FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 17, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2003-15-M
Petitioner	:	A. C. No. 23-02077-05511
	:	
v.	:	Docket No. CENT 2002-315-M
	:	A. C. No. 23-02077-05510
WASHINGTON COUNTY AGGREGATES,	:	
Respondent	:	Washington County Aggregates

DECISION

Appearances: Ann N. Noble, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, on behalf of Petitioner;
Kelly C. Silvey, Washington County Aggregates, Potosi, Missouri, on behalf of Respondent.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Civil Penalties filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege that Washington County Aggregates ("WCA") is liable for eleven violations of mandatory safety and health standards applicable to surface metal and nonmetal mines. A hearing was held in St. Louis, Missouri. At the commencement of the hearing, the Secretary modified one of the citations and Respondent agreed to pay a reduced penalty for that violation. Respondent also withdrew its notices of contest as to three of the remaining citations. The Secretary proposes civil penalties totaling $2,671.00 for the seven alleged violations remaining at issue. For the reasons set forth below, I find that WCA committed six of the alleged violations and impose civil penalties totaling $1,025.00.

Findings of Fact - Conclusions of Law

Washington County Aggregates is a small limestone mine owned by a partnership that acquired it in October of 2000. The operation, located near Potosi, Missouri, consists of a single bench mine, with a crusher, conveyors, screens, a scalehouse and a maintenance area. Approximately five persons are employed at the site. In April 2002, Lawrence D. Sherrill, an inspector employed by MSHA for over six years, conducted an inspection of WCA's mine. He determined that there were violations of health and safety standards and issued citations and

orders, eleven of which were contested in these actions.

As noted above, the parties agreed to settle four of the citations. The citations remaining at issue will be discussed in the order that evidence was presented at the hearing.

Citation/Order No. 6212148

Citation/Order No. 6212148 was issued by Sherrill on April 10, 2002, and alleges a violation of 30 C.F.R. § 56.14101(a)(1) which requires that: "Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels." The conditions he observed were noted on the citation as:

> The service brakes on the Caterpillar 966B (serial # 75A3959 B) would not stop and hold the loader on a grade it travels. The service brakes were tested on the declined roadway just north of the chat pile. The loader rolled freely forward with the transmission in neutral and the service brakes fully applied. The loader was in operation loading customer trucks from various stockpiles at the mine property. This condition created the hazard of the equipment operator not being able to stop the loader. An oral 107(a) imminent danger order was issued to Steve Silvey, co-owner, at 1114 hours this date.

Sherrill concluded that it was highly likely that the violation would result in a fatal injury, that the violation was significant and substantial, that one person was affected and that the operator's negligence was high. The imminent danger order directed that the haul truck not be used until the service brakes were operational. The Secretary proposes a specially assessed civil penalty of $2,200.00 for this violation.

The Violation

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

Sherrill observed the loader being used to load customer trucks from a stockpile of material referred to as "chat." He approached the driver, James Benson, inquired about the brakes, and was told that they were "shot" or "weak." Benson stated that he had told Andy Pittman, the foreman, about the problem numerous times. Pittman had operated the loader on the previous shift. There was a grade adjacent to the stockpile that led up to a storage area. Sherrill estimated the grade to be 7-8% and typical of the grades on other ramps in the work area.

Benson stated that he traversed that grade with the loader a couple of times each day. At Sherrill's instruction, the loader was driven to the top of the grade, turned around, and started down at a slow speed. As the 36,000 pound loader proceeded down the grade, the transmission was placed in neutral and the service brakes were applied. The loader did not stop or slow appreciably. It proceeded at a steady rate down the grade until it reached a nearly level area at the bottom, where it stopped.

Sherrill issued an oral imminent danger order, directing that the loader not be used until the defective brakes were repaired. While he wrote the order/citation on his laptop computer, one of WCA's partners asked if the brakes could be adjusted, and Sherrill replied in the affirmative. The brake adjustment was made during the approximately fifteen minutes that elapsed while the order was written. The loader was then tested on the same grade. The brakes worked effectively, and the citation/order was terminated.

Kelly Silvey, WCA's representative, is one of its owners. He investigated the alleged violation after receiving the special assessment, and conceded that the loader's brakes were not adjusted properly and that the foreman was told that they needed adjustment prior to the shift commencing. Tr. 141, 145. However, he contends that the test was conducted on a grade considerably steeper than those upon which the loader normally is operated, and that the results of the test were mischaracterized so as to inflate the gravity of the violation.

Silvey measured the grade using a tape measure and a level and found that the initial forty feet of the grade declined at a rate of eighteen inches in one hundred inches, i.e., 18%, about twice as steep as other ramps the loader would encounter. Tr. 149. He also testified that the area at the top of the grade was used only to store extra screens and that the loader did not normally traverse the test grade. Tr. 150-54, 160-61. He attributed the driver's representation to the contrary to an ongoing dispute between the driver and the foreman. Tr. 142, 162-63. I found Silvey to be a very credible witness who candidly admitted several facts adverse to WCA.

Sherrill similarly impressed me as an excellent inspector and a credible witness. He was very thorough in preparing for and conducting the inspection and previous inspections of the facility. I find that the grade upon which the loader was tested was not normally traversed by the loader. However, I credit Sherrill's assessment that the test grade was generally typical of the grades of other ramps on the property that would have been used by the loader. While the initial portion, measured by Silvey, was somewhat steeper than the grade on the other ramps, the loader was tested with the bucket empty and the brakes were unable to stop it until it reached an essentially level area. Therefore, I find that the regulation was violated.

Significant and Substantial

A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated

S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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

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

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

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

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

Sherrill described several scenarios in which an injury could occur because of the defective brakes. The loader was built in 1963. Because of its age, it was not required to have a seat belt, and did not have one. In the event of a collision, the driver could be thrown into the windshield or steering wheel, or possibly ejected from the cab. Of course, the inability of the loader to stop quickly also created a hazard for other vehicles and/or pedestrians it might encounter in the loading area or while traveling from work-site to work-site.

WCA argues that Sherrill's description of the test result, that the loader "rolled freely forward," was misleading and overstated the defective condition. The point has merit. While the brakes did not bring the loader to a stop on the grade, the test grade was substantial and the brakes were able to prevent the 36,000 pound machine from accelerating. Obviously, the brakes were supplying some stopping power, which appears to have been adequate for normal loading operations. Prior to the test, Sherrill had observed the loader for about ten minutes as it was used to load customer trucks. Tr. 23. Two trucks were loaded, each requiring three bucket loads. Tr. 38. The loader performed six cycles that included stopping to maneuver and stopping at the trucks to dump the loads. Sherrill did not observe any problems or difficulties with the operation of the loader, including its ability to slow and stop, as needed. Tr. 42. The violation was abated promptly with a simple adjustment of the brakes.

In evaluating the risk of injury in other situations, the Commission has emphasized that the vagaries of human conduct cannot be ignored. *See, e.g., Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). While I disagree with Sherrill's assessment that the probability of injury was "highly likely," I find that there was a reasonable likelihood that the hazard contributed to by the violation would result in a serious injury. The brakes were "weak," and there was a reasonable possibility of a collision that would result in a serious injury to the equipment operator. The Secretary has carried her burden on this issue. I find that the violation was significant and substantial. I also affirm the imminent danger order.[1]

Negligence

Sherrill evaluated the operator's negligence as "high" based upon Benson's statement that he had told Pittman numerous times that the brakes were not working properly. Silvey acknowledged that Pittman had been told that the brakes needed adjustment at the beginning of the shift. Silvey had operated the loader approximately one week before the inspection. He found that the brakes performed adequately, but felt that they would not have held the loader on the steep portion of the test grade. Tr. 144. At the time of the inspection, the loader's service brakes were in need of adjustment and they should have been repaired prior to the loader being put into operation. However, the brakes did supply some stopping power, which apparently was at least marginally adequate for normal operations, a conclusion that was partially confirmed by Sherrill's observations. Under the circumstances, I find that the operator's negligence in deferring the brake adjustment is more properly categorized as moderate.

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[1] An imminent danger order need not be based upon a violation of a mandatory standard or a condition that poses an immediate danger. It is sufficient that the condition could reasonably be expected to cause serious physical harm if normal mining operations were permitted to proceed before the dangerous condition is eliminated. *Cyprus Empire Corp.*, 12 FMSHRC 911, 918-19 (May 1990).

Citation No. 6212149

Citation No. 6212149 alleges a violation of 30 C.F.R. § 56.14107(a), which requires that moving machine parts that can cause injury "shall be guarded to protect persons from contacting" them. The conditions noted on the citation were:

> There were no guards to prevent persons from contacting the pinch points and moving machine parts of the v-belt drive system on the Caterpillar 966B front end loader. There was no guard on either side of the engine compartment. The pinch point was located approximately 5' 6" above ground level on both sides of the loader. This condition created the hazard of an employee contacting the moving machine parts. This loader was in operation loading customer trucks from various stockpiles at the mine.

Sherrill concluded that it was unlikely that the violation would result in a permanently disabling injury, that the violation was not significant and substantial, that one person was affected and that the violation was due to the operator's moderate negligence. A civil penalty of $55.00 is proposed.

The Violation

In construing an analogous standard[2] in *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984), the Commission stated:

> We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct. *See, e.g., Great Western Electric*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Industries, Inc.*, 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, *e.g.*, accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-[case]basis.

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[2] 30 C.F.R. § 77.400
(a) Gears; sprockets; chains; drive, head, tail and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

Thompson involved citations issued for failure to guard cooling fan blades, air compressor belts and pulleys in the engine compartments of two Euclid R-50 dump trucks. The Commission affirmed the decision of an ALJ finding violations of the standard based on the possibility that a miner might come into contact with the exposed moving machine parts while examining or working on the engines while they were idling. While the possibility of such contact was determined to be "minimal," it satisfied the "reasonably possible" test.

I similarly find that, while the possibility of contact and injury presented by the unguarded v-belt/pulley assembly was minimal, contact and injury was reasonably possible within the meaning of *Thompson*. There is no question that the v-belt/pulley assembly was accessible to a miner or mechanic standing near the engine compartment of the loader. The loader driver could contact the v-belt/pulley with a hand or clothing while exploring some problem with the engine. A mechanic examining the engine while idling, even though trained to work in such conditions, could also inadvertently contact the unguarded v-belt/pulley resulting in injury.

Respondent's failure to guard the v-belt pulley violated the standard. I concur with the inspector's determinations that the possibility of injury was unlikely, that one person was affected and that the violation was a result of the operator's moderate negligence.

WCA contends that the loader had been inspected previously by MSHA and that the subject condition had not been cited, thereby raising the issue of whether it had received fair notice of the interpretation of the standard urged by the Secretary here. *See Lodestar Energy, Inc.*, 24 FMSHRC 689, 694 (July 2002); *Island Creek Coal Co.*, 20 FMSHRC 14, 24 (Jan. 1998); *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986). The only prior inspection of the mine while under WCA's ownership was conducted by Sherrill in June 2001. He inspected front-end loaders and recorded the serial numbers of the equipment that he inspected. He had no record of inspecting the loader in question. Tr. 73-74, 77-78. Silvey testified that the loader, in the same condition, was on the site in June 2001, but could not say for sure that it was in operation at the time of the inspection. Tr. 167. I find that the loader was not inspected by Sherrill in June 2001. The loader was most likely inspected while the mine was operating under previous ownership. However, side panel guards may have been in place at that time. There were holes in the frame of the loader which could have been used for such guards, and they simply may not have been replaced at some point in time. Tr. 74, 165-67. WCA failed to establish that this particular condition had been tacitly approved by MSHA inspectors in the past. Therefore, its fair notice defense must be rejected. I also note several other ALJ decisions finding violations of guarding standards based upon the failure to install guards on moving machine parts in the engine compartments of vehicles that were manufactured without such guards. *See Nelson Bros. Quarries, Inc.*, 21 FMSHRC 1100, 1102-03 (Oct. 1999) (ALJ); *Riverton Corp.*, 16 FMSHRC 2082 (Oct. 1994) (ALJ); *Power Operating Co.*, 16 FMSHRC 591, 595 (May 1994) (ALJ).

Citation No. 6212150

Citation No. 6212150 alleges a violation of 30 C.F.R. § 56.4402, which requires that flammable liquids "shall be kept in safety cans labeled to indicate the contents." The conditions noted on the citation were:

> Flammable liquid was being stored in a plastic container in the bed of the Chevrolet maintenance truck. Approximately 4 gallons of gasoline was in the 5 gallon container. The practice of storing flammable liquids in containers other than safety cans created a fire and explosion hazard. Combustible materials and ignition sources, including a welder and cutting torch set, were also in the bed of the truck. This truck is used as needed as transportation and in performing various maintenance duties at the mine.

Sherrill concluded that it was reasonably likely that the violation would result in an injury involving lost work days or restricted duty, that the violation was significant and substantial, that one person was affected and that the violation was due to the operator's moderate negligence. A civil penalty of $196.00 is proposed.

The Violation

The container in the bed of the truck, a picture of which was introduced into evidence,[3] was a plastic gas can typical of those used by most homeowners for the storage of gasoline for lawnmowers and similar pieces of equipment. It bore a label identifying the contents as gasoline and warning of its dangerous nature. The label also indicated that the container complied with standard specifications used by "Underwriters Laboratories, Inc," and developed by nationally recognized groups, "ANSI/ASTM." It did not, however, meet the requirements of the regulation. The term "safety can" is defined elsewhere in the regulations as "[a] container of not over five gallons capacity that is designed to safely relieve internal pressure when exposed to heat and has a spring-closing lid and spout cover." 30 C.F.R. § 56.4000. It is unclear whether the plastic container was designed to safely relieve pressure when exposed to heat. It clearly did not have a spring-closing lid. Therefore, the regulation was violated.

Significant and Substantial

The violation contributed to a hazard, a potential fire, which could result in a serious injury. Sherrill determined that the violation was significant and substantial because of "readily available ignition sources" in and near the bed of the truck. Tr. 83. The truck was equipped with a cutting torch and welder and there were hand tools and other metal objects in the truck bed. In the event of a fire, he concluded that a miner fighting the fire might suffer burns or an injury from a fall. Tr. 83-84. However, he verified that the can was in good condition, and that there

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[3] Ex. P-5.

was no spillage or gasoline vapor in the vicinity of the can. Tr. 91. Sherrill conceded that it was unlikely that the metal objects in the bed of the truck would cause a spark capable of igniting any gasoline that escaped from the can. Tr. 95. He also confirmed Silvey's testimony that the cutting torch and welder would be used some distance from the truck bed. Tr. 91, 170.

I find that the possibility of a fire resulting from use of the plastic gasoline can was remote. The truck was owned by Pittman and was used only occasionally to perform maintenance tasks. Obviously, such tasks would be performed outdoors and a fire alone would not pose a particularly serious threat of injury to any miner. While it is possible that a miner engaged in fighting such a fire could suffer a serious injury, I find the possibility of injury from use of the non-conforming gasoline can to be too remote to justify classifying the violation as significant and substantial.

Citation No. 6212152

Citation No. 6212152 alleges a violation of 30 C.F.R. § 56.14107(a), which requires the guarding of moving machine parts that can cause injury. The conditions noted on the citation were:

> There was no guard to prevent persons from contacting the pinch point and moving machine parts of the alternator v-belt drive system on the plant generator. The pinch point of the v-belt was located 4' 6" above the adjacent walkway on both sides of the generator. This condition created entanglement hazards. An employee accesses this area to start and stop the generator when the plant operates.

Sherrill concluded that it was unlikely that the violation would result in a permanently disabling injury, that the violation was not significant and substantial, that one person was affected and that the violation was due to the operator's moderate negligence. A civil penalty of $55.00 is proposed.

The Violation

The v-belt pulley in question is depicted in exhibit P-9. Sherrill did not take into consideration the probability of an injury occurring as a result of the condition, in determining whether it violated the standard. Tr. 102. He did, however, consider the probability of injury in evaluating the gravity of the violation. Sherrill's assessment of the likelihood of injury was based upon his belief that a WCA employee entered and exited the trailer at the beginning of the day to start the generator and again at the end of the day to turn it off, thereby passing by the running generator twice a day. The employee could be injured if he tripped or fell and encountered the pinch point. Tr. 97-99. Silvey testified, however, that employees seldom passed through the trailer to access the generator's control room because there was a more direct route through a different entrance. Tr. 153. He also questioned whether an employee could encounter

the pinch point, which was four and one-half feet above the wooden floor and about two and one-half feet beyond and slightly below metal tubing that was immediately above the muffler/exhaust piping. Tr. 172, 177; ex. P-9. There is no evidence that there were any tripping hazards on the trailer's walkways. According to Silvey, it is extremely unlikely that a miner would come into contact with the v-belt pinch point in the course of WCA's normal operations.

I accept Silvey's credible testimony and find that the probability of contact and injury was not "reasonably possible" within the meaning of *Thompson*. The condition cited did not violate the regulation, and the citation will be dismissed.

Citation Nos. 6212156, 6212157 and 6212158

Citation Nos. 6212156, 6212157 and 6212158 allege violations of 30 C.F.R. § 62.120, which requires that: "If during any work shift a miner's noise exposure equals or exceeds the action level the mine operator must enroll the miner in a hearing conservation program that complies with § 62.150 of this part." The conditions noted on the citations were that miners operating two front-end loaders and the crushing plant were exposed to noise levels exceeding the action level and that they had not been enrolled in a hearing conservation program meeting the requirements specified in the regulations.

Sherrill concluded that it was unlikely that the violations would result in a permanently disabling injury, that they were not significant and substantial, that one person was affected by each violation and that they were due to the operator's moderate negligence. A civil penalty of $55.00 is proposed for each violation.

The Violations

Substantial amendments to the regulations governing exposure to occupational noise were promulgated in 1999, and became effective on September 13, 2000. *See* 30 C.F.R. Part 62, Occupational Noise Exposure, 64 FR 49630, Sept. 13, 1999. Mine operators must monitor miners' exposure to noise and, where necessary, take steps to assure that no harmful effects result from noise exposure. Noise exposure is measured by use of a dosimeter worn by a miner during his entire shift. The dosimeter records and provides a digital readout of a time-weighted average of noise to which the miner was exposed. If the 8-hour time weighted average ("TWA_8") sound level is 85 decibels or higher, the "action level," the miner must be enrolled in a hearing conservation program which must include monitoring, provision and use of hearing protection, audiometric testing, training and recordkeeping. 30 C.F.R. § 62.150. Substantial additional steps are required if a miner is exposed to noise levels beyond the TWA_8 "permissible exposure level" of 90 decibels. *Id*. § 62.130.

On April 11, 2002, Sherrill outfitted three miners with dosimeters, the operator of the #3 Caterpillar 988 front-end loader, the operator of the Caterpillar 966B front-end loader and the crusher plant operator. The meters measured the miners' exposure to noise over their entire shift

and indicated that their exposure exceeded the TWA_8 action level of 85 decibels. While they were wearing effective hearing protection, which was encouraged and mandated by the operator, none had been enrolled in a hearing conservation program meeting the requirements of the regulations.

WCA does not contest the fact that the miners were exposed to noise in excess of the action level. Nor does it contend that they had been enrolled in a noise conservation program, as required by the regulation. In addition to noting that miners were supplied with and required to wear excellent hearing protection devices, Silvey explained that the mine had been acquired in October 2000, and that materials that had been sent by MSHA announcing and explaining the newly promulgated noise regulations had not been preserved by the previous owner. The new owners were simply not aware of the regulations. According to Silvey, they had obtained a copy of the 2000 edition of the Code of Federal Regulations, but did not believe that the new noise regulations were included.

It is apparent that WCA provided excellent hearing protection to its employees and considered itself compliant with safety and health standards it believed applied to its operations. However, WCA was not in compliance with the regulations governing occupational noise exposure that became effective on September 13, 2000. WCA cannot rely on ignorance of the regulations as a defense to the alleged violations. As Sherrill pointed out, the regulations were readily available from a number of sources. They were also contained in the 2000 edition of Title 30, of the Code of Federal Regulations, which Silvey acknowledged having.

The regulation was violated as to each of the three miners who were exposed to noise levels beyond the action level and were not enrolled in an appropriate hearing conservation program. I agree with Sherrill's determinations that the violations were unlikely to result in a permanent injury, that the violations were not significant and substantial, that one person was affected by each violation and that the violations were the result of the operator's moderate negligence.

The Appropriate Civil Penalties

WCA had operated the mine for less than two years at the time of the inspection. One previous inspection, in June 2001, had resulted in the issuance of nine citations, all of which were determined to be single penalty assessments, with the exception of one significant and substantial violation. Respondent does not contend that imposition of the proposed penalties would threaten its ability to remain in business, and it is not disputed that Respondent demonstrated good faith in achieving compliance with the regulations. Respondent is a small operator with a very small controlling entity. The gravity and negligence assessments with respect to each violation are discussed above.

Citation/Order No. 6212148 is affirmed as a significant and substantial violation. However, the probability of injury and negligence of the operator were lower than alleged. The Secretary proposes a penalty of $2,200.00, based upon a special assessment. Upon consideration of the factors itemized in section 110(i) of the Act, I impose a penalty of $750.00.

Citation No. 6212149 is affirmed in all respects. A civil penalty of $55.00 is proposed by the Secretary. I impose a penalty in the amount of $55.00, upon consideration of the factors enumerated in section 110(i) of the Act.

Citation No. 6212150 is affirmed. However, the violation is found not to be significant and substantial. Rather, the violation is found to be unlikely to result in an injury. A civil penalty of $196.00 is proposed by the Secretary. I impose a penalty in the amount of $55.00, upon consideration of the factors enumerated in section 110(i) of the Act.

Citation Nos. 6212156, 6212157 and 6212158 are affirmed in all respects. The Secretary proposes a penalty of $55.00 for each violation. Upon consideration of the factors itemized in section 110(i) of the Act, I impose a penalty of $55.00 for each violation.

The Settlement

At the commencement of the hearing, the parties announced that they had negotiated a resolution of four of the citations and, by motion, sought approval of the settlement agreement. The Secretary agreed to modify Citation No. 6212154 to specify that an injury was unlikely to occur, and that the violation was not significant and substantial. It is proposed that the penalty for that violation be reduced from $196.00 to $55.00. Respondent withdrew its notice of contest as to Citation Nos. 6212151, 6212153, 6212155 and 6212154, as amended. I have considered the representations and evidence submitted and conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

ORDER

As to the citations that the parties have agreed to settle, Citation Nos. 6212151, 6212153, 6212154 and 6212155, the motion to approve settlement is **GRANTED**, and Respondent is directed to pay a civil penalty of $220.00 within 45 days.

Citation No. 6212152 is hereby **VACATED**, and the petition as to it is **DISMISSED**.

Citation Nos. 6212149, 6212156, 6212157 and 6212158 are **AFFIRMED**, and Citation Nos. 6212148 and 6212150 are **AFFIRMED**, as modified, and Respondent is directed to pay a civil penalty of $1,025.00 within 45 days.

Michael E. Zielinski
Administrative Law Judge

Distribution: (Certified Mail)

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/mh