FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 26, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2001-370-M
Petitioner	:	A.C. No. 41-00071-005504
v.	:	
	:	Docket No. CENT 2002-49-M
LEXICON, INC., d/b/a	:	A.C. No. 41-00071-05505 3NC
SCHUECK STEEL COMPANY	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT-2002-13-M
Petitioner	:	A.C. No. 41-00071-05501 3NC
	:	
v.	:	
	:	
LEXICON, INC.,	:	
Respondent	:	Midlothian Quarry and Plant

DECISION

Appearances: Brian A. Duncan, Esq., and Madeleine T. Le, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Alicia Sienne Voltmer, Esq., and David P. Poole, Esq., Hunton & Williams, Dallas, Texas, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Lexicon, Inc., d/b/a Schueck Steel Company (Schueck), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege three violations of the Secretary's mandatory health and safety standards and seek penalties of $70,000.00. A hearing was held in Dallas, Texas. For the reasons set forth below, I affirm the citations, as modified, and assess a civil penalty of $43,000.00.

Procedural Matters

At the beginning of the hearing, the Respondent's Motion for Partial Summary Decision was denied. (Tr. 5-9.) In addition, the Secretary's motion to amend the name of the Respondent in Docket Nos. CENT 2001-370-M and CENT 2002-49-M to be *Lexicon, Inc., d/b/a Schueck Steel Company* rather than *Schueck Steel Company* was granted over the Respondent's objection. (Tr. 9-13.) Finally, the Secretary's unopposed motion to dismiss Docket No. CENT 2002-13-M, because the sole citation in that proceeding had been vacated, was granted. (Tr. 13-16.) Consequently, this decision addresses only Citation No. 7889352 in Docket No. CENT 2001-370-M and Citation Nos. 7899407 and 7899408 in Docket No. CENT 2002-49-M.

Background

TXI operates the Midlothian Quarry and Plant in Midlothian, Texas. Limestone is mined from the open pit quarry and then processed at the plant into cement products. In 2000, TXI was having major construction performed at the plant. TIC-The Industrial Company of Steamboat Springs was the general contractor and Schueck, a steel fabricator, was one of 12 subcontractors performing work at the facility. Among other projects, Schueck was constructing the steel structure for a finishing mill.

On June 23, 2000, Mario Lopez Albarran, a Schueck employee, stepped on an unsecured piece of steel grating, on what was known as the "719 level" of the mill, and fell through the floor almost 50 feet to his death. MSHA began its investigation of the accident that same day.

MSHA Field Office Supervisor James Thomas was assigned as head of the investigation team. The rest of the team was made up of Special Investigator Fred L. Gatewood, George Gardner, an engineer, and Hilario Palacios, a training specialist. Prior to the investigators arrival at the site, assistant district manager Michael Davis issued an oral 103(k) order, 30 U.S.C. § 813(k), over the telephone to Dale Hanks, TXI's Safety Manager.[1] On his arrival, Inspector Gatewood issued the 103(k) order in writing. The order, No. 7889351, stated that:

> A fatal accident occurred at the Finish Mill #6 area of the

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[1] Section 103(k) provides that:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

> plant. An employee of contractor Schueck Steel fell about 40 feet from an upper level deck to the concrete floor at ground level. This order is issued to assure the safety of all persons in the immediate area of this accident, including both the upper level deck and the concrete floor beneath it. The operator shall obtain approval from MSHA before resuming activity of any kind in these areas.

(Govt. Ex. 4.)

On June 25, 2000, Steve Dineen, Lexicon, Inc.'s, Safety Director, and Scotty Burgess, Schueck's onsite Safety Coordinator, spent about an hour and fifteen minutes on the 719 level. Believing that this violated the 103(k) order, Inspector Gatewood issued Citation No. 7889352 to Schueck on June 26, 2000.

Following the conclusion of the investigation, Inspector Gatewood issued two additional citations to Schueck on September 6, 2000. Citation No. 7899407 alleged a violation of section 56.15005 of the Secretary's regulations, 30 C.F.R. § 56.15005, for failing to use a safety belt and lines. Citation No. 7899408 charged a violation of section 56.20011, 30 C.F.R. § 56.20011, because the area of the unsecured grating was neither barricaded nor posted with warning signs.

These three citations were contested at the hearing. In addition, the parties have filed Proposed Findings of Fact and Conclusions of Law setting out their positions. The citations are discussed below, *seriatim*.

Findings of Fact and Conclusions of Law

Citation No. 7899407

This citation alleges a violation of section 56.15005 because: "A fatal accident occurred at this operation on June 23, 2000 when a contractor's employee fell 50 feet after stepping on an unsecured floor grating at 719 level of the new finish mill. The victim was not tied off with a safety belt and line." (Govt. Ex. 1.) Section 56.15005 requires that: "Safety belts and lines shall be worn when persons work where there is a danger of falling . . . ." With regard to this violation, the parties have stipulated that: "Mario Lopez Albarran was not tied off when he fell from the 719 level." (Tr. 18.) In addition to the stipulation, the evidence is undisputed that Albarran was wearing a safety harness, but not tied-off with a safety line.

The Act provides that an operator is liable for the violative acts of its employees. *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1359-60 (September 1991). Therefore, I conclude that Schueck violated section 56.15005 as alleged.

Significant and Substantial

The Inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act, 30 U.S.C. § 814(d), 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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *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 Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). 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 2007 (December 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct safety hazard, 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 will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

There is little doubt that this violation was S&S. The only argument that Respondent makes on this issue is the conclusory statement that "the complete lack of negligence in connection with this citation precludes a finding that the alleged violation was 'significant and substantial.'" (Resp. Br. at 20.) As is set out above, however, negligence is not one of the *Mathies* criteria.

Turning to those criteria, I make the following findings: (1) there is a violation of a safety standard, section 56.15005; (2) failing to tie off with a safety line where there is a danger of falling contributes to the danger of falling; (3) there is a reasonable likelihood one will fall from an area which is not otherwise protected against falling and that falling will result in an injury; and (4) there is a reasonable likelihood that the injury will be reasonably serious in nature. Clearly, the failure to tie-off was a significant contributing cause to the fatal accident, making it "significant and substantial." *Walker Stone Co., Inc.*, 19 FMSHRC 48, 53 (January 1997). Accordingly, I so conclude.

Negligence

Inspector Gatewood determined that this violation was the result of "high" negligence on the part of the operator. Undoubtedly, Albarran was highly negligent. However, as the Respondent has noted, the Commission has long held that the negligence of a "rank-and-file" miner cannot be imputed to the operator for penalty assessment purposes. *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (March 1988); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1982) (*SOCCO*). Rather, to find the operator negligent, "where a rank-and-file employee has violated the Act [or the Secretary's regulations], *the operator's* supervision, training and disciplining of its employees must be examined to determine if *the operator* has taken reasonable steps to prevent the rank-and-file miner's violative conduct." *Whayne Supply Co.*, 19 FMSHRC 447, 452-53 (March 1997); *SOCCO* at 1464.

The Secretary argues, with regard to this issue, that: (1) Joe Rodriguez, the crew foreman had not been trained as a foreman and, as a result, Schueck's tie-off policy was not enforced; (2) Employees were rarely, if ever, monitored for safety compliance; (3) Albarran was observed not being tied-off and Rodriguez did nothing about it; and (4) It was impossible for employees to stay tied-off all of the time because of the length of their lanyards and the location of the safety lines. Significantly, the Secretary has failed to cite evidence in the record to support any of these assertions. Perhaps this is because the record establishes that Schueck did take reasonable steps to prevent Albarran's conduct.

All of the Schueck management personnel, Dineen, Burgess, Kelly McGill (Site Manager) and Rodriguez, testified that: (1) Schueck had a written fall protection program (Resp. Ex. J); (2) there was a "one hundred percent" tie off policy at the finish mill; (3) the policy stressed during the initial training given to miners at the site and reinforced in weekly and daily safety meetings; (4) supervisors, particularly Burgess, were continually on the look-out to make sure the men were tied-off; (5) there were signs on the site reminding employees that the project was a one hundred percent tie-off area;
(6) it was well known that being caught not tied-off could result in firing; and (7) personnel had been disciplined for not being tied-off.[2]

This testimony was corroborated by miners Abraham Grisham and Darwinn J. Reid. Grisham stated that he and everyone else knew there was a one hundred percent tie-off policy at the job site and that failure tie-off could result in termination. (Tr. 152.) He also said that weekly safety meetings were held on Monday mornings and translated into Spanish. (Tr. 154.) Finally, he related that Burgess tried to sneak-up on the miners to make sure that they were tied-off. (Tr. 151.)

Reid also testified that he knew that the company had a one hundred percent tie-off

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[2] Schueck offered into evidence four written warnings given to employees at the Midlothian site for not being tied-off. (Resp. Ex. G.) However, none of them were employees working at the finish mill. (Tr. 345-46.)

policy. (Tr. 183.) He asserted that Rodriguez had safety meetings every morning, in both English and Spanish (Tr. 184.) In addition, Reid testified that at the bottom of the stairs going up the finish mill structure there was a sign advising that the mill was a one hundred percent tie-off area. (Tr. 178, 199-200.) Further, he agreed with Grisham that Burgess checked on the crew to make sure that they were tied-off, including trying to sneak-up on them. (Tr. 182-83.)

There was one witness who disagreed with part of this testimony, Alejandro Lopez, Albarran's brother. He claimed that Rodriguez did not hold safety meetings every day, although he did admit to weekly meetings. He further testified that he was aware of the one hundred percent tie-off policy, but maintained that the company did not enforce the policy. In addition to being Albarran's brother, Lopez is also a party to a wrongful death action being brought in Texas against Schueck as the result of Albarran's death. (Resp. Ex. UU.) Thus, his testimony on these issues must be viewed with some skepticism.

The other reasons given by the Secretary for imputing Albarran's negligence to Schueck are either incorrect or insignificant. For example, it is not surprising that Rodriguez was not given any formal training before being made a crew foreman. The Secretary has not shown that such training is customary in the field and I suspect that it is not. The fact is that while Rodriquez was a novice foreman, he was not a novice in the steel business.

Furthermore, there is no evidence that Rodriguez knew Albarran was sometimes not tied-off and did nothing about it. Grisham testified that he told Rodriguez that Albarran had not tied-off and that "then they just started talking the Spanish." (Tr. 142-43.) Surprisingly, neither side asked Rodriguez whether he had been told that Albarran was not tying-off and, if so, what he did about it. Finally, there is no evidence, other than from Lopez, that the tie-offs furnished the Schueck employees were not long enough.

On the day he fell, Albarran was wearing a safety harness and, for reasons known only to him, unhooked his safety line and walked across the unsecured grating. Even if I found Lopez' evidence to be entirely credible, which as noted above I do not, the weight of the credible evidence supports a finding that Schueck had made reasonable efforts in supervision, training and discipline to make sure that its employees were tied-off when working at heights.

Therefore, I conclude that Albarran's negligence cannot be imputed to Schueck for this violation. I will reassess the penalty accordingly.

Citation No. 7899408

This citation charges a violation of section 56.20011 in that:

> A fatal accident occurred at this operation on June 23, 2000 when a contractor's employee fell 50 feet after stepping on an unsecured floor grating at 719 level of the new finish mill. The unstable floor grating had not been barricaded and posted with warning signs. Foreman Joe Rodriquez and superintendent Bobby Hightower engaged in aggravated conduct constituting more than ordinary negligence. They knew that the floor grating was not secured and that steel was missing but they did not barricade the hazard or post warning signs. This was an unwarrantable failure to comply with a mandatory safety standard.

(Govt. Ex. 2.) Section 56.20011 requires that: "Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches."

The undisputed evidence concerning this violation is that near the end of the workday on the day before the accident, Albarran laid out the steel grating in question, and, in doing so, became aware that there was no steel beam below to support it. He, as well as Grisham and Reid, reported this fact to Rodriguez. In fact, Grisham went so far as to suggest that the area be barricaded. Rodriguez discussed the matter with Bobby Hightower, but neither took any action to have the area barricaded or have warning signs posted.

In interpreting a general standard, such as this one, the Commission has held that the appropriate test for determining whether a set of factual circumstances comes within the scope of the standard is "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982). Applying the test to this case, the question is whether a reasonably prudent person would have recognized that the grating over the missing steel beam was an area where a safety hazard was not "immediately obvious." The Respondent argues that "the missing steel beneath the grating was an obvious hazard for an experienced iron worker" and that, therefore, the hazard was immediately obvious. (Resp. Br. at 24.) As discussed below, I find that the hazard was not "immediately obvious."

The term "immediately obvious" is not defined in the regulations. Nor does there appear to be any caselaw defining it. While there are several definitions of "immediately" in the dictionary, the one that is most pertinent to the rule is "without interval of time: without delay." *Webster's Third New International Dictionary* 1129 (1993) (*Webster's*). The most germane definitions of "obvious" are: "Capable of easy perception: a: readily perceived by the senses . . . b: readily and easily perceived by the sensibilities or mind: requiring very little insight or reflection to perceive, recognize, or comprehend
. . . c: easily understood: requiring no thought or consideration to understand or analyze." *Webster's* at 1559. Thus, a hazard which is immediately obvious is one that can be readily

perceived, recognized or comprehended, with no thought or consideration to understand or analyze and without delay.

The company's reliance on whether the missing beam was immediately obvious to experienced iron workers is misplaced. In the first place, even if the missing beam was immediately obvious, that does not mean that the hazard of falling through the grating was immediately obvious.

In the second place, the testimony of the "experienced iron workers" at the hearing was not unanimous that it was obvious that a steel beam was missing beneath the grating. Grisham testified:

> Q. Was it obvious that if you're walking across the top of the grating that a piece of steel was missing if you didn't know it?
>
> A. You probably wouldn't see it.
>
> JUDGE HODGDON: You say you probably wouldn't see it?
>
> THE WITNESS: No, because where the beam comes together, that beam, you probably won't see it unless you – not tied of at 100 percent, you just step on it, and that beam would be teeter-tottering, and you go down with it.

(Tr. 145.) He also stated: "I already came back down to Joe and told him we're missing a beam up there. If we lay that grating down like that on the floor, somebody will easily walk up to it and just fall right through there . . . ." (Tr. 137.) Reid testified: "When you're up there, you can like hardly see. It will be just like there's nothing wrong with it." (Tr. 174-75.) When asked specifically if you could see the missing beam when standing on top of the grating, he responded: "No." (Tr. 175.)

Furthermore, even an experienced iron worker may suffer a lapse of attentiveness which could result in a fall. In a case involving section 57.15-5, 30 C.F.R. § 57.15-5,[3] the operator argued " that the skill of a miner is a relevant factor in determining whether there is a danger of falling because the miner's skill defines the scope of the hazard presented." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983). The Commission rejected that argument, stating:

> We find that such a subjective approach ignores the inherent vagaries of human behavior. Even a skilled employee may suffer a

[3] 30 C.F.R. § 57.15-5 was a predecessor of 30 C.F.R. § 57.15005, which is identical to 30 C.F.R. § 56.15005, set out in the discussion of the previous citation.

> lapse of attentiveness, either from fatigue or environmental distractions, which could result in a fall. The specific purpose of 30 C.F.R. § 57.15-5 is the prevention of dangerous falls. By adopting an objective interpretation of the standard and requiring a positive means of protection whenever a danger of falling exists, even a skilled miner is protected from injury.

Id. (citation omitted).

Here, either the hazard was not immediately obvious, or Albarran intentionally walked over the unsupported grating. Since there is no evidence to suggest that the latter was the case, I conclude that the hazard was not immediately obvious. This is because a hazard is not immediately obvious unless it is readily apparent to an inattentive, experienced miner, as well as to an inexperienced miner. Albarran was an experienced steel worker, who had apparently put down the very unsupported grating that he stepped on and later reported it to his foreman, yet he walked on it and fell through. A barricade would have prevented this from happening.

Accepting Schueck's subjective approach would defeat the safety purposes of the rule. By adopting an objective interpretation of section 56.20011 and requiring a positive means of protection whenever a hazard is not immediately obvious, even an experienced steel worker is protected from injury.

I find that a reasonably prudent person familiar with the mining industry and the protective purposes of section 56.20011 would have recognized that a barricade was required around the unsupported grating on the 719 level. Consequently, I conclude that Schueck violated section 56.20011 by not barricading the area.

Significant and Substantial

The inspector found this violation to be S&S. A review of the *Mathies* criteria, *supra* at 4, shows that that finding was correct. There was a violation of a safety standard. The violation caused a distinct safety hazard, that is, the danger of falling through unsupported grating. There was a reasonable likelihood, if not barricaded, that someone would walk on the unsupported grating and fall through, and that falling through the unsupported grating would result in an injury. Lastly, there was a reasonable likelihood that the injury would be reasonably serious.

In this instance, the injury was death. However, since this was a one hundred percent tie-off area, it was not reasonably likely that a miner who was not tied-off would walk over the grating. Nonetheless, as Inspector Gatewood testified, "falling with a lanyard on doesn't guarantee that you're not going to be injured." (Tr. 392.) A six to eight foot free fall before hitting the end of the tie-off would cause reasonably serious injuries, such as, lacerations, contusions, strains or sprains, and broken bones. In addition, if the grating fell after the miner, it could strike him on the way down, or he could swing and hit a beam, both of which could cause

much more serious injuries. Consequently, I conclude that the violation was "significant and substantial."

Unwarrantable Failure

The inspector also found that this violation resulted from the company's unwarrantable failure to comply with the regulation. The term "unwarrantable failure" is taken from section 104(d)(1) of the Act, which assigns more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply . . . mandatory health or safety standards."

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC at 2010. "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

As discussed above, Rodriguez knew the night before the accident that there was unsupported grating on the 719 level. He conveyed this information to the site superintendent. Rodriguez testified that he told his crew during the morning safety briefing that there was a steel beam missing and that no one but Reid and Pablo Lopez Albarran were to go to the 719 level, but neither supervisor took any action to barricade the area.

Grisham testified that when he told Rodriguez about the missing beam, he also advised him that: "If a beam is missing like that, we should run a red tape line, just the corner section, so nobody would go through it or walk through that red barricade." (Tr. 139.) Grisham also stated that Rodriguez did not say to the crew "that no one's supposed to go onto the 719 level." (Tr. 146.)

Schueck argues that because "Rodriguez not only warned his crew on the morning of the accident about the missing steel, but also restricted access to the area to the welders," the violation was not unwarrantable. (Resp. Br. at 26.) The company also asserts that MSHA's completion of 110(c), 30 U.S.C. § 820(c), investigations without charging Rodriguez or Hightower supports a conclusion that the violation was not unwarrantable.[4] I find that the evidence does not support the company's position.

[4] Section 110(c) provides that: "Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties . . . that may be imposed upon a person under subsections (a) and (d)."

Respondent's argument concerning the dropping of the section 110(c) cases is without merit. Section 110(c) requires that the violation be knowingly authorized, ordered or carried out. An unwarrantable failure does not have to be knowing. In addition, the Secretary's determination not to bring cases under section 110(c) can be for reasons having nothing to do with whether the case can be proved or not. Further, the Secretary is free to conclude that a 110(c) case is appropriate and still decide not to bring it. Therefore, I find that the Secretary's determination not to prosecute the section 110(c) cases is not probative of whether Schueck unwarrantably failed to comply with this regulation. *Cf. Fort Scott Fertilizer*, 17 FMSHRC at 1117.

The Commission has established several factors as being determinative of whether a violation is unwarrantable, including:

> [T]he extent of a violative condition, the length of time it has existed, whether the violation is obvious, or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). The Commission has also examined the operator's knowledge of the existence of the dangerous condition. *E.g., Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator aware of brake malfunction failed to remedy problem); *Warren Steen*, 14 FMSHRC at 1126-27 (knowledge of hazard and failure to take adequate precautionary measures support unwarrantable determination).

Cyprus Emerald Resources Corp., 20 FMSHRC 790, 813 (August 1998).

In this case, the danger caused by the unsecured grating was obvious and was reported to management by at least three miners. Even if the supervisors assumed that the worst that could happen was that someone who was tied-off would fall through the grating, that still had the potential for significant injury. Further, even a rank-and-file miner (Grisham) knew what action should be taken and advised Rodriguez to barricade the area. Instead, that advice was ignored and a miner was killed. Rodriguez' admonition to his miners not to go to the 719 level, if in fact it was made, was insufficient in view of the danger involved. Accordingly, I conclude that

Schueck demonstrated a serious lack of reasonable care and, therefore, unwarrantably failed to comply with section 56.20011.[5]

Citation No. 7889352

This citation alleges that:

> Two contractor employees violated the 103(k) order 7889351 that was issued on June 23, 2000. The Site Safety Supervisor for Schueck Steel, Scotty Burgess, man-lifted Corporate Safety Director, Steven Dineen, to the 719 level of the Finish Mill during the afternoon of June 25. The two of them then walked onto the 719 level, inspected the area and took some measurements. Dineen had twice been denied approval by MSHA to perform these tasks because unsafe conditions still existed and safe recovery procedures had not yet been approved.

(Govt. Ex. 3.) This situation appears to have arisen because of misunderstanding.

Thomas, the head of the investigation team, testified that Dineen asked him two times if he could go up to the 719 level. He said the first time was sometime before lunch on Saturday, "[a]fter we had modified the order for them to do some clean-up on the lower level."[6] (Tr. 446.) Thomas related that he told Dineen "no" and explained to him "that we hadn't determined that it was safe, that the grating was – none of the grating had been secured; there were still holes in the floor, and we hadn't really completed our investigation." (Tr. 446.) Thomas said that the second request was made on Sunday, "sometime before lunch," and he again told Dineen, "No." (Tr. 447.) He denied that Dineen ever asked him a third time. Thomas did testify, however, that there was a "third conversation," "when we modified the order that morning for them to clean up the lower level. Now, if you're counting that as one of the conversations, then there was [*sic*] three, but there was [*sic*] only two conversations with Mr. Dineen asking to go up to the 719 level." (Tr. 456.)

Inspector Gatewood testified that he and Thomas "were probably together 95 percent of the time." (Tr. 381.) He said that:

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[5] In reaching conclusions on this citation, I have given the greatest weight to the testimony of Reid and Grisham, who, since they no longer work for Schueck, were the only witnesses with no stake in the outcome of the proceeding.

[6] The 103(k) order was modified at 10:50 a.m. "to allow the removal of materials, equipment, and other items from the ground level of Finish Mill #6 in the vicinity of the fatal accident . . . ." (Govt. Ex. 4, p.3.)

> At 10:50 in the morning on Saturday – and the reason I know the 10:50 is because that's the time of the modification to the order, to allow the clean-up – Mr. Dineen, Mr. Hanks and Mr. Strong came and asked specifically to remove some materials and the blood and so on from the base of the cooling tower, and that permission was granted at exactly 10:50 a.m. on Saturday morning.

(Tr. 382.) He went on to say that a few minutes later, Dineen came to them by himself and asked if he could go up to the 719 level. He testified that Thomas told Dineen, "No." (Tr. 387.)

Gatewood testified that Dineen approached them a second time on Sunday morning between 9:00 a.m. and 11:00 a.m. and again asked for permission to go up to the 719 level. He said that Thomas responded: "No. And he gave him two conditions on before he would ever approve anything. One, that Mr. Dineen would have to have our prior approval, and, two, that we wanted to be present when it happened." (Tr. 388.) Finally, Gatewood asserted that he had not witnessed a third conversation concerning such a request between Thomas and Dineen.

Dineen testified that he made three requests of Thomas to go up to the 719 level and the third time Thomas gave him permission to do so. He said that:

> [T]he first time was Saturday morning when we were – you know, after we had gotten down there and done our ground inspection. It was right before lunch. And one of the inspectors, I believe, went up – there might have been one or two went up before lunch, and the other one went up after lunch, and then I asked him again sometime around – maybe an hour after we got back down there after lunch."

(Tr. 344.) With regard to the third time, he testified:

> On Saturday afternoon towards the end of the day, we were sitting in the TIC trailer, and a third time I asked Mr. Thomas if we [could] go back out there and get it cleaned up. And I figured that since their inspection was done, appeared to be – their onsite, direct inspection appeared to be concluded, that now would be the best opportunity to try and get that permission to go back in.
>
> I didn't want to, you know – didn't want to perform any work; I just wanted to make sure that everything was cleaned up, and that there was no other immediate hazards that might occur, such as, you know, teetering or grating that might fall in the middle of the night or while somebody else might be down there, things like that.

> So I asked Mr. [Thomas] at the end of the day on Saturday in this meeting if we could have permission to go back up there, if now would be a good time, and I was told that he would release the area for inspection, and so I went out there Saturday morning – or Sunday morning with Scotty. We met out there at six o'clock, cleaned up the ground area, and then started working our way up.

(Tr. 284.)

McGill testified that he was in TXI's office between 3:00 and 4:00 on Saturday afternoon with Dineen, Thomas, Gatewood and Hanks and that "we were sitting around, going over the results of the investigation, and Mr. Thomas said that he'd release the area for clean-up and inspection." (Tr. 483-84.)

Dineen and Burgess went up to the 719 level "about 1:00 or 1:30" on Sunday afternoon. (Tr. 330-31.) They spent one hour and 15 minutes on that level. (Tr. 18.) During that time, Dineen observed Gardner below and called to him to warn him that they were up there and to put his hard hat on in case they knocked something off. (Tr. 286-87.) Indeed, the parties stipulated that while Dineen and Burgess were up there, they were observed by both Gardner and Palacios, neither of whom ordered them to come down. (Tr. 18.)

The next day, Dineen was called down to the MSHA trailer and given a citation for violating the 103(k) order. He said that he told Thomas that:

> I thought I was within the rights, that I thought I was part of the accident investigation team, that he had released the area to me for inspection and clean-up, and that's what we did. We went up; we inspected the area. We cleaned up the area down below with the results of the accident, the bodily fluids. Okay.
>
> That we had gone up on top of the cement cooler. We looked at that, and we found some blood and some scalp, some hair, on top of the cement cooler handrail, and we cleaned that up, and that we had gone up top to make sure that everything was secure, that nothing could fall, took some measurements and some pictures, and we came down.

(Tr. 290-91.) He also testified that he told Thomas that: "You released the area to me last night; you told me that we could go up and do inspection and clean-up. And he said, No; what I told you was you could go into the area below and clean up the body fluids." (Tr. 345.)

Gatewood testified that when Dineen was given the citation:

> [t]he notes I took indicate that he said, I thought I heard somebody talking about releasing the order.
>
> . . . .
>
> He made a couple of comments. He said he needed to take measurements and other things, in order to, I think he said at that time, to refute gross negligence on the part of Schueck Steel. He added that he thought it was okay, since he was part of the investigation team, and then the previous statement I made about he thought he had heard us talking about releasing the order.

(Tr. 390.) He claimed that Dineen did not say anything about Thomas "giving him authority to be up there." (Tr. 390.)

This testimony is difficult to reconcile. Dineen insists that he asked the MSHA investigators a third time if he could go up to the 719 level and that that time they gave him permission. Thomas and Gatewood insist that Dineen only asked them twice and that he was refused both times. There is no reason to believe that Thomas and Gatewood were not telling the truth. To find otherwise would be to conclude that they gave Dineen permission and then lied about it and gave him a citation. There is nothing in the record to indicate either that this is what occurred or, if it did occur, why the inspectors would do such a thing. Consequently, I find that neither inspector gave Dineen permission to go to the 719 level on Sunday.

On the other hand, Dineen's actions were not those of a man who knew he was violating the order. Rather than go up surreptitiously, he went to the 719 level in broad daylight, spend one hour and fifteen minutes up there and while there, deliberately attracted the attention of Gardner. Nevertheless, since this citation directly involves him and an adverse finding could also affect his future with the company, he had more reason to shade the truth than did the inspectors.

In addition to these two diametrically opposed interpretations, there is a third possibility – that the parties misunderstood one another. Dineen testified that Thomas said he was releasing the "area" for inspection. If so, it is entirely possible that Thomas meant the "area" he had already released, the bottom level, but Dineen heard what he wanted to hear, the "area" being the entire accident area. By giving Dineen the benefit of the doubt, on this point, the most reasonable conclusion as to what occurred can be reached.

This does not mean, however, that Dineen was, in fact, given permission to access the 719 level, or that he did not violate the 103(k) order, it only means that there are mitigating circumstances to explain the violation. Accordingly, I conclude that Schueck, through Dineen and Burgess, violated the 103(k) order as alleged.

Significant and Substantial

Inspector Gatewood found this violation to be S&S. However, as section 104(d)(1) clearly states, only violations of "mandatory health or safety standard[s]" can be S&S. Section 3(l) of the Act, 30 U.S.C. § 802(l), defines "mandatory health or safety standard" as, "the interim mandatory health or safety standards established by titles II or III of the Act, and the standards promulgated pursuant to title I of this Act." Since this citation involves a violation of the Act and not a mandatory health or safety standard, it cannot be S&S. *Cyprus Cumberland Resources v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999). Therefore, I conclude that the violation was not "significant and substantial."

Equitable Relief

As it did in its Motion for Partial Summary Decision, Schueck requests in its brief that "equitable relief be granted in the form of requiring MSHA to retract and/or revise its investigation report and accompanying sketch to accurately reflect the undisputed facts of the accident." (Resp. Br. at 34.) This request is beyond the scope of this proceeding. Therefore, I deny it.

Civil Penalty Assessment

The Secretary has proposed penalties of $70,000.00 for these three violations. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

With respect to the penalty criteria, the pleadings indicate that Schueck is a moderately sized company. It has no history of previous violations. (Resp. Ex. K, Tr. 561.) As there is no evidence that the payment of the penalties in these cases would adversely affect Schueck's ability to remain in business, I find that payment of the penalties would not have such an effect. Further, I find that the company acted in good faith in attempting to achieve rapid compliance in abating the violations.

Turning to the individual citations, with regard to Citation No. 7899407, the failure to tie-off, I find that the violation was of the most serious gravity since it resulted in a death. As indicated above, however, I find that the company was not negligent. Taking all of the penalty criteria into consideration, I assess a penalty of $5,000.00 instead of the $25,000.00 proposed by the Secretary.

Turning to Citation No. 7899408, the failure to barricade, I find that the gravity of the violation was serious, although not as serious as that found by the Secretary, in view of Schueck's one hundred percent tie-off policy. While a serious injury was foreseeable if the

unsecured grating was not barricaded, the resulting injury, from falling to the end of the tie-off, would most likely result in lost workdays or restricted duty, as set out in the discussion of S&S for this citation, *supra* at 9-10. I also find that the company demonstrated high negligence in unwarrantably failing to comply with the regulation. Accordingly, taking all of the penalty criteria into consideration, I assess a penalty of $35,000.00 rather than the $40,000.00 proposed by the Secretary.

Finally, with regard to citation No. 7889352, while I find that the gravity of the violation was not so serious from an injury standpoint, I do find it to be a grave violation in that it challenges MSHA's authority. The Act provides in section 103(k) that it is MSHA, not the operator, who is in charge at an accident investigation. Consequently, MSHA's orders must be followed. While the failure to do so in this case apparently resulted from a misunderstanding, the violation is still serious.

Turning to negligence, in view of the apparent misunderstanding, I find that the negligence involved in this violation was "moderate" instead of "high" as alleged by the Secretary. Therefore, taking all of the penalty criteria into consideration, I assess a penalty of $3,000.00 instead of the $5,000.00 proposed by the Secretary.

Order

Docket No. CENT 2002-13-M is **DISMISSED**. With regard to Docket No. CENT 2002-49-M, Citation No. 7899407 is **MODIFIED**, by reducing the level of negligence from "high" to "none," and is **AFFIRMED** as modified, and Citation No. 7899408 is **AFFIRMED**. Citation No. 7889352, in Docket No. CENT 2001-370-M, is **MODIFIED** by deleting the S&S designation and reducing the level of negligence from "high" to "moderate" and is **AFFIRMED** as modified. Lexicon, Inc. d/b/a Schueck Steel Company is **ORDERED TO PAY** a civil penalty of **$43,000.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

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