FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 23, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 2006-100-M A. C. No. 11-02161-84185
v.	:	
CARMEUSE LIME, INC., Respondent	:	South Chicago Plant

DECISION

Appearances: Christine M. Kassak Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, on behalf of the Secretary of Labor;
R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, on behalf of Carmeuse Lime, Inc.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of a Civil Penalty filed by the Secretary of Labor ("Secretary"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 ("Act"). The petition alleges that Carmeuse Lime, Inc. ("Carmeuse"), is liable for one violation of the Secretary's safety and health standards applicable to surface metal and nonmetal mines, and proposes the imposition of a civil penalty in the amount of $5,500.00. A hearing was held in Chicago, Illinois, and the parties waived posthearing briefing. For the reasons set forth below, I find that Respondent committed the alleged violation, but that it was not the result of an unwarrantable failure to comply with the mandatory standard, and impose a civil penalty in the amount of $1,250.00.

Findings of Fact - Conclusions of Law

Carmeuse Lime operates a facility, the South Chicago Plant, at which it processes material. Stone is shipped in, stored in silos, and processed through kilns, by use of material handlers and conveyor belts. On January 9, 2006, William R. Garrison, an inspector employed by the Secretary's Mine Safety and Health Administration ("MSHA"), visited Carmeuse's plant to conduct an investigation of a complaint that had been made regarding an electrical "flash" incident. After completing the investigation on January 10, he conducted a follow-up to a regular inspection he had done in December 2005. On January 11, he reviewed a new system for reporting and correcting hazardous conditions, that had been implemented in response to a

citation that had been issued because of shortcomings in that area. Tr. 23.

The new system required a person performing a workplace examination to note any hazardous conditions or items that needed attention on a form printed on the back of his daily time sheet. The time sheets/workplace examination reports had to be turned in to a supervisor, who certified the "time" component for payroll purposes. The supervisor also reported any repair or maintenance items that needed to be addressed to Richard D. Miller, the maintenance supervisor, by entering the information into a computerized system. Miller began his day at 5:30 a.m., by checking the system, assuring that work orders had been printed, and scheduling work for the maintenance crew, which reported at 6:30 a.m. Tr. 87-89. Conditions that involved safety were assigned #1 priority. Tr. 76-78. Matters that required immediate attention were handled by phone. The maintenance crew would first address the #1 priority items, and would note completion of the assigned task on the work order and their time sheets. Tr. 89.

In evaluating the new maintenance system, Garrison reviewed workplace examination records to identify hazardous conditions that had been reported recently, and then checked on whether they had been corrected. A time sheet/report dated January 8, 2006, by James Ross, reported that during his workplace examination on the third shift, there was an exposed electrical wire leading to the head pulley motor of the feed conveyor to the #4 kiln. Ex. G-3. The form bore the initials of Art Arroyo, Ross' foreman, who acknowledged to Garrison that he had received the form. Tr. 26, 33. When Garrison checked the #4 kiln, he found that the condition had not been corrected.[1] Because the condition had been allowed to exist for eight shifts, he issued Order No. 6184464, pursuant to section 104(d)(2) of the Act, charging that the violation was the result of Carmeuse's unwarrantable failure.[2]

Respondent does not contest the fact that the regulation was violated. However, it strongly disputes the unwarrantable failure designation, and the amount of the proposed civil penalty.

Order No. 6184464

Order No. 6184464 alleges a violation of 30 C.F.R. § 56.12004, which requires that "Electrical conductors exposed to mechanical damage shall be protected." Garrison described the violation in the "Condition or Practice" section of the order as follows:

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[1] The broken conduit was the only condition noted on workplace examination forms reviewed by Garrison, that had not been corrected. Tr. 55.

[2] The parties stipulated that the procedural prerequisites for a section 104(d)(2) order are not in dispute, i.e., that a valid order previously had been issued pursuant to section 104(d)(1) of the Act, and there had been no intervening "clean" inspection. Ex. Jt.-1.

> The 480 volt power cable for the drive motor on the #29 stone conveyor located at the feed end for the #4 Kiln had exposed energized conductor to mechanical damage. The conduit provided had broken exposing the inner conductors. The cable was 81 inches above the floor adjacent to the walkway. This condition was reported on the work place exam on the 3rd shift January 8, 2006, to mine management. Mine management has engaged in aggravated conduct by acknowledg[ing] a safety hazard and not taking corrective action. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. G-2.

Garrison determined that it was unlikely that the violation would result in an injury, but that an injury could be fatal. He determined that the violation was not significant and substantial ("S&S"), that one employee was affected, and that the operator's negligence was high. The Order was issued pursuant to section 104(d)(2) of the Act, because Garrison determined that the violation was the result of Carmeuse's unwarrantable failure to comply with the standard. A civil penalty in the amount of $5,500.00 has been proposed for this violation.

The Violation

The conduit in question had pulled apart where a flexible metal segment connected to a fixed segment. A gap of approximately one inch existed, exposing the inner conductors to mechanical damage. The condition is depicted in a photograph taken by Garrison. Ex. G-4. Consequently, the standard was violated.

For a number of reasons, Garrison determined that the condition was "unlikely" to result in an injury. The inner conductors, which supplied 480-volt electrical power to the conveyor's head pulley, were insulated, and that insulation was not compromised. Tr. 28, 31. The gap in the conduit was small, and was located 81 inches, nearly seven feet, above the adjacent walkway. The area was traversed infrequently, as little as once per shift. Tr. 31, 47, 94. Consequently, there was virtually no possibility of mechanical damage to the internal conductors from outside sources, and almost no likelihood of anyone coming into contact with the wires themselves. Garrison's primary concern was that vibration would cause the "rigid" edge of the pulled-apart conduit to wear through the insulation on the conductors, and thereby energize the conduit, the head pulley motor, and the frame of the conveyor.[3] Tr. 36, 63. However, he was in agreement with Carmeuse's witness that there was only a small amount of vibration caused by the head pulley motor. Tr. 40, 48, 91. In addition, he explained that a ground fault system, which he tested and found to be working properly, would protect the motor housing and conveyor frame from becoming energized, and another system would deenregize the conductors in the event of phase-to-phase contact. Tr. 32, 58, 62-63. Consequently, in order for an injury to have occurred,

[3] Garrison originally described the edge as "sharp," but later rejected that characterization in favor of "rigid." Tr. 32, 36.

the insulation on the conductors would have had to wear through to the point that the conduit became energized, the working safety systems would have had to fail, and a person would have had to come into contact with an energized metal part.

There was no disagreement with Garrison's assessments that an injury that might result from a person contacting an energized 480-volt circuit would most likely be fatal, and that one person was affected by the violation. He rated Respondent's negligence as high because the condition had been made known to mine management at least six shifts earlier, and it had not been corrected. Tr. 30. As noted above, Respondent's disagreement is with the negligence finding and the resultant significant civil penalty.

Unwarrantable Failure

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

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp*., 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id*. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); *see also Buck Creek* [*Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).
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> Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) . . . ; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because

> supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

Critical factors weigh on both sides of the unwarrantable failure determination. The Secretary relies heavily on the fact that the condition existed for over six shifts after it had been reported to management in the workplace examination report. Respondent argues that the condition was not extensive or obvious, posed virtually no danger to miners, and was about to be corrected when the order was issued.[4]

The workplace examination record noting the condition was turned over to management at the end of the January 8 midnight shift, i.e., about 7:00 a.m. on Monday morning, January 9, 2006.[5] It should have been entered into the maintenance computer system on January 9, which most likely would have resulted in repairs being made by the day shift maintenance crew on January 10. The actual entry was not made until January 10, which resulted in a maintenance work order being assigned to an electrician on January 11, and eventual repair that day. Tr. 102, 104-05; ex. R-2. The reason for this one day lapse is not known. Respondent pointed out that the responsible foreman was involved in the complaint investigation on January 9. Tr. 43-45. But, that would not have consumed all of his time. Tr. 67-69.

In her closing argument, counsel for the Secretary cited cases in which unwarrantable failures were found because hazardous conditions were allowed to exist for several shifts. *See Consolidation Coal Co.*, 23 FMSHRC 588 (June 2001) (*Consol I*) (condition that existed for a minimum of several shifts was the result of an unwarrantable failure); *Consolidation Coal Co.*, 22 FMSHRC 328 (March 2000) (*Consol II*) (condition that existed for two days was the result of an unwarrantable failure). However, there are significant factors that distinguish those cases.

In *Consol I*, the violative condition, accumulations of coal spillage and pulverized rib sloughage, was extensive and widespread. The violation was S&S.[6] Despite Respondent having

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[4] The Secretary does not contend that the condition was extensive, or that the operator was placed on notice that greater compliance efforts were necessary.

[5] There is no evidence that the condition existed prior to the January 8 midnight shift. Garrison originally testified that dust deposits indicated that the condition may have existed earlier. Tr. 42. However, he did not explain how he could have made such a determination from his observations on January 11, and later stated that he did not know the rate that dust was deposited in the area, and did not know if the condition existed earlier. Tr. 60.

[6] A violation is properly characterized as 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" under continued normal mining

been put on actual notice by MSHA that greater efforts were necessary to achieve compliance with the standard, no efforts were being made to correct the condition because Respondent had deliberately subordinated its cleanup responsibilities to its desire to complete construction. In *Consol II*, the violation of a standard governing supplementary roof support materials was also S&S. Consol had been specifically alerted to the presence of the violation by an MSHA inspector two days earlier, putting it on notice that greater efforts were needed to comply with the regulation. At the time the citation was issued, the condition had not been corrected and there was no indication that it would have been corrected in the near future, because management officials had not followed-up to assure that corrective action had been accomplished.

Here, the condition was not obvious, and was located in a somewhat remote area.[7] The condition did not pose an imminent danger, and was not determined to be S&S. It posed little danger to miners, as evidenced by the factors that resulted in the assessment that it was unlikely to result in an injury.[8] While corrective action had been delayed by one day, effective actions had been taken to assure that the condition was repaired. As noted above, Respondent had not been placed on notice that greater compliance efforts were required.

Because the condition was not dangerous, transmitting a maintenance request through Respondent's established system was an appropriate manner in which to address the problem.[9] As Garrison stated, it is reasonable to allow more time to correct a non-S&S violation than an

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operations. *Cement Div. Nat'l. Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

[7] I conclude that the condition was not obvious because of its nature and location. Ex. G-4. Aside from the fact that persons rarely traveled the walkway, the condition was located almost seven feet above the walkway surface, and it is not likely that a person would look up and see it. There is no evidence that the condition had been reported in any other workplace examination reports.

[8] The degree of danger posed by a condition is one of the critical factors in determining whether a violation was the result of an unwarrantable failure. *Lafarge Construction Materials*, 20 FMSHRC 1140, 1145 (Oct. 1998) (*citing BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Construction. Inc.*, 14 FMSHRC 1125, 1129 (July 1992); and *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988)); *Midwest Material,* 19 FMSHRC at 34-35.

[9] Initiating corrective action through a regular supply system was criticized in *Consol II*, 22 FMSHRC at 332-33. However, that did not appear to be the lynchpin of the Commission's decision. Had Consol's system functioned properly, the condition would have been corrected the day after the inspector pointed it out, and it is unlikely that a citation would have been issued.

S&S violation.[10] Tr. 59. He also found a similar, though more obvious, condition in the same area on a conduit enclosing conductors to the kiln's bindicator. Ex. G-5. That condition was noted and placed into the maintenance system on January 10 and was scheduled for repair on January 11. Ex. R-2. Garrison did not characterize that violation as an unwarrantable failure. Ex. R-5.

Considering all of the factors discussed above, particularly the fact that the condition posed very little danger to miners, I find that Respondent's failure to enter the condition into its maintenance system on January 9, which delayed repairs for one day, did not exhibit reckless disregard, negligence, or indifference rising to the level of an unwarrantable failure. Rather, its negligence was moderate to high.

The Appropriate Civil Penalties

Carmeuse Lime is a medium-sized mine, as is its controlling entity. Ex. Jt-1. Respondent does not contend that payment of the penalties would impair its ability to continue in business. The violation was promptly abated in good faith. Respondent's history of violations is set forth in exhibit G-1. The Proposed Assessment form, filed with the petition, reflects that in the two years preceding the issuance of the subject Order, Respondent was cited for 178 violations on 92 inspection days. Under the regular assessment formula, that would result in allocation of 18 out of a possible 20 penalty points for violation history, which reflects a relatively poor history of violations.[11]

The non-S&S violation cited in Order No. 6184464 is affirmed. The gravity of the violation was moderate, not serious.[12] The operator's negligence was moderate to high, but the violation was not the result of an unwarrantable failure. A civil penalty of $5,500.00 was proposed by the Secretary, based largely upon the characterization of the violation as having been the result of the operator's unwarrantable failure. The regular assessment formula would yield a penalty in the range of $800.00 to $1,500.00. Upon consideration of the lower negligence finding and the other factors enumerated in section 110(i) of the Act, I impose a penalty in the

[10] Respondent received a citation in 2004, for a condition that appears to have been very similar to that at issue here. Ex. R-4. Although all of the circumstances surrounding that violation are not known, the inspector specified an abatement period of three days.

[11] Regular assessments are computed through a process that assigns points to the various penalty factors. 30 C.F.R. § 100.3.

[12] Although it is possible that a fatal injury could have resulted from the violation, the hazard created by the edge of the conduit wearing through the insulation on the conductors would most likely have been immediately neutralized by the ground fault protection system. Because the possibility of injury was extremely remote, I find that the gravity of the violation was moderate. *See Hubb Corp.*, 22 FMSHRC 606, 609 (May 2000).

amount of $1,250.00.

ORDER

Order No. 6184464 is modified to a citation issued pursuant to section 104(a) of the Act, and is **AFFIRMED**, as modified. Respondent is directed to pay a civil penalty of $1,250.00. Payment shall be made within 45 days.

Michael E. Zielinski
Administrative Law Judge

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