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

February 24, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2005-24-M
Petitioner	:	A. C. No. 41-02363-40451
	:	
v.	:	Docket No. CENT 2005-88-M
	:	A. C. No. 41-02363-45908
WEIRICH BROTHERS INC.,	:	
Respondent	:	Davis Pit

DECISION

Appearances: Carlton C. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, on behalf of the Secretary of Labor;
Terry Weirich, Johnson City, Texas, on behalf of Weirich Borthers, Incorporated.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Civil Penalties filed by the Secretary of Labor ("Secretary"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 ("Act"). The petitions allege that Weirich Brothers Incorporated ("Weirich Brothers") is liable for ten violations of the Secretary's regulations applicable to surface, metal and non-metal mines, and proposes the imposition of civil penalties totaling $12,331.00. A hearing was held in San Antonio, Texas. At the commencement of the hearing the parties announced that Respondent had agreed to withdraw its contest and request for hearing with respect to six of the alleged violations, and had further agreed to pay the civil penalties proposed for those violations.[1] The hearing proceeded on the four remaining violations. The Secretary filed a brief after receipt of the transcript. Respondent elected not to file a brief. For the reasons set forth below, I find that Respondent committed three of the alleged violations and impose civil penalties totaling $635.00 for those violations.

[1] Respondent withdrew its contest and request for hearing with respect to Citation Nos. 6233498, 6233501, 6233502, 6233503, 6233504, and 6233506. A civil penalty of $60.00 was proposed for each of those violations pursuant to 30 C.F.R. § 100.4.

Findings of Fact - Conclusions of Law

Weirich Brothers is located in Johnson City, Texas. One of its facilities, the Davis Pit, located in Junction, Texas, is a surface mine that extracts material from natural deposits by use of a dragline, and processes it through crushers and screens to produce finished product that is sold to customers. The Davis Pit has been in operation for many years, and has been in its present configuration since 1986. On July 7, 2004, Jerry Anguiano, an Inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an inspection of the Davis Pit. He arrived at approximately 8:00 a.m., while the plant was being put through a start-up procedure, and remained there for most of the day. In the course of the inspection, he issued ten citations charging violations of the Secretary's regulations establishing safety and health standards for surface metal and non-metal mines, 30 C.F.R. Part 56. Civil penalties were assessed for the violations, and Weirich Brothers contested the penalties and requested a hearing before the Commission.

The citations that Weirich Brothers continues to contest are discussed below, in the order that they were presented at the hearing.

Citation No. 6233497

Citation No. 6233497 alleged a violation of 30 C.F.R. § 56.15002, which provides: "All persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard." Anguiano described the violation in the "Condition or Practice" section of the citation as follows:

> The supervisor and an employee were not wearing hard hats. The supervisor, Ronny Barclay, was washing under the roll crusher conveyor while employee Jaime Dominquez was loading the red truck at the load out station. The system had a load of material. Rocks were bouncing off the roll screen – a rock could strike an employee on the head resulting in lost work days.

Ex. P-1.

Anguiano determined that it was reasonably likely that the violation would result in an injury resulting in lost work days or restricted duty, that the violation was significant and substantial, that one employee was affected and that the operator's negligence was moderate. A civil penalty in the amount of $247.00 has been proposed for this violation.

The Violation

Anguinao observed this alleged violation as he arrived on the property. Ronny Barclay, supervisor of the pit operation, was in the vicinity of a roll screen, using a hose to wash material from the tail pulley of the conveyor leading from the screen. The plant had just been started up.

There was a small amount of material left over from the previous day moving through the system. Tr. 99. Barclay, who was not wearing a hard hat, is depicted in a photograph taken by Anguiano when he observed the alleged violation. Ex. P-1.

Small rocks, 1.25-1.5 inches maximum dimension, were bouncing off the roll screen, which was located five feet above ground level and seven to ten feet to Barclay's left. Tr. 20, 100. Although no rocks bounced far enough to strike Barclay while Anguiano observed him, he believed that it was possible that a rock could bounce far enough to strike Barclay's head, resulting in an injury that would cause lost work days. Tr. 20-21, 39. He also felt that Barclay might move closer to the screen, where it would be more likely that he could be struck. Tr. 22, 33-34. There were a number of rocks on the ground near Barclay, and Anguiano assumed that they had bounced off the screen.

Barclay testified that, while rocks do bounce off the screen, there was virtually no possibility that they would bounce far enough to strike him. Tr. 100, 103. He had had a discussion with another MSHA inspector, who explained that the standard required the use of hard hats only where falling objects may create a hazard. Tr. 103. Based upon that discussion, it was his understanding that hard hats did not need to be worn in the area where he was located, because there was no hazard presented by falling objects. He told Anguiano about the prior discussion and explained why he wasn't wearing his hard hat at the time. Tr. 17, 42. Weirich Brothers issued hard hats to employees, and Barclay's was in close proximity. Tr. 44, 104, 108. He testified that he and the other employees always wore their hard hats when they worked close to the roll screen, or in other areas of the plant where there was a chance of being struck by a falling object. Tr. 106-07. Following Anguiano's inspection, the employees began to wear hard hats whenever they were working in the plant.

In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of 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).

Based upon Anguiano's testimony, I find that there was a possibility, albeit small, that Barclay might have been struck on the head by one of the small rocks. Consequently, his failure to wear a hard hat, in an area where "falling objects may create a hazard," was a violation of the regulation. There is also a good chance that his duties would have taken him closer to the screen, and that he would not have interrupted his work to retrieve and don his hard hat.

Respondent has argued that, because of the previous MSHA inspector's advice, the Secretary has taken inconsistent positions with respect to the requirement of hard hats in the area in question, and that it did not have fair notice of the Secretary's interpretation of the regulation. When "a violation of a regulation subjects private parties to criminal or civil sanctions, a

regulation cannot be construed to mean what an agency intended but did not adequately express." *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982), *quoting Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976). To determine whether an operator received fair notice of the agency's interpretation, the Commission applies an objective, "reasonably prudent person" test, i.e., "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990); *BHP Minerals Int'l Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996). In applying this standard, a wide variety of factors are considered, including the text of the regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, whether MSHA has published notices informing the regulated community with "ascertainable certainty" of its interpretation of the standard in question, and whether the practice at issue affected safety. *See Island Creek Coal Co.*, 20 FMSHRC 14, 24-25 (Jan. 1998); *Ideal Cement Co.*, 12 FMSHRC at 2416.

I reject Respondent's fair notice defense as to this violation. A reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized that the standard required the wearing of hard hats in the area in question. Moreover, there is no evidence that the Secretary has actually taken inconsistent positions with respect to this particular application of the standard. Barclay testified that the previous inspector did not specifically identify the subject area as a place where hard hats were not required. Tr. 109. It was only his "understanding" of the discussion that led him to conclude that it was not necessary to wear a hard hat on the day in question. Tr. 42, 109.

Significant and Substantial

A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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

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

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

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

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *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 2007 (Dec. 1987).

The fact of the violation has been established. The focus of the S&S analysis for this violation is the likelihood that the hazard would result in an injury, and the likelihood that any injury would be serious. I find that the Secretary has failed to carry her burden as to both issues.

The rocks in question were relatively small and were not traveling at any significant velocity. They were being shaken or bounced off a roll screen that was roughly the same height as Barclay. While some of them traveled a few feet from the screen, generally by sliding down parts of the equipment, Anguiano did not observe any rocks travel to where Barclay was located. Tr. 33. While it is possible that Barclay would have moved to a position where there was an greater possibility that a rock might have struck his head, I accept his testimony that he would have donned his close-by hard hat before working in such an area. Under the circumstances, it was not reasonably likely that Barclay's failure to wear a hard hat would result in an injury, and it was not reasonably likely that any injury would be serious. The violation was not S&S.

I also find that the operator's negligence with respect to this violation was low. In light of the conditions that existed, Barclay's interpretation of the discussion he had had with the previous MSHA inspector, while erroneous, was not unreasonable.

Citation No. 6233500

Citation No. 6233500 alleged a violation of 30 C.F.R. § 56.14107(a), which provides:

> Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

The violation was described in the "Condition or Practice" section of the citation as follows:

> The provided guard that protects the tire coupling and shaft was not in place. The length of the coupling, motor and gearbox shaft combined measured 12 inches long. The guard was removed by an employee when he performed welding on the roll crusher. The tire coupling was rolled by hand to rotate the roll crusher. The roll crusher is operated by a 15 HP electric motor. Three employees work in the area maintaining the operation of the plant. An employee could become entangled by the rotating shaft resulting in a permanent disabling injury.

Ex. P-4.

Aguiano determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was S&S, that one employee was affected and that the operator's negligence was moderate. A civil penalty in the amount of $324.00 has been proposed for this violation.

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

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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.

> 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.

The guard in question had been removed the prior evening to facilitate welding on the crusher, and had not been replaced. Anguiano took a photograph of the condition, which shows that the guard had been temporarily placed on top of the motor. Ex. P-4. Respondent does not dispute that the guard should have been replaced prior to the starting of the plant on the morning of the inspection. Operation of the plant without the guard having been replaced violated the standard.

Significant and Substantial

Respondent does not dispute that the violation contributed to a hazard, i.e., a rapidly rotating shaft and coupling that could entangle a miner coming into contact with it. It is also clear that any injury suffered as a result of such entanglement would be serious. Tr. 55. Respondent contends that the violation was not S&S because it was not reasonably likely that the hazard would result in an injury. I agree.

There were three employees that worked around the plant, operating equipment, doing general cleaning and monitoring the plant's operation. None of them were in the immediate vicinity of the unguarded coupling when Anguiano observed it. Tr. 52-53. Barclay had not noticed that the guard had not been replaced. However, he testified that he was about to do his daily inspection after starting the plant, and would have noticed the missing guard and replaced it. Tr. 112. Terry Weirich, Respondent's president, also testified that the failure to replace the guard was an oversight and that Barclay would have noticed it and replaced it shortly after the plant had been started. Tr. 134. Weirich also believed that the likelihood of a miner becoming entangled as a result of the missing guard was remote, because the shaft and coupling were located at "about chest height" such that one would "have to make a deliberate effort" to come into contact with the rotating machinery. Tr. 133-35.

Weirich's testimony about the height of the hazard was not contradicted, and appears to be reasonably accurate judging from the photographs taken by Anguiano. Ex. P-4. Those photos also depict substantial framing members that inhibit access to the hazard and would reduce the risk of a person accidentally encountering it. Anguiano testified that he considered an injury reasonably likely because the condition was "within reach" and cleaning was required in the area. Tr. 55. However, the area depicted in the photographs does not appear to be one that would require cleaning on any regular basis, and Anguiano later clarified that any cleaning would have been done at ground level, i.e. not in the area of the coupling itself. Tr. 59-60. Considering the location of the hazard, the limited protection provided by the framing members, the fact that any cleaning would have been done at ground level where the risk of inadvertent contact would have been substantially reduced, and that Barclay would most likely have noticed the missing guard and replaced it within approximately two hours after the plant had been started up and before any

cleaning activity would have been performed, I find that it was not reasonably likely that the hazard contributed to would result in an injury, and that the violation was not S&S.[3] I agree with Anguiano's assessment that the operator's negligence was moderate and that one person was affected by the violation.

Citation No. 6233499

Citation No. 6233499 also alleged a violation of 30 C.F.R. § 56.14107(a), the guarding standard. The violation was described in the "Condition or Practice" section of the citation as follows:

> The head pulley of the under roll conveyor belt was not guarded. A pinch point existed between the smooth head pulley and the conveyor belt. The hazard is 69 inches away from the ground. (Supervisor) Ronny Barclay, and employees Jaime Dominguez, Santos Garcia are exposed to the hazard when they work in the area, maintaining operation of the plant. Barclay stated he knew of the condition for two months. No effort to correct the condition was attempted. Barclay engaged in aggravated conduct constituting more than ordinary negligence in that he was aware the head pulley exposed a pinch point hazard. This violation is an unwarrantable failure to comply with the mandatory standard.

Ex. P-3.

Anguiano determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was S&S, that three employees were affected and that the operator's negligence was high. As noted in the body of the citation, it is alleged that the violation was the result of the operator's unwarrantable failure to comply with a mandatory safety standard. A civil penalty in the amount of $6,300.00 has been proposed for this violation.

The Violation

Anguiano took a photograph of the cited condition after a guard had been welded in place to abate the citation.[4] Ex. P-3. With the exception of the approximately one foot high piece of expanded metal screen welded to the conveyor frame and depicted in the left center of the photo,

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[3] Anguiano also believed that it was reasonably likely that Barclay would have become entangled in the rotating shaft and coupling. Tr. 56. However, I reject that conclusion, and accept Barclay's testimony, i.e., that upon noticing the hazard, he would have shut down the motor and replaced the guard, a task that would have taken less than a minute. Tr. 51, 112.

[4] Weirich testified that there had never been a guard on the head pulley. Tr. 113. Anguiano agreed that there was no evidence that a guard had ever been fabricated or installed on the head pulley prior to issuance of the citation. Tr. 79.

all of the other guarding shown in the picture was in place before the subject inspection. Tr. 72, 79. What is not apparent from Anguiano's photograph is that the smooth head pulley is located a considerable distance off the ground. The location of the pulley is more accurately depicted in the upper-right-hand portion of Petitioner's Exhibit P-1. Anguiano attempted to measure the height of the pinch point, and obtained a figure of 69 inches. Tr. 64, 71, 116. Anguiano also testified that there were no obstructions between him and the pinch point when he took the picture. Tr. 81.

Anguiano's 69-inch height figure was more of an estimate than an actual measurement. It was taken from ground level, some four feet away from the side of the conveyor, to a "reference line," i.e., Anguiano's estimate of the height of the pinch point at that distance. Tr. 74-77. Access to the pinch point, where the conveyor belt contacts the top of the smooth head pulley, is considerably more restricted than is apparent from Anguiano's photograph. Ex. P-3. Respondent introduced a photograph showing Barclay, who is approximately six feet tall, standing close to the conveyor, fully extending his arm up and over electrical conduit and the conveyor frame, and still "not quite reaching the pinch point." Tr. 139-40; ex. R-1, R-2. Barclay testified that he couldn't reach to the pinch point, in part, because he had to stand in a small drainage ditch to approach it. Tr. 114, 118. He also testified that he did not believe that Anguiano's measurement reflected the true height of the pinch point. Tr. 117-18.

The conveyor in question had been in essentially the same position since 1986. Tr. 115, 136. It had been inspected twice yearly since that time, and the head pulley, which had never been guarded, had never been cited as a violation.[5] 113, 136-37. Anguiano, himself, had inspected the plant once prior to July 2004, and had failed to cite the condition, although he testified that he would have cited it if he had seen it. Tr. 12, 77-78, 81. On one prior occasion, an MSHA inspector had suggested adding some guarding to cover an opening on the side of the motor drive guard, which was done. Tr. 114, 136. That small, rectangular piece of woven-wire screen is shown bolted to the yellow framing on the right side of Anguiano's photograph. Ex. P-3.

Respondent contends that the condition was not a violation of the cited standard because the location of the head pulley dictated that it could not "cause injury," and that a guard was not required because the regulations state that "guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces," 30 C.F.R. § 56.14107(b). It also contends that it did not have fair notice of the Secretary's interpretation of the guarding standard as applied to the particular condition here at issue. I agree with Respondent on both points.

Anguiano agreed that the opposite side of the head pulley did not need to be guarded because it was "inaccessible." Tr. 74. It appears, however, that the side he was concerned about

[5] The Act requires that mines, other than underground coal mines, be inspected at least two times per year. 30 U.S.C. § 813(a).

was just as effectively inaccessible under any reasonable application of the regulation. It is apparent from Respondent's photograph that the hazard, the pinch point of the belt and pulley, was at least seven feet away from where a person would have to stand in order to attempt to reach it. Ex. R-1. Moreover, that location was in a small drainage ditch, not a walking or working surface. There is no evidence that miners traveled or worked in the immediate area, and it appears that there was no possibility of inadvertent contact. Weirich and Barclay believed that the condition did not violate the regulation because the moving machine parts in question could not cause injury, and were located at least seven feet away from walking or working surfaces. Several MSHA inspectors that had inspected the condition in the past apparently reached the same conclusion.

I find that the Secretary has failed to carry her burden of proving that the moving machine parts at issue presented a hazard, or that they were located less than seven feet away from walking or working surfaces.[6] The condition did not violate the regulation and the citation will be dismissed.

In addition, enforcement of the regulation in this instance would be barred because Respondent did not receive fair notice of the Secretary's interpretation of the standard, i.e., a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would not have recognized the specific prohibition or requirement of the standard as the Secretary seeks to apply it here. It is apparent that numerous MSHA inspectors have observed essentially the same condition and concluded that it did not violate the standard. One inspector actually made a suggestion to improve the guarding of the drive motor on the conveyor, but did not suggest that additional guarding was needed for the head pulley.

There is no evidence that the Secretary has published notice or otherwise provided an interpretation of the regulation that would have informed operators with reasonable certainty that the standard required guarding under the circumstances presented here. None of the other factors typically considered in analyzing the fair notice argument provide significant guidance or suggest a result other than that Respondent did not have fair notice of the Secretary's interpretation of the standard.

Order No. 6233505

Order No. 6233505 also alleges a violation of 30 C.F.R. § 56.14107(a), the guarding

[6] Anguiano testified that Barclay agreed that the head pulley presented a hazard that could cause injury to miners. Tr. 68-70. However, if Barclay made such a statement, it is not apparent whether he was referring to head pulleys in general, or this particular installation. As Anguiano described the conversation, Barclay agreed that "the head pulley should have been covered on both sides and on the back side." Tr. 69. But, Anguiano, himself, believed that no guard was necessary on the far side of the pulley, and none was required in order to abate the citation. Tr. 74.

standard. The violation was described in the "Condition or Practice" section of the citation as follows:

> The six-bladed fan on the Detroit diesel engine was not guarded on the Northwest side. The engine is used to drive a water pump. The engine and pump were set up on July 6, 2004. The hazards were the sharp edges of the fan blades, a pinch point on the V-belt of the alternator and another pinch point on the belt that turns the engine's crank shaft. The hazards were two feet from the ground. The engine's ignition switch is on the same side that the hazards existed. An employee started the engine at 07:45 on this date. Ronny Barclay (Supervisor) stated that he knew of the missing guard, and the engine had been overheating. A gasket had been replaced on the valve cover. Barclay engaged in aggravated conduct constituting more than ordinary negligence in that he knew the guard was not in place. This violation is an unwarrantable failure to comply with the mandatory standard.

Ex. P-9.

Anguiano determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was S&S, that two employees were affected and that the operator's negligence was high. As noted in the body of the order, it is alleged that the violation was the result of the operator's unwarrantable failure to comply with a mandatory safety standard. A civil penalty in the amount of $5,100.00 has been proposed for this violation.

The Violation

The cited condition is depicted in photographs taken by Anguiano. Ex. P-9. There was no guard on the left side of the pump engine, and the fan blades and small belt pulleys near the front of the engine were exposed. The engine was not running at the time. However, it had been operating that morning, most likely from shortly before Anguiano's 8:00 a.m. arrival until about 9:00 a.m., when other guarding violations were issued. Anguiano believed that employees were exposed to the hazard four times each day as they accessed the "ignition switch" to start and stop the engine for the day and during the lunch break. Tr. 89-90. The switch is depicted in one of the pictures, mounted on a small plate, along with some gauges, to the rear and left of the engine. Ex. P-9. Because of the proximity of the exposed hazards to the switch and the frequency that Aguinao believed that employees passed by the hazard, he concluded that it was reasonably likely that a serious crushing injury would occur. Tr. 92. Because Barclay was aware that the guard was not in place, and was responsible for other guarding violations, including one alleged to be an unwarrantable failure, Anguiano believed that the operator was highly negligent and that the violation was the result of an unwarrantable failure to comply with a mandatory safety standard.[7]

[7] Anguiano also related that he had had a later phone conversation with Weirich, who stated that he had told Barclay to reinstall the guard. Tr. 93. However, both Barclay and Weirich

Barclay and Weirich testified that work had been done on the engine the day before, in an attempt to remedy an overheating problem. The thermostat had been changed and new belts had been installed. Tr. 119, 145-47. The guard on the right side of the engine was in place, but the one on the left had been left off to facilitate possible further remedial efforts, e.g., tightening the new belts, or more substantial repairs if the engine continued to overheat. The engine had been running about an hour, and would have been checked at lunch to see if the repairs had been effective. Tr. 125-27, 147. The engine normally ran all day, i.e., it was not shut off during the lunch break. Tr. 120. Barclay explained that the start-up procedure involved two employees, neither of whom would be on the left side of the engine, where the hazards were located. Tr. 121-24. Moreover, the switch was not an electrical cut-off, it only controlled the starter. The engine was shut off by pulling back on the throttle, which was located at the rear of the engine. Tr. 124, 148. Employees engaged in starting or stopping the engine would not be on the left side of the engine, near the hazard. They needed to be to the right and rear of the engine, and there was an eight-inch diameter water pipe that they would have had to crawl over to reach the area. Tr. 121-25, 143-45, 148. The positions of employees engaged in starting the pump motor are depicted in pictures introduced by Respondent. Ex. R-5, R-7. Weirch explained that there was no reason that a miner would be on the left side of the engine, where the hazard was located. Tr. 146, 148.

The guard that had been fabricated for the left side of the engine had not been replaced, leaving the hazards exposed. Miners worked in the area and, although their exposure to the hazards was substantially more limited than Anguiano believed, it was possible that a miner would inadvertently come into contact with the hazards and suffer an injury. Consequently, I find that the regulation was violated.

Respondent relies upon a provision in the Secretary's regulations stating that guards are not required "when testing or making adjustments which cannot be performed without removal of the guard." 30 C.F.R. § 56.14112(b). However, this limited exception does not encompass running of the engine for the whole morning to see if it would continue to overheat. While such a trial might be characterized as a test, it could, and should, have been performed with the guard in place. I find that Respondent violated the regulation.

Significant and Substantial

While any injury suffered as a result of the violation would have been serious, no injury was reasonably likely to occur because of the limited access to the area. Anguiano did not explain the basis for his conclusions about how often employees would be in proximity to the hazards. He apparently assumed they would be exposed four times each day because they would need to reach the "ignition switch." His assumptions were erroneous in several respects.

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testified that the instruction was to let the engine run for awhile, that the belts would probably have to be tightened, and to replace the guard after the test. Tr. 120, 145. I find the latter explanation more credible.

Respondent's unrebutted testimony establishes that the engine was started and stopped only once each day, and that the switch was used only while starting the engine. More significantly, the employees involved would not have been in close proximity to the hazard, because they would have been positioned to the right and rear sides of the engine, as depicted in Respondent's photographs. Ex. R-5, R-7. Anguiano's pictures, like those taken with respect to the previous citation, adequately depict the hazardous condition, but fail to depict the condition's accessibility. They do not show that the area on the left side of the engine is essentially barricaded off by a large water pipe approximately two feet off the ground. Respondent's testimony established that employees, who would be in the vicinity of the engine only twice per day, would have remained on the opposite side of that pipe, substantially reducing their exposure to the hazards. The condition existed that morning and would have been corrected either at the noon break, or at the end of the day. Consequently, even the limited exposure presented would have affected employees on only two limited occasions. Under the circumstances, I find that it was not reasonably likely that the violation would result in an injury, and that the violation was not S&S.

Unwarrantable Failure

In *Lopke Quarries, Inc.,* 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an unwarrantable failure:

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp*., 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id*. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); *see also Buck Creek* [*Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).
>
> Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) . . . ; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC

705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

The Secretary failed to carry her burden of proof with respect to Citation No. 6233499, the head pulley guarding violation, negating the S&S and unwarrantable failure allegations as to that violation. The violation alleged in this order was also found to have been non-S&S. Consequently, it cannot form the basis of an unwarrantable failure charge. 30 U.S.C. § 814(d)(1). However, even if it had been S&S, it was not the result of an unwarrantable failure. As noted above, the decision to leave the guard off the left side of the engine while it was run that morning, impermissibly stretched the testing exception of the regulations. However, considering the extremely limited exposure of employees to the condition, its location with respect to their positions, and the fact that the engine would have been started once and shut down once at the lunch break to do further repairs, or re-install the guard, Respondent's negligence could not be characterized as anything more than moderate, and the violation was not the result of an unwarrantable failure.

The Appropriate Civil Penalties

Weirich Brothers is a small operator, as is its controlling entity. The Secretary introduced a printout from MSHA's computer database, an Assessed Violation History Report, showing that Respondent had 21 assessed and sustained violations in the 24 month period preceding the issuance of the subject citations. Ex. P-11. Of those violations, 12 were regularly assessed and four were S&S. The Proposed Assessment mailed to Respondent noted that there had been 29 assessed violations within the 24-month period, during which there had been 17 inspection days, i.e., 1.7 violations had been issued per inspection day. Under the penalty formula used by MSHA, this resulted in 16 penalty points being charged to Respondent, indicating a relatively poor violation history.[8] Respondent introduced a financial statement, and argued that the $12,331.00 in proposed civil penalties would affect its ability to remain in business. However, Weirich indicated that he might not make the argument if the penalties were in the $1,000.00 range. I find that the penalties imposed below would not affect Respondent's ability to remain in business. All of the violations were promptly abated in good faith. The gravity and negligence associated with the alleged violations have been discussed above.

[8] *See* 30 C.F.R. § 100.3. Regular assessments, as opposed to single penalty and special assessments, are determined by reference to a point scale, with points being assigned for each of the penalty factors specified in the Act. The table of points for violation history ranges from zero for up to 0.3 violations per inspection day, to 20 for over 2.1 violations per inspection day.

Citation No. 6233497 was affirmed. However, it was found not to have been S&S. The violation was unlikely to result in an injury, and any injury would have been minor. The operator's negligence was found to have been low. A civil penalty of $247.00 was proposed by the Secretary. I impose a penalty in the amount of $60.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6233500 was affirmed. However, it was found not to have been S&S. The violation was unlikely to result in an injury. A civil penalty of $324.00 was proposed by the Secretary. I impose a penalty in the amount of $275.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Order No. 6233505 was found not to have been S&S, and was not the result of the operator's unwarrantable failure. The operator's negligence was moderate. Consequently, the order will be modified to a citation issued under section 104(a) of the Act. A civil penalty of $5,100.00 was proposed by the Secretary. I impose a penalty in the amount of $300.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Respondent withdrew its contest and request for hearing with respect to Citation Nos. 6233498, 6233501, 6233502, 6233503, 6233504, and 6233506. It agreed to pay the proposed penalties for those violations, a total of $360.00. I have considered the representations and evidence submitted and conclude that the proffered resolution is appropriate under the criteria set forth in section 110(i) of the Act. Respondent will be ordered to pay civil penalties in the amount of $360.00 for those violations.

ORDER

Citation No. 6233499 is hereby **VACATED** and the petition as to that citation is hereby **DISMISSED**.

Citation Nos. 6233497 and 6233500 are **AFFIRMED**, as modified. Order No. 6233505 is modified to a citation issued pursuant to section 104(a) of the Act, and is **AFFIRMED**, as modified. Respondent is directed to pay civil penalties totaling $635.00 for those violations. Payment shall be made within 45 days.

With respect to the six citations as to which Respondent withdrew its contest and request for hearing, Respondent is ordered to pay civil penalties totaling $360, within 45 days.

Michael E. Zielinski
Administrative Law Judge

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