FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 13, 2007

EMPIRE IRON MINING PARTNERSHIP, Contestant	:	CONTEST PROCEEDING
	:	Docket No. LAKE 2006-60-RM
v.	:	Citation No. 6192002; 02/21/2006
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Empire Mine Mine ID: 20-01012

DECISION

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

Before: Judge Barbour

In this contest proceeding, brought pursuant to section105(d) of the Federal Mine Safety and Health Act of 1977, 20 U.S.C. § 815(d) (the Mine Act or Act), Empire Iron Mining Partnership (Empire) contests the validity of a citation issued on February 21, 2006, at its Empire Mine. The citation arose out of an accident that occurred on November 6, 2005, when Chad Weston, an assistant plant operator (a.p.o.), was fatally injured as he and a co-worker attempted to free a stuck equipment part. Weston was pinned between the equipment's frame and the part. He was 28.

The same day, the Secretary's Mine Safety and Health Administration began an investigation of the accident. As a result of the investigation, the Secretary took enforcement actions, including issuance of the contested citation. Citation No. 6192002 charges Empire with a violation of either 30 C.F.R. § 56.12016 or 30 C.F.R. § 56.14105. The citation states:

> 56.12016: On November 6, 2005, two miners were attempting to free a stuck cooler pallet at [U]nit 4. The electric power was not de-energized, the power switch was not locked out, and no other measures were taken to prevent the equipment from being energized without . . . [the two miners'] knowledge while . . . [the work of freeing the stuck cooler pallet] was being performed.

> Or, in the alternative [Empire violated] 30 C.F.R. § 56.14105 [in that]: Maintenance was being performed on the cooler pallet dump arm although the electric power was not de-energized and . . . the person was not protected from hazardous motion.

Gov't Exh. 2.[1]

In addition to alleging alternative violations and the fact the violation was reasonably likely to result in a fatal accident, the citation charges the violation was a significant and substantial contribution to a mine safety hazard (S&S) and was the result of Empire's moderate negligence.

Empire timely contested the citation, asserting, among other things, there was no violation of either standard, or, if there was, the S&S and other findings were incorrect. The Secretary answered by asserting the citation was properly issued in all respects. The matter was heard in Marquette, Michigan. Following the hearing, counsels submitted helpful briefs.

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[1]Section 56.12016 states in part:

> Electrically powered equipment shall be de-energized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch . . . .

Section 56.14105 states in part:

> Repairs or maintenance of machinery or equipment shall be performed only after the power is off, and the Machinery or equipment blocked against hazardous motion.

Originally, the citation asserted the fatal accident was the result of a violation of either or both standards. Gov't Exh.1. Prior to the hearing, the Secretary moved to amend the citation to charge the violation was the result of one or the other of the standards and to charge the violation was reasonably likely to result in a fatal accident. Motion to Amend Citation 2-3. Counsel for Empire took no position on the motion, and it was granted. Order Granting Motion to Amend Citation (May 4, 2006). On May 31, 2006, MSHA issued the amended citation to Empire. The amended citation is the subject of this proceeding.

STIPULATIONS

The parties agreed to numerous stipulations regarding jurisdiction and the factual circumstances leading to the citation. Joint Exh. 6. The stipulations are referenced in this decision as appropriate.[2]

THE MINING PROCESS

The case involves the making of pellets used in manufacturing steel. The process begins with the mining of taconite ore at the Empire Mine, one of two open pit mines owned by Empire.[3] Once extracted, the ore is taken to an ore concentrator, where iron is separated from rock. John Kosher, a metallurgical engineer, who is the manager of operations at Empire's mines, described what happens next. Tr. 124, 129, 162. After the ore is concentrated and filtered at the concentrator, it is sent to the pellet plant, where it is fed into balling drums. In the drums it is combined with a binder. The binder fixes the concentrate and the material passes through the drums and is formed into balls or pellets. The pellets travel into a kiln, where they are heated. The heat fuses the binding agent and the concentrated ore. Tr. 136. The hot pellets are transferred to a cooler. From the cooler they are moved to a storage pile or they are shipped directly to purchasers.

The alleged violation took place at one of the mine's coolers.[4] The cooler is a large, circular machine with 30 pallets that rotate around its circumference. The cooler's drive motor is electrically powered. The hot pellets are dumped onto the pallets and air is forced over and around the pellets, cooling them while the pallets rotate. Tr. 17; Joint Exh. 6, Stip. 16. As Kosher explained, the pellets are loaded onto a pallet so 60 percent of the load is on one side, which means the weight of the pellets is off-center. A dump arm with a wheel is attached to each pallet. A rail above the wheel prevents the pallet from rotating into the dump position. However, as a pallet reaches the dumping point, the rail transitions from almost horizontal to almost vertical. With the rail no longer holding down the dump arm and pallet, gravity causes the pallet to move into a nearly vertical position, and the pellets fall off the pallet into a hopper.

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[2]One stipulation needs clarification. It states the citation "allege[s] a violation of . . . [section] 56.12016 and/or [section] 56.14105." Joint Exh. 6, Stip. 7. As indicated in n.1 and as reflected in counsel for the Secretary's statements both at trial and on brief, the Secretary's position is one or the other of the standards was violated, not both. *See* Tr. 50-51; Sec. Br. 5.

[3]"Taconite" is defined as "[a]ny bedded ferruginous chert of the Lake Superior district." United States Department of the Interior, *A Dictionary of Mining, Mineral, and Related Terms* (1968) 1116. "Taconite ore" is defined as "[a] type of highly abrasive iron ore now extensively mined in the United States." *Id.*

[4]There are four coolers at the pellet plant. According to Empire's counsel, the cooler involved in the accident has been in place since the "late 1970's." Tr. 26.

Nothing other than gravity causes the pallet to dump. Tr. 22; Joint Exh. 6 at 16. From the hopper the pellets travel by conveyor belt to a storage pile or to a loading area. Tr. 130-132, 136, *see also* Tr. 20-22, 41. [5]

Occasionally a pallet sticks in a horizontal position and will not dump. A stuck pallet commonly occurs when a cooler is restarted after a shutdown. Tr. 26, Tr. 141, 164. As hot air again moves over and around the pellets, the pallets heat up. This sometimes causes the pallets to change shape and bind to one another. Tr. 141; *see* Joint Exh. 6, Stip. 26. A stuck pallet will not tip as the guide rail rises to vertical.

When a pallet sticks, a hydraulic cylinder attached to the dump arm is compressed. Compression initiates the "sure dump system." Tr. 138. The cylinder starts to apply force to the arm and "more often than not . . . [the force] will be sufficient to cause the pallet to break free." Tr. 138. The hydraulic "sure dump system" has nothing to do with the cooler's electrical system. Tr. 139, 142, 170.

Also, when a pallet is stuck, an alarm sounds in the cooler control room. If the pallet continues to stick, the cooler shuts down. Tr. 23. The heated pellets start to fuse in five minutes once the cooler stops. Tr. 24; *see also* Tr. 95. Therefore, as soon the alarm sounds, the control room operator contacts an a.p.o. and another miner and assigns them to free the pallet. [6]

After receiving the assignment, the miners get a portable hydraulic pump (porta-power) and take it to the stuck pallet. Tr. 24; Joint Exh. 6 at Stips. 24, 25. At the pallet one of the miners places the head of the porta-power under the pallet's dump arm. A hose extends from the porta-power to an area some distance removed from the pallet. The other miner operates the porta-power from the end of the hose and away from the cooler. Tr. 24. The miner pumps the porta-power until hydraulic pressure forces the pallet dump arm to lift and free the pallet. Tr. 24; *see also* Tr. 165; Joint Exh. 6 at 25. As the freed pallet rotates upward, the wheel quickly and forcefully can move back to its proper position against the guide rail. Tr. 25, 139-140.[7]

THE ACCIDENT

On November 6, after being instructed to free a stuck pallet, Weston and Jeremy Ring,

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[5]The cooling and dumping process is visually depicted in a video entered into evidence by the company. Emp. Exh. 8.

[6]Although one miner can do the job, in most cases two are sent. Tr. 24.

[7]Counsel for Empire described the process of freeing the pallet: "[W]hat you are doing is applying force to [the pallet dump] arm in order to assist the pallet to dump by gravity. . . . [Y]ou jack [the dump arm] with the porta-power, [and] it then goes back up against the . . . guide rail in a rather forceful fashion. It's a simple task." Tr. 25.

who is also an a.p.o., hurried to the cooler.[8] They approached the pallet. Weston had the porta-power. Weston tried to position the porta-power correctly, but could not. According to Ring, Weston then moved closer to the pallet to try again. Tr. 108. He still could not properly position the porta-power. Ring testified, Weston "handed . . . [the porta-power] to me and I went around the back side of the wheel part . . . . [and] as soon as I put it back there . . . [the arm] released by itself. And that's when I seen . . . [Weston] hanging there." Tr. 108-109. For some reason, Weston had moved between the dump arm and the guide rail. Tr. 26-27.[9] When the pallet broke free and the arm moved on its own, Weston's head was caught in the pinch point between the dump arm and the rail.[10]

When Ring and Weston tried to unstick the frozen pallet, the cooler drive motor was not de-energized or locked out. Tr. 90-91. This was not unusual. It was an accepted work practice at the mine to try to unstick a pallet without first de-energizing the power to the drive motor. Tr. 92-93. Asked if he ever received instructions on how to de-energize the cooler drive motor, Ring answered, "No, because we never [de-energized it]." Tr. 95; *see also* Tr. 97-99.

MSHA'S ACCIDENT INVESTIGATION AND THE CITATION

Dethloff investigated the accident for the agency. Prior to joining MSHA, Dethloff worked for 16 years at a taconite facility in Northern Minnesota. Tr. 39-40. His job duties included working at a kiln and cooler similar to Empire's. Tr. 40-41.

As part of the investigation, Dethloff inquired about the cooler. Tr. 40-41. He was told it had been shut down for repairs and was restarted on the evening of November 5. Tr. 70; *see* Gov't Exh. 6, Stip. 26. On November 6, after the pallet froze and the control room operator assigned Weston and Ring to free it, the two miners hurried to the pallet to carry out the task. According to Dethloff, putting the head of a porta-power under the dump arm usually is not

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[8]Ring explained, when a pallet sticks, it is important to respond immediately because if hot pellets fuse a jackhammer is required to separate them. Tr. 88. The jackhammer has a bit approximately 11 feet long. When the fused pellets are broken up, the miner doing the work stands outside and away from the pallet. The miner is not endangered by the pallet dump arm. Tr. 108. Nor is he or she on a part of the cooler that moves. Tr. 104.

[9]Kosher testified, to get between the dump arm and guide rail, Weston had to take down one of two restrictive chains, step over the remaining chain, step up on a ledge and lean into the area between the rail and the arm. Tr. 143-144.

[10]Neither the company nor MSHA could explain why Weston moved as he did. Tr. 27. The hazard of the pinch point was well known and was "covered in training." Tr. 27. MSHA inspector and accident investigator William Dethloff testified Weston was properly trained to free a stuck pallet. In fact, Weston's instructor told Dethloff he specifically instructed Weston not to place himself between the pallet dump arm and guide rail. Tr. 70-71.

dangerous. A miner steps back once the porta-power is placed and before the dump arm frees the pallet. Or, if the pallet swings free before the miner steps back, the dump arm moves away from the miner's hand. Tr. 105. Moreover, the miner can and should reach in from outside the restraining chains. Tr. 143.[11] Locking out or de-energizing the cooler drive motor does not prevent the dump arm from moving. Tr. 67, 74. The pallet can break free and move on its own. Tr. 46. Dethloff described the movement, which has nothing to do with the cooler drive motor (Tr. 56-57), as "very rapid [and] violent." Tr. 46. Ring described it as "deadly." Tr. 105.

The operation of the cooler is centered in the control room. The control room operator is not in visual contact with the cooler. Rather, he or she monitors its operation through reports generated by the equipment's computerized control system.[12] Dethloff requested information from Empire concerning logs (computer printouts) of the cooler's operation on November 6. Gov't Exh. E-4. Dethloff reviewed the logs and concluded they showed, after the pallet stuck and the cooler stopped, the control room operator made 22 attempts in approximately three

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[11]Kosher agreed the job, if done correctly, is minimally hazardous. Tr. 145. His description of how the job should be done essentially tracked Dethloff's:

> [O]ne [miner] will reach in [and] place the porta-power. The [miner] behind him is normally holding the pump to be able to start pumping the hydraulic jack. Once the porta-power's in place, the [miner] can stand back. His partner is pumping there. They are standing away from the equipment. They're not . . . on top of the equipment. They're not standing in . . . any area that anything can move toward them. In fact, everything is going to be moving away from them.

Tr. 145.

[12]The system was explained by Allan Whitford, the Senior Processing Control Engineer at the Empire Mine. The system is in fact a part of the computer system that controls the entire pellet plant. It is called the Distribution Control System (DCS). Among other things, the DCS, which was first utilized at the plant around 1999, takes the place of individual start and stop stations. The DCS also monitors the processing of the pellets. Tr. 176. The control room operator oversees the DCS system by checking eight separate computer control stations in front of him or her.

minutes to restart the cooler. All of the attempts were unsuccessful. Tr. 42-43; *see also* Tr. 57, 178.[13]

Dethloff identified photographs of the cooler dump area and the dump system. Tr. 60; Joint Exh. 1. He explained, one of the photographs depicts two dump system limit switches: the alarm switch and the stop switch. Tr. 61-62; Joint Exh. 3. When a pallet is stuck, the alarm switch sends a signal to the control room, alerting the control room operator. When the sure dump system fails to free the pallet, the stop limit switch sends a second signal to the control room operator and stops the cooler. Tr. 62; Joint Exh. 3; *see also* Tr. 169, 177, 186. The cooler's electrical control circuit is disrupted. The cooler drive motor will not start as long as a stuck pallet alarm condition exists. Tr. 178. Once the pallet is free and a start command is issued, the cooler will resume operation. Tr. 185.

Dethloff learned the alarm switch malfunctioned prior to the accident and the control room operator did not receive an alarm indicating a stuck pallet. Tr. 62. However, the stop switch operated as designed. It shut down the cooler by opening the electrical circuit necessary to run the cooler. Tr. 67, 82. Dethloff noted, however, the switch did not cut off electricity to the circuit. He also noted the stop switch could fail, and if it did, without the cooler being de-energized or locked out, power could flow to the cooler drive motor. Tr. 76, 79.[14]

Based on information MSHA gathered during the investigation, Dethloff issued the contested citation to Empire. Tr. 43. Because Dethloff never had issued a citation alleging alternative violations, he "had help . . . writing" the citation. Tr. 43, 74. The citation also was the first time Empire was cited for failing to de-energize and lock out the cooler or for failing to lock the pallet dump system against motion when trying to unstick a pallet. *See* Tr. 117.

Because section 56.14105 applies when repairs or maintenance are undertaken on machinery, Dethloff was asked whether freeing the pallet was "maintenance work." Tr. 76. He responded, "I believe it is. . . . If you don't free the stuck pallet, you're not producing." Tr. 76. However, he agreed freeing the pallet did not require removing, replacing or lubricating any parts

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[13]Dethloff testified, when the control room operator pushes the start button, there is a five-second delay in starting the cooler; then, "If there is a problem, . . . [the control system] takes away the start voltage." Tr. 54. Dethloff noted the logs indicated "about every five or six seconds" the control room operator was "trying to give . . . [the cooler] the start command." Tr. 54.

[14]Raymond Sundquist, Empire's Coordinator of Work Performance for Electrical, agreed when the stop switch worked, the circuit was disrupted, but the circuit and drive motor were still powered, as opposed to being entirely de-energized. Tr. 199-200.

of the cooler. Tr. 81.[15]

ABATEMENT OF THE CITATION

Shortly after the accident and almost three months before the citation was issued, the company requested and received MSHA's permission to guard the area involved in the accident. Tr. 75. Kosher testified, "having had somebody . . . climb up and actually get . . . into a position where he could be hurt, I felt it was prudent to put a guard up." Tr. 132-133. According to counsel for the Secretary, because the guard was in place when the contested citation was issued, "there was no need to require . . . [guarding] for termination of . . . [the] citation." Tr. 32. Miners "were already gonna be protected from hazardous motion by the guard . . . [I]t didn't help to require them to . . . block . . . [the arm] if they [could not] get to it. So, once the guard was in place, MSHA . . . perceived . . . the only termination for the . . . citation . . . was to establish new policies and procedures to require . . . cooler drives be de-energized and locked out and [to] post warning signs and . . . [to de-energize the cooler by] turning the power off." Tr. 35. Dethloff agreed abatement procedures did not address blocking the parts against hazardous motion because "with the area guarded the employees were protected against hazardous motion." Tr. 46. Rather than blocking the pallet against motion, Empire abated by implementing:

> New policies and procedures . . . requiring . . . the cooler drive be de-energized and locked out with a warning notice signed and posted at the switch by the individuals doing the work prior to freeing a stuck cooler pallet . . . .

Tr. 45. In addition, according to Dethloff, "Miners required to free stuck pallets were trained on or plans implemented to train absent personnel upon return in the new policies and procedures." Tr. 45.

THE ISSUES

At the hearing and on brief, the parties sharply disagreed whether MSHA could validly issue a citation alleging alternative violations and, if so, whether there was a violation of either section 56.12016 or section 56.14105. In the pleadings, they also disagreed whether a violation of either standard was S&S, was likely to result in a fatality and was the result of the company's

[15]Sundquist did not consider using the porta-power to unstick the pallet to be maintenance work, but he did not explain why. Tr. 198. In addition, Michael Luke, Empire's Senior Coordinator for Pellet Plant Operations, did not consider the work to be in the nature of repair or maintenance. He described the task as "operational." Tr. 207.

moderate negligence.[16] I will address the issues in the order they were presented by the parties.

THE ALTERNATIVE VIOLATIONS

Counsel for the Secretary stated citing violations in the alternative is "rare," but it "has been done before in other cases before the . . . [Commission] . . . .[a]nd is specifically permitted under Federal Rule of Civil Procedure 8[(e)(2)], which . . . allows . . . a party . . . to set forth two or more statements of a claim alternatively." Tr.11-12.[17] Counsel also noted alternative pleading has been allowed by other Commission judges. *See* Sec. Br. 6 n.11. Counsel maintained the "essence of the allegations" under either section 56.12016 or section 56.14105 is "essentially the same and the requirements of the two standards are similar. Basically, it has to do with "[Empire's] failure to de-energize or turn off the power to a cooler's drive motors while repair and maintenance work was being performed on a stuck cooler pallet. . . . [T]he Secretary is alleging . . . the cooler's drive motors were not de-energized or had their power turned off. And . . . there was no protection for persons from hazardous motion of the equipment." Tr. 12.[18]

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[16]In its contest, Empire asserted the inspector's "evaluation" was without foundation in fact or law, which I interpret as raising the validity of the inspector's modified finding the violation was reasonably likely to result in a fatal injury as well as the validity of his negligence finding. Notice of Contest 2. The Secretary generally denied Empire's allegations. Answer 2.

[17]The rule states in part:

> A party may set forth two or more statements of a claim . . . alternatively . . . . When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements.

Fed. R. Civ. P. 8(e)(2).

[18]Counsel acknowledged the genesis of the agency's decision to allege alternative violations lay in *Phelps Dodge Corporation v. FMSHRC*, 681 Fed. 2d 1189, a decision in which the United States Court of Appeals for the Ninth Circuit held the "main concern" of then mandatory standard 30 C.F.R. § 55.12-16, later renumbered § 56.12016, was protection from electrical shock and the standard could not be applied to dangerous machinery motion without abusing the Secretary's discretion. *Phelps Dodge*, 681 F. 2d at 1192-93. Apprehensive one of the Commission's judges or the Commission itself might follow *Phelps Dodge* and conclude section 56.12016 was not violated, the Secretary elected also to cite section 56.14105. Tr. 14. However, the Secretary also made clear her position *Phelps Dodge* applied only in the Ninth Circuit, a circuit that does not include the Empire Mine.

Counsel for Empire countered section 104(a) of the Act, 30 U.S.C. § 814(a), does not permit alternative pleading because it specifically requires the Secretary to describe "with particularity the nature of the **violation**, including a reference to the **provision** of the Act, standard, rule, regulation, or order alleged to have been violated." 30 U.S.C. § 814(a) (*emphasis supplied)*. Counsel emphasized the Act states "violation," not "violations," and "provision," not "provisions." Tr. 28. This means under section 104(a) "[t]he Secretary is not permitted to select a number of different provisions in the hope that she can make one of the charges stick." Emp. Br. 8-9. Counsel acknowledged the Commission's judges have allowed alternative pleading, but counsel argued they erred. Unlike federal civil actions to which the Federal Rules apply, the contest of a citation is not static litigation requiring no action by the operator until the litigation is completed. Rather, a citation requires an operator to do an act (i.e., to abate) while the litigation is incomplete. The operator should not be put in a position where it has to guess action it is required to take. Counsel noted the alternatively pleaded standards require different actions: section 56.12016 requires a lockout of the power switches and section 56.14105 requires the machinery or equipment to be blocked against hazardous motion. Counsel also noted while section 56.12016 applies to electrically powered equipment, section 56.14105 applies more generally. Counsel asserted the different requirements of the standards prevented Empire from determining what it had to do to abate the citation and prevented it from being able to prepare adequately for the hearing. *Id.* 11 (*citing Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 369 (March 1993); *Twentymile Coal Co.*, 26 FMSHRC 666, 675-676 (August 2004)).

I conclude the Secretary has the better part of the argument, and the assertion of alternative violations in this case does not run counter to the Act. I find the ruling of Commission Judge Richard Manning in *CDK Contracting Company*, 23 FMSHRC 783 (July 2001) instructive.[19] Judge Manning's reasoning is couched in succinct and cogent language. He stated: "It is well settled that administrative pleadings are liberally construed and easily amended, as long as adequate notice is provided and there is no prejudice to the opposing party." *CDK Contracting*, 23 FMSHRC at 784. Here, Empire had adequate notice of the alternative standards and was not prejudiced by the charge it violated one of them.

First, the allegations arose out of an investigation to which the company was a party and involved equipment and circumstances of which the company had full knowledge. In addition, the alternatively charged violations were based on the same underlying facts.

Second, the company had adequate time to prepare for trial. The citation alleging alternative violations was issued a little more than three months after the accident, the case was assigned to me approximately a month and a half after the citation was contested, and the trial took place slightly less than four months after that. Discovery was fully conducted. There is no indication Empire was dissatisfied with the discovery process or was unprepared in any way for the trial.

[19]Empire's arguments for the most part repeat those presented to Judge Manning.

Third, the Secretary is not alleging violations of totally disparate standards. Rather, as Judge Manning observed, the standards are similar. *See CDK Contracting*, 23 FMSHRC at 784.

Fourth, and contrary to Empire's assertion (Emp. Br. 11), the company knew what to do to abate the citation. As Dethloff explained, the abatement procedures the company chose addressed de-energizing the cooler, in that the company implemented new policies and procedures requiring the cooler drive to be de-energized and locked out and a warning sign to be posted at the switch before a miner worked to free a stuck pallet. Tr. 46.[20]

Finally, I note, although the vast majority of citations allege the violation of a single standard, there are instances – *e.g.*, conflicting circuit courts of appeals rulings on the applicability of a standard or a lack of clarity where particular facts fall within similar standards – when alternative allegations are necessary to effective enforcement of the Act. To construe section 104(a) of the Act to prevent alternative pleading would violate the liberal and flexible spirit of administrative law and would deprive the government of an infrequently used but essential tool to achieve the Act's objectives.

THE VIOLATION

30 C.F.R. § 56.12016

As noted above (*see* n.18), the Secretary believed *Phelps Dodge* required her to assert Empire violated either section 56.12016 or section 56.14105. Because the hazard in the instant proceeding was not one of electrical shock but, rather, of a moving equipment part, the Secretary feared if *Phelps Dodge* were followed, Empire would be "off the hook" unless she could show another violation. Nonetheless, because the court's decision is not binding outside the Ninth Circuit (this case arose in the Sixth Circuit), before I consider whether section 56.14105 was violated, the Secretary invites me to depart from the holding in *Phelps Dodge* and find section 56.12016 applies.

The issue of whether to follow *Phelps Dodge* is not new to the Commission. At least one of the Commission's judges, Arthur Amchan, expressed his belief *Phelps Dodge* was wrongly decided. Rather than agree with the majority in the case, Judge Amchan stated:

> The dissenting opinion of Circuit Judge Boochever . . . is far more compelling. He found that the plain language of the standard was clear and unambiguous and saw no reason to qualify its application on account of the title of the sub-

[20]Of course, on its own volition it also chose to install a guard at the dump arm area. Tr. 46, 115-116.

part in which the regulation was placed.

James M. Ray, employed by Leo Journagan Construction Co., Inc., 18 FMSHRC 892, 897 (June 1996). The judge also stated he "agree[d] with the dissent that the Commission should defer to an agency interpretation of the standard which appears to better effectuate the purposes of the Act, [rather] than [to] one limiting its reach to situations in which there is a danger of electrical shock." 18 FMSHRC at 897. Despite Judge Amchan's rejection of *Phelps Dodge*, in a subsequent Equal Access to Justice case, the Commission declined to express its view whether *Phelps Dodge* was "correctly decided or not." *James M. Ray*, *employed by Leo Journagan Construction Co., Inc.,* 20 FMSHRC 1014, 1025 (September 1998). Thus, the Commission left the door open for the Secretary to press her position and for Commission judges to respond *ad hoc*.

It is tempting to agree with Judge Amchan and to reach the less than startling conclusion the standard means exactly what it says – to wit, that "[e]lectrically powered equipment shall be de[-]energized before mechanical work is done on such equipment." Were I to accept this plain meaning of the standard, I would be led, inexorably, to finding a violation of section 56.12016, since it is clear the cooler was not de-energized and freeing the stuck pallet was mechanical work. *See Ozark-Mahoning Co.*,12 FMSHRC 376, 379 (March 1990).[21] However, and as I have noted, the Commission has not yet expressed its views on *Phelps Dodge,* and restraint is always prudent when considering departure from a decision of a United States circuit court of appeals.

Other matters also warrant caution. The hazard leading to the citation – the hazard of an injury caused by a sudden, unexpected movement of the dump arm – was not the result of the failure to lock out or de-energize the cooler drive motor. Tr. 67-68. In fact, the sudden movement had nothing to do with electricity. Tr. 56-57,198. Nor does the record reveal another electrically-related hazard that would have been prevented by compliance with the standard.[22] Moreover, the

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[21]Ring's credible testimony the cooler was not de-energized or locked out on November 6 was not surprising, since he also testified it was an acceptable work practice at the mine to free a pallet without first de-energizing the power to the cooler drive motor. Tr. 90-92; *see also* Tr. 95. Indeed, Kosher testified, prior to the accident the company had no "de-energization" procedure for circumstances involving the freeing of a stuck pallet. Tr. 156. Moreover, although the stop switch halted operation of the cooler by disrupting completion of the drive motor electrical circuit, power was still available to the circuit and the motor. *See* Tr. 199-200. In addition, "mechanical" is defined as "of, relating to or concerned with machinery or tools." *Websters Third New Dictionary* (1993)1400. The pallet was an integral part of the cooler, which, in turn, was a large piece of machinery. The work of freeing the pallet was "relate[d] to" and was "concerned with" the cooler and the pallet, as was the work of positioning a porta-power under the pallet drive arm.

[22]There was no testimony establishing the dangers faced by miners if the cooler drive motor unexpectedly started up while a miner was trying to free a stuck pallet. Nor was there evidence of other electrical hazards compliance would prevent. *See, e.g.,* n. 8 *infra*.

Secretary has not previously cited Empire for a violation of section 56.12016 under these circumstances.

Weighing all of these factors, I cannot dismiss out-of-hand Empire's argument the application of section 56.12016 constitutes an abuse of discretion. I, therefore, conclude the better course is to leave undecided that which does not need a decision and to move to consideration of the Secretary's alternative allegation.

SECTION 30 U.S.C. § 56.14105

Section 56.14105 requires in pertinent part: "Repairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment is blocked against hazardous motion." I find freeing the stuck pallet involved the "repair or maintenance" of the cooler. As the Secretary points out, the words "repair and maintenance" connote the act or acts of putting machinery and equipment back in good condition after damage and/or restoring machinery and equipment to functioning condition. Sec. Br. 23. Ring and Weston were trying to return the pallet and, hence, the cooler to functional condition. Thus, they were engaged in repair or maintenance work. Compliance with the standard required the power to the cooler drive motor to be "off" prior to Ring and Weston attempting to free the pallet. It was not "off" within the meaning of the standard because, although the stop limit switch halted the cooler drive motor, it did not de-energize or lock out the power. Tr. 76, 79. To be "off" the power should have been completely removed from the cooler drive motor, and it was not. Nor was the pallet dump arm "blocked against hazardous motion." Its rapid and unencumbered movement killed Weston.[23]

S&S AND GRAVITY

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). A violation is properly designated S&S, "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). To establish the S&S nature of a violation, the Secretary must prove: (1) the

[23]I recognize the Secretary did not establish the existence of a feasible means for Empire to block the dump arm. MSHA Inspector Robert Leppanen made suggestions, but could not say they ever had been tried by an operator, and Kosher testified without dispute a feasible blocking system would require much development. Tr. 114,120-121,150. This stated, I also recognize a lack of feasible compliance is not a defense to a violation. Compliance and its means are the operator's responsibility, and if an operator cannot feasibly meet its responsibility, the Act provides the option of a variance. 30 U.S.C. § 811(c). Here, of course, the issue of a variance has not arisen because the Secretary has accepted a procedure falling outside the standard (*i.e.*, guarding) as equivalent to compliance.

underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (January 1984); *accord Buck Creek Coal Co., Inc.* 52 F. 3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec'y of Labor*, 81 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

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

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

Given my conclusion the Secretary established a violation of section 56.14105, the first of the *Nat'l Gypsum* factors has been met. The next question is whether the record supports finding the failure to disconnect the power to the cooler drive motor and to block the pallet dump arm against motion resulted in a discrete safety hazard. It is a question that is answered only in part. There is nothing in the record establishing a hazard posed to those working to free a stuck pallet if the company fails to disconnect power to the cooler drive motor. *See* Tr. 56-57, 198. However, there is no question a hazard was posed by the failure to block the dump arm. Tr. 198. The hazard proved fatal to Weston. Moreover, at the time of the violation there was nothing to prevent Weston or other miners from placing themselves between the arm and the guide rail. Therefore, I conclude there was a reasonable likelihood the failure to block the arm against unexpected motion would result in an injury. In reaching this conclusion I find even though miners were instructed not to do what Weston did, in the context of continued mining operations it was likely others would disregard their training and be seriously injured or killed. The history of mining is replete with the injury and deaths of those who did not follow proper procedures, and it is the operator's duty to guard against such aberrant behavior. For these reasons, I find the violation was S&S.

Finally, the violation obviously was serious. The effect of the failure to block the arm against sudden, unexpected motion killed Weston. I am well aware of Dethloff's and Kosher's agreement the job of freeing a stuck pallet was not inherently dangerous provided proper procedures were followed (Tr. 105, 145), but I also am cognizant that I must focus on the effect of the hazard if it occurs, and here the effect was fatal.

NEGLIGENCE

Inspector Dethloff found the violation was due to "moderate" negligence. Gov't Exh. 1. His reason for finding Empire negligent involved his belief the company should have been aware of the hazards inherent in the unexpected movement of the dump arm. Tr. 44-45. The record reveals the company took measures to protect its miners by instructing them how to safely free a stuck pallet. In fact, as Dethloff testified, Weston's instructor specifically told Weston not to place himself between the pallet dump arm and guide rail. Tr. 70-71. For these reasons, I conclude that while the company did not exhibit the care required by the circumstances, it was cognizant of the hazard and took steps to protect against it; and because the company had no reason to believe Weston would disregard his training, I conclude its negligence was low.

ORDER

Citation No. 6192002 **IS AFFIRMED** to the extent it alleges an S&S violation of section 56.14105, one that was reasonably likely to result in a fatal injury. Line 11 of the citation **IS MODIFIED** to indicate Empire's negligence was low. Empire's contest **IS DISMISSED**.

David F. Barbour
Administrative Law Judge
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