is entitled to summary decision as a matter of law.

A. Citation No. 7622039.

1. Fact of Violation.

In *El Paso Rock Quarries, Inc.*, an MSHA inspector issued a citation because the operator had allowed haulage trucks to be driven on a bench before berms were installed. 3 FMSHRC 36. The judge affirmed the citation and the operator appealed on the basis that a bench is not an elevated roadway. The Commission affirmed the judge and held that a bench is an elevated roadway. In another contested citation at issue in the same case, the operator challenged a citation that was issued on an elevated roadway that provided access to the top of the quarry wall. The operator contested the citation because the roadway was not used to haul rock, but was used

to haul explosives and to provide access to areas which were to be drilled and blasted. The judge vacated the citation on the ground that the standard only applied to roads used for loading, hauling, and dumping and that the road was not used for any of those purposes.¹ The Commission reversed the judge and held that hauling explosive materials is the kind of haulage contemplated by the safety standard.

Several Commission judges have also determined that benches and the area above a highwall can be elevated roadways, as that term is used in section 77.1605(k). *S. & M. Construction, Inc.*, 19 FMSHRC 566, 576-77 (March 1997) (ALJ); *Peabody Coal Company*, 12 FMSHRC 109, 114-16 (Jan. 1990) (ALJ). More recently, Judge Miller reached the same conclusion. *Black Beauty Coal Company*, 32 FMSHRC ____, slip op. at 2-4, LAKE 2008-477 (March 25, 2010) (ALJ) (*Pet. for disc. rev. granted by Comm., May 4, 2010*).

Arch relies heavily on my decision in *Higman Sand & Gravel, Inc.*, 24 FMSHRC 87, 104-07 (Jan. 2002) (ALJ). The facts in that case, however, differ significantly from the present case. In *Higman*, the MSHA inspector cited the operator for not installing a berm along the edge of a pond in the sand pit. An excavator operated at the edge of the pond to scoop out sand from the pond, but the inspector determined that a berm was not required for this activity. The inspector cited the company because a loader was operated in the area. The loader operator loaded haulage trucks with the sand that had been excavated from the edge of the pond. The inspector also testified that he was not concerned with the haulage trucks because they did not travel near the edge of the pond. He said that berms were required because the loader was operated in the vicinity of the pond. I determined that the area in which the loader was operated was not an elevated roadway and that safety standard did not apply. *Id.* I held that the cited area was a “working place,” as that term is defined in section 56.2, rather than an elevated roadway. The loader worked in the area loading material into dump trucks. This area was not a roadway but was the working place where material was being extracted from the pond.

Arch also relies on a decision by former Commission Judge John J. Morris in *Peabody Coal Company*, 6 FMSHRC 2530, 2540-45 (Nov. 1984) (ALJ). In that case, Judge Morris distinguished the facts in his case from the facts present in *El Paso Rock Quarries* and vacated a citation issued for the operator’s failure to install berms on its benches. The facts revealed that trucks operated within 10 to 12 feet of the edge of the bench at the mine operated by El Paso Rock Quarries. At Peabody’s Black Mesa Mine, on the other hand, the benches were 120 to 140 feet wide and trucks did not operate any closer than 60 feet from the edge of the bench. *Id.* at 2541. The judge determined that these differences were “crucial.” *Id.* at 2542.

In the present case, the stipulations establish that the benches were used as roadways. The Elk Mountain Mine, a surface coal mine, uses drilling equipment to create blast holes. The

¹ The safety standard for metal and nonmetal mines provides that “[b]erms or guards shall be provided on the outer banks of elevated roadways.” § 56.9300 (a). The heading for the standard is entitled “Loading, hauling, dumping.”

benches are built using a bulldozer to provide the drill with a safe, flat surface on which to work. Once a drill bench is constructed, the shot pattern is staked out on a grid pattern with each blast hole at the desired location. The holes are on a 25-foot by 25-foot grid.

The holes are drilled in a logical sequence and the shooting crew loads the holes with explosives following the drill. The area is then barricaded and a warning sign is erected so that only authorized miners can enter the area. The explosive material used, an ammonium nitrate and fuel oil mixture known as ANFO, is brought onto the drill bench in a truck. The ANFO truck travels the line of blast holes to load the ANFO into the holes from an auger-fed tube. This truck travels at a slow rate of speed since it must stop every 25 feet to load the next hole. The shooting crew walks on the ground and install primers, delays, and shooting cord in each hole before the ANFO is added. Once the hole is loaded with primers, delays, shooting cord, and ANFO, the holes are filled with stemming using a track vehicle called a "skidder." Drill hole cuttings are typically used to fill each hole to ground level. Once the holes are loaded, all equipment and personnel, except the shooting crew, leave the area. The shooting crew ties all of the holes together and then the shot is detonated. Occasionally, the shooting crew uses a pickup truck to enter the drill bench, but they usually ride in the ANFO truck. The upper drill bench was about 300 feet long while the lower bench was about 200 feet long. The benches varied in width from 35 to 45 feet.

I find that Arch's reliance on *Higman Sand & Gravel* and *Peabody Coal* to be misplaced because they present significantly different factual situations from the present case. Arch points out that at the Elk Mountain Mine vehicles do not travel along the benches to get from one area of the mine to another nor do these vehicles transport material out of the area. In my decision in *Higman*, I relied on a number of factors when reaching the conclusion that the area cited was not an elevated roadway. The fact that vehicles did not use the area adjacent to the pond to travel from one area of the mine to another or that the loader did not transport material out of the area were two factors I considered. The key fact, however, that differentiates that case from the present case is that the cited area in *Higman* was clearly a working place, not a roadway. It was a loading area for dump trucks. It is instructive to note that the MSHA inspector who issued the citation at Higman did not believe that berms were necessary to protect the excavator or trucks operating in the same area. He only required berms for the loader operator.

I am not bound by Judge Morris's decision in *Peabody Coal* and the facts there are quite different as well. The judge credited evidence that vehicles did not travel anywhere near the edge of the benches in that case.

In the present case, a drill, the ANFO truck, and the skidder travel along on the bench. A pickup truck is driven on the bench in some instances. The fact that they do not transport material out of the area is not determinative. These vehicles travel along the bench to drill holes and load ANFO. The evidence establishes that the benches are 35 to 45 feet wide, are used as roadways, and are elevated. It is well established that the safety standard is not limited to roadways that are used by haulage vehicles that transport coal, equipment, or personnel. *El Paso*

Rock Quarries, at 36. The record in the present case establishes that all the vehicles described above enter the benches when drilling commences and that this same equipment is removed from the benches before detonation of the explosives. When on the benches, the vehicles travel along these benches as the holes are loaded. While it is true that the vehicles travel at a low rate of speed and access to the benches is limited, those factors do not affect the status of the benches as elevated roadways.

Arch also argues that the citation should be vacated because it was not provided with adequate notice of the Secretary's interpretation of the safety standard. I reject this argument. The Secretary's intent has been clear since 1981. The language of the berm standard applicable to metal and nonmetal mines is identical to that applied to coal mines. Commission judges have accepted the Secretary's interpretation that the standard applies to benches, except in very limited circumstances. The Secretary has provided the mining community with adequate notice of the requirements of the standard. MSHA's "Haul Road Inspection Handbook" provides that the cited safety standard "is applicable to all elevated roadways on mine property, including roads to transport coal, equipment, or personnel, and regardless of the size, location, or characterization of the roadways." (Sec'y Br. Ex. 5). Although this provision does not mention benches, it certainly does not support Arch's interpretation that only "haulage roads" are covered by the standard. Arch has never been cited for a violation of this standard on its drill benches at the Elk Mountain Mine. I have considered this fact when evaluating the negligence of Arch.

Based on the discussion above, I find that the Secretary established a violation of section 77.1605(k). The benches were elevated roadways and the outer banks of these roadways were not provided with berms.

2. Significant and Substantial Nature of the Violation; Gravity.

The Secretary argues that the violation was serious and S&S. She relies on the fact that the large vehicles that must operate on the benches are required to maneuver in tight spaces. She states that the types of vehicles operated on the bench were of special concern to Inspector Dickson. Visibility is restricted from the cab of the bulldozer used to build the benches. (Sec'y Br. Ex. 1, Declaration of Dickson ¶ 19). The ANFO truck is problematic because it is large and has less room to maneuver than the other trucks on the benches. (Dickson ¶ 22). Inspector Dickson believes that skidders are susceptible to tipping over on uneven terrain, and icy and muddy conditions make them difficult to control. (Dickson ¶ 25). The mine is in Wyoming and the ground can freeze and ice over in the winter. (Dickson ¶ 26).

An 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." 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 of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

We have explained further that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of “continued normal mining operations.” *U.S. Steel*, 6 FMSHRC at 1574. 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 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

I find that the Secretary established that the violation was S&S. The bench was rather narrow. Large vehicles traveled along the bench. Given the environmental hazards present and the types of vehicles that travel on the bench, it was reasonably likely that the hazard contributed to by the violation would result in an injury of a reasonably serious nature. Although the vehicles do not travel at a high rate of speed, they must maneuver in tight spaces in all types of weather. Even a slight operator error could result in a vehicle tipping over the edge of a bench. The height of the benches varied, but they ranged up to 20 feet. A very serious or fatal injury would likely result if a vehicle went over the edge of a bench. Although no vehicle had ever slipped off the

edge of a bench at the Elk Mountain Mine, the conditions presented a serious risk that such an accident would occur assuming continuing mining operations. The violation was serious.

3. Negligence.

The inspector determined that Arch was highly negligent with respect to this violation. I find that the operator's negligence should be reduced. I base this finding on the fact that the mine has been in existence for several years and it has been inspected by MSHA many times. MSHA never previously issued a citation to Arch for a violation of this standard on its benches and MSHA never otherwise advised the company that berms were required. Although the Secretary is not required to advise mine operators what conditions violate her safety and health standards, Arch reasonably relied on the fact that citations had never been issued at this mine or at other surface coal mines owned by Arch Coal, Inc., for failing to have a berm on the outer bank of a drill bench. *See e.g. Dix River Stone, Inc.*, 29 FMSHRC 186, 203 (March 2007) (ALJ). In addition, the Secretary's written interpretations do not address the question whether benches are elevated roadways requiring berms. The failure of Arch to provide a berm was the result of its moderate to low negligence.

B. Citation No. 7622039.

In this citation, Inspector Dickson alleged that the lack of berms on the outer edges of the drill benches was "a safety hazard" and this hazard "should have been noticed and corrected by a certified person during the pre-shift examination of the pit and surrounding areas." The safety standard at section 77.1713(a) provides that "[a]t least once during each working shift . . . each active working area and each active surface installation shall be examined by a certified person designed by the operator to conduct such examinations for hazardous conditions and any hazardous conditions shall be reported to the operator and shall be corrected by the operator." 30 C.F.R. § 77.1713(a).

It is clear that the safety standard requires that "hazardous conditions" be reported and corrected. Such hazardous conditions are not limited to those conditions that violate MSHA's safety and health standards. In the present case, there is no allegation that an examination was not conducted or that the certified person who conducted the examination was not competent to conduct examinations for hazardous conditions. The only allegation is that the lack of berms on the outer edge of the drill benches created a safety hazard and the examiner did not report this condition to the mine operator and the condition was therefore never corrected.

The parties' arguments on this citation are rather superficial. The Secretary argues that Arch properly examined all other areas of the mine with the result that the rest of the mine was hazard-free at the time of the inspection, but that the examiner should have noted the lack of berms in the mine's examination records and steps should have been taken to install a berm. Arch argues that, because the drill benches are not elevated roadways, a berm was not required to

be installed at that location and no hazardous condition existed. It contends that the citation should be vacated.

The real issue here is whether a citation for failure to conduct a competent pre-shift examination should be affirmed in a situation in which the mine operator believed that the condition was not hazardous based, in part, on the Secretary's lack of enforcement of the underlying safety standard at the mine. I affirmed the berm citation and found that the failure to install berms on the edge of the drill benches created a serious safety hazard. Despite previous MSHA inspections, however, the condition had never been cited by MSHA. I have previously vacated citations issued under section 56.18002, a similar metal/nonmetal standard, when the Secretary simply relied on other citations issued during the same inspection to support the citation alleging a violation of the examination standard. In these cases, the Secretary is unable to establish that examinations were not being performed by a certified person, but she is trying to prove that the examinations were inadequate based in the fact that the MSHA inspector issued other citations at the mine. See *Dumbarton Quarry Associates*, 21 FMSHRC 1132, 1134-36 (Oct. 1999) (ALJ). Other judges have vacated examination citations in similar circumstances. See *Lopke Quarries, Inc.*, 22 FMSHRC 899, 911-12 (July 2000) (ALJ). In one case, I affirmed an examination citation where the hazards cited by the MSHA inspector were "so obvious that I [could] only conclude that the workplace examinations were rather cursory and superficial." *Clayton's Calcium Inc.*, 29 FMSHRC 230, 244 (March 2007) (ALJ).

In the present case, the lack of berms along the outer edge of the drill benches was obvious. This condition had never been recorded by certified persons during pre-shift exams at the mine because berms had never been present on benches. If an operator genuinely believes that berms are not required on benches and genuinely believes that the lack of berms in that location does not create a safety hazard, the qualified person cannot be expected to report this condition where, as in this case, the operator has never been cited by MSHA for the condition. Information at MSHA's website indicates that the mine has been operating since April 2006. Arch states that MSHA has never required berms on drill benches at any of the other surface coal mines owned and operated by Arch Coal, Inc. (Arch Br. 13).

Based on the above, I find that the citation should be vacated. The Secretary did not establish that the qualified person failed to perform a competent examination of the active working areas and each active surface installation at the mine, including an examination of the drill benches.

III. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. 30 U.S.C. § 110(i). The mine was not issued any citations in the 24 months preceding January 10, 2008. (S. Br. 16; Ex. 8). In 2007, 10,555 tons of coal was produced at the mine and Arch Coal, Inc., produced more than 10,000,000 tons of coal at all of its mines in 2007. Arch Coal, Inc. is a large operator. The penalty assessed in this decision will not affect the operator's ability to continue in business. The violation was abated in good faith.

My findings on gravity and negligence are set forth above. Based on the penalty criteria, I find that the Secretary's proposed penalty of \$1,600.00 for Citation No. 7622039 is appropriate.

IV. ORDER

The motion for summary decision filed by the Secretary is **GRANTED**, in part. The motion for summary decision filed by Arch of Wyoming, LLC, is **DENIED**, in part. Citation No. 7622039 is **AFFIRMED** in all respects except the negligence attributed to the operator is reduced. Citation No. 7622040 is **VACATED**. Arch of Wyoming, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$1,600.00 within 40 days of the date of this decision.²

Richard W. Manning
Administrative Law Judge

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² Payment should be sent to Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.