FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
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March 15, 2006

HIBBING TACONITE COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. LAKE 2005-50-RM
v.	:	Citation No. 6159916; 12/15/2004
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. LAKE 2005-51-RM
	:	Citation No. 6159917; 12/15/2004
	:	
	:	Docket No. LAKE 2005-52-RM
	:	Citation No. 6159918; 12/15/2004
	:	
	:	Docket No. LAKE 2005-53-RM
	:	Citation no. 6159919; 12/15/2004
	:	
	:	Hibbing Mine
	:	Mine ID: 21-01600

DECISION

Appearances: Christine M. Kassak Smith, Esq.; Wayne Lundquist, CLR, U.S. Department of Labor, Chicago, Illinois, on behalf of the Respondent; R. Henry Moore, Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, on behalf of the Contestant

Before: Judge Barbour

In these contest proceedings, brought pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (the "Mine Act" or "Act"), Hibbing Taconite Company ("Hibbing" or "the company") challenges the validity of three citations issued on December 15, 2004, at its Hibbing Mine.[1] The citations allege violations of 30 C.F.R. §50.20(a), a mandatory standard requiring reporting to the Secretary's Mine Safety and Health

[1] Initially, the company challenged a fourth citation (Docket No. Lake 2005-50-RM), but at the hearing Hibbing withdrew the contest. Tr. 13; *see also* Jnt. Exh. 7 at 2. I will dismiss Docket No. LAKE 2005-50-RM at the close of this decision.

Administration ("MSHA") any mine-sited accident, occupational injury or occupational illness.[2] The citations charge the company violated the standard when it failed to complete and submit Forms 7000-1 for three injury-causing incidents that occurred at the mine.[3] The company asserts the citations do not set forth violations of section 50.20(a). The Secretary, on behalf of MSHA, responds that the citations were properly issued. A hearing was conducted in Duluth, Minnesota, at which both parties offered testimony and documentary evidence. Both also submitted briefs.

At the beginning of the hearing counses sumarized their positions. Counsel for the company acknowledged the three incidents resulted in injuries, but maintained the injuries were the results of "long-standing [physical] problems[,]" problems the company "treated as

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[2] In pertinent part section 50.20(a) states:

> Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000-1 . . . . Each operator shall report each accident, occupational injury, or occupational illness at the mine. The principal officer in charge of health and safety at the mine or the supervisor of the mine area in which an accident or occupational injury occurs, or an occupational illness may have originated, shall complete or review the form in accordance with the instructions and criteria in §§ 50.20-1 through 50.20-7. . . . The operator shall mail completed forms to MSHA within ten working days after an accident or an occupational injury occurs or an occupational illness is diagnosed.

[3] Citation No. 6159917 (Docket No. Lake 2005-51-RM) involves an April 27, 2004 incident that occurred to miner Don Classen. Exh. G-2. (Although the citation gives April 29 as the incident date, Inspector Michael Anderson testified the actual date was April 27, 2004. Tr. 34. Counsel for the Secretary moved without objection to modify the citation to that date, and the motion was granted. Tr. 35.) Citation No. 6159918 (Docket No. Lake 2005-52-RM) involves an April 28, 2004, incident that occurred to miner Ron Wirkkula. Exh. G-4. Citation No. 6159919 (Docket No. Lake 2005-53-RM) involves an August 16, 2004, incident that occurred to miner Tim Duffney. Exh. G-6.

The citations also state the company was aware of the Part 50 reporting procedures, the alleged violations were unlikely to cause lost work days, and the company was moderately negligent. If the citations are affirmed the parties agree a $60 civil penalty is appropriate for each violation. Tr. 14.

recurrences that did not have to be reported." Tr. 24. Counsel also asserted there was "some inconsistency" on MSHA's part regarding the reporting of recurrent injuries. He described the issue of whether or not to report such injuries as "long festering." *Tr.* 26-27. Counsel argued the Secretary should engage in rulemaking to make clear exactly what is required when a miner experiences a recurring injury. Tr. 29. In counsel's opinion, because none of the cited injuries was "contemplated by the regulations[,]" the citations do not allege violations of section 50.20(a). Tr. 29-30.

Counsel for the Secretary stated that her case was "very simple." Tr. 19. Each of the three miners experienced an injury-causing incident at work. The incidents were required to be reported. The company failed to report them and, therefore, violated section 50.20(a). *Id.* The fact that the injuries might have been the result of "preexisting condition[s]" or the "recurrence of . . . past injur[ies]" did not matter. Tr. 22. Counsel stated, "[A]s long as there was a new occurrence or a new incident . . . and it resulted in an injury[,] . . . then it needed to be reported." *Id.*

THE INSPECTOR, THE COMPANY'S INJURY REPORTER AND THE CITATIONS

Inspector Anderson testified that in late fall 2004, he was told there "was a possible problem with the [Part 50] reporting procedures" at the Hibbing Mine. Tr. 35. In December, Allen Caligiuri, the chairman of the union local safety, health and environmental committee, gave Anderson a list of 17 miners and asked if alleged injuries and/or accidents involving the miners had been reported by Hibbing. Tr. 46; *see also* Tr. 119, 127.

On December 15, Anderson traveled to the mine. He met Caligiuri and they went to the mine office. There, Anderson and Caliguiri spoke with Lena Haltvick, Hibbing's workers' compensation administrator. Haltvick is the person in charge of reporting accidents, injuries and illnesses to MSHA. Anderson, Caligiuri and Haltvick reviewed information pertaining to the individuals. Anderson concluded the three subject miners suffered reportable injuries and Haltvick did not file the required reports. Tr. 120-121.

Haltvick explained to Anderson that she regarded the miners' injuries as recurrent and that she did not believe they had to be reported. Tr. 46-47, 121, 173. For example, although miner Don Classen suffered a hernia, Haltvick noted that Classen's doctor diagnosed it as a recurrence of a previous hernia. Tr. 48. In fact, Haltvick testified that Classen experienced "four or five different hernias" over five or six years. Tr. 162-163.

Anderson disagreed with Haltvick's interpretation of what was and was not reportable. He believed even if an injury was recurrent, it was a "medical reportable incident." Tr. 37. With regard to Classen, Anderson stated because he "was on the job at the time" and the injury was caused by the job, it should have been reported. Tr. 37.

Anderson also pointed out that Classen's injury required subsequent medical treatment and that MSHA's "Yellow Jacket[,]" a publication in which MSHA set forth its interpretation of certain mandatory safety and health standards, including section 50.20(a), indicated "a hernia is always considered reportable." Tr. 37, *see* Exh. G-9; *see also* Tr. 27-29. Anderson specifically noted question and answer 39 in the Yellow Jacket:

> Q. I have an employee who has suffered a hernia at work. He went to a doctor who diagnosed the hernia condition, but did not treat it. The employee returned to his regular job the next day. How should it be reported?
>
> A. A Form 7000-1 should be completed showing the date of injury or date of diagnosis. . . .
>
> Exh. G-9 at 30; *see* Tr. 38.

Anderson also testified that he was guided by question and answer 40:

> Q. An employee who suffered a hernia at work but received no treatment initially and returned to work at full capacity the next day. A month later the employee had the hernia surgically repaired. The employee subsequently missed ten days of work. How do I report this?
>
> A. Form 7000-1 should be completed within ten days of injury.
>
> Exh. G-9 at 30, *see* Tr. 39.

In addition to the Yellow Jacket, Anderson noted guidelines subsequently published in an MSHA Program Information Bulletin (PIB):

> An injury may be considered a recurrence [and not be reportable] only if there is no new event, occurrence or accident which contributed to the recurrence and there is sufficient medical documentation to substantiate that the injury is, in fact, only a recurrence.

> PIB No.: 88-05 (September 28, 1988) at 3; Exh. G-10 at 3. *See also Tr. 50-51, 54.*[4]

Anderson believed that under the Yellow Jacket and the PIB an incident was reportable if it was the result of a new event contributing to a recurrent injury. Tr. 60-62. In Anderson's view, there was no difference between an employee who was injured for the first time and an employee who had a prior injury and was re-injured, provided in each instance the injury was "tied to an event at the mine." Tr. 51-52; *see also* Tr. 54. For these reasons, Anderson issued Citation No. 6159917 to Haltvick for failing to report Classen's injury. Exh. G-2; Tr. 40.

With regard to Ron Wirkkula, Haltvick explained that although he suffered an on-the-job back injury, a doctor who reported his condition noted previous back injuries "go[ing] back to . . . [a]1994 incident[,]" (Tr. 146), and another doctor described Wirkkula's April 2004 injury as "[a] re-injury." Tr. 148; *see* Exh. H-5. Because, she viewed Wirkkula's April injury as a recurrence, Haltvick did not report it. Tr. 150.

While Anderson agreed that Wirkkula had a "fairly long history of [back] problems[,]" for the same reasons he gave regarding Classen, he believed the injury to Wirkkula was reportable, and he issued Citation No. 6159918 to Haltvick. Exh. G-4; Tr. 43, 49.

As for Tim Duffney, Haltvick explained that although he also suffered an on-the-job back injury, he, too, had an "active history" of back problems, and she did not believe it was necessary to file a Form 7000-1for his re-injury. Tr. 163.; *see* Jnt. Exh. 7 at 7.[5]

Anderson reached the opposite conclusion. He understood that Duffney had a history of back problems, but he also understood Duffney had "over-exerted himself while pulling a hose."

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[4] The guidelines also state:

> All other instances must be reported as separate cases. It is sufficient to be a new reportable case if work exposure was a contributing factor. Aggravation of a previous injury due to the work environment will not be considered a recurrence, but will be considered a separate case.

Exh. G. 10 at 3-4; *see* S. Br. 39.

[5] Haltvick recalled Duffney's doctor stating that Duffney was "having more and more frequent low back strains." Tr. 151; Exh. H-10 at 2.

Tr. 44, 49, 52. Therefore, he viewed the injury as reportable, and he issued Citation No. 6159919 to Haltvick. Exh. G-6, Tr. 44.

After the citations were issued, company representatives, including Haltvick, conferred with MSHA officials regarding the citations and the reporting of recurrent injuries. Haltvick stated that when she told about the number of reports the company would have to file if such injuries were reportable, someone representing MSHA stated the agency didn't "want to be flood[ed] . . . with paperwork." Tr. 152. Following the meeting, Haltvick was "still unclear" about what should be reported. Tr. 153.

THE MINERS AND THEIR INJURIES

The miners explained their prior injuries, what happened on the day they were re-injured, and the treatment they received. Classen testified although he had experienced a previous hernia, when he went to work on April 27, he did not have one; nor was he on restricted duty. Tr. 69, 72. Upon arriving at the mine, he was assigned to remove an electrical outlet box from a beam. The box was held in place by four screws. The screws were rusty, and the box resisted his attempts to loosen it. Classen appplied "Liquid Wrench[,]" but could not turn the screws. He applied more "Liquid Wrench" and used a pipe wrench to try to twist the box. When this procedure failed, Classen inserted a "cheater bar" (a short pipe) onto the handle of the wrench to get more leverage. Tr. 77, 196. After several unsuccessful attempts to wrench the box from the beam, he "start[ed] to feel belly pain." Tr. 71. When he still was unable to remove the box, he gave up. Later in the day, he experienced more pain. Tr. 72.

That night, Classen pulled up his shirt and saw a "good size bulge in [his] stomach." Tr. 74. The next day he visited a doctor, who told him he had a hernia, but who allowed him to return to work. Tr. 80. The doctor suggested Classen see a surgeon. Tr. 74. However, Classen went to his personal doctor, who recommended Classen wear a "belly binder" while at work. Tr. 75. The doctor gave Classen a note stating that Classen had suffered a recurrence of a ventral hernia. Tr. 75-76. In July, Classen had surgery to repair the hernia. *Id.; see* Jnt. Exh. 7 at 3.

Wirkkula testified that on April 28, 2004, he drove his haulage truck to one of the mine's electric shovels so the truck could be loaded. The shovel operator swung the shovel bucket toward the truck. The bucket struck the rear of the truck. Tr. 105; *see* Jnt. Exh. 7 at 5. Wirkkula described the impact as "pretty violent" and as a "jarring type hit." Tr. 100. Shortly thereafter, Wirkkula noticed numbness in his right foot. *Id.*

Wirkkula reported the incident and the numbness to his supervisor, who sent Wirkkula to a clinic where Wirkkula's doctor was on duty. She examined him and scheduled an X ray and an MRI. Wirkkula returned to work on his next scheduled shift. He worked a full day. Tr. 101-102. Subsequently, Wirkkula experienced increased back pain for which he underwent physical therapy and traction. Tr. 104; *see also* Tr. 160. He did not return to his duties as a full-time driver until mid-summer. Tr. 103.

Wirkkula confirmed he first experienced back problems in 1980. Tr. 104. Then, on February 6, 1994, Wirkkula injured a disk.[6] In 1996, Wirkkula suffered another back injury, and yet another one in 1999, when he herniated a disk while working at the mine. Jnt. Exh. 7 at 6. Prior to the April 2004, incident, he underwent two back surgeries and a number of steroid injections. Tr. 108-109; *see* Jnt. Exh. 7 at 6. Because of his back condition, Wirkkula was rated as having a 13-percent restriction of his back, but he still performed all of his duties as a truck driver. Tr. 153, 156.

Duffney, testified that on August 16, 2004, he was told by his foreman to roll up a fire hose. The hose consisted of two or three coupled sections. It was located in the mine's pellet plant and extended from the level of the plant where Duffney was working up and into the level above Duffney. Tr. 88-89. To wind the hose, Duffney pulled it toward the hose reel, wound the accumulated lengths on the reel and repeated the process. Tr. 88-89. As he pulled, he strained his lower back. He reported the injury to his foreman, and the following day, August 17, he saw a doctor, who stated Duffney had experienced a "back spasm." Tr. 91. The doctor scheduled an X ray. The X ray revealed Duffney was suffering from degenerative disk disease. Tr. 91. In addition to the X ray, Duffney was prescribed physical therapy and pain killing medication. Tr. 91-92. Later, an MRI was ordered. Tr. 91, 95. Duffney returned to work on September 7, 2004. Tr. 92; Jnt. Exh. 7 at 7.

THE COMPANY'S REPORTING PROCESS

Hibbing's reporting process was described by Haltvick:

> To begin with, we get the initial report which is filled out by the super[visor] or the foreman regarding the incident . . . . If it says report only, then it just gets put in the file. If it says first aid, or medical treatment, or reoccurrence, then we request medical [records] from the clinic . . . . We have a group meeting which consists of three or four people . . . [who] go over the medical records, and rely on the information we have to see if it's a reportable [injury] or not.

Tr. 138-139.

According to Haltvick, those usually involved in the group meeting are the supervisor in charge of the department in which the subject employee works; John Kannas, the senior section manager for safety and loss control at the mine; Brian Moody, a management employee working

[6] Wirkkula's doctor reported the 1994 date as the onset date of his April 28, 2004, injury. Tr. 107-108, Hibbing Exh. 5 at 4; *see* Jnt. Exh. 7 at 5.

in human resources; and Mike Milnar, the company's general manager. Tr. 139. Moody held the job before Haltvick, and she frequently asks him for a "second opinion" about whether an injury is reportable. Tr. 140.

In Haltvick's view, the most important things when determining whether or not to report an injury are the records generated when an employee seeks medical attention. Tr. 141, 168. If a doctor states an injury is recurrent, she does not report it to MSHA. Tr. 141-142. The company regarded recurrent injuries as non-reportable before she assumed the reporting responsibilities, and she has continued the practice. Tr. 142.

Kannas stated that Hibbing has kept track of recurring injuries for a number of years, and that the average number is 20 a year. Tr. 178, 181. Like Haltvick, Kannas emphasized the importance of medical records in the company's decisional process. Tr. 202, 205.

For example, with regard to Classen's injury, Kannas felt:

> It was very evident from reading the medical [records] that . . . [the injury] was a recurrence . . . . [L]ooking back through the records you could see where he had a hernia, he had a repair, he had a reinjury or rehernia in the same area[,] and I think this was the third. And the doctor defined it as an incisional hernia where it actually took place on the scar of a previous hernia.

Tr. 189; *see* Exh. H-1 at 3.

With regard to Wirkkula, Kannas noted a reference in Wirkkula's medical records to a 1994 back injury and an indication the 2004 injury was a recurrence. Tr. 192, Exh. H-5 at 3. Similarly, Kannas noticed in Duffney's medical records a "mention of . . . more and more frequent low back pain syndromes[.]" Tr. 195. Kannas did not think a person with "a good strong healthy back" would be injured pulling a fire hose. Tr. 199. In Kannas's opinion, if all recurring injuries were reported to MSHA, the reports would "overload" MSHA, and the statistical information MSHA compiled would be "watered down." Tr. 200.

THE ISSUE

Did Hibbing violate section 50.20(a) when it failed to file Forms 7000-1 for the injuries to Classen, Wirkkula and Duffney? If so, the citations must be affirmed.

THE PARTIES' ARGUMENTS

Counsel for Hibbing asserts that the reporting of recurrent injuries poses a continuing dilemma for operators. Section 50.20(a) does not specifically address the issue; nor does the

regulatory definition of "occupation injury." H. Br. 10.[7] Counsel maintains that a recurrence is simply a continuation of an original injury and that the language and context of the regulations indicates their intent is not to have multiple reports on the same injury. *Id.* The focus of section 50.20(a) and section 50.2(e) is on the nature of the injury, not on the event that caused it. For this reason, the Secretary's regulations define reportable injuries not by how an injury happened, but on the basis of whether it required medical treatment or whether it resulted in lost time or work restriction. *Id.*; *see also Id.*12.

Counsel also argues that the Secretary's interpretation is unreasonable and due no deference. In counsel's view, the Secretary has effectively created a "whole new reporting requirement" by including recurrences within the definition of "occupational injury." This new requirement should have been the subject of APA rulemaking. H. Br. 14-21.

Quoting the regulation, counsel for the Secretary counters that section 50.20(a) requires, "[e]ach operator [to] report each accident, occupational injury or occupational illness at the mine." She also notes the definition of "occupation injury" in section 50.2(e), and asserts that the language of the regulations must be enforced as written. It is unnecessary to interpret the regulations beyond their plain meanings. S. Br. 3; *see* Tr. 219

Paraphrasing the words of the regulations, counsel argues the elements of proof are that:

1.) an injury must have occurred;
2.) to a miner;
3.) at a mine; and
4.) the injury must have:
    a.) required medical treatment; or
    b.) resulted in:
        i) death; or
        ii) loss of consciousness; or
        iii) an inability to perform all job duties any day after the injury; or
        iv) temporary assignment to another job; and

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[7] Section 50.2(e) defines an "occupational injury" as:

> [A]ny injury to a miner which occurs at a mine for which medical treatment is administered . . . or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.

5) the operator must not have reported the injury.

S. Br. 25-26.

Alternatively, counsel argues if the regulation and/or the meaning of "occupational injury" is not clear regarding the obligations of an operator in the face of a recurring injury, the Secretary's reasonable interpretation as explained in the Yellow Jacket – an interpretation requiring reporting of a recurring injury if the recurrence is caused by a new event – is entitled to deference. S. Br. 38-39. Also entitled to deference is the "clarification" contained in the PIB, which specifically relieves an operator of the duty to report if a renewal of a prior injury is not caused by a new event or if "work exposure was [not] a contributing factor." S. Br. 35, 39 *citing* Exh. G 10 at 3-4. Counsel argues that the Secretary's interpretation is valid because it is "reasonably related to the statutory provision under which it was promulgated." S. Br. 40 (*quoting Freeman United Coal Mining Company*, 6 FMSHRC 1577, 1579-89 (June 1984)) and that "MSHA would abdicate its responsibilities under the Act were it to rely solely on the mine operator's determination that an injury need not be reported." S. Br. 44. Because in the three instances at issue the medically treated injuries were caused by "new events," they had to be reported. S. Br. 39.

RESOLUTION OF THE ISSUE

The meanings of sections 50.20(a) and 50.2(e) and the application of the meanings to the facts are at the heart of the parties' dispute. When an issue of regulatory meaning arises, the Commission has directed its judges to follow a specific analytical roadmap. They must look at the "plain language of the regulation," which, "[a]bsent a clearly expressed legislative or regulatory intent to the contrary ordinarily is conclusive." *Freeman United Coal Mining Company*, 6 FMSHRC 1577, 1578 (July 1984). Only if the language is ambiguous should they consider the Secretary's interpretation, to which they must defer if it is reasonable and not plainly erroneous or inconsistent with the regulation. *See Island Creek Coal Co.*, 20 FMSHRC 14, 18-19 (January 1998).

Following the roadmap, I arrive at the conclusion the citations should be sustained. I agree with the Secretary that the plain meaning of the regulations resolves the issue. Like the Commission in *Freeman,* I find no legislative or regulatory intent requiring me to go beyond the regulations' words, and I fully concur with the Secretary that to meet her burden of proof she must show nothing more than that the evidence tracts the definition of "occupation injury" and that the injury was not reported. *See* S. Br. 25-26. Here, I find that the Secretary has made the necessary showings. She has correctly parsed the wording of the regulations to specify what she must prove, and in each of the three instances at issue, she has met her burden by establishing an injury to a miner at the mine that required medical treatment and that was not reported.

As the Commission noted in *Freeman*, in section 50.2(a) the word "injury" is used in its ordinary sense, which means that there must have been "an act that damages, harms or hurts." 6 FMSHRC at 1578-79, *citing Webster's Third New International Dictionary (Unabridged)* 1164 (1977). On April 27, 2004, Classen "damaged" or "hurt" himself when he tried to remove the electrical outlet box from the beam. The "belly pain" he experienced was caused by a hernia which in turn was caused by pulling on the wrench. This was an injury within the meaning of section 50.2(a). Tr. 71, 75-76, 77. Wirkkula also experienced "damage" or "hurt" when his truck was hit by the shovel's bucket. The resulting numbness in his foot, which was caused by his disk problems, was triggered by the jarring he received. This was an injury. Tr. 100, 103-104, 107-109. Duffney was "damaged" or "hurt" when he pulled on the fire hose. The back pain he experienced, which was the result of a back spasm and related to his degenerative disk disease, was caused by pulling on the hose. This, too, was an injury. Tr. 88-89, 91.

In each instance, medical treatment was required. Classen was initially prescribed and used a "belly binder." Tr. 75. Wirkkula was prescribed an X ray, as well as an MRI. Tr. 103-104. Duffney was prescribed an X ray, physical therapy, painkillers and, ultimately, an MRI. Tr. 91-92. Because each miner while working at the mine suffered an injury that required medical treatment, I find that each miner suffered an "occupational injury" as defined by section 50.2(e), and because Hibbing did not report any of the three injuries, I conclude the violations existed as alleged.

In reaching this conclusion, I note the Commission's determination that section 50.20(a) is "consistent with and reasonably related to the statutory provisions under which it was promulgated." *Freeman* at 1580. I also note my full agreement with the Secretary that her interpretation of the regulations as requiring the reporting of a recurrent injury if there is a new event or occurrence that causes or contributes to the recurrence is reasonably related to the purpose of the statute, a purpose that broadly authorizes the Secretary to gather accident and injury information to facilitate a reduction in accidents and injuries. Therefore, were I not deciding this case for the Secretary on the basis of the plain meaning of the standards, I would do so on the basis of deference to her interpretation.

This does not gainsay that Hibbing may have a point when it questions the usefulness to MSHA of data on recurrent injuries. However, as long as the Secretary acts within the letter and intent of her regulations – as she has done here – the desirability of amending the regulations to take account of changing conditions, such as an increasing number of recurrent injuries among an aging work force, is a matter for the Secretary and the industry, not for the Commission, to consider. *See* S. Br. 30.

ORDER

For the reasons stated above, the three contested citations are **AFFIRMED,** and the contests are **DISMISSED**. Docket No. LAKE 2005-50-RM also is **DISMISSED.** *See* n.1 *infra*.

David F. Barbour
Administrative Law Judge
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