# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

June 26, 2006

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 2000-294-M |
| Petitioner | : | A.C. No. 03-00257-05501 XSC |
| | : | |
| v. | : | Docket No. CENT 2003-26-M |
| | : | A.C. No. 03-00257-05505 XSC |
| PHILIP ENVIRONMENTAL SERVICES, | : | |
| Respondent | : | Arkansas Operations Mill |

## DECISION[1]

Appearances: Michael D. Schoen, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner; Steven R. McCown, Esq., Littler Mendelson, Dallas, Texas, for the Respondent;

Before: Judge Feldman

[1] Disposition of these cases was delayed by the October 2001 anthrax attack on the U.S. Postal Service. Docket No. CENT 2000-294-M was stayed on January 19, 2001, for consolidation with any citations that may be issued upon completion of The Mine Safety and Health Administration's (MSHA's) accident investigation of a January 21, 2000, fatal demolition accident. The accident investigation resulted in the issuance of Citation No. 7894001. The Secretary of Labor's (the Secretary's) proposed $15,000.00 civil penalty for Citation No. 7894001 was received by Philip Environmental Services (Philip) on September 12, 2001. Philip mailed its notice of contest to MSHA on October 1, 2001, but it apparently was never received because of the anthrax incident. Consequently, the proposed penalty assessment was deemed a final order of the Commission. 30 U.S.C. § 815(a). On March 19, 2004, the Commission remanded this matter to the Chief Administrative Law Judge (CALJ) to determine if Philip's contest should be reopened. The CALJ reopened this matter and assigned the case to me on August 16, 2004. After completion of discovery, these matters were scheduled for hearing on July 19, 2005. However, due to the retirement and unavailability of Philip's demolition expert, these matters were continued to enable Philip to retain a new expert. Neither Philip nor the Secretary allege prejudice as a result of this delay.

These civil penalty proceedings concern petitions for assessment of civil penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor against the respondent, Philip Environmental Services. Philip has stipulated that it is "an operator" subject to the jurisdiction of the Mine Act as a contractor performing services at the Arkansas Operations Mill, a surface alumina mill owned by Alcoa World Alumina (Alcoa). (Tr. 18). 30 U.S.C. § 802(d).

The petition in Docket No. CENT 2000-294-M seeks to impose a total civil penalty of $90.00 for Citation No. 7884114 for an alleged violation of the mandatory safety standard in 30 C.F.R § 56.11001. This safety standard requires that a safe means of access must be provided to all working places. The citation was issued because there were puddles of caustic material located on the ground outside the south side of the digestion building. Subsequent to the hearing, on March 2, 2006, the parties filed a Joint Motion to Approve Settlement wherein the Secretary agreed to vacate Citation No. 7884114. The parties' settlement motion **IS GRANTED** and Docket No. CENT 2000-294-M shall be dismissed.

The remaining issue for resolution is the petition in Docket No. CENT 2003-26-M that seeks to impose a $15,000.00 civil penalty for Citation No. 7894001. This citation alleges a significant and substantial (S&S) violation of the mandatory safety standard in 30 C.F.R § 56.16010 that requires that drop areas are cleared of personnel before material is dropped from an overhead elevation.[2] The citation was issued to Philip as a result of its performance of demolition work at Alcoa's alumina facility. The citation was issued following a January 21, 2000, accident that occurred when David Gauthier, a Philip employee, was fatally injured when he was struck by a dust collector that fell from the seventh floor of a building undergoing demolition.

The hearing was conducted on February 7, 2006, in Little Rock, Arkansas. The parties' post-hearing briefs and replies have been considered.

## I. Statement of the Case

Section 56.16010 of the Secretary's regulations provides:

> To protect personnel, *material shall not be dropped* from an overhead elevation *until the drop area is first cleared of personnel* and the area is then either guarded or a suitable warning is given.

(Emphasis added).

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[2] A violation is properly designated as significant and substantial if there is a reasonable likelihood that the hazard contributed to by the violation will result in a serious injury. *Nat'l. Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

The dimensions of the "drop zone" are not defined in the regulation. Eyewitness accounts reflect that, at the time of the drop, the victim was standing to the side and in front of the building being demolished. Specifically, the victim was standing approximately 29 ½ feet to the side of the building, and 76 ½ feet in front of the building. (*See* Gov. Ex. 7; Gov. Ex. 38).[3] The drop resulted in the dust collector impacting the ground, causing a plume of dust that totally obscured visibility. Attempting to flee to safety, the victim ran from his position in a southeasterly direction towards the building and into the path of the dust collector. He was struck by the dust collector at a location 120 feet from the base of the southwest corner of the building. (*See* App. I).

The central issue is whether the victim was standing within the "drop area" as contemplated by section 56.16010 of the Secretary's regulations *immediately prior to the drop.* As discussed below, because the dust collector impacted the ground in close proximity to where the victim was standing, the Secretary has demonstrated that the drop zone was not cleared of personnel *before* demolition began. Consequently, Citation No. 7894001 shall be affirmed.

## II. Findings of Fact

The essential facts are not in dispute. The Arkansas Operations Mill is located in Bauxite, Arkansas. The mill is situated in close proximity to Alcoa's aluminum mine. (Tr. 30). Variations of four products were produced at the mill. The products were hydrate chemicals, calcined alumina, calcium aluminate cement and tubular. Hydrate chemicals are manufactured via a pressure digestion process. The Activated Alumina Division, that included the refinery and clarification areas, ceased operations in 1993.

Philip was hired as an independent contractor to demolish the abandoned portion of the plant and began its on-site work in August 1999. On the day of the accident on January 21, 2000, Philip was in the process of demolishing Building 70, a 103-foot tall, seven story steel bulk loading structure. (Gov. Ex. 2, p.1; Gov. Ex. 16, p.1). Philip employees were using a "cut and drop" or "cut and pull" method of demolition, a commonly used procedure in the demolition industry. (Gov. Ex. 2, p.2; Tr. 202-03). Using this procedure, after determining the direction of removal, sections of the building structure were pre-cut using an oxygen/acetylene torch. Complete torch cuts were made on all but one of the steel structural members of the building, thus creating a hinge point or "sticker" on the support. (Gov't. Ex. 2, p.2; Gov. Ex. 16, p.2; Tr. 46, 48-9).

[3] Gov. Ex. 7 and Gov. Ex. 38 have been appended to this decision and will be referred to hereafter as Appendix I and II, respectively. Gov. Ex. 7 is a diagram of the site conditions on January 21, 2000, depicting Philip's designation of the location of its employees and MSHA's measurements. Gov. Ex. 38 is Inspector Graham's accident investigation field notes containing measurements taken at the accident site. (Tr. 175).

Wire cable was then attached to the cut section of the building and connected to the boom of a Caterpillar L-350 excavator. The operator of the excavator, positioned in an operator's compartment, used the controls to maneuver the boom to pull down the partially severed structural portion. After a pull by the excavator operator, the hinge point typically causes the pre-cut section to rotate, shear the "sticker," and topple to the ground. (Gov. Ex. 2, pp.2-3; Gov. Ex. 16, p.2; Gov. Ex. 26). Once the section is on the ground, the excavator operator, using an attached shearer, reduces the fallen debris to manageable-size pieces which are then removed from the area. (Gov. Ex. 2, p.3).

At the time of the accident, the excavator was positioned approximately 80 feet from the base of Building 70. (Gov. Ex. 2, p.3). The roof of Building 70 over the seventh floor had already been removed using the cut and pull method. (Gov. Ex. 2, p.3; Gov. Ex. 16, p.1; Tr. 54). The pre-cut section of the seventh floor to be "cut and pulled" was approximately 80 feet above ground level. The section of the floor measured approximately 20 feet wide, 24 feet in depth and the seventh floor was 12 feet in height. (Gov. Ex. 2, pp.2-3).

Positioned in the seventh floor was a Nor-blo 120-AS Series 39 dust-bin collector (dust bin) also known as a bag house. The dust bin was approximately 9 feet wide, 8 feet in length and 10 feet in height. (Tr. 75). A discharge cone was attached beneath the dust bin and a supply duct was attached to the top. The total height of the dust bin assembly was approximately 22 feet. (Gov. Ex. 2, p.3; Tr. 75, 222-24). The dust bin was positioned in an opening in the seventh floor. Approximately 8 feet of the dust bin protruded into the ceiling space of the sixth floor, and 10 feet of the dust bin was in the seventh floor space. (Gov. Ex. 2, p.3; Gov. Ex. 16, p.2; Gov. Exs. 21-23; Tr. 54-55, 294).

The dust bin was partially full and weighed approximately 5,000 pounds at the time of the accident. (Gov. Ex. 2, p.3; Tr. 75). Prior to the pull that resulted in the accident, the dust bin was not secured to the seventh floor because the mounting bolts had been cut off. (Gov. Ex. 2, p.3; Gov. Exs. 16, 17, 21; Resp. Ex. 2; Tr. 66, 70-1, 143, 282). It was Philip's standard operating procedure to first remove the bolts. (Resp. Ex. 2).

The Building 70 drop area was created by establishing an "exclusionary zone" that was demarcated by orange mesh which was placed behind the excavator. (Gov. Ex. 16, p.2, Gov. Exs. 22, 23, 25; Tr. 211-12). The purpose of the mesh was to define the general parameters of the drop zone and to warn personnel not to go into the drop zone. (Tr. 211, 275; Gov. Exs. 22, 23).

Chris Croniser, Philip's shift superintendent, was supervising the demolition activity on Building 70 on the day of the accident. Croniser's crew members were torch burners Bryan Hvizdak, Ramone Lopez and Ernesto Rosales. (Gov. Ex. 2, p.1; Gov. Ex. 16, p.2; Tr. 111).

At the time of the accident David Gauthier had been employed by Philip as a shift superintendent for approximately two years. Gauthier had approximately 30 years experience in the demolition industry. (Gov. Ex. 2). Earlier in the day on January 21, 2000, Gauthier had been working at another building located at the mine site. Gauthier joined Croniser's crew at Building 70 at approximately 3:45 p.m. (Gov. Ex. 2, p.1). Although Gauthier was also a shift superintendent, he apparently was working under the direction of Croniser at all times relevant to the accident. (Gov. Ex. 16).

To begin demolition of the seventh floor, Croniser directed Gauthier to operate the excavator to effectuate the pull while Hvizdak and Lopez moved to safety adjacent to the exclusionary zone to the southwest of the building, and Rosales moved to safety adjacent to the exclusionary zone to the southeast of the building. (*See* App. I). Croniser removed himself to a point approximately 100 feet to the west of the building. (Gov. Ex. 16). Gauthier mounted the excavator and began pulling on the structure with the cable by lowering the boom while simultaneously backing up the excavator. (Gov. Ex. 16, p.2). The pre-cut section of the seventh floor became stuck, or hung-up, compressing and listing downward at a 20 to 25 degree angle, rather than hinging and falling as intended. (Gov. Ex. 16, p.2; Gov. Ex. 20; Tr. 57, 301-02).

The dust bin also listed forward along with the canted pre-cut section of the seventh floor. The center of gravity of the dust bin was on the seventh floor. (Gov. Ex 2, p.3). Because the mounting bolts had been disconnected from the seventh floor, it was reasonably foreseeable that the dust bin could become dislodged from the seventh floor as demolition proceeded. (Tr. 309-10). In such an event, it was difficult to predict the path of the dust bin or its ultimate resting location. (Tr. 311-16; 319-21).

After the seventh floor section hung, Gauthier stopped attempting to pull and Croniser approached the cab of the excavator. After a brief discussion, Croniser and Gauthier switched places with Croniser assuming his position in the operator's compartment. Gauthier positioned himself 82 feet southwest of the southwest edge of the base of Building 70. (*See* App. I; Gov. Ex. 16, p.2). At this location Gauthier was 29 feet 6 inches due west of the point that was approximately 76 feet 6 inches south of the southwest corner of the building. (*See* App. II).

After getting the all clear sign from Gauthier, Croniser repositioned the excavator approximately 10 feet to the east of the position from where Gauthier previously had attempted the pull. (Gov Ex. 16, p.2). Croniser raised the excavator boom in an upward position causing the back of the pre-cut section to pull up slightly before stopping. (Gov Ex. 16, p.2). At that moment, the dust bin toppled over and rolled off of the seventh floor striking the taut steel pull cable. The dust bin continued down the cable as Croniser moved the excavator boom causing the dust bin to "flip" off of the cable in a southwesterly direction striking the ground at a point approximately 17 feet west of the building and 64 feet from the southwest corner of the structure. (*See* App. II; Tr. 76, 175). Striking the cable increased the dust bin's momentum as it hit the

ground and continued to roll past the side of the excavator. (Gov Ex. 16, p.2). The dust bin continued its rapid forward movement impacting the ground at a second point approximately 17 feet west of the building and 76 feet from the southwest corner of the building. (*See* App. II; Tr. 175). A dust cloud was created when the dust bin impacted the ground causing a complete lack of visibility. (Gov Ex. 16, p.2).

The initial direction of the dust bin momentum was towards Gauthier as demonstrated by the points of impact that were in close proximity to where Gauthier was initially standing. (App. II). Specifically, the second point of impact was 17 feet west of the building, only approximately 12½ feet from Gauthier's original position that was 29½ feet west of the building. (App. II; Tr. 175).

To flee from the approaching dust bin, witnesses saw Gauthier turn and run in a southeasterly direction. (App. I). Had Gauthier remained in his original position, he would not have been struck by the dust bin. (Gov Ex. 16, p.2). However, it is not difficult to imagine why Gauthier panicked and ran from the approaching dust collector.

As the dust cleared, Lopez began to scream as he approached the dust bin that had come to rest approximately 120 feet south of the southwest corner of the building. Croniser dismounted the excavator and found Gauthier under the south edge of the dust bin lying face down with obvious head injuries. (Gov Ex. 16, p.2). Gauthier was air lifted to a local hospital but he did not survive. (Gov. Ex. 2, p.2; Gov Ex. 16, pp.2-3).

MSHA was notified shortly after the accident at 5:12 p.m. An accident investigation team led by Willard Graham arrived at the mine site the following day. Graham and his team inspected the area, took measurements and photographs, interviewed witnesses and reviewed Philip's demolition procedures at the time of the accident.

As a result of MSHA's investigation, on April 3, 2000, Graham issued 104(a) Citation No. 7894001 alleging a violation of the mandatory safety standard in section 56.16010. The citation stated:

> On January 21, 2000, a shift supervisor was fatally injured when he was crushed by a dust collector that fell from the 7th floor of a building being demolished. The victim was standing several feet away from a track-mounted backhoe that was attached to a wire rope being used to pull down the seventh floor. The drop area was not first cleared of personnel prior to dropping the floor.

(Gov. Ex. 4). The citation was terminated on May 4, 2000, after all employees involved in demolition were retrained in safe work practices regarding building demolition.

MSHA's accident investigation report was issued on May 24, 2000. The report concluded:

> The cause of the accident was management's failure to clear the material drop area of personnel. *The root cause was the attempt to remove the decking and the unsecured dust bin with a single pull. This allowed the dust bin to separate from the decking and fall in an uncontrolled fashion.*

(Emphasis added) (Gov. Ex. 2, p.4).

Ronald Dokell testified as a demolition expert on behalf of Philip. Dokell was employed from 1957 until 1996 by Olshan Demolishing Company, a company with domestic and international operations located in Houston, Texas. During his tenure with Olshan, Dokell's duties included serving as a site supervisor on hundreds of demolition projects and a general supervisor overseeing several demolition projects at multiple job sites. (Resp. Ex. 1; Tr. 190-92, 197). He ultimately became President of the corporation. Dokell was also a past president of the National Demolition Association. (Tr. 192).

Dokell stated the cut and pull process was a common method of demolition. (Tr. 202-03). Dokell was responsible for determining the parameters of many drop zones during his professional career. (Tr. 195). He described the process of establishing a drop zone as a "simple" rather than a "scientific calculation." (Tr. 195). Dokell testified that the adequacy of a drop zone depends on the size of the structure being demolished by the cut and pull procedure. (Tr. 208). Dokell opined that, given the effect of gravity, ordinarily the length of a drop zone should be twice the depth of the structure being pulled.. (Tr. 209-10). Dokell explained:

> Well, basically . . . a drop zone is . . . a place for the material you're going to cut and pull to drop. Now, where do things go when you cut them and pull them? And the answer, which we can't avoid because - - as gravity - - it is straight down. When you pull something, once you've got it past the 50 percent point, it comes down.
>
> The cable, which is attached to the excavator and runs taut because it's pulling - - but the cable itself has no hydraulic power. It's just a piece of steel that's pulled tight. When you pull the piece of steel tight, you pull what you've attached it to. As soon as it - - the part you're pulling, which is this, has become past the point of 50 percent, it falls and the cable, of course, becomes loose. It no longer is doing anything. It just falls down. And you'll disattach [sic] your cables, cut up the steel on the ground that you've just pulled down, and start on the next piece. And this is standard cut and pull procedure.

(Tr. 205-06).

Given the fact that the seventh floor section of Building 70 to be pulled was 24 feet deep, Dokell opined that industry standards required a drop zone of 25 feet wide and 48 to 50 feet long.[4] (Tr. 213-14). Dokell opined that Philip's drop zone of 48 feet was reasonable because it was twice as long as the depth of the flooring being demolished. (Tr. 215). Based on his experience, considering gravity, ordinarily he would expect the floor to fall within the first half of the drop zone. (Tr. 209). However, Dokell's calculation did not account for an unsecured dust collector.

Dokell conceded that it was reasonably foreseeable that an unsecured 5,000 pound dust bin could become dislodged during demolition. In such an event, Dokell altered his drop zone calculation by doubling the width to 50 feet and adding 50 percent to the original length resulting in a revised 75 feet long drop zone as measured from the base of Building 70. (Tr. 286, 317-18). Dokell stated that there were no personnel in his hypothetically expanded 50 by 75 feet drop zone. (Tr. 286). Dokell further conceded that his 50 feet by 75 feet parameter "worse case scenario" is based on the dust bin *not* hitting the steel cables before striking the ground. (Tr. 308-09).

Significantly, Dokell's testimony concerning a reasonably prudent drop zone of 50 by 75 feet given the circumstances in this case is flawed. Dokell opined that the probability of the dust collector deflecting off of the taut cable was unforeseeable because the demolition crew "thought [the dust collector] was not loose." (Tr. 309-10). However, there is no evidence to suggest that the crew was unaware that the dust bin's mounting bolts had been removed. (Gov. Ex. 2, p.3; Gov. Exs. 16, 17, 21; Resp. Ex. 2; Tr. 66, 70-1, 143, 282). In fact, MSHA determined that "it was probably normal operating procedures to cut the bolts." (Resp. Ex. 2). Philip did not present testimony from any of its employees, and it did not otherwise proffer any evidence concerning Philip's demolition procedures. In the absence of evidence to the contrary, it is reasonable to conclude that the mounting bolts had been disconnected by the demolition crew as part of their torch cutting procedures. (Tr. 289-90; 310).

Moreover, even Dokell's expanded "worse case scenario" drop area is inadequate. Dokell expanded the width of the drop zone by 25 feet, or 12½ feet on each side. However, the dust collector impacted the ground approximately 17 feet west of the building, 4½ feet outside Dokell's expanded drop area. (App. II; Tr. 175).

Accident investigation photographs reveal the steel cable was attached to the structure directly in front of where the dust collector had been in the opening in the seventh floor. (Gov. Exs. 18-20). Graham testified that he "didn't see any way the [dust collector] could avoid" the steel cable if it became dislodged from the seventh floor during demolition. (Tr. 171).

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[4] Dokell opined the width of the drop zone should be 25 feet because he believed the section of flooring to be cut was 25 feet wide. (Tr. 214). In fact, MSHA determined the cut section was 20 feet wide. (Gov. Ex. 2, p.2; Gov. Ex. 16, pp.1-2). Thus, using Dokell's calculations, under normal circumstances, the drop zone should have been 20 feet by 48 feet.

Dokell conceded that, after the dust bin hit the taut steel cable, "[y]ou really don't know where it's going to end up." (Tr. 316). However, Dokell maintained it was not reasonably foreseeable that the dust bin would roll a distance of 120 feet. (Tr. 319). In the final analysis, Dokell agreed it would have been prudent to remove the unsecured dust bin separately prior to dropping the seventh floor. (Tr. 221, 227, 232-33, 276-77).

The Secretary has not specifically set forth what she believes are the appropriate dimensions of the drop zone in this case. Graham testified that establishing a drop zone is a dynamic process that depends on the unique circumstances of each pull. As noted, he opined that once the seventh floor became hung causing the dust bin to list forward, it was likely the dust bin would hit the cable in the event it became dislodged. (Tr. 170-71). In such an event, even Dokell conceded the path of the dust collector was unpredictable. (Tr. 316). It is in this context that Inspector Graham testified, "[i]f a piece of material or debris could come off this building and strike somebody, then the drop area would not be cleared." (Tr. 92). Gauthier apparently fled his initial location in an attempt to seek sanctuary in the vicinity behind the excavator when he was struck by the dust bin. (Tr. 96, 119-132). Consequently, Graham believed the drop zone in this case included Gauthier's initial location at the side of the building. (Tr. 120).

## III. Further Findings and Conclusions

Citation No. 7894001 alleges a violation of the mandatory safety standard in section 56.16010. The citation stated:

> On January 21, 2000, a shift supervisor was fatally injured when he was crushed by a dust collector that fell from the 7th floor of a building being demolished. The victim was standing several feet away from a track-mounted backhoe that was attached to a wire rope being used to pull down the seventh floor. The drop area was not first cleared of personnel prior to dropping the floor.

(Gov. Ex. 4).

Section 56.16010 of the Secretary's regulations provides:

> To protect personnel, *material shall not be dropped* from an overhead elevation *until the drop area is first cleared of personnel* and the area is then either guarded or a suitable warning is given.

(Emphasis added).

As a general matter, the Secretary does not contend that the basis for the alleged violation of section 56.16010 is Philip's failure to either guard the general area or to provide a suitable warning. Rather, the Secretary maintains the cited standard was violated because Philip did not first clear the drop area of personnel.

a. Applicability of the Standard

As a threshold matter, Philip argues that the mandatory safety standard in section 56.16010 is inapplicable to demolition because the regulation "contemplates *dropping* materials from an overhead elevation, not the demolition of a structure." (Emphasis in original). (*Philip post-hrg. br.* at p.4). Philip first argued that section 56.16010 is inapplicable in its post-hearing brief. Consequently, the Secretary did not have the opportunity to present evidence on this issue at the hearing. In her post-hearing response, the Secretary notes that Dokell, during his sworn deposition testimony, readily agreed that the provisions of section 56.16010 applied to Philip's demolition activities. (*Sec'y Resp*. at p.5).

Notwithstanding Dokell's admission during deposition, ensuring that a suitable "drop area" is unoccupied is virtually the only way of protecting personnel during demolition. Thus, an adequate drop zone is an indispensable part of the demolition process. Philip's assertion that the "drop area" provisions of section 56.16010 apply to dropping materials from overhead rather than to demolition activities creates a distinction without a difference. Moreover, Philip's assertion is belied by the testimony Philip elicited from Dokell at the hearing:

> Counsel: Were you responsible for the calculation or configuration of drop areas or drop zones in the demolition activities that you supervised.
>
> Dokell: I've approved many of them, yes, sir.

(Tr. 195).

Without belaboring this question, the relevant definition for the operative term "drop" is "a sudden fall." *Webster's New World Dictionary*, 428 (Second College Edition 1980). Falling material necessarily must originate from overhead. A sudden fall is the goal of demolition. Accordingly, Philip's contention that section 56.16010 should be narrowly construed to exclude demolition from sites where material is "dropped from an overhead elevation" is lacking in merit and must be rejected.

b. Interpretation of the Standard

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning, or, unless such a meaning would lead to absurd results. *See Dyer v. United States,* 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light co.,* 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.,* 15 FMSHRC 1555, 1557 (Aug. 1993). The terms of section 56.16010 are ambiguous in that the methodology for determining the parameters of a drop area is not defined.

If a regulatory standard is ambiguous, the analysis shifts to whether the Secretary's interpretation is reasonable. *See Energy West Mining Co. v. FMSHRC*, 40F.3D 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.,* 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation of its own regulation is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'") (quoting *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945)) (other citations omitted). Philip contends the Secretary's interpretation of section 56.16010 is unreasonable because the Secretary's position is that the dimensions of the drop zone can only be determined after demolition occurs.

The Secretary's interpretation of her regulations is reasonable where it is "logically consistent with the language of the regulation[s] and . . . serves a permissible regulatory function." *General Elec. Co. v. EPA,* 53 F.3D 1324, 1327 (D.C. Cir. 1995) (citations omitted). Additionally, a regulation must be interpreted so as to harmonize with the objective it seeks to implement. *See Emery Mining Corp. v. Sec'y of Labor,* 744 F.2d 1411, 1414 (10th Cir. 1984) (citation omitted).

Section 56.16010 requires a demolition contractor to establish an adequate drop zone without the guidance or pre-approval of the Secretary. Although the parameters of a drop area are not defined in the regulation, application of the standard requires consideration of the unique circumstances surrounding each demolition project. The Secretary's role under section 56.16010 is limited to determining whether the drop zone established by the demolition contractor is adequate under the circumstances, *i.e.*, whether a suitable area was first cleared of personnel. Thus, the Secretary has not delineated what she believes are the outer perimeters of the drop zone in this case, nor is she required to do so. The Secretary's interpretation of section 56.16010 is that it only requires her to demonstrate that, at the time of demolition, the drop area was not cleared because personnel were exposed to falling debris. (Tr. 92). This interpretation is reasonable in that it furthers the obvious regulatory concern of promoting the safety of demolition crews.

c. Fact of Violation

Philip's attempt to remove the unsecured dust bin and flooring with a single pull, rather than removing the dust bin separately, allowed the dust bin to fall in an unpredictable and uncontrollable manner. As Dokell stated, "[y]ou really don't know where [the dust bin is] going to end up." (Tr. 316). Since the path of the dislodged dust bin was unpredictable, the drop zone must encompass a broader area to account for the uncertainty. However, Philip relied on a standard drop zone of approximately 20 by 48 feet. Having failed to significantly expand the drop zone, Philip put its employees at risk.

If an employee is exposed to the hazard of being struck by debris, he is in the drop zone. The impact point of the dust bin, only 12½ feet from where Gauthier was standing, reflects that Gauthier was exposed to danger. Thus, the Secretary has demonstrated that the drop area was

not first cleared of personnel prior to the drop.[5] Consequently, the Secretary has demonstrated that a violation of section 56.16010 occurred.

The violation was designated as significant and substantial. The Commission has explained an S&S finding requires the Secretary to establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). The Commission has also emphasized it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *Id.* at 1868. The Commission subsequently reasserted its prior determinations that as part of any "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508, 510-11 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508, 510-11 (April 1996). Here the violation was properly designated as significant and substantial as the violation resulted in a hazard, *i.e*, exposure to falling debris, that caused a fatality.

With respect to negligence, even Philip's expert agreed that it would have been prudent to remove the unsecured dust bin separately before attempting to bring down the seventh floor with a single pull. Consequently, Philip's loss of control of the demolition area is attributable to a high degree of negligence.

d. Secretary's Attempted Citation Modification

Having determined Gauthier's presence in a drop area provides the basis for the section 56.16010 violation, for the first time, at the hearing, the Secretary alleged Croniser was also in the drop zone. Croniser was in the operator's cab approximately 80 feet south of the base of Building 70 when the attempted pull was made. (Gov. Ex. 2, p.3). Neither Citation No. 7894001 nor MSHA's accident investigation alleges that Croniser was in the drop zone at the time of the accident. Significantly, section 10(d) of Citation No. 7894001 designates the number of persons affected as "001."

I construe the Secretary's belated assertion that Croniser was in the drop area as an attempt to modify Citation No. 7894001. Although there is no provision in the Commission's Rules for amending citations, as a general proposition, modifications to citations should be liberally granted unless there is a "legally recognizable prejudice to the operator [that] would bar [an] otherwise permissible modification." *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (August 1992); *Cyprus Empire Corp.*, 12 FMSHRC 911 (May 1990).

[5] It is noteworthy that Gauthier was located only 29½ feet west of the building although Croniser had positioned himself 100 feet west of the building during Gauthier's attempted pull. (Gov. Ex. 16; App. II).

It is undisputed that the cut and pull method is a common demolition practice. There is nothing in the record to demonstrate that the termination of Citation No. 7894001 required modification of Philip's cut and pull methodology with respect to cable length or the location of the excavator. Nor was any evidence proffered to establish that the position of the excavator on January 21, 2000, was contrary to industry standards. The Secretary's belated attempt to modify Citation No. 7894001 to include Croniser as a person affected precluded Philip's pre-trial discovery and preparation on the issue of proper excavator positioning during cut and pull demolition. Consequently, I find the attempted modification to be prejudicial. Therefore, I will not address whether Croniser was in the drop area at the time of the accident.

e. Constitutionality[6]

Finally, even if the evidence supports the fact of a violation of section 56.16010, Philip asserts that Citation No. 7894001 must be vacated because section 56.16010, as it applies to demolition, is unconstitutionally vague. In this regard, Philip asserts that the cited standard does not provide a fair and reasonable warning of the conduct it prohibits or requires because the Secretary is calculating the drop zone after demolition occurs.

Philip's reliance on a purported responsibility of the Secretary to articulate where a drop zone begins and ends is misplaced. The provisions of section 56.16010 impose no such duty on the Secretary. As previously noted, demolition contractors establish drop zones based on the unique circumstances of each demolition project without the Secretary's pre-approval. Thus, section 56.16010 does not require the Secretary to delineate the outer perimeters of a drop zone. Rather, section 56.16010 only requires the Secretary to demonstrate that the drop area was not first cleared of personnel.

To prevent exposure to the hazard of being struck by debris, the Secretary has fashioned section 56.16010, the terms of which are "simple and brief in order to be broadly adaptable to a myriad of circumstances." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (December 1992). However, broadly written mandatory safety standards must provide fair notice of what is required. *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (January 1983).

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[6] The hearing was held on February 7, 2006. Following the hearing, on February 21, 2006, Philip filed a Supplemental Answer to the Petition for Assessment of Civil Penalty seeking to argue that section 56.16010 is unconstitutionally vague. On February 27, 2006, the Secretary filed a Motion to Strike Philip's Supplemental Answer as untimely. Philip replied to the Secretary's Motion to Strike on March 10, 2006. The Secretary's Motion to Strike was denied during a March 21, 2006, telephone conference. At that time I advised the parties that I would permit the constitutional issue to be presented in Philip's post-hearing brief, and I would establish a briefing schedule for the Secretary's response brief and Philip's reply. The Secretary's response brief was filed by facsimile on June 2, 2006. Philip's reply was filed by facsimile on June 20, 2006.

The Commission addressed the issue of "fair notice" in *Higman Sand & Gravel, Inc.*, 24 FMSHRC 87 (January 2002). The Commission stated:

> In "order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be 'so incomplete, vague, indefinite, or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application"' *Ideal Cement Co.,* 12 FMSHRC 2409, 2416 (November 1990)(citation omitted). A standard must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Lanham Coal Co.,* 13 FMSHRC 1341, 1343, (September 1991).
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> > When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, *i.e.*, the reasonably prudent person test. The Commission recently summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard."
>
> *Id.* (citations omitted). To put it another way, a safety standard cannot be construed to mean what the Secretary intended but did not adequately express. "The Secretary, as enforcer of the Act, has the responsibility to state with ascertainable certainty what is meant by the standard [she] has promulgated." *Diamond Roofing Co. v. OSHRC*, 528 F.2D 645, 649, (5th Cir. 1976).

24 FMSHRC at 89-90.

Applying the "reasonably prudent person" test, it is obvious that section 56.16010 seeks to effectuate the protective purposes of a drop zone. To achieve this goal, it reasonably can be inferred that section 56.16010 requires control of the force and direction of debris from the structure to be demolished because that is the only means by which an adequate drop zone can be established. In other words, section 56.16010 requires a controlled drop.

Both MSHA and Philip's demolition expert agree that Philip's failure to separately remove the dust collector caused it to fall in an uncontrolled manner. (Gov. Ex. 2, p.4; Tr. 221, 227, 232-33, 276-77, 316). Having forsaken control for the apparent sake of the expediency of a single pull, Philip finds itself in the unenviable position of arguing that the uncertainty it created renders the standard unconstitutionally vague. Such an argument must be rejected.

Rather, a reasonably prudent person familiar with demolition would recognize that, given the uncertainties, Philip's reliance on the traditional drop zone calculation of the width of, and double the depth of, the structure being pulled was grossly inadequate. Even Dokell's expanded hypothetical drop zone was inadequate as Dokell failed to appreciate the distance the unsecured dust bin would travel. Obviously, Philip knew or should have known that establishment of an inadequate drop zone does not satisfy the requirements of section 56.16010.

As Inspector Graham stated, the provisions of section 56.16010 are violated "[i]f a piece of material or debris could come off this building and strike somebody [because] then the drop area would not be cleared." (Tr. 92). In the final analysis, it was reasonably foreseeable that the traditional drop zone should have been extended to include clearance of personnel from the general area impacted by the dust bin. Philip cannot credibly rely on a lack of notice as an excuse for its failure to ensure that a suitable drop area was kept free of personnel. Consequently, Philip has failed to demonstrate that section 56.16010 is unconstitutionally vague as applied by the Secretary in this case. **Accordingly, Citation No. 7894001 shall be affirmed**.

f. Civil Penalty

The Secretary has proposed a civil penalty of $15,000.00 for Citation No. 7894001. Commission judges assess penalties *de novo* and are authorized to reduce or increase the penalty proposed by the Secretary as circumstances warrant. *Topper Coal Co.*, 20 FMSHRC 344, 350 n.8 (April 1998); *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (March 1983), aff'd 736 F.2d 1147 (7th Cir. 1984). In determining the appropriate civil penalty, Commission Rule 30, 29 C.F.R. § 2700.30, requires the judge to consider the statutory criteria set forth in 110(i) of the Mine Act, 30 U.S.C. § 820(i). In determining the appropriate civil penalty, section 110(i) provides, in pertinent part:

> the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

i. Size of Operator and Ability to Remain in Business

A Final Decree in Philip's reorganization plan under Chapter 11 of the United States Bankruptcy Code was entered on April 7, 2005. Bankr. S.D. Tex., Case No. 03-37718-H2-11. There is no evidence that Philip is currently relieved from debt due to its bankruptcy filing. Philip is a moderately sized contractor, and it does not contend that imposition of the proposed $15,000.00 civil penalty in this matter will adversely impact its continuing business operations. (Tr. 19; Gov. Ex. 1, p.2).

ii. Negligence

With respect to negligence, the high degree of negligence attributed to Philip is amply supported by the record. Loss of control in demolition is a grave concern. In this regard, Philip's expert Dokell expressed disbelief that Philip would have disregarded the hazard associated with an unsecured dust bin if Philip knew the dust collector was "loose." (Tr. 309-10). However, the evidence reflects Philip knew or should have known that the dust collector was not secured. The negligence associated with a failure to ensure the drop area was first cleared of personnel, given the unpredictability of the path of the dust bin, was committed by Philip management personnel and is properly imputed to Philip. *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1686 (October 1995) (Citations omitted).

iii. Gravity

The gravity penalty criterion contained in section 110(i) requires an evaluation of the seriousness of the violation. *Hubb Corporation*, 22 FMSHRC 606, 609 (May 2000) *citing Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (September 1996); *Sellersburg*, 5 FMSHRC at 294-95. In evaluating the seriousness of a violation, the Commission focuses on "the affect of a hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC at 1550. Here, failing to ensure that the drop zone was clear of personnel exposed an employee to the hazard of falling debris that resulted in his death. Consequently, the violation is indicative of extremely serious gravity.

iv. History of Previous Violations

The Secretary does not assert that Philip has a relevant history of previous violations that would impact on the appropriate penalty to be assessed in this matter.

v. Good Faith Efforts at Abatement

Philip has precluded the possibility of a similar accident by providing proper training and it has modified its demolition practices in recognition of the hazards caused by unsecured structures during the demolition process.

On balance, there are no significant mitigating factors to warrant reduction of the civil penalty proposed by the Secretary. In view of the high degree of negligence and serious gravity, I conclude that the Secretary's proposed civil penalty is appropriate. Accordingly, a civil penalty of $15,000.00 shall be imposed for the violation of section 56.16010 cited in Citation No. 7894001.

## ORDER

Accordingly, **IT IS ORDERED** that, pursuant to the parties' agreement, Citation No. 7884114 in Docket No. CENT 2000-294-M **IS VACATED.** Consequently, Docket No. CENT 2000-294-M **IS DISMISSED**.

**IT IS FURTHER ORDERED** that Citation No. 7894001 in Docket No. CENT 2003-26-M **IS AFFIRMED.**

**IT IS FURTHER ORDERED** that Philip Environmental Services shall pay a civil penalty of $15,000.00 within 40 days of the date of this decision in satisfaction of Citation No. 7894001. Upon timely payment of the $15,000.00 civil penalty, Docket No. CENT 2003-26-M **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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