FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 9, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-118-M
Petitioner	:	A. C. No. 41-00009-05548
v.	:	
	:	Fairland Plant & Quarries
CACTUS CANYON QUARRIES OF	:	
TEXAS, INC.,	:	
Respondent	:	

DECISION

Appearances: Sheryl L. Vieyra, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Andy Carson, Esq., Marble Falls, Texas, for Respondent.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalties filed by the Secretary of Labor against Cactus Canyon Quarries of Texas, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815. The petition alleges six violations of the Secretary's mandatory health and safety standards and proposes civil penalties totaling $2,686.00. A hearing was held in Burnett, Texas on November 30, 2000. The parties submitted post-hearing briefs following receipt of the hearing transcript. For the reasons set forth below, I vacate one citation, affirm five citations and assess penalties totaling $1,416.00.

The Evidence — Findings of Fact

Cactus Canyon's Fairland Plant & Quarries is a small operation producing marble, crushed granite and quartz in a variety of colors. Its primary customers are in the more artistic market and quality control, to assure consistent color and sizing, is essential. It has a small, experienced work force with very low employee turnover.

On August 24 and 25, 1999, Danny Ray Ellis, an inspector employed by the Department of Labor's Mine Safety and Health Administration (MSHA), conducted an inspection of Respondent's Fairland Plant and Quarries. Inspector Ellis has been an MSHA inspector for nine years and has numerous years of prior experience as a miner and in the mining industry. In the course of the inspection he observed what he determined to be violations of the Secretary's

mandatory safety and health standards. Six citations issued by Ellis in the course of that inspection are at issue here.

As Ellis inspected the shop area, he observed what he perceived to be a violation of 30 C.F.R. § 56.20003(a) which requires that workplaces "be kept clean and orderly." He issued Citation No. 7881518, and described his observations in the "Condition or Practice" section of the citation as follows:

> The floor of the shop was not being kept clean and orderly. There were parts and pieces of metal laying on the shop floor. There were chains laying around the shop also there were pump parts on the floor. The area was very littered with old pieces of motors, crushers and machinery parts.

He concluded that the conditions presented a trip and fall hazard and that an employee who fell might sustain a sprain or fracture resulting in lost workdays or restricted duty. Because there were clear walkways through the area, such that employees would not have to encounter the obstacles unless they were trying to get a part, he concluded that it was unlikely that the violation would result in an injury. He assessed the degree of operator negligence as moderate, because the owner, Jack Carson, admitted that he was aware of the problem and had instructed his employees to clean the area. The condition was abated the following day, by which time the area had been cleaned.

While in the shop Ellis also observed what he perceived to be a violation of 30 C.F.R. § 56.15003, which requires the wearing of protective footwear in areas "where a hazard exists which could cause an injury to the feet." He issued Citation No. 7881519, and described his observations in the "Condition or Practice" section of the citation as follows:

> There were two men working in the shop and they were not wearing protective footwear. The men were working on a backhoe and had to pick up and carry various parts or tools that if dropped would cause damage to their feet.

Ellis was told by one of the men that they were replacing a relatively heavy part on the backhoe, a starter or an alternator. He concluded that it was reasonably likely that a serious injury, i.e., broken toes resulting in lost workdays or restricted duty, could result from the violation and concluded that it was significant and substantial. While the owner stated that he thought the men were wearing protective footwear, Ellis concluded that he should have known of the violation had reasonable diligence been exercised. He classified the degree of operator negligence as moderate, having given some credence to the owner’s statement. The violation was promptly abated. The owner had all fourteen of his employees transported to a local store, where protective footwear was purchased for them.

While inspecting the crusher, Ellis observed what he perceived to be a violation of 30 C.F.R. § 56.12008, which reads, in pertinent part:

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

He issued Citation No. 7881520, and described his observations in the "Condition or Practice" section of the citation as follows:

> The wires going into the junction box for the primary crusher were not properly bushed. The wires going into the bottom of the box were loose and could possibly be pulled out of the box. There were four wires going into a one inch hole.

The hole was located on the bottom of the box, which was approximately at waist height. He had bent over to look at the bottom of the box and did not see evidence of any bushing in the hole. He did not open the box, however, because he is not allowed to open junction boxes when the circuits are energized. He concluded that the condition presented an electrocution hazard and that any resulting injury would likely be fatal, because the box was energized at 220 volts.[1] However, because he did not observe any broken or defective insulation on the wires, he concluded that an injury was unlikely to occur. He rated the operator's negligence as high because approximately nine prior citations had been issued at the facility for the violations of the same standard.

Respondent established during its case that there was a porcelain bushing installed in the opening of the junction box, through which the wires passed. Respondent introduced a picture of the box taken a day or two following the inspection with the box's door open and the bushing clearly visible from the interior of the box. Carson also testified credibly that the box and bushing had been in the same condition since 1983 and had not been cited during previous inspections.

At the crusher, Ellis observed what he perceived to be a violation of 30 C.F.R. § 56.11002, which requires that handrails be provided on "[c]rossovers, elevated walkways, elevated ramps, and stairways. " He issued Citation No. 7881521 and described his observations in the "Condition or Practice" section of the citation as follows:

> There were two sections of handrailing missing at the crusher at the #1 plant.

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[1] At the hearing he testified that the box was energized at 480 volts. However, his notes, taken during the inspection, stated the voltage as 220 volts and Carson testified that 220 volts is the highest voltage used at the facility.

> One section missing was where a person had to cross over the feed to the crusher. A person could fall into the crusher. The fall would be approximately 4 feet. The crusher could be running.
>
> The railing was missing on the walkway going down the steps on the side of the crusher. A person could fall approximately 3 feet into the crusher.
>
> A person works in the control booth and has to pass by a section without a handrail to get to the control booth.

The missing section of railing at the crossover left a gap of 24 inches. The missing piece would have been attached with screws, but had been removed some undetermined amount of time prior to the inspection. The other missing railing piece had been permanently attached and it did not appear that it had been removed recently. He concluded that it was reasonably likely that an injury would occur as a result of the violation and that the injury might be fatal. He classified the violation as significant and substantial because he determined that the hazard contributed to by the missing handrails was reasonably likely to result in a reasonably serious injury. Though the owner disclaimed knowledge of the missing railings, Ellis classified the operator's negligence as moderate because he determined that in the exercise of reasonable diligence, the problem should have been known and corrected.

Carson testified that employees had removed the railing pieces to facilitate their clearing of blockages at the opening of the crusher jaws, which were located approximately four feet (horizontally) away from, and 1-1.5 feet lower than, the crossover. The opening to the crusher jaws was 12 inches by 24 inches and was located at the end of the reciprocating feeder that passed under the crossover. Occasionally rocks would clog the opening and Respondent's employees would stand on the crossover or the walkway, insert the hooked end of a bar into the cluster of clogged rocks and then pull back, or lift, in order to dislodge the stoppage. The employees did not like to lean over the railings and could get more leverage by removing them. Carson also testified that the openings in the railings were relatively small, such that a person could reach a railing from anywhere on the crossover or the walkway and that no employee has ever been hurt by falling into the jaws of the crusher.

After observing two men drinking from the same bottle at a water cooler, and the absence of other containers available for men to drink from, Ellis issued Citation No. 7881522, for a violation of 30 C.F.R. § 56.20002(b), which prohibits use of common drinking cups. He concluded that it was unlikely that an injury would occur, because he was unable to determine whether one of the men had a communicable disease or illness. The risk of injury presented was of transmission of illness or disease, which he concluded might result in lost work days or restricted duty. He rated the operator's negligence as moderate because the violation should have been known in the exercise of reasonable diligence. Carson had provided individual cups to the men from time to time, had asked them to use them and thought that they were using them. Ellis did not know why the two men were drinking from the same container on this occasion, he did not know, for example, whether one of the men had simply temporarily

misplaced his drinking container.

On August 25, 1999, Ellis was examining Respondent's records related to testing of the electrical grounding system and observed that the last continuity and resistence test of the grounding system had been performed on May 22, 1998, more than one year earlier. He issued Citation No. 7881523 for a violation of 30 C.F.R. § 56.12028, which requires that such tests be performed "annually." He testified that MSHA has consistently interpreted this and other "annual" testing requirements to mean that no more than 365 days can elapse between tests. Because he did not find any defects in the grounding system, he determined that it was unlikely that an injury would occur as a result of the violation, but that if one did occur it would be fatal. He rated the operator's negligence as moderate because, even though Respondent had been cited for violating this provision twice in the past, the owner had stated that he had requested that a qualified electrician perform the test and Ellis knew that mine operators in the area had a difficult time obtaining the services of a qualified electrician.

Conclusions of Law and Fact

Respondent's Objection to Inspector's Testimony on Gravity and Negligence

Respondent objected to portions of exhibits and related testimony as to the gravity of the alleged violations and the extent of Respondent's negligence, contending that such evidence was expert opinion and, therefore, was barred by a prehearing order precluding the Secretary from offering expert testimony, within the meaning of Rule 702, Fed. R. Evid.[2] The objection was overruled, subject to further briefing on whether specific testimony constituted expert testimony. For the reasons set forth below, I conclude that the disputed evidence is more properly characterized as lay rather than expert opinion and was not precluded by the order. Alternatively, if the disputed evidence was deemed to be expert opinion under Rule 702, I would reconsider the prehearing order and hold that the evidence was properly admitted.

Respondent contends, specifically, that the degree of operator's negligence and various aspects of the gravity of a potential violation, i.e., the likelihood and seriousness of an injury

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[2] Prior to the hearing, Respondent filed a motion entitled, "Motion to Exclude Testimony of Government Experts." The grounds for the motion were that the Secretary had failed to respond to discovery requests directed at potential expert testimony, stating that she did not intend to call any expert witnesses. Respondent contended that anticipated evidence on the issues of gravity and negligence amounted to expert opinion and that the Secretary's failure to provide substantive responses to its discovery requests justified precluding such testimony. By order dated November 17, 2000, Respondent's motion was denied to the extent that it sought to preclude otherwise admissible lay testimony, but was granted as to possible expert testimony. Absent good cause, the Secretary was "precluded from offering expert testimony, within the meaning of Fed. R. Evid. 702."

resulting from the violation, are matters provable only by expert testimony within the meaning of Rule 702. With respect to Citation No. 7881519, for example, Respondent contends that Ellis' conclusions, 1) that an injury was "Reasonably Likely" to occur as a result of miners' failure to wear protective footwear when handling machine parts and tools, 2) that an injury would be severe enough to result in "Lost Workdays or Restricted Duty", 3) that the violation was "Significant and Substantial" because there was a reasonable likelihood that the hazard contributed to would result in an injury or illness of a reasonably serious nature, and 4) that the degree of the operator's negligence was "Moderate", are matters of expert testimony that should have been precluded under the pre-hearing order.

Ellis' conclusions were based upon his observations of two miners working in Respondent's shop area who were not wearing hard-toed boots. In response to his questions, one of the men told him that they were engaged in replacing a part, a starter or a generator, on a backhoe. Ellis concluded that men wearing soft-toed boots handling a heavy part, like an alternator or generator, or tools that would be used in the process of replacing one, might drop the part or tools on their, or a fellow employee's, foot and that broken bones might be the result. He determined that the failure to wear hard-toed boots presented a hazard, that an injury would be reasonably likely to occur, that it would result in lost time or restricted duty and would be of a reasonably serious nature. He also determined that Respondent's management, in the exercise of reasonable diligence, should have known of the condition. He accepted the owner's mitigating explanation that he thought that protective footwear was being worn, and assessed the degree of negligence as "moderate."

Rule 701, Fed. R. Evid., deals with opinion testimony by lay witnesses and, at the time of the hearing in this case, read as follows:[3]

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Asplundh Mfg. Div. v. Benton Harbor Eng'g., 57 F.3d 1190 (3d Cir. 1995), cited in the Advisory Committee Notes to the 2000 Amendment of Rule 701, Fed. R. Evid., is a very informative case on the distinction between lay and expert testimony. As noted in *Asplundh,* Rule 701 has been applied by the courts to permit lay persons to express opinions that go beyond shorthand statements of fact, so long as the personal knowledge, rational basis, and helpfulness standards of the Rule are met. The cases "are arrayed along a spectrum, ranging from what might be described as modest departures from the core area of lay opinion testimony . . . to those

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[3] Rule 701 was amended, effective December 1, 2000, the day following the hearing in this case, to add a third qualification "(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

which approach the ambit of Rule 702 expert opinion." *Id*. At 1198. The conclusions or opinions at issue here would be representative of those in cases at the end of the spectrum furthest from the ambit of Rule 702. See discussion and cases cited in *Asplundh*, 57 F3d. at 1198-99.

Conclusions as to the general likelihood and seriousness of injuries and operator negligence that Ellis formed in the performance of his duty as he personally observed what he believed to be violations of mandatory safety standards are not opinions based upon scientific, technical, or other specialized knowledge within the scope of Rule 702. They are not opinions on complex issues, such as whether a particular injury or illness was caused by a particular negligent act. They are merely general conclusions about the risk that an injury may occur, what types of injuries may be reasonably anticipated, and the degree of operator culpability. These types of conclusions result "from a process of reasoning familiar in everyday life" not from one that "can be mastered only by specialists in the field." *State v. Brown*, 836 S.W.2d 530, 549 (1992), also cited in the Advisory Committee Notes. Ellis' conclusions were clearly lay, rather than expert, opinion. *See, Wilburn v Maritrans GP Inc.*, 139 F.3d 350, 359-60 (3d Cir. 1998) (expert testimony not required for jury to conclude that certain actions under conditions presented would negligently expose plaintiff to injury); *Eckert v. Aliquippa & Southern Railroad Co.*, 828 F.2d 183, 185 n. 5 (3d Cir. 1987) (plaintiff with thirty years experience and familiarity with railroad procedures allowed to offer lay opinion on likelihood that injuries would have occurred had railroad cars been properly coupled); *Hulmes v. Honda Motor Co., Ltd.*, 960 F.Supp. 844, 859-60 (D.N.J. 1997), *aff'd.* 141 F.3d 1154, *cert. denied*, 119 S.Ct. 49 (police officer's testimony, based upon post-accident investigation, that vehicle was traveling over posted speed limit and that accident resulted from driver inattention, admitted as lay opinion).

This conclusion is entirely consistent with settled Commission precedent that the judgement of an MSHA inspector "is an "important element" in making significant and substantial findings. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Mathies Coal Co.*, 6 FMSHRC 1, 5 (Jan. 1984); *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822-825-26 (Apr. 1981); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1999) (inspector's opinion alone sufficient to support "common sense conclusion that a fire burning in an underground coal mine would present a serious risk of smoke and gas inhalation to miners"). While the inspectors, who generally have considerable experience in the mining industry, possess specialized experience and training, the nature of their testimony as to gravity and negligence issues results from a "process of reasoning familiar in everyday life"[4], like the "common sense" conclusion referenced in *Buck Creek*. As the Advisory Committee Notes make clear, the Federal Rules of Evidence do not "distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*."

The testimony at issue here was clearly lay opinion testimony and was not precluded by the prehearing order. Even if the disputed evidence was deemed to be more properly classified as expert opinion under Rule 702, it was properly admitted. The prehearing order was not

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[4] *State v. Brown, supra.*

intended to establish a rule of admissibility more restrictive than should have been applied in this administrative proceeding.

> The complicated rules of evidence applicable to judicial trials were designed to govern decisionmaking by juries. They are premised on the belief that lay jurors are likely to misuse large categories of relevant evidence if they become aware of that evidence. Whether or not the [Federal Rules of Evidence] are well-suited to that purpose, they are totally inappropriate for application either to agency adjudications or to judge-tried cases. . . . .

II Davis and Pierce, *Administrative Law Treatise* 118 (3rd ed.).

The Commission, like most federal agencies, operates under a far more relaxed standard for the admission of evidence. Commission Procedural Rule 63(a), 29 C.F.R. § 2700.63(a), provides that: "Relevant evidence, including hearsay evidence, that is not unduly repetitious or cumulative is admissible." The Federal Rules of Evidence are referred to only for guidance. *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1366 n. 8 (Dec. 2000) (Federal Rules of Evidence "may have value by analogy," but are not required to be applied to Commission hearings); *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1843 (Nov. 1995), *aff'd, sub nom, Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C.Cir. 1998) (on issues of admissibility and crediting of expert testimony, Commission is "guided by principles established under Rule 702 of the Federal Rules of Evidence").

The disputed evidence was clearly relevant and was properly admitted. Moreover, baring the evidence based upon a failure to provide discovery would have been an overly harsh sanction here. Respondent was fully apprized of Inspector Ellis' conclusions on the issues of gravity and negligence because they were clearly itemized on the citations. Ellis had discussed the citations with Respondent's owner, who was aware that Ellis' conclusions were formed as a result of observations during the inspection, as guided by his general experience and training. Respondent had determined not to depose Ellis to determine the precise basis for each of his conclusions. It could hardly claim surprise or prejudice by the admission of Ellis' testimony and related exhibits.

Citation No's. *7881518, 7881519 and 7881522.*

I find that Respondent violated the health and safety standards cited in the subject violations and also find that the gravity and negligence of the violations was accurately assessed by Inspector Ellis. Respondent's only real defense to these citations was its evidentiary challenge to what it claimed to be expert testimony on issues of gravity and negligence. Those objections are without merit as discussed above. I also find that the violation charged in Citation No. 7881519 was significant and substantial.

A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause

and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Nat'l Gypsum*, *supra*, 3 FMSHRC at 825.

In *Mathies Coal*, *supra*, 6 FMSHRC at 3-4, the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. (footnote omitted)

See also, Buck Creek Coal, Inc. v. MSHA, *supra*, 52 F.3d at 135; *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g, Austin Power, Inc*., 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary 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). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

There can be little question that the violation contributed to a discrete safety hazard, the potential that any dropped or falling machine part or tool could land on unprotected feet causing injury. The more serious of the injuries likely to result, broken bones, is easily classified as reasonably serious. The circumstances of the violation also made it reasonably likely that the hazard contributed to would result in a reasonably serious injury. The two men were working in relatively close proximity and would have been handling machine parts and tools with some frequency. It is reasonably likely that one of them would drop a part or tool, or that a loose part

or tool would fall, and strike one of their feet and that a broken bone, or bones, would result.

Citation No. 7881520

I find that Respondent did not commit the violation charged in Citation No. 7881520. The citation was issued because Inspector Ellis did not observe an insulated bushing in the junction box hole when he bent over to look at the bottom of the box. In fact there was a porcelain bushing in the hole through which the wires passed. There was also some testimony that a proper fitting should have included a clamp for the wires. However, the source of that requirement was never explained, and it appears that the standard's reference to "proper fittings" applies only to cables not wires.[5] I find that there was a substantial insulated bushing in the hole through which the wires passed and that the Secretary has not carried her burden on this citation.

Citation No. 7881523

Respondent's defense specific to this citation is that the Secretary's interpretation of the requirement that grounding and continuity tests be performed "annually" as requiring that no more than 365 days elapse between tests is unreasonable. The correct interpretation, according to Respondent is that the standard would be satisfied if the test is performed at any time in each calendar year. Any ambiguity in the term "annually" was apparently addressed by the Secretary long ago. I accept Inspector Ellis' testimony that the Secretary's interpretation is taught to inspectors at MSHA's training academy and that other similar standards are interpreted and enforced in the same manner. As he explained, Respondent's interpretation would permit deferring the test for almost two years. The Secretary's interpretation of this, and apparently other similar standards, appears to be well-settled, is a reasonable interpretation of the regulatory provision consistent with the purposes of the Act, and is entitled to deference. *See, e.g., Kerr-McGee Coal Corp. v. FMSHRC*, 40 F.3d 1257, 1261-62 (D.C.Cir. 1994), *cert. denied*, 115 S.Ct. 2611 (1995); *Island Creek Coal Co.*, 20 FMSHRC 14, 18-19 (Jan. 1998).

I find that Respondent violated the standard as alleged and that the assessment of gravity issues made by Inspector Ellis were reasonable. I disagree with his assessment of "moderate" negligence, however. It is uncontested that mine operators in the area have considerable difficulty securing the services of qualified electricians to perform such tests. I accept Carson's testimony that he had ordered the test previously and that the test was overdue by only a little over two months. Under the circumstances, I assess the operator's degree of negligence as "low."

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[5] The applicable standard appears to address two types of electrical conductors, "wires" and "cables," establishing somewhat different requirements for each. Though Inspector Ellis referred to the conductors as cables, he also referred to them as wires and both his notes and the citation itself refer to them as wires.

I find that Respondent violated 30 C.F.R. § 56.11002 as charged in this citation and that the violation was significant and substantial. The standard clearly requires that handrails be provided on these elevated walkways. Parts of the handrails that satisfied the standard had been deliberately removed. While the resulting openings were not large, they created a risk of falling three to four feet for anyone traveling the walkways. Respondent's point that a person could still reach a handrail from anywhere on the walkways does not diminish the violation. The safety enhancement provided by handrails goes considerably beyond providing a secure handhold for someone deliberately seeking to steady himself. It also acts to prevent inadvertent movement of a person's body from the walkway and a secure place to grab in the event of an unanticipated slip. The missing portions of handrail clearly contributed to the hazard of falling from the walkways. It was also reasonably likely that an injury would result, i.e., that a fall would occur, and that an injury resulting from a fall of three to four feet would be reasonably serious. Consequently, the violation was significant and substantial. I disagree with Inspector Ellis in only one respect. I find that the possibility of a fatal injury was so remote as to reduce the gravity of the offense. Ellis' assessment was premised upon someone falling into the 12" by 24" opening of the crusher while it was operating. That opening, however, was some four feet away from the crossover walkway and, if the crusher was operating, would have been filled with rocks. While it might be possible that a person falling from the crossover or the side walkway would encounter the opening and rocks for a sufficient length of time to suffer injury from the crusher, that prospect appears quite remote. The type of injury that could be reasonably likely to occur could reasonably be expected to result in no more than lost work days or restricted duty.

The Appropriate Penalties

As noted above, Respondent is a small operator. Respondent's history of violations was reflected in an Assessed Violation History Report, referred to as an "R-7." The report had been prepared shortly before the hearing.[6] That report and the assessment sheet reflect that in the 24 months preceding the subject inspection that Respondent's operation had been inspected on 17 days and that 41 citations had been written. Findings on the gravity and negligence associated with each sustained citations are also noted above.

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[6] Respondent objected to admission of the report on grounds that it was produced for the first time at the hearing and had not been properly authenticated. The report, Petitioner's exhibit "P-12", bore the certification of the custodian of such records, the Assistant Director of Assessments for MSHA's Civil Penalty Compliance Office, dated November 28, 2000, two days prior to the hearing. While the report was produced to Respondent on short notice, it was produced as soon as it was available and at least some of the information would have been available to Respondent upon request. Respondent has not identified any inaccuracies in the report in its post-hearing briefs. The certified report was properly admitted over Respondent's objection. As noted, *supra*, under Commission rules of procedure, all relevant evidence, including hearsay, is admissible.

Upon consideration of the factors itemized in § 100(i) of the Act, I impose the following penalties, which are appropriate to the size of Respondent's business. As to Citation No. 7881518, I assess a penalty of $224.00, the penalty proposed by the Secretary. As to Citation No. 7881522, I assess a penalty of $242.00, the penalty proposed by the Secretary. As to Citation No. 7881519, I assess a penalty of $200.00, a reduction of the proposed penalty of $294.00, because Respondent's abatement effort substantially exceeded its obligations. As to Citation No. 7881521, I assess a penalty of $450.00, a reduction from the proposed penalty of $655.00, because of the reduced severity of the reasonably likely injury. As to Citation No. 7881523, I assess a penalty of $300.00, a reduction from the proposed penalty of $399.00, because of the lower degree of negligence.

Financial Hardship

Respondent contends that imposition of the proposed penalties totaling $2,686.00 would result in financial hardship. Carson testified that neither he nor Respondent's representative have drawn a salary from Respondent's operation in years and that he deferred purchasing a used fork lift truck because of the pending assessment of penalties for the citations at issue. Respondent's gross sales range from approximately $500,000.00 in a "bad" year to $900,000 in a "good" year. Sales in 1998, the last year for which sales figures were available, were approximately $890,000.00. While Respondent has paid some past penalties on an installment basis, it did not approach MSHA seeking a reduction in the proposed penalties on the basis of financial hardship.

While Respondent asserts, in essence, that imposition of the proposed penalties would result in financial hardship, it does not directly claim, and did not introduce any evidence, that imposition of those penalties would threaten its ability to remain in business. In fact, the only impact upon Respondent's operations described by Carson was the deferral of the purchase of a piece of equipment. Respondent's evidence and arguments fall far short of demonstrating that either the proposed penalties or the reduced penalties imposed above would threaten its ability to remain in business. *Broken Hill Mining Co*, 19 FMSHRC 673 (April 1997); *Spurlock Mining Co.*, 16 FMSHRC 697 (April 1994).

ORDER

Based upon the foregoing, Citation numbered 7881520 is **Dismissed**. Citations numbered 7881518, 7881519, 7881521, 7881522 and 7881523 are affirmed, as modified, and Respondent is ordered to pay a civil penalty of $1,416.00 within 30 days.

Michael E. Zielinski
Administrative Law Judge

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