FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

November 19, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2002-65-M
Petitioner	:	A.C. No. 23-02207-05503
	:	
v.	:	Docket No. CENT 2002-184-M
	:	A.C. No. 23-02207-05505
NELSON BROTHERS QUARRIES,	:	
Respondent	:	Jasper Quarry

CONSOLIDATION ORDER
AND
DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
Paul M. Nelson, President, Nelson Brothers Quarries, Jasper, Missouri, for the Respondent.

Before: Judge Feldman

The hearing in these proceedings was conducted in Springfield, Missouri on July 23, 2002. As a preliminary matter, at the hearing the Secretary, in the interest of judicial economy, moved to consolidate the civil penalty proceeding in Docket No. CENT 2002-65-M, that had previously been scheduled for hearing, with the civil penalty case in Docket No. CENT 2002-184-M. The Secretary's motion was granted on the record. Accordingly, these civil penalty matters **ARE CONSOLIDATED**.

These matters concern petitions for assessment of civil penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Nelson Brothers Quarries (Nelson Brothers). The petitions seek to impose a total civil penalty of $1,798.00 for nine alleged violations of the mandatory safety standards in 30 C.F.R. Part 56 of the Secretary's regulations governing metal and nonmetal surface mines that were cited by MSHA Inspector Wesley Lee Hackworth. Only one of the nine alleged violative conditions was characterized as significant and substantial (S&S) in nature. A violation is properly designated as S&S if it is reasonably likely that the hazard contributed to by the violation will result in an illness or injury of a reasonably serious nature. *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

The Secretary issued 104(b) withdrawal orders for eight of the nine cited violations in these proceedings. Section 104(a) of the Mine Act, 30 U.S.C. § 814(a), provides, in pertinent part, that a citation issued for an alleged violation of the Secretary's mandatory safety standards ". . . shall fix a reasonable time for the abatement of the [cited] violation." Section 104(b) of the Mine Act, 30 U.S.C. § 814(b), authorizes the Secretary to issue an order requiring the mine operator to immediately withdraw all persons affected by the cited violative condition if the condition is not totally abated within the time period originally set forth, or subsequently extended, by the Secretary.

I. <u>Pertinent Penalty Criteria</u>

This decision applies the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), to determine the appropriate civil penalty to be assessed. In this regard, section 110(i) provides, in pertinent part:

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

Commission judges make *de novo* findings with respect to the penalty criteria in section 110(i) based on the record in adjudicatory proceedings, and they are not bound by the Secretary's proposed civil penalties. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Separate civil penalties are not assessed for 104(b) withdrawal orders. Notwithstanding the *de novo* nature of these proceedings, it is worth noting that, in instances where 104(b) orders are issued, the Secretary does not apply the 30% proposed penalty reduction the operator ordinarily would receive for good faith abatement efforts.

Applying the general statutory penalty criteria, Nelson Brothers is a small mine operator with only two or three employees. The parties have stipulated that Nelson Brothers is subject to the jurisdiction of the Mine Act. (Joint Stip., Ex. 1; Tr. 8). Nelson Brothers has an excellent compliance history in that there is no evidence of any history of violations since operations began at the Jasper Quarry in July 2000. *Id*. It is not contended that the total $1,798.00 civil penalty proposed by the Secretary will negatively impact Nelson Brothers' ability to continue in business. The Secretary has stipulated that Nelson Brothers does not have a relevant history of failing to timely abate citations in that only one 104(b) order was issued during the previous 13 years at any of the mine facilities it has operated. (Tr. 86). The propriety of the 104(b) orders that are in issue in these matters is discussed below.

II. Contest of the 104(b) Orders

Section 105(d) of the Mine Act requires a mine operator to contest a citation or order within 30 days of its issuance. 30 U.S.C. § 815(d). Alternatively, section 105(a) permits an operator to postpone its contest of a citation or order until 30 days after the issuance of the proposed assessment of a civil penalty. 30 U.S.C. § 815(a). The Secretary asserts that 104(b) orders that are not immediately contested pursuant to section 105(d) are not subject to challenge in a civil penalty proceeding under 105(a) because they do not contain special findings. The term "special findings" refers to facts alleged in a citation or order under section 104(d) that could expose a mine operator to a possible withdrawal order before a penalty could be proposed. 30 U.S.C. § 814(d); *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.10 (Sept. 1987).

Commission Rule 20 and Commission Rule 21 implement the statutory provisions of sections 105(d) and (a), respectively. Commission Rule 20 requires an operator to file a notice of contest with the Secretary ". . . within 30 days of receipt by the operator of the contested citation or order. . . ." 29 C.F.R. §§ 2700.20(a)(iii) and 27.00.20(b). Alternatively, under Rule 21, the operator may decline to immediately contest a citation or order, but rather wait to challenge *"the fact of violation* or any special findings contained in the citation or order . . .," including assertions of S&S and unwarrantability. (Emphasis added). 29 C.F.R. § 2700.21.

Significantly, the Mine Act does not permit the Commission to stay the abatement requirements of a citation during litigation. 30 U.S.C. §§ 814(b) and (h), 815(b)(1)(A) and (B)(2). Thus, absent exceptional circumstances that may warrant an expedited hearing, the vast majority of 104(b) orders are abated long before a civil penalty is proposed. In such cases where abatement has occurred, the Commission long ago recognized that the operator may have no need to immediately file a notice of contest, and that it understandably may wait to challenge the citation or order until the civil penalty phase. *Energy Fuels Corporation*, 1 FMSHRC 299, 307 (May 1979). However, the Commission also noted, if continued abatement was expensive, an operator may desire an early hearing to contest the validity of the cited violation in an effort to eliminate the continued need for abatement. *Id.*

In *Energy Fuels*, the Secretary sought to preclude the operator, who had abated a citation that contained special findings of S&S and unwarrantable failure,[1] from immediately contesting the citation. *Id.* at 299. Ironically, in *Energy Fuels*, the Secretary urged the Commission that "sound adjudicative practice mandates that piecemeal adjudications be avoided, and that all issues in a case [should] be tried simultaneously." *Id.* at 306. Although *Energy Fuels,* held that an operator has a statutory right to an immediate contest, even if a citation has

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[1] The term "unwarrantable failure" is taken from section 104(d) of the Mine Act and refers to circumstances where a violation is attributable to a mine operator's serious lack of care. Generally, the Commission considers unwarrantable conduct to be aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987).

been abated, the Commission noted, absent a need for an immediate hearing, it is preferable for operators to postpone contests until a penalty is proposed. *Id.* at 308.

While *Energy Fuels* involved a contest of a citation with special findings, there is no substantive difference in the current proceedings with respect to the goal of avoiding inefficient and repetitive litigation. In fact, the Commission already has rejected the Secretary's proffered interpretation of section 105 that operators are statutorily required to file a contest rather than waiting to challenge citations or orders in a civil penalty proceeding. *Quinland Coals*, 9 FMSHRC at 1620. In *Quinland Coals* the Commission stated:

> The contest provisions of section 105 are an interrelated whole. We have consistently construed section 105 to encourage substantive review rather than to foreclose it. *See, e.g., Energy Fuels Corp.,* 1 FMSHRC 299, 309 (May 1979). The statutory scheme for review set forth in section 105 provides for an operator's contest of citations, orders, and proposed assessment of civil penalties. Generally, it affords the operator two avenues of review. Not only may the operator "contest" a citation or order within 30 days of receipt thereof, 30 U.S.C. § 815(d), but he also may initiate a contest following the Secretary's subsequent proposed assessment of a civil penalty within 30 days of the Secretary's notification of the penalty proposal. 30 U.S.C. § 815(a).
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> . . . .
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> There is no dispute that the fact of violation may be placed in issue by the operator in a civil penalty proceeding regardless of whether the operator had availed itself of the opportunity to contest the citation or order in which the allegation of violation is contained. The Commission also has held that the procedural propriety of the issuance of a withdrawal order does not affect the allegation of a violation contained in the order. *Island Creek Coal Co.*, 2 FMSHRC 279, 280 (February 1980); *Van Mulvehill Coal Co.*, 2 FMSHRC 283, 284 (February 1980). The allegation of violation survives and if proven must be subject to the assessment of a civil penalty. 30 U.S.C. § 820(a); *Tazco, Inc.,* 3 FMSHRC 1895, 1896-98 (August 1981); *See also Co-op Mining Co.*, 2 FMSHRC 3475, 3475-76 (December 1980). Similarly, since the alleged violation survives, findings incidental to the violation survive as well.

9 FMSHRC at 1620-22. (Footnote omitted).

In the final analysis, the subject withdrawal orders were issued pursuant to section 104 of the Mine Act. Commission Rule 21 broadly provides that the failure to contest an "order issued under section 104 of the Act" does not preclude challenging the order in a civil penalty proceeding. By its terms, Rule 21 does not limit its applicability only to certain orders issued pursuant to section 104. Rather, Rule 21 expressly permits challenge of an order where *the fact of violation* is questioned. The fact of a violation and findings incidental to the violation are fundamental issues in a 104(b) challenge. Obviously, if the underlying violation is not supported

by the facts, the 104(b) order lacks validity. Consequently, neither section 105 nor the Commission's Rules preclude Nelson Brothers' from challenging the validity of the subject orders in these civil penalty proceedings.

Notwithstanding the above discussion, the Secretary's assertion that a 104(b) challenge is precluded in a civil penalty proceeding is inconsistent with the Secretary's assessment procedures. The Proposed Assessments that serve as the basis for these proceedings, issued by MSHA's Office of Assessments, cite civil penalties for the subject eight combined 104(a) citations and 104(b) orders. The Proposed Assessments specify that there is a 30 day period to contest the proposed assessments. Nothing in the Proposed Assessments reflects that an operator is precluded from challenging the listed 104(b) orders.

III. <u>Criteria for 104(b) Orders</u>

Section 104(a) of the Mine Act provides that a citation issued by the Secretary ". . . shall fix a reasonable time for the abatement of the [cited] violation." 30 U.S.C. § 814(a). Section 104(b) provides that if on follow-up inspection the Secretary finds:

> (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, [she] shall . . . promptly issue an order requiring the operator . . . to immediately cause all persons [affected] . . . to be withdrawn . . . until . . . the Secretary determines that such violation has been abated.

In contesting a 104(b) order, the operator may challenge the reasonableness of the time set for abatement, or, the Secretary's failure to extend that time. *Energy West Mining Company*, 18 FMSHRC 565, 568 (April 1996) (citations omitted). Neither the Mine Act nor the legislative history address the extent of an inspector's inquiry into whether an extension of the abatement period should be granted. *Id*. at 569. The Commission has recognized that whether or not to extend the time for abatement is committed to the Secretary's enforcement discretion. *Id*. Therefore, in reviewing an operator's challenge to the Secretary's failure to extend an abatement period, the proper inquiry is whether the mine inspector abused his discretion in issuing the 104(b) order. *Id*. In addressing this question, the Commission has noted that a considerable body of precedent, arising under the 1969 Coal Act and continuing under the 1977 Mine Act, has recognized that the degree of danger that any extension of abatement time would cause miners is a relevant factor in determining whether such an extension should have been granted. *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2128 (November 1989).

In these proceedings, seven of eight 104(b) withdrawal orders prosecuted by the Secretary were issued for failure to timely abate violations that were characterized as non-significant and substantial because they were not reasonably likely to contribute to an injury. In order to prevail,

in instances where the cited unabated violation lacks gravity, the Secretary must show a lack of diligence by the operator in attempting to meet the Secretary's abatement schedule. *Youghiogheny and Ohio Coal Company*, 8 FMSHRC 330, 339 (March 1986) (ALJ) *citing Consolidation Coal Company*, BARB 76-143 (1976).

Ordinarily, I would be reluctant to interfere with the Secretary's broad discretion to issue 104(b) orders because such orders are an effective method of achieving compliance. However, the harsh withdrawal sanction in 104(b) orders normally is reserved for instances where operators fail to timely abate hazardous conditions. When 104(b) orders casually are issued for non-hazardous conditions, as they were in seven instances in these proceedings, the effectiveness of such withdrawal orders is undermined.

Moreover, the initial two day abatement period established for abating the numerous citations issued by inspector Hackworth was illusory. Thus, the "extensions" of the initial two day termination period fixed in the 104(b) orders in issue were, in effect, the only termination dates established for abatement. While I recognize that Nelson Brothers could have demonstrated greater zeal in its efforts to abate some of the numerous cited non-hazardous conditions, the refusal to extend termination dates, even in instances where some abatement efforts had been performed, demonstrates a regrettable lack of restraint by the Secretary.

IV. Background

Nelson Brothers Quarries is a corporation that operates the Jasper Quarry, a small surface limestone facility located in Jasper, Missouri. Paul M. Nelson is the President and his brother John B. Nelson is the Vice-President.[2] The quarry operates only during daylight hours and there are no lights illuminating the facility. The quarry normally employs two or three people. Nelson and mine foreman Ralph Carter were the only individuals operating equipment at the quarry when the mine was inspected in March 2001. (Tr. 37). Hackworth testified there was a third employee who was sometimes at the quarry during subsequent inspections. (Tr. 18-19).

Limestone extraction is accomplished by blasting in the quarry pit. During March 2001, Nelson operated a 560 Hough pay loader to load the limestone removed from the pit into a haulage truck. Nelson then drove the haulage truck from the pit to the crusher where the material was crushed and screened. After the limestone was processed, Carter operated a Caterpillar 966B front-end loader to stockpile the finished product and load the product into customer trucks.

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[2] All references to "Nelson" in this decision concern Paul M. Nelson who represented the respondent in this matter and who was present during the subject inspections.

V. **Findings and Conclusions**

A. Docket No. CENT 2002-65-M

1. Citation No. 6205054 and 104(b) Order No. 6205167

Inspector Hackworth arrived at the Jasper Quarry on March 13, 2001, to perform a routine inspection. Hackworth was accompanied by Nelson. Hackworth inspected the Hough 560 pay loader that normally was operated by Nelson in the pit. Hackworth determined the brakes on the pay loader were functioning properly. However, Hackworth noted the back-up alarm did not operate when the vehicle was put in reverse. Nelson admitted that the back-up alarm had not been working for approximately one week. (Tr. 21). Nelson told Hackworth that he had purchased the necessary replacement switch required to activate the alarm although he had not yet installed it. (Tr.23).

As a result of Hackworth's observations, he issued Citation No. 6205054 citing a violation of the mandatory safety standard in 30 C.F.R. § 56.14132(a) that requires audible warning devices on mobile equipment to be maintained in functional condition. Hackworth attributed the inoperative warning device to a high degree of negligence because Nelson had not repaired the condition despite his awareness of it. Hackworth concluded the inoperative back-up alarm was not reasonably likely to contribute to an injury because Nelson used the loader to fill the haulage truck before he exited the loader to drive the truck to the crusher. Consequently, no one in the pit was exposed to being struck by the loader. Thus, Hackworth determined the cited condition was non-significant and substantial. (Tr. 25-26, 45).

Hackworth gave Nelson Brothers two days to repair the back-up alarm. Thus, Hackworth specified March 15, 2001, as the termination date for Citation No. 6205054. Hackworth returned to the mine on April 19, 2001, and found that the back-up alarm had not been repaired. Hackworth extended the termination date until April 26, 2001, because additional time was required to complete installation of the new switch. Installation involved rewiring from the switch to the audible warning horn located on the rear of the loader.

Hackworth returned to the quarry on May 16, 2001, and observed that, although Nelson had installed wiring from the switch to the vicinity of the horn at the back of the vehicle, the wiring remained unconnected and the horn still was not functional. Consequently, Hackworth issued 104(b) Order No. 6205167 requiring the immediate withdrawal from service of the Hough pay loader until the back-up alarm was repaired. Hackworth terminated the 104(b) order on May 30, 2001, after he determined the warning device had been repaired and the pay loader was returned to service.

With respect to the degree of negligence, Hackworth stated he considered the negligence to be high because the condition was permitted to exist for approximately one week. However,

as discussed above, Hackworth admitted there really was no hazard caused by the inoperable warning device because Nelson was alone in the pit. (Tr. 47).

In challenging the reasonableness of the abatement period, it is significant that Hackworth conceded he issued 26 citations March 13, 2001, and, that virtually all of the cited conditions initially had March 15, 2001, as the termination date. (Tr. 177). Most of the cited conditions were non-S&S in nature. Hackworth admitted a two day termination period may not have been realistic for all of the cited conditions, particularly when there were only two employees present at the mine site to correct the conditions. (Tr. 40-41). The Secretary seeks to minimize the apparent burden placed on Nelson Brothers to abate all the cited conditions within two days by explaining that: "*Only* twenty-two citations required that further action be taken to abate the violations (emphasis added)." (*Sec. Br.*, p.1).

Both Carter and Nelson testified that the repair delay occurred because the existing wiring kept shorting out the switch. To repair the condition a new switch had to be ordered and new wiring had to be installed. (Tr. 53-55, 62-63).

As a threshold matter, Nelson admits the back-up alarm on the Hough loader was inoperable. Consequently, the fact of the violation is not in dispute. With respect to the degree of negligence, the Secretary does not argue that the back-up alarm was inoperable for considerably more than the one week period asserted by Nelson Brothers. Thus, the question is whether Nelson's failure to attempt to make the necessary repair within one week, alone, constitutes high negligence.

In evaluating the degree of negligence, it is instructive to focus on the foreseeability and degree of risk posed to mine personnel by the violative conduct. Here, the Secretary concedes that the violation exposed no one to a risk of injury. Thus, the Secretary's reliance on Nelson Brothers' one week delay in addressing the inoperable back-up alarm does not provide a basis for demonstrating high negligence. Rather, the degree of negligence attributable to Nelson Brothers for this non-significant and substantial violation is moderate.

With respect to 104(b) Order No. 6205167, the initial March 15, 2001, termination date was illusory given the fact that it is undisputed that 22 citations had to be abated in two days by only two employees.[3] Thus, the April 26, 2001, extended termination date was, in reality, the initial termination date. Hackworth's failure to extend the termination date further must be viewed in the context of the non-hazardous nature of the violation, and Nelson Brothers' demonstrated efforts to rewire the back-up alarm switch. Under these circumstances, Hackworth's failure to grant a reasonable extension of the abatement period constitutes an abuse of discretion. **Accordingly,104(b) Order No. 6205167 shall be vacated.**

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[3] As noted at the hearing, I am not suggesting that having only two employees at a mine site justifies a delay in abating hazardous conditions. (Tr. 202-211). However, in the present case the vast majority of the cited conditions were considered to be non-hazardous.

In view of the above, **104(a) Citation No. 6205054 is affirmed**. The Secretary seeks to impose a civil penalty of $371.00 for the combined citation and 104(b) withdrawal order. As previously noted, the Secretary explained that when a 104(b) order is issued, the 30 % reduction in proposed civil penalty for good faith abatement is inapplicable. (Tr. 36-37). Considering the low gravity, moderate negligence, and the vacated 104(b) order, **a civil penalty of $75.00 shall be assessed for Citation No. 6205054**.

2. Citation No. 6205055 and 104(b) Order No. 6205168

Hackworth also noted that there were no windshield wipers or front lights on the Hough loader. He also determined that the air pressure gauge on the loader was inoperable. As a consequence of his observations, Hackworth issued Citation No. 6205055 citing a violation of the mandatory standard in 30 C.F.R. § 56.14100(b). This safety standard provides, in pertinent part, that: "*Defects . . . that affect safety* shall be corrected in a timely manner to prevent the creation of a hazard to persons." (Emphasis added). Hackworth concluded the cited conditions were unlikely to contribute to an injury. Thus, he characterized the violation as non-S&S in nature. Hackworth attributed the violation to a moderate degree of negligence.

Broadly worded safety standards such as section 56.14100(b) must apply to a myriad of circumstances. *Kerr McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981). That is why the applicability of such standards must be analyzed on a case-by-case basis. Here, as discussed below in the next citation, Hackworth cited the Hough loader for not having a windshield. Putting aside the issue of the propriety of a missing windshield, the fact remains that the failure to have windshield wipers on a vehicle that does not have a windshield is not a safety defect.

With respect to front headlights, it is undisputed that there are no lights installed at the Jasper Quarry and there are no mine operations at the mine site after dark. Front-end loaders normally travel at the quarry at speeds of approximately three to five miles per hour. (Tr. 128). Depending on their intended use, front-end loaders are not always manufactured and equipped with headlights. (Tr. 92-95; Resp. Exs. 1, 2). I recognize that it can be argued that headlights may be useful at dusk. However, headlights under these circumstances may encourage hazardous operation after quarry operations should cease because the quarry is not illuminated.

The Secretary, assuming that quarry operations would occur during extremely foggy conditions, asserts that such conditions also require headlights. However, given Nelson Brothers' limited daylight hours of operation, neither the remote possibility of severe fog enveloping the quarry, nor a total eclipse of the sun, provide an adequate basis for concluding an absence of front-end loader headlights is a "defect affecting safety" under section 56.14100(b). It should be noted, I am not suggesting that headlights on front-end loaders are not prudent. I simply am concluding that they are not required by the terms of section 56.14100(b). If the Secretary wishes to require that *all mobile equipment* must have operational headlights, even if the equipment is operated in surface mines only during daylight hours, she should do so in a notice and comment rule making proceeding.

Finally, Citation No. 6205055 cites an inoperable air pressure gauge. Nelson Brothers asserts without contradiction, that the brake system on the Hough loader is designed to release the parking brake at 45 PSI and release the service brake at 70 PSI. Thus, Nelson Brothers maintains that a sudden loss of air pressure would bring the loader to a halt. Consequently, Nelson Brothers argues that the inoperable air pressure gauge is not a defect affecting safety.

Unlike the absence of windshield wipers and headlights that are not necessary under the circumstances of this case, Nelson Brothers has failed to demonstrate that the air pressure gauge provided by the manufacturer is superfluous. Although the absence of an air pressure reading is unlikely to result in catastrophic brake failure, the Secretary has not characterized this condition as likely to contribute to injury. Although injury is an unlikely consequence, I cannot conclude that an inoperable air pressure gauge does not affect safety. However, the non-functioning air pressure gauge is indicative of low rather than moderate negligence. **Accordingly, Citation No. 6205055 is affirmed.**

Hackworth initially specified March 15, 2001, as the termination date for Citation No. 6205055. On April 19, 2001, Hackworth returned to the Jasper Quarry and determined although the air gauge had been repaired, additional time was required to complete the headlight and wiper installation. Consequently, Hackworth extended the termination date until April 26, 2001. When Hackworth returned on May 16, 2001, he found that, although wiring had been installed for headlights, the headlights still were not operational. As a result, Hackworth issued 104(b) Order No. 6205168 causing the Hough loader to immediately be removed from service. The order was terminated on May 30, 2001, when Hackworth determined the headlights and windshield wipers had been installed.

Nelson Brothers timely repaired the air pressure gauge. Since 104(b) Order No. 6205168 was issued for failure to timely abate the headlight and windshield conditions that have been determined not to be violations, **104(b) Order No. 6205168 shall be vacated**.

With respect to the appropriate civil penalty, the lack of gravity, low negligence and timely abatement of the defective air pressure gauge warrant reducing the $162.00 penalty initially proposed by the Secretary. **Accordingly, a civil penalty of $55.00 shall be assessed for Citation No. 6205055**.

3. <u>Citation No. 6205056 and 104(b) Order No. 6205169</u>

As noted above, Hackworth also issued Citation No. 6205056 for an alleged violation of 30 C.F.R. § 56.14103(b) because the front windshield and the left side door glass were missing from the Hough loader. Section 56.14103(b) provides:

> If damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed.

> Damaged *windows shall be replaced if absence of a window would expose the equipment operator to hazardous environmental conditions* which would affect the ability of the equipment operator to safely operate the equipment. (Emphasis added).

In apparent recognition of the condition precedent, *i.e.*, that windows must be installed if they expose the equipment operator to hazardous environmental conditions, Hackworth stated in Citation No. 6205056 that the missing windows ". . . created a hazard of the operator losing his hearing or having lung problems." (Gov. Ex. 4). Thus, Hackworth initially characterized the cited missing glass as S&S in nature. However, Citation No. 6205056 was subsequently modified on March 19, 2001, to reflect the cited condition was not S&S. In this regard, the modification noted: "The Citation is modified *to better reflect* the likelihood of injury." (Emphasis added). (Gov. Ex. 4, p.2).

Since the Secretary does not assert the absence of the windshield or left side glass was reasonably likely to contribute to injury or illness, there is an inadequate basis for concluding that Section 56.14103(b) requires installation of the missing glass. Accordingly, **Citation No. 6205056 shall be vacated**. Having vacated the citation, **104(b) Order No. 6205169** issued by Hackworth on May 16, 2001, for Nelson Brothers' alleged failure to timely abate Citation No. 6205056 **is also vacated**.

I note parenthetically, that although a need for a windshield has not been shown in these circumstances, the mandatory safety standard in 30 C.F.R. § 14106 requires front-end loaders to be equipped with protective structures if a loader operator is exposed to a hazard from falling objects. The Secretary has not alleged a falling object hazard in this case.

4. Citation No. 6205059 and 104(b) Order No. 6205170

On March 13, 2001, Hackworth also inspected the Caterpillar 966B front-end loader that was normally operated by foreman Ralph Carter to load limestone material into customer trucks. Hackworth noted the Caterpillar loader also did not have operational headlights. Consequently, Hackworth issued Citation No. 6205059 citing an alleged violation of section 56.14100(b). As previously noted, this safety standard requires defects that affect safety to be corrected in a timely manner. Hackworth characterized the cited condition as non-S&S and attributable to Nelson Brothers' moderate degree of negligence.

As discussed, the operative consideration is whether the absence of headlights on the Caterpillar loader constitutes a defect that affects safety. It is undisputed that the Jasper Quarry only operates during daylight hours. In this regard, 30 C.F.R. § 56.17001 requires illumination sufficient to provide safe working conditions of loading and dumping sites, as well as work areas. The Secretary does not contend that Nelson Brothers' reliance on natural daylight for illumination of the quarry violates the provisions of section 56.17001. Yet the Secretary maintains natural daylight is insufficient for safe operation of the front-end loader.

Consistent with the discussion concerning the absence of headlights on the Hough loader, the Secretary has failed to demonstrate, by a preponderance of the evidence, that the absence of headlights on the Caterpillar loader affects safety. **Accordingly, 104(a) Citation No. 6205059 and 104(b) Order No. 6205170** issued by Hackworth for Nelson Brothers' alleged failure to timely abate Citation No. 6205059 **are vacated**.

My conclusion that headlights are not required under these circumstances should be narrowly construed to apply to front-end loaders given their limited area of operation at very low speed. I am not suggesting that haulage trucks do not require headlights under the facts of this case.

5. Citation No. 6205060 and 104(b) Order No. 6205171

Hackworth also cited the Caterpillar loader in Citation No. 6205060 for an alleged violation of section 56.14103(b). Consistent with his actions in issuing Citation No. 6205056 for the missing glass on the Hough front-end loader, Hackworth initially characterized the missing side window of the Caterpillar loader as S&S because it was likely to contribute to the hearing loss or respiratory illness of the loader operator. However, the citation was later modified to non-S&S.

As previously discussed, to establish the fact of occurrence of a section 56.14103(b) violation, the Secretary must demonstrate that an absence of glass "expose[s] the equipment operator to hazardous environmental conditions." The Secretary does not assert that it is reasonably likely that such a hazard exists. **Accordingly, 104(a) Citation No. 6205060 and 104(b) Order No. 6205171** issued by Hackworth for Nelson Brothers' alleged failure to timely abate Citation No. 6205060 **are vacated**.

6. Citation No. 6205063 and 104(b) Order No. 6205172

______During the course of his March 13, 2001, inspection, Hackworth noted that the Jasper Quarry lacked toilet facilities. Consequently, Hackworth issued Citation No. 6205063 citing a non-S&S violation of the mandatory standard in 30 C.F.R. 56.20008(a). This standard provides that "[t]oilet facilities shall be provided at locations that are compatible with the mine operations and that are readily accessible to mine personnel." After setting March 13, 2001, as the initial termination date, Hackworth extended the termination date until April 26, 2001.

Nelson Brothers admits that it relied on toilet facilities located in the nearest town that is located approximately one mile from the quarry. To abate the citation Nelson brought an outhouse to the mine that was built by his uncle in 1956. (Tr. 179). However, the outhouse lacked a door. On April 19, 2001, noting the continued absence of an outhouse door, Hackworth extended the abatement period until April 26, 2001. When the door had not yet been installed on Hackworth's return to the quarry on May 16, 2001, predictably, Hackworth issued 104(b) Order

No. 6205172 against the offending outhouse. One shudders to imagine the enforcement actions necessary to ensure the immediate withdrawal of the persons affected by this "violative" condition.

I recognize there may be instances where toilet facility conditions raise serious enforcement concerns. However, this is not such an instance. Although this bathroom facility lacked a door, it was located in a secluded quarry, and, it primarily was used only by Carter and Nelson. The issuance of a 104(b) order in this circumstance is illustrative of the degree of discretion exercised on behalf of the Secretary in these matters. The withdrawal order ultimately was terminated on May 23, 2001, after Hackworth determined a door capable of being locked from the inside had been installed.

The Secretary proposed a civil penalty of $139.00. At the hearing, I urged the parties to settle this situation. Nelson agreed to pay a $55.00 civil penalty, and the Secretary mercifully agreed to withdraw the 104(b) order. (Tr. 178-83). Accordingly, pursuant to the parties' agreement, **Nelson Brothers shall pay a $55.00 civil penalty in satisfaction of Citation No. 6205063, and, 104(b) Order No. 6205172 is vacated**.

7. Citation No. 6205067 and 104(b) Order No. 6205173

Hackworth also inspected the shaker screen on March 13, 2001. The shaker screen is held in place by wedges that are driven into slotted bolts that cause tension against the screen. Hackworth noted that there was no working platform to service the shaker screen. To maintain or remove the screen, employees had to stand on ladders that were placed against the steel framework of the v-belt drive assembly and the steel frames of the discharge conveyors that carry material from underneath the shaker. Hackworth and Nelson estimated that the wedges and bolts that held the screen in place were located approximately ten to twelve feet above the ground. (Tr. 186-88).

As a result of Hackworth's observations, he issued Citation No. 6205067 citing a violation of the mandatory safety standard in 30 C.F.R. § 56.11001 that requires a safe means of access to all working places. Hackworth was concerned that relying on ladders to service the shaker screen was hazardous. Specifically, Hackworth was concerned about the potential instability caused by standing on a ladder while using both hands to remove wedges and bolts. In such event, a fall could occur resulting in serious or disabling injuries. Consequently, Hackworth designated the cited violation as significant and substantial. He concluded the cited condition was due to a moderate degree of negligence. Although significant construction was required to abate the violation, Hackworth allowed only three days, until March 16, 2001, for termination of the citation.

Hackworth returned to the quarry on April 19, 2001, at which time he noted that construction had begun on a work platform adjacent to the shaker screen. Nelson had begun welding supports to the steel framework that would serve as the support base for the platform. However, Nelson requested additional time to complete construction because welding had been

delayed by rainy conditions. Nelson provided written assurances that the shaker screen would not be accessed by ladder while construction continued. (Gov. Ex. 9). Accordingly, Hackworth extended the abatement period until April 26, 2001.

Upon Hackworth's return on May 16, 2001, he observed that five angle iron floor braces had been welded on both the north and south sides of the screen. Although a total of ten floor braces had been welded, welding was incomplete because only one welding pass had been made for each brace. Consequently, Hackworth issued 104(b) Order No. 6205173 requiring the immediate withdrawal of the shaker screen from service. Hackworth terminated the withdrawal order on May 30, 2001, after he determined that welding had been completed and walkways had been installed on the north and south sides of the screen.

Nelson Brothers does not dispute the fact of the cited violation. (*Resp. Br.*, p.3). However, it challenges the S&S designation because maintenance or replacement of the shaker screen was not expected to occur in the foreseeable future. A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984); *Cement Division, National Gypsum*, 3 FMSHRC at 825.

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

The likelihood of injury posed by the violative condition must be viewed in the context of continued normal mining operations. *U.S. Steel Mining*, 7 FMSHRC 1125, 1130 (August 1985). Consideration should be given to both the time the violative condition existed before the citation was issued and the time it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 12 (January 1986).

Maintenance requirements by nature are unpredictable and can arise at any time. In its post-hearing brief, Nelson Brothers admits walkways around the shaker screen were planned. However, installation of the walkways was delayed until financing was available and the time necessary to perform the installation could be found. (*Resp. Br.*, p.3). Under these circumstances, given the need for shaker screen service at any time in the context of ongoing quarry operations, it is reasonably likely that a ladder accident will occur from elevations from as

high as twelve feet, resulting in injuries of a reasonably serious nature. **Accordingly, Citation No. 6205067 citing a significant and substantial violation of the mandatory safety standard in 30 C.F.R. § 56.11001 is affirmed**.

With respect to 104(b) Order No. 6205173, as noted, the issue is whether Hackworth's failure to extend the abatement period beyond April 26, 2001, was an abuse of discretion. The initial termination date of March 16, 2001, provided Nelson Brothers with three days to abate the cited condition. Hackworth testified:

> Q. How much time did you give Mr. Nelson to terminate this particular citation?
>
> A. . . . I realized he would have to do quite a bit of work, so I give (sic) him three days. (Tr. 189).

As a preliminary matter, I do not view the initial March 16, 2001, termination date as reasonable given the welding and construction that was required to abate this condition, not to mention the numerous additional citations that required termination. Thus, the April 26, 2001, termination date must be considered as an initial termination dated. The focus shifts to whether it was an abuse of discretion not to grant an additional extension. As noted, resolving this question requires an analysis of the danger posed by granting an extension, and the degree of diligence demonstrated by Nelson Brothers in attempting to meet Hackworth's abatement schedule. *Clinchfield Coal Co.*, 11 FMSHRC at 2128; *Youghiogheny and Ohio Coal Co.*, 8 FMSHRC at 339.

With respect to the danger an extension of the abatement time would cause, Hackworth testified that the shaker screen was not changed very often, and, that changing screens "probably [is] not a real frequent thing . . . ." (Tr. 191, 200). Hackworth equated the need for changing the screen to the need for changing a car battery in that both are dictated by their frequency of use. (Tr. 199-200). To mitigate any danger, Hackworth testified that Nelson provided written assurances that, in the unlikely event the screen had to be changed before the work platform was installed, Nelson Brothers would use scaffolding rather than ladders to service the screen. (Tr.193; Gov. Ex. 9). Thus, on balance, the evidence does not reflect that a significant risk of injury would have been created by granting a reasonable extension of the April 26, 2001, termination date.

Regarding the diligence of abatement efforts, when Hackworth observed the shaker screen framework on April 19, 2001, Nelson had begun to weld angle irons to support the walkway. Hackworth gave Nelson an additional week to finish construction and established a termination date of April 26, 2001. When Hackworth returned on May 16, 2001, a total of ten floor braces had been welded to the steel structures on the north and south sides of the screen. (Gov. Ex. 10). However, final welding passes had not been completed on all of the brace supports and the platform and railing had not yet been installed. Hackworth refused to extend the termination date and issued 104(b) Order No. 6205173. The 104(b) order was terminated on May 30, 2001, after construction was completed.

As noted, the evidence does not reflect that a significant risk of injury would have been created by granting a reasonable extension of the April 26, 2001, termination date. Moreover, the welding of ten angle iron braces in preparation for installation of the required work platform evidenced a degree of diligence that was a significant good faith effort to achieve compliance. Thus, I cannot conclude the failure to grant a reasonable extension beyond the April 26, 2001 termination date was an exercise of sound discretion. **Accordingly, 104(b) Order No. 6205173 shall be vacated**.

The Secretary seeks to impose a $264.00 civil penalty for Citation No. 6205067. Given the Secretary's failure to demonstrate a lack of good faith abatement efforts as an aggravating factor, **a civil penalty of $185.00 shall be imposed for Citation No. 6205067**.

8. Citation No. 6205175

During Hackworth's follow-up inspection on May 16, 2001, he observed an oxygen cylinder that was stored at the north end of the office trailer. Hackworth noted that the cylinder did not have a cover or cap over the valve. Consequently, Hackworth issued Citation No. 6205175 citing a non-S&S violation of the mandatory standard in 30 C.F.R. § 56.16006. This standard provides: "*Valves on compressed gas cylinders* shall be protected by covers when being transported or stored, and by a safe location when the cylinders are in use." (Emphasis added). Hackworth attributed the alleged violation to a moderate degree of negligence.

Significantly, Citation No. 6205175 noted, "[t]he operator stated that the cylinder was empty." (Gov. 11). Hackworth testified he had no reason to doubt that the cylinder was, in fact, empty. (Tr. 230). The citation was terminated on May 23, 2001, after Hackworth determined that Nelson Brothers had returned the cited cylinder to the supplier. The Secretary seeks to impose a $55.00 civil penalty for this citation.

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Lodestar Energy, Inc.*, 24 FMSHRC 689, 692 (July 2002) (Citations omitted). If however, a standard is ambiguous, deference is owed the Secretary's reasonable interpretation of the regulation. *Id.* Here, the term "compressed gas cylinder" in section 56.16006 is ambiguous and requires interpretation because it is not clear that this term includes an empty cylinder.

A regulation must be interpreted to harmonize with its intended purpose. *Id.* Hackworth testified that the regulatory purpose of requiring a valve cover in section 56.16006 is to prevent the valve assembly from becoming a projectile fueled by the sudden release of compressed gas if the gas cylinder was struck or fell. (Tr. 222-24). Thus, the intent of section 56.16006 is to require valve covers on cylinders containing compressed gas. The Secretary does not dispute that the cited cylinder was empty. Thus, there was no propellant in the cylinder. Consequently, the Secretary's application of section 56.16006 to the facts of this case is impermissible because it

does not further the regulation's intended purpose. Accordingly, the Secretary has failed to demonstrate the fact of the alleged violation. Therefore, **Citation No. 6205175 shall be vacated**.

B. Docket No. CENT 2002-184-M

1. Citation No. 6205075 and 104(b) Order No. 6205174

During Hackworth's March 13, 2001, inspection he noted that the entire length of the conveyor belt system at the crushing plant was not visible from the control booth because the shaker screen obscured a portion of the conveyor. As a conveyor start-up warning system, Nelson told Hackworth that he used visual hand signals to communicate to Carter in the control booth that the beltline was clear. (Tr. 238). Although Hackworth initially accepted this method of hand signaling, upon his return to his office Hackworth concluded this procedure did not satisfy the safety provisions of 30 C.F.R. § 56.14201(b). (Tr. 242). Consequently, Hackworth issued Citation No. 6205075. Section 56.14201(b) provides, in pertinent part:

> When the entire length of the conveyor is not visible from the starting switch, a system which provides visible or audible warning *shall be installed* and operated to warn persons that the conveyor will be started." (Emphasis added).

Hackworth considered the violation to be non-S&S because, while not as effective as an audible warning system, he believed Nelson's visual warning system was a method of ensuring conveyor belt safety. (Tr. 255). Hackworth attributed the violation to a moderate degree of negligence. Hackworth established March 25, 2001, as the termination date. The Secretary seeks to impose a civil penalty of $215.00 for Citation No. 6205075.

Nelson does not deny that the entire conveyor was not visible from the control booth. Rather, Nelson maintains the hand signal warning method satisfies the cited safety standard. However, the hand signal method is ineffective if the control operator does not see anyone in the vicinity of the belt. Under such circumstances, the control operator may be unable to resist the temptation to start the belt because he is convinced no one is around. Under such circumstances, an individual in the belt area that is obscured from view by the shaker screen is at risk. The terms of section 56.14201(b) apply because it is undisputed that a portion of the belt is obstructed from view. Under such circumstances, the cited mandatory standard requires the *installation* of a warning system. Thus, Nelson's alternative hand signal system does not satisfy the standard. **Accordingly, Citation No. 6205075 shall be affirmed**.

Upon Hackworth's return to the quarry on April 19, 2001, he determined that a conveyor start-up warning system had still not been installed. Nelson informed Hackworth that he was having difficulty locating a 120 volt alarm to install at the beltline. Consequently, Hackworth extended the termination date until April 26, 2001. Hackworth returned to the quarry on May 16, 2001, and determined that no action had been taken to install the warning system. When asked why nothing had been done, Nelson informed Hackworth that he had forgotten about it. (Tr.

243; Gov. Ex 13). Consequently, on May 16, 2001, Hackworth issued 104(b) Order No. 6205174 that required the immediate suspension of conveyor operations. The order was terminated on May 23, 2001, after a 120 volt start-up alarm was installed at the crusher control booth.

As discussed, weighing the abuse of discretion issue with respect to a 104(b) withdrawal order requires considering whether an extension of the abatement period would expose personnel to risk, and whether the mine operator demonstrated diligence in attempting to meet the established abatement schedule.

In this case, there apparently was no significant danger posed by extending the abatement date past April 26, 2001, as Hackworth had designated the condition as non-S&S. However, here, unlike other 104(b) orders considered in this proceeding, Nelson Brothers failed to demonstrate any diligent efforts to comply to warrant an extension of the abatement period. Rather, it failed to timely install the audible warning system because Nelson forgot to do it. Under such circumstances, it cannot be said that Hackworth's failure to extend the abatement period beyond April 26, 2001, evidenced an abuse of discretion. **Accordingly, 104(b) Order No. 6205174 shall be affirmed**. **The $215.00 civil penalty proposed by the Secretary for Citation No. 6205075 shall be assessed**.

ORDER

Consistent with this Decision, **IT IS ORDERED** that 104(a) Citation Nos. 6205054, 6205055, 6205063 and 6205067 in Docket No. CENT 2002-65-M **ARE AFFIRMED**.

IT IS FURTHER ORDERED that 104(a) Citation Nos. 6205056, 6205059, 6205060 and 6205175, **AND**, 104(B) Order Nos. 6205167, 6205168, 6205169, 6205170, 6205171, 6205172 and 6205173 in Docket No. CENT 2002-65-M **ARE VACATED.**

IT IS FURTHER ORDERED that 104(a) Citation No. 6205075 and 104(b) Order No. 6205174 in Docket No. CENT 2002-184-M **ARE AFFIRMED**.

IT IS FURTHER ORDERED that Nelson Brothers Quarry **shall pay a total civil penalty of $585.00** in satisfaction of 104(a) Citation Nos. 6205054, 6205055, 6205063 and 6205067 in Docket No. CENT 2002-65-M and 104(a) Citation No. 6205075 in Docket No. CENT 2002-184-M. Payment is to be made to the Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, Docket Nos. CENT 2002-65-M and CENT 2002-184-M **ARE DISMISSED**.

____________________________________Jerold Feldman
Administrative Law Judge

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/hs