FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 18, 2001

ORMET PRIMARY ALUMINUM. CORPORATION, BURNSIDE ALUMINA DIVISION, Contestant	:	CONTEST PROCEEDINGS Docket No. CENT 2000-233-RM Citation No. 7884162; 3/14/2000
v.	:	Docket No. CENT 2000-234-RM Citation No. 7884168; 3/14/2000
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. CENT 2000-235-RM Citation No. 7884188; 4/4/2000
	:	Docket No. CENT 2000-236-RM Citation No. 7884189; 4/4/2000
	:	Docket No. CENT 2000-237-RM Citation No. 7884193; 4/5/2000
	:	Docket No. CENT 2000-322-RM Citation No. 7885282; 6/5/2000
	:	Docket No. CENT 2000-323-RM Citation No. 7885279; 5/17/2000
	:	Ormet Corporation Mine ID 16-00354
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2000-331-M A. C. No. 16-00354-05548
v.	:	Docket No. CENT 2000-435-M A.C. No. 16-00354-05549
ORMET PRIMARY ALUMINUM, CORPORATION, BURNSIDE	:	Docket No. CENT 2001-182-M A.C. No. 16-00354-05550

ALUMINA DIVISION, :
Respondent : Ormet Corporation

DECISION

Appearances: Brian Duncan, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, on behalf of Petitioner;
John C. Artz, Esq., Polito & Smock, P.C., Pittsburgh, Pennsylvania, on behalf of Respondent.

Before: Judge Zielinski

These cases are before me on Notices of Contest filed by Ormet Primary Aluminum Corporation and corresponding Petitions for Assessment of Civil Penalty filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Act"). 30 U.S.C. § 815. The petitions allege that Ormet is liable for seven violations of mandatory safety and health standards applicable to surface metal and nonmetal mines. A hearing was held in Baton Rouge, Louisiana.[1] The parties submitted briefs following receipt of the transcript.[2] At the commencement of the hearing, the Secretary withdrew two of the alleged violations and the petitions as to those citations will be dismissed. The Secretary proposes civil penalties totaling $769.00 for the remaining charges. For the reasons set forth below, I find that Ormet committed two of the alleged violations and impose civil penalties totaling $315.00.

Findings of Fact - Conclusions of Law

During March and April, 2000, MSHA inspector John Ramirez conducted an inspection of Ormet's Burnside Aluminum Division's alumina mill in Ascension County, Louisiana. He issued several citations alleging violations of mandatory safety and health standards. On May 17, 2000, fellow MSHA inspector, James Bussell, performed a follow-up compliance inspection to determine whether violations cited by Ramirez had been abated. He also visited the mine on June 5, 2000, and issued a citation for failure to timely report a work-related accident. Both

[1] The civil penalty proceeding as to Citation No. 7885282 had not yet been filed at the time of the hearing. The issues raised by Ormet's related contest proceeding, as well as penalty issues common to all of the citations were heard and, by agreement of the parties, this decision disposes of all issues raised in the subsequently filed civil penalty proceeding, Docket No. CENT 2001-182-M.

[2] Substantial delays were experienced in obtaining the transcript. It was necessary to request further review of the court reporter's notes to supply some 27 pages that had been omitted from the transcript initially submitted. The official transcript consists of pages numbered 1 through 40, followed by pages numbered 40-1 through 40-27, followed by pages numbered 41 through 314. See the Amended Briefing Order entered on September 19, 2001.

Ramirez and Bussell have 14 years of experience as MSHA inspectors and both have considerable prior mining experience. They also had inspected Ormet's facility on several prior occasions.

The citations are discussed below in the order that they were presented at the hearing.

Citation No. 7884162

Citation No. 7884162 was issued by Ramirez on March 14, 2000, and alleged a violation of 30 C.F.R. § 56.9300(a), which requires that: "Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." The conditions he observed were noted on the citation as:

> Berms or guardrails were not provided on the banks of roadways where a drop-off existed of sufficient grade and depth to cause a vehicle to overturn. Fatal injuries could occur as a result of the condition. The affected roadway runs east and west along the pipelines to the mud lakes and two other roads running south from that same road. Tire tracks were observed as close as one foot from the edge. Only persons that check and maintain the pipeline use the road. It is traveled at least once a shift.

He concluded that it was unlikely that the violation would result in an injury – but that an injury could be fatal, that the violation was not significant and substantial, that one person was affected and that the operator's negligence was moderate. The citation was subsequently modified to reduce the operator's negligence to low because the condition had existed for a long time and had not been noted in prior inspections.

Ramirez was concerned about two areas that he determined were "roadways," neither of which had berms or guardrails separating the traveled surfaces from drainage ditches running alongside them.

The area of Ramirez's primary concern consisted of cleared ground running north/south for about six-tenths of a mile along the pipeline, on which there were numerous vehicle tracks. The area was accessed from a short east/west road but did not connect with any other road or portion of Ormet's facility. A picture taken by Ramirez showed marks where a tracked, as opposed to a wheeled, vehicle traveled within one foot of the edge of a drainage ditch. (Ex. S-4, Tr. 119). Ramirez believed that the area was part of the pipeline inspection road that was used once each shift by Ormet's employees. (Tr. 20). The area is depicted in exhibits S-4 and O-9.

The other area was an unpaved road approximately two-tenths of a mile long that ran east/west connecting the paved plant access road with another unpaved road that ran north/south alongside a pipeline from the plant to the "mud lakes," or settlement ponds, about one mile

away.[3] The road was used once per shift by an employee in a pickup truck to inspect the pipeline. A drainage ditch about five feet deep ran along the north side of the east/west road and was closest to it near its intersection with the paved plant access road. As it proceeded away from that intersection, the road curved gradually away from the ditch, such that it ran roughly parallel to the ditch for only about half of its length, i.e. about one-tenth of a mile. The road had a shoulder which measured six feet wide at its closest proximity to the ditch. Both the Secretary and Ormet introduced pictures of the short east/west road into evidence. (Ex. S-5, O-7, O-8).

Ramirez had inspected Ormet's facility on more than six prior occasions, but had never determined that the mud lakes road posed a safety hazard and had not issued any citations to that effect. He issued the instant citation because his observation of a track mark within one foot of the edge of a ditch raised a concern that a vehicle might be inadvertently driven into the ditch, injuring the driver.

In an enforcement proceeding under the Act, the Secretary has the burden of proving an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd., Secretary of Labor v. Keystone Coal Mining Corp.,* 151 F.3d 1096 (D.C.Cir. 1998); *ASARCO Mining* Co., 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources Inc.*, 9 FMSHRC 903, 907 (May 1987).

I find that the Secretary has not carried her burden of proof with respect to this alleged violation. The area primarily focused on by Ramirez was not a roadway and the drainage ditch running alongside the short east/west road did not present a hazard to vehicle operators.

Ormet's witnesses and exhibits, including an aerial photograph of the area (Ex. O-1), clarified that the roadway used to inspect the pipeline starts at the plant access road, proceeds west for two-tenths of a mile and then runs about seven-tenths of a mile south along the pipeline. However, the north/south portion is on the opposite side of the pipeline from the area depicted in exhibits S-4 and O-9. There is a small, approximately one foot deep, drainage ditch running alongside the north/south roadway, but it does not present a hazard. The north/south portion of the mud lakes road is shown in exhibit O-10.

Ramirez did not recall whether there was a roadway on the other side of the pipeline from the area depicted in exhibit S-4. (Tr. 61). However, he later admitted that it was possible that there was such a roadway used for inspection of the pipeline and that the area he cited was used only temporarily to clean out the drainage ditch. (Tr. 122). His field notes, which may have refreshed his recollection and clarified his testimony, were not available because he had not brought them with him to the hearing.

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[3] The east/west road was also used by a farmer to access land beyond the north/south mud lakes road.

Ramirez mistakenly concluded that the area depicted in exhibit S-4 was part of the pipeline inspection road. In fact, it was not a roadway at all. It was simply ground that had been traversed by a tracked backhoe that had dredged out the drainage ditch. It was not normally traveled by Ormet employees and was used only to maintain the ditch every few years or to make repairs to the pipeline that could not be effectuated from the north/south mud lakes road.

The short east/west road was part of the pipeline inspection road and there was a drainage ditch that ran alongside it. However, that ditch was sufficiently far away from the road that it did not present an appreciable hazard to the operators of vehicles. As noted above, the road curves gradually away from the ditch such that it was close to it for only about one-tenth of a mile nearest the plant access road. A vehicle traveling that portion of the road would be moving relatively slowly because the driver would have just turned onto the road or would be preparing to turn onto the plant access road. Olin K. Dart, Jr., Ph.D., testified as an expert in the field of civil engineering, specializing in highway design and traffic engineering. He inspected the area and measured the width of the shoulder on the ditch side of the east/west roadway as six feet for the short distance that the ditch paralleled the road and testified that, in his opinion, the shoulder presented sufficient protection from the hazard of a vehicle overturning in the ditch and was typical of roadway/ditch configurations in that area.

Ramirez testified that he observed tire marks within one foot of the ditch at that location. However, that testimony is inconsistent with the weight of the evidence and I find that the only vehicle tracks he observed in close proximity to a ditch were the tracks made by the backhoe depicted in exhibit S-4. Both exhibit S-5, depicting the east/west road, and exhibit S-4, depicting the area traversed by the backhoe, bore the notation that tire marks were observed within one foot of the edge of the ditch. Vehicle tracks, made by the tracked backhoe, are shown close to the edge of the ditch in exhibit S-4. Any vehicle tracks within one foot of the ditch running alongside the east/west road would have had to have been on the shoulder, several feet from the roadway surface, and Ramirez would surely have taken a picture of them.

If Ramirez had not mistakenly concluded that the area used by the backhoe was part of the mud lakes pipeline road, it is highly unlikely that he would have concluded that a violation existed. Ramirez had inspected the mud lakes road during six to eight prior inspections and, like other MSHA inspectors that inspected Ormet's facilities twice yearly, had determined that the road's proximity to the ditch did not violate the regulation. While he testified that conditions in both of the described areas were the bases for the citation, it is apparent that the work area depicted in exhibit S-4 was the primary, if not the exclusive, focus of his violation assessment. The citation itself initially refers to "roadways," but goes on to describe the "affected roadway" as one that "runs . . . along the pipelines to the mud lakes." It was the presence of the tracks within one foot of the ditch that prompted his concern. But, those tracks were not on a roadway.

The Secretary has not proven the violation alleged in Citation No. 7884162.

Citation No. 7884168

Citation No. 7884168 was issued by Ramirez on March 14, 2000, and alleged a violation of 30 C.F.R. § 56.20003(b), which requires that "[t]he floor of every workplace shall be maintained in a clean and, so far as possible, dry condition." The conditions he observed were described in the citation as follows:

> Poor housekeeping was evident on the north side of the red mud tank in the 368 area. The mud does contain caustics and a burn hazard existed if a person slipped, tripped or fell into the mud. The build up was up to 12 inches deep in some areas. Two pumps were observed with worn out packing, causing a large amount of leakage. A supervisor stated that they were hard to keep up with. Evidence (foot prints) of persons entering and leaving the affected area could be seen. Lack of maintenance on the pumps and sump areas created the hazard. It is also evident that the build up has been there for an extended time.

He concluded that it was reasonably likely that an injury would result from the violation and that an injury could be permanently disabling, that it was significant and substantial, and that two persons were affected. He initially assessed the degree of operator negligence as moderate, but later modified it to low because the mud had a low caustic content and an emergency eye wash station was in the area.

The Violation

The area in question is a concrete deck or pad with an approximately one foot high wall or curb around its perimeter. It was designed to collect and retain leakage from pumps and other sources. The red mud is removed from the alumina solution by presses, is washed to remove caustic used in the alumina extraction process and is then pumped to the mud lakes, or settlement ponds, about a mile from the plant. Because of the nature of the material and the process involved, leaks from pump packing and other sources occur on an ongoing basis. The leakage collects on the pad and is periodically cleaned up. The floor of the concrete pad is sloped downward slightly to a drain feeding into a sump pump, which pumps the material back into the pressing/washing process. The area is cleaned with a hose using water extracted as part of the process. The water contains a small amount of caustic and is used to wash the mud, in suspension, down to the sump pump drain. The only work performed in the area is periodic cleaning and occasional pump maintenance and repair.

On the day the citation was issued, the sump pump was not operational and had not been for several days. Efforts had been made to repair it, and Ramirez observed footprints in the mud most likely made by workers involved in the repair effort. There is some dispute as to the thickness of the mud. Ramirez estimated it as 12 inches by measuring the height to which mud was deposited on the boot of the miners' representative. Pictures of the area, taken before and after it had been cleaned, depict a concrete step at the base of a ladder which was measured to have been six inches higher than the pad floor. Before cleaning, the level of the mud solution

was lower than the step, although it was more likely higher in the thicker mud where Ramirez observed the footprints. (Ex. S-8, S-9, O-2, O-3).

I find that Ormet is liable for the violation cited in Citation No. 7884168. The area had not been cleaned in some time, apparently because of the failure to repair the sump pump. No evidence was introduced to establish that the pump could not have been promptly repaired. The buildup of slippery mud in the area presented a hazard to miners maintaining and repairing the sump and other pumps.

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." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

> 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.

Mathies Coal Co, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *See also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g, Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> 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 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (Dec. 1987).

Ramirez's S&S assessment was based upon his conclusion that a miner falling while walking through the area might get some of the caustic mud in his eyes and/or ears and suffer a permanent loss of sight or hearing. (Tr. 40-5). I find that possibility too remote to support the S&S designation. Ramirez admitted on cross examination that he did not know the caustic content of the mud or the effect that it would have on human tissue. (Tr. 78). He had previously suffered a burn from caustic material. However, it did not occur at Ormet's facility and his assessment was based upon an assumption that the mud at Ormet's facility was comparable to the substance he had previously encountered. The Secretary did not introduce any evidence quantifying the risk of permanent injury posed by the limited exposure assumed by Ramirez. There is no dispute that workers in the area have access to and use appropriate safety equipment, including eye goggles. There is an eye wash station in the immediate area, and emergency showers and clean clothing are available. Assuming that a fall was reasonably likely, it is considerably less likely that caustic material would get into a miner's eye or ear, and there is no evidence to support a finding that relatively prompt flushing at the eye wash station would not be sufficient to avoid injury, much less a reasonably serious injury.

I find that the violation was not S&S and that, while an injury may have been reasonably likely, the injury would result in no more than lost work days or restricted duty. I agree with Ramirez's conclusion that the operator's negligence was low.

Citation No. 7884183 and Order No. 7885279

Citation No. 7884183 was issued by Ramirez on April 4, 2000, and alleged a violation of 30 C.F.R. § 56.11001, which requires that "[s]afe means of access shall be provided and maintained to all working places." The conditions that he observed were noted on the citation as:

> A safe means of access was not provided to persons through the filtration area. It included: the press floor, the half deck, and the pad area. The grating between the presses was irregular and bent, scale was observed throughout the half deck and on the floor, hoses, scrap pipe and mud was observed. A slip, trip and fall hazard existed as a result of the condition.

He concluded that it was unlikely that an injury would occur as a result of the violation – but that an injury could result in lost time or restricted duty, that it affected one person, and was the result of the operator's moderate negligence. He required that the violation be corrected by April 24, 2000. Ormet did not contest the citation.

The press floor of the plant is about 20 feet above the concrete pad area. The presses remove the "liquor" containing the dissolved alumina from the solids, the red mud-like substance. It is a dirty process and there is spillage throughout the press floor. The presses are separated by aisles and the flooring consists largely of open steel grating, bridging drainage channels that allow for the area to be washed down with hoses. Ramirez observed pieces of grating that were bent and/or not seated properly and loose pieces of pipe and hose that he determined were tripping hazards. (Ex. S-11).

The half deck refers to a platform that is suspended about five feet below the press floor. It contains piping, conduit and equipment associated with the presses, and has narrow walkways with hand railings and floors consisting of grating. Leakage from the presses drips onto the half deck and builds up on the surfaces of the pipes, conduit and equipment. The deposits are referred to as "scale." Some of the material hardens as it drips down, resulting in stalactite-type formations. The formation of scale is an ongoing process and Ramirez recognized that there would always be some scale present. He felt that the buildup had been allowed to go too far. (Tr. 40-18). Some of the scale was loose and some was very hard. Scale is dense material and its weight had caused deflection in at least one horizontal piece of electrical conduit. Ramirez was concerned about loose scale falling on persons who might be traversing or working on the pad area some 15-20 feet below, and about heavy deposits deforming and breaking the electrical conduit. Although he noted the scale buildup in the body of the citation, the only hazard he specifically identified was the trip and fall hazard presented by the grating and materials on the press floor.

Ramirez testified that he took a conservative approach to the violations that he observed in the area and chose to issue one citation encompassing several conditions that could have been cited separately. He also stated that, in retrospect, the violation may have been more properly evaluated to have presented a reasonably likely possibility of an injury occurring from a slip and fall and that, if a heavy deposit of scale fell and struck a miner on the pad floor, a permanent or fatal injury could result. He, like Bussell later, rated the possibility of an injury to a miner on the pad floor as remote because no-one worked in that area; they merely passed through occasionally.

On May 17, 2000, Bussell visited Ormet's plant to, among other things, terminate Citation No. 7884183. He concluded that some of the conditions cited by Ramirez had not been abated by Ormet and issued Order No. 7885279, pursuant to section 104(b) of the Act, barring access to the pad area below the press floor and half deck until the unsafe conditions were corrected and inspected by MSHA for compliance. He described the conditions in the body of the order as follows:

> A safe means of access was not provided to persons working or traveling in the pad area below the press floor. The buildup of material on top of the piping, conduit, and framework above the pad area had not been taken down sufficiently to protect persons from the hazard. The pad area below the press floor was barricaded off and entry to the area is denied except to remove the material

creating the hazard, and until MSHA can inspect the area for compliance.

Bussell was satisfied that Ormet had abated the unsafe conditions on the press floor that Ramirez had itemized on the citation as presenting the "slip, trip, and fall hazard." (Tr. 179-80). Bussell's concern was the scale buildup on the half deck. Although he was not present when Ramirez issued the citation on April 4th, he saw no-one working on scale removal and concluded that virtually no effort had been devoted to removing the scale. He observed what he considered to be loose scale on conduit and throughout the half deck area, as well as deteriorated pipe insulation. His order essentially closed-off the pad area below the half deck. He allowed the barricades barring access to the closed area to be moved as progress was made removing the scale, a process that took nearly two months.

Terry E. Bozeman, Ormet's superintendent of the digestion/filtration area, was present when Ramirez made his inspection and issued the citation. He testified that Ramirez told him that, in order to abate the citation, Ormet needed to eliminate the slip and fall hazards on the press floor and remove the loose scale, not the hard cemented-on scale, on the half deck. Ormet employs two persons to do scaling and assigned one of them to work solely on the half deck. Bozeman observed the person working on a daily basis and testified that all of the loose scale was removed within one week of Ramirez's inspection and that by the time Bussell came to abate the citation, approximately 50% of the remaining scale had been removed. The hard scale, which was similar to concrete, had to be chiseled off by hand or with an air hammer.

Bozeman was surprised and aggravated by Bussell's assessment of the abatement effort on the half deck. He felt that all of the loose scale, which was Ramirez's concern, had been removed and that the miners' representative who had also accompanied Ramirez on the inspection was also of the opinion that the scale problem had been corrected. Bussell, however, had no recollection of anyone at Ormet, including the miners' representative, claiming to have made an effort to eliminate the scale buildup. Rather, Ormet officials told him that, due to vacation schedules and other demands, there had been essentially no time available to remove the scale.

It is apparent that the citation issued by Ramirez, which is not contested by Ormet, was properly issued and that the gravity and negligence factors were correctly assessed. It is also clear that Ramirez and Bussell differed considerably on their respective evaluations of the condition of the half deck scale. Neither inspector explained how he determined whether scale was loose or cemented and it appears, from the single photograph depicting scale observed by Bussell, that it would be difficult to make such a determination from observation alone. (Ex. S-15). Of course, Bussell was not present when Ramirez issued the citation. The evaluation of a general condition like that noted by Ramirez ("scale was observed throughout the half deck") is somewhat subjective and it is not surprising that inspectors would differ in their evaluations of such conditions.

The parties' dramatically different positions on Ormet's efforts to abate the scale buildup cannot be reconciled, even when the subjective nature of the evaluation is considered. Bussell

did not make his compliance inspection until six weeks after Ramirez had issued the citation, well past the 20 days that had been allowed for abatement. Had Ormet actually removed all of the loose scale within the first week, and had one person been exclusively assigned to remove scale for the additional five weeks prior to Bussell's inspection, it is virtually impossible that Bussell would have reached the conclusions that he did. He testified that if he had seen any evidence of progress on abatement of the scale buildup he most likely would have extended the time allowed for compliance. However, he concluded from his observations that virtually no effort had been made. I find that, while Ormet may have devoted some effort to removal of the half deck scale between April 4 and May 17, 2000, it had not taken adequate steps to abate the hazard posed by the scale.

Ormet's claim of having made a good faith effort to abate the hazards identified by Ramirez also has support in the record. The only hazard specifically identified by Ramirez in the body of the citation was the trip, slip, and fall hazard presented by the grating and obstacles on the walkways of the press floor. There is no dispute that those conditions were satisfactorily abated. While Ormet should have done more to remove the scale buildup, its abatement effort cannot properly be categorized as completely non-compliant, which resulted in imposition of an additional 10 points in the penalty calculation, as well as loss of the 30% reduction in the originally proposed penalty. *See* 30 C.F.R. § 100.3(f). A more appropriate penalty would be that which would have been assessed without addition of the 10 penalty points added for failure to abate the violation.

Citation No. 7884193

Citation No 7884193 was issued by Ramirez on April 5, 2000, for what he perceived to be a violation of 30 C.F.R. § 56.11001, which requires that a "[s]afe means of access shall be provided and maintained to all working places." The conditions that resulted in the violation were described on the citation as:

> A safe means of access was not provided to persons in the 350 area shaker floor. A buildup of alumina up to 5 feet deep was observed on the roof area between the #1 and #2 kilns. The weight of the material was not known but the hazard of structural failure could exist. Persons work under the affected area.

He concluded that it was unlikely that an injury would result from the violation – but that an injury could be fatal, that the violation was not S&S, that one person was affected, and that the operator's negligence was moderate. The roof area is depicted in exhibits S-15 and O-5.

The roof in question is adjacent to kilns that are used to dry Ormet's final product, alumina, which is a white crystalline substance. It is abrasive and eventually wears through the walls of the kilns' cooling equipment. Alumina leaking through such openings, as well as smaller amounts that simply escape the drying/cooling process, accumulates alongside the kilns on the roof. There are three kilns, which operate at very high temperatures, approximately 2,500 degrees Fahrenheit, effectively preventing access to the roof. Every three months, the kilns are shut down, one of them is repaired and refurbished and the alumina accumulated in the area is removed.

Ramirez did not go onto the roof. In consultation with the miners' and management representatives, he estimated the thickness of the deposit at five feet at its highest point. However, he did not know the slope of the roof. (Tr. 96). Nor did he know the composition of the roof. (Tr. 47, 100). There was a vertical corrugated steel wall at the far end of the roof. He observed the underside of the roof from the affected area and concluded that it was likely that the roof deck was constructed of a similar corrugated material. The structural components of the roof appeared to be of "pretty heavy construction" and were in good condition. (Tr. 55). He observed no deflected or corroded members. (Tr. 100). He based his assessment on the possibility that, under the weight of the alumina, the roof decking might give way between the supports and that pieces of the roof structure might strike persons working in the affected area. (Tr. 54-56).

Ormet's witnesses and exhibits established that the roof is not constructed of corrugated material, as Ramirez had assumed. Rather, it is constructed of steel decking with an overlay of steel plate. (Tr. 249-50). A picture taken in May of 2000, also shows that there is a slope to the roof, such that the depth of the material observed and photographed by Ramirez was likely no more than three feet. (Ex. O-5). The photographs also show an outline on the corrugated metal wall of a prior, considerably thicker accumulation. Jeffery Yeager, who had been Ormet's safety services manager at the Burnside facility, related an incident when one of the coolers fell onto the roof. The cooler weighed about 1,500 pounds and fell from a distance of five feet causing no damage to the roof. The May 2000, photograph, moreover, depicts a somewhat smaller, but comparable, accumulation that Bussell concluded was sufficient to abate a similar violation that he had issued.

Ramirez noted that the alumina was exposed to rain which might dramatically increase its weight. However, the heat from the kilns would tend to dry the alumina and Yeager testified that the material tended to crust over when rained on, such that water penetrated only one to two inches. I accept this testimony and find that rainfall would only marginally add to the weight of the accumulations.

I find that the Secretary has failed to carry her burden of proof with respect to this alleged violation, i.e., that the buildup of alumina posed a safety risk to the workers in the affected area. While the quantity of alumina was not as great as Ramirez estimated, the main failing is that his conclusions were based upon an erroneous assumption about the structure of the roof. It was not made of relatively light corrugated material. Rather, it was made of steel

decking with an overlay of steel plate and had safely supported, not only considerably greater accumulations, but the impact of the 1,500 pound cooler. Bussell, a similarly experienced inspector, had concluded that comparable accumulations did not violate the regulation.

Citation No. 7885282

Citation No. 7885282 was issued on June 5, 2000, by inspector Bussell. It alleged a violation of 30 C.F.R. § 50.20(a), which requires that certain occupational injuries be reported to MSHA within 10 working days. The grounds for the charge were noted on the citation as:

> A miner . . . was injured on March 31, 2000, which resulted in 11 days loss of work. The employee received a fractured finger due to accidently striking his right index finger with a knocker while operating a hitting valve. The Company failed to complete and submit an MSHA 7000-1 (Mine accident, injury and illness report) within the 10 working days required by this standard.

MSHA's attention was called to the potential violation by Ormet's submission of a report regarding the accident. (Ex. S-17). The report had been prepared on April 18, 2000, and bore a notation that the "accident did not turn into a LTA until 4/6/00." Potential late reporting violations are discussed at staff meetings in the MSHA office. The inspectors and their supervisor review the circumstances of each case and it is determined whether or not a citation should be issued. Where an operator claims extenuating circumstances, an inspector reviews them and has discretion to accept a late submission. (Tr. 113, 189-91). As noted on the report, Ormet claimed extenuating circumstances.

The miner had left work on March 31, 2000, at the end of his shift, but returned from the parking lot to the guard station and claimed to have suffered an on-the-job injury to his finger. According to Yeager, who investigated the accident, the guard checked the finger, which did not appear to have suffered trauma, and the miner was able to move it freely. The guard asked the miner to fill out paperwork reporting the injury, but the miner declined and left.[4] The following day, a Saturday, the miner apparently went to a hospital emergency room. The hospital called Ormet to verify his workmen's compensation coverage, which triggered the investigation by Yager. Ormet was skeptical that the miner had been injured while on-the-job, but eventually concluded on April 6, 2000, that he may have been so injured. Yeager filled out the report form, MSHA 7000-1, on April 18, 2000, and it was mailed. Yeager testified that, consistent with longstanding company practice, it was most likely mailed on the 18th. Bussell testified that, according to his recollection, the envelope had not been postmarked on the 18th, but "more like the 20th." However, he had thrown away the envelope shortly after it was received. The date of mailing is considered to be the date the report was submitted. (Tr. 207).

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[4] A miner reporting an injury must undergo drug and alcohol screening. It is possible that the miner declined to file the report to avoid that obligation. The miner was subsequently terminated on the basis of a positive drug/alcohol test.

Regardless of whether the report was mailed on the 18th or the 20th, it was submitted timely based upon Bussell's testimony. Bussell did not recall the specifics of Ormet's justification, but testified that he determined that the injury became reportable on April 6, 2000. (Tr. 191, 203). Bussell apparently accepted Ormet's claim that the injury was not reasonably determined to be work-related until April 6, 2000. The regulation requires that the report be submitted within 10 working days of becoming reportable. The 6th was a Thursday and the 20th was the tenth working day after the 6th.

The Secretary advances several alternative arguments in support of the citation. However, her arguments are inconsistent with the evidence. It is argued that Ormet was notified of the claimed injury on March 31st and April 1st, and that a report prepared on April 18th was untimely using either of those dates as the starting point for the reporting period. However, both Ramirez and Bussell testified that inspectors have discretion to take into consideration extenuating circumstances when determining whether a report is timely. Bussell's testimony regarding this citation was somewhat inconsistent due to his limited recollection of the facts, and he clearly struggled in his attempts to reconstruct the events surrounding issuance of the citation.[5] He testified that he could not recall the circumstances surrounding this report, concluding that he must not have found any extenuating circumstances. (Tr. 190-91). He was fairly firm, however, in recalling that he used April 6th as the date the injury became reportable. Under the circumstances, I find that the starting date for the reporting period was April 6, 2000, the date Ormet obtained sufficient information to justify a determination that an on-the-job injury may have occurred.

The Secretary also argues that, even if April 6th is used as the starting date, the report was untimely because Ormet's plant operates seven days a week, such that the report should have been submitted by April 16, 2000. Ormet counters that only weekdays should be counted because the term "working days" does not normally include weekends and holidays, that Bussell's testimony is consistent with its interpretation, and that the office staff responsible for preparing such reports does not work on weekends. Ormet's arguments are well taken. The term "working days" does not normally include weekends and holidays, and Bussell's testimony, although unclear, indicates that he counted only weekdays in determining the period within which the report should have been submitted. The Ormet personnel responsible for preparing and submitting the reports did not work on weekends. (Tr. 208). I find that only non-holiday weekdays can properly be used to determine the reporting period.

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[5] For example, he testified that April 6th was "evidently" when the miner received (not sought) medical treatment, thereby making the accident reportable. (Tr. 191). In fact, the miner sought, and may have obtained, medical treatment on April 1, 2000, when he visited the hospital emergency room.

April 6, 2000, was a Thursday. The report was submitted the date it was postmarked. Whether it was postmarked on April 18th, as Yager testified was probable, or on April 20th, as Bussell recalled, it would have been submitted on or before the 10th work day after Bussell determined that the injury became reportable.

As noted previously, Bussell's testimony with regard to this citation was inconsistent. Obviously, if he used April 6th as the starting date for the reporting period and the 18th as the submission date, as he stated at one point, he must have miscalculated the number of working days. Even if he used April 20th as the submission date, he would have had to have made a mistake. It may be that he, in fact, did not find any extenuating circumstances to justify tolling of the reporting period. However, his inability to recall the circumstances and his fairly certain recollection that he used the 6th as the starting date, can justify no other conclusion but that the Secretary has failed to carry her burden of proof as to this violation.

The Appropriate Civil Penalty

In excess of 500,000 man-hours are worked per year at Ormet's mine, which makes it a relatively large mine and a medium-sized controlling entity. The parties have stipulated that the payment of the proposed civil penalties would not threaten Ormet's ability to continue in business. I find that neither payment of the proposed civil penalties, nor payment of the reduced civil penalties imposed by this decision, will impair Ormet's ability to continue in business. I also find that the civil penalties imposed below are appropriate to the size of Ormet's business. Ormet has a relatively good history of violations, with 47 violations having been issued over 69 inspection days in the 24 months preceding March 14, 2000.

The proposed civil penalty for Citation No. 7884168 was $184.00. The violation is sustained. However, the violation presented a reasonable likelihood of an injury resulting in lost work days or restricted duty, rather than a permanent injury, and is not S&S. Taking into consideration all of the factors required to be addressed under section 110(i) of the Act, I impose a civil penalty of $100.00 for that violation.

The proposed civil penalty for Citation No. 7884183 and Order No. 7885279 was $420.00. The violation is sustained. However, the imposition of 10 penalty points for failure to abate the violation, in addition to loss of the 30% reduction in penalty for good faith abatement, is too harsh and is not supported by the evidence. Taking into consideration all of the factors required to be addressed under section 110(i) of the Act, I impose a civil penalty of $215.00 for that violation.

ORDER

As to the citations withdrawn by the Secretary, Citation Nos. 7884188 and 7884189, the petition in Docket No. CENT 2000-435-M is **DISMISSED**.

Citation Nos. 7884162, 7884193 and 7885282 are hereby **VACATED** and the related

petitions for assessment of civil penalties are **DISMISSED** as to those citations.

Citations Nos. 7884168 and 7884183 and Order No. 7885279 are **AFFIRMED**, as modified, and Respondent is directed to pay a civil penalty of $315.00 within 45 days.

Michael E. Zielinski
Administrative Law Judge

Distribution:

John C. Artz, Esq., Polito & Smock, P.C., Four Gateway Center, Suite 400, 444 Liberty Ave., Pittsburgh, PA 15222-1220 (Certified Mail)

Brian Duncan, Esq., Office of the Solicitor, U.S. Department of Labor, 525 South Griffin St., Suite 501, Dallas, TX 75202 (Certified Mail)

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