FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

December 26, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-101-M
Petitioner	:	A.C. No. 41-00320-05591
v.	:	
	:	Bayer Alumina Plant
ALCOA ALUMINA & CHEMICAL, L.L.C.,	:	
Respondent	:	

DECISION

Appearances: Ernest A. Burford, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Harold J. Engel, Esq., Arent Fox Kintner Plotkin & Kahn, PLLC, Washington, D.C., for Respondent.

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Penalty filed by the Secretary of Labor, through the Mine Safety and Health Administration ("MSHA"), against Alcoa Alumina & Chemical, L.L.C. ("Alcoa"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(c). The Petition seeks civil penalties for alleged violations of 30 U.S.C. §§ 56.18002(a), 48.28(a), and 48.31(b), in the amounts of $1,603.00, $9,000.00, and $3,000.00, respectively.

A hearing was held in Houston, Texas. The parties' post-hearing briefs are of record.[1] At hearing, the parties moved for approval of settlement of 104(d)(2) Order No. 7879416, which settlement motion was granted on the record, subject to filing of the executed agreement (Tr. 6). The terms of the agreement and final approval of settlement shall be set forth as part of this Decision. Order Nos. 7879697 and 7879698, for the reasons set forth below, shall be AFFIRMED, as amended.

[1]The parties were notified that the record would be closed on July 31, 2000. Consequently, portions of MSHA Inspector Melvin "Whitey" Jacobson's deposition, appended to Respondent's post-hearing brief, filed September 18, 2000, have been considered as part of Respondent's closing argument only.

I. Stipulations

The following are the parties' stipulations:

1. Alcoa stipulates, for the purposes of this proceeding only, that Order 7879416, 7879697 and 7879698 were timely issued and contested.

2. It is also stipulated, for the purpose of this proceeding only, that the Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding.

3. It is further stipulated, for the purpose of this proceeding only, that the proposed penalties will not have an effect on Alcoa's ability to continue in business.

4. The parties are also prepared to stipulate as to the authenticity of the exhibits and admissibility of the exhibits that the other party's going to offer in this proceeding.

5. And it is also noted for the record that the parties have settled Citation [sic] No. 7879416, on the grounds that it be reduced to a 104(a) citation and the penalty amount shall remain as proposed.

II. Factual Background

Alcoa's Bayer Alumina Plant, located in Point Comfort, Texas ("Point Comfort plant"), produces alumina from bauxite that is mined and shipped from Africa, Puerto Rico, and other overseas locations (Tr. 12-13). Point Comfort is a large plant, employing 700-800 workers and operating 24 hours a day, seven days a week (Tr. 14-16). Bauxite, taken from storage at the plant, is mixed and ground with sodium hydroxide to form a slurry (Tr. 54, 169-70). The slurry is combined under high heat and pressure with steam in large vessels called digesters, which creates sodium aluminate (Tr. 170-72). The sodium aluminate is then clarified, which is the settling out of the mud characteristics of the liquor stream, thus leaving the other chemicals intact in the solution (Tr. 173). The final product produced at the plant is alumina, which is aluminum oxide (Tr. 173, 175). Point Comfort's processing of bauxite is a milling operation and, therefore, subject to the jurisdiction of the Act (Tr. 13, 54).

On July 13, 1999, MSHA Inspector Larry Parks conducted an inspection of the Point Comfort plant, in response to a hazard complaint made that day by a Point Comfort employee to MSHA's San Antonio Field Office (Tr. 11). Specifically, the complaint alleged that there were "frontline supervisors and other supervisors who had not had any refresher training (Tr. 16)." Inspector Parks met with Alcoa safety specialist Richard Ripley (standing in for Point Comfort's safety and industrial hygiene manager Ray Scott) and union representative Mike Monroy, discussed the particulars of the complaint, reviewed Alcoa's training records for the previous year, and interviewed several employees, in order to ascertain when their last training had occurred (Tr. 16-17, 158; ex. P-10).

As a result of his investigation, Inspector Parks concluded that over 80 supervisors had not received annual refresher training and six salaried employees had not received hazard training, during the period covering one year prior to the inspection date (Tr. 18, 28, 35-36). Consequently, Inspector Parks issued 104(g)(1) Order Nos. 7879697 and 7879698, for violations of the Part 48 training standards (Tr. 18-21). Alcoa subsequently contacted MSHA's Dallas District Manager, Doyle Fink, who agreed to "work with [Alcoa]," to avoid negatively impacting production by withdrawal of the affected employees (Tr. 60-63, 161-62). In response, Alcoa promptly abated the Orders by training all the affected miners within the ensuing week (Tr. 68, 161-62).

III. Findings of Fact and Conclusions of Law

A. Order No. 7879697

1. Fact of Violation

104(g)(1) Order No. 7879697, as modified, charges a violation of 30 C.F.R. § 48.28(a), describing the condition or practice as follows:

> Allegation: seven day-shift supervisors in area two have not received Part 48 annual refresher training and there may be additional supervisors not trained in other areas of the plant.
>
> Finding: eighty-seven salary employees which includes supervisors working in the plant have not received annual refresher training within the last 12 months. The mine operator was aware of the training requirements. The operator is hereby ordered to withdraw the eighty-seven employees from the affected work area until they have received the required training. The Federal Mine Safety and Health Act of 1977 declares that an untrained miner is a hazard to himself and to others. (Listed names of 87 salaried and supervisory employees omitted)

(Ex. P-3).

30 C.F.R. § 48.28, Annual refresher training of miners; minimum courses of instruction; hours of instruction, provides that: " (a) Each miner shall receive a minimum of 8 hours of annual refresher training as prescribed by this section." The scope of the standard is found in Subpart B, section 48.21, which covers " miners working at surface mines and surface areas of underground mines." By definition, "miner," for purposes of the standard, means, in pertinent part, "any person working in a surface mine or surface areas of an underground mine and who is engaged in the extraction and production process, or who is regularly exposed to mine hazards, or who is a maintenance or service worker employed by the operator or a service or maintenance worker contracted by the operator to work at the mine for frequent or extended periods." 30 C.F.R. § 48.22(a)(1). At the time of inspection, the only surface supervisors exempted from Part 48 training were those certified under an MSHA-approved State certification program, which exemption was inapplicable at Point Comfort, because it applies to the coal industry and, in any case, Texas has no State certification program (Tr. 33-34, 222; see ex. P-8).

Alcoa takes the position that Part 48 training standards are not applicable to Point Comfort, however, because the plant is neither a surface mine nor a surface area of an underground mine, but a milling operation (Tr. 170-71; Resp. Br. at 9-12). Essentially, Alcoa appears to be arguing that Point Comfort is a mine for jurisdictional purposes under the Act, but not a surface mine for purposes of Part 48 training regulations (Resp. Br. at 9-14). The meaning of the scope and definitional provisions of Part 48, Subparts A and B, is plain and unambiguous, and the two sections distinguish training required for underground miners from that which is required for surface miners. Nothing on the face of the provisions suggests an interpretation of "mine," whether underground or surface, that would exclude any operation deemed a "mine" under section 3(h)(1) of the Act, 30 U.S.C. § 802(h)(1), from training its employees under the applicable standards (Tr. 28). Accordingly, I find that Alcoa's Point Comfort plant is covered by Part 48, Subpart B.

The violation period at issue spans July 13, 1998, to July 13, 1999 (Tr. 26). At the time the Orders were issued, there had been no active training program for the supervisory and salaried personnel since, at least, 1986, and Alcoa stipulated at hearing that "the employees listed in both Citation [sic] Order No. 7879697 and 7879698 did not receive the training required by the listed standard in the citation [sic] (Tr. 21, 86; Resp. Br. at 4)." Accordingly, having found that the Point Comfort plant is covered by Part 48 training standards, and that the listed supervisory and salaried miners had not received annual refresher training, I conclude that Alcoa violated section 48.28(a).

2. Significant and Substantial

Section 104(d) of the Act designates a violation "significant and substantial" (S&S) when it is "of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set forth the four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 1) The underlying violation of a mandatory safety standard; 2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (*approving Mathies criteria)*. Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued mining operations." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1998).

Inspector Parks determined that the violation was S&S. He testified that there are many kinds of valves and caustic acid at Point Comfort, and that miners untrained in the proper procedures to be followed in the plant are exposed to tripping and traffic hazards, which could result in burns, falls and guarding injuries of a very serious nature (Tr. 23-24). Moreover, the inspector testified that a vital component of annual refresher and hazard recognition training is emergency evacuation, irrespective of the limited exposure of the supervisory or salaried employee to the plant operations (Tr. 75-76). I find, based on the evidence, that there was a reasonable likelihood that supervisory and salaried miners, not updated periodically on safe plant procedures, could be seriously injured by machinery or chemicals. Therefore, I conclude that the violation was S&S.

3. Penalty

While the secretary has proposed a penalty of $9,000.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(j). *See Sellersburg Co*., 5 FMSHRC 287, 291-92 (March 1983), *aff'd*, 763 F.2d 1147 (7th Cir. 1984). 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.

Alcoa urges a reduction in penalty based on its good faith belief that it had a grace period in which to complete training of its supervisors (October 1999), and because of the exemplary manner in which it trained all the affected employees to abate the Orders (Resp. Br. at 18).[2]

Point Comfort is a large mine, and the parties have stipulated that the proposed penalties will not affect Alcoa's ability to continue in business.

In analyzing the history of previous violations, the Commission has indicated that the operator's general history, rather than its history of similar violations, should be considered.

---

[2]Alcoa filed a Motion to Compel Depositions on March 31, 2000, in which it sought to depose "person or persons at MSHA's Office of Assessments who made the decision regarding the amount of the penalty for each of the orders which are the subject of this proceeding." By Order of April 6, 2000, the motion was denied. In its Post-hearing Brief, Alcoa moves for exclusion from my consideration of penalty, of any evidence presented at trial on the six penalty criteria, and requests reconsideration of my ruling and reopening of the record for depositions (Resp. Br. at 2, 15-17). The motion is hereby denied.

Cantera Green, 22 FMSHRC 616, 623 (May 2000) (*citations omitted*). In the 24-month period prior to the subject inspection, Alcoa was issued 234 citations, one of which involved violation of a Part 48 training standard, distinguishable from the standards at issue herein (Tr. 15, 129-30, 134-36; exs. P-7, P-11). Although Alcoa has a significant overall history of violations, I find that the company has a good record respecting training violations and, therefore, consider its violations history a mitigating factor in assessing appropriate penalties.

A finding on the gravity criterion requires an assessment 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 has focused on "the effect of a hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC at 1550. In this case, the annual refresher and hazard training standards contemplate safety awareness and procedures for supervisory and salaried employees who are exposed, irrespective of frequency, to the operations in the Point Comfort plant, which exposure could result in serious injury. For the reason that failure to train these miners on safe plant procedures on a regular, periodic basis, exposes them to the very hazards that the standards seek to prevent, I find the violations to be serious.

Respecting Alcoa's negligence in violating the standards, Inspector Parks testified that he assessed the negligence as high based on the substantial number of untrained employees, and his conclusion that Alcoa was aware of the training requirements, since the company had trained several similarly situated supervisors and salaried employees in 1996-97, and during the violation period (Tr. 25-28, 65-66). The inspector further testified that Ray Scott explained to him that he (Scott) was under the impression, from a previous safety director, that Part 48 training was not required for the supervisory and salaried employees (Tr. 25, 66). Many of the affected employees interviewed by Inspector Parks communicated to him that they had been told that they did not need the training, while some stated that they had taken the training with their departments, of their own volition (Tr. 22, 27, 111; ex. P-10).

Alcoa takes the position that its failure to regularly conduct annual refresher and hazard training for its supervisory and salaried employees since, at least, 1986, was based on a good faith belief that the training was not required, because those employees had limited exposure to plant operations and did not perform the hands-on work of the hourly workers. Ray Scott testified that there was no training program in place for supervisory and salaried employees in 1989, when he joined Point Comfort's safety department, and that his predecessor, as well as MSHA personnel, communicated to him that the training was not required (Tr. 84-88, 100-01). Scott also explained that some supervisory and salaried personnel had received training between 1990 and 1996, in preparation for strikes that never occurred, since Alcoa had anticipated that those employees would be taking on the duties of the hourly workers (Tr. 99, 101, 133-34). Moreover, Scott testified that MSHA's San Antonio inspectors had conducted Part 48 audits during regular inspections of the Point Comfort plant between 1990 and 1994, had been satisfied with Alcoa's training records, and had not cited Alcoa for training violations, respecting its supervisors and salaried employees, until the date of the instant Orders (Tr. 87-91, 122; ex. P-12). Finally, Alcoa

places great significance on a December 7, 1998, cover letter from J. Davit McAteer, Assistant Secretary for Mine Safety and Health, providing the mining community with a "Compliance Guide for MSHA's Modified Regulations on Training and Retraining of Miners," to assist the industry in complying with new training requirements (Ex. R-6). Alcoa argues that, based on its prior belief that its supervisors and salaried employees were exempt from Part 48 training, the effect of the McAteer letter and new Compliance Guide was to create the impression that those employees were no longer exempt, and that Alcoa had until the end of October 1999, to complete their annual refresher or hazard training, as appropriate (Tr. 85, 91-95, 112, 137-38).

MSHA Inspector David Weaver, training specialist with Educational Field Services Division, testified that all mines are covered by Part 48 training, and that the new training requirements under Part 48 modify the definition of "miner" to include all supervisory personnel, whereas the old rule exempted State-certified supervisors from annual refresher training (Tr. 192-93). "All other supervisory personnel," he testified, "were required all of Part 48 training (Tr. 193)."

Alcoa had been operating for years under a misconception that it had no duty to provide annual refresher and hazard training for the affected Point Comfort miners. During that time, MSHA had been examining Point Comfort's training records and had failed to issue any citations or orders. The Secretary called MSHA Inspector Melvin "Whitey" Jacobson to testify that, pursuant to his Part 48 audit of Point Comfort's training in 1992, he had advised Ray Scott that supervisory and salaried employees needed Part 48 training (Tr. 225-27; ex. P-12). While the record as a whole substantiates Jacobson's testimony, it is equally clear that MSHA dropped the ball after the audit, by failing to take any enforcement action until July of 1998. Furthermore, the Secretary has not rebutted the testimony of Scott and Ripley, that discussions between Alcoa and MSHA, during reviews of Point Comfort's training records, contributed to Alcoa's assumption that it was in compliance with Part 48 standards; MSHA's behavior during inspections also indicates some confusion on the part of San Antonio Field Office inspectors, as to the requirements of Part 48 standards. Alcoa's interpretation of the new requirements under Part 48, from its reading of the McAteer letter and new Compliance Guide, was a continuation of the misconception it held prior thereto. Simply stated, the McAteer "package" was inapplicable to Point Comfort, because the affected employees had never been exempt from training in the first place. Whitey Jacobson's statements to Scott and his audit report, alone, did not get Alcoa's attention or, at least, straighten out its confusion over Part 48 requirements. It is clear that MSHA's course of behavior over the years-- its failure to cite Alcoa for its failure to appropriately train Point Comfort's supervisory and salaried miners-- reinforced the company's good faith belief that those employees were exempt; likewise, there is no doubt that citing Alcoa at an earlier stage would have brought its non-compliance to a head. There is no reason to believe, especially in light of Alcoa's overall training record and its rapid compliance in this matter, that Alcoa knowingly ignored Part 48 requirements. Moreover, for the reason that Point Comfort's considerable number of supervisory employees is solely a consequence of its sizeable operation, I am not persuaded by the Secretary's argument that the number of affected miners is significant or justifies a finding of high negligence. Therefore, having found that Alcoa proceeded on a good

faith belief that it was in compliance with the standards, and that MSHA's lack of enforcement over several years reinforced Alcoa's misconception, I find that Alcoa's negligence was low.

Finally, respecting Alcoa's good faith efforts at abatement, the evidence establishes that Alcoa did an excellent job in training all affected miners expeditiously.

Accordingly, having considered Alcoa's large size, ability to continue in business, seriousness of violation, low degree of negligence, and good record of past violations and rapid compliance as mitigating factors, I conclude that a penalty of $2,250.00 is appropriate.

B. Order No. 7879698

1. Fact of Violation

104(g)(1) Order No. 7879698, as modified, charges a violation of 30 C.F.R. § 48.31(b), describing the condition or practice as follows:

> Allegation: seven day-shift supervisors in area two have not received Part 48 annual refresher training and there may be additional supervisors not trained in other areas of the plant.
>
> Findings: Six salary employees have not received hazard training within the last twelve months. The mine operator was aware of the training requirements. The operator is hereby ordered to withdraw the six employees from the affected work areas until they have received the required training. The Federal Mine Safety and Health Act of 1977 declares that an untrained miner is a hazard to himself and others. (Listed names of six salaried employees omitted)

(Ex. P-4).

30 C.F.R. § 48.31, Hazard Training, provides, in pertinent part, that: (a) Operators shall provide to those miners, as defined in § 48.22(a)(2) (Definition of miner) of this Subpart B, a training program before such miners commence their work duties. This training program shall include the following instruction, which is applicable to the duties of such miners: (1) Hazard recognition and avoidance; (2) Emergency and evacuation procedures; (3) Health and safety standards, safety rules and safe working procedures; (4) Self-rescue and respiratory devices; and, (5) Such other instruction as may be required by the District Manager based on circumstances and conditions at the mine. (b) Miners shall receive the instruction required by this section at least once every 12 months." "Miner," for purposes of the standard, means, "any person working in a surface mine, including any delivery, office, or scientific worker or occasional, short-term maintenance or service worker contracted by the operator, and any student engaged in academic projects involving his or her extended presence at the mine." 30 C.F.R. § 48.22(a)(2). As discussed above, Point Comfort is a "mine" under section 3(h)(1) of the Act, its employees are covered by Part 48, Subpart B, training requirements, and having found that the listed salaried

employees had not received hazard training during the violation period, I conclude that Alcoa violated section 48.31(b).

2. Significant and Substantial

Inspector Parks determined that the violation was S&S. He described salaried employees as those not performing the hourly work in the plant, in occupations such as engineering, safety, clerical/office and security, who go into the plant and are exposed to its hazards, on a daily basis (Tr. 27-28, 32, 35-37). He testified that, while the salaried employees primarily stay in the office, the training is designed to teach hazard recognition and emergency evacuation procedures, so that traffic hazards, as well as hazards specific to equipment can be avoided (Tr. 38-39, 75-76). For these, and the reasons discussed above, I find that there was a reasonable likelihood that salaried miners, not periodically trained in recognizing hazards in the plant, could be seriously injured by machinery or chemicals. Therefore, I conclude that the violation was S&S.

3. Penalty

Consideration of the six penalty criteria under section 110(i) of the Act has been discussed fully above, and applies to both Orders. The Secretary has proposed a penalty of $3,000 for this violation. As discussed previously, my determination of the appropriate penalty takes into account Alcoa's large size, ability to continue in business, seriousness of violation, low negligence, and the mitigating factors of good overall history of training violations and rapid compliance. Accordingly, I conclude that a penalty of $750.00 is appropriate.

C. Order No. 7879416

The parties' settlement agreement, respecting 104(d)(2) Order No. 7879416, was considered under the criteria set forth in section 110(i) of the Act, and approved at hearing. Under the terms of the agreement, Alcoa agreed to pay-in-full the proposed penalty of $1,603.00, and the Secretary agreed to modify the Order to a 104(a) citation, with high negligence. The parties having filed the executed agreement, approval of settlement is hereby confirmed.

ORDER

WHEREFORE, the approval of settlement is **GRANTED**, it is **ORDERED** that the Secretary **MODIFY** Order No. 7879416 to a 104(a) citation, and that Alcoa Alumina & Chemicals, L.L.C., **PAY** a civil penalty of $1,603.00.

IT IS FURTHER ORDERED that Order Nos. 7879697 and 7879698 are **AFFIRMED**, as modified to cite the appropriate standards, that the Secretary **MODIFY** the Orders to reduce the level of negligence to "low," and that Alcoa Alumina and Chemicals, L.L.C., **PAY** civil penalties of $2,250.00 and $750.00, respectively, for the violations.

IT IS FURTHER ORDERED that Alcoa Alumina & Chemicals, L.L.C., **PAY** a total civil penalty of $4,603.00, in satisfaction of the subject Citation and Orders, within 30 days of the date of this Decision. Upon receipt of payment, this case is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (Certified Mail)

Ernest A. Burford, Esq., Office of the Solicitor, U.S. Department of Labor, 525 South Griffin Street, Suite 501, Dallas, TX 75202

Harold J. Engel, Esq., Arent Fox Kintner Plotkin & Kahn, PLLC, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036-5339

/nt