FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 18, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. CENT 96-10-M
	:	A.C. No. 39-01328-05519
v.	:	Docket No. CENT 96-31-M
	:	A.C. No. 39-01328-05520
BOB BAK CONSTRUCTION, Respondent	:	Docket No. CENT 96-60-M
	:	A.C. No. 39-01328-05521
	:	Docket No. CENT 96-61-M
	:	A.C. No. 39-01328-05522
	:	Docket No. CENT 96-85-M
	:	A.C. No. 39-01328-05523
	:	Docket No. CENT 96-99-M
	:	A.C. No. 39-01328-05524
	:	Docket No. CENT 96-116-M
	:	A.C. No. 39-01328-05525
	:	Docket No. CENT 96-117-M
	:	A.C. No. 39-01328-05526
	:	Crusher No. 3 Mine

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, Mr. E. Kimball Alvery and Ms. Judy R. Peters, MSHA, for Petitioner; Mr. Robert Bak, Ms. Elsie Bak, and Ethan W. Schmidt, Esq., for the Respondent.

Before: Judge Fauver

These are consolidated civil penalty cases under ' 105(d) of

the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 **et seq**.

On June 5, 1995, Inspector Roger Nowell, of the Rapid City, South Dakota, Mine Safety and Health Administration Office, conducted an inspection at Bob Bak Construction=s Crusher No. 3 Mine. Inspector Nowell was accompanied by his supervisor, Tyrone Goodspeed. The mine operation produces and processes sand and gravel sold in and substantially affecting interstate commerce.

During the inspection, Inspector Nowell issued nine ' 104(a) citations, one ' 104(d)(1) unwarrantable failure citation, four 104(d)(1) orders, and one combined imminent danger order and citation under '' 107(a) and 104(a) of the Act.

Inspector Guy L. Carsten inspected the mine on September 11-12, 1995, to determine, among other things, whether the conditions cited in the outstanding citations and orders issued on June 5, 1995, had been abated. During this inspection, Inspector Carsten issued a ' 104(a) citation for working in the face of a ' 104(b) closure order.

On December 21-22, 1995, Inspector Nowell and Electrical Inspector Lloyd Ferran inspected the mine, issuing two ' 104(a) citations, one of which was for operating in the face of an imminent danger order issued on June 5, 1995. They also issued six ' 104(d)(2) unwarrantable failure orders.

As a result of the three inspections, Respondent was issued 24 citations and orders totaling $23,951 in proposed civil penalties. The cases were heard in Pierre, South Dakota.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, probative, and reliable evidence establishes the Findings of Fact and further findings in the Discussion below.

FINDINGS OF FACT

I

INSPECTION ON JUNE 5, 1995

Combined Order/Citation No. 4643116

1. Inspector Nowell issued this combined imminent danger order/citation under '' 107(a) and 104(a) of the Act, alleging a violation of 30 C.F.R. ' 56.14101(a)(1), which provides:

(a) Minimum requirements: (1) Self-propelled mobile

equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. This standard does not apply to equipment which is not originally equipped with brakes unless the manner in which the equipment is being operated requires the use of brakes for safe operation. This standard does not apply to rail equipment.

2. Upon his arrival at the Crusher No. 3 mine, Inspector Nowell observed a Michigan front-end loader (Serial Number 438-C452C) backing up. Inspector Nowell approached the vehicle to talk to the operator, who lowered the bucket to try to stop the vehicle. The loader did not stop but gradually coasted to a halt. Inspector Nowell questioned the operator about the brakes. The operator, who was also the foreman, informed him that the brakes were not functioning properly. Inspector Nowell observed that another employee was on foot nearby (the employee regularly worked around the crusher), another front-end loader was operating in the same area and the working conditions were very noisy.

3. Inspector Nowell performed a brake test on the front-end loader by asking the foreman to drive forward and apply the brakes. This was on fairly even ground. The test was done with the bucket up and empty. The brakes failed to stop the vehicle, which coasted to a gradual stop. Inspector Nowell further questioned the foreman about the brakes, and the foreman said that he had reported the condition of the brakes to the owner, Mr. Bob Bak.

4. The loader routinely traveled up a ramp six to eight feet high to load the crusher feed. After coming down the ramp the loader would travel on uneven to rough terrain to return to the pit for another load.

5. The crusher was very noisy, requiring the employees nearby to wear hearing protection devices.

6. Inspector Nowell concluded that the loader brakes were defective and created an imminent danger.

Order No. 4643209

7. Inspector Nowell issued this order under ' 104(d)(1)of the Act, concerning the same Michigan front-end loader, alleging a violation of 30 C.F.R. ' 56.14132(a), which provides:

Manually operated horns or other audible warning devices

provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.

8. Inspector Nowell observed that when the loader operated in reverse the backup alarm did not work. He found that the wires to the backup alarm were not connected. Another loader was operating in the same area, and the crusher operator regularly worked on foot to clean around the crusher, in the vicinity of the front-end loaders. As stated, working conditions were very noisy.

9. Inspector Nowell asked the foreman, who operated the cited loader, how long the alarm had not been functioning, and the foreman stated, Aat least five months@ and that the owner, Bob Bak, knew of the defect. Bob Bak testified that the switch for the alarm Awas on order and it wasn=t there and I couldn=t put it in@ (Tr.5).

10. Inspector Nowell found that the violation alleged in the order was significant and substantial and due to an unwarrantable failure to comply with the safety standard.

Order No. 4643211

11. Inspector Nowell issued this ' 104(d)(1) order concerning the same front-end loader, alleging a violation of 30 C.F.R. ' 56.14100(c), which provides:

> When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

12. Inspector Nowell asked the foreman, who was operating the loader, why he was not wearing the seat belt provided in the vehicle. The foreman stated that he could not wear the seat belt Adue to the poor condition of the seat@ (Tr. 49).

13. The seat was worn to the point that very little foam rubber remained and the metal edges of the seat frame were visible and protruding. The seat condition made proper wearing of the seat belt hazardous because of the metal edges.

14. The front-end loader operated on uneven and rough terrain and traveled a steep ramp to load the crusher trap feed. Another loader operated in the same area, and an employee regularly worked on foot near the loaders. Inspector Nowell concluded that if the loader operator was not wearing a seat belt, he was more likely to be injured in case of an accident.

15. The inspector found that the violation cited in the order was significant and substantial and was due to an unwarrantable failure to comply with the cited safety standard.

Order No. 4643214

16. Inspector Nowell issued this ' 104(d)(1) order concerning the same front-end loader, alleging a violation of 30 C.F.R. ' 56.14101(a)(2), which provides:

> If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels.

17. Inspector Nowell observed that the parking brake on the front-end loader was inoperable.

18. The loader traveled on uneven to rough terrain and traveled up a steep ramp to load the crusher feed. Inspector Nowell asked the foreman-operator of the front-end loader how long the parking brake had been inoperable, and the foreman said he had Areported the defect to the owner@ (Tr. 56).

19. Inspector Nowell found that the violation cited in the order was significant and substantial and was due to an unwarrantable failure to comply with the cited safety standard.

Citation No. 4346204

20. This ' 104(a) citation alleges a violation of 30 C.F.R. ' 56.18013, which provides:

> A suitable communication system shall be provided at the mine to obtain assistance in the event of an emergency.

21. Inspector Nowell found that there was no communication system at the site for use by the employees in the event of an emergency. There was no phone line, cellular phone, or business band radio on the property. Inspector Nowell concluded that in the event of an accident, somebody would be required to leave the mine site and go to the nearest phone, wherever that might be, to care for assistance. The delay in getting assistance, depending on the type of accident, could contribute to the death or critical condition of an injured person. If only two employees were on the site and one had to go for help, there would only be the injured person left.

Citation No. 4643207

22. This ' 104(a) citation alleges a violation of 30 C.F.R. ' 56.12032, which provides:

> Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

23. The citation alleges the following condition or

practice:

> Two cover plates were not provided for a 440 V-AC outlet and a breaker box at the main outside electrical control panel for the conveyor belts.

The uncovered fixtures were exposed to rain, dust, and dirt and could inadvertently be contacted by an employee operating other breakers and switches, exposing the person to a severe shock hazard.

24. Respondent admits the facts alleged in the citation.

25. Inspector Nowell found that it was reasonably likely that a person would be injured from the hazard he observed. Without cover plates, the AC outlets and breaker box were exposed to rain, dirt, and dust and could inadvertently be contacted by somebody. An electric shock of 440 volts could reasonably be expected to result in a fatal or very serious injury.

Citation No. 4643216

26. This ' 104(a) citation alleges a violation of 30 C.F.R. ' 56.14107(a), which provides:

> Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take up pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

27. A belt and chain drive unit beneath the crusher trap feed was not guarded. An old piece of screen was installed at the entrance to the trap feed, apparently as a barricade. However, the screen was almost covered with overfill material and did not prevent access to the belt and chain drive. The inspector found that the area around the belt and chain drive had a substantial buildup of overfill material that would require clean up work.

Citation No. 4643210

28. This ' 104(a) citation alleges a violation of 30 C.F.R. ' 56.14100(d), which provides:

> Defects on self-propelled mobile equipment affecting safety, which are not corrected immediately, shall be reported to, and recorded by, the mine operator. The records shall be kept at the mine or nearest mine office from the date the defects are recorded, until the defects are corrected. Such records shall be made

available for inspection by an authorized representative of the Secretary.

29. Inspector Nowell observed that the same front-end loader involved in the above orders and citations had an inoperable windshield wiper and severely cracked windshield that impaired the visibility of the operator. Also, the wiper blade had been removed. It was raining on the day of the inspection. A crusher operator was working on foot in the area of the loader, and another front-end loader was operating in the same area. The defective wiper and missing wiper blade were not recorded by the company.

30. Inspector Nowell discussed the condition with the foreman, Lawrence Roghair, who was also the operator of the loader. The foreman stated that the loader was bought that way and they Adidn=t think anything of the defect@ (Tr.74).

Citation No. 4643212

31. This ' 104(a) citation alleges a violation of 30 C.F.R ' 56.14107(a), which provides:

Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take up pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

32. Inspector Nowell found that a shroud originally provided to guard the Michigan front-end loader radiator fan blades had been removed. He concluded that this was a violation of ' 56.14107(a). He found that it was unlikely that an injury would occur because there would be no reason for anyone to be around the engine when the loader was running. The engine and fan blades were about the head level of an average person.

Citation No. 4643213

33. This ' 104(a) citation alleges a violation of 30 C.F.R. 30 ' 56.14100(b), which provides:

Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.

34. Inspector Nowell found that the lights on the front-end loader involved in the above orders and citations were broken,

misaligned or otherwise not kept in operational condition.

Citation No. 4643120

35. This ' 104(a) citation alleges a violation of 30 C.F.R. ' 56.15003, which provides:

> All persons shall wear suitable protective footwear when in or around an area of a mine or plant where a hazard exists which could cause an injury to the fee.

36. Inspector Nowell found that protective footwear, such as hard-toed safety boots, were not worn by the crusher operator. Respondent admits the facts alleged in the citation but claims financial hardship as to the proposed penalty.

Citation No. 4343203

37. This ' 104(a) citation alleges a violation of 30 C.F.R. ' 56.20008, which provides:

> Toilet facilities shall be provided at locations that are compatible with the mine operations and that are readily accessible to the mine personnel.

38. Inspector Nowell found that there were no toilet facilities at the mine site.

39. Respondent admits the facts alleged, but claims financial hardship as to the amount of the proposed penalty.

Citation No. 4643205

40. This ' 104(a) citation alleges a violation of 30 C.F.R. ' 56.12028, which provides:

> Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent test shall be made available on request by the Secretary or his duly authorized representative.

41. Inspector Nowell found that Respondent had failed to test and record continuity and resistance of grounding systems on the electric motors, portable extension cords, hand held tools and main power tools.

42. Respondent admits the facts alleged, but challenges the amount of the proposed penalty.

Citation No. 4643118

43. This ' 104(d)(1) alleges a violation of C.F.R. ' 56.14132(a), which provides:

> Manually operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in a functional condition.

44. Inspector Nowell observed a 175B Michigan front end loader (Serial No. 438-C452C) moving in reverse and the backup alarm was not working. He asked the loader operator how long the backup alarm had not been functioning. The operator stated that the backup alarm had not worked for about three weeks, and that he had told the owner, Bob Bak, of this defect. Bob Bak testified that a switch for the alarm Ahad been on order, it had just been back ordered ... and I guess I just kind of lost track of it@ (Tr. 20).

Order No. 4643208

45. This ' 104(d)(1) order alleges violation of 30 C.F.R. ' 56.14103(b), which provides:

> (B) If damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed. Damaged windows shall be replaced if absence of a window would expose the equipment operator to hazardous environmental conditions which would affect the ability of the equipment operator to safely operate the equipment.

46. Inspector Nowell found that the windshield on a Michigan 175B Front End Loader (Serial No. 438-C202) was badly damaged with cracks radiating outward and downward. Another vehicle operated in the same area and an employee on foot worked in the same area. It rained on the day of the inspection.

47. The loader was operated by Foreman Lawrence Roghair, who stated the cracked window condition had existed for five months and he had told the owner, Bob Bak, about it. The defect was readily observable.

II

INSPECTION ON SEPTEMBER 11-12, 1995

Citation No. 4643458

48. Inspector Guy L. Carsten issued this ' 104(a) citation, alleging a violation of ' 104(b) the Act, which provides:

> (b) If, upon a follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (1) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

49. Inspector Carsten issued a ' 104(b) non-compliance closure order (Order No. 4643454) on September 11, 1995 for failure to abate a violation that was cited on June 5, 1995 (failure to provide adequate toilet facilities, Citation No. 4643203).

50. On September 12, 1995, Inspector Carsten returned to the mine site and observed a mine employee operating a bulldozer on mine property.

III

INSPECTION ON DECEMBER 21-22, 1995

Order No. 4643593

51. On December 21, 1995, Inspector Nowell conducted another inspection at Bob Bak Crusher No. 3 mine as a result of a hazard complaint. Inspector Nowell was accompanied by Inspector Lloyd Ferran, an electrical inspector. During the inspection Inspector Nowell issued the above ' 104(d)(2) order, alleging a violation of 30 C.F.R. ' 56.15002, which provides:

> All persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard.

52. Inspector Nowell found that the owner of the company, Bob Bak, was not wearing a hard hat while at the mine site in areas where there were hazards of falling objects.

53. Respondent admits the facts alleged in the order, but challenges the amount of the proposed penalty.

Order No. 4643594

54. Inspector Nowell issued this ' 104(d)(2) order, alleging a violation of 30 C.F.R. ' 56.15003, which provides:

> All persons shall wear suitable protective footwear when in or around an area of a mine or plant where a hazard exists which could cause an injury to the feet.

55. Inspector Nowell found that the owner of the company, Bob Bak, was not wearing hard-toed protective footwear while at the mine site in areas where there were hazards of foot injuries.

56. Respondent admits the facts alleged in the order, but challenges the amount of the proposed penalty.

Order No. 4643596

57. Inspector Nowell issued this ' 104(d)(2) order, alleging a violation of 30 C.F.R. ' 56.14101(a)(1), which provides:

> Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. This standard does not apply to equipment which is not originally equipped with brakes unless the manner in which the equipment is being operated requires the use of brakes for safe operation. This standard does not apply to rail equipment.

58. Inspector Nowell found that a fuel truck did not have

operable service brakes. The inspector performed a test on the brakes and found that when he pushed in on the brake pedal, it freely went all the way to the floorboard and he had to reach down and pull it back up. The truck was transported on a trailer to the mine site, driven off the truck and parked. When the company moved to another site, the truck was driven onto the trailer and transported to the new site.

Order 4643776

59. Inspector Lloyd Ferran issued this ' 104(d)(2) order, alleging a violation of 30 C.F.R. ' 56.12016, which 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 preventive devices shall be removed only by the persons who installed them or by authorized personnel.

60. Inspector Ferran observed an employee working on the stacker conveyor and found that the conveyor had not been de-energized and the power switch had not been locked out and tagged.

Citation No. 4643777

61. Inspector Nowell issued this ' 104(a) citation, alleging a violation of 30 C.F.R. ' 56.12001, which provides:

> Circuit breakers shall be protected against excessive overload by fuses or circuit breakers of the correct type and capacity.

62. A generator had an oversized fuse that did not protect two #8 cables from excessive overload and thereby becoming brittle, starting a fire, or causing electrical shock to employees.

63. Respondent admits the facts alleged, and does not challenge the proposed penalty.

Order No. 4643778

64. Inspector Lloyd Ferran issued this ' 104(d)(2) order, alleging a violation of 30 C.F.R. ' 56.12030, which provides:

> When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.

65. Inspector Ferran observed a deteriorated phase wire on the main 480-volt power cable that was feeding the portable distribution boxes. The electrical conductor was brittle and some of the insulation was falling off. The concentric piece was broken, allowing the cable to move in and out with a high risk that the phase wire would contact metal parts and cause an electrical shock.

66. Inspector Ferran found that the hazard was increased by the fact that there was snow on the ground.

67. Inspector Ferran talked with the owner, Bob Bak, about this condition. Mr. Bak told him that he was aware of the cited condition but he just had not had time to correct it. Mr Bak told the inspector that it had been this way for a few days.

Order No. 4643779

68. Inspector Lloyd Ferran issued this ' 104(d)(2) order, alleging a violation of 30 C.F.R. ' 56.12008, which provides:

> Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

69. The bushing on the main 480-volt power cable (which fed the portable distribution boxes) did not fit properly. This was the same power cable involved in Order No. 4643778. The inspector found that the concentric knock-out was broken and not secured to a point that would prevent movement of the cable and prevent contact with metal parts of the distribution box. The inspector talked with the owner, Bob Bak, and was told that Mr. Bak had seen this problem but had not had time to correct it. Mr. Bak told the inspector that it had been this way for a few days.

Citation No. 4643592

70. Inspector Nowell issued this ' 104(a) citation, alleging

a violation of ' 107(a) of the Mine Act, which forbids using equipment that is under an imminent danger withdrawal order.

71. In the December inspection, Inspector Nowell observed a 175B Michigan front-end loader parked with the motor running. The loader was under an outstanding ' 107(a) imminent danger withdrawal order issued on June 5, 1995.

72. The owner, Bob Bak, told the inspector that the loader was used only to move the stacker conveyor and was not being used to move sand and gravel. Mr. Bak told inspector Nowell that some abatement work had been done and the brakes still would not stop the loader. He also said that his mechanic quit and he needed the loader.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

I

GENERAL PRINCIPLES

Significant and Substantial Violation

The S&S terminology is taken from ' 104(d) of the Act, and refers to violations that are of Asuch nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard ....@ The Commission has defined an S&S violation as one that presents a Areasonable 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 (1981); and Mathies Coal Co., 6 FMSHRC 1 (1984).

The Commission has stated that an evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations without abatement of the violation. U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (1985). In Mathies Coal Co., supra, the Commission outlined four factors that must be present to establish an S&S violation:

> 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 **C** that is, a measure of danger to safety **C** 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.

See also Buck Creek Coal, Inc. v. Secretary of Labor, 861 F.2d 99, 103 (5th Cir. 1988) (approving the Mathies test).

The Mathies test refers only to a Asafety hazard,@ but Mathies does not purport to eliminate health hazards from S&S violations. For example, in Buffalo Crushed Stone, Inc., 19 FMSHRC ____ (February 18, 1997) (slip opinion p. 7), the Commission repeats its longstanding definition:

> A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

In United States Steel Mining Company, Inc., 18 FMSHRC 862 (1996), the Commission held that AThe term >reasonable likelihood= does not mean >more probable than not.=@ Its ruling is explained as follows:

> We agree with the judge that the third element of the Mathies test does not require the Secretary to prove it was Amore probable than not@ an injury would result. See 16 FMSHRC at 11900-93. The legislative history of the Mine Act indicates Congress did not intend that the most serious threat to miner health and safety, imminent danger, be defined in terms of Aa percentage of probability.@ S.Rep. No. 181, 95th cong., 1st Sess. 38 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 626 (1978). We do not find error in the judge=s conclusion that, because an S&S violation under the Mine Act is less serious than an imminent danger, it is also not to be defined in terms of percentage of probability. 16 FMSHRC at 1191. Furthermore, Commission precedent has not equated Areasonable likelihood@ with probability greater than 50 percent. A Amore probable than not@ standard would require the Secretary, in order to prove a violation is

> S&S, to prove it is likelier that not that the hazard at issue will result in a reasonably serious injury. We reject such a requirement.

The S&S definition is part of a special enforcement chain in ' 104(d) of the Act, but is not necessary to prove a Aserious violation.@ See, e.g., Consolidation Coal Company, 18 FMSHRC 1541, 1550 (1996).

Unwarrantable Violation

Like an S&S violation, the term Aunwarrantable@ violation derives from ' 104(d)(1) of the Act, which refers to Aan unwarrantable failure of [the] operator to comply with ... mandatory health or safety standards....@ The Commission has defined Aunwarrantable failure to comply@ as meaning Aaggravated conduct constituting more than ordinary negligence ...characterized by such conduct as >reckless disregard,= >intentional misconduct,= >indifference= or a >serious lack of reasonable care.=@ Emery Mining Corp., 9 FMSHRC 1997, 2004-04 (1987); Rochester & Pittsburgh Coal Corp., 13 FMSHRC 189, 193-94 (1991); Ambrosia Coal & Construction, 18 FMSHRC 1552, 1560 (1996).

Imminent Danger

Section 3(j) of the Mine Act defines Aimminent danger@ as Athe existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated....@

The Commission and the courts have held that, because an inspector must act quickly when he or she perceives a condition to be dangerous, an inspector=s findings and decision to issue an imminent danger order[1] should be supported unless there was an

[1]Section 107(a) of the Act provides for imminent danger orders, as follows:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn

abuse of discretion or authority. In Old Ben Coal Corp v. Interior Board of Mine Operations Appeals, 523 F.2d 25, the Court of Appeals for the Seventh Circuit stated:

> Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners= lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb. . . . We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority.

In Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2164 (1989), the Commission stated: ASince he must act immediately, an inspector must have considerable discretion in determining whether an imminent danger exists.@ This principle was re-affirmed by the Commission in Utah Power & Light Co., 13 FMSHRC 1617, 1627 (1991); and Island Creek Coal Company, 15 FMSHRC 339, 345 (1993).

The Commission held in Rochester & Pittsburgh, supra, that:

> ***[A]n imminent danger is not to be defined Ain terms of a percentage of probability that an accident will happen.@ *** Instead, the focus is on the Apotential of the risk to cause serious physical harm at any time@ [quoting the legislative history of the Mine Act]. The [Senate] Committee stated its intention to give inspectors Athe necessary authority for the taking of action to remove miners from risk.@

> from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 104 or the proposing of a penalty under section 110.

In Utah Power & Light, the Commission stated that Aimminent danger@ means the Ahazard to be protected against must be impending so as to require the immediate withdrawal of miners.@ 13 FMSHRC at 1621. AWhere an injury is likely to occur at any moment, and an abatement period, even of a brief duration, would expose miners to risk of death or serious injury, the immediate withdrawal of miners is required.@ 13 FMSHRC 15 1622.

In Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals, 491 F.2d 277, 278 (4th cir. 1974), the Court stated:

> ***[T]he Secretary determined, and we think correctly, that Aan imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.@

Civil Penalties

Under ' 110(i) of the Act, the Commission and its judges assess all civil penalties under the Act. The Commission or presiding judge is not bound by the penalty proposed by the Secretary. Penalties are assessed de novo based upon six criteria provided in ' 110(i): (1) the operator=s history of previous violations, (2) the appropriateness of the penalty to the size of the business, (3) the operator=s negligence, (4) the effect on the operator=s ability to continue in business, (5) the gravity of the violation, and (6) the operator=s good faith in abatement of the violation. Secretary of Labor v. Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff=d Sellersburg Stone Co. v. FMSHRC, 736 f.2d 1147 (7th Cir. 1984).

In evaluating the fourth factor, Ain the absence of proof that the imposition of authorized penalties would adversely affect [an operator=s ability to continue in business], it is presumed that no such adverse effect would occur.@ Spurlock Mining Company, Inc., 16 FMSHRC 697, 700 (1994), quoting Sellersburg Stone Co., 5 FMSHRC 287. The burden of proof is on the operator. If an adverse effect is demonstrated, a reduction in the penalty may be warranted. However, Athe penalties may not be eliminated . . ., because the Mine Act requires that a penalty be assessed for each violation.@ Spurlock Mining, supra, 16 FMSHRC at 699, citing 30 U.S.C. ' 820(a); Tazco, Inc., 3 FMSHRC 1895, 1897 (1981).

Tax returns and financial statements showing a loss or negative net worth are, by themselves, not sufficient to reduce penalties because they are not indicative of the ability continue in business. Spurlock Mining, Inc., 16 FMSHRC at 700, citing Peggs Run Coal Co., 3 IBMA 404, 413-414 (1974).

The purpose of civil penalties is to induce the operator and others similarly situated to comply with the Act and safety and health regulations. To be successful in the objective of inducing effective and meaningful compliance, Aa penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act=s requirements than it is to pay the penalties assessed and continue to operate while not in compliance.@ S. Rep. No. 181, 95th Cong., 1st Sess. 40-41 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legistative History of the Federal Mine Safety and Health Act of 1977, at 628-29 (1978).

The ability to continue in business is only one of six criteria. Since the other criteria must also be considered, it would be inappropriate to rule that penalties should be nominal or reduced by a set percentage whenever an operator establishes that the proposed penalties would have an adverse effect on its ability to continue in business. Penalties must still be assessed for each violation, with a deterrent purpose. For example, if an operator is financially unsound and cannot pay its debts and taxes, ' 110(i) still does not exempt it from penalties Asufficient to make it more economical ... to comply with the Act=s requirements than it is to pay the penalties assessed and continue to operate while not in compliance.@ S. Rep. supra.

II

RULINGS ON CITATIONS AND ORDERS

Combined Order/Citation No. 4643116-- Defective Brakes on Front-End Loader

I find an S&S violation of ' 56.1401(a)(1) due to high negligence. I also find that the facts warranted the inspector=s issuance of an imminent danger order.

Respondent contends that ' 56.14101(b)(2) requires a detailed brake test before a violation may be charged under ' 56.14101(a)(1) and that the inspector failed to comply with this requirement.

I find that Inspector Nowell conducted a reasonable brake

test before issuing the order/citation. He had the foreman drive the loader on fairly level ground and apply the brakes. The brakes did not stop the vehicle, which coasted until it came to a gradual stop. This test confirmed the inspector=s opinion that the brakes were unsafe. He formed that opinion when he first saw the loader in operation, because the operator, who was the foreman, used the bucket to try to stop the vehicle and it still did not stop but coasted to a gradual stop.

The brake test clearly showed that the brakes were not capable of holding the loader on the highest incline traveled during the normal workday. It was not necessary to make a more detailed test under ' (b)(2) in order to cite a violation of ' (a)(1) of the regulation.

I find that the facts sustain the inspector=s issuance of a ' 107(a) imminent danger order. Operating the front-end loader with defective brakes in a high-noise area where an employee worked on foot and another vehicle operated, and operating it on a steep ramp, showed a reasonable basis for the inspector=s finding that the hazard Acould reasonably be expected to cause death or serious physical harm before it [could] be abated@ (' 107(a)).

Order No. 4643209--Inoperable Backup Alarm on Front-end Loader

I find an S&S violation of ' 56.14132(a) due to an unwarrantable failure to comply with the standard.

Bob Bak testified that Awe had a problem with the switch and it was on order@ (Tr. 5). The foreman told the inspector that the backup alarm had been defective Aat least five months@ and that Bob Bak knew about it. Tr. 46. The extensive period of this violation -- at least five months **C** shows a Aserious lack of reasonable care@ constituting an unwarrantable failure to comply with the safety standard. Emery Mining Corporation, 9 FMSHRC 1997, 2003-04 (1987).

Operating a front-end loader without a backup alarm in a high-noise area where an employee worked on foot and another vehicle operated constituted a significant and substantial violation. The conditions were reasonably likely to cause a serious injury.

Order No. 4643211 -- Failure to Provide Suitable Seat Belt on Front-end Loader

I find an S&S violation of ' 56.14100(c) due to an

unwarrantable failure to comply with the standard.

The foreman, who was operating the front-end loader, knew that the exposed metal edges of the seat frame prevented proper use of the seat belt. Because of this condition, Respondent failed to provide a suitable seat belt and was in violation of the safety standard. The foreman knew about the condition and stated that the owner, Bob Bak, also knew about it. The condition developed over a long period. Failure to correct it showed a serious lack of reasonable care and therefore an unwarrantable failure to comply with the standard.

The vehicle traveled over uneven to rough terrain, up a steep ramp, and operated in the same area where an employee worked on foot and another vehicle operated. In the event of a collision or an emergency requiring the front-end loader to swerve or brake suddenly, the failure to provide a suitable seat belt was reasonably likely to contribute significantly and substantially to a serious injury. The violation was therefore S&S.

Order No. 4643214 – Inoperable Parking Brake on Front-end Loader

I find an S&S violation of ' 56.1401(a)(1) due to an unwarrantable failure to comply with the standard.

The same front-end loader with defective service brakes (cited in Order/Citation No. 4643116) had an inoperable parking brake. The same rulings as to the service brake violation, above, apply here. The parking brake violation was S&S and due to an unwarrantable failure to comply with the standard. Had the emergency brake been working properly, it may have prevented an accident or reduced its impact if the operator needed to stop the vehicle quickly. The violation was reasonably likely to contribute significantly and substantially to a serious accident and injury. The foreman and owner had longstanding knowledge of this uncorrected violation, which was due to a serious lack of reasonable care.

Citation No. 4643204 – No Communication System at Mine

I find a non-S&S but serious violation of ' 56.18013 due to ordinary negligence.

Bob Bak testified that the mine was within Atwo miles of town, and I didn=t feel there was a problem@ (Tr. 7). However, the safety standard requires a Asuitable communication system at the mine to obtain assistance in the event of an emergency.@ There was no phone line, cellular phone, or business band radio on the property. The citation noted Respondent=s contention that Aan employee on site does have a CB radio,@ but concluded Athis cannot be relied on@ and Athere is no base station withing range.@ The violation was abated by installation of a cellular phone in the foreman=s car. The phone was found to be operational.

I find that this was a clear violation that could readily have been avoided, as shown by the action taken to abate it.

Although the inspector marked this violation as non-S&S on the citation form, I find this to be a serious violation. Time is often critical in a medical emergency. Reducing an injured employee=s chance of receiving prompt medical attention is a serious violation.

Citation No. 4643207 - No Cover Plates on Electrical Outlet and Breaker Box

I find an S&S violation of ' 56.13031 due to ordinary negligence.

Respondent does not dispute this violation.

Without cover plates on the 440-volt outlet and breaker box, the wire connections, fixtures, and fuses were exposed to rain, dirt, and dust and could have been inadvertently contacted by someone. I find that the violation was reasonably likely to result in a serious injury. The violation was therefore S&S.

Citation No. 4643216 - No Guard Over Moving Machine Parts

I find an S&S violation of ' 56.14107(a) due to ordinary negligence.

Respondent contends that a wire screen served as a barricade to prevent contact with the belt and chain drive beneath the trap feed. However, the inspector observed and a photograph (Exh G-11) plainly shows that the screen was almost covered up with overfill material and was not effective as a barricade. The exposed moving machine parts presented a reasonable likelihood of resulting in a serious injury. The

violation was S&S, and could have been prevented by the exercise of reasonable care. It was therefore due to ordinary negligence.

Citation No. 4643210 - Inoperable Windshield Wiper and Missing Wiper Blade

I find an S&S violation of ' 56.14100(d) due to ordinary negligence.

At the hearing, Bob Bak stated that he Abought [the loader] used, the windshield wipers did not work when we got it, we do not work in the rain, if there is snow, so there was no need for it [the wiper]@ (Tr. 8). The foreman told the inspector that Athe loader was bought that way and they didn=t think anything of the defect@ (Tr. 74). The citation additionally alleges, and the inspector testified, that the loader also had a badly damaged windshield, which impaired operator visibility and was more hazardous when it rained. It was raining on the day of the inspection. An employee was working on foot nearby and another vehicle was operating in the area. There was a reasonable likelihood that this violation would result in serious injury.

Citation No. 4643212 C Failure to Guard Radiator Blades

I find a non-S&S violation ' 56.14107(a) due to ordinary negligence.

The inspector testified that the front-end loader was manufactured with a shroud to guard the radiator blades but the shroud was missing. He found a non-S&S violation, stating that injury was unlikely because Athere would really be no reason for somebody to work in the area, be around the fan blade when the loader is running@ (Tr. 76). The radiator was elevated, about the head level of an average person. Injury was not likely, but a guard was required.

Citation No. 4643213 C Front-End Loader Lights Not Operable

I find a non-S&S but serious violation of ' 56.14100(b) due to ordinary negligence.

Respondent admits the facts alleged.

Bob Bak testified that Athe lights were not operable when I bought [the front-end loader], but we don=t work at night, so there was no need for lights@ (Tr. 10).

This is the same front-end loader that had defective service brakes, an inoperable parking brake, inoperable windshield wipers, a cracked windshield, and an inoperable backup alarm. The inspector testified that it rained on the day of the inspection.

The inspector found that, assuming the vehicle operated only during daylight hours, the violation was non-S&S. I find that this was still a serious violation. There are various conditions that may render headlights an important safety factor during Adaylight@ hours, e.g., sudden or heavy rain, fog or dust. In such conditions, headlights are an important safety protection to show the location and movement of vehicles.

Citation No. 4643120 C **Failure to Wear Suitable Protective Footwear**

I find an S&S violation of ' 56.15003 due to ordinary negligence.

Respondent does not dispute this violation, but claims financial hardship as to the amount of the proposed civil penalty.

Citation No. 4643203 C **Lack of Toilet Facilities**

I find a non-S&S but serious violation of ' 56.13028 due to ordinary negligence.

Respondent does not dispute this violation, but challenges the amount of the proposed civil penalty.

Citation No. 4643205 C **Equipment Grounding Systems Not Tested and Recorded**

I find an non-S&S but serious violation of ' 56.13028 due to ordinary negligence.

Respondent does not dispute this violation, but disputes the amount of the proposed civil penalty.

Citation No. 4643118-- Inoperable Backup Alarm on Front-end Loader

I find an S&S violation ' 56.14132(a) due to an unwarrantable failure to comply with the standard.

The loader operator told the inspector that the backup alarm

had not worked for about three weeks and that he had told the owner, Bob Bak, of this defect.

Bob Bak testified that a replacement backup alarm switch Ahad been on order, it had just been back ordered ... and I guess I just kind of lost track of it (Tr. 20).

I find that the operation of the loader without an operable backup alarm, the period of the violation, and the failure to take the loader out of service rather than operate it in violation of the standard, showed a serious lack of reasonable care.

The loader operated in a high-noise area where another vehicle operated and an employee worked on foot. These conditions presented a reasonable likelihood of a serious injury.

Order No. 4643208--
Cracked Windshield on Front-end Loader

I find an S&S violation of ' 56.14103(b) due to an unwarrantable failure to comply with the standard.

The inspector observed that a front-end loader operated by the foreman had a badly cracked windshield that obscured the operator=s visibility. He also found that the hazard was increased when it rained. It rained on the day of the inspection.

The foreman told the inspector that the window had been cracked for about five months and he had told the owner, Bob Bak, about it.

Bob Bak testified that there were cracks in the windshield but he disagreed that they obscured visibility. I find that the cracks did obscure visibility and were a hazard.

The long period of the violation shows a serious lack of reasonable care.

The loader operated in an area where another vehicle operated and an employee worked on foot. The violation was reasonably likely to result in a serious injury.

Citation No. 4643458 C
Operating Mine in Violation of
' 104(b) Closure Order

I find a non-S&S but very serious violation of ' 104(b) of the Act due to high negligence.

Respondent was cited on June 5, 1995, for failing to provide toilet facilities at the mine. After a delay of over two months without abatement, the inspector issued a ' 104(b) closure order on September 11, 1995. The order prohibited any work at the mine until the earlier citation was terminated based upon a finding by MSHA that the violation had been abated.

The next day, he returned to the mine and found that an employee was operating a bulldozer at the mine, in clear violation of the closure order. The owner knew the mine was operating despite the order. He stated that he had ordered a toilet and it had not arrived. After the inspector issued Citation No. 4643458, the owner promptly bought a toilet, that day, and installed it the next morning in order to abate the violation and have the closure order terminated.

Order No. 4643593 C **Hard Hat Not Worn**

I find an S&S violation of ' 56.15002 due to an unwarrantable failure to comply with the safety standard.

Respondent does not dispute this violation, but challenges the amount of the proposed civil penalty. The owner was not wearing a hard hat in a location where one was required.

Order No. 4643594 C **Failure to Wear Suitable Protective Footwear**

I find an S&S violation of ' 56.15003 due to an unwarrantable failure to comply with the safety standard.

Respondent does not dispute this violation, but challenges the amount of the proposed civil penalty.

The violation was committed on December 21, 1995, by the owner, Bob Bak, who had been cited for a violation of the same safety standard on June 5, 1995. His conduct showed a serious lack of reasonable care.

Order No. 4643596 C **Inoperable Brakes on Fuel Truck**

I find an S&S violation of ' 56.14101(a)(1) due to an unwarrantable failure to comply with the standard.

Respondent contends that a violation was not proved because

there was Ano testimony as to the weight of the fuel truck, its stopping distance on the day of the inspection, or that anyone had been injured as a result of the alleged condition of these brakes.@ Respondent=s Brief, p.12. I credit the inspector=s testimony that he Apushed in on the brake pedal, the brake pedal freely went all the way to the floorboard and as a matter of fact I had to reach down and pull it back up@ (Tr. 90). I find that the brakes were inoperable. Where a basic brake test shows the brakes are inoperable, there is no necessity to perform a more detailed brake test under ' 56.14101(b)(2) in order to prove a violation of ' 56.14101(a)(1).

Bob Bak testified that the fuel truck was transported on a lowboy trailer to the mine site, driven off the lowboy, parked for fuel storage, and was not moved until the company moved to a new site. It was then driven onto the lowboy and transported to the new site. Inspector Nowell testified that although the truck was driven a minimal distance, the lack of brakes in driving onto and off the lowboy trailer was a safety hazard. Driving a truck without brakes onto and off a trailer could cause the driver to lose control of the vehicle and have an accident. The lack of brakes had a reasonable likelihood of contributing significantly and substantially to a serious injury.

Respondent=s conduct in having an employee drive a fuel truck without operable brakes onto and off a trailer showed a serious lack of reasonable care and therefore an unwarrantable failure to comply with the standard.

Order No. 4643776 C Failure to Deenergize and Lock Out Power Circuit to Conveyor

I find an S&S violation of ' 56.12016 due to an unwarrantable failure to comply with the standard.

Inspector Ferran observed an employee working on the stacker conveyor when the conveyor was not deenergized and the power switch had not been locked out and tagged.

The owner, Bob Bak, testified that a padlock to lock out the power switch was available Aby the parts trailer@ and the crusher operator neglected to use it. Tr. 14-15. However, the inspector found no lock in the area of the power switch and Bob Bak was assisting the employee who was working on the conveyor. I find this violation was S&S. Working on a conveyor that had not been deenergized, locked out and tagged was a dangerous practice that presented a reasonable likelihood of serious injury.

I also find that the violation was due to an unwarrantable failure to comply with the safety standard. The owner was present and assisting the employee who was working on the conveyor. The failure to deenergize the conveyor and lock out and tag its power switch showed a serious lack of reasonable care.

Citation No. 4643777 C Failure to Protect Power Circuit from Overload

I find a non-S&S but serious violation of ' 56.12001 due to ordinary negligence.

Respondent does not dispute this violation.

I find that the violation was serious, although non-S&S. The electrical inspector testified that if there were a phase fault the No. 8 cables would not be protected by the required fuse. If the faulted circuit Apulled 190 amps for a long period . . . it would have deteriorated the cable@ and an employee could have been electrocuted with 480 volts. Tr. 149-150; Exh. G-25.

Order No. 4643778 C Inadequate Insulation of Power Circuit

I find an S&S violation of ' 56.12030 due to an unwarrantable failure to comply with the standard.

Inspector Ferrar, an electrical inspector, found that a main 480-volt phase wire feeding the distribution boxes was deteriorated and the concentric insulation piece was broken, allowing the deteriorated cable to move in and out with a high risk of contacting metal parts of the equipment. He pointed out the hazard to the owner, Bob Bak, who told him that he was aware of the problem, that it had been that way for a few days but that he just had not had time to correct it. Tr. 137. Exh G-26. The owner=s knowledge of the violation and failure to correct it demonstrated a serious lack of reasonable care.

Order No. 4643779 C Inadequate Insulation of Power Cable

I find an S&S violation of ' 56.12008 due to an unwarrantable failure to comply with the standard.

Respondent does not dispute this charge but challenges the amount of the proposed civil penalty.

The bushing on the main 480-volt power cable did not fit properly and the concentric knock-out was broken, permitting the cable to move with a high risk of coming into contact with the metal part of the distribution box. Bob Bak told the inspector that he knew about the condition but just had not had the time to correct it. The electrical inspector testified that there was a risk that the power cable would be pulled out and come into contact with the metal frame of the distribution box and electrocute anyone touching it. The owner=s direct knowledge of the violative condition and failure to have it corrected shows a serious lack of reasonable case.

Citation No. 4643592 C Operating Front-end Loader in violation of an Imminent Danger Withdrawal Order

I find an S&S and very serious violation of ' 107(a) of the Act due to high negligence.

On December 21, 1995, Inspector Nowell observed a front-end loader parked with its motor running. The loader was under an imminent danger withdrawal issued on June 5, 1995. The owner, Bob Bak, told the inspector that they only used the loader to move the stacker conveyor and were not using it to move sand and gravel. He said the mechanic had quit and the company needed the loader. The brakes on the loader had not been repaired.

The imminent danger order prohibited use of the loader until the order was terminated based on a finding by MSHA that the brakes had been repaired. The order required Respondent to notify MSHA when the repairs were completed so that an inspector could test the brakes and determine whether the vehicle was ready to be returned to service. The company had not contacted MSHA about this vehicle.

Respondent=s violation of the imminent danger order was deliberate and is a very serious violation. Of approximately 800 federal safety and health inspections that Inspector Carsten had conducted in his 20 years experience, the two citations against Respondent for disregarding withdrawal orders were his first encounter of this type conduct by an operator.

CONCLUSIONS OF LAW

1. Respondent=s mine operations are subject to the Act.

2. Respondent violated the cited sections of the Act and regulations as found above.

CIVIL PENALTIES

I

Respondent=s Claim that the Proposed Penalties Will Adversely Affect Its Ability to Continue in Business

Respondent submitted a December 31, 1995, balance sheet for Bob Bak Construction and Federal tax returns of Robert A. Bak and Elsie J. Bak for tax years 1993, 1994, and 1995, in support of its contention that the proposed penalties will adversely affect its ability to continue in business.

These documents indicate that Bob Bak Construction is a sole proprietorship owned and operated by Robert A. Bak. Bak Construction=s reported income progressed from a loss of $54,999 in 1993, to income of $65,147 in 1994, and income of $83,020 in 1995.

The adjusted gross income in the Baks= joint tax returns shows a loss of $339,509 in tax year 1993, a loss of $276,664 in tax year 1994 and a loss $192,059 in tax year 1995. The Baks= substantial progress in reducing the carryover loss corresponds with the pattern of increased income of the business for those years.

The business balance sheet as of December 31, 1995, shows a minus net worth of $124,127. However, the evidence indicates that Bak Construction is an ongoing business with increasing net business income and that the Baks are making substantial progress in reducing their carryover loss. No net worth statement has been submitted for the Baks as individuals.

I find that Bak Construction has not proved by a preponderance of the evidence that the proposed penalties would have an adverse affect on its ability to continue in business. However, in light of its financial condition, amortizing the payment of penalties is appropriate.

II

Findings as to the Six Statutory Criteria

Size of Operator

Respondent is a small-sized operator.

History of Violations

There are three focus points here: The history before the June 1995 inspection, the history before the September 1995 inspection, and the history before the December 1995 inspection.

The history before the June 1995 inspection is presumed to be neutral, since there is no evidence as to this period.

The history before the September 1995 inspection includes the June 1995 violations. This history is poor. There were 15 citations and orders in June 1995. Of the 15 violations found in June, six were due to high negligence or an unwarrantable failure to comply, 10 were S&S violations and 1 contributed to an imminent danger. This history is a negative factor regarding penalties for violations after the June inspection.

The history before the December 1995 inspection includes the June 1995 violations and the violation found in the September inspection. The September violation was a deliberate violation of a mine closure order, which adds to the poor history of the June violations. This is an increased negative factor regarding penalties for violations after the September inspection.

Negligence

Of the 24 violations, 14 were due to high negligence or an unwarrantable failure to comply and 10 were due to ordinary negligence.

Gravity

Of the 24 violations, 17 were S&S violations and 1 contributed to an imminent danger. Of the 7 non-S&S violations, 6 were serious violations.

Efforts to Achieve Compliance After Notification of a Violation

After notification of the violations, Respondent made a reasonable effort to achieve compliance with the exception of three violations. Those were the toilet facilities violation and the two violations caused by disregarding a closure order.

III

Assessment of Civil Penalty for Each Violation

I have considered the findings as to the six statutory criteria, above, in relation to each violation and the individual findings of fact and discussion as to each violation, above, in assessing a civil penalty for each violation. The following penalties are assessed:

Order or Citation	Civil Penalty
4643116	$1,000
4643209	1,000
4643211	500
4643207	235
4643214	500
4643204	50
4643207	235
4643216	189
4643210	189
4643212	50
4643213	50
4643120	412
4643203	382
4643205	724
4643118	1,000
4643208	1,000
4643458	1,000
4643593	800
4643594	800
4643596	500
4643776	1,200
4643777	50
4643778	1,200
4643779	1,200
4643592	2,000[2]

[2]In the case of Citation No. 4643592, the penalty has been raised to $2,000 from the $1,000 proposed by the Secretary. In increasing the penalty, I considered that this was a second violation disregarding a closure or withdrawal order and the order violated was an imminent danger order. The first violation was on September 12, 1995, when the operator disregarded a ' 104(b) closure order. The September citation put the operator on clear notice that closure orders and withdrawal orders must not be violated. The second violation occurred in December 1995, when an imminent danger order was violated. Violations of withdrawal orders and mine closure orders are very serious and warrant a strong deterrent penalty.

Total	**$16,266**

Considering Respondent=s financial condition, I find that a schedule of 12 monthly payments to pay the total civil penalties is appropriate.

ORDER

WHEREFORE IT IS ORDERED that:

1. Respondent shall pay total civil penalties of $16,266 in 12 monthly payments of $1,355 each, due on May 1, 1997, and the 1st day of each successive month until the total amount is paid.

2. If Respondent fails to make any monthly payment when due, the total remaining civil penalties shall become due the following day, with interest accruing from that date until the full amount is paid. The applicable interest rates will be those announced by the Executive Secretary of the Commission.

William Fauver
Administrative Law Judge

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