**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
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June 18, 2010

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. LAKE 2009-223<br>A.C. No. 12-02010-171751-01 |
| v. | : | |
| BLACK BEAUTY COAL COMPANY, Respondent | : | Mine: Air Quality #1 |

**DECISION**

Appearances: R. Peter Nessen, Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
R. Henry Moore, Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against Black Beauty Coal Company ("Black Beauty"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or "Act"). The case involves twenty violations, including one 104(d)(2) order issued by MSHA under section 104(d) of the Mine Act at the Air Quality #1 Mine operated by Black Beauty. The parties presented testimony and documentary evidence on Order No. 6672489 at a hearing held in Evansville, Indiana on March 31, 2010. The remaining 19 violations were settled on the record at hearing.

## I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

At all pertinent times Black Beauty operated the Air Quality #1 Mine (the "mine"), an underground coal mine near Gibson, Indiana. The Air Quality #1 Mine mined coal and/or coal byproducts which affected commerce. The mine is subject to regular inspections by the Mine Safety and Health Administration pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). The parties stipulated that Black Beauty is an operator as defined by the Act, and is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission. Stip. ¶¶ 1-3.

*a. Order No. 6672489*

On March 4, 2008, Johnny Moore, an MSHA inspector, issued Order No. 6672489 to Black Beauty for a violation of Section 75.1722(c) of the Secretary's regulations. Moore determined that the violation was the result of an unwarrantable failure to comply with the cited standard.

The citation alleges that:

> [t]he guards for the 2 Main West conveyor belt tail piece have not been secured in place during equipment operation. The guards have been hung by belt chains, tie-wire and loosely fastened together with tie-wire. Accumulation of coal fines and mud approximately 3 feet deep has created openings up to 19 inches wide in the guards. The guards will separate with little pressure and swing in several directions. The condition is obvious, extensive and existed for a significant amount of time. This violation is an unwarrantable failure to comply with the mandatory standard.

The inspector found that a permanently disabling injury was highly likely to occur, that the violation was significant and substantial, that one person would be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of $60,000.00.

1. The Violation

Johnny Lee Moore has been an MSHA mine inspector since September 2005. (Tr. 72). Moore has worked as a regular inspector and, as recently as seven months prior to hearing, held the title of Field Office Supervisor for the Vincennes, Indiana MSHA office. (Tr. 40-41). Moore is currently the acting ventilation supervisor in MSHA District 8. (Tr. 39). Prior to working for MSHA, Moore was employed in the mining industry as an engineer. (41-42). He has a mining engineering degree from the University of Kentucky, and extensive MSHA training on guarding. (Tr. 42-43).

On March 4, 2008, Inspector Moore traveled to the Air Quality #1 Mine to conduct an inspection. Terry Courtney, the shift manager, accompanied Moore during the inspection. (Tr. 110). After inspecting one conveyor belt, Courtney drove ahead on the mantrip while Moore began to inspect the tail piece of the two main west ("2MW") conveyor. (Tr. 53). Moore described the area near the tail piece as "muddy" and noted that there were slip, trip and fall hazards along with a semi-buried water line that was slick. (Tr. 59). Further, he stated that the ribs were "kind of bad." (Tr. 59).

The 2MW conveyor tail piece is protected by three guards. Two of the guards hang on the sides of the tail piece, while the third guard is suspended at the end of the tail piece.[1] A large sump is located at the end of the conveyor. (Tr. 56). Moore testified that that the sump was filled with mud and coal fines approximately three and one half feet deep, and that a pile of the same material had accumulated below the tail roller and was pushing the guards apart such that a 19 inch gap in the guarding had developed. (Tr. 56, 60-61); Gov. Ex. 3 p. 16-17 of 3/4/08 notes. According to Moore, there was limited to no walkway around the end of the sump, i.e., approximately 9-10 inches wide at most. (Tr. 56). Further, Moore testified that, had he not utilized a sounding rod to probe the depth of the sump as he carefully traveled around the end of the tail piece, he very well could have "stepped off into [the sump] and grabbed a guard" as he fell. (Tr. 61). Moore observed that the guards had been hung like curtains around the tail piece using a combination of rusty tie wire[2] and chains[3]. (Tr. 57-58, 60). According to Moore, while tie wire may be properly used to fasten corners, it should never be used to hang guards and, instead, the guards should be attached with studs or some type of metal fastener. (Tr. 74). Del Culbertson, an examiner at the mine, testified that he was aware that Moore had in the past recommended that guards be attached by bolts in order to properly secure them. (Tr. 107). Moore noted that some of the tie wire being used to hang the guards was barely hooked at the connection points and had not been locked. (Tr. 58). Further, he determined that the guards were not secure and could be easily pushed or swung with the application of minimal pressure. (Tr. 63).

According to Moore, while there is little reason for a day-to-day miner to be in the subject area, miners would still need to come to this area to conduct preshift examinations and service the equipment. (Tr. 57). Moore testified that in order to adequately inspect the end of the conveyor it would be necessary to carefully hang on to one of the side guards so that you could lean around and observe the rear guard. (Tr. 56-57). In the alternative, one could walk around to the far end of the sump, however, according to Moore, that would not give a very good view of the tail piece or surrounding guards. (Tr. 56-57).

Culbertson testified that it was unlikely that anyone would slip and fall into the sump because most people would not walk around the sump, and rather would just use the crossover approximately 20 feet from the tail piece. (Tr. 101). However, he also testified that during an examination it was common for him to walk around the sump at the 2MW tail piece. (Tr. 97). Culbertson indicated that the guarding arrangement on the tail piece had not been changed in the past six to seven years, and that he conducted the examination of the 2MW belt on March 3rd,

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[1] Moore testified that small pieces of guarding were attached to the bottom of the three guards surrounding the tail pieces. These small additional guards were buried in the mud and were not discovered by Moore until the area was cleaned. (Tr. 58).

[2] According to Moore, tie wire can be different gauges, but the particular wire used on the subject guards was similar to the thickness of a clothing hanger and was very flexible. (Tr. 68-69). Generally tie wire is used to tie up cable. Moore indicated that, although tie wire is generally coated in rubber, it begins to rust quickly in the corrosive mine environment if the rubber wears off. (Tr. 68-69). According to Terry Courtney, tie wire is not as strong as a chain. (Tr. 118).

[3] Moore testified that the use of chains to hang the guards is satisfactory. (Tr. 74).

and found no deficiencies, including no buildup of accumulations at the tail end of the conveyor. (Tr. 99, 106).

Terrance Kiefer, also a mine examiner, conducted the examination of the subject belt the day the order was issued, i.e., March 4th. (Tr. 137). Kiefer testified that he used the crossover to examine the tail piece from each side so that he didn't have to go around the sump. (Tr. 137, 138). Kiefer could not remember any problems with the guards on March 4th, and, if there had been any problems he would have put them in his notes. (Tr. 139). He further testified that, on March 4th, he did not see any accumulations of mud or dirt pushing the guards out at the tail end. (Tr. 142).

Moore testified that the condition was obvious and that the "poor construction [of the guards] was immediate and very noticeable right off the bat." (Tr. 53, 60). He instructed Culbertson to shut down the conveyor. (Tr. 53, 60, 100). Moore issued order number 6672489 as a 104(d)(2) order for a violation of 30 C.F.R. § 75.1722(c). (Tr. 45); Gov. Ex. 2.

Shortly after the belt was stopped and the order issued, Terry Courtney returned to the area of the 2MW tail piece. (Tr. 54, 111-112). As Courtney traveled around the tail piece, he slipped and, while falling into the sump, grabbed on to the end of one of the guards that was hung by a chain. (Tr. 57, 113). Moore did not see Courtney grab the guard, but he heard him fall into the sump. (Tr. 67-68). According to Moore, Courtney told him that he had grabbed the guard. (Tr. 67-68). Courtney testified that the guard did not fail when he grabbed it and he did not come in to contact with the tail roller. (Tr. 113).

Moore testified that the alleged violative condition was abated by cleaning the area, including the sump, so that the guards were accessible, fabricating one guard to replace the end guard which was in very poor condition and, finally, securely attaching the guards with mechanical fasteners. (Tr. 67); Ex. G-2. According to Moore, the cleaning and repairing of the guards took approximately five hours. (Tr. 65)

The Commission has recognized that "[t]he purpose of section 75.1722(c) is to prevent accidents in the use of equipment." *Arch of Kentucky, Inc.*, 13 FMSHRC 753, 758 (May 1991), *aff'g* 12 FMSHRC 536 (Mar. 16, 1990) (ALJ). The regulation requires that "[e]xcept when testing the machinery, guards shall be *securely* in place while machinery is being operated." 30 C.F.R. § 75.1722(c)(emphasis added). The Secretary's regulations do not define what it means for a guard to be "*securely* in place." The Commission has held that in the absence of a regulatory definition of a word, the ordinary meaning of that word may be applied. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation . . . is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation' ") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (other citations omitted)). The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation[] and . . . serves a

permissible regulatory function." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citation omitted).

The ordinary meaning of "secure," the verb form of the adverb in question, is instructive. Webster's defines "secure" as "to make fast." *Webster's New Collegiate Dictionary* 1037 (1979). Webster's goes on to define "fast" as "1 a: firmly fixed . . . c: adhering firmly . . . d: not easily freed . . . e: [stable]." *Id*. at 413. Relying upon the ordinary meaning of these words, the Secretary's regulation seems to require that guards be firmly fixed in place such that they are not easily moved while machinery is in operation. The Secretary's interpretation of the cited standard, set forth in the MSHA Program Policy Manual ("PPM"), seems to echo the ordinary meaning. The PPM, for purposes of this particular analysis, states that "[g]uards installed to prevent contact with moving parts of machinery shall . . . [b]e firmly bolted or otherwise installed in a stationary position." V MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 75.1722 ("*PPM"*). Based on the above analysis, the cited mandatory standard requires guards to be firmly fixed in a stationary position.

I credit Inspector Moore's testimony that the poor condition of the guards was easily noticed and that the guards could be easily pushed or moved with the application of minimal pressure. I find that the guards, specifically those guards hanging by the rusty tie wire, were not fastened in a manner that could be described as "firmly fixed" or "in a stationary manner." In fact, the guards were so loose that they were being pushed away from the tail piece by accumulations of materials that had built up in the sump and under the tail piece, thereby creating a large gap in the guarding. I question whether Culbert or Keifer were conducting adequate exams given that they failed to notice these accumulations. The guards were not "securely" in place, as required by the cited standard. The belt was running at the time Moore began his inspection of the tail piece, and no evidence has been presented that any sort of testing was underway. For those reasons, I find that Black Beauty violated the cited standard.

Black Beauty argues that the guards were secure, as evidenced by Courtney falling and grabbing the guard which prevented him from coming into contact with the tail pulley. However, I credit Inspector Moore's testimony that it was only by chance that Courtney happened to grab the end of a guard that was hung by a chain, as opposed to rusty tie wire. I further credit Moore's testimony that, had Courtney grabbed the end of a guard hung by tie wire, the inadequate securing of the guard would not have prevented contact with the pulley. For those reasons, I reject Black Beauty's argument.

Black Beauty also argues that the 19 inch gap in the guarding is not a violation of the standard at issue and, in addition, need not be guarded because there is no "reasonable possibility of contact and injury," as required by Commission case law. BB Br. 11 (*citing Thompson Brothers Coal*, 6 FMSHRC 2094, 2097 (Sept. 1994)). Again, I reject Black Beauty's argument. While I need not reach the question of whether the gap in the guard is a violation of the cited standard, I take note of the fact that the gap was caused in large part by the unsecure nature of the guards, which allowed the guards to be pushed outwards by accumulations which had built up underneath the tail piece. Nevertheless, I credit Inspector Moore and his drawings which indicate that the gap spanned 19 inches at the widest point. While the gap may not be 19 inches

at the top, it is a gap nonetheless, and provides an opening where a miner may come in contact with the pulley at a distance much less than 30 inches. Based on Courtney's fall, the mine cannot dispute that it is easy for a miner to slip and fall into the guarding. When that happens, it is reactionary to grab onto, or attempt to grab onto, anything in reach. I find that the gap in the case, whether it was 19 inches or narrower, was a direct result of the guards not being "securely" in place.

In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd*, *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152. The Secretary has met her burden of proving that, on the day of inspection, the mine failed to comply with the cited standard. I find that the Secretary has established a violation.

2. Significant and Substantial Violation and Gravity

A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). 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 (Apr. 1981). The Commission has explained that:

> [i]n order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (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 in question will be of a reasonably serious nature.

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

First, as noted above, I find that there is a violation of the mandatory safety standard as alleged by the Secretary. Second, I find that a discrete safety hazard existed as a result of the violation. The guards were capable of being easily moved by the application of limited pressure. The guards were loosely hung by tie wire and had been pushed away from the tail piece by accumulations of coal and mud, thereby exposing an area where a miner could have gotten caught in the conveyor or a pinch point on the conveyor belt.

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

Third, I find that there is more than a reasonable likelihood that the hazard described will result in an injury. As discussed above, the guards were inadequately secured, with some of the guards having been loosely hung by rusty tie wire, as opposed to chains. The danger in such a situation is that a miner could fall into the unsecured guards which, given their unsecure nature, would not prevent the miner from coming into contact with moving machinery of the tail piece. If a miner were to come into contact with the moving machinery, in this case a tail pulley or moving conveyor belt, they could be caught in the conveyor or a pinch point on the conveyor belt. While improperly secured guards may in some instances present all that is needed to find a violation to be S&S, here, the situation is exacerbated by the condition of the area in which the inadequate guards were located. The mud and coal accumulations, slick water line, and narrow walkway around the sump presented a serious slip and fall hazard.

I credit Inspector Moore's testimony that, had he not utilized a sounding rod to probe the depth of the sump as he carefully traveled around the end of the tail piece during his inspection, he very well could have "stepped off into [the sump] and grabbed a guard" as he fell. (Tr. 61). As further evidence of the slip and fall hazard and the likelihood of injury, I note Courtney's fall into the sump. Courtney, a shift manager at the time the order was issued and an individual who would presumably have knowledge of the sump at the end of the conveyor in question, slipped while traveling around the tail piece and, while falling into the sump, grabbed the end of one of the guards that happened to be hung by a chain. Had he grabbed an end that was hung by rusty tie wire, the tie wire would not have held his weight and he would have fallen into the tail pulley machinery. While the conveyor was off at the time Courtney fell, assuming normal mining

operations, the conveyor would have been on when other miners were examining or passing through the area. Even if the area was not frequented by a large number of miners per day, the hazardous conditions presented by slip, trip and fall hazards made it highly likely that any individual traveling around the tail piece would fall into the unsecured guarding and, in turn, come in contact with the moving machinery of the tail piece. I further credit Inspector Moore's testimony that the ribbed tail roller increases the hazard and potential for injury. (Tr. 61-61). According to Moore, ribbed rollers, as opposed to smooth rollers, are much more difficult to break free from once an individual becomes entangled.

Fourth, I find that it is reasonably likely that an injury sustained as a result of the hazard presented would be of a reasonably serious nature. I credit Moore's testimony that accidents in which miners are caught in the pinch points of machinery often result in the loss of fingers, arms or other appendages, and can result in the death of a miner. (Tr. 61).

Moore testified that, in his experience, the subject violation was certainly S&S. Black Beauty argues that it is unlikely that a miner will be in a position to get caught in the conveyor. Specifically, it argues that belt examiners are the only individuals who would be in the area while the belt was in operation, and the only other miners likely to be in the area, maintenance people, would de-energize the conveyor before beginning work near the tail piece. While there may be limited exposure, I credit the inspector's testimony and find that the unsecure guarding, combined with the trip and fall hazard and the fact that examiners would be in the area at least once per shift, make it more than reasonably likely that an injury would occur and that the injury would of a reasonably serious nature. Further, I find that only one person would be affected by this condition, given that it is unlikely that two people would be in the area and fall in into the conveyor simultaneously. For the above reasons, I affirm the citation as written with regard to the Secretary's S&S and gravity findings.

3. Unwarrantable Failure and Negligence

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* at 2004-04; *Rochester & Pittsburgh Coal Co*., 13 FMSHRC at 193-94. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.,* 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol,* 22 FMSHRC at 353.

In order to conduct an appropriate analysis of the aggravating factors, it is important to consider the context in which the order was issued, specifically those events that occurred prior

to the date the order was issued. Moore testified that in January of 2008 he traveled to Black Beauty's Air Quality #1 Mine to conduct a routine inspection. (Tr. 44). During the course of the inspection, Moore issued a number of citations for conveyor belt guarding violations, including violations for unsecure guards. (Tr. 47). On January 28, 2008, Moore informed Marty Wade, a Black Beauty employee, that many of the conveyor guards were unacceptable and could contribute to miners being injured. (Tr. 48). The following day, Moore had additional discussions concerning the guarding with Ron Madlem, Rick Kerry, Gary Campbell, Terry Courtney, Brandon Flath, and Chris Robinson. (Tr. 48-50). At some point during the days following the discussions, Moore and members of Black Beauty management created a list of the conveyors at the mine. (Tr. 49). Moore testified that he struck an agreement with Black Beauty management that the mine would, at the rate of one conveyor per day, examine and make necessary repairs to the guards on each of the 25 to 26 conveyor belts at the mine. (Tr. 49-50). Courtney testified that he was aware of the list of belts that required guarding repairs, but he was not aware that the use of tie wire was problematic. (Tr. 117). According to Moore, Brandon Flath, who was in charge of the belt crew, told Moore that after the meeting he, along with a group of other Black Beauty employees, had examined the belts and prioritized the conveyor drives that needed the most work on their guarding. (Tr. 50-51). Flath testified that the belts were not addressed in order of priority, but rather by starting in one area and then working across the mine. (Tr. 129). Flath testified each drive had approximately 17 sheets of guarding, and that to redo the guarding on a drive he would have to fabricate components and build new hangers. (Tr. 122-123).

Flath testified that he was aware of the list and that Moore didn't want to see tie wire attached anywhere on the guards; however he never informed the belt examiners of Moore's problem with tie wire. (Tr. 120-121, 130-131). Kiefer, an examiner, testified that he was not aware of the list, but that he had heard that Inspector Moore had a problem with the way the guarding was affixed to the conveyors. (Tr. 141). Ronald Madlem, a safety supervisor at the mine, testified that he was aware of the list and Inspector Moore's concern with using tie wire. (Tr. 145). Flath further testified that, in spite of the list, he never committed to examining/repairing one conveyor per day. (Tr. 123). When questioned regarding his response to Moore's proposed plan Flath stated "I didn't say I couldn't do it. . . . I didn't think it was possible, . . . [but] I didn't say, no, that's impossible, we can't do that. I'm not going to do that. I just – you know, okay." (Tr. 130). Flath testified that he only committed to doing his best. (Tr. 123).

Moore noted in his testimony that many of the conveyors did not need actual work or repairs, and could have easily been checked off after a quick examination. (Tr. 49). However, he noted, while many of the guards were well constructed, it was the method of hanging and securing those guards that was unacceptable and needed to be addressed. (Tr. 49-50). Specifically, Moore cited the unacceptability of using tie wire to hang guards. (Tr. 50). Moore testified that in the weeks and days following the meeting he noticed that the agreed to examination/repair schedule was not being adhered to. (Tr. 52). According to Flath, the guarding of only five or six belts had been examined/repaired as of March 4th, the day the subject order was issued. (Tr. 124). Moore testified that on March 6th, two days after the order was

issued, he spoke to Brandon Flath, who told Moore that the mine was working on the guarding but that they had fallen behind schedule. (Tr. 78).

I credit Moore's testimony with regard to the agreement that was reached and Black Beauty's subsequent failure to abide by that agreement. Further, I find that the agreement not only put Black Beauty on notice that greater efforts were required for compliance, but also expressly set out what was required for compliance. In spite of that notice, Black Beauty failed to make a reasonable effort to repair the guards which, in turn, resulted in the subject order.

In addition, I find that the violative condition existed for an extended period of time and, while some effort was made to abate the violation, it was minimal at best. The condition existed during Moore's January 28th inspection, and had not been abated prior to the March 4th inspection during which the order was issued. The mine had indicated to the inspector that it would repair the guards on one conveyor each day. I was not persuaded by Flath's testimony that he was diligently working on the guards or that he did not commit to repairing one conveyor per day. I credit Moore's testimony that Black Beauty was not fulfilling its end of the bargain, and, in doing so, allowed the violative condition, which I have found to be of an S&S nature, to exist for over a month. The violative condition took five hours to abate. That time included cleaning the area, fabricating the appropriate guarding, and securely attaching the guarding. This particular drive required a great deal more work than many of the other drives, yet its condition was corrected in approximately five hours. 25 to 26 days was more than enough time to repair the guarding on the conveyors at the mine, regardless of any agreed to schedule, yet Black Beauty failed to do so. In fact, the only step taken by Black Beauty to abate the violative condition was to place the 2MW belt on the list of belts that needed to be examined.

I find that the violative condition was obvious. I credit Inspector Moore's testimony that the condition was obvious and immediately noticeable when he entered the area. The guards were hung at some points by rusty tie wire, which was described as being approximately the same thickness as a clothing hanger. In addition, the guards were capable of being easily moved with the application of minimal pressure. Further, the guards had been pushed away from the tail piece by a pile of accumulations. Such conditions are very obvious and should have been easily noticed by Black Beauty's examiners.

Black Beauty avers that it has used the same guarding practices for years without issue. While this may be true, it stands to reason that guarding systems deteriorate over time and must be repaired. In this case, it appears that stop-gap repairs were made in lieu of more permanent fixes. As mentioned above, the condition was obvious, and therefore should have been addressed by Black Beauty regardless of whether it had been cited in the past.

Moore testified that the mine had received approximately 33 violations related to guarding since May 2006 and he, personally, had issued 17 violations for guarding since July 2007. Management was notified in several meetings with Moore that there was a serious problem with the guarding systems. Ample time was given to the belt boss and the shift managers to conduct the inspections and make corrections. The mine had a recent history of guarding violations, and was on notice of the need to comply. In spite of that, the serious lack

of reasonable care exhibited by management resulted in continued guarding violations, including the one at issue, and clearly amounts to aggravated conduct constituting more than ordinary negligence. For the above reasons, I find that Black Beauty has unwarrantably failed to comply with the mandatory standard and I affirm the Secretary's high negligence finding.

*b. Remaining nineteen citations.*

The parties entered into a stipulation at hearing regarding the remaining 19 violations in this docket. The Secretary agreed to modify Citation Nos. 4263729, 4263730, 6669996, 6670742, 6670747, 6681052, 6681084, 6681086 and 6682005 to non-S&S violations and to remove the unwarrantable designation from Citation No. 6678358. The parties agreed that the Respondent will pay the penalty as assessed for Citation Nos. 6669994 and 6682100 and that the Secretary will reduce the remaining violations, primarily be modifying the level of negligence. The entire docket was originally assessed at $317,405.00 with $60,000.00 of that amount assessed to the Order that was tried, leaving $257,405.00 for the citations that are settled. The Respondent has agreed to pay $71,518.00 of that amount.

There was a discussion on the record about the settlement and the details of the modification of each alleged violation are set forth in the transcript. The discussion revolved around the reasons for this particular settlement and other recent settlement motions that have been filed concerning this mine operator. I am reluctant to approve a settlement that has such a drastic reduction in penalty and so many modifications to the citations. However, given the representations of the parties and a review of the file, I find that the proposed settlement is appropriate and the Motion to Approve the Settlement is **GRANTED.**

## II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R.§ 2700.28. The Act requires that, "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is "bounded by proper consideration of the statutory criteria and the deterrent purpose[s] . . . [of] the Act. *Id.* at 294; *Cantera Green,* 22 FMSHRC 616, 620 (May 2000).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size and ability to continue in business. The violations were abated in good faith, and no evidence has been presented to the contrary. The history shows a number of violations for guarding in the 15 months prior to this order, including the violations discussed above. I find that the Secretary has established that the negligence is high for the violation and that the gravity determined in the order is accurate. The total proposed penalty of $60,000.00 is appropriate in this case, given the statutory criteria.

## III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of $60,000.00 for the contested order, and **ORDER** Black Beauty Coal Company to pay the Secretary of Labor the sum of $131,518.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

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