FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 7, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2004-211-M
Petitioner	:	A.C. No. 41-01171-32192
	:	
v.	:	
	:	
WEIRICH BROTHERS, INC.,	:	Boerner Pits & Plant
Respondent	:	

DECISION

Appearances: Thomas A. Paige, Esq., and Carlton C. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Terry Weirich, President, Weirich Brothers, Inc., Johnson City, Texas, *Pro Se*, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Weirich Brothers, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges five violations of the Secretary's mandatory health and safety standards and seeks a penalty of $2,575.00. A hearing was held in San Antonio, Texas.[1] For the reasons set forth below, I vacate one order, affirm an order/citation, modify three orders and assess a penalty of $700.00.

Background

Weirich Brothers, Inc., is a small, family-owned, sand and gravel company that operated three pits, known as the Boerner Pits and Plant, the Davis Pit and the Myer Pit, in the vicinity of Johnson City, Texas. In addition, to Terry Weirich, President, and his sister, Sandra Danz, Vice President, the company has no more than four employees at any one time. The Boerner Pits and Plant closed in May 2004.

[1] The record was kept open to admit the deposition of Jose G. Garza. (Tr. 103, 165.) Garza's deposition has been submitted as Petitioner's Exhibit 16 and is admitted as such.

This case arises out of semi-annual inspections of the Boerner Pits and Plant in July 2003 and February 2004. The Respondent has contested a combined 107(a) order/104(a) citation, 30 U.S.C. §§ 817(a) and 814(a), issued on July 14, 2003, and four 104(d)(2) orders, 30 U.S.C. § 814(d)(2), issued on February 3, 2004. The orders, and citation, will be discussed in the order of their issuance.

Findings of Fact and Conclusions of Law

Order/Citation No. 6233133

This order/citation alleges that a violation of section 56.14101(a)(1) of the Secretary's regulations, 30 C.F.R. § 56.14101(a)(1), occurred on July 14, 2003, because:

> The service brakes of the 980 CAT F.E.L. would not stop the loader on the typical grade in the plant area. The 980 CAT F.E.L. could smash or run over someone or something in the plant area with the defective brakes. Operator did not know how long the brakes had been defective[;] he does not run it every day. An oral 107(a) imminent danger order was issued to Joe Garcia [*sic*], foreman, at 1405 hours on this date.

(Pet. Ex. 1.) Section 56.14101(a)(1) provides, in pertinent part, 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. . . ."

Inspector Rick Knupp testified that as he was conducting his inspection on July 14,

> the piece of equipment that's mentioned here [in the order/citation] was coming by us, and Joe Garcia was the – or Joe Garza was accompanying me. And we went to stop the loader to do a safety check on it, he couldn't stop. The service brakes wouldn't work, and he ended up putting the bucket down to get the piece of equipment stopped there.

(Tr. 66.) He further related that during this time, "[t]here was at least one plant haul truck hauling materials, and then there was a couple of over-the-road trucks that were waiting to be loaded in the area there. And the truck drivers were standing around talking." (Tr. 67.) The inspector said that the loader was moving material and loading trucks and that when it loaded a truck, "he'd go up with his bucket, and his tires would go against the tires of the haul truck." (Tr. 70.)

Tim Hahne, the loader operator, testified that the loader "had brakes on it that morning. Then we start working, pushing the loader, working twice as hard with the trucks coming in and

out, then loading the pit trucks up. And, you know, it starts wearing down." (Tr. 99.) He said that the brakes had to be adjusted every once in awhile. (Tr. 97.) Terry Weirich testified that after receiving the order/citation, he adjusted the brakes on the loader. (Tr. 124.)

Imminent Danger

Section 107(a) of the Act states that:

> If, upon any inspection or investigation of a coal or other mine which is subject to the Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons . . . to be withdrawn from, and to be prohibited from entering, such area until an authorized representative . . . determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

Section 3(j) of the Act, 30 U.S.C. § 802(j), defines an "imminent danger" as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

In interpreting this definition, the Commission has stated that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989), *quoting Eastern Associated Coal Corp. v. Interior Bd. Of Mine Op. App.*, 491 F.2d 277, 278 (4th Cir. 1974) (emphasis omitted) (*R&P*). The Commission has elaborated that "[t]o support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time." *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991).

An inspector's finding of an imminent danger must be supported "unless there is evidence that he has abused his discretion or authority." *R&P*, 11 FMSHRC at 2164, *quoting Old Ben Coal Corp. v. Interior Bd. Of Mine Op. App.*, 523 F.2d 25, 31 (7th Cir. 1975) (emphasis omitted). "An inspector abuses his discretion, making a decision that is not in accordance with law, if he orders the immediate withdrawal of miners in circumstances where there is not an imminent threat to safety." *Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 858-59 (June 1996).

In determining whether he has abused his discretion, an inspector "is granted wide discretion because he must act quickly to remove miners from a situation he believes is

hazardous." *Id.* at 859. In assessing an inspector's exercise of his discretion, the focus is on "whether the inspector made a reasonable investigation of the facts, under the circumstances, and whether the facts known to him, or reasonably available to him, supported the issuance of the imminent danger order." *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1292 (Aug. 1992).

In this case, I find that the inspector did not abuse his discretion in issuing the imminent danger order. Operating a loader without brakes in area where trucks are moving and being loaded and truck drivers are standing outside of their trucks, not to mention any mine employees who might have been working in the area, certainly has a reasonable potential to cause death or serious injury within a short period of time. Accordingly, I affirm the imminent danger order.

104(a) citation

I further conclude that the Respondent violated section 56.14101(a)(1) as alleged. Although the inspector did not test the loader's brakes on the maximum grade that it travels, it is obvious that if the loader could not stop on level ground, it would not be able to pass such a test.

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)(1), 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 (Apr. 1981)

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission enumerated 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 (Dec. 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 S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) a violation of a safety standard; (2) a distinct safety hazard 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.

Here the Respondent violated section 56.14101(a)(1) by operating a front-end loader without brakes. This violation contributed to a safety hazard to the employees and truck drivers in the area of the loader's operation, as well as the operator of the loader. There was a reasonable likelihood that one of the truck drivers or mine employees could have been struck by the loader, or that the loader could have struck a truck or other immoveable object resulting in injuries to the operator. Finally, there was a reasonable likelihood that any resulting injury would be reasonably serious or fatal.

For these reasons, I conclude that the violation was "significant and substantial."

Order No. 6236339

This order charges a violation of section 56.14112(b), 30 C.F.R. § 56.14112(b), on February 3, 2004, in that:

> The guard for the #2 screen v-belt and pulley drive was not in place. The foreman stated that he had performed repairs on the drive and had not replaced the guard. This exposes persons to an entanglement hazard. This mine has been issued three previous violations for this standard in the last seven months. Management engaged in aggravated conduct constituting more than ordinary negligence in that the foreman was running the plant and knew the guard was not in place. This violation is an unwarrantable failure to comply with a mandatory standard.

(Pet. Ex. 2.) Section 56.14112(b) requires that: "Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard."

Inspector Kevin Busby testified that when he pulled into the quarry and parked his car he observed that the #2 shaker screen was running and that there was no guard on the pulley and drive belts. (Tr. 14.) Jose Garza, the foreman, admitted that the screen was operating with an unguarded pulley, but claimed that he was testing it. (Garza Dep. at 36.) This claim does not fit within the exception to the rule.

In the first place, there is no claim that the testing could only be done with the guard removed. Garza said that he wanted to see if the belt would stay on after he fixed it. (Garza Dep. at 36.) This observation did not require the guard to remain off. In the second place, after he observed that the belt was holding, Garza left the belt unattended with the guard off. (Tr. 36.) Therefore, I find that the regulation was violated as alleged.

Unwarrantable Failure

This order was issued under section 104(d)(2) of the Act.[2] As the Commission has explained:

> Section 104(d) creates a "chain" of increasingly severe sanctions that serve as an incentive for operator compliance. *See Nacco Mining Co.*, 9 FMSHRC 1541, 1545-46 (Sept. 1987). Under Section 104(d)(1), if an inspector finds a violation of a mandatory standard during an inspection, and finds that the violation is S&S and that it is also caused by an unwarrantable failure, he issues a citation under section 104(d)(1). 30 U.S.C. § 814(d)(1). That citation is commonly referred to as a "section 104(d)(1) citation" or a "predicate citation." *See Greenwich Colleries, Div. Of Pa. Mines Corp.*, 12 FMSHRC 940, 945 (May 1990). If during the same inspection or any subsequent inspection within 90 days after issuance of the predicate citation, the inspector finds another violation caused by unwarrantable failure to comply with a standard, the inspector issues a withdrawal order under section 104(d)(1), sometimes referred to as a "predicate order." 30 U.S.C. § 814(d)(1); *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1622 n.7 (Aug. 1997). If an inspector "finds upon any subsequent inspection" a violation caused by unwarrantable failure, he issues a withdrawal order for that violation under section 104(d)(2). 30 U.S.C. § 814(d)(2). The issuance of withdrawal orders under section 104(d)(2) does not cease and an operator remains on probation "until such time as an inspection of such mine discloses no similar violations." *Id.; see Nacco*, 9 FMSHRC at 1545.

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[2] Section 104(d)(2) provides that:

> If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

Cyprus Cumberland Resources Corp., 21 FMSHRC 722, 725 (July 1999) (footnote omitted). Thus, in order to establish that a violation comes within section 104(d)(2), the Secretary must prove three things: (1) a valid section 104(d)(1) predicate order; (2) a violation of a mandatory health or safety standard caused by an unwarrantable failure; and (3) the absence of an intervening clean inspection. *Id.*; *U.S. Steel Corp.*, 6 FMSHRC 1908, 1911 (Aug. 1984); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1600 (July 1984).

The predicate order for this order is listed in section 14 of the order form as Order No. 6233165, issued on August 27, 2003. (Pet. Ex. 2.) The predicate order, however, was not offered at the trial. Nor is it included in the Assessed Violation History Report, which purportedly lists all violations at the Boerner Pits & Plant between July 4, 1976, and January 20, 2005. (Pet. Ex. 14.) Indeed, there are no 104(d)(1) orders at all listed in the report. Therefore, there is no way to determine whether there is a valid predicate order. In addition, the Secretary did not offer any evidence of the absence of an intervening clean inspection.

Consequently, I find that the Secretary has failed to make out a *prima facie* case that this violation should be a section 104(d)(2) order and will modify it. In this regard, it cannot be modified to a section 104(d)(1) order because there is no evidence that this order was issued within 90 days of a 104(d)(1) citation. According to the violation history report, the most recent inspection prior to this one was on August 27, 2003, more than 90 days earlier. Furthermore, if a section 104(d)(1) order had been issued within 90 days of the instant order, the order would have been issued as a section 104(d)(1) order, not a section 104(d)(2) order. Nor can it be modified to a 104(d)(1) citation since the inspector determined the violation to be not "significant and substantial." Hence, I will modify it to a 104(a) citation, 30 U.S.C. § 814(a).

Order No. 6236340

This order also alleges a violation of section 56.14112(b) on February 3, 2004, because:

> The guard for the left side of the tail pulley of the truck load out belt conveyor was not in place. The foreman stated that he had taken the guard off to clean around the tail pulley and had not replaced it. This exposes the foreman who monitors the plant and accesses this area to an entanglement hazard. This mine has been issued three previous violations for this standard in the last seven months. Management engaged in aggravated conduct constituting more than ordinary negligence in that the foreman was running the plant and knew that he had not replaced the guard. This violation is an unwarrantable failure to comply with a mandatory standard.

(Pet. Ex. 3.)

Inspector Busby testified that while he was observing the previous violation, the foreman, Garza, "had driven up and parked his truck under the load-out belt and had walked over, and when I turned he was replacing that guard on the tail pulley." (Tr. 23.) He further testified that the belt does not run continuously, but is turned on by the truck driver after parking his truck under the belt, so material can be loaded into it. (Tr. 26-27.) On cross examination, when asked if the belt was running when Garza put the guard back on, he answered: "I believe it was." (Tr. 51.) Finally, the inspector and I had the following conversation:

> JUDGE HODGDON: Mr. Busby, going back to the load-out hopper, do you – did you observe Mr. Garza backing the truck up to the load-out hopper?
>
> THE WITNESS: Well, I – yes, sir, in a way. I turned and saw the truck backing up, and then he was exiting it. I don't – I can't say, for example, if – still rolling or if he had actually parked it, but he had exited and was walking in that area.
>
> JUDGE HODGDON: And what did he do? Where did he go?
>
> THE WITNESS: He came by the controls, and that's when I thought that he had activated that belt. And then he was putting the guard back on the tail pulley of the under-hopper belt when I turned completely and observed him.
>
> JUDGE HODGDON: So you're saying he activated the belt before he put the guard on?
>
> THE WITNESS: That's what I thought I saw, yes, sir.
>
> JUDGE HODGDON: Okay. When he put the guard on, was the belt operating?
>
> THE WITNESS: I believe so, sir.
>
> JUDGE HODGDON: Was it loading the truck?
>
> THE WITNESS: I didn't observe that.

(Tr. 59-60.)

Garza testified that:

> A rock got hung on the belt. I had to take [the guard] off to take the rock off. And my truck was loaded, and I went to take my load up, and when I get back to put the guard on, like I said, he's right on the money. He comes with the guard off. You know, by the time I park my truck, he already saw the guard.

(Garza Dep. at 43.) He further explained that the belt does not run constantly, that "[t]he only time I run it is when I turn it on with one of these switches. I turn it on, empty the hopper, turn it back off." (Dep. at 44.) He said that it was not running when the inspector saw it. (*Id.*)

Based on this evidence, I find that the regulation was not violated. The inspector was equivocal as to whether the belt was running or not. In his initial testimony, he did not mention the belt running at all. When questioned about it, he qualified his answers with "I believe" and "I thought." On the other hand, Garza's explanation that he loaded his truck, a rock got caught on the belt, he turned off the belt, removed the guard, removed the rock and then took his truck to dump it, is very plausible. He was not asked if he turned the belt on before replacing the guard, but since he knew the inspector was watching him, it does not make sense that he would do so. Furthermore, even if he did turn the belt on before replacing the guard, such a short time would have elapsed, with no one exposed to the hazard, that it would not be a violation. Accordingly, I will vacate this order.

Order No. 6236341

This order charges yet another violation of section 56.14112(b) because:

> The guard for the lower pulley of the drive for the jaw crusher was not in place exposing the pinch point. The foreman stated that he had removed the guard to replace the belt earlier in the day and had not replaced the section of guarding. This exposes the foreman who accesses this area to monitor feed to the crusher to an entanglement hazard. This mine has been issued three previous violations for this standard in the last seven months. Management engaged in aggravated conduct constituting more than ordinary negligence in that the foreman was running the plant and knew the section of guarding had not been replaced. This violation is an unwarrantable failure to comply with a mandatory standard.

(Pet. Ex. 4.)

The inspector testified that a portion of the guarding around the drive motor and pulley was missing, exposing the pinch points on the pulley and v-belt drive. (Tr. 40.) The pictures taken by the inspector confirm this. (Pet. Ex. 4.) Garza admitted that the piece of guarding was

missing. (Garza Dep. at 46-47.) Therefore, I conclude that the Respondent violated the regulation as alleged.

Unwarrantable Failure

This order was issued under section 104(d)(2). For the same reasons that I found that section 104(d)(2) did not apply to Order No. 6236339, *supra*, I find that the section does not apply to this violation and will modify it accordingly.

The order was amended on March 5, 2004, by deleting the "significant and substantial" designation. (Pet. Ex. 4.) Hence, for the same reasons as Order No. 6236339, the order can only be modified to a 104(a) citation.

Order No. 6236345

This order alleges a violation of section 56.14132(b)(1)(ii), 30 C.F.R. § 56.14132(b)(1)(ii), in that:

> The wheel mounted reverse movement bell alarm had been removed from the F700 Ford bobtail dump truck loading from the plant load out to stockpile. The truck also did not have a horn to warn persons of movement of the truck. Management engaged in aggravated conduct constituting more than ordinary negligence in that the foreman knew the bell alarm was not installed on the truck and he operated it in this condition. This violation is an unwarrantable failure to comply with a mandatory standard.

(Pet. Ex. 5.) Section 56.14132(b)(1)(ii) requires that: "When the operator has an obstructed view to the rear, self-propelled mobile equipment shall have – . . . (ii) A wheel-mounted bell alarm which sounds at least once for each three feet of reverse movement."

The inspector testified that the truck was equipped with a wheel-mounted bell alarm, but that the bell had been removed from the wheel. (Tr. 34-36.) The Respondent admitted the violation. (Tr. 128.) Consequently, I find that the Respondent violated the regulation.

Unwarrantable Failure

This violation was also issued as a 104(d)(2) order. The inspector found the violation not to be "significant and substantial." Therefore, for the same reasons as for Order Nos. 6236339 and 6236341, *supra*, I will modify this order to a 104(a) citation.

Civil Penalty Assessment

The Secretary has proposed a penalty of $2,100.00 for the four remaining 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 (Apr. 1996).

With regard to the penalty criteria, I find that the Respondent is a small operator. Based on the Assessed Violation History Report, I find that the Company has a good history of previous violations. (Pet. Ex. 14.) Based on the order/citations, and the lack of evidence to the contrary, I find that the operator demonstrated good faith in abating the violations after being notified of them. I further find that the gravity of Order/Citation No. 6233133 was serious in that a fatal injury could have resulted from the operation of the loader without brakes. On the other hand, I find the gravity of the three remaining citations was not so serious since injuries were unlikely to result from them.

Turning to negligence, I find that the operator's negligence with regard to Citation (formerly Order) Nos. 6236339, 6236341 and 6236345 to be high. All of these violations were committed by the foreman, Jose Garza, who, as a foreman, is held to a heightened standard of care concerning safety matters. *S & H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995); *Youghiogheny*, 9 FMSHRC at 2011. In addition, the Secretary has established that the operator has a recent history of repeatedly committing guarding and back-up alarm violations. (Pet. Exs. 6, 7, 8 and 14.)

I also find that the Respondent's negligence was high with regard to Order/Citation No. 6233133. While Hahne was obviously highly negligent in continuing to operate the loader without brakes, that negligence is not necessarily imputable to the operator. Normally, the negligence of a "rank-and-file" miner cannot be imputed to the operator for civil penalty purposes. *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (Mar. 1988); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982) (*SOCCO*). However, the Commission has held that: "[W]here a rank-and-file employee has violated the Act, the *operator's* supervision, training and disciplining of its employees must be examined to determine if the *operator* has taken reasonable steps necessary to prevent the rank-and-file miner's violative conduct." *SOCCO* at 1464.

In this case, I find that the operator had not taken reasonable steps in its supervision, training and disciplining to prevent the violative conduct. Garza testified that no one had ever been disciplined or fired for failing to follow safety rules. (Garza Dep. at 28.) In addition, in view of its continuing to receive citations for the same types of violations, one would expect the operator to exercise increased vigilance and to expect the same from his employees. Yet, there is no evidence of that in this case. The Respondent has apparently continued to operate as normal. Accordingly, I find that the operator's negligence with regard to this violation was high.

To show that paying the proposed penalty will adversely affect the company's ability to remain in business, the Respondent has submitted balance sheets and income statements for the years 2000 through 2003. (Resp. Exs. B, C, D and E.) In addition, Mr. Weirich testified that he expected a $30,000.00 loss for 2004. (Tr. 117.) All of the financial statements are accompanied by the following statement by the accountants:

> The owners have elected to omit substantially all of the disclosures ordinarily included in financial statements prepared on the income tax basis of accounting. If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the Company's financial position and results of operations.

(Resp. Exs. B, C, D and E.) Furthermore, all of the financial statements are unaudited. (Tr. 157.)

It is apparent that the financial statements are not reliable information on which to determine whether the penalty will adversely affect Weirich's ability to remain in business. There is no way to know whether the information in them is complete, true and correct. The burden is on the operator to show that the penalty will adversely affect its ability to remain in business. *Sellersburg* at n.14. Unaudited financial statements are not sufficient to sustain that burden. *See Spurlock Mining Co., Inc.*, 16 FMSHRC 697, 700 (Apr. 1994).

Nevertheless, the Secretary has submitted three settlement agreements from prior cases involving the Respondent in which the Secretary has reduced penalties because payment would adversely affect the company's ability to remain in business. (Pet. Exs. 11, 12 and 13.) Thus, it is clear that the Secretary has accepted that the payment of penalties will affect the operator's ability to remain in business. There is no evidence that business has gotten better since these agreements were made. Therefore, I find that payment of a penalty would adversely affect the Respondent's ability to remain in business and will take that into consideration in assessing penalties.

Taking all of these factors into consideration, I find that a penalty of $700.00 is appropriate, assessed as follows: (1) Order/Citation No. 6233133-$400.00; (2) Citation No. 6236339-$100.00; (3) Citation No. 6236341-$100.00; and (4) Citation No. 6236345-$100.00.

Order

In view of the above, Order No. 6236340 is **VACATED**; Order/Citation No. 6233133 is **AFFIRMED**; Order Nos. 6236339, 6236341 and 6236345 are **MODIFIED** to104(a) citations by deleting the "unwarrantable failure" designations and are **AFFIRMED** as modified. Weirich Brothers, Inc., is **ORDERED TO PAY** a civil penalty of **$700.00** within 30 days of the date of this order.

T. Todd Hodgdon
Administrative Law Judge

Distribution: (Certified Mail)

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/hs