FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 17, 1998

INLAND STEEL MINING COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
22.	:	Docket No. LAKE 98-4-RM
	:	Citation No. 7809287; 9/5/97
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 98-5-RM
ADMINISTRATION (MSHA),	:	Citation No. 7809288,
		9/9/97
Respondent	:	
	:	Minorca Mine
	:	Mine ID No. 21-02449
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 98-45-M-A
Petitioner	:	A.C. No. 21-02449-05611
v.	:	
	:	Minorca Mine
INLAND STEEL MINING COMPANY,	:	
Respondent	:	

DECISION

Appearances: L. Joseph Ferrara, Esq., Jackson & Kelly, Washington, D.C., for Contestant/Respondent;
Christine M. Kasak, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Respondent/Petitioner.

Before: Judge Hodgdon

These consolidated cases are before me on Notices of Contest and a Petition for Assessment of Civil Penalty filed by Inland Steel Mining Company against the Secretary of Labor, and by the Secretary, acting through her Mine Safety and Health Administration (MSHA), against Inland Steel, respectively, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815. The company contests the issuance to it of two citations alleging violations of the Secretary=s mandatory health and safety standards. The petition seeks a penalty of $1,328.00 for the contested violations. For the reasons set forth below, I vacate one citation, modify and affirm the other, and assess a penalty of $50.00.

Background

The Minorca Mine is an open pit, taconite[1] mine in St. Louis County, Minnesota, operated by Inland Steel. On September 5, 1997, while conducting a semi-annual inspection of the mine, MSHA Inspector Leon Mertesdorf issued two citations alleging violations of section 56.20011 of the Secretary=s regulations, 30 C.F.R. ' 56.20011. Citation No. 7809287 alleges that:

> At the South side of the Plant Electric Shop, there was a Service road that passed along said shop that was [a] travel route from the Fines Crusher and other associated shops. There was a Fifth Wheel Semi-Trailer used for storage parked at the said location, South of the Plant Electric Shop, which was a hazard to any vehicles traveling from the lower plant site. The said Trailer front end was raised by placing blocks under the dolly wheels. The height of the trailer was 51 inches from the roadway/ground that was graded up to the trailer. The hood of a pickup truck was 48 inches, and could travel under the raised trailer. The trailer supports/dollies were 10 feet back from the end of the raised end of the trailer, that was parked with the front facing South. The traffic traveled from the South and curved toward the left/West. There was no barricade or even a warning to prevent travel under [the] raised trailer.

Citation 7809288 alleges that:

> At the bottom floor of the Flux Plant of the Pellet Plant, there was an Over-head Crane with a Repair Bay below that was not barricaded while an employee was inspecting and working with

[1] ATaconite@ is A[a] local term used in the Lake Superior iron-bearing district of Minnesota for any bedded ferruginous chert or variously tinted jaspery rock, esp. one that enclosed the Mesabi iron ores (granular hematite); an unleached iron formation containing magnetite, hematite, siderite, and hydrous iron silicates (greenalite, minnesotaite, and stilpnomelane). The term is specif. applied to this rock when the iron content, either banded or disseminated, is a least 25%.@ American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 560 (2d ed. 1997) (*DMMRT*).

> hand tools on the said over-head crane, and the hand tools could be dropped upon persons below. The area was not barricaded or warning placed at the entrance to said Service bay, to prevent persons from entering below a hazardous condition that would alert that person of conditions that were unaware to them.

Section 56.20011 requires, in pertinent part, that: "Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches."

A hearing was held on March 31, 1998, in Duluth, Minnesota. The parties also submitted post-hearing briefs in the cases.

Findings of Fact and Conclusions of Law

Citation No. 7809287

Inspector Mertesdorf had been to the mine twice before the inspection in this case, once for an accident investigation and in March 1997 for a previous semi-annual inspection. He testified that as he drove up the road toward the trailer, "[e]verything looked different than I had seen it before and I couldn't understand how I could have missed something like this before" in March. (Tr. 37-38) He stated that the difference was that

> [T]he trailer was higher and there was -- the road was graded off entirely underneath the trailer and you couldn't find the road edge like it normally was. There used to be a road edge where the, you know, where a grader goes along the road. You'd leave a lip and there was kind of a washout there before. And this is all graded over.

(Tr. 38.) The inspector later explained that the edge or lip that he was referring to was grader windrow.[2] He contended that "the hazard would be to possibly run underneath [the trailer]." (Tr. 40.)

The company's evidence indicated that the trailer had been in the same location since 1988 and there had not been any traffic incidents involving it. Mr. Gus Josephson, Inland's Staff Safety and Environmental Engineer, further testified that the roadway up to and on either side of the trailer was graded twice weekly and that any windrow resulting from the grading was not

[2] "Windrow" is a "ridge of soil pushed up by a grader or bulldozer." *DMMRT* at 628. "Windrow" is incorrectly reported as "windroll" throughout the transcript.

intended to serve as a berm along the road. He contended that any hazard involving the trailer was immediately obvious.

The issue in this citation is whether the hazard perceived by the inspector, driving underneath the trailer, was Aimmediately obvious.@ The Commission has held that although something may be Areadily observable@ and Avery much in plain sight@ the hazard associated may not be obvious. *American Materials Corp.*, 4 FMSHRC 415, 481 (March 1992). However, this is not such a case. I conclude that any hazard involving the trailer, and particularly the hazard of driving underneath it, is immediately obvious to someone approaching the trailer on the frontage road.

The old saying that Aa picture is worth a thousand words,@ applies to this citation. I base my decision mainly on Respondent=s Exhibit B-1, a picture of the scene. In the picture it is clear that the trailer is not hidden from the roadway; anyone approaching it can see it from a long way off. Nor does it appear that the roadway goes under the trailer. The roadway plainly goes on either side of it. Even if one were not concerned with driving under the trailer, one would still stay clear of the trailer to avoid hitting it.

I find that the evidence strongly supports the Respondent=s contention that any hazard involving the trailer would be Aimmediately obvious@ to employees and that, therefore, no barricade or warning sign was required. Accordingly, I will vacate the citation.

Citation No. 7809288

In August 1997, Inland contracted with Lakehead Constructors to build a new overhead flux mill crane in the Flux Plant. While the construction project was proceeding, Inland flagged or blocked with tape all access ways to the work area. On the morning of September 9, 1997, the employee performing the preshift inspection in the area noted that the entrances to the work area were still blocked with tape at 7:30 a.m. However, when the inspection party arrived at the area, between 10:00 a.m. and 11:00 a.m., the tape blocking one of the doors was no longer up, but was found lying on the ground partially under the wheel of a basket-lift truck belonging to Lakehead. A Lakehead employee was on the crane checking the tightness of the bolts with a torque wrench at the time. Although there is no direct evidence as how the tape came down, it seems clear that someone maneuvering the Lakehead truck had knocked it down.

Inland has stipulated that the citation sets out a violation of the Secretary=s rules. Nevertheless, it argues that the citation should be vacated because the Secretary abused her discretion in issuing a citation to both Inland and the independent contractor. The company maintains that the Secretary=s failure to follow the guidelines set out in *III MSHA Program Policy Manual*, Part 45, at 6 demonstrates this abuse of discretion. I do not agree and find that the Secretary did not abuse her discretion in this case.

The Commission has recently summarized the law in this area, as follows:

The Commission and various courts have long recognized that, under the Mine Act=s scheme of strict liability, an operator, although faultless itself, may be held liable for the acts of its independent contractor. *Bulk Transp. Services, Inc.*, 13 FMSHRC 1354, 1359-60 (September 1991); *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981). In instances of multiple operators, the Secretary has Awide enforcement discretion@ and may proceed against an operator, independent contractor, or both. *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249 (February 1997), *aff=d per curiam*, No. 97-1392 (4th Cir. January 8, 1998); *Consolidation Coal Co.*, 11 FMSHRC 1439, 1443 (August 1989). The Commission has determined that Aits review of the Secretary=s action in citing an operator is appropriate to guard against abuse of discretion.@ *W-P Coal Co.*, 16 FMSHRC 1407, 1411 (July 1994). A litigant seeking to establish an abuse of discretion bears the heavy burden of establishing that there is no evidence to support the Secretary=s decision or that the decision is based on an improper understanding of the law. *Mingo Logan*, 19 FMSHRC at 249-50 n.5.

The Commission has considered various factors in determining whether an enforcement action constitutes an abuse of the Secretary=s discretion, including the operator=s day-to-day involvement in the mine=s operation (*Mingo Logan*, 19 FMSHRC at 250, *W-P*, 16 FMSHRC at 1411), whether the operator is in the best position to affect safety (*Bulk*, 13 FMSHRC at 1361) and whether the enforcement action is consistent with the purpose and policies of the Act (*Old Ben Coal Co.*, 1 FMSHRC 1480, 1485 (October 1979)). In addition, the Commission has considered whether any of the criteria of the Secretary=s Guidelines for proceeding against an operator have been satisfied. *See, e.g., Bulk*, 13 FMSHRC at 1360; *Mingo Logan*, 19 FMSHRC at 250. While failure to satisfy the criteria is not fatal to an enforcement decision (*Mingo Logan*, 19 FMSHRC at 250), the Commission has relied upon satisfaction of the criteria in concluding that there was no abuse (*e.g., Bulk*, 13 FMSHRC AT 1360).[4]

[4] The Commission has repeatedly recognized that the Guidelines are policy statements and not binding on the Secretary. *Mingo Logan*, 19 FMSHRC at 250; *D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (September 1996), *appeal docketed*, No. 96-70877 (9th Cir. Oct. 21, 1996).

Extra Energy, Inc., 20 FMSHRC 1, 5-6 (January 1997).

In this case, Inland, not Lakehead, had assumed the responsibility for barricading the entrances to the area where the crane was being installed, from the beginning. Having taken on that responsibility, it follows that Inland should also be responsible for the violation when the blocking ribbon came down. In addition, since the crane was being constructed in Inland=s building, Inland clearly was in the best position to affect safety by preventing access to the area in which the crane was being erected. Furthermore, the barricades were clearly for the benefit of Inland=s employees who may have to walk through the area, not Lakehead=s employees who were already working in the blocked off area. Accordingly, I conclude that the Secretary properly cited the operator for this violation.

Significant and Substantial

The Inspector found this violation to be Asignificant and substantial.@ 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." 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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

As in most cases, the issue here is whether the third criterion has been met, that is, whether the violation contributed to a hazard which would be reasonably likely to result in an injury. The inspector testified that he found this violation to be S&S because he believed that the employee tightening the bolts on the crane could drop his torque wrench and it could hit someone below.

In order for this to occur, there would have to be a confluence of events which happened simultaneously. First, someone would have to enter the area through the one door at which the blocking ribbon had been knocked down. Second, the employee would have to drop the wrench. Third, the person entering the area would have to be below the employee dropping the wrench. Fourth, the wrench would have to hit the person below. The evidence indicates that one or two

Inland employees per shiftã were likely to be in the area. The evidence further establishes that the job of Atorquing@ the bolts took about two hours and then work on the crane was complete.

Considering all of these factors, I conclude that it was not reasonably likely that an injury would occur in this situation. Accordingly, I will modify the citation to delete the Asignificant and substantial@ designation.

Negligence

The inspector determined that Inland=s negligence for this violation was low because Awhen [the Lakehead employee is] climbing about on a crane he should have also made sure that this area was roped off below.@ (Tr. 67.) I agree that the contractor=s employee should have made sure that the area was blocked off. This is particularly true since he apparently was the one who knocked down the tape in the first place. I disagree, however, with the inspector=s assessment of negligence. In view of the fact that Inland=s preshift inspection had verified that the tape was still in place and that the tape was not taken down by an Inland employee, I conclude that Inland was not negligent at all in this instance and will modify the citation.

Civil Penalty Assessment

The Secretary has proposed a penalty of $309.00 for Citation No. 7809288. However, it is the judge=s independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. ' 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the criteria, the parties have stipulated that the AMinorca Mine worked in excess of 600,000 hours during the period January 1, 1996 - December 31, 1996.@ (Jt. Ex. 1.) Therefore, I conclude that it is a large mine. The Assessed Violation Report indicates that 189 violations had occurred at the mine in the 2 years preceding these violations. (*Id.*) I find this to be in the average range for a mine this size and, thus, it neither aggravates nor mitigates a penalty. Inland did not present any evidence that a penalty would have an adverse effect on its ability to remain in business, so I conclude that it would not. I have already found that the violation was not S&S, so its gravity is not serious, and I have already found that the company was not negligent. The evidence indicates that the Respondent demonstrated good faith in achieving rapid compliance after being informed of the violation. Taking all of these factors into consideration, I conclude that a penalty of $50.00 is appropriate for this violation.

ORDER

Accordingly, Citation No. 7809287 in Docket Nos. LAKE 98-4-RM and LAKE 98-45-M-A is **VACATED** and Docket No. LAKE 98-4-RM is **DISMISSED**; and Citation No. 7809288 in Docket Nos. LAKE 98-5-RM and LAKE 98-45-M-A is **MODIFIED** by deleting the

Asignificant and substantial@ designation and reducing the level of negligence from Alow@ to Anone@ and is **AFFIRMED** as modified. Inland Steel Mining Company is **ORDERED TO PAY** a civil penalty of **$50.00** within 30 days of the date of this decision. On receipt of payment, Docket Nos. LAKE 98-5-RM and LAKE 98-45-M-A are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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