FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

March 10, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 96-123-M
	:	A. C. No. 41-00072-05501 R5U
v.	:	
	:	Plant & Quarry
SOUTHERN REFRACTORIES, INC., Respondent	:	

DECISION

Appearances: Jennifer W. Hilburn, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas Texas, for the Petitioner; Joe D. Gregory, Esq., Gregory & Gregory, Grapevine, Texas, for the Respondent.

Before: Judge Feldman

This matter concerns a petition for assessment of civil penalty filed by the Secretary of Labor against the respondent, Southern Refractories, Inc. (SRI), pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. ' 820(a). SRI is a refractory sales and installation company. Briefly stated, SRI removes and replaces old and worn refractory material in preheaters and kilns. Refractory material typically consists of a concrete mixture, called Acastable,@ which lines the interior ceiling and walls of the preheater or kiln.

The assessment petition that serves as the basis for this proceeding sought to impose a total civil penalty of $353.00 for five alleged violations of mandatory safety standards in Part 56, 30 C.F.R. Part 56, cited in Citation Nos. 4448249 through 4448253. This case was heard in Fort Worth, Texas, on November 19 and November 20, 1996. The parties= post-hearing findings of fact and conclusions of law, as well as their reply briefs, have been considered in the disposition of this proceeding.

At the beginning of the hearing, the Secretary moved to withdraw **Citation No. 4448253**, and the respondent agreed to pay a reduced civil penalty of $56.00, rather than the $75.00 penalty

initially proposed, for **Citation No. 4448249** based on a reduction in the degree of the respondent=s. During the hearing, the respondent also agreed to pay the $50.00 civil penalty proposed for **Citation No. 4448252** in view of the Secretary=s agreement to reduce the degree of the respondent=s negligence from moderate to low. (Tr. 330).

Bench Decision Concerning
Citation No. 4448251

Citation No. 4448251, citing an alleged violation of the mandatory standard in section 56.13021, was vacated in a bench decision entered at the culmination of the hearing. The bench decision is finalized below.

Section 56.13021 provides, in pertinent part, that Asuitable locking devices shall be used at connections ... between high pressure hose lines of :-inch inside diameter or larger, where a connection failure would create a hazard.@ (Emphasis added). The refractory service process (discussed in further detail below), involves the process of Achipping@ away castable material inside preheaters and kilns by using pneumatic air guns. SRI=s air guns are powered by compressed air. The compressed air is fed through an incoming hose into the main line in each of two Y-type quick connectors. Each connector splits the compressed air into two outgoing hoses that carry the compressed air to the air guns. On March 5, 1996, MSHA inspector Mike Davis observed that a clip used to lock an outgoing hose to the Y-connector was missing.

At the hearing, Davis acknowledged two conditions that are required to sustain the cited violation. Namely, the incoming hose to the Y-connector must be connected to the air compressor to create the potential Aconnection failure,@ and, the outgoing hoses must be at least :-inches in inside diameter. The Secretary has failed to satisfy his burden of establishing that either of these conditions existed at the time of the cited violation. At the time of the inspection, SRI foremen, Jack Kennedy, advised Davis that the air guns had been taken out of service for cleaning, and that the incoming air hose was not attached to the compressor. However, Davis did not check the compressor, which was located outside of the preheater, to determine if the hose was connected. Thus, the evidence is inadequate to support a finding that the missing clip constituted the requisite connection failure hazard to support the cited violation.

Moreover, SRI asserts, although the incoming hose off the compressor is :-inch inside diameter, the split outgoing hoses are only **2**-inch inside diameter. In support of its assertion, SRI demonstrated a Y-type quick connector at the hearing that had a :-inch incoming fitting and two **2**-inch outgoing fittings. SRI explained this is a standard Y-connector design so that the compressed air supplied through the :-inch hose can be efficiently transferred to the two narrower **2**-inch hoses without a diminution in air pressure.

In addition, as demonstrated at trial, it is difficult to determine the inside diameter of the subject high pressure air hoses solely through observation because of the thickness of the outer jackets. At trial, Davis admitted he did not compare the cited hose to other :-inch or **2**-inch hoses to obtain a basis for comparison to ensure the outgoing hoses were, in fact, :-inch inside diameter. Thus, the Secretary has failed to establish, by a preponderance of the evidence, that section 56.13021 applies. Consequently, Citation No. 4448251 is vacated.

Preliminary Findings of Fact
for Citation No. 4448250

Remaining for disposition is the Secretary=s proposed $128.00 civil penalty for **Citation No. 4448250** that alleges a significant and substantial (S&S) violation of the mandatory safety standard in section 56.11001, 30 C.F.R. ' 56.11001. This standard requires that A[s]afe means of access shall be provided and maintained to all working places.@ The Secretary alleges SRI failed to provide its employees with safe access to the inside of the preheater during the castable removal process.

MSHA=s concern with respect to the hazards associated with the removal of castable in this case was heightened as a result of a fatal accident, involving SRI employees, that occurred at another location on February 9, 1996, shortly before the issuance of the subject citations on March 5, 1996. In that incident, which occurred at the North Texas Cement Company (NTCC) mine site in Midlothian, Texas, an entire portion of castable liner around a portal door opening, measuring approximately 12 inches thick, by 10 feet wide, by 12 feet long, fell and struck SRI employees, killing one and seriously injuring another.[1] The cause of this accident is still under MSHA investigation.

[1] Although the NTCC accident has been referred to as a double fatality, one victim was killed as a result of the castable collapse. The other victim of this accident died during the

Refractory is material that will withstand extreme heat and abrasion, and is typically used in preheaters and kilns. As noted above, SRI is a distributer of refractory product, buying directly from manufacturers and selling to end-users for use in refractory linings in various heat enclosures. Refractory material includes Acastable@, which is a concrete mixture anchored to steel base plates, that lines the interior ceiling and walls of the preheater or kiln, where bricks cannot be used because of curvature. SRI contracted with Texas Lime Company (TLC), located in Cleburne, Texas, to recondition TLC=s No. 5 preheater. The preheater is used to preheat limestone before the limestone is heated in the kiln.

In resolving the issue of Asafe access@, the construction and dimensions of TLC=s No. 5 preheater are significant considerations. The preheater is constructed in a circular pattern with an outer circle of 29'4" in diameter and an inner circular roof area of 20'4**2**" in diameter. The inner, circle roof is wrapped with ten bullnose modules constructed of refractory castable material. Limestones, ranging from baseball to softball in size, enter the preheater from ten conveyor belts that drop limestones onto the ten bullnose modules located around the perimeter of the preheater.

The inner circle height from I-beams to the preheater floor is approximately 4 feet. However, this distance is diminished by SRI=s placement of a temporary platform over the preheater floor that is installed in order to level the slope in the floor. Thus, the pertinent distance from the I-beams to the platform below is no more than 3**2** feet.

The outer circle height from the bottom (lowest part) of the bullnose modules to the preheater floor is approximately 30 inches. Each bullnose module is approximately 20 inches thick at the bottom and extends up the outer diameter of the inner circular roof area a distance of several feet. Each module is 7**2** inches in length at the outer perimeter. Each module is separated by a dry joint. Thus, removal of a castable bullnose module with jack hammers does not compromise the structural integrity of the adjoining modules.

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course of treatment for his leg injuries. However, the cause of death apparently was not related to the accident.

The refractory castable material comprising the bullnose modules is anchored to steel base plates by a system of two alternating types of anchors: (i) V-type stainless steel alloy anchors welded to steel base plates; and (ii) refractory or ceramic, ribbed brick anchors held in place by stainless steel alloy clips welded to steel base plates. The ribbed brick anchors are located on 12 inch centers with V-type anchors welded to the base plates between the brick anchors. The castable includes small nail-like brads mixed with the concrete material to provide added strength.

The inner circular roof is constructed primarily of ceramic brick (3" x 4" x 9" long) hung from steel I-beams placed on 8 inch centers. An expansion joint separates the ceiling from the bullnose modules to prevent the ceiling, which expands during the heating process, from pushing against, and damaging the bullnoses. Thus, removal of the ceramic ceiling bricks does not compromise the structural integrity of the bullnose modules.

Because the round ceiling is constructed with 3" x 4" brick rectangles, castable plugs 9" in depth are poured to finish out the smooth circle in order to form the expansion joint between the inner diameter roof and the modules. Layers of lightweight castable and insulating castable are poured over the brick and castable plugs.

SRI contracted with TLC to remove the complete brick ceiling section of the No. 5 preheater that was supported by the 8 inch centered I-beams. This was accomplished by SRI personnel knocking the castable and brick out from above while they stood on the I-beams outside, and on the top of, the preheater. SRI also contracted to remove the castable liner material from 4**2** of the 10 bullnose modules surrounding the inner most preheater ceiling area.

All of the brick, and approximately ninety-eight percent of the insulating castable, were removed while working from the roof using a nail bar, chipping hammer and brick hammer. The small portion of the remaining castable roof, that could not be accessed from above because of a walkway located over a portion of the preheater, was removed from below by standing or kneeling on the preheater floor.

SRI:s foreman, Jack Kennedy, testified regarding his method for determining whether castable is safe to work under. Initially, Kennedy observes the castable to determine if there are any cracks, missing or sagging pieces, or any indications the castable has pulled away from the steel anchored base plates.

Next, he Asounds@ the castable, by hitting it with a two-pound hammer in several places, to see if it sounds hollow or has a ring to it. Kennedy stated both he, and the TLC plant inspector, had Asounded@ the bullnose module castable prior to entering the No. 5 preheater. MSHA inspector Davis conceded that he has used the same Asounding@ methods Aa thousand times@ to determine if castable is stable and well secured. (Tr. 222-23).

On February 29, 1996, Inspector Davis began an inspection of TLC=s limestone facility in Cleburne, Texas. On March 5, 1996, during the course of his TLC inspection, Davis arrived at the preheater area where he was informed by TLC=s plant engineer, Tom Hoff, that SRI was replacing castable in the No. 5 preheater. Davis proceeded to inspect SRI as an independent contractor performing refractory service on mine property.

Hoff accompanied Davis to the top of the preheater where Davis met Kennedy. Davis observed that SRI employees had already removed a majority of the ceramic ceiling (roof) section of the preheater. Davis was informed the center portion of the ceiling had been removed by SRI personnel from the top while they stood on top of the I-beams. At this time, Davis observed men inside the preheater, standing in the center on the work platform that was installed to level the preheater floor. The men were chipping the castable liner with jack hammers from the inside of the circle in an outward direction towards the outside of the preheater ring. The castable material lined the ceiling, as well as the outer walls, and was approximately 12 to 14 inches thick.

Davis subsequently observed an SRI employee climb out from the shell of the preheater through an opening in the ceiling where the castable or brick had been removed. The employee exited the preheater by hoisting himself up a distance of approximately 3**2** feet onto the I-beams in an area where the I-beams, normally spaced 8 inches apart, had been moved to create an opening of approximately 2**2** to 3 feet. The employee then walked approximately 3 to 4 feet on the I-beams to a walkway, where he stepped over the walkway handrails and exited on the walkway. Davis testified that Kennedy had informed him that employees had been accessing the preheater in this manner for several hours.

Davis concluded that an employee entering or exiting in such a manner could fall from the I-beams to the preheater floor below. Davis concluded a slip and fall hazard of approximately 4 to 6 feet existed depending on whether the employee fell from the I-beams, or, from the walkway as he was attempting to climb over the handrail. Davis took a photograph of the area where the

I-beams had been separated which was admitted into evidence as Exhibit P-7.

Based on his observations, Davis issued Citation No. 4448250 for SRI's alleged failure to provide a safe means of access to the workplace by allowing men to enter the preheater through the overhead framework in violation of section 56.11001. Davis considered this condition to be S&S in nature. To abate the citation, Davis required SRI to install a ladder from the preheater floor to the walkway by removing a cross piece from the handrail and securing the ladder to the walkway.

Davis was then advised that the primary means of access to the preheater was by using an access door to traverse an 8 foot sectional ladder that had been placed down a vertical passageway. Davis observed the passageway had only elbow room from side to side in that it was only approximately 42 inches in width. The area behind the ladder was wide open space into the preheater. As Davis descended, he felt the second rung below the slip joint, located approximately 6 feet above the preheater floor, bow under his weight of 170 pounds. Davis concluded the ladder was not sturdy enough for commercial use. Thus, Davis concluded it was reasonably likely the ladder will fail, causing an employee to strike his head on the castable, metal liner or base of the ladder. Consequently, Davis included this condition in Citation No. 4448250 as further evidence of the cited section 56.11001 violation.

As Davis reached the bottom of the ladder, he observed employees chipping remaining castable (that could not be reached from above because of the walkway) from the center of the preheater toward the exterior wall and expansion joint. The castable hung down 12 inches from the ceiling. Davis estimated the castable was approximately 3 to 4 feet deep from the inside edge of the castable to outside wall. It is not clear whether Davis was observing removal of 9 inch castable plugs, removal of bullnose modules, or both.

As Davis observed these individuals working, he noticed others accessing the preheater by climbing down the access door ladder, and then crawling under the castable material to be removed so that they could turn around and chip the castable in the direction of the outside perimeter wall. Davis concluded there was no means of exiting the preheater by the ladder in the access door without traveling under castable that had already been compromised during the ceiling removal process. Davis' conclusion was based on his belief that there was no area of castable that was undisturbed during the demolition process

because the entire center area (inner circle ceramic brick ceiling) had been removed. Thus, Davis felt the perimeter castable on the bullnose modules had been compromised. However, as discussed below, Davis= conclusion concerning the lack of the modules= structural integrity, fails to consider the effect of dry joint between each bullnose module as well as the expansion joint between the ceiling and the bullnose modules.

Davis did not believe chipping away castable was hazardous because employees were using pneumatic air guns to chip straight ahead at the castable, and, the castable over their heads had already been removed from above. Davis explained, however, that it was hazardous for employees to crawl underneath castable that was in the process of being chipped away.

Davis concluded that SRI Acould have blocked and braced that area of the castable that they were crawling under@ to provide a safe system of temporary support. (Tr. 138-39). In view of the recent fatality of an SRI employee at NTCC, Davis concluded that it was reasonably likely that an SRI employee entering or exiting the preheater under castable will suffer serious or fatal injuries by a sudden castable collapse. Consequently, Davis determined that SRI=s failure to designate a discrete access area for travel under castable, by providing temporary structural support, constituted an additional failure to provide safe access in violation of section 56.11001 in Citation No. 4448250.

Further Findings and Conclusions of Law

Safety standards cannot possibly contemplate every condition encountered during the mining process. Thus, as a general proposition, mandatory safety standards must be broadly adaptable to a myriad of circumstances. Kerr McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). Here, MSHA seeks to broadly apply its safe access standard to the refractory industry.

The policy of broadly applying mandatory standards is outweighed by the due process requirement that application of a mandatory regulatory safety standard must afford an operator adequate notice. Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982). Thus, standards, as applied, cannot be Aso incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.@ Id. When faced with whether MSHA=s application of a standard provides adequate notice, the Commission has concluded that the test is whether a reasonably

prudent person familiar with the mining industry (i.e., the refractory industry), and the protective purposes of the standard, would have recognized the specific prohibition or requirement of the standard. Ideal Cement Co., 12 FMSHRC 2409, 2416 (November 1990).

Section 56.11001 states that A[s]afe means of access shall be provided and maintained to all working places.@ Citation No. 4448250 cites three distinct conditions that allegedly constituted unsafe access to the preheater floor (the workplace). Namely, use of a ladder that was too light and bowed at the expansion joints; traveling under castable to position oneself to chip away at the castable material; and climbing through overhead framework to access the preheater floor. Thus, the Commission=s Aprudent person@ test must be applied to determine if these conditions were properly cited under section 56.11001.

The Sectional Ladder

Obviously, a ladder is a fundamental means of accessing a workplace. Consequently, the application of the safe access standard to the condition of a ladder creates no due process notice issues. Thus, with respect to the fact of occurrence of the cited violation, use of an unsafe ladder to access a workplace would constitute a violation of section 56.11001.

In determining whether the ladder was properly characterized by Davis as Aunsafe,@ the Commission has stated that equipment is Aunsafe@ when a reasonably prudent person familiar with industry standards, and the factual circumstances surrounding the allegedly hazardous condition, would recognize a hazard warranting corrective action. 4 FMSHRC at 2129. I credit Davis= testimony that the 8 foot ladder in preheater access door was a sectional ladder that bowed under Davis= weight at the second rung below the slip joint. Although subjective in nature, I also credit Davis= conclusion that this sectional ladder was not fit for its intended use. In this regard, the respondent does not contend that the ladder was rated as a Type I ladder manufactured for heavy duty commercial applications. Since the ladder was not intended for heavy use, the Secretary has met his burden of establishing a lack of the requisite Asafe access@ mandated by section 56.11001.

A violation is properly designated as significant and substantial (S&S) in nature if, based on the particular

facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury or an illness of a reasonably serious nature. Cement Division, National Gypsum, 3 FMSHRC 822, 825 (April 1981); Mathies Coal Co., 6 FMSHRC 1 (January 1984); United States Steel Mining Company, Inc., 7 FMSHRC 1125 (August 1985). Although Davis felt the ladder bow under his weight, the subject ladder, photographed in Exhibits R-9 through R-12, is constructed of steel and does not appear to be defective. In this regard, Davis did not observe any structural defects in the ladder=s rungs. The sensation of Agive@ on a ladder=s rung, especially near a slip joint, does not mean that it is reasonably likely that a failure of the rung will occur. Although the ladder was a technical violation, in that it did not provide Asafe access@ as contemplated by section 56.11001, the evidence fails to establish that continued use of the ladder was reasonably likely to result in serious injury. Consequently, although the fact of the section 56.11001 violation with respect to this ladder shall be affirmed, Citation 4448250 shall be modified to delete the S&S designation.

Traveling Under Castable

The Commission has noted there are various factors that dictate what a reasonable person would do under particular circumstances. In this case, the pertinent factors include accepted safety standards in the refractory service field, considerations unique to the refractory industry, and the circumstances at the No. 5 preheater. See U.S. Steel Corp., 5 FMSHRC 3, 5 (January 1983).

Here, the castable was anchored with a system of steel based plates and steel hangers and clips, not unlike the pouring of reinforced concrete. The castable was further strengthened with steel nails in the concrete mixture. This method of castable installation is the industry standard. With the exception of the NTCC accident, it has never been known to fail.

In this regard, SRI called several witnesses to testify that they had never heard of castable falling down in large pieces. Kennedy testified, in his 27 years of experience in the industry, he has never seen or heard of a large structural failure. Likewise, Mike McPherson, who was employed for 34 years by A.P. Green, a company that develops, markets and installs refractory products, was not aware of any other incident comparable to the NTCC accident where castable fell in large pieces. Mark Stanfield, President of SRI, testified in his

38 years in the refractory business, he has never known of a failure similar to that which occurred at NTCC. Finally, Gerald Forrester, SRI=s safety consultant, attended MSHA health and safety conferences arising out of the NTCC incident. Forrester stated MSHA officials were unaware of any previous event like the NTCC accident.

In view of the unrebutted testimony of McPherson and Forrester, the Secretary has failed to show that the unexplained systematic failure of castable at NTCC is a basis for a blanket prohibition of travel under any castable, under any circumstances, during the removal process. The enclosed work environment in a preheater or kiln is analogous to the environment in underground mining. While this case concerns the issue of safe access to a preheater rather than travel under unsupported roof, the similarities are inescapable. By analogy, surely MSHA would not assert that travel under roof supported by roof bolts in a given mine should be prohibited simply because of an isolated roof fall of a roof supported by roof bolts at another mine site.

In this case, it is important to note that the respondent was not cited because SRI employees were observed crawling under a discrete section of castable that had been compromised by the Achipping@ removal process. Rather, Davis considered all castable to have been compromised as a consequence of the ceramic brick ceiling removal. The perimeter castable comprised the bullnose modules. However, only 4**2** of the 10 bullnose modules were replaced. These bullnose modules, under which personnel crawled a distance of approximately 20 inches in order to reach the inner circle so as to work in an outward direction, were separated from each other by dry joints. The bullnose modules were also separated from the ceramic brick ceiling by an expansion joint.

Despite the utilization of separation joints in the bullnose module construction design, Davis did not view the bullnose modules as separate units. (Tr. 155). In addition, because Athe entire core@ consisting of the ceramic bricks and the expansion joint had been removed from the inner perimeter of the bullnose modules, Davis did not consider any portion of the bullnose castable to be Auntouched.@ (Tr. 151).

However, the evidence fails to support Davis= concern that virtually all of the bullnose castable had been compromised. Rather, given the circular configuration of the preheater, SRI employees could access the preheater under various areas of castable where little or no removal activity had occurred, or,

under areas where castable had been removed. As noted, the respondent was not cited because personnel accessed the preheater under a particular, identifiable area where the structural integrity of the castable was in doubt.

In his reply brief, the Secretary asserts the NTCC fatality placed SRI on notice that greater safety measures were required. However, the accident at NTCC was an isolated, and as yet unexplained, event. Moreover, the circumstances in this case are significantly distinguishable from the NTCC case. NTCC involved a kiln that was lined entirely with castable material. Thus, the victims in NTCC were surrounded by castable. The injuries occurred as a result of a systematic failure of an entire section of castable. While that NTCC accident is apparently still under MSHA investigation, the structural failure due to metal fatigue of the steel clips and/or V-type anchors, as a cause of the collapse of an entire castable section, has not been ruled out.

By contrast, in this case, Davis testified that he did not consider the removal of castable in the No. 5 preheater as hazardous because the air hammer removal is a Achipping@ process Athat doesn=t generally bring down really large pieces.@ (Tr. 131). Davis also did not consider this chipping process dangerous because the preheater ceiling had been removed. Thus, unlike NTCC, employees were not surrounded by castable. Thus, SRI=s abatement in NTCC, which required use of remote controlled equipment, in an enclosed kiln where a large area of castable had already failed, is not relevant to the issue of notice in the instant case, where only relatively small areas of castable were being removed. Thus, I do not view the circumstances surrounding the fatal accident as comparable or otherwise material in this case.[2]

Finally, MSHA=s difficulty in identifying a suitable mandatory standard that would provide adequate notice to a person familiar with the refractory industry that travel under castable

[2] On March 3, 1997, SRI filed a written objection to the copy of Citation No. 4447554 issued on April 9, 1996, that was submitted as an attachment to the Secretary=s March 1, 1997, reply brief. This citation concerns the NTCC fatality. SRI objects to this citation, which was not proffered at trial, as being outside the record. The citation merely documents record testimony and does not unduly prejudice or surprise SRI. While not admitted as an exhibit, the citation is relevant in this proceeding and shall be accepted as part of the Secretary=s reply brief. Accordingly, SRI=s objection is overruled.

is prohibited is illustrated by Citation No. 4447554 issued on April 9, 1996, as a result of the NTCC fatality.[3] That citation initially charged SRI with a violation of the mandatory standard in section 56.16009 that requires A[p]ersons [to] stay clear of suspended loads.@ Apparently, however, MSHA concluded that castable is not properly characterized as a Asuspended load@ because the citation was ultimately amended to reflect an alleged violation of section 56.11001 for failure to provide safe access. Thus, MSHA=s uncertainty with regard to the proper mandatory standard to apply, is a further indication that its enforcement efforts in this case have failed to provide SRI with the notice required to pass constitutional muster.

Accordingly, I am unpersuaded that a reasonably prudent person familiar with the refractory castable removal process would have recognized that crawling under castable, a material comparable to reinforced concrete,[4] constituted unsafe access to working places as contemplated by section 56.11001. Consequently, this basis for the cited section 56.11001 violation in Citation No. 4448250 shall be deleted.

Use of Overhead I-Beams to Access the Preheater

We next address whether the prohibition in section 56.11001 is applicable to accessing and departing the preheater floor by traversing the I-beam framework under these circumstances. As an

[3] Although the fatality occurred on February 9, 1996, prior to the March 5, 1996, issuance of the subject citations, Citation No. 4447554 was issued after the citations in issue. Thus, it is the occurrence of the accident, rather than Citation No. 4447554, that is relevant on the question of notice.

[4] Forrester, a former materials engineer with the Army Corps of Engineers, equated the structural strength of castable with that of concrete bridges and highways. (Tr. 513-14, 525).

initial matter, it should be noted that the primary, and normally exclusive, access into the preheater is by way of a ladder in the vertical passageway leading from the access door. The I-beams were used as a secondary means of accessing the preheater floor only after the ceiling bricks had been removed. The I-beams are less than 40 inches above the temporary platform that had been installed to level the preheater floor.

Ordinarily, the Secretary=s interpretation of his own regulations should be given deference ... unless it is plainly wrong@ so long as it is Alogically consistent with the language of the regulation and ... serves a permissible regulatory function.@ Buffalo Crushed Stone, 19 FMSHRC __ (February 1997) (citations omitted). It follows that the Commission normally should not substitute its own reasonable interpretation of a mandatory standard if the Secretary=s interpretation of that standard is also reasonable. Thunder Basin Coal Company, 18 FMSHRC 582, 592 (April 1996) (citations omitted).

However, the Commission=s deference policy is not without its limitations. While it is difficult to quarrel with the goal of Asafe access,@ the Secretary=s application of such a broadly worded mandatory standard cannot be so obscure as to deprive an operator of adequate notice of the condition or practice sought to be prohibited. Ideal Cement, 12 FMSHRC at 2415-16; see also Thunder Basin, 18 FMSHRC at 592 (dissenting opinion of Commissioner Marks).

The refractory removal process is a demolition project. Such projects do not always lend themselves to conventional means of passage such as stairs, ladders or platforms. I am unconvinced that a person familiar with the refractory service industry would recognize that entering the preheater, as a secondary means of access, from I-beams above, to the preheater platform floor less than 40 inches below, was a violation of the safe access provisions of section 56.11001. Such access would facilitate the transfer of tools and equipment, and may be a preferred method of entry to climbing down a ladder in some instances.

Significantly, the Secretary has not alleged that standing on the I-beams to remove the ceiling brick from above was unduly hazardous or otherwise prohibited conduct.[5] Accordingly, I conclude that section 56.11001 cannot be applied to prohibit this method of accessing the platform that was temporarily installed over the sloped preheater floor.

The Secretary has proposed a civil penalty of $128.00 for Citation No. 4448250. Given the deletion of two of the three conditions that were cited as a basis for the section 56.11001 violation, the deletion of the S&S designation, the low gravity (which is also reflected by the relatively small civil penalty initially proposed by the Secretary), and the moderately low degree of the respondent=s negligence, a civil penalty of $75.00 shall be imposed.

As a final note, I recognize the Secretary=s legitimate concerns regarding hazards that are unique to the refractory service industry. However, there is no mandatory standard that addresses the methods by which castable should be removed, or, that requires supplemental support of castable during the removal process. These safety concerns can best be addressed through the notice and comment provisions in the rulemaking process.

ORDER

IN VIEW OF THE ABOVE, the parties= settlement agreement wherein the respondent has agreed to pay a civil penalty of $56.00 for Citation No. 4448253, and a $50.00 civil penalty for Citation No. 4448252, **IS APPROVED**. The Secretary=s motion to vacate Citation No. 4448253 **IS GRANTED**. Pursuant to the bench decision, formalized herein, Citation No. 4448251 **IS VACATED**. **IT IS ORDERED** that Citation No. 4448250 as modified herein, including deletion of the significant and substantial

[5] Applying the Secretary=s theory of this case, accessing the ceiling of the preheater, i.e., the workplace, via the I-beams to remove the ceramic tiles, would be prohibited by section 56.11001. Such an approach ignores the unique circumstances inherent in demolition work.

designation, **IS AFFIRMED**. The respondent shall pay a civil penalty of $75.00 for Citation 4448250.

ACCORDINGLY, **IT IS FURTHER ORDERED** that the respondent pay a total civil penalty of $181.00 in satisfaction of the subject citations. Payment shall be made to the Mine Safety and Health Administration within 30 days of the date of this decision. Upon timely receipt of payment, this matter **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE ADMINISTRATIVE LAW JUDGES
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March 21, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. CENT 96-123-M
Petitioner	:	A. C. No. 41-00072-05501 R5U
v.	:	
	:	Plant & Quarry
SOUTHERN REFRACTORIES, INC.,	:	
Respondent	:	

ORDER CORRECTING DECISION

Before: Judge Feldman

This order corrects the decision released in this proceeding on March 10, 1997. 19 FMSHRC __. The decision erroneously ordered the respondent to pay a $56.00 civil penalty in satisfaction of Citation No. 4448253. However, Citation 4448253 was vacated. The decision **IS HEREBY CORRECTED** to reflect that the respondent **IS ORDERED TO PAY** a civil penalty of $56.00 in satisfaction of Citation No. 4448249 instead of Citation No. 4448253.

Jerold Feldman
Administrative Law Judge

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