

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

March 2, 2007

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. KENT 2005-386-M |
| Petitioner | : | A. C. No. 15-16138-62819 |
| v. | : | |
| | : | Docket No. KENT 2005-424-M |
| | : | A. C. No. 15-16138-65643 |
| DIX RIVER STONE INC., | : | |
| Respondent | : | Dix River Surface |

DECISION

Appearances: Brian W. Dougherty, Esq., U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner
Marcus P. McGraw, Esq., Greenebaum Doll & McDonald PLLC, Lexington, Kentucky, on behalf of the Respondent

Before: Judge Barbour

These consolidated cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor (“Secretary”) on behalf of her Mine Safety and Health Administration (“MSHA”) against Dix River Stone, Inc. (“Dix River”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. §§ 815, 820 (“Mine Act” or “Act”). The Secretary seeks the assessment of civil penalties totaling \$1220 for eight alleged violations of mandatory safety standards for surface metal and nonmetal mines. The alleged violations are set forth in citations issued pursuant to sections 104(a) and 104(d)(1) of the Act. 30 U.S.C. §§ 814(a), 814(d)(1). The citations are the result of inspections at the company’s Dix River Surface Mine in January and April 2005. In addition to alleging violations, the Secretary charges several of the violations were significant and substantial contributions to mine safety hazards (“S&S”) and one was caused by Dix River’s unwarrantable failure.

Dix River denied the violations and contested the Secretary’s S&S and unwarrantable allegations. The cases were tried in Lexington, Kentucky.¹

¹ Clarence Barrett, a company witness, was unavailable to testify at the Lexington hearing due to illness. Subsequently, Mr. Barrett’s testimony was taken via the telephone. *See* Tr. II; *see also* Tr. 13-14; 212-213.

STIPULATIONS

The parties stipulated as follows:

1. [T]he mine is subject to the Act;
2. Dix River and the mine affect interstate commerce;
3. Dix River and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission (Commission) and . . . the administrative law judge has authority to hear and decide the subject cases;
4. [T]he proposed penalties will not affect the ability of Dix River to continue in business;
5. [T]he mine is a small-sized, metal/nonmetal mine that operates one production shift per day during five-day weeks, with annual hours worked ranging from 10,000 to 20,000 per year;
6. Dix River is a small-sized, metal/nonmetal controlling entity with less than 60,000 annual hours worked per year;
7. [I]n 2005, the mine received seven citations over nine inspection days, in 2004 it received zero citations over 19 inspection days and in 2003 [it] received six citations over four inspection days.

Tr. 11-12; *see also* Joint Ex. 1.

DIX RIVER'S FACILITY THE INSPECTIONS AND THE CITATIONS

Tommy Owens, the owner and operator of the quarry, testified he and a partner acquired the mine in 1997. Before they began operations, the partner died and Owens became solely responsible for the quarry. Tr. 128. Owens stated he ran a very safety-conscious operation. For example, prior to January 31, 2005, Dix River had not received a citation or order charging the company with an unwarrantable failure to comply (*i.e.*, a citation or order issued pursuant to section 104(d) of the Act). Tr. 129-130.

Owens maintained he always got along with MSHA’s inspectors, but when James Ellison, the inspector who issued the subject citations came to the mine on January 31, 2005, Ellison “got mad” because he was kept waiting at the office for an hour-and-a-half while the mine’s foreman, Gene Smith, made necessary equipment repairs. Tr. 129, 144. Owens implied Ellison then went out of his way to cite Dix River for conditions he might not otherwise have found objectionable. *See* Tr. 129, 1454.

Ellison, who works at MSHA’s Lexington, Kentucky, field office, has been an MSHA inspector for approximately three-and-one-half years.² Although he inspects both underground and surface mines, surface mines predominate. Tr. 23-24. Prior to joining MSHA, Ellison worked for approximately 31 years at a Colorado cement plant where he started as a laborer and rose to safety director. Tr. 25. Along the way, he held positions ranging from maintenance manager to quarry superintendent and production manager. Tr. 25. Ellison maintained the mining methods employed at the Colorado facility were “very similar” to those employed at Dix River’s facility. Tr. 25-26.

On Monday, January 31, 2005, Ellison arrived at the mine at approximately 1:00 p.m. and went to the scale house, a building serving as the mine office. Ellison had been at the mine once before. Tr. 26. Ellison asked the dispatcher to notify Gene Smith, Dix River’s supervisor, that he, Ellison, was on the property. Tr. 27. The dispatcher told Ellison that Smith was repairing a conveyor belt. *Id.* Therefore, Ellison began the inspection at the scale house office, where he looked through some of the company’s records. He then inspected the employee’s break room. Shortly thereafter, Smith arrived, and Ellison began inspecting the rest of the mine accompanied by Smith. Tr. 28. Ellison estimated he waited about an hour before Smith came to the office, but he denied the delay made him angry. Tr. 52.

| <u>Citation No.</u> | <u>Date</u> | <u>30 C.F.R. §</u> |
|---------------------|-------------|--------------------------|
| 6108357 | 1/31/05 | 56.14112(b) ³ |

² In addition to his MSHA qualifications, Ellison holds a BA in history from Brigham Young University and an MA in occupational safety and health from Columbia Southern University. Tr. 25, 26.

³ Section 56.14112(b) states:

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.

Ellison and Smith traveled to the secondary crusher, a two-story structure with electrical components on both floors. Ellison explained that “[e]very mine has a crusher” and that part of his training with MSHA involved courses concerning the inspection of crushers. Tr. 24. On the second floor, the maintenance crew was working on a damaged belt. From the crusher control room, Ellison watched the miners. Soon, Smith left him to join them. Tr. 28.

Clarence Barrett, the control room operator was in the room. Tr. 28-29. Ellison noticed the guard for the roll crusher was not in place. It was around 3:00 p.m. He also noticed the “disconnect [for the crusher] had not been . . . locked out, so the only thing that prevented . . . [the] motor from starting . . . [was that] nobody had gone in and pushed the start button.” Tr. 48. In Ellison’s view, the guard had been missing for “a lengthy period of time” (Tr. 57), because Barrett told him the guard had been off since the previous Friday when the motor that drives the roll crusher was replaced. Tr. 29, 30.⁴ (Barrett testified he did not recall this conversation. Tr. II 28.) Ellison asked Barrett why the guard was off. According to Ellison, Barrett responded he could not put it on himself. Tr. 29. Ellison also maintained Barrett told him the crusher had been operating that morning, and Barrett did not indicate tests or adjustments had been performed on the motor at any time that Monday. Tr. 31.

Ellison explained the motor had a pulley at its end. V-belts ran from the pulley to the crusher. The motor turned the pulley which, in turn, caused the v-belts to turn at a high speed. Tr. 34. A pinch point was created by the pulley and the belts. Tr. 34. In addition, there was another pinch point at the top of the pulley. Tr. 36. Ellison feared if the belts caught a person’s clothing, hand, or finger, the person would be pulled into the pinch points. Tr. 36. In such case, the motor “wouldn’t even slow down” and the person would suffer amputation, loss of blood and other significant injuries. Tr. 43.⁵

There was a walkway from the control room to the crusher. The walkway was adjacent to the motor. Ellison testified Barrett used the walkway several times during a shift. Tr. 38. Ellison also testified he had seen other Dix River employees use the walkway. Tr. 39. According to Ellison, the walkway made a turn of 90 degrees at the motor, which meant there were places from which a miner could contact the pinch points. Tr. 37. Ellison estimated the distance between the walkway and the nearest pinch point was “[a]pproximately 12 inches.” Tr. 38. However, Ellison did not measure the distance. Tr. 55-56.

Ellison recalled Barrett expressing concern he would be injured because the motor was close to the walkway and Barrett had to pass it multiple times during a shift. Tr. 42. Ellison believed Barrett’s fears were justified. Ellison had seen spillage on the walkway. Tr. 40.

⁴ The motor is depicted in Gov. Ex. 6

⁵ Ellison also explained because the belts moved at, around 1,760 revolutions per minute, contact with their surfaces could produce abrasions. Tr. 43, 66.

Although no rocks were present that Monday, Ellison speculated that as normal mining operations continued, rocks could be caught in the walkway's metal grating. They could cause Barrett or other miners to slip or trip and contact the moving parts. Tr. 40.

Much of Ellison's testimony was contradicted by Owens, who maintained the walkway was not as close to the pinch points as Ellison believed. In fact, it only came within three feet of the pulley wheel and stopped at a dead end before the guarded area. Tr.139-140; *see also* Tr. 150. According to Owens, the only way a miner could reach the moving machine parts was to "climb up on the machinery . . . on crushers and stuff like that." Tr. 151.

Supervisor Smith, on the other hand, was not as certain that the moving parts were out of reach. Smith testified to touch them, "[y]ou would have to reach [or stretch] out." Tr. 180. He stated when the guard was off a person on the walkway could "walk over to . . . [the moving parts] and reach over to them" (Tr. 181), and if a person came in contact with the moving flywheel, "it would probably jerk you through it . . . [and] kill you." Tr. 189.

As for Barrett's use of the walkway, Owens testified Barrett walked it to inspect the crusher before starting the equipment. However, Owens maintained Barrett always locked out the equipment before starting it and he again locked it out at the end of the work day. Moreover, Smith and Owens agreed because of noise and dust generated by the equipment, Barrett never used the walkway while the crusher was operating. Tr. 140, 189. Rather, he stayed in the operator's booth. Tr. 140-141.⁶

Owens explained why the guard was not in place. He stated the motor driving the belts stopped working on Thursday, January 27. A replacement was installed the same day. Tr. 145-146. Although it was necessary to remove the guard to install the new motor, the guard was reinstalled after the work was completed. Smith agreed with this scenario. Tr. 172-173.

As best Barrett could recall, the new motor was not installed completely until the following day, Friday. During the time the new motor was being installed, the guard was off and was "propped up on the walkway." Tr. II 12. After the motor was in place, Barrett ran it to make sure it was properly installed. In fact, according to Smith, rock was crushed at the mill on Friday, and Owens and Smith agreed when production was resumed on Friday, the guard was in place. Tr. 148, 174. Barrett, too, recalled rock being crushed on Friday and the guard being on. Tr. II 12.

⁶ However, Owens later stated Barrett stayed in the booth "about 95 percent of the time" (Tr. 152) and came out only "on occasion," "once a month" or "once a week." Barrett was less restrictive when describing his use of the walkway; he stated he might use it during the shift if, "I have to go up there and check the screen and see if it's shaking right." Tr. II 17.

In Smith's view, on Friday "everything seemed ... okay," but when he reached the mine the following Monday, Barrett told him there was "trouble." Tr. 175. Barrett testified the "trouble" first was noticed on Friday night after the crusher was shut down. Tr. II 13. A loose pulley had moved toward the newly installed motor. Barrett maintained the guard was in place over the weekend. Barrett reported the problem to Smith on Monday morning. Tr. II 19-20, 26. After reporting the malfunction, Barrett locked out the equipment. Tr. II 14-15. Because of the malfunction, production could not take place. Tr. II 25.

Smith testified the guard was again removed on Monday so the pulley could be returned to its correct position. Tr. 175-176; Tr. II 21, 27. After the problem was corrected, everyone went into the operator's booth and watched as Barrett restarted the equipment. Tr. 179, Tr. II 21, 27. Rock was crushed for about ten minutes in order to make sure the repair was proper and the pulley was secure. Tr. 179; *see also* Tr. II 22. During this test, the guard was off. Tr. II 22.

While this was going on, something else was occurring and complicating the situation. Smith stated a "belt was about to break in two" and had to be replaced. Tr. 176. Barrett agreed. In fact, according to Barrett, the belt was being repaired when Ellison arrived at the crusher. Tr. II 15-16.

Barrett recalled Ellison asking why the guard was off. Barrett stated he told Ellison, "[W]e . . . had to tighten the sheave up. Then we had to leave . . . [the guard off] till [sic] they run it In the meantime, they were working . . . [on the belt] and we hadn't had time to put . . . [the guard back] on." Tr. II 16. In other words, the guard could not be replaced because the crew was "all up there working on the belt," and Barrett could not put it on himself. Tr. II 27.

Smith agreed he was working on the belt problem when he was told Ellison was at the mine. Tr. 178. Smith went to get Ellison and brought him to the crusher. Smith then went back to help with the belt. Tr. 178. The next thing Smith knew, Barrett yelled that Ellison wanted the guard replaced immediately, and the guard was reinstalled. Tr. 178.

Owens was certain that while the repairs were underway on Monday, no one was endangered and there was no violation. While the equipment was being repaired, Barrett would have locked out the crusher, and when the mill was run to test the repairs, MSHA regulations allowed the guard to be off. Tr. 142-143.

With regard to negligence, Ellison believed Smith knew the guard was taken off on the previous Friday and that Smith had a responsibility to make sure it was put back in place before work resumed on Monday. Ellison testified Smith acknowledged production had been underway on Monday morning until the conveyor belt pulled apart. Tr. 44.⁷ In failing to meet his responsibility, Ellison believed Smith, and through Smith the company, was negligent. Tr. 43-44.

⁷ In addition, Ellison noted rock on the conveyor belt, which indicated to Ellison the belt had been in operation prior to the time the belt problem developed. Tr. 49.

Ellison also testified Smith told him the electrician who should have replaced the guard was just too lazy to do it (Tr. 48), but Smith denied the exchange. Tr. 190. According to Smith, Ellison did not let him explain why the guard was off. Ellison simply demanded it be immediately replaced. Tr. 182.

Ellison also felt the failure to replace the guard represented an unwarrantable failure on the company's part. He stated Smith "had not made any effort to check on the completion of the job, [and] make sure it was safe." Tr. 47. Although the mine did not operate on Saturday and Sunday, the fact that Ellison believed the guard was missing from Friday to Monday had an impact on Ellison's unwarrantable failure finding. Tr. 47.⁸

The condition was abated in 30 minutes by replacing the guard. Ellison regarded this as prompt abatement. Tr. 76.

THE VIOLATION

_____ Citation No. 6108357 states in part:

The guard over the drive pulley and drive belts for the drive motor on the roll crusher was not in place. The guard had been removed to replace the motor Following the motor swap the end section of the guard was not reinstalled thereby exposing persons to the moving motor sheave and drive belts. A [walkway] is adjacent to the motor platform and drive unit. Persons are in the area on a daily basis.

Gov. Ex. 5.

Section 56.14112(b) is straightforward. It requires guards to be in place while machinery is being operated. The sole exception to the requirement is the guard can be "off" during adjustments or repairs to the machinery that cannot be made with the guard "on."

The first question is whether the guard was in place while the motor and drive belts for the crusher were operating. The inspection took place on a Monday. During the course of the

⁸ Ellison modified the citation from one initially issued pursuant to section 104(a) to one issued pursuant to section 104(d)(1) because of his conclusion regarding the company's unwarrantable failure and because approximately one month after the section 104(a) citation was issued, it was reviewed by his supervisor, who "pointed out the conditions for a [section] 104(d)(1) citation existed." Tr. 60.

inspection Ellison noticed the guard was not in place, and Ellison stated he was told by Barrett that it had been “off” since the previous Friday (Tr. 29-30). Barrett did not recall making the statement (Tr. II 28), and Smith, Owens and Barrett all maintained the guard was replaced after the new motor was put on. Tr. 148,174, Tr. II 12. Thus, the testimony is in conflict as to whether the guard was on or off on Saturday and Sunday, but it is a conflict I need not resolve, because it is clear that whether or not the guard was on or off the equipment, the crusher was not operated over the weekend. In fact, in the context of ongoing operations the quarry never would have been operated because production did not take place on the weekends.

It also is certain the guard was off on Monday, so the next question is whether the crusher motor was operated or was going to be operated on Monday while the guard was off. Although Ellison did not actually observe the crusher operating, Ellison testified Barrett told him the crusher motor had been operating on Monday morning with no guard, Tr. 31, and Barrett confirmed this was so. Tr. II 13, 23.

This leads to the question of whether the motor was operated in order to test the efficacy of the repair; or whether it was operated for other purposes. The testimony is in conflict on this critical issue. According to Ellison, Smith stated production occurred on Monday morning before miners had to repair the conveyor belt. Tr. 44. On the other hand, Smith maintained Monday was the day additional problems involving the motor required the guard to be removed while miners worked on the needed repairs. The equipment was operated with the guard off, but only as part of a test to make sure the repairs were successfully accomplished. Tr. 175-176, 179. Barrett agreed with this scenario. He stated that rock was crushed for about ten minutes to make sure the repairs were effective. Tr. II 21-22, 27; *see also* Tr. 179.

Therefore, under both Ellison’s and the company’s versions of events, the guard was not in place on Monday while the motor was operating. This would establish a violation unless, as the company contends, it was making adjustments which could not be performed without removal of the guard; in other words, unless the company’s actions came within the regulatory exception.

I conclude the record supports finding the exception applied. Ellison did not see the motor operating. He did see rock on the conveyor belt (Tr. 49), but that rock does not support an inference production took place on Monday. Since the crusher did not operate over the weekend, the rock was as likely the result of production from the previous Friday as from Monday, or from when the equipment was operated to test the efficacy of the repairs. Moreover, I am struck by Barrett’s testimony Ellison asked why the guard was off and Barrett explained about tightening the sheave and that the guard had to be off and the equipment operated while the repair was tested. Tr. II 16. I believe Barrett accurately related what he told Ellison. Barrett’s response was logical, and it offers the most plausible explanation for why the guard was not replaced.⁹ Even if,

⁹ Further, in view of Barrett’s logical explanation, it is likely Smith’s purported statement to Ellison that “production” took place on Monday morning (Tr. 44), if made at all,

as Ellison testified, Barrett told Ellison only that the crusher was operated that morning (Tr. 31), it was incumbent on Ellison, as the representative of the party bearing the burden of proof, to inquire as to the nature of the operation – *e.g.*, Was it for production purposes? Was it for test purposes? – something Ellison did not do.

I also find it logical that the company would have assigned miners to repair the belt before the guard was replaced. Production could not be resumed before the repair was made. It was important to get the work done. The fact that belt repair was going on at or nearly at the same time as the sheave was being tightened does not mean the company should be penalized because the belt repair was not completed. The two repairs were of a unit as far as returning to production was concerned, and it is reasonable to expect the guard would be replaced once the repairs were completed and the company was ready to resume production.

In sum, I conclude the Secretary did not present sufficient evidence to refute Dix River’s defense, and I find the Secretary did not establish the alleged violation by a preponderance of the evidence. I will vacate the citation at the close of this decision.

| <u>Citation No.</u> | <u>Date</u> | <u>30 C.F.R. §</u> |
|---------------------|-------------|------------------------------|
| 6108392 | 4/25/05 | 56.14107(a) ¹⁰ |
| 6108393 | 4/26/05 | 56.14101(a)(2) ¹¹ |

On April 25 and 26, 2005, Ellison returned to the mine. His activities included the inspection of two trucks, a Euclid R-35 truck and a Euclid R-25. On the R-35 truck, Ellison found the crank shaft pulley and the pulley for the air conditioner compressor were not guarded. Tr. 72-73; *see* Gov. Ex. 8. The pulleys are near the front of the engine on the left side. Tr. 73.

was a reference to activation of the equipment to test the repairs.

¹⁰ Section 56.14107(a) states:

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

¹¹ Section 56.14101(a)(2) states:

If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels.

Ellison believed the position of the fender, “allow[ed] a person to step in behind the tire in close proximity to the pulleys and drive belt on the crank shaft and compressor.” Tr. 73.

Ellison posited reasons why drivers or other miners might place themselves in close proximity to the unguarded moving parts. First, drivers went behind the fender “quite often” to investigate noises or vibrations emanating from the engine. Tr. 73-74. Second, although he agreed the company’s normal procedure was to check the oil while the engine was not running, he noted the oil dip stick was on the same side of the engine as the unguarded pulleys. Tr. 74, 77. Third, drivers not infrequently used the space behind the tire as a pissoir. Tr. 74.

Ellison’s fears were disputed by Owens, who maintained, “the truck can’t be running to check the oil” (Tr. 155, *see* Tr. 156), and who testified he was not aware of miners relieving themselves behind the fender. It would be “against . . . company rules.” Tr. 155. Besides, the company maintained two on-site bathrooms. Tr. 155. Owens also noted the truck was manufactured without a guard. Tr. 156.

With regard to the kind of injury that might result from the lack of a guard, Ellison testified the crank shaft was a foot-and-a-half inside the truck frame and about five feet aboveground. The compressor pulley was even closer to the frame. Tr. 74-75. If a driver or other miner got his or her hand or fingers caught in the shaft or pulley, Ellison believed he or she would suffer cuts and “maybe a broken bone.” Tr. 75. However, he also believed such an accident was “unlikely” because there was no reason for a person to visit the area daily. It was “not likely a person would be in . . . [the area] unless something drew him there.” Tr. 75.

In Ellison’s view, the violation was due to the company’s “moderate” negligence. He agreed the truck was manufactured without a guard, and he noted no one reported the condition to mine management. Tr. 76.

The condition was promptly abated by installing a screen over the cited area. Tr. 75-76.

The following day, Ellison inspected the R-25 tuck. The truck was used to transport rock to the mine’s primary crusher. The truck was stopped above the top of the ramp near the crusher. Ellison checked the truck’s park brake and found that it would not hold the truck. Tr. 77-78. The truck was loaded, and Ellison estimated the grade on which the truck was parked as “somewhere around four percent.” Tr. 78.

Ellison testified how he determined the brake was not functioning. He ask the truck driver to set the brake three times, and each time the brake failed to hold the truck. Tr. 78. The truck’s engine was running when the tests were conducted. Tr. 78-79. The truck’s pneumatic service brakes have a short life if the engine is not running because the air compressor cannot refill the air brake reservoir. Tr. 79, 82-83. The only way to stop the truck when the engine is off is with the park brake. Tr. 79, 82-83. Thus, if the engine failed, the service brakes would not work and, given the non-functioning park brake, there would be no way to stop the truck. It

would descend uncontrolled to the bottom of the pit or roll off of the road, and the driver, or others, would be seriously, even fatally, injured. Tr. 79-80.¹² In Ellison's view, the lack of a working park brake created a "serious and significant situation." Tr. 83.

Owens maintained Ellison did not properly test the brake. To do it right, the air pressure should have been 120 pounds per square inch (p.s.i.). The inspector did not let the truck operator "pump the air to 120," thus invalidating the test. Tr. 158, 161, *see also* Tr. 150. Owens also noted the truck was inspected by MSHA at least ten other times and its brakes never were found inadequate. Tr. 150.

Owens did not share Ellison's concern that an engine failure would lead to a runaway. He testified if the truck's engine cut off, the service brakes would "probably work for at least 10 or 15 minutes." Tr. 157. He maintained, "There [was] enough air [pressure] on reserve to take care of that truck." *Id.*

As for the company's negligence, Ellison believed it was moderate. The truck operator did not report the defective brake to Smith. Rather, the truck operator told Ellison the brake worked the morning of the inspection. Tr. 80, *see also* Tr. 81.

After Ellison issued a citation the truck was moved onto a flat area and the park brake was repaired. Tr. 78, 81.

THE VIOLATIONS

Citation No. 6108392 states in part:

The crankshaft pulley, drive belt and compressor pulley for the air compressor on the Euclid R-35 . . . were not guarded to prevent contact on the moving parts by persons. The pulleys and belt are located on the left side of the engine compartment at the front of the truck engine, behind the left tire. This is the same side of the engine as the engine oil dip stick. Persons are in this area at least once each shift that the truck is operating. Normal procedures are to check engine oil while the engine is not running.

¹² Ellison noted Smith told him the road had grades of up to ten percent. Tr. 78, *see also* Tr. 79. The road also had several turns, including a long sweeping U-turn before it descended to the bottom of the pit. Tr. 79. In addition, there was a powder magazine and a maintenance area along the road where miners worked. Moreover, on the day the alleged violation was cited, an excavator was operating in the area of the long turn. Tr. 80.

Gov. Ex. 7.

Section 56.14107(a) requires moving machine parts to be guarded to protect persons from the parts specified in the standard and from similar parts that can cause injury. There is no question the cited pulleys and drive belt were the kinds of parts coming within the standard. As Ellison persuasively testified, if the pulleys and drive belt were operating and were contacted by miners, they could cause a serious injury. Tr. 75.

Further, everyone agreed the parts were not guarded. Tr. 72-73, 156; Gov. Ex. 8. Indeed, as Owens noted, a guard never was installed. Tr. 156. For these reasons I conclude the violation of section 56.14107(a) existed as charged.

Citation No. 6108393 states in part:

The park brake on the Euclid R-25 . . . [t]ruck, would hold on the typical slope traveled with the typical load. The truck was tested, loaded with production rock, on the pit haul road near the jaw crusher where the slope is between 4% and 6% grade. The haul road climbs about 125 feet from the loading area near the bottom of the pit to the jaw crusher at the top. The grade ranges between about 10% grade to about 4%. Each truck hauls between 25-35 loads each shift that the crusher operates. The haul road has sever turns, including one sweeping, long U turn near the bottom.

Gov. Ex. 9.

There is no question Ellison found the park brake did not function as required by the standard. Such brakes are required to hold a truck like the R-25 “with its typical load on the maximum grade it travels.” 30 C.F.R. § 14101(a)(2). Ellison testified that the truck was loaded and that it was parked on a grade that was “around four percent.” Tr. 77-78. Although that grade was less than the maximum grade the truck traveled (Tr. 78-79), if the park brake would not hold on the lesser grade, it would not hold on the maximum grade. Further, it is clear the park brake would not keep the truck from moving. Ellison testified he had the brake tested three times, and each time it failed. Tr. 78. Although Owens challenged the way in which the tests were conducted, he did not refute Ellison’s contention that if the engine cut off and the service brakes failed, the lack of a properly functioning park brake meant there was no sure way to stop the truck. Tr. 55, 79, 82-83, 165. From all of this, I conclude the violation existed as charged.

S&S AND GRAVITY

_____The Secretary did not allege the lack of a guard for the pulleys and drive belt of the air compressor on the R-35 truck (Citation No. 6108392) was an S&S violation, and for good reason. The evidence supports finding a miner could, but rarely would, go behind the wheel to check on an engine malfunction or to answer the call of nature. It also supports finding the engine should be off when the oil is checked. It is true that once behind the tire a miner could slip or trip and contact the moving, unguarded pulleys and belt,¹³ but the fact a miner rarely would go behind the tire meant an accident would be equally rare. Indeed, the possibility of an accident was so unlikely as to render the violation less than serious.

In contrast to the violation of section 56.14107(a) (Citation No. 6108392), the Secretary alleged the violation of section 56.14101(a)(2) (Citation No. 6108393) was S&S. An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). 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 (April 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (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 will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (January 1984); *accord Buck Creek Coal Co., Inc.* 52 F. 3rd 133, 135(7th Cir. 1995); *Austin Power Co., Inc. v. Sec’y of Labor*, 81 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985). Further, an S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (August 1985); *U.S. Steel*, 7 FMSHRC at 1130.

Finally, the S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the “focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (September, 1996).

¹³ The moving parts were within easy reach. Tr. 74-75.

I conclude the violation of section 56.14101(a)(2) (Citation No. 6108393) was both S&S and serious. I have found the park brake on the R-25 truck was non-functioning and in violation of section 56.1410(a)(2). I further find the lack of the park brake contributed to the danger of the truck running away, a condition that would endanger its driver and those working or traveling along the road as the driver descended into the pit. Tr. 79-80. In this regard, Ellison's testimony was convincing. Certainly, in the context of continuing mining operations, it was likely the truck's engine would fail during one of its frequent and repeated descents into the pit and the service brakes would be lost as air pressure faded. The service brakes might or might not lock, but the only thing left to stop or control the truck would be the park brake. (Ellison specifically noted, when the engine was not functioning, the service brakes quickly bled off and the park brake had to be used. Tr. 82-83.) Moreover, the road's grades must be kept in mind. *See* Tr. 79. They meant in the event of engine failure during a descent, without a park brake to slow and stop the truck, it quickly would gather speed and most likely would roll uncontrolled down or off the road or ramp. Tr. 79-80. It was reasonably likely that such an uncontrolled descent would result in very serious injuries or, worse, to the truck driver and/or to those working in the area. Tr. 79-80. These factors made the violation S&S.

I also find the gravity of the reasonably expected injuries resulting from the truck's running away (contusions, broken bones, or even death) made the violation serious.

NEGLIGENCE

The violation of section 56.14107(a) (Citation No. 6108392) was the result of the company's neglect. Negligence is the failure to meet the standard of care required by the circumstances, and I find the Secretary established Dix River failed to meet its required standard of care. Even though the truck was manufactured without a guard and even though the condition was not reported (*see* Tr. 76), the lack of a guard was visually obvious. Moreover, I take note of the fact such trucks are subject to inspection prior to use. Reasonable care required the exposed moving engine parts be guarded.

In the case of the violation of section 56.14101(a)(2) (Citation No. 6108393), I conclude the Secretary did not establish Dix River was negligent. Although there is scant relevant testimony on the subject, it is clear Ellison accepted what he was told by the truck's operator, that the park brake functioned properly on the morning of the inspection. Tr. 81. The citation was issued at 9:30 a.m., which leads me to conclude the brake was ineffective for only a very brief period. There is no testimony the park brake was or should have been used between its pre-operational inspection, when it presumably functioned properly, and the time it was cited by Ellison, and there is no basis in the record to conclude mine management knew or should have known the brake was defective prior to Ellison finding it so.

| <u>Citation No.</u> | <u>Date</u> | <u>30 C.F.R. §</u> |
|---------------------|-------------|---------------------------|
| 6108394 | 4/26/05 | 56.14107(a) ¹⁴ |

During the course of his April 26 inspection, Ellison saw miners working in the general area of the primary crusher. As a result, Ellison examined the crusher's discharge belt. Tr. 102. (The belt was the No.1 conveyor belt, and it ran from the crusher to the silo where the crushed material was deposited. Tr. 166.) Ellison noticed an idler roller on the belt was not guarded. The belt, which ran over the top of the roller, moved toward the right as Ellison faced the belt. The belt caused the roller to turn clockwise. Tr. 87. *See Gov. Ex.12.* A walkway passed within one foot of the roller. Tr. 88. As Ellison recalled, the roller was approximately four feet above the ground. Tr. 91. The unguarded idler roller was "very obvious." (Tr. 91). Ellison saw no indication it ever had been guarded. Tr. 91, 94.

The tail roller of the discharge belt also was in the area. The tail roller often needed adjustment and cleaning. Material carried back on the belt after it discharged frequently sloughed off in the area of the tail roller, about ten feet behind the idler roller. Tr. 89-90. Ellison believed the area was cleaned by employees using shovels and hoses. Tr. 88-89. In fact, during the inspection, Ellison saw a miner using a hose to clean under the belt. As Ellison recalled, the miner was "a couple of feet" from the belt and the miner passed "within two feet of the roller." Tr. 90. Ellison believed miners could work from both sides of the belt, and a hazard existed regardless of the side used. Tr. 99. However, at the time of the inspection the belt was not operating, and Ellison could not recall if the belt was locked out while the cleaning was taking place. Tr. 94

Ellison testified if a miner stooped under the belt to retrieve a tool, he or she could be exposed to contact with the moving roller. In addition, because mud built up on the idler roller, Ellison believed "people sometimes [were] tempted to take a shovel and clean the mud off." Tr. 91. His main fear was that, in the course of cleaning, miners would travel under the belt and be exposed to the unguarded roller. He observed miners at times took shortcuts. Tr. 104.

Because the belt and the roller turned toward one another, anyone caught between them would be pulled into the pinch point. The speed at which the belt traveled made it unlikely a miner could extricate himself or herself. In fact, in similar situations miners had been suffocated or killed by the belt cutting through their bodies. Tr. 92.

Owens testified that Larry Wilson, the jaw crusher operator, inspected the crusher every morning before production started. Tr. 167. In order to do this, Wilson climbed down a ladder to look at various levels of the crusher. When he conducted a pre-operational inspection "[e]verything was tagged and locked out." Tr. 167. Owens maintained that Wilson never went near the equipment without the power being off. (He stated, "That's the rule, and they all do it.")

¹⁴ The standard is set forth in n.10 *supra*.

Tr. 167). Owens observed Wilson hosed collected fines from beneath the crusher, and it was almost always wet in the area. Tr. 167-168.

Owens speculated the unguarded idler roller was “probably . . . at least 20 feet . . . [from] the . . . crusher.” Tr. 167. Owens also stated the roller was “approximately 32 inches off . . . the ground,” and Wilson “never [went] under it and . . . never work[ed] under it, [and] never crosse[d] under it, because . . . [he’d] have to get down on . . . [his] hands and knees if he did.” Tr. 167.¹⁵

Wilson maintained he went to the area of the idler roller every day to grease fittings. Tr. 202-203. He applied grease either in the morning before the operation started, or in the evening after everything shut down. He never did so when the belt was moving. Tr. 202-203. The only time other miners went into the area was when something had to be repaired. Then, all the equipment was locked out. Tr. 203-204. Wilson testified no one traveled in the area of the return idler while the equipment was operating. Tr. 202. Wilson observed the idler roller never had been previously cited. Tr. 169.

Ellison found the violation was S&S because he believed the belt was operated “a long time” without the roller being guarded. Tr. 93. He also found Dix River was negligent, but that its negligence was tempered by the fact foreman Gene Smith, who was supposed to examine the area, was incapacitated and could not perform the examination. No one else reported the condition to Smith. Tr. 93.¹⁶

The condition was abated when Dix River fabricated and installed a guard. Tr. 95. Ellison believed this constituted good faith abatement. Tr. 100.

THE VIOLATION

Citation No. 6108394 states:

The return idler at the lower end of the # 1 conveyor belt was not guarded to prevent contact with the moving parts. The idler is located at the lower end of the # 1 conveyor about 10 feet from the tail roller.

¹⁵ Wilson agreed with Owens there was not enough room to travel and work under the belt. Tr. 205.

¹⁶ However, Ellison acknowledged it was the company’s duty to assign someone to do a proper workplace examination, and the person conducting an examination was required to report any hazardous condition to mine management, which, in turn, was required to “repair the situation.” Tr. 94.

It is about 4 feet above the concrete pad that the jaw crusher and conveying equipment sits on. Persons are in the area on a daily basis to inspect, lubricate, adjust or clean. The cleaning is accomplished by using a water hose to wash spilled rock from under the conveyor belt. Contact with the unguarded idler could result in loose clothing, hands, or arms becoming entangled with the moving roller.

Gov. Ex. 11.

As previously noted, section 56.14107(a) requires moving machine parts to be guarded to protect persons from specified and similar parts that can cause injury. An idler roller is not one of the specified parts. However, it is a moving machine part that can cause injury. If there is a reasonable possibility the roller can be contacted, it must be guarded. *See Thompson Brothers Coal Co., Inc.*, 6 FMSHRC 2094, 2097 (September 1984).

I conclude Ellison's decision to cite Dix River for a violation of section 56.14107 was proper. The idler roller was in a position (under the belt and belt structure) where it could be accessed and where miners might travel to repair or maintain the belt structure and or belt parts, or to clean around the crusher.

Owens' credible testimony that the belt was too low to travel under¹⁷ and his testimony that miners hosed, not shoveled, fines from under the crusher, removed from the realm of reasonable possibility two of Ellison's fears how a miner would be caught in the pinch point created by the roller while shoveling or traveling under it. Nonetheless, contact remained a reasonable possibility.

The area near the roller was constantly wet from hosing. Further, I accept Wilson's testimony miners at times went into the vicinity of the roller to make repairs. Tr. 203-204. I conclude the wet surface of the floor in the vicinity of the roller combined with the visits of miners sent to hose the area, or to repair or maintain the belt and/or belt structure, as well as the approximately 32-inch height of the roller, created a reasonable possibility a miner would slip and fall and be ensnared in the unguarded pinch point. Moreover, Dix River's witnesses did not dispute Ellison's testimony that on one side of the belt a walkway passed within one foot of one

¹⁷ Although Ellison testified the roller was approximately four feet above the concrete apron on which the structure rested (Tr. 91), Owens's testimony that it was approximately 32 inches above the apron was more believable. Tr. 167. Owens visited the area shortly before the hearing and presumably had a fresher recollection of the conditions at and around the crusher, and there was no evidence the roller was repositioned between Ellison's inspection and Owens's visit.

end of the roller. Tr. 88. This, too, meant a miner would be close enough to the pinch point where a slip would be dangerous. The idler roller should have been guarded. Tr. 91-92, 104.

This stated, I recognize Owens maintained Wilson always locked out the crusher (Tr. 167), and Ellison stated the pinch point “would not be a hazard” if the belt was locked out (Tr. 96). Wilson, too, maintained when miners made repairs in the vicinity of the roller, the belt always was locked out. Tr. 203-204. However, the history of mining is replete with injuries and fatalities which occurred when preventive practices that “always” were implemented, were not. Therefore, I conclude that in the context of continued mining, despite a generally practiced lock-out procedure at the crusher, the guard should have been in place.

S&S AND GRAVITY

I have found there was a violation of the cited standard. It is clear to me there also was a safety hazard that was contributed to by the violation; namely, the possibility a miner would be caught and pulled into the pinch point. Moreover, I conclude in the context of ongoing mining operations that even if the practice at the mine was to shut down the belt while miners made repairs in the vicinity of the roller or hosed away accumulated material, it was reasonably likely a miner would slip or trip and be caught in the pinch point because best mining practices are not invariably followed, and the fact the area under and around the belt was almost always wet, made an injury-producing slip likely.

Further, I find the Secretary established if contact with the unguarded pinch point occurred, suffocation, laceration and/or death would result. Obviously, these consequences were “reasonably serious,” which, given the other findings, means the inspector properly found the violation to be S&S. Moreover, in view of the likely injuries, the violation was serious.

NEGLIGENCE

The lack of a guard was “visually obvious.” Tr. 91. Dix River should have known a guard was necessary. Ellison saw no indication one ever was installed, and Dix River presented no evidence to the contrary. Tr. 91, 94. However, Ellison’s inspection was not the first time the mine was inspected by MSHA, and the lack of a guard was not previously cited. Tr. 169. While the failure of inspectors previously to cite the missing guard does not provide Dix River with a defense, it lessens the company’s negligence. The degree of its negligence was less than had it failed to replace an existing guard. Therefore, I find the company’s negligence was low.

| <u>Citation No.</u> | <u>Date</u> | <u>30 C.F.R. §</u> |
|----------------------------|--------------------|------------------------------|
| 6108395 | 4/26/05 | 56.14101(a)(3) ¹⁸ |

¹⁸ The standard states:

Later that morning, Ellison inspected a water truck Dix River leased for use at the mine. Tr. 106. The truck was parked, but the truck driver told Ellison the truck had been used that morning to wet down the mine's roadways, including those at the pit and stockpile Tr. 106-107. (As previously noted, Ellison testified the maximum grade of the road that ran into the pit was ten percent. Tr. 107). At the time Ellison inspected the truck, it was located on "a flat level area at the tip of the ramp adjacent to the . . . dump area." Tr. 107.

Part of the inspection of the truck involved testing the truck's pneumatic service brakes. The test was conducted at the flat, level area.¹⁹ Ellison asked the driver to start the engine and let it idle until the air pressure reached 95 pounds per square inch (p.s.i.). He then asked the driver to apply the service brakes. When the driver applied the brakes, the air pressure dropped from 95 p.s.i. to 70 p.s.i.. This indicated there was a leak in the brake system air lines. In fact, Ellison heard the air leaking. Tr. 115. Ellison explained if the driver applied the brakes multiple times, the air would leak off and it would be "very, very likely . . . [the driver] would not be able to stop the truck." Tr. 108.

Although Ellison was not a mechanic, he stated he knew "the principal operation of air brakes." Tr. 112. He did not know the minimum air pressure needed to stop the truck; but he believed to be safe, the pressure should be at least 95 p.s.i. Tr. 108.²⁰ When the truck operator requested Ellison let the p.s.i. get to the "operating p.s.i." before the test was conducted, Ellison waited until the air pressure got as "high as it would go," which, according to Ellison, was 95 p.s.i. Tr. 112, 113. Because the air pressure then dropped to 70 p.s.i. and could not be sustained at 95 p.s.i., Ellison concluded the brake system was not maintained in functional condition and that the lack of properly maintained service brakes was reasonably likely to result in a fatal injury. Tr. 109. Ellison noted the truck was operated on the steep, sloping road into the pit, and that a service brake failure could lead to the truck's uncontrolled descent and to its overturning. According to Ellison, this type of accident "often result[ed] in fatal injuries." Tr. 109. In addition to the driver, other miners were at risk -- those that used the road and those working in an area set aside for equipment maintenance adjacent to the road. Tr. 109-110.

All braking systems install on . . . [self-propelled mobile] equipment shall be maintained in functional condition.

¹⁹ Ellison did not ask the driver to set the service brakes on a grade because he did not want to put the driver at risk if there were a brake failure. Tr. 114-115.

²⁰ Ellison stated that 95 p.s.i. was in the green area of the pressure gauge in the truck's cab, whereas 70 p.s.i. was in the red area. He was not sure if the gauge had a margin of error. Tr. 109, 115.

Ellison believed Dix River was negligent in allowing the service brakes to malfunction. However, the company's negligence was mitigated, in Ellison's view, by the fact that he could not establish the condition of the brakes was reported to company officials. The truck driver told Ellison the air line "didn't leak last time . . . [he] ran . . . [the truck]" (Tr. 110), and Ellison could not remember if he asked the driver whether there were problems with the service brakes on prior runs. Tr. 113.

The condition was abated by the installation of new brake system parts. Tr. 111; Gov. Ex.13 at 2-3.

THE VIOLATION

Citation No. 6108395 states:

The service brake on the . . . water truck . . . was not maintained in a functional condition in that an air leak existed in the area of the break chambers on the rea[r] axle. When tested the air pressure on the truck compressed air system, dropped from 95 p.s.i. to about 70 p.s.i. when the service brake was being applied. When tested at a high engine idle as long as the service brake remained applied the compressor would not recover air pressure. The water truck is used to water roads throughout the mine, including the inclined haul road coming out of the quarry pit.

Gov. Ex. 13.

I conclude the violation existed as charged. Clearly, air was leaking from the system. Ellison heard it, and Dix River did not deny it. Tr. 114-115. It is equally clear the air pressure in the system dropped from 95 p.s.i. to 70 p.s.i. Tr. 114-115. Pneumatic brakes are not maintained in "functional condition" as required by the standard, if there is a leak in the system, and this is true even if the leak does not cause the air pressure to fall to the point where the brakes are wholly inoperable. The condition must be viewed from the standpoint of continuing mining operations, and in this context it is reasonable to assume that the leaking air will continue until the brakes fail.

S&S AND GRAVITY

I have found there was a violation of the cited standard. I also find there was a safety hazard contributed to by the violation, namely, and as Ellison testified, that as the truck was driven and the driver applied the brakes, the air pressure would continue to decline and the

brakes would not be able to stop or, ultimately, even to slow the truck. Tr. 108. This situation not only endangered the truck driver, it also put at risk others who traveled or worked in the vicinity of the truck.

Moreover, in the context of ongoing mining operations, I conclude it was reasonably likely that the brakes would fail and injuries would result. Ellison described the road leading into the pit as steep and long, and he noted on the day the violation was observed an excavator was being repaired in an area along the side of the road. Tr. 109-110. Ellison properly concluded under these circumstances a serious, even fatal, runaway accident was “very, very likely.” Tr. 108. Obviously, injuries resulting from such an accident would be either reasonably serious or fatal. Therefore, I agree with the inspector the violation was S&S. Moreover, given the expected consequences, it was serious.

NEGLIGENCE

The company knew the truck would be operated in circumstances where non-functioning brakes would pose a hazard not only to the driver but to those working and/or traveling near the truck. It realized, or should have realized, how important fully functional service brakes were to the safety of its miners. The fact that Ellison found the truck being operated with a audibly leaking brake system means the company did not meet the standard of care required by the circumstances and was negligent. Although Ellison could not establish company officials knew of the condition through a prior report or reports, and although Ellison could not establish the system was leaking the last time the driver used the truck (Tr. 110, 113), it does not excuse the company of negligence, but, rather, means there was no showing of aggravated conduct by the company. The violation was audibly obvious and should have been detected and corrected.

| <u>Citation No.</u> | <u>Date</u> | <u>30 C.F.R. §</u> |
|---------------------|-------------|---------------------------|
| 6108398 | 4/26/05 | 56.20003(a) ²¹ |

Citation No. 6108398 states:

The passageway at the base of the stair to the pug mill feed conveyor was not kept clean and orderly. A spill of material had occurred which buried the approach to the stair and the bottom two stair steps. Persons must use this stair to access the pug mill

²¹ The standard states:

At all working operations –
(a) Work places, passageways, store rooms, and service rooms shall be kept clean and orderly [.]

control platform. The pug mill is seldom used because of low demand.

Gov. Ex. 15.

During the course of the April 26 inspection, Ellison noticed a pile of spilled material at the bottom of a “ladder stairway” leading to the pug mill. The material had fallen off the mill conveyor (Tr. 116-117; Gov. Ex. 16). The material, was of various sizes. It covered the approach to the stairway so that the bottom two stairs or treads of the ladder were covered. Tr. 116-117, 123.

Although Ellison identified a photograph depicting the spilled material (Tr. 116; Gov. Ex.16), Smith maintained the photograph was misleading. According to Smith, the angle at which the photograph was taken made it appear the material was snug against the steps, when in fact it was not. Tr. 197. Rather, there was a narrow walkway between the spilled material and the steps. The walkway was not shown on the photograph. According to Smith, the walkway consisted of material that had “flattened out.” Tr. 196. Smith insisted miners coming down the ladder would step onto the flattened area. Tr. 196. The bottom step was snug to the ground, and although the second step from the ground had loose material on it, the material was level, and there were no mounds of material up against the steps. Tr. 196, 199; *see* Co. Exs. 9 and 10. Smith also emphasized the pug mill, “hadn’t been used in some time.” Tr. 196.

Ellison believed the area at the bottom of the stairway was a workplace as well as a passageway. Tr. 118. He noted a miner “ha[d] to go up the ladder to get to the control to the pug mill to operate it.” Tr. 118; *see also* Tr. 119. He also believed a miner had to travel across the material to reach and use the stairway. Tr. 117-118, 123-124.

In Ellison’s opinion, the material presented a slip-and-fall hazard. If a miner fell accessing or using the stairway, he or she could suffer an ankle, knee or wrist injury. Tr. 118; *see also* Tr. 120-121. But, such an accident was not likely. Ellison explained the material, which had been wet originally, hardened over time so that a miner was not “near as likely to fall as if it was a fresh spill.” Tr. 221. Moreover, access to the mill was limited. Tr. 221. Nonetheless, because the spilled material prevented the area in which it existed from being kept “clean and orderly,” Ellison believed Dix River violated section 56.2003(a).

Ellison was told the pug mill was not in operation for “several months” (Tr. 121) and that “the pug mill is seldom used.” Tr. 124. Although the material was visually obvious, Ellison considered Dix River’s negligence to be no more than “moderate.” In making this determination, he noted the infrequent use of the mill. Tr. 122.

The company abated the condition by cleaning up the material with a front end loader. Tr. 122-123.

THE VIOLATION

I conclude the testimony establishes the bottom two steps and the approach to the stair leading to the pug mill were not kept “clean and orderly” as required by section 56.20003(a). I accept as a fact – as Ellison testified and as Gov. Ex.16 shows – that the approach was strewn with piles of material of various sizes. While I also accept Smith’s testimony the tramped down material created a “little walkway” at the foot of the stairs (Tr. 196), the “walkway” was obviously narrow and a misstep still could have placed a miner’s foot outside the confines of the walkway and onto the piled material. The area into which miners could step as well as the ladder treads were parts of the “passageway” covered by the citation. The presence of the material in the area approaching the ladder meant the passageway was not kept “clean and orderly.” In addition, even though, as Smith testified, the material on the bottom two steps was level, it was, as he admitted, loose. Tr. 196. The presence of the loose material also meant the passageway to the from the pug mill was not kept “clean and orderly” as required by the standard.

GRAVITY

The inspector properly believed the violation was not serious. Even when the mill was operating, access to it was limited (Tr. 121), and, as Ellison and Smith further observed, the mill had not operated recently. Tr. 121, 124, 196. Moreover, if a miner were to access the stairway and surrounding area, it was not likely an injury-causing accident would occur. The steps not kept clean and orderly were the lowest two, meaning a stumble was more likely than a fall. Further, the presence of the “little walkway” reduced the chance a miner who stumbled approaching the ladder would be injured, and Ellison’s uncontradicted testimony, that the originally wet material had dried, limited the chance of a stumble and injury even more. Tr. 121.

NEGLIGENCE

The piles of material and the covered treads were visually obvious. The condition should have been detected and corrected by Dix River. In failing to do so, Dix River was negligent, but the degree of its negligent was low. The lack of use of the area meant that it was not subject to frequent inspection by Dix River personnel. Moreover, the diminished hazard created by the violation justified a lower level of watchfulness on the company’s part.

CIVIL PENALTY CRITERIA APPLICABLE TO ALL VIOLATIONS

ABILITY TO CONTINUE IN BUSINESS

The parties stipulated the proposed penalties would not affect the ability of Dix River to continue in business. Stip. 4.

SIZE

The parties stipulated the mine is a small metal, nonmetal mine that operates one production shift per day during five-day-weeks, with annual hours worked ranging from 10,000 to 20,000, and that the mine's controlling entity, Dix River, is a small operator with less than 60,000 annual hours worked per year. Stips. 5, 6.

GOOD FAITH ABATEMENT

As the witnesses testified, the conditions resulting in each violation were abated promptly and in good faith by Dix River.

HISTORY OF PREVIOUS VIOLATIONS

_____The parties stipulated in 2005 the mine received seven citations over nine inspection days, in 2004 it received no citations over 19 inspection days, and in 2003 it received six citations over four inspection days. Stip. 7; *see* Gov. Ex. 2. This is a small history.

CIVIL PENALTY ASSESSMENTS

DOCKET NO. KENT 05-424-M

| <u>Citation No.</u> | <u>Date</u> | <u>30 C.F.R. §</u> | <u>Proposed Assessment</u> |
|----------------------------|--------------------|---------------------------|-----------------------------------|
| 6108357 | 1/31/05 | 56.14112(b) | \$500 |

I have found the Secretary did not prove the alleged violation. Therefore, there is no basis to assess a penalty.

DOCKET NO. KENT 05-386-M

| <u>Citation No.</u> | <u>Date</u> | <u>30 C.F.R. §</u> | <u>Proposed Assessment</u> |
|----------------------------|--------------------|---------------------------|-----------------------------------|
| 6108392 | 4/25/05 | 56.14107(a) | \$60.00 |

I have found the violation was not serious and was due to Dix River's negligence. The violation was abated in good faith and the penalty will not affect the company's ability to continue in business. Given these criteria, and in view of Dix River's small size and small history of previous violations, I conclude an assessment of \$50.00 is appropriate.

| <u>Citation No.</u> | <u>Date</u> | <u>30 C.F.R. §</u> | <u>Proposed Assessment</u> |
|----------------------------|--------------------|---------------------------|-----------------------------------|
| 6108393 | 4/26/05 | 56.14101(a)(2) | \$135.00 |

I have found the violation was serious and was not due to Dix River's negligence. The violation was abated in good faith and the penalty will not affect the company's ability to continue in business. Given these criteria, and in view of Dix River's small size and small history of previous violations, I conclude an assessment of \$100.00 is appropriate.

| <u>Citation No.</u> | <u>Date</u> | <u>30 C.F.R. §</u> | <u>Proposed Assessment</u> |
|---------------------|-------------|--------------------|----------------------------|
| 6108394 | 4/26/05 | 56.14107(a) | \$135.00 |

I have found the violation was serious and was due to Dix River's negligence. The violation was abated in good faith and the penalty will not affect the company's ability to continue in business. Given these criteria, and in view of Dix River's small size and small history of previous violations, I conclude an assessment of \$120.00 is appropriate.

| <u>Citation No.</u> | <u>Date</u> | <u>30 C.F.R. §</u> | <u>Proposed Assessment</u> |
|---------------------|-------------|--------------------|----------------------------|
| 6108395 | 4/26/05 | 56.14101(a)(3) | \$135.00 |

I have found the violation was serious and was due to Dix River's negligence. The violation was abated in good faith and the penalty will not affect the company's ability to continue in business. Given these criteria, and in view of Dix River's small size and small history of previous violations, I conclude an assessment of \$150.00 is appropriate.

| <u>Citation No.</u> | <u>Date</u> | <u>30 C.F.R. §</u> | <u>Proposed Assessment</u> |
|---------------------|-------------|--------------------|----------------------------|
| 6108398 | 4/26/05 | 56.20003(a) | \$60.00 |

I have found the violation was not serious and was due to Dix River's low negligence. The violation was abated in good faith and the penalty will not affect the company's ability to continue in business. Given these criteria, and in view of Dix River's small size and small history of previous violations, I conclude an assessment of \$40 is appropriate.

| <u>Citation No.</u> | <u>Date</u> | <u>30 C.F.R. §</u> | <u>Proposed Assessment</u> |
|---------------------|-------------|--------------------|----------------------------|
| 6108397 | 4/26/05 | 56.12025 | \$135.00 |

At the hearing, Dix River stated it wished to withdraw its request for a hearing on the validity of the citation. Tr. 13. Accordingly, I conclude the violation existed as charged and an assessment of \$135 is appropriate.

| <u>Citation No.</u> | <u>Date</u> | <u>30 C.F.R. §</u> | <u>Proposed Assessment</u> |
|---------------------|-------------|--------------------|----------------------------|
| 6108396 | 4/26/05 | 56.12025 | \$60.00 |

At the hearing, Dix River stated it wished to withdraw its request for a hearing on the validity of the citation. Tr. 70. Accordingly, I conclude the violation existed as charged and an assessment of \$60 is appropriate.

ORDER

Citation No. 6108357 **IS VACATED**. Within 30 days of the date of this decision, Dix River **SHALL PAY** to the Secretary civil penalties totaling \$655 for the violations found above. In addition, within the same 30 days, the Secretary **SHALL MODIFY** Citation No. 6108357 from a citation issued pursuant to section 104(d)(1) of the Act (30 U.S.C. § 814(d)(1)) to a citation issued pursuant to section 104(a). 30 U.S.C. § 814(a). Upon payment of the penalties and modification of the citation, these proceedings **ARE DISMISSED**.

David F. Barbour
Administrative Law Judge
(202) 434-9980

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/ej