FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

December 29, 1997

EMPIRE IRON MINING PARTNERSHIP,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. LAKE 97-37-RM
SECRETARY OF LABOR,	:	Order No. 4537189; 1/21/97
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 97-38-RM
Respondent	:	Order No. 4537190; 1/21/97
	:	
	:	Docket No. LAKE 97-39-RM
	:	Order No. 4537216; 2/12/97
	:	
	:	Docket No. LAKE 97-53-RM
	:	Order No. 4537285; 3/10/97
	:	
	:	Mine ID 20-01012
	:	Empire Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 97-41-M
Petitioner	:	A.C. No. 20-01012-05618
v.	:	
	:	Docket No. LAKE 97-47-M
EMPIRE IRON MINING PARTNERSHIP,	:	A.C. No. 20-01012-05616
Respondent	:	
	:	Docket No. LAKE 97-50-M
	:	A.C. No. 20-01012-05620
	:	
	:	Docket No. LAKE 97-51-M
	:	A.C. No. 20-01012-05621
	:	
	:	Docket No. LAKE 97-69-M
	:	A.C. No. 20-01012-05625
	:	
	:	Empire Mine

DECISION

Appearances: Christine M. Kassak Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, and Thomas J. Pavlat, Conference and Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Peru, Illinois. for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Notices of Contest and Petitions for Assessment of Civil Penalty filed by Empire Iron Mining Partnership against the Secretary of Labor, and by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Empire, respectively, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815. The company contests the issuance to it of two orders and two citations. The Secretary=s petitions allege nine violations of the Secretary=s mandatory health and safety standards and seek penalties of $10,054.00. For the reasons set forth below, I approve the parties= settlement agreement, affirm one contested order, vacate three contested citations and assess penalties of $5,122.00.

A hearing was held on September 3 and 4, 1997, in Marquette, Michigan. The parties also submitted post-hearing briefs in the cases.

Settled orders and citations

At the beginning of the hearing, counsel for the Secretary announced that the parties had settled all but four of the violations. As part of the agreement, the Secretary moved to vacate Citation No. 4537051 in Docket No. LAKE 97-47-M and Citation No. 4537206 in Docket No. LAKE 97-51-M and the motion was granted. (TrI. 14-15.)[1] The parties agreed to reduce the penalty for Citation Nos. 4537187 and 4537188 and Order Nos. 4537189 and 4537190 in Docket No. LAKE 97-50-M, which orders were contested in Docket Nos. LAKE 97-37-RM and LAKE 97-38-RM, from $7,448.00 to $3,724.00. (TrI. 15-16.) The parties also agreed to modify Order No. 4537047 in Docket No. LAKE 97-47-M by deleting the Asignificant and substantial@ designation and to reduce the penalty from $382.00 to $100.00. (TrI. 16.)

[1] A separate transcript, beginning with page 1, was prepared for each day of the hearing. In this decision, the transcript for September 3 will be referred to as ATrI.@ and the transcript for September 4 will be referred to as ATrII.@

After considering the parties= representations, I concluded that the settlements were appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. ' 820(i), and informed the parties that I would approve the agreement. (TrI. 17.) The provisions of the agreement will be carried out in the order at the end of this decision.

Citation No. 4537093 in Docket No. LAKE 97-41-M, Order No. 4537055 in Docket No. LAKE 97-47-M and Citation Nos. 4537216 and 4537285 in Docket Nos. LAKE 97-39-RM, LAKE 97-53-RM and LAKE 97-69-M were contested at the hearing. The order and citations were tried at the hearing and will be discussed in this decision in the following order: Order No. 4537055, Citation No. 4537216, Citation No. 4537093 and Citation No. 4537285.

Contested Matters

Order No. 4537055, Docket No. LAKE 97-47-M

Order No. 4537055 alleges a violation of section 56.14100(b), 30 C.F.R. ' 56.14100(b), of the Secretary=s regulations. That regulation requires that: ADefects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.@ The machinery at issue in this order is a metal shear used to cut metal plate of various sizes. The parties stipulated that Larry Smith incurred a lost time back injury in an accident that occurred while operating a Pacific metal shear in the fabricating shop on September 10, 1996, and that Marvin Swanson had previously reported back soreness on August 29, 1996, resulting from an incident with the same machine on August 28, 1996. (TrI. 30-31.)

An injury report for the September 10 injury was filed with MSHA on September 23, 1997. Inspector Dominic Vilona conducted an investigation of the incident during a regular inspection of the mine on December 12, 1997. As a result of his investigation, he issued Order No. 4537055. He found that:

> The restricted duty back injury that occurred on 9-10-96 was directly related to a defect on the Pacific Metal Shear, serial S10902, located in the fabricating shop. The table of the shear is provided with 17 air operated balls which assist the machine operator when pushing steel in the shear. Larry Smith was trying to feed a 12 foot long, 6 foot wide by 3/4 inch thick plate into the shear with the help of his partner, Gary Waterman. This is when Larry injured his back. At least 8 out of 17 balls were reported inoperative on 8-28-96 when another employee strained his back performing the same work. Foreman Rich Hill engaged in aggravated conduct constituting more than ordinary negligence in

> that he was aware that their [*sic*] was a problem with the feed assist balls and that employees were operating this machine.

(Govt. Ex. 3.)

In discussing the predecessor to this regulation,[2] the Commission held that "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.'" *See, e.g., Canon Coal Co.*, 9 FMSHRC 667, 668 (April 1987); *Quinland Coal, Inc.*, 9 FMSHRC 1614, 1617-18 (September 1987)." *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (September 1990) (*Ideal I*). Applying this test, I find that Empire violated the regulation.

To establish a violation of this regulation, the Secretary must show: (1) that there was a defect in the metal shear; (2) that the defect affected safety; and (3) that the defect was not corrected in a timely manner to prevent the creation of a hazard. It is the Secretary's position that the defect in this case was the failure of 8 of the 17 air lift transfer balls used to assist in positioning steel on the shear to function;[3] that the defect affected safety because the non-functioning balls made it hard to move the steel on the shear resulting in the two back injuries; and that the defect was not corrected in a timely manner because the operator was put on notice by the first back injury, if not before, that the defect created a hazard and had not corrected the defect before the second injury occurred. On the other hand, while the Respondent concedes that some of the balls were not functioning, it argues that the defect did not affect safety and that, even if it did, it was corrected in a timely manner.

While there may be some dispute as to exactly how many of the transfer balls were not functioning, there is no dispute that some were not functioning. The Commission has previously held that: "In both ordinary and mining industry usage, a 'defect' is a fault, a deficiency, or a condition impairing the usefulness of an object or a part. *Webster's Third New International*

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[2] 30 C.F.R. ' 56.9002 (1987) provided: "Equipment defects affecting safety shall be corrected before the equipment is used."

[3] There are recessed metal balls in two rows across the table of the shear. (Resp. Exs. 4 and 6.) When heavy metal plate is being positioned on the table to be sheared, the balls can be raised to table level by air pressure and as the plate is pushed onto the table, the balls rotate making it easier to move the metal.

Dictionary (*Unabridged*) 591 (1971); U.S. Department of Interior, Bureau of Mines, *A Dictionary of Mining, Mineral, and Related Terms* 307 (1968).@ *Allied Chemical Corporation*, 6 FMSHRC 1854, 1857 (August 1984). I find that the failure of some of the transfer balls to function impaired the usefulness of the shear. Therefore, I conclude that there was a defect in the metal shear.

Turning to the second element, whether the defect affected safety, I note that the Commission has stated that: AThe phrase >affecting safety= . . . has a wide reach and the >safety effect of an uncorrected equipment defect need not be major or immediate to come within that reach.=@ *Ideal Cement Co.*, 13 FMSHRC 1346, 1350 (September 1991) (citations omitted) (*Ideal II*). The transfer balls purpose was to make it easier to move large pieces of steel onto the shear. The harder it is to move heavy metal on the shear table, the more likely that a back strain or other type of injury could occur. Thus, while there may have been other factors that contributed to the back injuries in this case, such as the floor not being level, I conclude that the defect comes within the Awide reach@ set out by the Commission, and was a defect affecting safety.[4]

That leaves the third element, whether the defect was corrected in a timely manner. Empire argues that Atimely@ does not mean immediately and that it corrected the defect in a timely fashion. The regulations do not define Atimely,@ nor has the Commission had occasion to address this question. However, the dictionary defines Atimely@ as Adone or occurring at a suitable time.@ *Webster=s Third New International Dictionary* (*Unabridged*) 2395 (1986) (*Webster=s*). And the Secretary has indicated that a suitable time depends on the defect:

> If safety defects are detected on any equipment, machinery or tools, the required compliance measures vary with the degree of the hazard. The . . . rule requires that all safety defects be corrected in a timely manner and that, in instances where continued use would pose a risk of injury, the correction must be made immediately unless the defective equipment is removed from service and identified as defective. The defective condition must be corrected before the equipment is returned to service.

Safety Standards for Loading, Hauling, and Dumping and Machinery and Equipment at Metal and Nonmetal Mines, 53 Fed. Reg. 32,496, 32,504 (1988) (*Safety Standards*).

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[4] In connection with this conclusion, I find the testimony of Richard Bradley, who had never used the shear, and Ed Tresedder, that the transfer balls were merely a Aconvenience@ inapposite. Likewise, I find the testimony that there may have been other means of getting the plate onto the shear, such as a crane or forklift, not relevant to this determination. The important point is that the balls were part of the machine, and their failure to function could, and did, result in injuries.

Although there is evidence that management was put on notice in the spring of 1996 that some of the transfer balls were not working, the fabrication shop had been moved from town out to the mine during that period and all the equipment had to be erected again. Consequently, it was only shortly before Swanson=s injury on August 28, that the shear had resumed operation. Accordingly, I find for the purpose of this decision, that Rich Hill, the fabrication shop foreman, was put on notice on August 29 that there was a defect affecting safety on the metal shear.

Hill initiated an investigation of the incident which was completed on September 4, 1996. The Safety System Final Investigation Report, (Govt. Ex. 5), found that the immediate causes of the injury were Aimproper handling/loading/placement, improper position for task,@ that the basic causes were Ainadequate capability, inadequate maintenance@ and that AMarvin was probably trying to push harder than he is physically capable. Some of the transfer balls which aid the movement of the plate were not working properly which caused more friction, requiring more bull work to move the plate.@ As preventive action the report indicated that the equipment should be repaired by Arepair[ing] transfer balls which are not working.@

Hill had only been the foreman of the fabrication shop since March 1996. Prior to that he had never worked in the fabrication shop and he had no training in running the fabrication shop. Although he had determined that the transfer balls had to be repaired, he did not know how to do it. He checked the manual for the shear, but it provided no help. He called the shear manufacturer who in turn told him to call the transfer ball manufacturer. He did not, however, ask any of the shop employees for their input.

Consequently, nothing had been done when Smith=s back injury occurred on September 10, 1996. Fortunately, Byron Tosseva, foreman of the welding shop, happened to overhear some of the employees discussing Smith=s injury, inquired what had happened, and told the men to Ashut the machine down, lock it out and we=ll get it fixed.@ (Tr. 202-03.) Gary Waterman, a fabrication shop employee, figured out how to remove the balls, clean and replace them and the machine was ready to operate the next day. Hill, who still had not received any guidance from either manufacturer,[5] initiated a work order to account for the machine=s down time, describing the work as: Arepair transfer balls on Pacific shear. Clean, adjust or replace all the transfer balls.@ (Resp. Ex. 1.)

Empire asserts that Hill=s actions in contacting the manufacturers was reasonable and that he was trying to correct the problem in a timely manner. I do not agree. What he should have done was what Tosseva, who knew no more about the machine than he, did, *i.e.* shut down the machine and repair it. I find Hill=s response to the problem simply unreasonable. Not knowing anymore on September 10 than he knew on August 29 he still was able, after Tosseva had acted, to direct that the transfer balls be Acleaned, adjusted or replaced.@ He could have done the same

[5] He finally received something in January 1997.

thing on August 29 or September 4. Accordingly, I find that the defect was not corrected in a timely manner.

Section 56.1 of the regulations, 30 C.F.R. ' 56.1, states: AThe purpose of these standards is the protection of life, the promotion of health and safety, and the prevention of accidents.@ I find that a reasonably prudent person familiar with the mining industry and this purpose would have repaired the shear immediately after Swanson reported his injury and the reasons for it on August 29, to prevent a similar injury, and would not have permitted work to continue while he waited for guidance from the manufacturer. Therefore, I conclude that Empire violated section 56.14100(b) of the regulations.

Significant and Substantial

The Inspector found this violation to be Asignificant and substantial.@ A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act, 30 U.S.C. ' 814(d)(1), as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out 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 (December 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 significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

The inspector found the violation to be S&S because two back injuries had occurred before the shear was repaired. The Respondent argues that the violation is not S&S because the Secretary did not show that the transfer balls were the cause of either injury. While it is true that the evidence does not establish that the failure of the transfer balls to operate was the only cause of the injuries, it does show that it was a contributing cause. Furthermore, since there is no evidence that similar back injuries occurred after the balls were fixed, it appears that they were a significant part of the injuries.

I find that the failure of the transfer balls to operate properly made it reasonably likely that an injury would occur. The parties stipulated Smith suffered lost time due to his injury. Therefore, it is apparent that the injury was reasonably serious. Accordingly, I conclude that the violation was Asignificant and substantial.@

Unwarrantable Failure

The inspector also found that this violation resulted from Empire=s Aunwarrantable failure@ 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 (December 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). AUnwarrantable 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 Corp.* 13 FMSHRC 189, 193-94 (February 1991).@ *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994).

Empire argues that the violation did not result from an unwarrantable failure because A[g]iven the minor nature of the condition reported by Mr. Swanson, it was appropriate for Mr. Hill to proceed as he did to investigate the proper way to repair the air-assisted balls.@ (Resp. Br. at 14.) Surprisingly, the Secretary did not question the inspector as to why he found the violation to be an unwarrantable failure, nor did she discuss unwarrantable failure in her brief. Nevertheless, I conclude that this violation resulted from the Company=s unwarrantable failure to comply with the regulation.

The nature of the injury makes no difference on this issue. It would be unreasonable to assume that because Swanson=s back injury did not require any lost time, that any future back injuries would also be minor. It is the fact of injury that is significant in this case. Swanson=s injury put Hill on notice that the defective transfer balls created a hazard for his employees. Because the defect created a hazard, he should have shut the shear down and tagged it out immediately. His nonchalance in not doing so demonstrated an indifference that raises the violation to the level of an unwarrantable failure.

Citation No. 4537216, Docket Nos. LAKE 97-39-RM and LAKE 97-69-M

The No. 2 ore crusher belt is about 2,100 feet long. The belt itself is 60 inches wide and is 43 inches above the surrounding floor. Up near the head of the belt, there are I-beams on either side of the belt, the tops of which are also 43 inches above the floor, extending along the belt for about 30 feet. The top surface of each I-beam is 10 inches wide. The beams are part of the structural steel for the conveyor belt bed.

On February 12, 1997, as part of a regular mine inspection, Inspector Vilona was walking along the No. 2 belt. He observed footprints in the dust on top of one of the I-beams. Based on the footprints, the fact that he was told that repair work was occasionally performed on the belt in that area, and the fact that there were no handrails on the I-beams, he concluded that a violation of section 56.11027 of the regulations, 30 C.F.R. ' 56.11027, had occurred. Consequently, he issued Citation No. 4537216, which states: AThe belt repair area located at the head end of the 2 belt was not equipped with handrails. The area measures about 30' long 7' wide and 43" high. A 60" wide belt runs down the center. Footprints were observed along the 10" wide steel on each side of the belt. Work is done here a few times a year, 2 men on a crew. Fall hazard.@

Section 56.11027 requires, in pertinent part, that: AScaffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition.@ The Secretary maintains that the I-beams are working platforms. The Respondent contends that they are not and that, even if they are now found to be, the company did not have adequate notice that the regulation applied to this area. I find the Secretary has not established that the I-beam was a working platform.

Since the regulations do not define Aworking platform,@ the standard must be evaluated under the Areasonably prudent person@ test. *Ideal I, supra.* The dictionary defines Aplatform@ as Aa horizontal flat surface usu[ually] higher than the adjoining area.@ *Webster=s* 1735. The regulations define Aworking place@ as Aany place in or about a mine where work is being performed.@ 30 C.F.R. ' 56.2. Therefore, it seems logical that a Aworking platform@ is a Araised, horizontal, flat surface where work is being performed.@ Applying that definition to this case, it is apparent that the issue is not whether the I-beams were a raised, horizontal, flat surface, but whether work was being performed on them.

Both of the company=s witnesses, Gordon Nelson, Maintenance Coordinator, and William Hansard, Safety Coordinator, testified that the I-beam was only used to step onto the belt when belt repairs were performed. They claimed that no work was done while standing or kneeling on the I-beam. The Secretary=s witness, Ray Ball, a former plant repairman, was more equivocal. When pressed on the issue, he testified as follows:

> Q. Did you ever do work while you were on the I-beam?
>
> A. I think --- like I said earlier, wherever you spotted the belt you might have had to stand on the end of the beam to guide your cooker in underneath the belt.
>
> Q. I thought that when you used the cooker you spotted it ahead of the I-beam?
>
> A. You had the I-beam here and it stopped and then you had an opening where you put your cooker underneath. So if you got it hanging by the crane and you=re trying to get underneath here, somebody=s standing here trying to wiggle it underneath the crane.
>
> Q. Would that be on the I-beam or in front of the I-beam?
>
> A. Sometimes you=re on the I-beam and sometimes you=re in front of the I-beam.

(TrI. 322.)

The testimony showed that the cooker to which Ball was referring is used only two or three times a year. Thus, at best, the evidence demonstrates that an employee may or may not stand on the platform two or three times a year to guide the cooker onto the area of the belt being repaired. In addition, the evidence is that when the cooker is used now, the handrails, installed by the company to abate this violation, have to be removed.

I find that so little, if any, work is done on the I-beam that the I-beam is not a Aworking platform@ within a reasonable interpretation of the regulation. To find that this *de minimis* use of the I-beam makes it a working platform, results in the paradoxical circumstance of the required handrails having to be removed to perform the very function that makes them required. Accordingly, I conclude that Empire did not violate section 56.11027 and will vacate the citation.

Citation No. 4537093, Docket No. LAKE 97-41-M

On Thursday, January 2, 1997, Glenn Wing, a surveyor at the Empire Mine, was coming to work at about 6:30 a.m. While traveling on a two lane, blacktop, access road on mine property, the rear of his car slid while exiting a curve and he collided with a pickup truck driven by an employee at the Tilden Mine. Wing received a few small cuts and a sore back as a result of the accident.

The week previously, the road had been closed because a pipeline had been leaking causing ice to form on the road in the area where the accident occurred. The leak was repaired before the road was reopened and the pipeline was not leaking on January 2.

The night before the accident, it snowed two to three inches. That morning it snowed another **2** inch. Wing described the road conditions as follows: ABasically looked like there had been a fresh snowfall with approximately a half to an inch of snow on the road, and the lanes where the cars had been driving, where the tires had been running was mostly wet with slush on the rest of the roadway.@ (TrII. 68.)

Inspector Stephen Field was conducting an inspection of the Tilden Mine when he learned of the accident and was instructed by his supervisor to investigate it. He arrived at the accident scene six or seven hours after it had occurred. Based on his investigation, he issued Citation No. 4537093 because:

> An employee on his way to work could not maintain control of his vehicle while rounding a corner on the mine access roadway near the Empire pipeline crossing. The employee vehicle slid into the opposite lane colliding with a vehicle traveling in the opposite direction. Two patches of ice, cause by a pipeline leak during the previous week, extended across the roadway in 2 areas near the corner. An accident of this nature has the potential to cause serious injuries to persons involved. Reportedly, there was about 1" of snow, ice and slush on the roadway.

(Govt. Ex. 7.)

The citation initially alleged a violation of section 56.9101 of the regulations, 30 C.F.R. ' 56.9101,[6] but was amended to allege a violation of section 56.11016, 30 C.F.R. ' 56.11016, on August 19, 1997.[7] Section 56.11016 requires that: ARegularly used walkways and travelways shall be sanded, salted, or cleared of snow and ice as soon as practicable.@ The Secretary argues that the Respondent violated this section because Athe ice was not removed from the travelway as soon as was practicable.@ (Sec. Br. at 24.) However, that is not what the standard requires; the standard requires that if there is snow and ice on a walkway or travelway, the operator may sand it, salt it or clear it as soon as practicable.

In this case, the company elected to salt the road, although the evidence of this is not overwhelming. The inspector, who visited the scene some six or seven hours after the fact, stated, when asked if he could tell whether the roads had been salted, Athe roads were bare.@ (TrII. 30.) Wing testified that: AIt appeared because of the melt in the slush that there had been salt on the road. . . . The impression I had was they had salted and it snowed a little bit after.@[8] (TrII. 68, 70.) Steven Laine, the man whose truck Wing hit, had only this to say about salt:

> Q. Had you seen a salt truck operating while you were ---
>
> A. No.
>
> Q. --- on the road? Did you see any evidence of salting or sanding?
>
> A. No.

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[6] See discussion of Citation No. 4537285 *infra* for the requirements of this regulation.

[7] The Respondent=s objection to the amendment of the citation was overruled at the hearing. (TrI. 21-28.)

[8] Wing was not able to verify that he slid on the ice caused by the pipeline leak, which is the theory of the Secretary=s case, because he never went back to check on what he had slipped. No one else testified that he had slipped on the ice patch.

(Tr. 84.) The only other testimony on this issue was from Steven Roberts, Safety Coordinator at the mine, who related: AI believe [Inspector Field] had asked me whether the road had been salted, and I didn=t know the answer, so I called our pit area to find out and they had indicated that it had been during the night shift.@ (TrII. 136-37.)

I find that a preponderance of the credible evidence demonstrates that the company had salted the access road prior to Wing=s accident. In making this finding, I am giving no weight to the testimony of Laine on this issue because his Ano@ answer was not explained and it was apparent from his testimony that he was shading it to support his lawsuit against Wing and the company for this accident. Accordingly, I conclude that instead of violating the regulation, the company complied with it. Consequently, I will vacate the citation.

Citation No. 453285, Docket Nos. LAKE 97-53-RM and LAKE 97-69-M

While driving home from work in his personal vehicle on February 21, 1997, James Beltrame attempted to pass a truck hauling material to the mine when he skidded on ice. His car hit a snow bank and rolled over resulting in his receiving a broken rib and being off work for five days. The road on which this occurred was on mine property. The attempted pass was in a marked no passing zone.

Inspector Field went to the mine to investigate this accident on February 25. After talking to Beltrame and viewing the accident scene, he issued Citation No. 4537286 alleging a violation of section 56.9101 because:

> An accident occurred on February 21, 1997 when an employee on his way home from work failed to maintain control of his vehicle on the mine access road. The employee vehicle, while attempting to pass an over-the-road haulage truck, overturned after sliding on ice and striking the snow bank on the opposite side of the road. Consequently, the employee suffered a fractured rib resulting in 5 days lost time and restricted duty. The roadway speed was posted and this accident occurred in a no passing zone.

(Govt. Ex. 9.)

Section 56.9101 provides: AOperators of self-propelled mobile equipment shall maintain control of the equipment while it is in motion. Operating speeds shall be consistent with conditions of roadways, tracks, grades, clearances, visibility, and traffic, and the type of equipment used.@ The Respondent asserts that this standard does not apply to the operation of personal automobiles used by miners to travel to and from work. I agree.

This is a case of first impression. The Secretary has not cited any cases where a miner has been charged with not maintaining control of his car going to and from work. It appears that

there are none. While it seems obvious that this regulation was never intended to apply to a situation such as this, I will examine it under the Areasonably prudent person@ test. *Ideal I supra*.

I note first that a personal automobile, by definition, is not owned by the mine operator. Nor was it being used by the miner in the performance of his duties at the mine. Secondly, the standard is found in Subpart H of the regulations, which is entitled ALoading, Hauling, and Dumping.@ The car was not being used to perform any of these functions. Third, there is no mention in the final rule of these standards that they apply to personal automobiles. *Safety Standards*, 53 Fed. Reg. 32496 (1988). Finally, there is no evidence in the record that the Secretary has ever, either in her *Program Policy Manual* or by some other means of public notice, interpreted the regulation to include personal automobiles.

Furthermore, as suggested by the Respondent, if a personal automobile is mobile equipment within the meaning of the regulations, it would have to be inspected each shift, 30 C.F.R. ' 56.14100(a); the mine operator would have to maintain a record of defects found, 30 C.F.R. ' 56.14100(c); it would have to have a service brake system, 30 C.F.R. ' 56.14101; it would have to have a backup alarm, 30 C.F.R. ' 56.14132; and a warning would have to be sounded before it could be started, 30 C.F.R. ' 56.14200. It apparently would not, however, have to have seat belts. Personal automobiles are not listed among the specific types of mobile equipment required to have seat belts installed in them. 30 C.F.R. ' 56.14130(a). On the other hand, cars are also not listed among the specific types of mobile equipment exempted from the requirement. 30 C.F.R. ' 56.14130(f). Plainly, there was never any intention to include personal automobiles as mobile equipment in the regulations.

Although the Commission has never had occasion to rule on this issue, there have been some cases involving personal automobiles. In *Energy West Mining Company*, 15 FMSHRC 586 (April 1993), the Commission held that an injury sustained in a personal automobile accident on mine property was a reportable injury under section 50.20 of the regulations, 30 C.F.R. ' 50.20. The case turned, however, on the definition of reportable injury under the regulation, Aany injury to a miner,@ and not on whether a personal automobile was covered by the regulations.

Two Commission judges have found violations of section 77.404(a), 30 C.F.R. ' 77.404(a),[9] when security guards were asphyxiated while on duty in their personal cars. *Extra Energy, Inc.*, 18 FMSHRC 1489 (Judge Melick August 1996); *Madison Branch Management*, 17 FMSHRC 1257 (Judge Feldman July 1995). In both cases the deaths were caused by defective exhaust systems. In neither case, however, was the issue of whether the regulation applied to personal automobiles addressed. Furthermore, the cases are distinguishable from the instant case in that the personal automobiles were being used by the miners to perform their duties at the mine.

[9] Section 77.404(a) provides: AMobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall by removed from service immediately.@

I find that a reasonably prudent person, familiar with the mining industry and the protective purposes of the Act, would not have recognized that section 56.9101 applies to the operation of personal automobiles being driven home from work. Accordingly, I conclude that Empire did not violate section 56.9101 and will vacate the citation.

Civil Penalty Assessment

The Secretary has proposed a civil penalty of $1,298.00 for Order No. 4537055 and the parties have agreed on penalties of $3,824.00 for the settled order and citations. 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. *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483084 (April 1996).

The parties stipulated that Empire worked approximately 1.9 million hours in 1995 and that payment of the proposed penalties will not affect Empire=s ability to continue in business. (TrI. 29-30.) With respect to the remaining criteria, since no evidence was presented that the company did not demonstrate good faith in attempting to achieve rapid compliance after notification of the violations, I find that Empire demonstrated good faith in this area. The company=s history of violations indicates an average number of prior violations. (Govt. Ex. 1.) Therefore, I find that the Respondent=s history of prior violations is neither good nor bad. I find that the gravity of the violation in Order No. 4537055 was relatively serious in that moderately serious injuries occurred as a result of it. I also find the level of negligence for that violation to be high.

Taking all of this into consideration, I conclude that the penalty proposed by the Secretary for Order No. 4537055 and the penalties agreed to by the parties for the settled violations are appropriate. Accordingly, for Docket No. LAKE 97-47-M, I assess penalties of $100.00 for Order No. 4537047 and $1,298.00 for Order No. 4537055. For Docket No. LAKE 97-50-M, I assess penalties of $1,862.00 each for Citation Nos. 4534187 and 4537188.

ORDER

Accordingly, Order No. 4537189 in Docket Nos. LAKE 97-37-RM and LAKE 97-50-M, Order No. 4537190 in Docket Nos. LAKE 97-38-RM and LAKE 97-50-M and Citation Nos 4537187 and 4537188 in Docket No. LAKE 97-50-M are **AFFIRMED**; Citation No. 4537216 in Docket No. LAKE 97-39-RM and Citation No. 4537285 in Docket No. LAKE 97-53-RM, which citations are also included in Docket No. LAKE 97-69-M, are **VACATED**; Order No. 4537047 in Docket No. LAKE 97-47-M is **MODIFIED** by deleting the Asignificant and substantial@designation and **AFFIRMED** as modified, Order No. 4537055 in Docket No. LAKE 97-47-M is **AFFIRMED** and Citation No. 4537051 in Docket No. LAKE 97-47-M is

VACATED; Citation No. 4537093 in Docket No. LAKE 97-41-M is **VACATED**; and Citation No. 4537206 in Docket No. LAKE 97-51-M is **VACATED**.

Empire Iron Mining Partnership is **ORDERED TO PAY** civil penalties of **$5,122.00** within 30 days of the date of this decision. On receipt of payment, these cases are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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