

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 18, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2008-201-M
Petitioner	:	A.C. No. 42-02159-130699
	:	
v.	:	
	:	
GILBERT DEVELOPMENT CORP.,	:	Mine: SR9/ Harrisburg Pit
Respondent	:	

DECISION

Appearances: Jennifer A. Casey, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, and Hillary A. Smith, Conference and Litigation Representative, Mine Safety and Health Administration, Denver, Colorado, for Petitioner;
Michael F. Leavitt, Esq., and Bryan J. Pattison, Esq., Durham, Jones & Pinegar, St. George, Utah, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”) against Gilbert Development Corporation (“Gilbert Development”) 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”). An evidentiary hearing was held in St. George, Utah and the parties introduced testimony and documentary evidence. For the reasons set forth below, I find that the Secretary established a violation of the safety standard, but that the violation was not the result of the company’s unwarrantable failure to comply with the safety standard.

Gilbert Development is made up of several divisions that engage in different types of enterprises. The division at issue here is engaged in mining aggregate. (Tr. 211). It has mined gravel since the early 1970s and it has operations in several states. The company produces materials for asphalt and concrete products and for roadway and embankment projects. The quarry and crusher operation involved in this case is located in Washington County, Utah.

I. BACKGROUND

A. The Citation.

On June 19, 2007, Inspector Michael Okuniewicz issued Citation No. 6319158 under section 104(d)(1) of the Mine Act, alleging a violation of 30 C.F.R. § 56.12016, in part, as follows:

A non-fatal accident occurred at this mine on 06/14/2007 when an employee tried to energize a defective 480 volt Square D electrical circuit breaker causing a short and arc flash. The employee received burns to the face and right arm.

The main line 480 breaker that supplied power to the defective breaker was deenergized and locked out prior to the employee coming on shift due to an electrical problem in the defective box found on the previous shift. There was no sign nor warning notices posted at the power switch to indicate the hazard. All employees that were working on the switch did not add their locks to the gang lock to prevent the removal. The key for the lock was inadvertently left where an employee was able to find it and energize the electrical system causing the short.

The mine superintendent and foreman who were working on the defective circuit breaker engaged in aggravated conduct in that they failed to properly lock out the 480 volt power to the plant and the defective main circuit breaker they were working on.

The inspector determined that an injury was reasonably likely and that a fatal accident could occur. He determined that the violation was of a significant and substantial nature (“S&S”) and that the company’s negligence was high. (Ex. G-1). Section 56.12016, entitled “Work on electrically-powered equipment” provides:

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

The Secretary proposes a penalty of \$60,000.00 for this citation.¹

II. SUMMARY OF THE EVIDENCE

The evidence introduced by the parties presented significantly different accounts of what happened at the plant on June 13-14, 2007. The basic configuration of the quarry is not disputed. Rock was extracted from the earth and transported to the plant, where it was crushed, screened, and sorted. Material was conveyed through the plant on belts and piles of product were created through the use of stacker conveyors. At the time of the accident, power for the electrical equipment was purchased from the local utility. The power entered through the main breaker. From there, the power was wired to various power boxes in the nearby electrical trailer. (Ex. J-1). These power boxes were very large cabinets, about the size of refrigerators, but not as deep. The power boxes contained circuit breakers for various pieces of electrical equipment. There was a pegboard in the electrical trailer that was used to store the locks used to lock out the power at the main breaker. The keys to these locks and danger tags were also kept on the pegboard.

The power box at issue in this case was the second box in the electrical trailer and it contained the breaker for an impact crusher. The power boxes were kept closed at all times, unless repairs were being made on equipment in that box. The handle on the second power box, used to close the circuit breaker that supplied power to the crusher, was on the right-hand side of the box at the front. This handle could not be pushed down to close the circuit breaker and energize the circuit if the door to the power box were not completely closed.

A. Katherine Gonzales.

Katherine Gonzales, who worked for Gilbert Development for about three years, testified for the Secretary. She was employed as the tower operator at the crusher and she testified that she was responsible for, among other things, conducting a general morning walkthrough of the plant, turning on the main power breaker and four power boxes, warming up the plant, shutting down and restarting the plant during lunch, and shutting down the plant at the end of the day. (Tr. 107, 109-110).

Gonzales testified that on April 23, 2007, the plant switched from being powered by a portable generator to receiving power from the local electric utility company. (Tr. 110-111). She said that once the plant started receiving power from the utility, she did not initially start up the plant in the morning. (Tr. 130). She testified, however, that about two weeks after this switch, she resumed her morning startup responsibilities. (Tr. 112).

Gonzales testified that at the end of her shift on June 13, 2007, she shut off the main power to the plant, placed a lock with the letter "K" written on the lock at the main breaker (the

¹ The proposed penalty was specially assessed under 30 C.F.R. § 100.5. Under the regular assessment formula, the penalty would have been \$3,689.00. (Ex. G-7).

“K” lock) along with a blank tag, and left the plant sometime between 3:00 p.m. and 3:30 p.m. (Tr. 114, 117, 123-124). There was no rock on the conveyor belts at the time she left and she was unaware of any problems at the plant when she left that day. She also testified that she was not aware of a meeting planned for the morning of June 14 at the shop. (Tr. 117-18, 135). Gonzales said that, although there had been power problems at the plant the previous week, she was not aware of any problems the week of June 14. (Tr. 133).

Gonzales testified that she arrived at the plant on June 14 at about 6:00 a.m. She did not notice anything unusual, except that a water truck had tipped over. (Tr. 119). She believed that she should start up the plant so that everything would be ready to go once the water truck was up and running. (Tr. 107, 120, 136).

Gonzales testified that, if problems develop at the plant when she is not there, someone calls her or leaves a note on the pegboard in the electrical trailer. (Tr. 123). She was not notified of any problems on June 14. She conducted a walkthrough of the plant and began the process of starting it up. She testified that she took the key from the pegboard in the electrical trailer, unlocked and removed the “K” lock and tag from the main breaker, and turned on the main power. (Tr. 116, 120, 123). If the tag for the lock had been filled out or signed, she said that she would not have removed the lock from the main power breaker. (Tr. 126). She then hung up the “K” lock and key on the pegboard and began throwing the switches on the power boxes in the trailer. The door to the first power box was open about 1/4 of an inch but, because there was no indication that anything was wrong, she shut the door and threw the switch. (Tr. 120). The door of the second electrical box was closed. She testified that there was nothing posted on the box, there were no wires lying on the floor or hanging out of the box, and there were no tools lying in the area. (Tr. 125-126). Gonzales testified that when she attempted to turn the power on at the second box, her hand became stuck to the switch, her arm started shaking, and she felt something surge through her. (Tr. 120-121, 137). There was an explosive blast that blew open the door of the box and threw her across the trailer. (Tr. 120-121). Gonzales shut off the power at the main switch and was taken to the hospital where she was treated for burns. (Tr. 121-122, 138).

Gonzales testified that she remembers everything that happened that morning. She said that, if there had been a tag or lock on the second power box, she would not have attempted to turn it on. (Tr. 126). She also said that, if the key to the lock at the main breaker had been secured, she would not have been able to turn on the main power breaker.

Gonzales testified that her procedure at the end of each working day was to lock out and tag out the plant by turning off the power at the main breaker, placing the “K” lock and “danger do not operate” tag on the breaker, and returning the key for the lock to the pegboard in the trailer. (Tr. 113-114, 123-124). This trailer is never locked. She sometimes left notes on the pegboard for the mechanics so that repair work could be completed after hours.

Gonzales initially testified that she was never issued her own lock and she assumed that the “K” on the lock could be used by employees whose name started with “K” including herself (“Katy”). (Tr. 114). She later testified that everyone had their own lock, except for her. (Tr.

115, 132). She was presented with a number of locks during cross-examination at the hearing and she testified that she had seen one of the locks but that she had never seen the lock labeled “GDC.” (Tr. 131).

B. Inspector Michael Okuniewicz.

Inspector Okuniewicz is the field office supervisor for Utah. He testified that his office received a call from the local Utah OSHA office that someone had reported that an injured employee had not been provided with prompt medical attention. On June 18, 2007, Okuniewicz went to the pit to investigate. Based on his investigation, Okuniewicz said that a “K” lock was present on the main breaker on the morning of June 14. This lock belonged to Keith Gilbert, vice-president of Gilbert Development, but it was considered to be a common lock available to all employees to lock out the plant at the end of the day. (Tr. 25, 51, 60). It was the lock Gonzales had used every day to lock out the plant at night. Gonzales also placed a blank danger tag on the lock every evening to prevent potential vandalism.

Okuniewicz determined that there had been a discussion at the pit on June 13, 2007, about problems with the electrical system. (Tr. 17, 19). Keith Gilbert and Frank Taylor, a mechanic, had been working on the second power box, which controlled power to the crusher. (Tr. 27-28). When they were unable to complete the repairs, Taylor removed his lock from the main breaker but Keith Gilbert kept his lock in place. *Id.* On the morning of June 14, as part of her daily routine, Gonzales attempted to start the plant by opening the “K” lock at the main breaker and proceeding to switch on each of the power boxes in the electrical trailer. (Tr. 19-0, 33, 49, 53). Okuniewicz testified that the power box for the crusher was not locked or tagged out and there was no indication of any problem with the box. (Tr. 26, 55). A short occurred when she turned on the power for this box, which resulted in an arc flash. (Tr. 20). Okuniewicz testified that an arc flash occurs when there is a major ground fault, resulting in a large flash with explosive force that can cause electrocution, burns, and other injuries. (Tr. 33-34). Gonzales suffered severe burns as a result of this flash. Okuniewicz did not notice any damage to the handle of the power box or to the locking mechanism for the power box. (Tr. 97). He said that burn marks and soot were the only physical evidence that the door to the box was blown open by the electrical flash. Okuniewicz determined that there was no rock on the conveyor belts at this time. (Tr. 55).

Okuniewicz relied on the statements of Ms. Gonzales when he investigated this accident. She told him about her daily routine and what happened on June 13 and 14. (Tr. 49-52). He admitted that he relied exclusively on her rendition of her responsibilities and the events that led up to the accident. (Tr. 75-76).

Okuniewicz testified that he issued the citation because: (1) there was no signature or description of the hazard on the tag that was attached to the lock at the main breaker box or at the defective power box for the crusher, and (2) the key to the lock that was used at the main breaker box was not secured, thereby allowing anyone to use it to unlock the lock. (Tr. 21-22, 35, 54, 70, 77, 80). Even though the safety standard does not specifically discuss securing the key,

materials available to industry show that the key should be secured. (Tr. 82; Ex. G-11). The accident would not have occurred if these procedures had been followed.

Okuniewicz said that he issued the citation under section 56.12016 because the work being done was mechanical as opposed to electrical work, which would have been cited under section 56.12017. (Tr. 36-37, 85-86).

C. Inspector Thomas Barrington.

Inspector Barrington is an MSHA electrical inspector based in Utah. He testified that the fault, which caused an arc flash, occurred inside the subject power box. (Tr. 156, 165). Barrington determined that, at the time of the accident, work had been started on the subject power box but that it had not been completed. The burn pattern at the bottom of the box was typical of an arc flash. (Tr. 157; Ex. G-4). Barrington believes that the power box's locking mechanism made contact with part of the dismantled breaker inside the box and caused the arc flash. (Tr. 157-158). He admitted that, if the door of a power box were blown open, there would be damage to the parts on the box that keep the door closed. (Tr. 205-206). The breakers in the box could not be energized if the door is not closed. *Id.* In addition, these breakers could not be energized if the main breaker is locked out.

Barrington testified that the accident would not have occurred if the company were using a proper lockout/tagout procedure. (Tr. 159-159). Specifically, he testified that a signed, dated tag must be placed on the lock and the tag must identify the hazard. The key to the lock must also be secured. (Tr. 159, 161, 190, 197). If someone else's lock is on a piece of equipment and there is a danger tag attached, then the lock should not be opened by anyone but the person who installed it. (Tr. 201-202). Following some of the steps necessary for a lockout/tagout procedure is not sufficient; all of the steps must be followed. (Tr. 163). Barrington admitted that, prior to the accident, he had reviewed and approved Gilbert Development's lockout/tagout procedure, including the use of the pegboard in the trailer. (Tr. 207).

D. Dale Gilbert

Dale Gilbert is a Vice-President of Gilbert Development and he oversees all of its operations. He is an MSHA-approved training instructor. Dale Gilbert testified that, when Ms. Gonzales was transferred to the pit, she was responsible for starting the plant. (Tr. 220). She did not have any mechanical experience or capabilities, so other people would conduct the pre-shift inspection of the plant. If the plant required maintenance during the day, Gonzales would shut down the plant, put her lock on the main breaker, and call for a mechanic. (Tr. 220, 265). Dale Gilbert testified that Gonzales was relieved of the duty to start up the plant in the morning when the plant started getting its power from the local electric utility in April 2007. (Tr. 221-224, 263-264). After the switch to commercial power, only mechanics were allowed to start up the plant in the morning. (Tr. 223-224). Keith Gilbert and Samuel Paoletti, who is a project manager, could also start the plant. Subsequently, Gonzales was trained to restart the plant when it had been shut down during the day, but she still had to get a mechanic to certify that the plant was

ready for startup. (Tr. 224, 251). Gonzales was fully trained on the company's lockout/tagout procedures and she was aware that she was never permitted to remove someone else's lock. (Tr. 243, 247).

Dale Gilbert testified that at about 2:00 p.m. on June 13, 2007, he was notified that there had been a power bump at the crusher. (Tr. 227). When he arrived at the plant, Gonzales and another employee were shoveling material from the tail pulleys and Keith Gilbert and Taylor were attempting to diagnose the problem. There were several locks on the main breaker. Keith Gilbert and Taylor determined that the breaker in the power box for the crusher had melted and that new breaker parts were required to fix it. (Tr. 229, 262). Dale Gilbert testified that as he was leaving, he noticed that Gonzales was in the electrical trailer with Keith Gilbert and Taylor. (Tr. 230). At a meeting at the end of the shift, it was decided that the plant would be down on June 14 and, until the problem was fixed, the crusher crew would do other work for Gilbert Development. (Tr. 232-233). A meeting was scheduled for 7:00 a.m. on June 14 to discuss this work. Dale Gilbert noticed that, at the end of the day, the door for the power box for the crusher was open and the breaker face plate was tied off and hanging outside of the box. (Tr. 243).

Dale Gilbert was at the pit when the accident occurred. When he was summoned up to the crusher, the electrical trailer was on fire and Gonzales had burns on her face and arms. (Tr. 235). He instructed an employee to take Gonzales to the hospital. Gonzales was treated and then discharged from the hospital that afternoon. She returned to the Gilbert Development office sometime after 2:00 p.m. on June 14. (Tr. 237). Dale Gilbert testified that she was very apologetic and asked if she was going to be fired. (Tr. 238-239).

Dale Gilbert testified that the company conducted an internal investigation of the accident. The company determined that Gonzales had removed Keith Gilbert's lock from the main breaker, turned on the main power and dislodged the plate and mechanical cable that was outside the power box for the crusher. When she dislodged the plate and cable, the plate swung between the right side of the box and the power legs which caused the plate to hit the hot bar. (Tr. 241, 243, 257). An arc flash occurred as a result. He said that the door to the power box must have been open when these events occurred because there was no damage to the door or door latch. (Tr. 244).

Dale Gilbert testified that a tag is not placed on the lock at the main breaker when the plant is shut down at night. (Tr. 250, 255). Rather, the "GDC lock" was used as a lockout device. (Ex. R-6). If, on the other hand, maintenance was to be performed or the plant was not to be started the next morning, then an individual mechanic would place a lock with his name on it along with a danger tag at the main breaker. (Tr. 250-252; Ex. R-5). Each employee, including Gonzales, had his or her own lock and key. (Tr. 264-265). All of the locks were kept on a pegboard at the trailer. If the mechanic fixed the problem during the night, he would remove his lock at the main breaker and replace it with the "GDC" lock to indicate that the plant could be started. (Tr. 255).

E. Samuel Paoletti

Paoletti is a project manager for Gilbert Development. He normally works in the office, but he also helps as a supervisor some of the time. He testified that the company has had the same lockout/tagout policy since the plant opened. (Tr. 285). Each employee had his own personalized lock and key which, when not in use, was hung on the pegboard in the trailer. (Tr. 280-282, 293). When that employee needed to perform maintenance or otherwise shut down the plant, he placed his own lock on the main breaker to lock out the power. (Tr. 281, 283, 317). If more than one person were working on the plant, multiple locks would be used. The reason the keys were kept on the pegboard was to prevent employees from accidentally losing them or taking them home. Employees were trained to only remove their own lock from the main breaker and to leave other locks alone. (Tr. 318-319, 294). He admitted that the company had not put this policy in writing. (Tr. 316-317). Paoletti testified that, prior to this accident, MSHA inspectors had approved the company's lockout/tagout procedure after reviewing the procedure and asking employees to perform an actual lockout/tagout. (Tr. 294, 296).

Paoletti was an MSHA-approved trainer. He testified that employees, including Gonzales, were trained on the proper lockout/tagout procedure. (Tr. 277, 279-280, 286-287, 290). He also testified that a meeting was held to discuss the transition from generator power to commercial line power. Employees were instructed that, once the switch to line power was made, only management employees were authorized to start up the plant in the morning. (Tr. 291-292).

The "GDC" lock was a general company lock that was to be used at night to keep the plant from being energized by outsiders. (Tr. 281, 283-284). The company started using this lock after it switched from generator power to commercial line power. (Tr. 284). This lock was never used with a tag and it was never used where maintenance or repairs were being performed. The presence of the "GDC" lock at the main breaker indicated that the plant was not under repair, but if another lock were present, it was a signal that the plant was locked out and should not be started until that lock was removed. (Tr. 285).

Paoletti testified that he was working at the office on June 13 and 14, 2007. (Tr. 300-301). He said that the plant had not been operating since the afternoon of June 13 and that material was on the conveyor belts. (Tr. 302-303). This material remained on the belts until the plant was operated again about a week after the accident. (Tr. 306-307).

F. Frank Taylor

Taylor is a former Gilbert Development employee. When he worked for the company he was the head mechanic. (Tr. 323-324). He worked directly under Keith Gilbert. He testified that training sessions were held when the switch was made to commercial line power and Gonzales was present for these meetings. (Tr. 330-331; Ex. R-2). It was explained that whenever someone is performing maintenance, he must install his own lock at the main breaker and that only he is permitted to remove this lock. (Tr. 330-331, 327-328, 358). Because company policy prohibited anyone from touching another person's lock, Taylor believes that it did not matter that all of the keys were kept on the pegboard. (Tr. 358). The "GDC" lock was

not part of this lockout program and was used to lock the main breaker at night to keep vandals from starting the plant. (Tr. 332, 363).

Taylor testified that he normally started the plant each morning. (Tr. 328). Keith Gilbert or Paoletti would start it when he was not there. Taylor said that he usually arrived at work about an hour before everyone else and he would conduct the pre-shift examination. (Tr. 333). Taylor testified that Gonzales was never responsible for these walkthrough inspections. *Id.* He could not recall anytime when Gonzales arrived at work before he did or when she started the plant before he inspected it to make sure that it was safe to operate. *Id.* Gonzales would sometimes start the plant in the middle of the day if it had been shut down, but she never started it by herself in the morning. (Tr. 334). If everything was fine during his inspection, he would remove the “GDC” lock at the main breaker and start the plant. (Tr. 328-329). He would then turn on the power boxes in the trailer. If, however, he saw an employee’s lock at the main breaker, he would not remove it or attempt to turn on the power. (Tr. 335). A personal lock and danger tag at the main breaker indicated that there was a problem with the plant. (Tr. 332, 334). He would then go and find that person or contact Keith Gilbert to see what the problem was. (Tr. 335). Even if there was a tag with the “GDC” lock, he would find out what was going on before he attempted to start the plant. (Tr. 336).

Taylor testified that on June 13, the plant experienced a problem with its electrical system that prevented the breaker in the second power box from resetting. (Tr. 338-339). Taylor then put his lock on the main breaker and Keith Gilbert put his lock on as well. They both then attempted to troubleshoot the problem. The plant, belts, and screens were all loaded with material. (Tr. 348). He said that Gonzales and another employee also put their locks on the main breaker and began shoveling the tail pulleys. (Tr. 340). Taylor then began to troubleshoot the problem in the second power box by removing the breaker plate and detaching the mechanism that turns on the breaker via a mechanical cable attached to the handle outside the box. Once detached, the cable with the attached switching mechanism hung down into the power wires that entered the box from the bottom. (Tr. 340). As a consequence, Taylor said that he pulled the breaker plate, cable, and switch mechanism out of the power box and wedged them into a ledge outside the box so that they were secure and would not curl back into the box. (Tr. 340, 348, 358-359). Taylor testified that about 3:00 p.m., Keith Gilbert told Gonzales and another employee to remove their locks and he advised them that he did not think that the plant would be running the next day so they should report to an area near the shop the following morning. (Tr. 341-342). Keith Gilbert told Taylor that he was going to get a certified electrician to come to the mine the next day to repair the power box. (Tr. 343). Taylor testified that he took his tools and placed them in the bottom of the power box and he left the door to the box open so it was obvious that the box was being worked on. (Tr. 347). Taylor then removed his lock from the main breaker when he left for the day, but Keith Gilbert’s lock and tag remained. (Tr. 343-344, 349).

Taylor testified that he arrived at the pit at about 6:00 a.m. on June 14 and began starting the mobile equipment before heading to the meeting place near the shop. (Tr. 349, 356). Gonzales was not present when he arrived at the pit and she was not at the meeting near the

shop. (Tr. 350). About 15 to 20 minutes after the meeting ended, a water truck drove off an incline. (Tr. 351-352). Shortly after he helped right the truck, Dale Gilbert informed them that there was a fire at the crusher plant. (Tr. 352-353).

G. Keith Gilbert

Keith Gilbert is a Vice-President of Gilbert Development and is in charge of day-to-day operations at the pit. He testified that the company uses two types of locks to lock out the main breaker: (1) the "GDC" lock and (2) personalized locks for each employee. The "GDC" lock is used to lock out the main breaker at the end of the day when there are no problems at the plant. (Tr. 376). He said that Gonzales was never instructed to use a tag when attaching the "GDC" lock at the end of the day. (Tr. 377). Keith Gilbert's testimony on the use of the different types of locks is the same as the company's other witnesses. (Tr. 372-378). He said that if an employee saw a danger tag on the lock for the main breaker in the morning, he would know that the plant was not operational and would call the person whose lock was present to determine what to do. (Tr. 377, 428-429). Gonzales had her own lock to use. (Tr. 373).

Keith Gilbert also testified that only he, Taylor, and Paoletti were authorized to conduct the morning walkthrough and examination of the plant. (Tr. 380). Gonzales was never given this responsibility even when power was obtained from a generator. (Tr. 382). She would sometimes start the plant after accompanying Keith Gilbert, Taylor, or Paoletti during the walkthrough, but at no time did she start the plant when none of them were around. (Tr. 381-382). The main breaker was not locked out at night when the plant was powered by a portable generator. (Tr. 378-379). When the change to commercial power occurred, everyone attended a meeting about the change, the lockout/tagout procedures, and the procedure for starting the plant each morning. (Tr. 379, 431; Ex. R-2). Gonzales was never trained to independently start the plant in the morning. (Tr. 383).

Keith Gilbert testified that he was at another work site on June 13 when he heard that there had been a power bump at the crusher and the plant had shut down. Taylor's lock was on the main breaker when he arrived at the plant and he added his lock and tag. (Tr. 388-389). When the problem could not be immediately fixed, he ordered Gonzales and another employee to put their locks on the main breaker. (Tr. 388-389). He and Taylor began to troubleshoot the problem. Keith Gilbert's description of the removal of the breaker plate and mechanical cable conforms to Taylor's. (Tr. 390). They determined that the breaker would need to be replaced. (Tr. 391). Keith Gilbert testified that he told Gonzales to remove her lock and meet at the shop the next morning. (Tr. 391-392). He said that Gonzales appeared to be attentive. Gonzales then left for the day. (Tr. 393). Keith Gilbert left his lock and warning tag on the main breaker and hung his key on the pegboard in the trailer. (Tr. 395, 397). Keith Gilbert testified that when he left for the day, there were tools lying in the bottom of the second power box, the breaker was torn apart, and the door to the power box was wide open. (Tr. 395-397).

Keith Gilbert testified that he arrived at work at 5:00 a.m. on June 14. He met with his managers and discussed the day's work. The mobile equipment used in the pit was started at

about 6:00 a.m. and crew began to arrive at 6:30 a.m. (Tr. 400).² The managers met with the crew before 7:00 a.m. to discuss the day's work, but Gonzales was not present. (Tr. 401). While attempting to right a water truck, he received a call that there had been an accident at the crusher and that Gonzales was injured. (Tr. 403-405). Keith Gilbert wondered what had happened because he had locked out the main breakers with his own lock. (Tr. 405). Dale Gilbert proceeded to the crusher to find out what had happened.

Keith Gilbert also testified that the company conducted an internal investigation into the accident. The investigation revealed that on the morning of June 14, Gonzales removed Keith Gilbert's lock and tag from the main breakers and hung them on the pegboard. (Tr. 415). She switched on the main breaker and then began turning on the power boxes inside the trailer. When she arrived at the second power box, she took the cable and plate that were outside the box and threw them into the box. (Tr. 415). The cable touched the two power legs at the bottom of the box. A flash occurred, which resulted in an explosion and subsequent fire. (Tr. 415). One of the reasons that the company reached the conclusion that the door was open when the flash occurred was because neither the door nor the doors's latch or hinges were charred or damaged by the flash. (Tr. 415-416).

Keith Gilbert said that, during the month prior to the accident, Gonzales had been arriving late to work and leaving unexpectedly. (Tr. 401). Gilbert Construction's managers verbally warned her several times about her attendance problems. (Tr. 401, 432-433).

After the citation was issued, the only change that was made to the company's lockout/tagout procedures was that keys for the individual locks were kept in that person's pocket rather than on the pegboard when the main breaker was locked out. (Tr. 412).

H. Tina Shumway

The Secretary called Tina Shumway as a rebuttal witness. Shumway began working for Gilbert Development in August 2006, but started working for Rinker Material Corporation in December of that year. Rinker operated the scale house at the same location. (Tr. 442-443). Shumway worked at this scale house, which was about 200 yards from where Gonzales worked at the tower for the crusher. Shumway testified that she normally arrived at the scale house at about 6:45 a.m. She testified that Gonzales was usually already at work when she arrived, but that she never noticed any management people at the facility at that time. (Tr. 447-448, 460). Shumway testified that she could not see the crushing plant but she could hear the radio communications. She admitted that her knowledge of Gonzales' duties is based solely on her conversations with Gonzales and what she heard over the radio. (Tr. 461).

Shumway testified that she arrived at work on June 13, 2007, at about 6:45 a.m. Everything seemed to be normal that day and she did not see any maintenance or repair work

² Even though the plant was down for repairs, work could still be performed in the pit.

being performed. (Tr. 449). Shumway also arrived at work at 6:45 a.m. on June 14. Nothing seemed to be unusual and the crusher did not appear to be loaded with material. (Tr. 450). At some point after she arrived, she heard over the radio that there was a fire at Gilbert Development. *Id.* She noticed Gonzales walking with her arms out in front of her. Shumway testified that she grabbed a bucket of water and went to help Gonzales, who was hysterical. (Tr. 451). Gonzales had burns on her arms and face and burn marks on the bottoms of her shoes. Shumway testified that Gonzales told her that the second power box blew up when she tried to turn it on. (Tr. 451-452).³

III. SUMMARY OF THE PARTIES' ARGUMENTS

A. Secretary of Labor

The Secretary argues that Gilbert Development violated section 56.12016, or in the alternative section 56.12017, when it failed to properly lock out and tag out the plant while mechanical work was being conducted on an electrical power box. Specifically, the Secretary cites Gilbert Development's failure to secure the key to the lock that was used at the main breaker as well as the failure to sign and date the tag that was with the lock. (Tr. 473-475).

The Secretary argues that Gonzales, a longstanding employee with no disciplinary record, was acting as she had been trained when she removed the lock and tag from the main breaker and started the plant the morning of the accident. (Tr. 469-470, 472). Gonzales was not aware, and there was nothing to indicate, that there was anything wrong with the plant that morning. (Tr. 469-470). A "GDC lock" did not exist as evidenced by the fact that it was not on the pegboard on the day of the accident. (Tr. 470-471). Gilbert Development did not offer any evidence to dispute this fact and Gonzales testified that the only key on the pegboard that morning was the key to the "K" lock. *Id.* Had Gilbert Development adhered to a proper lockout/tagout practice, the accident would never have occurred. (Tr. 473).

The Secretary also argues that the violation should be upheld as S&S given that electrical accidents are one of the leading causes of serious injuries and fatalities. If the violative condition had not been abated, there was a reasonable likelihood that it would have contributed to an injury of a reasonably serious nature. (Tr. 478). Further, the Secretary argues that the violation was a result of high negligence on the part of Gilbert Development given that a high level manager, who was involved in the training of the lockout procedures, was the individual who failed to follow the required procedure. (Tr. 478-479). The violation was properly characterized as an unwarrantable failure because management demonstrated a serious lack of reasonable care by not securing the key to the lock that had been placed on the main breaker. (Tr. 479-480).

³ Counsel for Gilbert Development moved to have Ms. Shumway's testimony stricken from the record because she was not listed as a potential witness in the Secretary's list of witnesses. (Tr. 482-483). The motion is denied because she was called as a rebuttal witness.

B. Gilbert Development Corporation

Gilbert Development argues that the citation should be vacated because the power at the main breaker was properly locked out and tagged out with Keith Gilbert's lock and a danger tag. Gonzales had been advised that the No. 2 power box was not in working order and that the plant would not be in operation on the morning of June 14. (Tr. 484-485, 487-488). Further, the citation was improperly issued under section 56.12016 and should have been issued under section 56.12017, which does not require a signature on a tag. (Tr. 483-484). In either case, the name written on the lock that was used to lock out the main power breaker served the same purpose that a signature on a tag would have served. Gonzales' statement that a tag is always present on the lock, even when there is no problem, is simply not true. (Tr. 485). The fact that the key was not secured does not make any difference because company policy dictates that no employee is permitted to touch another person's lock and, further, MSHA testified that the use of a common pegboard was not a problem. (Tr. 489-490). Gilbert Development also argues that the testimony of the Secretary's rebuttal witness, should be stricken because the witness was not disclosed prior to the hearing and her testimony was neither relevant nor credible. (Tr. 482-483).

Gilbert Development argues that, should a violation be established, it should not be considered to be S&S because the Secretary did not establish that it is reasonably likely that (1) an employee would ignore their training, (2) that an employee would remove someone else's lock with a tag attached to it, and (3) that an employee would, as a consequence, be seriously injured. (Tr. 493-496). In addition, the alleged violation was not the result of high negligence because there were a number of mitigating factors involved, including the fact that Gonzales had been properly trained by the company, she was aware of the problem at the plant, and she failed to attend the scheduled meeting on the morning of the accident. (Tr. 497-499). Further, the alleged violation was not the result of an unwarrantable failure because Gilbert Development immediately eliminated the violative condition by removing the pegboard that MSHA had previously approved and requiring all employees to secure keys in their pocket. (Tr. 503-504). Additionally, the gravity should be adjusted from fatal to lost workdays to reflect what actually occurred. Finally, the proposed penalty should be reduced. (Tr. 506-507).

IV. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The Accident.

It is important to understand that my responsibility in this case is to determine whether Gilbert Development violated the Secretary's safety standard as alleged by the inspector. It is not my primary obligation to determine the cause of the accident. The accident has a bearing on the merits of this case, however, especially when considering the gravity of any violation and the negligence of Gilbert Development.

I have carefully reviewed the testimony, the exhibits, and the parties' arguments. Based on my careful examination of the record and weighing of the evidence, I conclude that the accident did not occur as described by Ms. Gonzales. The physical evidence does not corroborate her testimony. She testified that the door to the second power box was closed and that when she pulled down the handle to close the circuit breaker in the box, her hand became stuck to the handle, her arm started shaking, and she felt something surge through her. Gonzales testified that there was an explosive blast that blew open the door of the box and threw her across the trailer. This rendition of the events is inconsistent with the physical evidence. There was no damage to the door for the power box or to the hinges or the latching mechanism for the door. Two holes were blasted out of the bottom right side of the box and the adjacent area on the inside of the box was charred black. Yet, the inside of the door showed little or no evidence of an electrical blast. This fact is evidenced by the photographs presented by the Secretary as well as the testimony of company witnesses. (Tr. 414-415; Ex. G-4). Gilbert Development brought the power box to the parking lot of the courthouse. Upon examining the box, I determined that the frame, body, and door for the box had not been cleaned or altered since the accident. The markings on the inside of the door were the same as shown on the photographs and were entirely consistent with the company's position that the electrical short and blast occurred while the door to the box was open.

I also credit the key testimony of the company's witnesses, as summarized above, with respect to the events that occurred on June 13 and 14, 2007. I find that the reliable evidence establishes that, after the plant started receiving its power from the local utility, it was not the responsibility of Gonzales to start the plant each morning. Although there may have been days when a member of management told her to start the plant after the walkthrough examination had been completed, she had been instructed to no longer independently start the plant in the morning after the generator was no longer the power source. I also find that the preponderance of the reliable evidence establishes that the door to the power box at issue was open when Gonzales entered the electrical trailer on June 14. Something that she did that morning caused live electrical components to short out, which caused the accident. I find that she had been told to report to the shop that morning, rather than to the plant, and that she had been advised that the plant was down for repairs when she left on June 13. Since the plant began receiving power from the local utility on April 23, 2007, the plant was locked out at the main breaker at night to prevent intruders from energizing the circuits. I find that the lock that was normally used was

marked “GDC” rather than with “K.” In addition, I find that a danger tag was not normally attached to the lock when the plant was shut down for the evening. If the plant was under repair at the end of the shift, a lock other than the “GDC” lock was used and a danger tag was attached.

The Secretary based her entire case on the account of Ms. Gonzales as to the lockout procedures used and the events that occurred on June 13-14. For example, the Secretary contends that there never was a “GDC” lock provided at the plant. Ms. Gonzales testified that she had never seen a lock labeled “GDC” at the plant. (Tr. 131-132). Based on her statements, the Secretary argued that there was nothing out of the ordinary when Gonzales tried to start the plant on the morning of June 14 because the “K” lock was often used to lock out the plant at night. (Tr. 470-471).

Gonzales also testified that she arrived at the plant at about 6:00 a.m. on June 14. (Tr. 119-120, 134). She said that after she walked around the plant for a short time to make sure that no employees were doing any work, she put her purse in the tower and then attempted to start the plant. She saw that men were working on getting the water truck upright when she was in the tower. *Id.* The evidence establishes, however, that men did not start working on the water truck until some time after the close of the crew meeting at 7:00 a.m. that day. (Tr. 233, 350-352, 356, 403-404). Gonzales was injured sometime after that at about 7:15 a.m. on June 14. Under this chronology, it is clear that she could not have arrived at the plant as early as 6:00 a.m. Company witnesses testified that, starting about a month before the accident, Gonzales had often arrived late for work and she had been warned about her tardiness. (Tr. 300, 401-402, 406-407). I credit the testimony presented by the company where there is a disparity between its evidence and the testimony of Gonzales.

B. Applicable Safety Standard.

The issue remains whether Gilbert Development violated the safety standard cited by the inspector. At the hearing, the Secretary sought to allege, in the alternative, a violation of 56.12017.⁴ (Tr. 476-477). Inspector Okuniewicz testified that he cited section 56.12016 because “mechanical work” was being performed. (Tr. 34-35, 36-37). “They were troubleshooting inside the box to possibly replace either a circuit breaker or a main switch.” *Id.* He said that

⁴ Section 56.12017, entitled “Work on power circuits,” provides:

Power circuits shall be deenergized before work is done on such circuits unless hot-line tools are used. Suitable warning signs shall be posted by the individuals who are to do the work. Switches shall be locked out or other measures taken which shall prevent the power circuit from being energized without the knowledge of the individuals working on them. Such locks, signs, or preventive devices shall be removed only by the person who installed them or by authorized personnel.

section 56.12017, on the other hand, is for “work on electrical power systems.” (Tr. 37). Inspector Barrington testified that the company was not “so much at the time troubleshooting the circuitry [because] the power was removed and they were actually working on mechanical applications for a power circuit.” (Tr. 191). He envisions section 56.12017 as applying to “troubleshooting high voltage circuitry or extending high voltage circuitry off a . . . power pole, but also troubleshooting low voltage circuitry.” (Tr. 191-192). He also testified that 56.12017 applies to “working on energized components until you find the problem and then you use lockout/tagout that gives you that option more than anything else.” (Tr. 192). Barrington admitted that he would have issued the citation under section 56.12017 because he is an electrician. (Tr. 193).

There are two significant differences between these safety standards. First, section 56.12016 requires that warning notices be posted and *signed* by the individuals who are to do the work while section 56.12017 provides that warning signs shall be posted by the individuals who are to do the work. Section 56.12016 applies to work on “electrically powered equipment” while section 56.12017 applies to work on “power circuits.” Based on the plain meaning of the language, I hold that section 56.12017 applies to this situation. A circuit breaker is not “electrically powered equipment.” A circuit breaker is simply a “switch that automatically interrupts an electric circuit under an infrequent abnormal condition.” (*Webster’s New Collegiate Dictionary* 200 (1979)). Indeed, the circuit breaker at issue was a switch in the electrical circuit providing power to the crusher. If the crusher were being repaired, section 56.12016 would apply, but here the power circuit for the crusher was under repair. While it is true that replacing a circuit breaker requires some mechanical work, the replacement of the circuit breaker repairs the power circuit rather than electrically-powered equipment. As a consequence, the fact that the warning tag attached to the lock at the main breaker was not signed is irrelevant because it is not required under section 56.12017.

I grant the Secretary’s motion to charge Gilbert Development with a violation of section 56.12017, in the alternative. The two safety standards are virtually identical except as noted above. The evidence presented by Gilbert Development was equally applicable to either standard. Although Gilbert Development objected to the motion to amend, it recognized that the court had the authority to grant the motion. (Tr. 483-484). Such amendments are permitted under the Federal Rules of Civil Procedure. Fed. R. Civ. P. 8(d)(2), 15(b). I have granted similar motions to amend in the past. *CDK Contracting Company*, 23 FMSHRC 783 (July 2001) (ALJ). In that case, the motion was filed by the Secretary prior to the hearing so I determined that the respondent was not prejudiced by the amendment to the Secretary’s pleading. In this case, although the motion was made during the hearing, Gilbert Development was not prejudiced because it had been able “to discern what conditions required abatement” and the evidence it presented at the hearing was equally relevant to both safety standards. *Empire Iron Mining Partnership*, 29 FMSHRC 999, 1003-04 (Dec. 2007) (quoting *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 379 (Mar. 1993)).

C. Fact of Violation.

It is clear that the power circuit had been deenergized before the work was performed on the power box for the crusher. In addition, several locks were placed on the main breaker during the afternoon of June 13. When it was determined that the condition could not be corrected before the end of the shift, all of the locks were removed except the “K” lock and a danger tag was placed on that lock. As a consequence, the subject power circuit could not be energized without removing the lock.

Nevertheless, I find that Gilbert Development violated section 56.12017. Because the key to the “K” lock was hung on the pegboard in the electrical trailer, the company’s lockout procedure did not “prevent the power circuit from being energized without the knowledge of the individuals working” on that circuit. Although the work had been performed by Taylor and Keith Gilbert, Gonzales was able to easily remove the single lock and energize the circuit without their knowledge. The company had a procedure in place, that it communicated orally to its employees, that only the person doing the work was to remove a lock on a power circuit. That procedure was easily circumvented, however. Whether the person who installs the lock must keep the key on his person at all times is not directly at issue under the facts in this case. What is clear in this case is that, under Gilbert Development’s lockout/tagout procedures, the keys to the locks were easily accessible to any and all employees. Such procedures are not effective to “prevent the power circuit from being energized without the knowledge of the individuals working on them.”

Gilbert Development argues that in many industrial applications, plastic tabs or locks can be used in lieu of metal locks. (Tr. 434, 506). It contends that anyone could remove such devices by twisting them off. It is not clear that MSHA would approve such devices and, in any event, it takes more of an affirmative act to remove them. In this case, the lock that was used was marked in an ambiguous manner. Ms. Gonzales testified that she thought that the “K” on the lock stood for Keith or Katy. (Tr. 114, 130-131). I believe that when she arrived at the plant that day, she did not see anyone else around and was a little confused. There was testimony that she was experiencing personal problems at that time. Her attendance at work had started to slide. She knew she was late for work that day and believed that it would be a good idea to energize the plant. She had forgotten that everyone was to meet at the shop that morning. When she saw the “K” lock on the main breaker, she opened it believing that she had the authority to do so. The lockout/tagout requirement is designed to protect miners from these kinds of careless mistakes. If the key for the “K” lock had not been placed on the pegboard, Gonzales would not have been able to energize the power boxes in the electrical trailer. In addition, if the tag had been marked with Keith Gilbert’s name or it had listed the work to be performed, it is doubtful that Gonzales would have removed the lock. To abate the citation, Gilbert Development stopped keeping the keys on the pegboard.

D. Significant and Substantial.

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).

As stated above, the Secretary argues that the violation was S&S because, if the violative condition had not been abated, there was a reasonable likelihood that the cited condition would have contributed to an injury of a reasonably serious nature assuming continued mining operations. Gilbert Development maintains that the violation was not S&S because the Secretary did not establish that it was reasonably likely that an employee would ignore the training, remove someone else's lock with a danger tag attached, and that an employee would be seriously injured as a result.

I find that the Secretary established an S&S violation. The safety standard is designed to prevent someone, as a result of ordinary human carelessness, from energizing a circuit when it is under repair. Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or distractions, despite a comprehensive training program. I find that it was reasonably likely that, assuming continued mining operations, someone other than the person doing repair work would remove a lock from the main breaker and energize the circuits. I reach this conclusion taking into consideration the fact that (1) the key to the lock in question was kept on the nearby pegboard making it available to any employee, and (2) the lock was ambiguously marked with the letter "K" as the only identifier. Although there was a danger tag attached to the lock, it was not marked to indicate the work to be performed or who placed it there. Since the main breaker is only locked out during working hours if repair work is being performed, it was reasonably likely that someone would be seriously injured if the lock were removed and the main breaker energized by someone other than the miners doing the work.

E. Unwarrantable Failure and Negligence.

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission restated the law applicable to determining whether a violation is the result of an unwarrantable failure:

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("R&P"); see also *Buck Creek [Coal, Inc. v. FMSHRC]*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating

factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) . . . ; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

I find that the Secretary did not establish that the violation was the result of Gilbert Development's unwarrantable failure to comply with the safety standard. Its conduct was not aggravated. It had been using the same lockout/tagout system for some time. Inspector Barrington, an electrical specialist with MSHA, testified that, during a recent inspection of the plant, he examined and approved the company's lockout/tagout policies, including the use of the pegboard. (Tr. 207- 208). The company had never been issued a citation for violating the Secretary's lockout/tagout standards. Gilbert Development had good reason to believe that its lockout/tagout system complied with the Secretary's safety standards and that it was a safe, foolproof system. It had an extensive training program and genuinely believed that its employees understood these policies. But for the unusual chain of events that occurred on June 13 and 14, 2007, it is highly likely that Gilbert Development would have continued to use the same lockout/tagout system without being cited by MSHA. The company was not on notice that greater efforts were necessary to comply with the safety standard, the violation was not obvious, and the company did not realize that it was violating any safety standard. The company's conduct did not amount to "reckless disregard," "intentional misconduct," "indifference," or even a "serious lack of reasonable care."

For the same reasons stated above, I also find that the company's negligence was low to moderate. As stated above, Gilbert Development had been using its lockout/tagout system for some time without incident. It reasonably relied on the fact that Inspector Barrington did not find any problems with its lockout/tagout system during his inspection of the plant prior to the accident involved in this case. Inspector Barrington is an electrical specialist with MSHA and is

certified to do electrical work by the State of Utah. (Tr. 153). Gilbert Development and its managers genuinely believed that it was in compliance with MSHA's lockout/tagout standards. Potential deficiencies in its lockout procedures were not revealed until the accident.

V. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. The record shows that Gilbert Development had seven paid violations at this facility during the two years preceding June 19, 2007. (Ex. G-8). None of these violations were S&S. The mine is now permanently closed but it worked about 19,000 employee-hours in 2007 and 2,500 employee-hours in 2008 making it a relatively small operation. The violation was abated in good faith. No evidence was presented to show that the penalty assessed in this decision will have an adverse effect on Gilbert Development's ability to continue in business. The violation was serious and Gilbert Development's negligence was low. Based on the penalty criteria, I find that a penalty of \$5,000.00 is appropriate.

VI. ORDER

For the reasons set forth above, the unwarrantable failure designation in Citation No. 6319158 is deleted and the citation is **MODIFIED** to a section 104(a) citation with low negligence and Gilbert Development Corporation is **ORDERED TO PAY** the Secretary of Labor the sum of \$5,000.00 within 40 days of the date of this decision.⁵ Upon payment of the penalty, this case is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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⁵ 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.