FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

March 23, 2007

CARMEUSE LIME & STONE, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. KENT 2006-73-RM
v.	:	Citation No. 6108285; 10/31/2005
	:	
SECRETARY OF LABOR,	:	Docket No. KENT 2006-74-RM
MINE SAFETY AND HEALTH	:	Order No. 6108286; 11/01/2005
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. KENT 2006-75-RM
	:	Order No. 6108291; 11/02/2005
	:	
	:	Docket No. KENT 2006-76-RM
	:	Order No. 6108300; 11/08/2005
	:	
	:	Docket No. KENT 2006-77-RM
	:	Citation No. 6108303; 11/08/2005
	:	
	:	Docket No. KENT 2006-78-RM
	:	Order No. 6108304; 11/08/2005
	:	
	:	Docket No. KENT 2006-79-RM
	:	Order No. 6108305; 11/09/2005
	:	
	:	Plant Black River Operation
	:	Mine ID 15-05484
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2006-203-M
Petitioner	:	A. C. No. 15-05484-76359
	:	
	:	Docket No. KENT 2006-289-M
	:	A.C. No. 15-05484-84225
v.	:	
	:	Docket No. KENT 2006-307-M
CARMEUSE LIME & STONE, INC.,	:	A. C. No. 15-05484-79301
Respondent	:	
	:	Plant Black River Operation

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Notices of Contest and Petitions for Assessment of Civil Penalty brought by Carmeuse Lime and Stone, Inc., against the Secretary of Labor, and by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Carmeuse, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815. The company contests the issuance of one citation and five orders alleging violations of the Secretary's mandatory health and safety standards and one order alleging a violation of the Act. The petitions allege six violations of the Secretary's mandatory health and safety standards and one violation of the Act and seek penalties of $14,183.00. A hearing was held in Covington, Kentucky. For the reasons set forth below, I vacate one order, modify four orders and two citations, and assess a penalty of $7,150.00.

Settled Matters

At the beginning of the hearing, the parties announced that they had settled several orders and citations. (Tr. 10-11.) Order No. 6108286 in Docket Nos. KENT 2006-74-RM and KENT 2006-203-M, issued under section 104(g)(1) of the Act, 30 U.S.C. § 814(g)(1), was modified by deleting the "significant and substantial" designation and the penalty reduced from $1,033.00 to $700.00. (Tr. 11.) Order No. 6108291 in Docket Nos. KENT 2006-75-RM and KENT 2006-289-M, issued under section 104(d)(1), 30 U.S.C. § 814(d)(1), was modified by deleting the "unwarrantable failure" designation and reducing the level of negligence from "high" to "moderate," thus making it a 104(a) citation, 30 U.S.C. § 814(a), rather than a 104(d)(1) order. (Tr. 11-12.) The penalty was reduced from $4,500.00 to $2,000.00. (Tr. 12.) Order No. 6108300 in Docket Nos. KENT 2006-76-RM and KENT 2006-289-M was likewise modified from a 104(d)(1) order to a 104(a) citation by deleting the "unwarrantable failure" designation and reducing the level of negligence from "high" to "moderate." (Tr. 12.) The penalty was reduced from $2,200.00 to $1,500.00. (Tr. 12.) Finally, Citation No. 6108303 in Docket Nos. KENT 2006-77-RM and KENT 2006-307-M was modified from a 104(d)(1) order to a 104(a) citation between the filing of the notice of contest and the civil penalty proceeding and the Respondent agreed to pay the proposed penalty of $350.00 in full. (Tr. 12-14.) The terms of the agreement will be carried out in the order at the close of this decision.

Background

Carmeuse Lime and Stone, Inc., operates the Black Water underground mine and plant on

the Ohio River in Pendleton County, Kentucky. Limestone is mined underground and brought to the plant where it is processed, by heating it in kilns, into lime to be sold for various industrial uses.

MSHA Inspector Richard L. Jones inspected the plant portion of the mine over several days in the fall of 2005. One 104(d)(1) citation and two 104(d)(1) orders, issued by him during the inspection and contained in Docket No. KENT 2006-289-M, were contested at the trial.[1] The violations will be discussed in the order issued.

Findings of Fact and Conclusions of Law

These three violations range from questionable to inexcusable. The Respondent contends that none of the three amount to violations. The Secretary maintains that they all resulted from the Operator's indifference. The evidence, however, supports the Secretary on one, the Respondent on another and arrives at a middle ground on the third.

Citation No. 6108285

This citation was issued on October 31, 2005, and alleges a violation of section 57.11001 of the Secretary's regulations, 30 C.F.R. § 57.11001, because:

> Safe access was not maintained on the pond pump work platform and access ramp. Miscellaneous materials were allowed to accumulate on the ground at the entrance of the access ramp. This included wire rope, machine parts and discarded metal items. On the access ramp, other items were allowed to accumulate including stone spillage, metal pipe and metal pipe couplings. The cover over the valves located just below the walkway level was missing. The end of the access ramp was fairly level[,] but the floating ramp was tilted to the right creating an awkward step-down. A six-inch pump discharge water line lay in the middle of the floating ramp leading to the floating pump station. On the floating platform itself was an accumulation of various materials that included tools, spare parts, discarded items, scrap wood and scrap metal. One of the two pumps had been removed from the floating platform. This caused the float to list sharply. One corner of the work platform was at the water level while the opposite corner was about three feet above the water level. This was a list of about 30 percent. The float was about eight feet wide. This

[1] Section 104(d)(1) of the Act assigns more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

> combination of factors created an unsafe condition for persons to travel or work in. Persons work there about once per month on average. A person could trip and fall against the metal railing, onto the various items on the flooring or onto the metal flooring itself. This could result in lacerations, dislocations, broken bones or other similar lost time type injuries. This condition was easily detectable from various locations including the main roadway which is immediately adjacent the pond. Management personnel travel this way several times per shift including the plant production manager, Eric Caba. Management made no attempt to abate the condition or to barricade the area against entry. This constitutes conduct [of] more than ordinary negligence in that the condition was known but no corrective actions were initiated by management. This is an unwarrantable failure to comply with a mandatory standard.

(Govt. Ex. 3.) Section 57.11001 requires that: "Safe means of access shall be provided and maintained to all working places." Section 57.2, 30 C.F.R. § 57.2, defines *working place* as "any place in or about a mine where work is being performed."

The parties stipulated that: (1) The pump platform is in a pond at Carmeuse's lime plant known as the "high pH" pond, and water from the pond is used in the plant; (2) The platform may have one or two pumps on it, although at the time the citation was issued it had only one, and it floats in the pond when the water is of sufficient level; (3) A grated walkway extends from the shore to the platform; and (4) No persons were assigned to work on the platform when the inspector issued the citation. (Jt. Ex. at 4.) In addition, Inspector Jones testified concerning the condition of the entrance to the walkway, the walkway itself and the platform essentially as he laid it out in the citation. (Tr. 42-61.) He further presented photographs which corroborated his description. (Govt. Exs. 4-8.)

The company witnesses did not dispute the inspector's description of the area to any significant degree; what they and the operator disagree with are his conclusions. The Respondent argues that no violation occurred because: "[T]he pond platform was not a 'working place' at the time the [c]itation was issued; under a reasonable person standard no violation existed; the standard does not apply to the type of conditions cited by the inspector; and the standard is impermissibly vague." (Resp. Br. at 6.) None of these arguments are persuasive.

The company asserts that since the definition of *working place* is any place where work *is* being performed and since no one was assigned to work on the platform or was working on the platform on the day in question, the plain language of the standard is not met because the platform was not a working place at the time of the citation. The company does not claim, however, that work is never performed on the platform; only that it is "episodic and sporadic" rather than routine or regular. (Resp. Br. at 7.) This is a distinction without a difference.

The evidence in this case is clear that work had been performed on the platform in the past and would be performed on the platform in the future. These facts bring the platform within the meaning of the regulation. To hold otherwise would mean that, taking the Respondent's argument to its logical conclusion, any place where work was not being performed at the time the inspector observed a violation would not be a working place. Obviously, to make any sense, the word *is* has to mean now or in the future, not just now.[2] Consequently, I hold that the pond platform was a working place under the regulation.

The operator next maintains that there can be no violation under the Commission's "reasonable person" test. The Commission has held that in determining whether a broadly worded standard that is intended to be applied to many factual situations, such as this one, applies to a specific situation, "it is appropriate to evaluate the evidence in light of what a 'reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard.'" *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (Nov. 1990) (citations omitted). Applying this standard, the Respondent avers that the conditions present did not prevent safe access to the platform and, therefore, would not have put a reasonable person on notice that the standard was violated.

Specifically, the operator claims that the pump discharge water line was obvious and could be stepped over or walked beside, that the missing gratings were off to the side of the walkway as were a wooden pallet and metal pipe and couplings, that there was not appreciably more stone on the walkway at the time the citation was issued than was accepted by the inspector later for abatement purposes, that the wire rope at the entrance to the ramp was pressed flat to the ground and that the tilt of the platform was not sufficient to cause an access problem. Significantly, the operator does not discuss the hoses and discarded tools at the entrance to the ramp, the fact that the walkway was made up of two sections of catwalk, with close to a one foot drop down between the two, which were also loosely connected and could twist, or the fact that the beginning of the second section was in the water.

Furthermore, while individually any of these items might not have limited access, it is the accumulation of multiple deficiencies which caused the problem. The Commission has held that:

> To prove a violation of section 57.11001, the Secretary must establish that a safe means of access to working places was not provided to and maintained for miners gaining access. The Secretary, however, need not prove that safety is diminished to the degree that an accident or injury actually will occur while the

[2] If work had been performed at a place in the past, but was not being performed there in the present and would not be performed there in the future, it would not be a working place. Whether an area where work had not been performed in the past and was not being performed in the present would be a working place if work were to be performed there in the future would depend on the specific facts. That is not the situation in this case.

miners are using the route.

Dynatec Mining Corp., 23 FMSHRC 4, 19 (Jan. 2001). Here, I find that a reasonably prudent person familiar with the mining industry and the requirements for safe access to the working place in section 57.11001 would recognize that the pervasive clutter, openings in the grates, drop-offs and tilts described by the inspector created numerous stumbling and tripping hazards that impeded safe access to the work place.

Finally, the Respondent argues that "the standard is directed to hazards related to the ability to get to the working place, rather than ones involving tripping or stumbling" and, therefore, does not apply to the situation here, or if it does, it is impermissibly vague. (Resp. Br. at 15-16.) The logic of this argument is hard to discern. Clearly the tripping and stumbling hazards in this case affect the miners' ability to get to the work place. Further, as noted above, the standard meets the "reasonable person" test and, thus, is not impermissibly vague.

In construing an identically worded standard, 30 C.F.R. § 56.11001, the Commission held that "the standard requires an operator to uphold, keep up, continue, or preserve the safe means of access it has provided to a working place." *Lopke Quarries, Inc.*, 23 FMSHRC 705, 708 (July 2001). Clearly, by allowing the accumulation of clutter, missing grate covers, tilting and drop-offs at the entrance to, along the walkway and on the platform itself, the Respondent did not uphold, keep up, continue or preserve a safe means of access to the working place on the platform. Accordingly, I conclude that the company violated section 57.11001 as alleged.

Significant and Substantial

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

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission enumerated four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) a violation of a safety standard; (2) a distinct safety hazard contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4. Having found a violation of section 57.11001, criterion (1) has been established. Further, as discussed above, the violation created a tripping or stumbling hazard, so (2) has been met.

With regard to (3), I find that there was a reasonable likelihood that the hazard would result in an injury. The inspector testified that:

> What I was more concerned with was a person inadvertently, while they were working or traveling in the area heading towards the pump, that they would inadvertently trip on something. In that case, a part of their body could come in contact with the metal handrail. They could fall onto the stone or onto the gra[t]ing or one of the spare parts and fall into this hole where the controls are for the lines. And I figured someone could end up with a broken bone or laceration, strain, sprain sort of injury.

(Tr. 56-57.)

The Respondent argues that the inspector's use of the word *could* makes his testimony of the speculative type found by the Commission not to support a finding of S&S. *See e.g.*, *Ziegler Coal Co.*, 15 FMSHRC 949, 953-4 (June 1993); *Texasgulf*, 10 FMSHRC at 500-01. Those cases, however, have to do with permissibility violations and the likelihood of a hazard resulting in an injury occurring. Here the inspector did not use the word *could* in describing the likelihood of the hazard resulting in an injury, he used it in connection with the type of injury that might occur. He was clear that a tripping hazard would result in an injury.

I find that the evidence establishes (3); that there was a reasonable likelihood that the tripping and stumbling hazard would result in an injury. I further find that the injury would be of a reasonably serious nature involving broken bones, lacerations, strains and sprains and, therefore, (4) is also established.

Accordingly, I conclude that the violation was "significant and substantial."

Unwarrantable Failure

This violation was also charged as resulting from the "unwarrantable failure" of the company to comply with the regulation. The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987); *Youghiogheny*, 9 FMSHRC at 2010. "Unwarrantable failure is characterized by such conduct as 'reckless

disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991)*."* *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (Aug. 1994); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The Commission has set out the following guidelines for determining whether a violation is unwarrantable:

> 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 extent of the violative condition, the length of time that it has existed, the operator's efforts in abating the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's knowledge of the existence of the violation, and whether the violation is obvious or poses a high degree of danger. *See 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); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). These factors need to be viewed in the context of the factual circumstances of a particular case, and some factors may be irrelevant to a particular factual scenario. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000), *appeal docketed*, No. 01-1228 (4th Cir. Feb. 20, 2001). Nevertheless, all relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether the level of the actor's negligence should be mitigated. *Id.*

Consolidation Coal Co., 23 FMSHRC 588, 593 (June 2001).

The Secretary asserts that this violation was unwarrantable because it "was obvious and had existed for [a] long period of time." (Sec. Br. at 15-16.) While the argument correctly sets out two of the "unwarrantable failure" criteria, the record does not support such a finding.

In the first place, there is no evidence in the record to show how long the area had been in the state observed by the inspector. No one could remember the last time someone had worked on the platform. The last record of work being performed on the platform was the repair of a plastic line by a contractor in July 2005. There is no evidence of what the area looked like after

that repair was completed. Thus, I cannot conclude that the violation had existed for a long period of time.

Nor is it clear that the violation was obvious. The Secretary concludes that because the pond was adjacent to a road on which company supervisors at the plant traveled several times a day on their way to the plant, that the violation was obvious. Nonetheless, except for the tilt of the platform, nothing about the entrance, walkway or platform is obvious from the photographs offered into evidence to show what someone walking by the pond could see. (Govt. Ex. 4 & 5.) Further, there was no reason for anyone's attention to be attracted to the walkway and platform when walking by the pond. The evidence indicates that work was performed on the platform closer to once a quarter than the once per month alleged by the inspector. Other than noticing work on the platform, someone who walks by it several times a day would have little reason to observe it. Therefore, I find that the violation was not obvious.

While not discussed by the Secretary, it is also clear that the violation did not pose a high degree of danger. Indeed, the injuries likely to result from the violation fall at the lower end of the reasonably serious spectrum. Likewise, there is no evidence that the operator had been placed on notice that greater efforts were necessary for compliance. In fact, although the platform and pond area had been observed in the past by MSHA inspectors, this was the first time it had been cited. Finally, there is no evidence that the operator had knowledge of the existence of the violation and since it was not obvious it cannot be concluded that the operator should have known about it.

None of the unwarrantable factors are present in this violation. There has been no showing of indifference, willful intent, a knowing violation or a serious lack of reasonable care. The company was no more than ordinarily negligent with regard to this violation. Accordingly, I conclude that the Secretary has not established that this violation resulted from the operator's "unwarrantable failure" to comply with the regulation and will modify the citation from a 104(d)(1) citation to a 104(a) citation.

Order No. 6108304

This order was issued on November 8, 2005, and charges a violation of section 57.9315, 30 C.F.R. § 57.9315, in that:

> Lime dust emissions were not being controlled at the transfer points where belts 89-801 and 89-802 transfer lime onto belts 89-803 and 89-804. A thick dust cloud was intermit[te]ntly produced because dust collectors #844 and #845 were inoperable. This condition exposed persons who would be traveling or working in the area to the hazards that the cloud of dust caused. The dust could get into the eyes of a person and cause diminished visibility. This could cause a person to trip on the walkway or stairs and fall

> against metal structures nearby or onto the metal walkway resulting in injury. The dust could also cause physical injury to the eyes including corneal abrasions. Workplace examination records indicated an employee reported the condition no less than five times, the earliest time was on 10/05/2005. Jerry Hay, Supervisor, had signed the workplace examination cards that listed the hazard. The operator was engaged in conduct constituting more than ordinary negligence in that he was aware of the condition, had not initiated timely corrective actions, or barricaded the affected area against entry, and had allowed persons to continue to work and travel in the area. This is an unwarrantable failure to comply with a mandatory standard.

(Govt. Ex. 9.) Section 57.9315 provides that: "Dust shall be controlled at muck piles, material transfer points, crushers, and on haulage roads where hazards to persons would be created as a result of impaired visibility."

The Respondent argues that this violation occurred on conveyor belts inside a building and that, therefore, it cannot be a violation of this regulation which governs "the dumping of material by trucks or loaders, not the transition between two conveyor belts." (Resp. Br. at 36.) The operator correctly points out that the standard is found in Subpart H of the regulations which is entitled "Loading, Hauling and Dumping." Subpart H, 30 C.F.R. §§ 57.9100-57.9362. The subpart is further broken down into "Traffic Safety," "Transportation of Persons and Materials" and "Safety Devices, Provisions, and Procedures for Roadways, Railroads, and Loading and Dumping Sites." Section 57.9315 is included in the last category. Thus, based on the topic headings, at least, it appears that this argument may have some merit.

However, as the Commission has often pointed out:

> The "language of a regulation . . . is the starting point for its interpretation. *Dyer v. U.S.*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.; Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993).

Central Sand and Gravel Co., 23 FMSHRC 250, 253-54 (Mar. 2001). Here the meaning of the section is clear, there is no evidence that the Secretary intended the words to have a different meaning and the meaning does not lead to absurd results.

The issue is whether the meaning of *transfer points* is ambiguous in view of the fact that, according to the operator, *muck piles, crushers* and *haulage roads* seem limited to the outdoors.[3] *Transfer point* is not defined in the regulation. It is, however, defined in both editions of the mining dictionary as: "The point where coal or mineral is transferred from one conveyor to another." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 583 (2d ed. 1997) and 1158 (1st. ed. 1968). Therefore, I find that the meaning of *transfer point* is well established in the mining industry and its meaning plain in section 57.9315.

Furthermore, even if the meaning of the regulation were not plain, there is nothing in the context of Subpart H that clearly limits it to outdoors. Sections 57.9260 and 57.9261, 30 C.F.R. §§ 57.9260 and 57.9261, deal with transporting supplies, materials and tools underground, which is obviously not outdoors, and sections 57.9316 and 57.9318, 30 C.F.R. §§ 57.9316 and 57.9318, concern self-propelled mobile equipment which is frequently found indoors at large preparation plants. Thus, the regulation clearly is applicable to the situation cited by Inspector Jones.

The inspector testified that he was on an inclined walkway between belts 803 and 804 at the transfer point where belts 801 and 802 dump material onto 803 and 804 when he first felt and then observed a large cloud of dust giving forth from the transfer point. The dust was so thick that one can barely see the person standing in the cloud when the inspector took a photograph of it. (Govt. Ex. 10.) He described the dust as coming out of nowhere, instantaneously, and being composed of very thick, very fine dust. The cloud lasted about seven or eight minutes.

The inspector determined from witnesses that such dust clouds occurred intermittently and without warning. He also found out that kiln operators, electricians, maintenance people and others walked on the walkway through the area. He concluded that miners on the walkway would be unable to see if a dust cloud happened while they were in the area and could easily stumble on the walkway which was fairly steeply inclined.

Other than arguing that the regulation did not apply, the company did not dispute this evidence or the fact of violation. Accordingly, I conclude that the operator violated section 57.9315 as alleged.

Significant and Substantial

The inspector also found this violation to be "significant and substantial." He testified that if someone is on the walkway when a dust cloud occurs:

> The next second they can't see their feet in front of them and then

[3] Although not necessary to the disposition of this case, this assertion does not always hold true. I have had cases where crushers were located inside a building. *See e.g., Tilden Mining Co., L.C.*, 20 FMSHRC 80, 81 (Jan. 1998) (ALJ); *Empire Iron Mining Partnership*, 19 FMSHRC 1912, 1919 (Dec. 1997) (ALJ).

naturally, they're going to try to get away from it.

So they hold their breath and they take off to the nearest step or walkway or whatever and I believe that in a hurry in that situation, they could easily stumble and I think it's reasonably likely . . . some time in the future – I'm not going to speculate when – but some time with this exposure, somebody's going to get hurt.

(Tr. 90-91.) He further opined that injury would occur because:

A person could fall against a metal structure, strike their face, hand, arm, mouth or anything. Their head. They could fall against a handrail. They could fall while trying to climb down the steps which they could fall then and onto the concrete floor which a three- or four-foot fall a concrete floor even would result in some sort of injury.

Lacerations, broken bones, twisted – twisted ankle. That sort of thing. You know, joint injuries.

(Tr. 92.)

Applying the *Mathies* criteria to this violation, I have already found a violation of a safety standard and I further find that the impaired visibility resulting from the violation created a safety hazard of tripping or falling. As usual, it is the third factor which is contested.

The Respondent argues that the dust was intermittent, the number of miners in the area was low, no injuries had been reported due to the presence of dust in the past and the inspector again used the word *could* to describe the injuries. Therefore, the company maintains, the third and fourth *Mathies* factors are not present.

These arguments do not demonstrate, either individually or together, that it was not reasonably likely that the dust clouds would result in an injury. Further, they are all refuted by the fact that Rick Smith, a kiln operator, wrote up on his "Daily Safety Checklist" that the dust collectors were not working at least 11 times between October 5 and November 8, the date of the citation. (Govt. Ex. 11.) Accordingly, I find that the clouds were not as intermittent as the Respondent would have us believe and that one miner was so concerned about the problem that he took the time to continually write it up.

Based on the inspectors testimony, the photograph of a dust cloud (Govt. Ex. 10), and Smith's complaints, I conclude that it was reasonably likely that a miner would have his visibility impaired by dust and trip or stumble on the walkway or the stairway, receiving reasonably serious injuries such as lacerations, twists or sprains, or even a broken bone. Thus, the third and

fourth *Mathies* criteria are met. Consequently, I conclude that the violation was "significant and substantial."

Unwarrantable Failure

The inspector also found this violation to result from an "unwarrantable failure" on the part of the operator. The company disagrees, asserting that it was acting to address the problem, but no rapid remedy was available. The company's arguments are unconvincing.

The Respondent maintains that its response to the problem was appropriate. It points out that Jerry Hay, a production supervisor, responded to Smith's reports by asking him if the control room computers showed that the dust collectors were operating (they erroneously showed that they were), by asking maintenance employees to check the collectors and by going to the area to see if there was any dust. It notes that Ron Clos, another production supervisor, entered a work order concerning Smith's complaint into the system on October 25. Finally, the Respondent alleges that Gary Galloway, a maintenance supervisor, was looking into a new design for the dust collectors, but since options were limited, it would take a long time to solve the problem.

Contrary to the Respondent, I find that this evidence demonstrates that the company's response was completely inappropriate. At least six of Smith's complaints were received and acted on by Hay, yet it apparently never occurred to him that inasmuch as the complaints were continuing it might be necessary for him to take more than the superficial action he had already taken. He never went to examine the dust collectors. Even though Clos acted on four of the complaints, he never did more than write up a work order and then note on the other three complaints that he had written up a work order. Galloway responded to one complaint merely by noting that the company was "working on a new design." (Govt. Ex. 11.)

In fact, the dust collectors had apparently been dismantled before Smith's first complaint, although no one from the company who testified would admit to having been aware of that when the complaints were made. No one even knew when they had been dismantled, but Galloway guessed it was "probably August, September, something like that . . . ." (Tr. 321.) Thus, the complaints could never have been resolved by the actions taken by Hay and Clos.

To sum up, Smith made 11 complaints that the dust collectors were not working. No one responding to the complaints knew they had been dismantled. No one responding to the complaints bothered to check the collectors to see if they were working. No one responding to the complaints was spurred to investigate further or do anything more than they had already done even though the complaints continued. This clearly exhibits *indifference* or a *serious lack of reasonable care*. Accordingly, I conclude that the violation was the result of the company's "unwarrantable failure" to comply with the regulation.

This violation was originally written as a 104(d)(1) order with Citation No. 6108285

listed as the predicate 104(d)(1) citation.[4] However, I am modifying that citation to a 104(a) citation. In addition, it does not appear that there are any further 104(d) citations or orders in these cases which can serve as a predicate citation for this one. Therefore, I will modify this order to a 104(d)(1) citation.

Order No. 6108305

This order was issued on November 9, 2005, alleging another violation of section 57.11001 because:

> Safe access was not maintained along the travelways [*sic*] in and around the closed loop cooling system for the #4 and #5 kilns. Lime material was allowed to accumulate on the travelways up to about two feet in depth. This created trip, slip, and fall hazards and low clearance where electrical conduits cross over the travelway. Head clearance was about five feet. The south and east sides were not provided with handrails. There was a drop-off of up to about four feet in places for a distance of about forty feet. This could allow a person to fall which could result in sprains, strains, broken bones, or other injuries from falling to the ground below. Persons could be in this immediate area multiple times per shift while performing their normal duties. No barricade was in place to prevent persons from being exposed to the hazards. Lime material buildup in this area began about six months ago but was not completed. Several members of management were aware the condition existed. The operator was engaged in conduct more than ordinary negligence in that the condition was known, no attempt had been made to lessen or eliminate the hazards, and persons were allowed to continue to work in the area.
>
> This is an unwarrantable failure to comply with a mandatory standard.

(Govt. Ex. 14.)

In connection with this order, the inspector was concerned with three things: (1) the build-up of material on what he believed to be a walkway; (2) the low clearance of a conduit

[4] Section 104(d)(1) provides that on finding that a violation is S&S and an "unwarrantable failure" the inspector will include such findings in a citation. It then provides that if, during the same or subsequent inspection within 90 days after issuance of the citation, the inspector finds another violation resulting from an "unwarrantable failure" he shall issue an order.

crossing over the walkway; and (3) a four foot drop-off where no handrails were provided. The Respondent argues that the Secretary has failed to prove a violation of the standard. I agree.

The inspector testified that someone would be in the area described in the order because:

> In the event that the plant operator – the kiln operator – sees a spike in temperature, they will send someone to check the coolant level and they would be in the area also to put coolant into the container.
>
> Also, they would be in the area to do cleanup work to keep that dust from accumulating. Remember this is a radiator setup so you have to be able to move air through the radiators. So your intake has to be clear and your exhaust fans will have to be clear so they would be in that area for that as well.

(Tr. 103-04.) However, he later stated that: "The working place would be primarily the steps going up to and including the containment because that's where they're going to go to check the levels to make sure. Other than that, there's not a whole lot that could be done there on a regular basis." (Tr. 116-17.) The inspector opined that this was the path used to check the coolant levels because there were footprints on it. (Tr. 103.)

The bag houses are located to the left of the walkway and the material in the walkway resulted from "dumping the bag houses." (Tr. 189.) However, that was not being done at the time of the inspection, so there should not have been additional build-up on the walkway. Furthermore, as the inspector admitted, the only reason anyone would go to the area would be to check the coolant level. That is done very infrequently, three or four times a year. (Tr. 220, 347.) More importantly, when someone did go to check the coolant level, they did not go by way of the walkway and the area of the drop-off, as envisioned by the inspector, but they would come around from the left and use a ladder. (Tr. 202, 279, 350.)

The Commission has held that an identically worded standard, 30 C.F.R. § 55.11-1, "does not mean necessarily that an operator must assure that every conceivable route to a working place, no matter how circuitous or improbable, be safe." *The Hanna Mining Co.*, 3 FMSHRC 2045, 2046 (Sept. 1981). Here, while the Operator has not shown that there is no reasonable possibility that a miner would go in the areas cited by the inspector, the Secretary has not shown that the inspector's route was ever used as a means of access to check the coolant level. In this regard, footprints on a path between the bag houses and the cooling system, without more, does not indicate that miners were using the walkway to check coolant levels, particularly since there is evidence that that was not the route taken. Moreover, even if the Secretary could show that the areas listed by the inspector were a means of access, it is not obvious from the evidence that they were unsafe. Since the Secretary has the burden of proof, I conclude that she has failed on this violation. Accordingly, I will vacate the order.

Civil Penalty Assessment

The Secretary has proposed a penalty of $1,700.00 for Citation No. 6108285 and a penalty of $2,200.00 for Citation No. 6108304. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (Apr. 1996).

In connection with the penalty criteria, the parties have stipulated that the proposed penalties will not affect Carmeuse's ability to remain in business and that the company employed approximately 120 miners, who worked 247,291 hours in 2005, making the mine a medium size operation. (Jt. Ex. 1.) In addition, I find from the allied papers and the company's Assessed Violation History Report that Carmeuse has an average history of previous violations. (Govt. Ex. 17.) Further, it appears that the operator demonstrated good faith in attempting to achieve rapid compliance after being notified of the violations.

With regard to gravity and negligence, as previously indicated the gravity of Citation No. 6108285 was not very serious and the operator was only moderately negligent in committing the violation. The gravity of Citation No. 6108304 was more serious than the preceding citation, although it too did not involve a life threatening situation. The company was highly negligent in permitting this violation to occur and reoccur.

Taking all of these factors into consideration, I conclude that a penalty of $400.00 is appropriate for Citation No. 6108285 and that the penalty proposed by the Secretary of $2,200.00 is appropriate for Citation No. 6108304. I further conclude that the penalties proposed for the violations which the parties settled are appropriate under the six penalty criteria.

Order

In view of the above, Order No. 6108286, in Docket Nos. KENT 2006-74-RM and KENT 2006-203-M, is **MODIFIED**, as agreed by the parties, by deleting the "significant and substantial" designation and is **AFFIRMED** as modified; Citation No. 6108285, in Docket Nos. KENT 2006-73-RM and KENT 2006-289-M, is **MODIFIED** to a 104(a) citation, by deleting the "unwarrantable failure" designation and reducing the level of negligence from "high" to "moderate," and is **AFFIRMED** as modified; Order 6108291, in Docket Nos. KENT 2006-75-RM and KENT 2006-289-M, is **MODIFIED**, as agreed by the parties, to a 104(a) citation, by deleting the "unwarrantable failure" designation and reducing the level of negligence from "high" to "moderate," and is **AFFIRMED** as modified; Order No. 6108300, in Docket Nos. KENT 2006-76-RM and KENT 2006-289-M, is **MODIFIED**, as agreed by the parties, to a 104(a) citation, by deleting the "unwarrantable failure" designation and reducing the level of negligence from "high" to "moderate," and is **AFFIRMED** as modified; Order No. 6108304, in Docket Nos. KENT 2006-78-RM and KENT 2006-289-M, is **MODIFIED** to a 104(d)(1) citation

and is **AFFIRMED** as modified; Order No. 6108305 in Docket Nos. KENT 2006-79-RM and KENT 2006-289-M is **VACATED**; and Citation No. 6108303, in Docket Nos. KENT 2006-77-RM and KENT 2006-307-M is **AFFIRMED**.

Carmeuse Lime and Stone, Inc. is **ORDERED TO PAY** a civil penalty of **$7,150.00** within 30 days of the date of this order.

T. Todd Hodgdon
Administrative Law Judge

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