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

March 23, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2009-693-M
Petitioner	:	A.C. No. 42-01996-179938 U82
	:	
v.	:	
	:	
AMES CONSTRUCTION, INC.,	:	
Respondent	:	Mine: Copperton Concentrator

DECISION

Appearances: Matthew Finnigan , Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Michael Homer, Noah Hoagland, Suitter Axland PLLC, Salt Lake City, Utah, for Respondent.

Before: Judge Miller

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 Ames Construction, Inc., pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The case involves one citation issued by MSHA under section 104(a) of the Mine Act at the Kennecott Utah Copper mine, at the Tailings Facility operated by Ames Construction. The parties presented testimony and documentary evidence at the hearing held on January 12, 2010 in Salt Lake City, Utah.

The parties stipulated that, at all pertinent times, Ames Construction, Inc. was a mine operator subject to the provisions of the Mine Act. Stip. 1-3.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Ames Construction, Inc. ("Ames") is a contractor responsible for the construction of a tailings dam, and the raising of the tailings dam, pipe and roadways at the Kennecott Tailings Facility near Magna, Utah. Stip. 4; (Tr. 261-262). On October 29, 2008, Shane Julian, an

MSHA inspector and accident investigator, was called to the Kennecott Mine to investigate the death of William Kay, an employee of Bob Orton Trucking ("Orton"), a subcontractor at the facility. Subsequently, Julien issued a citation to both Ames and Orton for the identical violation. (Tr. 33-40, 71-71). Orton acknowledged that it is a contractor of Ames and admitted the fact of violation, but seeks to have the penalty reduced by means of a separate hearing.

a. Citation No. 6328009

As a result of the investigation Julien issued Citation No. 6328009 to Ames alleging a violation of 30 C.F.R. § 56.9201, which requires "[e]quipment and supplies shall be loaded, transported, and unloaded in a manner which does not create a hazard to persons from falling or shifting equipment or supplies." The citation described the violation as follows:

> A fatal accident occurred on October 29, 2008, when a delivery truck driver was struck by a section of pipe. The victim had operated a truck containing a supply of pipes which was loaded, transported and unloaded in a manner which was hazardous to persons from falling supplies. The pipes had been inadequately secured and the driver had begun to unload nine sections of pipe when one 50 foot section of pipe fell from the flat bed trailer and struck him.

Julien determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was significant and substantial, that one employee was affected, and that the negligence of Ames was low. A civil penalty in the amount of $13,268.00 has been proposed for this violation.

I. The Accident

The facts of the accident that killed William Kay are undisputed. On October 29, 2008, Kay arrived at the mine around 7:30 a.m. Kay was employed as a truck driver for Orton. *See* Stip. 5; (Tr. 192). Kay was 81 years old, had been a truck driver for more than 30 years, and had a hazard card, dated September 27, 2007, from Kennecott indicating that he had received training from Ames. (Tr. 88); Ex. G-11. The training did not include unloading of the truck or the use of a forklift to safely unload a truck. (Tr. 104, 118).

On October 29, 2008, Kay's flatbed truck was loaded with plastic pipe to be used at the tailings operation at the mine. WL Plastics Corporation loaded the pipes, which included nine separate pipes, each about 50 feet long and weighing approximately 3,000 pounds. (Tr. 65); *See* Ex. G-31 (photo). The pipes were strapped to the flatbed truck and separated by wood dunnage (i.e. general purpose landscape timber) to help secure the load. (Tr.129). Chocks, wedge-shaped devices which are designed to prevent rolling, were not used, although, according to witnesses, chocks should have been added onto the dunnage to help prevent rolling. (Tr. 131-132). The

mine received many deliveries of pipe each month, as pipe is an integral part of the process of building and maintaining the tailings ponds. (Tr. 150-151, 226).

When Kay arrived at the mine on the day of the accident, he stopped at the office and was then escorted to the delivery drop-off location by a pipe crew consisting of Greg Davis, James Hilton and Juan Florez. (Tr. 151). Kay's flatbed truck followed the pickup with the pipe crew for approximately eight miles to the unloading area. (Tr.154). Florez got out of the pickup to stay with Kay while Davis and Hilton went to retrieve a forklift to unload the truck. (Tr. 160); Stip. 12, 13. Davis told Kay to "stay right here" until he returned with the forklift, but gave Kay no further instruction. (Tr.194-195). Normally the Orton drivers do not unload the truck on their own, but do participate in the unloading process by loosening the straps that secure the load with a long tool that they carry in the truck, while the remainder of the process is left to the contractor who is in charge of the site. (Tr. 90).

While waiting in the unloading area with Kay, Florez crossed the road for a few minutes, then returned to the passenger side of the flatbed truck. He observed Kay out of the truck, near his toolbox. Florez assumed that Kay was getting tools and preparing to unload the truck, but couldn't remember if he saw Kay with the bar used to loosen the straps. (Tr. 62-64, 84, 169). Florez was at the passenger side of the truck, looking down the road, when he heard a loud crack, followed by a thump. He found Kay lying on the ground next to the truck. (Tr. 174-175). Kay had removed the straps for the top layer of pipes, causing a pipe to roll off the truck onto Kay, crushing him. Photographs of the scene of the accident provide a view of the truck driven by Kay, the forklift used to stabilize the load when it was removed, and the pipe that had been a part of the load delivered by Kay. Ex. G-29, 31, 33.

While it is Ames' responsibility to unload the pipes from the truck, it is generally the driver of the truck who loosens the straps prior to unloading. (Tr. 232). The driver normally has the tool, much like a long bar, to loosen the straps in the toolbox of the truck. (Tr.168-169). Inspector Julien testified that when Florez, or any person at the mine, saw what he thought might be some action on the part of Kay to loosen the straps without a safe support, he should have stopped the unloading and instructed Kay to wait. Florez agrees that it was his job to keep Kay safe. (Tr. 167). The Ames pipe crew normally speaks to the truck driver about the unloading procedure and conducts a safety meeting prior to the actual unloading of pipe. However, because two pipe crew members left in search of a forklift, safety procedures and instructions were not given prior to the time Kay began unloading. (Tr. 156, 162-165).

Ames has a Job Safety Analysis ("JSA") in place for the training and guidance of employees who are unloading pipe. The JSA does not address either what should be done while waiting for a forklift to arrive, or the role of the driver while waiting. (Tr. 163, 198-199). Florez, who was relatively new to Ames, testified that his experience extended to observing two flatbeds unloaded on the previous day. (Tr. 159-160). Florez and the other two men on the pipe crew that day were familiar with the JSA. (Tr. 140). The JSA requires a forklift to be stationed in a position to secure the load prior to loosening the straps or taking any other action. Ex. G-12.

ii. The Violation

Ames was cited for failing to safely transport and unload the pipes that were on the flatbed truck operated by Kay. The purpose of the regulation found at 30 C.F.R § 56.9201 is to assure that accidents, such as the one addressed here, do not occur. The standard requires that "equipment and supplies shall be . . . transported, and unloaded in a manner which does not create a hazard." The violation is straightforward; Kay was transporting the pipes for the use of Ames, on property that was under the control of Ames, and the pipes were to be unloaded by Ames employees with the limited assistance of the driver of the truck. (Tr. 56-58). Kay and the three Ames employees traveled to the unloading zone. Two of the pipe crew members left to retrieve the forklift. Kay began to loosen the straps on the load. (Tr. 210-212). As soon as he began to loosen the straps he was clearly "unloading" the "supplies", and according to the standard, he was required to do so in such a way so as to not create a hazard. Inspector Julien opined that the unloading process had begun at the time of the accident. (Tr. 91).

Ames essentially raises two arguments: (1) that its employees were not actively unloading the truck at the time of the accident and therefore it did not violate the cited standard, and (2) that Ames is not responsible for the actions of Orton's employee who had started to unload the delivery. Ames argues that escorting the truck to the "set down" location is purely for the purpose of making certain that contractors do not wander around the mine and suffer any injury or find themselves lost on the maze of roadways and, therefore, Ames has nothing to do with the actual transport of the materials.

Ames further argues that since its personnel had gone to find a forklift and had not yet had the opportunity to discuss the unloading process with Kay, the unloading had not begun for the Ames' pipe team and therefore the standard cited does not apply to Ames. However, it is undisputed that Kay retrieved his bar and had loosened the strap, an integral first step in the unloading process. Florez, the Ames employee was present when Kay began to unload but did nothing to ascertain that Kay was aware of the JSA or the safest manner in which to unload.

There is no argument that, at the very least, a violation of 30 C.F.R. § 56.9201, occurred when Kay unstrapped the load of pipes without a forklift to hold them in place and therefore did not unload "in a manner which does not create a hazard to persons from falling or shifting equipment". Without the forklift, or some other means securing the pipes, at least one pipe rolled off the truck and onto Kay. Orton has admitted to a violation of this standard. The next issue then is, did Ames violate this standard; was it a part of the unloading process when Kay began to loosen to the straps.

Ames first had contact with Kay when he checked in with the mine at the mine gate. The mine then arranged to have a pipe crew escort Kay to the loading site where the crew would then unload the pipe hauled by Kay. (Tr. 54-56). Instead of meeting with Kay and discussing the unloading process, two Ames employees left Florez with Kay and went to retrieve a forklift. Florez, who was with Kay the entire time and observed Kay retrieve the tools necessary to begin the unloading process, said little if anything to Kay. The Secretary argues that because Ames

escorted Kay, communicated with him to a limited degree, and left an employee with Kay at the unloading site, the mine was involved in the unloading process and therefore was required to submit to the requirements of the regulation cited. Ames argues that the escort is a mere formality accorded all persons who enter the mine, and that the unloading process would not begin until the forklift was retrieved, brought to the unloading location, and a safety meeting was held.

I agree with Ames that it was not responsible for the loading or transportation of the load. The part of the mandatory standard that is violated, therefore, is the portion regarding the unloading of the delivery. I agree with the MSHA inspector and find that once the mine escorted Kay to the loading site and left an employee with him while they retrieved the forklift, the unloading process had begun and Ames was responsible for doing it correctly, i.e. not allowing the restraints to be removed from the load until the forklift was in place and the load secured so that it could be safely unloaded. The unloading process includes parking the truck in the correct location so that the mine employees, along with the driver, can begin the physical removal of the pipe from the truck. Once the truck is in position and a member of the pipe crew is present for the sole purpose of unloading, it can be said that unloading has begun.

The Ames pipe crew and Kay together were to unload the truck and the process began with Kay loosening the straps while a member of the pipe crew was present. Kay had to undo a number of straps along the entire length of the truck from the cab to the end in order for the pipe to fall. During that period of time, Kay should have been observed and his progress halted by Florez. *See* (Tr. 114-115). I find that Kay was a part of the pipe crew as much as the three Ames' employees, and when he started to unload, the entire crew was in the unloading process whether they were ready to do so or not. Hence, when Kay began unloading in an unsafe manner, the unloading had begun and Ames violated the mandatory standard.

Next, Ames argues that it is not responsible for the actions of Kay as he began to unload the delivery. Section 104(a) of the Act, 30 U.S.C. § 814(a), requires that MSHA inspectors issue a citation whenever he or she believes an "operator" has violated the Act or any mandatory safety standard promulgated pursuant to the Act. Section 3(d) of the Act defines "operator" as including "any independent contractor performing services or construction at [a] mine." (30 U.S.C. § 802(d). The case turns upon the question of whether Ames was responsible for the actions of its contractor, Bob Orton Trucking. For the reasons that follow, I find Ames is responsible for the actions of Orton.

It is well established by Commission precedent that "in instances of multiple operators," the Secretary has "wide enforcement discretion" and "may, in general, proceed against either an owner/operator, his contractor, or both." *W-P Coal Co.* 16 FMSHRC 1407, 1411 (July 1994). Thus, MSHA may properly hold an operator strictly liable for all violations of the Mine Act that occurred on the mine site "whether committed by one of its employees or an employee of one of its contractors." *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249 (Feb. 1997). In *Mingo Logan*, the Commission, quoting its own earlier precedent, stated that "the Act's scheme of liability [that] provides that an operator, although faultless itself, may be held liable for violative acts of its employees, agents and contractors." *Id*. (quoting *Bulk Transportation Services, Inc.* 13 FMSHRC 1354, 1359-60 (Sep. 1991)). Both Ames and Orton, the employer of Kay,

acknowledge that they are operators within the meaning of the Act. Orton was also cited for the violation and has stipulated to the facts of the violation. Orton's remaining argument is the amount of penalty to be assessed.

The Commission's holding in *Mingo Logan, supra*, related to the citing of an *operator* for violations committed by its contractor. There, the Commission rejected the operator's assertion "that the citation against it fails to promote the safety purposes of the Act." 19 FMSHRC at 251. The Commission reasoned that this assertion was inconsistent with the rationale of the Ninth Circuit in *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F 2d. 1116, 1119-1120 (9th Cir. 1981). The Commission quoted the following language from *Cyprus*, "[i]f the Secretary could not cite the owner, the owner could evade responsibility for safety and health requirements by using independent contractors for most of the work." 19 FMSHRC at 251. Applying this language, the Commission reasoned that holding a production-operator liable for violations of their independent contractors "provides operators with an incentive to use independent contractors with strong health and safety records." *Id*. I find that the same rationale applies with equal force to holding a contractor liable for the violation of its subcontractor, i.e., that there is an incentive to use a subcontractor with strong health and safety records.

The Court in *Cyprus* also anticipated the situation herein, where the owner/lessee contracts extraction and safety functions to another entity and then argues that the owner/lessee is not liable for ensuing violations. In *Cyprus* case, the Court stated:

> The Secretary presents sound policy reasons for holding owners liable for violations committed by independent contractors. For one thing the owner is generally in continuous control of the conditions at the entire mine. The owner is more likely to know the federal safety and health requirements. If the Secretary could not cite the owner, the owner could evade responsibility for safety and health requirements by using independent contractors for most of the work. The Secretary should be able to cite either the independent contractor or the owner depending on the circumstances. *Cyprus Industrial Minerals Co. v. FMSHRC*, 664 F.2d 1116, 119 (9th Cir. 1981)

The Commission has further explained the rationale for holding owner/lessee operators liable under the Act in *Bulk Transportation Services, Inc*., 13 FMSHRC 1354, 1359 (1991), wherein the Commission wrote:

> Thus, an owner is held liable for the acts of its contractor not merely because the owner has continuous control of the entire mine but, rather, because the Act's scheme of liability provides that an operator, although faultless itself, may be held liable for the violative acts of its employees, agents and contractors.

Therefore, I find that Ames is responsible for the actions of its subcontractor, Orton, and violated the standard as cited. I find further that the Secretary, who has the burden of proving all

elements of an alleged violation by a preponderance of the evidence, has met that burden. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd, Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

iii. Significant and Substantial Violation

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

As noted above, I find that there is a violation of the mandatory safety standard as alleged by the Secretary. I find, further, that the violation contributed to the hazard of the pipes falling off the bed of the truck and striking persons involved in the unloading. Third, the hazard contributed to will result in an injury as a result of enormous pipes rolling off the truck. Finally, given the length and weight of the pipes, the injury would certainly be serious and potentially fatal, as was the case here.

The Commission and courts have observed that an experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek coal Inc. v. MSHA*, 52 F.3d. 133, 135-136 (7th Cr. 1995). Inspector Julien qualifies, without question, as an experienced MSHA inspector. He described the violation as significant and substantial and explained that improperly removing the straps that secure a load of pipes is reasonably likely to

lead to an event that causes serious injury. He further explained that there is a reasonable likelihood of fatal injury if "a 3,000-pound pipe [falls] from any height." (Tr. 74).

The question of whether a particular violation is significant and substantial 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 facts of this violation clearly lead to a finding that it was a significant and substantial violation.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(I) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(I). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.
>
> 30 U.S.C. § 820(I).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration of the statutory criteria and the deterrent purposes of the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size and ability to continue in business and that the violations were abated in good faith. The history is normal for this size operator. I accept the Secretary's finding of low negligence. Further, I find that the Secretary has established the gravity as described in the citation.

III. ORDER

Based on the criteria in section 110(I) of the Mine Act, 30 U.S.C. § 820(I), I agree with that the penalty as proposed by the Secretary is appropriate and assess a penalty of $13,268.00 for the violation. Ames Construction Company is hereby **ORDERED** to pay the Secretary of Labor the sum of $13,268.00 within 30 days of the date of this decision.[1]

Margaret A. Miller
Administrative Law Judge

Distribution:

Matthew Finnigan, Office of the Solicitor, U.S. Department of Labor, 1999 Broadway Suite 1600, Denver, CO 80202

Michael W. Homer, Suitter Axland, PLLC, 8 East Broadway, Suite 200
Salt Lake City, UT 84111
/atc

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