FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5267/FAX 303-844-5268

November 12, 2010

SECRETARY OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2009-536 A.C. No. 48-01034-175585
v.	:	
CABALLO COAL COMPANY, LLC, Respondent.	:	Caballo Mine

DECISION

Appearances: Ronald F. Paletta, Conference and Litigation Representative, Mine Safety and Health Administration, Price, Utah, for Petitioner;
Duane Myers, Safety Manager, Caballo Mine, Gillette, Wyoming, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA") against Caballo Coal Company, LLC, 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").

Caballo Coal Company ("Caballo" or "Respondent") operates the Caballo Mine (the "mine"), a surface coal mine in Campbell County, Wyoming. This case involves one 104(a) citation issued at the mine. An evidentiary hearing was held in Gillette, Wyoming, and the parties introduced testimony and documentary evidence. For the reasons set forth below, I find that the Secretary established a technical violation of the safety standard, but that the violation was not significant and substantial.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

On December 24, 2008, MSHA Inspector David Hamilton issued Citation No. 6686966 to Caballo for an alleged violation of section 77.205(d) of the Secretary's safety standards. The citation states that:

> The regularly used travel way at the Main office for the Caballo Mine was not sanded, salted or cleared of snow and ice as soon as

> practicable. For 150 feet on the East side and 150 feet on the South side of the Office Building the travel ways were covered with accumulations of at least one quarter inch of packed snow from foot traffic. Posing slipping and falling hazards.

(Ex. P-1). Inspector Hamilton determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was significant and substantial ("S&S") and that 50 persons would be affected. Hamilton subsequently modified the citation to reflect that only one person would be affected. In addition, he found that the violation was the result of moderate negligence on the part of the operator.

Section 77.205(d) of the Secretary's regulations requires that "[r]egularly used travelways shall be sanded, salted, or cleared of snow and ice as soon as practicable." 30 C.F.R. § 77.205(d). The Secretary proposes a penalty of $634.00 for this citation.

A. Background and Summary of Testimony

David Hamilton has worked for MSHA for over three years and is currently a surface coal mine inspector. (Tr. 8). As a surface mine inspector, Hamilton spends approximately 230 to 240 days a year inspecting equipment, buildings, impoundments, and explosive storage, and checking for, among other things, imminent dangers and other hazards. (Tr. 9-10). Prior to joining MSHA, Hamilton worked in the mining industry for over 26 years and, in 1996, received his surface mine foreman certificate from the State of Wyoming. (Tr. 8-9).

On December 23, 2008, Inspector Hamilton traveled to the Caballo mine to begin conducting a required biannual inspection. (Tr. 10-11). During the inspection Hamilton was accompanied by Randy Milliron, a safety supervisor at the mine. (Tr. 11, 47). Hamilton testified that, at some point on the 23rd, he had a conversation with Milliron and Duane Myers, the mine's safety manager. Milliron advised the inspector that there had been an accident at the North Antelope Rochelle Mine in which a miner had slipped and fallen on ice.[1] (Tr. 11). Hamilton testified that, during the conversation, Myers stated that he was planning to send an internal email to the supervisors at the Caballo mine asking them to clean all of the walkways, travelways, and sidewalks so that a similar accident would not occur at the Caballo mine. (Tr. 11-12). Hamilton stated that, as he left the mine on the 23rd, the outside temperature was at or near zero degrees Fahrenheit and there was ½ inch of snow on the ground. (Tr. 12-13). While he was concerned about the snow accumulations on the sidewalks, Hamilton believed that Myers and Milliron had the situation under control. (Tr. 12).

[1] The Caballo mine and the North Antelope Rochelle Mine are both owned by Peabody Energy.

At 8:30 a.m. on December 24, 2008, Inspector Hamilton returned to the Caballo mine to resume the inspection. (Tr. 13). During the course of the inspection, Hamilton took a series of 14 photographs which, according to him, represented the condition of the exterior walkway as it appeared at the time. (Tr. 19-25; Ex. P-2). Upon arrival, he noted that an additional eighth of an inch of snow had fallen over night and the parking lot area had been sanded. (Tr. 13, 17). Hamilton testified that further examination revealed that none of the sidewalks had been shoveled or otherwise cleaned, that the snow on the walkways was becoming packed down by people walking on it, and that, with one exception, all of the salt canisters located at the entrances and exits to the buildings had snow on top of them, which indicated to him that the canisters had not been opened since the snow began to fall. (Tr. 13; Ex. P-2). Salt had been thrown on the ground near the one exterior door. (Tr. 21; Ex. P-2, Photo 4). Hamilton testified that, while attempting to find Myers in one of the buildings, he encountered Walt Mayo, a Caballo employee, who told Hamilton that he was "stepping up" while Myers was in a meeting with mine management. (Tr. 14). Mayo accompanied Hamilton while he examined the remaining travelways and entrances/exits around the perimeter of the buildings. (Tr. 14). In addition to the snow on the travelways, Hamilton specifically noted "at least an inch" of ice that had formed on the step and the grating at the main entrance to the building. (Tr. 14-15, 23-24; Ex. P2, Photo 11). Hamilton testified that Mayo told him the ice was created by snow melt dripping off of a light above the entrance and re-freezing on the step. (Tr. 15). According to Hamilton, Mayo told him this had been a problem for quite a while. (Tr. 15). Hamilton observed additional areas where scuff marks in the snow on the travelways indicated to him that individuals had slipped while walking on the travelways. (Tr. 21-22; Ex. P-2, Photos 5& 7). Finally, Hamilton noted a mixture of ice and dirt that had formed inside and on top of the metal grating in front of an exterior door. (Tr. 22; Ex. P-2, Photo 5). Hamilton explained his concerns to Mayo and, based on the conditions observed, issued Citation No. 6686966 under section 104(a) for a violation of section 77.205(d). (Tr. 15-16).

Hamilton told Mayo that the travelways needed to be cleared before anyone else walked on them. (Tr. 14). Mayo instructed a number of mechanics, plant technicians, and truck drivers to clean the walkways. (Tr. 26). Hamilton terminated the citation after the employees abated the violation by shoveling and salting the travelways, at which point he took a set of post abatement photos. (Tr. 25-27; Ex. P-3).

Hamilton determined that an injury was reasonably likely to occur based on his observation that (1) the snow that had built up on the travelways had been packed down, (2) there were marks in the snow that indicated sliding or slipping, and (3) his knowledge that an accident involving a slip-and-fall had recently occurred at the North Antelope Rochelle Mine. (Tr. 17). However, Hamilton testified on cross-examination that he was not positive what type of injury was sustained, or what the conditions were, at the other mine. (Tr. 28). Hamilton testified that an injury could reasonably be expected to result in lost workdays or restricted duty since such accidents generally result in sprains, bruises, concussions, and broken bones, which "in [his] opinion would at least end up in restricted duty, and most likely lost work days, but . . . would [not] be permanently disabling." (Tr. 17). He initially determined that 50 persons would be

affected by the conditions,[2] but later modified the citation to one person affected since he could reasonably only expect one person to slip at a time. (Tr. 16-17). Hamilton testified that he did not issue the citation as an imminent danger because he did not see anyone standing in the cited areas at the time he issued the citation. (Tr. 30).

Hamilton determined that the violation was the result of the company's moderate negligence based on the fact that at least some effort had been made to address the conditions, i.e., the parking lot had been sanded and salt had been thrown in front of one door. (Tr. 18). He felt that the violation was the result of more than low negligence because there were still 300 feet of travelways around the buildings that had not been touched. (Tr. 18).

Walt Mayo, an hourly employee who worked as a plant maintenance technician at the mine, testified that, based on his hazard recognition training, he did not believe that the cited conditions were a hazard since "there was not enough snow . . . [and] [i]t wasn't slick." (Tr. 36-37, 39). He had not slipped on the snow, nor had he heard of anyone else slipping on it. (Tr. 39). Mayo testified that, while Hamilton told him the condition was citable, Hamilton did not issue the citation prior to it being abated. (Tr. 38). Mayo stated that the scuff marks noted by Inspector Hamilton were not from slipping but were caused by coveralls dragging behind the boots that created the footprints in the snow. (Tr. 40-41; Ex. R-1, Photo 8). Mayo testified that the employees had recently been issued new coveralls that were too long and would drag behind the miner's boots. (Tr. 40-41). Mayo noted that the texture of the ground under the snow was very rough and the ice which had built up near the main entrance was not on the tread, i.e., upward facing part of the step, but rather, was on the rise, i.e., outward facing part of the step. (Tr. 42; Ex. R-1, Photos 2 and 4). Mayo does not remember telling the inspector that ice on the front step had been a problem for "some time." (Tr. 42.). Mayo testified that it was below freezing on both the 23rd and 24th, and the snow that was on the ground was very dry and powdery. (Tr. 43, 45).

Duane Myers, the safety and training manager at the mine, testified that he was at the mine on both the 23rd and 24th. (Tr. 47). According to Myers the high temperature on the 23rd was four degrees Fahrenheit, while on the 24th the high temperature was twenty six degrees Fahrenheit. (Tr. 48). On the morning of the 24th it was sunny and cold before warming up in the afternoon. (Tr. 48). Myers testified that he was in a safety meeting on the 24th and did not get out of the meeting until after abatement of the citation had begun. (Tr. 52-53). It was his belief that the conditions did not constitute a violation because the snow was very light and it was mostly sitting on top of rough asphalt, which increased the traction on the surface. (Tr. 48, 53). He opined that it was unlikely for a slip-and-fall to occur and, as a result, the violation should not be S&S. (Tr. 54-55). According to Myers, the snow was so light that it was difficult to shovel and, even with ice melt on top of it, very little moisture was coming out of the snow. (Tr. 49-50, 53). Myers testified that the ice alleged to be on the step at the front entrance was to the side of

[2]Hamilton based this finding on a conversation he had Myers and Mayo during which he learned that at least 50 people walked the travelways twice per shift. (Tr. 16-17)

the front door, and not in front of it. (Tr. 51). As a result, the likelihood of someone stepping on the ice was very remote. (Tr. 51; Ex. R-1, Photo 2). Myers stated that the one area that had been salted was the main entrance for the hourly employees. (Tr. 51-52; Ex. R-1, Photo 6). Myers testified that the ice and dirt mixture in the grate near the exterior door that had been noted by Hamilton was not dangerous because the dirt provided traction and the frozen mix was below the surface of the grate. (Tr. 58; Ex. R-1, Photo 7). Further, the scuff marks in the snow were the result of the miners' coveralls dragging behind their boots. (Tr. 52; Ex. R1, Photo 8). He argued that if miners had been slipping, there would not have been clear boot sole imprints in the snow, which there were. *Id.* Additional photos taken by Caballo after the Christmas holiday show the rough asphalt that was under the snow at the time of the citation. (Tr. 49, 51; Ex. R-2, Photos 2-8). Myers testified that all mine employees are trained in how to identify and correct hazards. (Tr. 56).

B. The Violation

It is important to recognize that the Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. In addition, the Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

> The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a valid citation to issue. If conditions existed which violated the regulations, citations [are] proper.

Allied Products, Inc., 666 F.2d 890, 892-93 (5th Cir. 1982) (footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i). Thus, if a violation is found, a penalty must be assessed even if the chance of an injury is not very great.

There is little dispute regarding the relevant facts as to whether a violation of the cited standard occurred. The cited safety standard requires that "[r]egularly used travelways shall be sanded, salted, or cleared of snow and ice as soon as practicable." 30 C.F.R. § 77.205(d). It is not disputed that miners regularly travel the subject walkways, or that the walkways are travelways as contemplated by the cited standard. Indeed, the pre-abatement pictures provided by both parties show multiple footprints in the snow which indicate that heavy foot traffic is quite common on these walkways. (Ex. P-2; Ex. R1, pp. 2-9). Further, there can be no debate that snow existed on these walkways. I credit Inspector Hamilton's testimony that approximately 5/8ths of an inch of snow had fallen, i.e., there was ½ inch of snow on the ground on the 23rd and an additional 1/8th inch of snow fell overnight before Hamilton arrived on the 24th. Respondent takes issue with whether there was "enough" snow on the ground to create a hazard. The cited

section of the Secretary's regulations does not require a certain amount of snow to be present before it needs to be sanded, salted or cleared. Rather, the language requires only that snow and ice be sanded, salted, or cleared "as soon as practicable."

The issue of what constitutes "as soon as practicable" is not entirely clear. "As soon as practicable" is not defined in the Secretary's regulations. The Commission has held that in the absence of a regulatory definition of a word, the ordinary meaning of that word may be applied. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997). The dictionary defines "practicable" as "possible to practice or perform: FEASIBLE." *Webster's New Collegiate Dictionary* 895 (1979). Relying on such, a reasonable interpretation of the cited standard would require that snow and ice be sanded, salted, or cleared as soon as possible.

While neither the Commission nor its judges have addressed what "as soon as practicable" means in the context of the standard at issue, they have addressed this language in an identical standard for surface metal/non-metal mines.[3] In *Hanna Mining Co.*, the Commission upheld an administrative law judge's finding that, while the judge did not know exactly how long an accumulation of ice existed, he could infer that it had existed for some time and had not been removed "as soon as practicable" based on the particular cause of the condition, i.e., water dripping/spraying from a pipe, and the fact that more than three hours had elapsed since the beginning of the work shift. 3 FMSHRC 2045, 2049 (Sept. 1981). Commission administrative law judges have also addressed this similar standard. In *N.L. Industries, Inc.*, a judge found that an accumulation of six inches of snow and ice was not cleared as "as soon as practicable" when it had been present on a walkway for three days. 2 FMSHRC 3040, 3044 (Oct. 1980) (ALJ). In *Spencer Quarries Inc.*, I found that an operator had salted its walkway "as soon as practicable" when, on the morning after a day in which the mine was closed, salt was applied to the snow-covered walkway at the start of the shift. 32 FMSHRC 644, 646-647 (June 2010) (ALJ).

It is clear that snow, albeit very little, was present on the cited travelways on both December 23rd and 24th. Salt canisters were readily available along the exterior of the buildings. No evidence has been offered to show that any effort was made to sand, salt or clear the snow prior to Inspector Hamilton instructing Mayo to do so. I credit Inspector Hamilton and find that the snow which had accumulated on top of the salt canisters was evidence that the canisters had not been opened and that, with one exception, salt from those canisters had not been used on the cited travelways. The multiple footprints seen in the photos provided by both parties indicate that a number of people had traversed the walkways in the time since the snow had stopped falling. I find it highly unlikely that it was "impossible" or "not feasible" for any of the individuals who created such footprints to reach into the provided salt containers, grab some salt, and spread it along the travelways. In finding that cited areas had not been sanded, salted or cleared "as soon as practicable," I rely in part on the fact that at least one individual found time to spread salt on the travelway near one of the exterior doors. Clearly it was practicable to do so,

[3]The current surface metal/non-metal standard is located at 30 C.F.R. § 56.11016.

yet it had not been done. Light, dry snow can be easily removed from walking surfaces with a broom. For the above reasons, I find that a technical violation of section 77.205(d) did occur.

C. Significant and Substantial, Gravity and Negligence

At the outset of this analysis I note that snow is an extremely common occurrence in the region where this mine is located. The cited standard does not differentiate between trace amounts of snow, as were present in this instance, and amounts which could reasonably pose a hazard. I credit the testimony of Mr. Mayo that the snow was dry and powdery so that it contained very little moisture. For reasons that follow, I find that the violation discussed above was not S&S and that the gravity was very low.

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 discussed above, I find that a violation of the cited mandatory safety standard did occur. Further, I find that a discrete safety hazard contributed to by the violation did exist, i.e., the danger of injuries caused by a slip-and-fall accident on the accumulated snow and ice. However, I find that the Secretary has not met her burden with regard to the third element of the *Mathies* formula. The evidence indicates that the accumulated snow and ice were not extensive. The snow was dry and powdery, which means that it was not particularly slippery at low temperatures. Further, the surface of the travelways was level and the rough nature of the ground underneath the snow provided substantial traction such that a slip-and-fall, while possible, was not reasonably likely to occur. I do not credit the testimony of Inspector Hamilton that the scuff marks he observed in the tracks on the travelways indicated that someone had slipped in the snow. The inspector did not demonstrate any expertise in the interpretation of footprints in snow. It is more likely that the scuff marks behind the footprints were caused by coveralls that were dragging in the snow. The miner or miners who left those tracks could also have simply been dragging their feet.

With regard to the ice near the main entrance, I credit the testimony of Mayo and find that the ice on the step was at the very edge of the step and mostly on the rise, i.e., non-walking surface, of the step. The light above the main entrance was attached to a vertical surface that was directly above and along the same plane as the rise of the step. Given the location of the ice on the non-walking surface of the step, I find it unlikely that an individual would slip on the ice and, in turn, very unlikely that any slip would result in an injury. Finally, I credit the testimony of Myers and find that the ice and dirt mixture that had accumulated in the grating near the back entrance did not present a hazard that could reasonably be expected to result in an injury. Ex. R-1, Photo 7. Myers explained that the mixture had accumulated in the grating as miners used the grating to scrape the mud off of the bottom of their boots. The dirt in the mixture provided traction such that a slip-and-fall was unlikely to occur. For the above reasons, I find that the violation was not S&S. In addition, I find that the gravity should be modified to reflect that an injury or illness was unlikely.

I further find that Caballo's negligence was moderate. The violation did not create a hazard to employees. Dry, light snow is quite common in Wyoming. Caballo's management and

its miners genuinely believed that the cited condition did not create a hazard and did not violate the safety standard. Nevertheless, Myers advised the inspector on December 23, following their discussion of the accident at the North Antelope Rochelle Mine, that the snow would be removed. Caballo's failure to remove or apply salt to the snow and ice demonstrated a lack of reasonable care.

II . 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 Caballo had 36 paid violations at this facility during the two years preceding December 24, 2008. (Ex. P-4). Three of these violations were S&S. Caballo produced 31,172,396 tons of coal in 2008. Caballo Coal Company, 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 gravity and negligence findings are set forth above. Based on the penalty criteria, I find that a penalty of $100.00 is appropriate.

III. ORDER

For the reasons set forth above, Citation No. 6686966 is **MODIFIED** to delete the S&S determination and to reduce the gravity to "unlikely." Caballo Coal Company, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $100.00 within 30 days of the date of this decision.[4]

Richard W. Manning
Administrative Law Judge

Distribution:

Ronald F. Paletta, Conference and Litigation Representative, Mine Safety and Health Administration, 45 East 1375 South, Price, UT 84501 (Certified Mail)

Duane Myers, Caballo Coal Company, 2298 Bishop Road, Caller Box 3401, Gillette, WY 82717-3041 (Certified Mail)

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[4]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.