FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 29, 2007

MACH MINING, LLC,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. LAKE 2006-82-R
	:	Citation No. 7582682; 03/02/2006
v.	:	
	:	Docket No. LAKE 2006-83-R
SECRETARY OF LABOR,	:	Citation No. 7582683; 03/06/2006
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2006-84-R
Respondent	:	Citation No. 7583684; 03/06/2006
	:	
	:	Docket No. LAKE 2006-85-R
	:	Citation No. 7582685; 03/06/2006
	:	
	:	Mach #1 Mine
	:	Mine ID 11-03141
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2006-146
Petitioner	:	A.C. No. 11-03141-92222
	:	
v.	:	Docket No. LAKE 2006-149
	:	A.C. No. 11-03141-94581
MACH MINING, LLC,	:	
Respondent	:	Mach #1 Mine

DECISION

Appearances: Christine M. Kassak-Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, IL, for the Secretary of Labor
David J. Hardy, Esq., Spilman, Thomas & Battle, PLLC, Charleston, WV, for Mach Mining

Before: Judge Barbour

These are consolidated contest and civil penalty proceedings brought pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 ("Mine Act or Act") (30 U.S.C. §§ 815, 820). In the contest proceedings, Mach Mining, LLC challenges the validity of four citations issued pursuant to sections 104(a) and 104(d)(1) of the Act (30 U.S.C. §§ 814, 814(d)(1)). In the civil penalty proceedings, the Secretary of Labor, on behalf of her Mine Safety and Health Administration (MSHA), petitions for the assessment of civil penalties for the violations of mandatory safety standards alleged in the contested citations and for the assessment of a civil penalty for an additional alleged violation.

The contested citations issued as the result of two roof fall accidents at Mach's No. 1 Mine, a bituminous coal mine in Williamson County, Illinois. The falls occurred in the mine's slope on February 24 and February 25, 2006.[1] The Secretary investigated, and on March 6, 2006 issued the citations. In the citations, the Secretary asserts the company violated mandatory safety standard 30 C.F.R. 77.1900-1, which requires an operator to "adopt and comply" with its shaft and slope sinking plan once the plan has been approved by the MSHA district manager.[2] The Secretary further charges the alleged violations constituted significant and substantial contributions to mine safety hazards ("S&S"), that one of the violations was caused by Mach Mining's unwarrantable failure to comply with the company's plan and that the other alleged violations were caused by the company's moderate negligence.

Mach Mining denies it violated section 77.1900-1. It also denies the S&S and negligence allegations. The company further argues the penalties proposed by the Secretary for the alleged violations are inappropriate. The matter was heard in Carbondale, Illinois.[3]

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[1] A "slope" is in part defined as, "An entrance to a mine driven down through an inclined coal seam." U.S. Department of the Interior, *A Dictionary of Mining, Mineral, and Related Terms* 1988 at 1029 ("*DMMRT")*.

[2] 30 C.F.R. § 77.1900(a) states in pertinent part, "[e]ach operator of a coal mine shall prepare and submit for approval by the Coal Mine Health and Safety District Manager . . . a plan providing for the safety of workmen in each slop or shaft that is commenced or extended after June 30, 1971." Section 77.1900-1 states, "[u]pon approval by the Coal Mine Health and Safety District Manager of a slope or shaft sinking plan, the operator shall adopt and comply with such plan." Initially, the subject enforcement actions charged violations of 30 C.F.R. §77.1900(a). Prior to the hearing, counsel for the Secretary's motion to amend the citations to charge violations of 30 CFR §77.1900-1 was granted. *See* Order Granting Motion to Amend Citations (June 5, 2007).

[3] The Secretary and the company settled one of the contest proceedings and one of the civil penalty proceedings. Counsel for the Secretary explained the settlement on the record, and I dismissed the settled proceedings (Docket No. LAKE 06-82-R and Docket No. LAKE 06-146).

STIPULATIONS

The parties stipulated as follows:

> 1. The . . . Commission has jurisdiction over [the] proceedings.
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> 2. Mach Mining's operations affect interstate commerce.
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> 3. At all times relevant . . . Mach Mining [o]perated the Mach [No.] 1 Mine.
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> 4. The Mach [No.] 1 Mine extracts bituminous coal.
>
> 5. The Mach [No.] 1 Mine began its slope development in October[,] 2005.
>
> 6. The subject citations were properly served by a duly authorized representative of the Department of Labor upon an agent for Mach Mining on or about the date and at the place indicated therein.
>
> 7. On February 24, 2006, Mach [No.] 1 Mine had a roof fall in its slope development area.
>
> 8. On February 25, 2006, there was a more extensive roof fall in the same area.

Joint Exh. 1.

THE LEADUP TO THE CITATIONS AND THE SLOPE SINKING PLAN

Michael D. Rennie is an underground mine inspector in MSHA's Benton, Illinois field

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Tr. 10-11.

office and the primary accident investigator in MSHA's Vincennes District, the district encompassing the Benton field office. Tr. 18-19. Rennie has worked for MSHA since 1991. According to Rennie, during the winter of 2006, the company was in the process of developing the No. 1 Mine. One of the first things it had to do was drive the slope, which when completed would lead to the mine's active workings and be used daily by miners to access and exit the mine.

On February 24, Rennie was in Benton when he received a telephone call informing him of a roof fall in the slope. Rennie was familiar with the mine as he had been there twice before, most recently on February 21. Tr. 24. Rennie was assigned to investigate the accident. Tr. 25.

Before going to the mine, Rennie contacted Mach's president, Pete Hendrick, and orally issued an order pursuant to section 103(k) of the Act (30 U.S.C. § 813(k)) to ensure miners' safety and to preserve the accident scene.[4] The order, which was later reduced to writing, required the fall area to be barricaded so no person could travel into it. Gov't Exh. 1; Tr. 25.

Rennie reviewed the mine's approved slope sinking plan ("the Plan").[5] Tr. 25. The Plan had been submitted to the MSHA district manager, in September 2005. Following exchanges of letters between MSHA roof control specialist Mark Odum and Mach officials, MSHA approved the Plan on February 8, 2006. *See* Gov't Exh. 2.[6] Odum was responsible for reviewing and recommending for approval slope plans in the Vincennes District. Tr. 110-111.

Robert "Mickey" Gauldin, the mine manager, in great part drafted the Plan. Gauldin used copies of other mines' slope plans as models. Tr. 260. Under the Plan, the roof was required to be supported with 96 inch roof bolts. Tr. 34; Gov't Exh. 2 at 8. Rennie described the bolts as the roof's "primary" means of support. Tr. 34, *see also* Tr. 174-176. Secondary support was required

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[4] Section 103(k) provides an inspector with authority "[i]n the even of any accident . . . to issue such orders as he [or she] deems appropriate to insure the safety of any person in the . . . mine." 30 U.S.C. §813(k).

[5] As Rennie explained, a slope sinking plan in general, "spells out how . . . [an operator] is going to sink the slope . . . and what steps . . . [the operator is] going to take to protect the health and safety of . . . [its] workers as they [develop the slope]." Tr. 28. Such a plan is mine specific.

[6] Gov't Exh. 2 consists of the body of the Plan (pages 6-18), cover and submission letters (pages 4-5), a letter of conditional approval on behalf of the District Manager to the company (page 3), a letter from the company to the District Manager requesting final approval of the conditionally approved plan (page 2), and a letter on behalf of the District Manager to the company approving the Plan (page 1).

to be provided by steel arches (also referred to as steel "sets") and lagging.[7] Gov't Exh. 2 at 8., Tr. 35. The sets had to be installed on four to five foot spacing and, if wooden lagging was used, the lagging had to be a minimum of three inches thick. *Id.; see also* Tr. 36. In general, the distance between the floor and the underside of the top of a set was approximately 11 ½ feet. Tr. 40. The slope was 27 feet wide and the distance between the inside of the legs of a set was "just under 25 feet."[8] Tr. 40.

The Plan also required lagging to consist of "a minimum of 20 gauge corrugated decking or a hardwood block (minimum 3 inches thick)." Gov't Exh. 2 at 8. The Plan further stated the "[b]locking of the arches will be performed following the manufacturers recommendations." *Id.*; 37. In Rennie's view, the "manufacturer's recommendations*"* were shown in an attachment to the plan entitled "Attachment #3– Steel Arches." Tr. 101; Gov't. Exh.2 at 13. In addition to a structural drawing depicting a raised arch, Attachment 3 listed specifications for arch parts. Rennie agreed nothing in the Plan specifically referenced manufacturer's recommendations for blocking and there was no attachment or diagram showing how or where lagging was to be installed. Tr. 101, 133. Further, Rennie acknowledged that although lagging could be used on both the tops of arches ("top lagging") and along their sides ("side lagging"), the Plan just referred to "lagging"in general. [9] Tr. 134.

Although no blocking was represented in the attachment, a tension rod was shown. The rod stretched between the top of the legs of the arch. Rennie testified the rod served the same purpose as blocking in that it stabilized the arch. *See* Tr. 38; Gov't Exh. 2 at 13. Because the tension rod was shown in the drawing Rennie believed a rod was required to be installed at the top of each arch in the slope. Tr. 135.

Hendrick, on the other hand, believed manufacturers recommended the use of either blocking or tension rods, and if an arch was blocked, a tension rod was not needed. Tr. 195-196, 199. Hendrick noted a drawing Mach received from American Commercial (a manufacturer) after the falls showed blocks, but did not show a tension rod. Tr. 197, 199-200; Op. Exh. 6 at 2.

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[7] "Lagging" is defined as material whose purpose is to "[wedge] and [secure] the roof and sides behind the main timber or steel supports in a mine and provide early resistence to pressure" (*DMMRT* at 302) and as "[p]lanks, slabs, or small timbers" whose purpose is "not to carry the main weight, but to form a ceiling or a wall, preventing fragments of rock from falling through." *Id*.

[8] In parts of the roof where shale was encountered, wire mesh was affixed to the roof bolts to provide protection "from small rock and things." Tr. 34, *see also* Tr. 175-176. The mesh was an additional precaution, one not required by the Plan. Tr. 149.

[9] After the roof falls, MSHA insisted the Plan be changed "to clarify the lagging requirements" and to specifically require top lagging and side lagging. Tr. 134-135; *see also* Tr. 101-102.

In Hendrick's opinion, blocking was preferable because it made an arch stronger. Tr. 201. ("[B]locking's better than the tension rod." Tr. 241.) Hendrick agreed at the time of the roof falls, none of the arches in the slope had tension rods and side blocking was missing. Tr. 242.

Hendrick also maintained blocking and lagging were not required until all of the arches were installed to the end of the slope. Tr. 190, 232-233. This was because once the slope reached the bottom concrete would be poured to cover the ribs of the slope. Tr. 181. The concrete was especially needed at the corner of each arch. Hendrick called it the "magic corner." *Id*. It was the area of the arch that "ha[d] to have the most support." *Id.* However, the concrete could not be poured until the floor was "concreted" because the weight of the arches would cause their legs to sink into the soft "unpaved" floor. [10] *Id.* According to Hendrick, "[e]veryone [including MSHA] understood" blocking and lagging would not be completed until the slope was finished. However, Hendrick contended the roof falls changed the way MSHA viewed the Plan. Tr. 235.

Hendrick testified Odum came to the mine on January 23, 2006, and walked the slope. At that time, the slope had advanced about 1800 feet. Tr. 185, *see also* Tr. 269-270. Hendrick testified he told Odum the floor would be surfaced with concrete after the slope was driven and then concrete would be applied to the sides and to the corners of the arches. Tr. 185. The side lagging would serve as a form for the concrete. Hendrick believed Odum understood what Mach intended to do and did not have a problem with it. Tr. 186.

Hendrick also testified when Rennie was at the mine on February 21, Hendrick told Rennie the company planned to concrete the slope floor after the slope reached its lowest point. Tr. 144. Rennie did not object. The company had tried to pour concrete as mining progressed, and the process had not worked well. In fact, Gauldin described it as a "nightmare." Tr. 264. Gauldin believed the concrete "absolutely" was needed to properly anchor and support the steel arches. Tr. 265. As important to Mach, once the concrete was in place, the slope could be used for the next twenty years. Tr. 180.

When Rennie was at the mine on February 21, he issued one citation, for a loose screw on a piece of equipment (Tr. 114) and told Hendrick "everything looked good." Tr. 115. The lack of any questions about compliance with the Plan on February 21 was not unusual. Gauldin testified when MSHA officials were at the mine in January, none of the agency's officials voiced any objections to the way in which the slope was being constructed. Approximately 450 steel arches were then in place, none with tension rods. Further, side lagging was missing. Moreover, although Gauldin recalled a "big portion" of the arches exhibited top lagging, not all did. Tr. 271-272.

In addition to the Plan's statements about "steel sets and lagging," the Plan contained

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[10] The floor was so soft it was difficult for equipment to traverse. Concrete also would correct this problem. Tr. 177-178, *see also* Tr. 179-180; Op's Exhs. 3, 4.

another provision destined to be the center of a dispute. The Plan stated: "The language of 30 C.F.R. §§75.209-211 addressing temporary roof support installation procedures shall be adopted for purposes of this plan." [11] Gov't Exh. 2 at 8. According to Gauldin, the same language regarding sections 75.209-75.211 had been in the slope plans of other operators, and it was purposefully included in those plans to allow companies to erect temporary roof supports.[12] Tr. 278- 279. In Gauldin's opinion, because of the language, Mach's miners could proceed up to five feet beyond permanent roof supports when erecting temporary roof supports. After the roof falls, MSHA disagreed.

THE FEBRUARY 24 INSPECTION

On February 24, Rennie went to the mine (Tr. 26) where he met with Hendrick and Gauldin. The slope had advanced approximately 2,200 feet. The roof fall occurred at approximately 2000 feet. Tr. 27, Tr. 152. Rennie proceeded underground with Hendrick. The party traveled to the fall area. Rennie determined there was no methane present, and he took photographs of the roof fall and surrounding mine areas.

The roof leading to the edge of the fall area was supported by roof bolts and steel arches The steel legs of each arch were snug against the slope ribs. Between the rock of the roof and the top of the steel arches was wire mesh netting and below the netting was lagging in the form of wooden beams. The lagging rested on top of the steel arches. *See* Gov't Exh. 4. There was no side lagging. *See* Tr. 54-58.

Rennie could see the fall was large in size. Hendrick stated it extended for about 25 to 30 feet down the slope entry. Tr. 202. The fall had covered a scoop. *Id.;* Tr. 148. Rennie took a photograph while standing "just outby the last good arch on the left side of the [slope] entry." Tr. 60. The photograph showed four destroyed arches inby the good arch and the fall extending toward the left side of the slope entry. Tr. 61, 64; Gov't Exh. 5. In Rennie's opinion, most of the fall originated above the roof bolt anchors. Tr. 65-66. The photograph also showed two roof

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[11] Section 75.209 concerns "Automated Temporary Roof Support . . . systems." Section 75.210 concerns, "Manual installation of temporary support." Section 75.211 involves "Roof testing and scaling."

[12] Section 75.210(b) states:

> When manually installing temporary supports, the first temporary support shall be set no more than 5 feet from a permanent roof support and the rib. All temporary support shall be set so that the person installing the support remains between the temporary support and two other supports which shall be no more than 5 feet from the support being installed.

bolts, one of which was still "in tact" with its bearing plate against the roof. Tr. 62; Gov't Exh. 5. The other roof bolt had part of its shaft exposed. Rennie assumed the roof had fallen around it. *Id.* Rennie testified he did not see any other roof bolts further inby on the left. Tr. 63. Rennie believed most had "[come] down with the roof." Tr. 65.

Having viewed the fall, Rennie returned to the surface where he discussed with Hendrick how the fall would be cleaned up and the roof supported. Tr. 69. Rennie testified Hendrick told him the company was going to use a scoop to remove the debris. In addition, miners would set arch spans on top of the arch legs that were not moved or damaged by the fall. Rennie maintained Hendrick assured him miners would never be under unsupported roof while the work took place. Tr. 42.

Rennie asked Hendrick to put the cleanup plan in writing, which Hendrick did. *Id.; see also* Tr. 202. Rennie said the plan should be submitted to the MSHA district office for approval, and Hendrick had it "faxed" to Vincennes. Tr. 45, 70; Gov't Exh. 3 at 2. Anticipating approval, Rennie modified the section 103(k) order to allow the proposed cleanup to proceed.[13] Tr. 45-46; Gov't Exh. 3 at 1. MSHA maintained the cleanup plan, once approved became part of the original Plan.[14] Tr. 47-48. The cleanup plan stated, "No one to proceed out from unsupported roof." Gov't Exh. 3 at 2. In Rennie's view, this was substantively the same prohibition as that in the Plan stating, "no persons at any time will be allowed to travel under unsupported top." Tr. 48; Gov't Exh. 2 at 8. When Rennie left the mine, he understood, given the prohibitions on

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[13] The modification states:

> The investigation has begun. The miners have been instructed by mine management about procedures to be followed for the roof fall clean up. A supplemental plan has been submitted to the District Manager outlining the procedures to be followed while the roof fall is cleaned up, and how the roof will be supported. No mining is to take place until the additional support is installed.

Gov't Exh. 3 at 1.

[14] Counsel stated, "The Secretary's position has always been that the [cleanup] plan as modified becomes the [P]lan." Tr. 75. Although Mach sent the cleanup plan by fax to the MSHA district office and although the assistant district manager who reviewed it told Rennie he would approve it and to modify the section 104(k) order to allow the cleanup to proceed, nothing in writing was sent to Mach stating the cleanup plan was approved and/or was considered to be part of the Plan. Tr. 163-164.

proceeding out from under supported roof, during the clean up miners would work from under the arch supports that were left standing after the fall. Tr. 52.

THE CLEAN UP AND THE SECOND ROOF FALL

According to Hendrick, cleanup of the fall started on the night of February 24 and continued on February 25. Tr. 202. Mach set one or two additional arches under supported roof. Tr. 240. After the arches were set, miners began working from under them removing rock from the first roof fall and hand-loading it on the conveyor belt. Shortly thereafter, a rock fell from the roof. The rock landed on the fallen material, slid down the debris, and passed between two miners. Tr. 205, 242. Management's plan was to retrieve the scoop first and then remove the fallen rock (Tr. 283), however, Hendrick feared other rocks might fall. The roof was loose and layered (Tr. 206-207), and Hendrick decided a crib was necessary to further support it until the miners "got the cleanup plan implemented."[15] Tr. 124; *see also* Tr. 276.

In Hendrick's opinion, using a crib was the safest way to provide the needed additional support. Tr. 208. Jacks or posts would not work because their maximum length was eight feet, and the height of the roof was more. *Id*. In addition, and as Gauldin explained, a crib was stronger than a jack or post. Moreover, a crib would "[tell] you what's going on" by visually or audibly indicating when it was taking weight. Tr. 282. Hendrick believed the Plan allowed him to "build a crib . . . five feet inby the last permanent roof support." Tr. 205.

Hendrick testified he, Gauldin, and a few other miners proceeded to construct the crib and that during the process, none of them traveled or worked more than five feet inby the last permanent roof support, which in this case was the last arch before the fall area. Tr. 221-222; *see also* Tr. 82-83. He was sure because he "eyeballed" the distance. Tr. 228. Gauldin, speaking for himself, testified he too stayed within the five feet limit. Tr. 276-277.

First, the miners removed debris and leveled the area where they planned to erect the crib. Then, according to Hendrick, he, Gauldin, and one other miner moved out from under supported roof. They stacked the crib timbers and wedged the crib in place. Tr. 208. As Hendrick recalled, the job took between five and seven minutes. Tr. 209. Everything went smoothly. Tr. 211.

Rennie took issue with the way Hendrick and the others constructed the crib. Rennie believed the crib should have been built by going no more than "[a]n arm's length" under unsupported roof. He stated, "you set support as you go and gradually progress out." Tr. 50. However, Rennie knew of no written statement of this "arm's-length" rule. Tr. 154. He agreed although the language of the Plan prohibited persons from proceeding beyond supported roof, the

[15] The crib was to be "temporary" because it partly blocked the entry and because rock on which it was built eventually had to be removed. Tr. 131.

Plan also stated, "The language of 30 C.F.R. § 75.209-211 addressing temporary roof support installation procedures shall be adopted for purposes of this plan." Gov't Exh. 2 at 8. He further agreed the language including sections 75.209, 75.210 and 75.211 in the Plan was not changed after the fall. Tr. 153.

According to Hendrick, the crib was finished around 10:00 a.m on February 25. About an hour and a half later, the foreman told Hendrick the crib timbers began creaking. The noise was the result of the wood being subjected to increasing pressure. Tr. 213. Miners were working in the area. *Id.* The foreman ordered the entire crew to move into a nearby crosscut. After they did, the roof fell. Tr. 123. Because the miners were in the cross cut, no one was injured. *Id*., *see also* Tr. 284.

The second fall was more massive than the first. Hendrick described it as originating 12 or more feet above the first fall. Tr. 212; *see also* Tr. 71. In fact, the fall originated so high in the roof Gauldin stated the only way to support the roof above the fall was to fill the cavity with concrete, which is what Mach did. Tr. 267-268. Of the second fall Gauldin said, "I've never, never seen anything like it." Tr. 268.

RENNIE'S FEBRUARY 27 MINE VISIT

Rennie returned to the mine on February 27, along with Mark Odum. Once there, Rennie was told about the second roof fall. Tr. 69, 71. Rennie then met with Hendrick and Odum. Tr. 70. While the second fall was larger than the first, it encompassed much of the same area. Tr. 71. Rennie testified he learned miners had been working in the area just before the fall. Tr. 72. In addition to building the crib, miners had cleaned up ten feet of the debris from the first fall and they had erected two new steel arches on existing legs to support the roof above the cleaned area. *Id.*

Rennie believed the arches were erected by miners getting "up onto the rock, and . . . bolt[ing] . . . [the arches] to the legs."[16] Tr. 70, *see also* Tr. 72. This is not how Rennie thought the company planned the cleanup. Rennie recalled Hendrick telling him the company was going to use a scoop with a gin pole (a pole that supports hoisting tackle) to raise the arch spans. Using the pole would have allowed all miners to remain under supported roof. *Id.* However, in Rennie's opinion, manhandling the arch spans into position for bolting meant miners had to proceed beyond supported roof and have "an exposed cavity directly over . . .[their] head[s]." Tr. 73. This violated the cleanup plan because, in Rennie's view, the plan "plainly states that no one at any time would be out from under unsupported roof." *Id*.

Hendrick, on the other hand, maintained the roof above the arches was permanently supported with roof bolts. He testified the gin pole was not used because when the arches were

[16] Rennie used the term "manhandle" to describe how the arches were placed in position. *See e.g.*, Tr. 72.

raised, the miners were under roof support. Tr. 247.

After talking to Hendrick, Rennie proceeded to the area of the fall. On viewing the second fall, Rennie noticed pieces of wooden cribbing 12 feet outby the last supported roof. Tr. 78-80; Gov't Exh. 8; Tr. 119. The material was on top of the fall. *Id.* Rennie asked Hendrick how the material got to where he saw it. Hendrick said it was due to forces generated by the fall. Tr. 120. Although Rennie agreed this could have happened (Tr. 80), he nonetheless maintained the crib had been built "out from under unsupported top." Tr. 127.

RENNIE'S MARCH MINE VISITS AND THE CITATIONS

Rennie left the mine, but returned on March 1 and again on March 2. On March 1, Rennie was accompanied by MSHA District Manager, James Oakes. The two men met with Hendrick and reviewed how steel arches were installed in the slope. Tr. 85. On March 2, Rennie, along with Odum, brought members of MSHA's technical support team to the mine to observe how the arches were erected in the roof fall area. Tr. 85-86.

Following his March visits, Rennie consulted with members of the technical support team and with his supervisor. On March 6, he issued Citation No. 7582683 to Mach. Gov't Exh.10. The citation alleges Mach violated section 77.1900-1 by failing to comply with its slope sinking plan. The citation states "[e]vidence . . . indicated . . . work had been performed beyond permanent roof support." Gov. Exh. 10; *See also* Tr. 91. Rennie testified the alleged violation was based on the fact Hendrick told Rennie that Hendrick and Gauldin went up on top of the roof fall, under unsupported roof, to erect the crib and that miners set arches by "manhandling" them "out onto the rock" from under unsupported roof. Tr. 91. In Rennie's opinion, proceeding under unsupported roof violated the part of the Plan that states, "No persons at any time will be allowed to travel under unsupported top." Gov't Exh. 2 at 8; Tr. 91-92. In addition, proceeding under unsupported roof violated the clean up plan, which specifically prohibits the practice.[17] Tr. 92; Gov't Exh. 3 at 2.

[17] Rennie acknowledged mandatory safety standard 30 C.F.R. §75.210(b), which states in part, "When manually installing temporary supports, the first temporary support shall be set no more than five feet from a permanent roof support and the rib," allows miners to proceed up to five feet inby permanent roof support when setting temporary roof support. Tr. 129. He also acknowledged the standard was incorporated into the Plan. Tr. 129. However, he did not consider a crib to be a temporary support, even though he agreed the subject crib was of a temporary nature because the rock under and around it was going to be removed. Tr. 131. Hendrick's view of the question as to whether the crib was temporary roof support was more simple. He stated, "If it's not permanent, it has to be temporary." Tr. 210; *see also* Tr. 286.

In Rennie's opinion, the violation created a "very high chance" that an accident would occur and a miner would be killed. Tr. 93, 95. He pointed out that when the crib was erected, the roof already had fallen once. Tr. 94. In addition, Rennie found the alleged violation to be S&S, because Hendrick told him miners had, in fact, proceeded under unsupported top, albeit not more than five feet under. Tr. 94. Further, because Hendrick knew miners had gone beyond supported top Rennie found the violation was the result of Mach's unwarrantable failure to comply with the Plan. Tr. 94.

In addition to Citation No. 7582683, Rennie issued two other citations at issue. In Citation No. 7582684, Rennie charged lagging was not installed in the slope according to the Plan and in violation of section 77.1900-1. Gov't Exh.11, *see also* Gov't Exh. 4. Rennie believed the Plan required the installation of lagging above the arches, and some of this lagging was missing. Tr. 96, 97; *see* Gov't Exh. 4. He also testified the Plan required the lagging to be three inches thick, and he saw lagging that was two inches thick. *Id.*; Gov't Exh. 2 at 8. The place where the lagging was too thin was above the tripper. [18] Tr. 146. Further, Rennie identified a "whole side" that was not lagged (Tr. 97-98; Gov't Exh. 4), as well as "other isolated areas throughout the slope" where lagging was missing. Tr. 98.

Rennie feared a miner would be hit by rock falling from areas where lagging was inadequate or missing (Tr. 99), but Hendrick viewed this as unlikely. Hendrick estimated, at the time of the roof fall, 90 percent or more of the required lagging was installed. Tr. 222, 225-226. Rennie found the condition was caused by Mach's negligence.

Finally, in Citation No. 7582685, Rennie charged several of the arches were not blocked properly from the top of the slope to about 2000 feet into the slope and none of the arches had tension rods.[19] Gov't Exh. 2 at 13. In Rennie's opinion, the lack of adequate blocking and of tension rods was highly likely to cause permanently disabling injuries to miners. Two falls had occurred, and the lack of proper blocking "[took] away a lot of the [archs'] strength." Tr. 102. He further maintained the conditions were caused by Mach's negligence. Tr. 105-106

THE ALLEGED VIOLATIONS

LAKE 2006-82-R
LAKE 2006-146

[18] After the roof falls, MSHA insisted the Plan be changed "to clarify the lagging requirements" and to specifically require top lagging and side lagging. Tr. 134-135; *see also* Tr. 101-102.

[19] Rennie explained to strengthen the arches' crosspieces, blocks should have been wedged at the top of each leg of the arches between the ribs and the ends of the curved crosspieces. Tr. 103.

Citation No.	Date	30 C.F.R. §	Proposed Assessment
7582682	3/2/06	77.1900-1	$135

As previously noted, counsel for the Secretary moved to vacate the citation, dismiss the contest proceeding, and dismiss the civil penalty proceeding as it related to the citation. The motion was granted. *See* n.2 *infra*.

LAKE 2006-83-R
LAKE 2006-149

Citation No.	Date	30 C.F.R. §	Proposed Assessment
7582683	3/6/06	77.1900-1	$3800

THE CITATION

Citation No. 7582683 states:

> The operator[']s approved slope sinking plan was not being complied with. Evidence observed during the investigation of a roof fall accident in the slope which is under development indicated that work had been performed beyond permanent roof support. Cribbing materials had been placed under unsupported roof on top of fallen rock approximately 12 feet beyond the last permanent roof support. The approved slope sinking plan states that "No person[s] at any time will be allowed to travel under unsupported top[.]"

Gov. Exh. 10.

THE VIOLATION

The framework for analyzing a violation of section 77.1900-1 is identical to that for other "plan" standards (*e.g.*, 30 C.F.R. § 75.220(a)(1) (mandatory roof control plan) ; 30 C.F.R. § 75.370 (mandatory ventilation plan)). When asserting a violation of a submitted and approved plan, the Secretary:

> must first establish that the provision allegedly violated is part of the approved and adopted plan. *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987). She must then prove that the cited condition or practice violated the provision. *Id.* When a plan provision is ambiguous, the Secretary may establish the meaning intended by the

> parties by presenting credible evidence as to the history and purpose of the provision, or evidence of consistent enforcement. *Id.*

Harlan Cumberland Coal Co., 20 FMSHRC 1275, 1280 (Dec. 1998).

Standards such as section 77.1900-1 recognize due process entitles an operator to fair notice of the Secretary's interpretation of a plan's provision. *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (Aug. 1995). "The ultimate goal of the [plan] approval and adoption process is a mine-specific plan with provisions understood by both the Secretary and the operator and with which they are in full accord . . . . '[A]fter a plan has been implemented . . . it should not be presumed lightly that terms in the plan do not have an agreed upon meaning.' " *Jim Walter*, 9 FMSHRC at 907 (*quoting Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981).

The Secretary charges Mach Mining violated the provision of its Plan that states: "No persons at any time will be allowed to travel under unsupported top." As noted above, the provision appears in the section of the Plan titled "Safeguards for Prevention of Caving During Excavation." Gov't Exh. 2 at 8. Therefore, the Secretary has born the first part of her burden by establishing the provision allegedly violated is part of the approved and adopted plan. However, as *Harlan*, *infra*, instructs, the Secretary must do more. The Secretary also must prove that the cited condition or practice violated the provision (20 FMSHRC at 1280), and it is here her allegations of a violation come a cropper.

First, the Secretary maintains miners were beyond permanent roof support because "Evidence observed during the investigation . . . indicated that work had been performed beyond permanent roof support." Gov't. Exh. 10. The "evidence" is described in the citation as "[c]ribbing materials . . . placed under unsupported roof on top of fallen rock approximately 12 feet beyond the last permanent roof support." *Id.* In fact, the testimony establishes a crib was built beyond permanent roof support, but not 12 feet beyond, as the citation implies and as Rennie suspected. *See e.g.* Tr. 80. The Secretary provided no evidence to establish Rennie's suspicion as a fact, and at the hearing Rennie agreed the material could have been pushed or propelled to where he saw it by forces generated by the roof fall. Tr. 80.

What the record makes evident, and what Mach readily concedes, is that prior to the second roof fall, its miners constructed a crib in the fall area to provide temporary support so miners could start cleaning up the fallen roof material. Rennie stated Hendrick told him miners did not go more than 5 feet beyond supported room when they build the crib, and Hendrick repeatedly testified this was the case. Tr. 205, 209, 221-222, 240-241. In additional Gauldin, who helped build the crib, testified at all times he was within five feet of permanent roof support. He was sure because he "eyeballed" the distance. Tr. 228, 276-277.

Rennie was not present when the crib was built, and the Secretary did not present any convincing evidence the crib was constructed in a fashion other than that described by Hendrick and Gauldin, both of whom were present. Therefore, I find miners went beyond supported roof

to build the crib in question, but in so doing they did not go more than five feet beyond permanent roof support.

I further find the crib was temporary in nature as its purpose was to provide temporary roof support. Gauldin explained the crib was built to allow miners to remove debris and to retrieve the covered scoop. Once the scoop was removed, the crib would have been taken down. Tr. 283. Indeed, the crib had to be removed because the material on which it rested ultimately was going to be removed and because the crib blocked part of the entry. Thus, the crib's function was to provide roof support for a limited time. The crib was in every sense of the word, "temporary." Certainly, there are other kinds of temporary support; posts and jacks, for example, but the fact other types of less than permanent support exist does not deprive the subject crib of its temporary status.

It seems clear to me that building the crib did not violate the Plan, which by incorporating section 75.210(b) allowed miners to proceed five feet, but no more, beyond permanent roof support when installing temporary roof supports. In other words, with regard to building the crib, I find the Plan allowed Mach's miners to do exactly what they did, and for these reasons, I conclude Mach did not violate the Plan with regard to building the crib after the first roof fall.

Another aspect of the alleged violation, although one not specified in the citation, is Rennie's belief that miners proceeded under unsupported roof to erect arches prior to cleaning up the first fall. Tr. 73. Hendrick countered Rennie's testimony by maintaining the roof under which the miners worked to erect the arches was supported. Tr. 247.

There are two reasons why this particular allegation does not warrant a finding of violation. First, the allegation is not set forth in the citation and the citation was never amended to include it. Second, I recognize the citation states, "evidence observed during the investigation . . . indicate[s] that work had been performed beyond permanent roof support," but even if I found the phrase inclusive of the unspecified allegation miners worked beyond permanent support to erect several arches, the Secretary has not met her burden of proof. Rennie maintained the roof was not supported. Hendrick maintained it was. Neither witness was patently incredible. Hendrick was there. Rennie was not. The evidence is at best in equipoise, which means the Secretary did not prove the alleged violation by a preponderance of the evidence. *Keystone Coal Mining Corporation*, 17 FMSHRC 1819, 1838 (November 1995).

LAKE 2006-84-R
LAKE 2006-146

Citation No.	Date	30 C.F.R. §	Proposed Assessment
7582684	3/6/06	77.1900-1	$107

THE CITATION

Citation No. 7582684 states:

> The operator . . . has not complied with the approved slope sinking plan. Lagging is missing or has not been installed in the top and sides of the arches at several locations from the top of the slope to about the 2000 foot mark down the slope.
>
> Also, hardwood blocks measuring 3/4 to 2 inches thick were used as lagging in the tops and sides of the arches in several areas in the slope from the top of the slope to about the 2000 foot mark down the slope. The approved slope sinking plan requires on Page 3 that "Arches will be installed on 4-5 foot spacing and lagging with a minimum of 20 gauge corrugated decking or a hard-wood block (minimum 3 inches thick)."

Gov't Exh 11-1.

THE VIOLATION

There are two aspects to the alleged violation. First, the Secretary alleges lagging did not exist where it was required on the top and along the sides of the arches at "several locations from the top of the slope to about the 2000 foot mark down the slope." Gov't Exh. 11-1. Second, she alleges wooden blocks used as lagging on the top and sides of the arches were not of the required thickness in several areas from the start of the slope inby approximately 2,000 feet. *Id.*

After describing the primary and permanent roof support used in constructing the slope, the Plan described secondary and additional roof support. The Plan states: "Secondary support will be provided using arches or steel sets and lagging from the beginning of the cutting zone to the coal bed. . . . Arches will be installed on 4-5 foot spacing and lagged with a minimum of 20 gauge corrugated decking or a hardwood block (minimum 3 inches thick)." Gov't Exh. 2 at 8. The Plan thus requires the use of both arches and lagging. Materials required to be used for lagging must be either corrugated decking or hardwood block, and the decking must be 20 gauge while the block must be a "minimum [of] three inches thick." Gov't Exh. 2 at 8.

The word "lagging" has two connotations. It can mean material used primarily for a support function. It also can mean material used primarily for a protective function. *See DMMRT* at 302. Does the word as used in the Plan mean material that "wedges and secures the roof and sides behind the main timber or steel supports and provides early resistance to pressure;" or, does it mean material used "not to carry the main weight but to form a ceiling or a

wall, preventing fragments or rock from falling through"? *Id.* The Plan is poorly drafted and imprecise, but I conclude the word is used primarily in its protective function and that lagging under the Plan is to be used to protect against rock falling from the roof or sloughing from the ribs.

There is no doubt Mach failed to achieve full compliance in this regard. While Mach erected the steel arches required by the plan, the testimony establishes the company did not provide "lagging from the beginning of the cutting zone to the coal bed." Gov't Exh. 2 at 8. Hendrick testified some side lagging had been installed prior to the first roof fall (Tr. 194), but, as Gauldin testified, there was not much of it. Tr. 272. I find under the Plan, protective side lagging should have been installed as the mining advanced, and Mach's failure to do so violated the Plan as alleged in the citation. [20]

Citation No. 7582684 further alleges the lagging used on the top and the sides of the arches in several areas was of an inadequate dimension. As the citation notes, the Plan required if hardwood block were used lagging should be a "minimum of 3 inches thick." Gov't Exh. 2 at 8. The record supports finding top lagging was less than completely installed from the slope entry to the point where the roof fell. Rennie testified to this effect (Tr. 96, 97), and Gauldin agreed the tops of the arches were not all lagged. Tr. 272. In addition to missing top lagging, some of the lagging installed was not of the thickness required. Rennie identified, and Mach did not dispute, an area where Mach used two inch thick wooden top lagging. Tr. 97-98, Gov't Exh. 4. Hendrick responded that the company intended to eventually replace the two inch lagging with larger lagging. Tr. 146-147. However, this had not yet been done and, as I indicated, I read the Plan to have required on-going compliance on Mach's part. Therefore, I find the Secretary established Mach violated the Plan regarding the required thickness of the top lagging in the area depicted in Gov't Exh. 4, as well as the missing top lagging in areas of the slope as testified to by Rennie. [21]

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[20] Although Hendrick testified "everyone understood" side lagging was not required as mining advanced (Tr. 235; *see also* Tr. 181) the Plan stated, "Secondary support *will* be provided." (Gov't Exh. 2 at 8 (*emphasis supplied)*), and it is more reasonable to read the Plan as requiring implementation to take place as the slope developed, not after the slope was completed. This is because one of the Plan's primary goals was to protect miners during development, and side and top lagging played roles in meeting that goal by protecting miners from rib sloughage and roof fall. Thus, I conclude systematic and on going installation of side and top lagging was required. It is true following the roof falls the Plan was amended to contain more specific requirements about lagging, but the post-falls amendment of the Plan does not vitiate the original requirement. Tr. 138.

[21] It is true Hendrick estimated top lagging was installed over 90 percent of the slope from the fall area outby, but even if this was so, all of the required top lagging was not installed, and the Plan was violated. Tr. 225-226.

S&S and GRAVITY

A 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 a 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 underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood the hazard contributed to will result in an injury; and (4) a reasonable likelihood 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).

Here, the Secretary established a violation of the Plan. She also established a safety hazard contributed to by the violation. The side and top lagging provided protection from rib sloughage and falling roof material. The fact the ribs were likely to slough into the slope was attested to, among other things, by the fact Mach believed it was necessary to surface them with concrete to prevent their deterioration and keep them in tact. Tr. 193. The fact roof material was prone to fall in some areas of the slope was attested by the two falls that occurred and by the additional protective feature – i.e., the steel mesh – Mach chose to install. Tr. 34, 149, 175-176. Side and top lagging would have offered degrees of protection from rib bursts, sloughage, or roof falls. The fact the ribs and roof were subject to sloughage and falls and the fact miners used the slope on a daily basis meant the lack of required lagging and the use of inadequate lagging was reasonably likely to result in injuries to miners as mining continued. Moreover, because such injuries were the result of sloughing and/or falling rock, they were likely to be serious. For these reasons, I conclude the violation was S&S. Moreover, the nature of the likely injuries also meant the violation was serious.

NEGLIGENCE

Inspector Rennie found the violation was due to Mach's "moderate" negligence. Gov't Exh. 11-1; Tr. 99. I conclude he was correct. The company drafted the Plan and was solely responsible for compliance. While Hendrick believed "everyone," including MSHA, understood lagging could await application of concrete to the floor and sides (Tr. 235), a reasonably prudent operator would have read the Plan – as I have found – to require on-going compliance during the slope's development. A major purpose of the Plan, if not *the* major purpose, was to protect miners while they were engaged in the slope's development, and contemporaneous compliance furthered the purpose.

I am of the belief, however, the Secretary was complicit in the violation. At the time Rennie cited the violation, the lack of lagging as required by the Plan was not a recent phenomenon. The conditions were not cited until Rennie's roof fall-related inspection, even though they existed when Rennie and other MSHA personnel, including MSHA's district manager, were in the slope prior to the first fall. During those visits, no one from MSHA commented on the existing deficiencies in side and overhead lagging, let alone cited a violation of section 77.1900-1. Tr. 185, 271; *see also* Tr. 115.

Given the fact both Mach and MSHA did not focus upon the Plan's lagging requirements prior to the first roof fall, and given the fact the record reveals no imminent hazards that would have alerted the company to the immediate need for such lagging, I conclude the company's exhibited an ordinary lack of reasonable care.

LAKE 2006-146

Citation No.	Date	30 C.F.R. §	Proposed Assessment
7582685	3/6/06	77.1900-1	$135

THE CITATION

Citation No. 7582685 states in part:

> The operator . . . has not complied with the approved slope sinking plan. Arches installed in the slope have not been blocked properly. No blocking was installed on the sides of the arches in several locations and top blocking was missing in several locations from the top of the slope to about the 2000 foot mark down the slope, nor were the tension rods installed across any of the arches in the slope.
>
> The approved slope sinking plan requires on Page 3 that "Arches will be installed on 4-5 foot spacing and lagging

> with a minimum of 20 gauge corrugated decking or a hard-wood block (minimum 3 inches thick)." Blocking of the arches will be performed following the manufacturer[']s recommendation. American Commercial Inc.['s] ([m]anufacturer) recommendations are that the arches be blocked or a tension rod installed across the arches.

Gov't Exh 12 at1-2.

THE VIOLATION

There are two aspects to the alleged violation. First, the Secretary alleges arches were not side blocked and top blocked at "several locations from the top of the slope to about the 2000 foot mark down the slope." Gov't Exh. 12–1. Second, she alleges none of the arches had tension rods. *Id.*

After specifying the primary roof support to be used in constructing the slope, the Plan describes secondary support that is authorized, including the arches. In setting forth how the arches are to be installed, the Plan states in part, "Blocking of the arches will be performed following the manufacturer's recommendations. Included (Attachment #3 – Steel Arches) is the manufacture's steel set drawings and calculations." Gov't Exh. 2 at 8. As I read this statement, it does not require blocking, rather it means if there is blocking it must be carried out according to the manufacturer's recommendations. Further, the logical implication of the phrase "Included (Attachment #3– Steel Arches) is the manufacture's steel set drawings and calculations" (Gov't Exh.2 at 8) is that Attachment 3 contains the applicable "manufacturer's recommendations." Gov't Exh. 2 at 13; Tr. 101.

Attachment 3 includes no reference to "blocking." In fact, as the following exchange between the Secretary's counsel and Inspector Rennie shows, there was nothing in the Plan setting forth the manufacturer's recommendations for blocking. Rather, such recommendations were included in an amendment to the Plan that was prepared, submitted, and approved after the subject citation was issued.

> Q. [Secretary's counsel]: Is there anything in this plan that shows manufacturer's recommendations for blocking?
>
> A. [Inspector Rennie]: Not in this plan, no.
>
> Q. [Secretary's counsel]: Okay. In a later plan?
>
> A. In a later plan, there was, yes.
>
> Q. But not in effect at the time?

A. Not in this plan, no.

Tr. 101-102.

Therefore, I conclude the Secretary has not established, and in fact cannot establish under the specific wording of the Plan, that "[a]rches installed in the slope have not been blocked properly." Gov't Exh. 12–1.

I further find she cannot establish a failure to install tension rods on the arches violated the Plan. The purpose of using wood blocks to hold an arch in place and to help bear the weight of the roof may be similar to the purpose of a tension rod in that they both can stabilize an arch and support the weight above and around it. However, they are two very different means of achieving the purpose, and there is nothing in the Plan that states tension rods shall be installed following the manufacturer's recommendation. Rather it is "[b]locking," if used, that must "be performed following the manufacturer's recommendations" (Gov't Exh. 2 at 13), and as Rennie testified, there is nothing in the Plan regarding blocking recommendations. Tr. 101-102. It is not enough to include in the Plan a schematic drawing of an arch showing a tension rod and insist this means the rod must be included on all arches when there is no reference to tension rods in the written portion of the Plan. [22]

For these reasons I conclude the Secretary has not established the conditions set forth in Citation No. 7582685 violated section 77.1900-1.

[22] Indeed, the Plan as approved was written in such an imprecise and convoluted manner misunderstandings as to its meaning were almost certain to occur. The agency owes it to those whom it is charged to protect to make sure any plan she approves states what she and the company actually intend. Approval of a verbal mish mash fosters the safety of no one.

REMAINING CIVIL PENALTY CRITERIA

HISTORY OF PREVIOUS VIOLATIONS

As counsel for the Secretary explained, because the mine was being developed at the time the citations were issued, there is "basically no history of previous violations." Tr. 9. Accordingly, the history of previous violations criteria will have no bearing on the penalties assessed.

SIZE

In proposing penalties for the alleged violations, the Secretary, perhaps due in part to the fact production had yet to commence, indicated Mach was small in size. *See* Petitions for Assessment of Civil Penalty, Exhibits A. I find this to have been the case.

GOOD FAITH ABATEMENT

No allegation was made by the Secretary that Mach failed to exhibit good faith in abating the violation of section 77.1900-1 set forth in Citation No. 7582684. Therefore, I conclude Mach's abatement efforts were timely and effective.

ABILITY TO CONTINUE IN BUSINESS

No evidence was offered that any penalty assessed will affect Mach's ability to continue in business, and I find it will not.

CIVIL PENALTY ASSESSMENT

Citation No.	Date	30 C.F.R. §	Proposed Assessment
7582684	3/6/06	77.1900-1	$107

I have found the violation was serious. I also have found the company's negligence was moderate. Given these findings and the other civil penalty criteria, I conclude a civil penalty of $250 is appropriate.

ORDER

The Secretary has failed to prove the violations of section 77.1900-1 alleged in Citations No. 7582683 and 7582685, and the citations **ARE VACATED**. The Secretary has proven the violation of section 77.1900-1 alleged in Citation No. 7582684, and Mach **SHALL PAY** a civil penalty of $250 for the violation within 40 days of the date of this decision. Upon payment of the penalty, these proceedings **ARE DISMISSED**.

David F. Barbour
Administrative Law Judge

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