FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 19, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2006-201
Petitioner	:	A.C. No. 36-09274-87087
	:	
v.	:	
	:	
SUMMIT ANTHRACITE, INC.,	:	Brockton Slope
Respondent	:	

DECISION

Before: Judge Bulluck

Appearances: Lynne Bowman Dunbar, Esq., U.S. Department of Labor, Arlington, Virginia, and Ronald M. Miller, CLR, U.S. Department of Labor, Hunker, Pennsylvania, for Petitioner;
Michael Rothermel, President, Summit Anthracite, Inc., Klingerstown, Pennsylvania, for Respondent.

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor on behalf of her Mine Safety and Health Administration ("MSHA"), against Summit Anthracite, Incorporated ("Summit"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Act" or "Mine Act"), 30 U.S.C. § 815. The Secretary seeks civil penalties in the amount of $1,569.00 for 19 alleged violations of the Act and her mandatory safety standards.

A hearing was held in Reading, Pennsylvania. The Secretary's Post-hearing Brief is of record.[1] Respondent waived its right to file a brief. For the reasons set forth below, I **VACATE** three citations, **AFFIRM** 16, as **AMENDED** where indicated, and assess penalties against Respondent.

[1] Two editions of the transcript were issued, identical in text, but distinguishable by configuration of page content and count. The Secretary's Brief references the second, more condensed edition. The citations in this decision are made to the first edition. For purposes of Commission review and any subsequent proceedings, the first edition is the official transcript.

I. Stipulations

The parties stipulated as follows:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this civil penalty proceeding, pursuant to section 105 of the Mine Act, 30 U.S.C. § 815;

2. Summit Anthracite, Incorporated, was an "operator" as defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the coal mine at which the citations at issue in this proceeding were issued;

3. The operations at Summit Anthracite, Incorporated, Brockton Slope Mine, at which the citations at issue in this proceeding were issued, are subject to the jurisdiction of the Mine Act;

4. The individuals, whose signatures appear in block 22 of the citations at issue in this proceeding, were acting in their official capacities as authorized representatives of the Secretary of Labor when the citations were issued;

5. True copies of the citations at issue in this proceeding were served on Respondent or its agent, as required by the Mine Act; and

6. The total proposed penalty for the citations at issue in this proceeding will not affect Respondent's ability to continue in business.

Tr. 12-13.

II. Factual Background

Michael Rothermel is the president of Summit Anthracite, which owns and operates the Brockton Slope underground coal mine in Schuylkill, Pennsylvania. Rothermel and his business partner operate the mine on an intermittent basis and, at most, employ one to two additional miners. Tr. 459. In the fall and winter of 2005-2006, when the citations at issue were written, Brockton Slope was a relatively new mine, and Rothermel was in the process of installing new systems. Tr. 322. Several inspectors were involved in issuing these citations, pursuant to section 104(a) of the Act.

Inspector Ronald Pinchorski generated Citation No. 7008242 on November 22, 2005, in the Pottsville Field Office, without a physical inspection, charging a violation of 30 C.F.R. § 50.30, for failure to file a quarterly employment and coal production report with MSHA. Tr. 158-63; ex. G-9.

On January 10, 2006, Inspector Jack McGann, accompanied by Potttsville Field Office supervisor, Lester Coleman, conducted an E-18, shaft/slope sinking inspection of the Brockton Slope mine, which encompassed the surface as well as the underground areas. Tr. 22-26. During a conversation with Michael Rothermel while on the surface, McGann observed a Mack haul truck enter mine property and back up, without an audible back up alarm. Tr. 27-28. After

verifying that the alarm was not operable, McGann issued Citation No. 7008148, alleging a violation of 30 C.F.R. § 77.410(a). Tr. 34-40; ex. G-2.

The following day, January 11, Inspector Gregory Mehalchick, accompanied by his supervisor, Tom Garcia, conducted a compliance assistance inspection of the Brockton Slope mine because the roof support being utilized was not generally used in District 1. Tr. 61-62. MSHA Inspector Danny Silvers was at the mine as well, conducting a spot electrical inspection of the new installations. Tr. 58, 322. While the three inspectors were underground, accompanied by Rothermel, several citations were issued. Mehalchick observed that the roof control system was performing adequately but, based on measurements he took with Silvers, found that the overall height and width of the entry at the face exceeded the specifications of the mine's Shaft and Slope Sinking Plan. Tr. 65. Accordingly, Mahalchick issued Citation No. 3561179, charging a violation of 30 C.F.R. § 77.1900-1. Tr. 66-67; ex. G-3. Mehalchick also issued Citation No. 3561180, charging a violation of 30 C.F.R. § 77.1914(a), based on his observation of a non-permissible pump in the mine that was being used to maintain the water level at the face. Tr. 75-79; ex. G-5. Silvers issued Citation No. 7008402, alleging a violation of 30 C.F.R. § 77.502, based on his observation of a 110-volt submersible pump located near the continuous miner, with a three-prong grounded cord plugged into a two-prong ungrounded extension cord. Tr. 329-35. When he returned to the top of the slope, Silvers discovered an unused and unplugged standard knockout (3/4 inch hole) in the bottom of the metal disconnect box on the telephone pole located near the mine entrance. Tr. 339-40. Therefore, he issued Citation No. 7008401, charging a violation of 30 C.F.R. § 77.516. Ex. G-26. Finally, while inspecting the electrical trailer that provides power to the underground section of the mine, Silvers discovered two unused and unplugged 2 ½ inch openings in the top of the disconnect box located on top of the trailer. Tr. 344-45. Consequently, he issued Citation No. 7008400, charging a violation of 30 C.F.R. § 77.516. Ex. G-27.

On January 18, Inspector Silvers returned to the Brockton Slope mine, which was not operating that day, to continue his spot electrical inspection. Tr. 349-50, 384. Silvers met with Rothermel and examined the electrical book, which documents the electrical examinations conducted in the mine. Rothermel told Silvers that the mine had been energized since late November. Tr. 355. The first record of an electrical examination, however, was January 13. Tr. 351-53. As a consequence of finding no record of electrical monthly examinations for November and December 2005, Silvers issued Citation No. 7008403, charging a violation of 30 C.F.R. § 77.502. Ex. G-29. As a result of the information that Rothermel gave Silvers about the electrical installations at the mine, Silvers issued two additional citations. First, Rothermel informed Silvers that he, Rothermel, had performed all the electrical work in the mine, and had

not had a qualified electrician examine the work before energizing the mine. Tr. 359-61. While Rothermel reported to Silvers that he had not worked on any energized circuits, he also acknowledged that he had not worked under the supervision of a qualified electrician. Tr. 361-62. Based on his finding that Rothermel was not qualified to perform the electrical installations in the mine without the supervision of a qualified electrician, nor had his work been examined and tested by a qualified electrician prior to energizing the mine, Silvers issued Citation No. 7008404, alleging a violation of 30 C.F.R. § 77.501. Tr. 362-66; ex. G-30. Silvers also learned from Rothermel that the mine's continuous miner had not passed a permissibility inspection underground before it was placed in service in December 2005, as required by regulation, but had been inspected off-site before it was brought into the mine, Tr. 372-75. Consequently, Silvers issued Citation No. 7008405, alleging a violation of 30 C.F.R. § 77.502 for failure to conduct the appropriate electrical exam in December. Tr. 376-77; ex. G-32.

On January 19, Inspector Pinchorski participated in a quarterly health and safety inspection of the underground and surface areas of the Brockton Slope mine. Tr. 164-66. Accompanying Pinchorski were his supervisor, Lester Coleman, supervisor Tom Garcia, Inspector Mehalchick, two MSHA technical support personnel, and Rothermel. Tr. 164-66. As a result of his observations, Pinchorski issued several citations. He issued Citation No. 7008253, alleging a violation of 30 C.F.R. § 77.1605(k), for failure to provide adequate berms along an elevated roadway. Tr. 167; 175-83; ex.G-12, 14. Citation No. 7008254 was issued by Pinchorski for failure to identify the mine office with a sign, in violation of section 109(a) of the Act, 30 U.S.C. § 819(a). Tr. 184; ex. G-15. Citation Nos. 7008255 and 7008256 allege violations of 30 C.F.R. §§ 77.1104 and 77.205(b), respectively, for a combustible materials accumulation and an obstructed travelway in the mine's mobile home-type trailer. Tr. 185-94; ex. G-16, 17. Pinchorski issued Citation No. 7008257, alleging a violation of 30 C.F.R. § 77.400(a), for failure to provide adequate guarding of belts and pulleys in the engine compartment of a Caterpillar haul truck. Tr. 194-99; ex. G-18. Citation No. 7008258 alleges a violation of 30 C.F.R. § 77.1102, for failure to provide a diesel fuel storage tank with signs warning against smoking and open flames. Tr.199-202; ex. G-19, 20. Pinchorski issued Citation No. 7008259, alleging a violation of 30 C.F.R. § 77.205(b), for failure to make the travelway clear of stumbling hazards in the generator building. Tr. 202-07; ex. G-21. He also issued Citation No. 7008260, charging a violation of 30 C.F.R. § 77.412(a), for failure to equip the compressed air receiver tank with an automatic pressure relief valve and a pressure recording gauge. Tr. 208-15; ex. G-23.

Based on information that Tom Garcia had learned on February 6, about a roof and rib fall at Brockton Slope, Mehalchick and Garcia returned to the mine on February 7 to conduct an investigation. Tr. 81-82. Also present were Rothermel and an inspector from the Pennsylvania Department of Deep Mine Safety. Tr. 84-85. Mehalchick and Garcia, accompanied by Rothermel, traveled underground as far as the collar, and observed that the area inby the collar was unsafe: top rock had fallen, some bolts and roof support were down and the continuous miner was visible, but covered with debris. Tr. 85, 88-96; ex. G-7. Consequently, Mehalchick issued Citation No. 3082100, alleging a violation of 30 C.F.R. § 50.10, for failure to formally

notify MSHA that an accident had occurred. Tr. 86-87, 98-100; ex. G-8. Mehalchick also issued a section 103(k) order (not at issue in this proceeding), requiring Rothermel to submit for MSHA's approval, a plan for retrieving the continuous miner. Tr. 87, 101-02.

III. Findings of Fact and Conclusions of Law

A. Fact of Violation

1. Citation No. 7008242

Inspector Pinchorski testified that, in assigning the Brockton Slope mine to him, his supervisor had called his attention to the fact that the quarterly employment and coal production report had not been timely submitted. Tr. 160. Therefore, Pinchorski issued 104(a) Citation No.7008242, alleging a non-significant and substantial violation of section 50.30(a).[2] Citation No. 7008242 describes the hazardous condition as follows:

> The operator did not submit MSHA Form 7000-2 quarterly employment and coal production report to the Denver office for the 3rd quarter of 2005.

Ex. G-9. Pinchorski assessed the operator's negligence as moderate because, he reasoned, Rothermel had been in business for a long time and knew or should have known that the report was due in a timely manner. Tr. 158-59. According to Pinchorski, the citation was served on Rothermel by certified mail. Tr. 161. Thereafter, he stated, when the inspectors conducted the health and safety inspection of the mine in February 2006, and the quarterly report had not been submitted by that time, he issued a 104(b) order for Rothermel's failure to abate the citation. Tr.160-61; ex. G-10. The citation was finally abated on February 23, 2006, when a report was sent to MSHA by facsimile. Tr. 161-63.

Michael Rothermel acknowledged that he had been submitting quarterly reports for 20

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[2] 30 C.F.R. § 50.30(a) requires the following:

> Each operator of a mine in which an individual worked during any day of a calendar quarter shall complete a MSHA Form 7000-2 in accordance with the instructions and criteria in § 50.30-1 and submit the original to the MSHA Office of Injury and Employment Information, P.O. Box 25367, Denver Federal Center, Denver, Colo. 80225, within 15 days after the end of each calendar quarter. These forms may be obtained from the MSHA District Office. Each operator shall retain an operator's copy at the mine office nearest the mine for 5 years after the submission date. You may also submit reports by facsimile, 888-231-5515. To file electronically, follow the instructions on MSHA Internet site, http:/www.msha.gov. For assistance in electronic filing, contact the MSHA help desk at 877-778-6055.

years, and stated that he had timely submitted the form by regular mail. Tr. 432-33. He admitted that he had failed to maintain a copy of the report, even though section 50.30(a) requires operators to retain copies of such reports for five years. Tr. 473-75. According to him, MSHA inspectors had been more reasonable in the past about minor oversights. Tr. 434-36. He did concede, eventually, that the report was submitted late, and that the company now sends them by facsimile. Tr. 435-36. Accordingly, I find that section 50.30(a) was violated, as alleged.

2. Citation No. 7008148

Inspector McGann testified that he was approximately 70 feet from the Mack haul truck when he observed it backing up without hearing an alarm. Tr. 28. In order to verify his observation, he stood about three feet from the cab, instructed the operator to put the vehicle in reverse so that he could listen for the alarm and, again, it did not sound. Tr. 29-30, 46-47. Consequently, McGann told the truck operator that he would be issuing a citation to his boss, the contractor. Tr. 55-57. He also issued Citation No. 7008148 to Rothermel, charging a significant and substantial violation of section 77.410(a).[3] Citation No. 7008148 describes the violative condition as follows:

> The Mack haul truck #240 operating in the coal load out area was not provided with an automatic warning device that gives an audible alarm when the truck is put in reverse.

Ex. G-2. McGann testified that at the close-out conference, Rothermel stated that he was not responsible for contractors coming on his property - - that they should have their trucks "up to

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[3] 30 C.F.R. § 77.410(a) requires as follows:

> Mobile equipment such as front-end loaders, forklifts, tractors, graders, and trucks, except pickup trucks with an unobstructed rear view, shall be equipped with a warning device that--
> (1) Gives an audible alarm when the equipment is put in reverse; or
> (2) Uses infrared light, ultrasonic waves, radar, or other effective devices to detect objects or persons at the rear of the equipment, and sounds an audible alarm when a person or object is detected. This type of discriminating warning device shall--
> (i) Have a sensing area of a sufficient size that would allow endangered persons adequate time to get out of the danger zone.
> (ii) Give audible and visual alarms inside the operator's compartment and an audible alarm outside of the operator's compartment when a person or object is detected in the sensing area; and
> (iii) When the equipment is put in reverse, activate and give a one-time audible and visual alarm inside the operator's compartment and a one-time audible alarm outside of the operator's compartment.

par." Tr. 41-42. The citation was terminated on January 30, 2006, by Inspector Pinchorski, who observed that the haul truck had been removed from mine property. Tr. 39-40; ex. G-2.

Inspector McGann explained that he believed it reasonably likely that an injury could occur, that would result in loss workdays or restricted duty, because the truck could back into pedestrians or vehicles behind it and result in injuries to the leg and head and also, the truck driver could be hurt. Tr. 34-35. This assessment, that the hazard affected the safety of the mine operator, the truck driver, and the end-loader operator, formed the basis of his significant and substantial designation. Tr. 36-37. McGann explained that he assessed the mine operator's negligence as moderate because he was responsible for all equipment on his mine property. Tr. 37.

Rothermel testified that the back-up alarm sounds and increases in volume the closer it comes to an object. Tr. 424. He conceded that he did not hear the alarm sound when the truck backed up, and that a front-end loader was operating in the area. Tr 467-68. According to him, the back-up alarm did not sound because the driver was not backing toward any object. Tr. 426-27. He admitted that he had not given the inspector this information, and he doubted that the truck driver even knew it. Tr. 426-27. Finally, Rothermel never made the argument during the course of the hearing that he was not responsible for the condition of the independent contractors' trucks that enter the mine property.

It is clear that the alarm was not audible when the truck backed up and, even if the alarm were activated by detecting echos from the sound of the truck nearing an object, as Rothermel alleges, the standard requires that a one-time audible alarm sound outside the operator's compartment when the truck is put in reverse. Therefore, section 77.410(a) was violated, as alleged.

B. <u>Significant and Substantial</u>

Inspector McGann determined that the gravity of the violation was "significant and substantial" (or "S&S"). The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that is "of such nature as could significantly and substantially contribite to the cause and effect of a coal or other mine or safety hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury 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 forth four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 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. *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* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). In *U. S. Steel Mining Co., Inc.,* 7 FMSHRC 1125, 1129 (August 1985), the Commission provided further guidance:

> We have explained 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 (August 1984); *U. S. Steel Mining Co., Inc.,* 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation, the reasonable likelihood of injury, should be made in the context 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 (December 2005); *U.S. Steel Mining Co.,* 6 FMSHRC 1573 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding the violation." *Texasgulf, Inc.,* 10 FMSHRC 498, 501 (April 1998); *Youghiogheny & Ohio Coal Co.,* 9 FMSHRC 2007 (December 1987).

Applying the *Mathies* criteria to this case, I have found a violation and that failure to maintain a back-up alarm that is audible in the surrounding environment was reasonably likely to result in injuries to unsuspecting pedestrians, equipment operators, and the truck operator, himself. It is also reasonably likely that injuries resulting from an accident with such a large instrumentality, i.e., lacerations, broken bones and trauma to the head and vital organs, would be of a reasonably serious nature. Accordingly, I find that the violation was S&S.

3, 4. <u>Citation Nos. 7008402 and 7008403</u>

Inspector Silvers issued Citation No. 7008402, alleging a non-significant and substantial violation of section 77.502, after he discovered in an underground area of the mine, a small submersible pump (3-pronged cord) plugged into an ungrounded extension cord (2 prongs), so that the bare ground prong was exposed on the exterior of the extension cord.[4] Tr. 329. According to Silvers, the pump was not running at the time, and the cord extended about 50-60

[4] 30 C.F.R. § 77.502 requires that "[e]lectric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept."

feet to within two feet of another extension cord, obviously the connection for energizing the pump. Tr. 327, 329-32. He explained that the pump was set up for ungrounded operation, thereby posing a shock hazard. Tr. 333, 335. The Condition or Practice section of the citation states that:

> The 110vac submersible pump located at the end of the track on the slope was not maintained to assure a safe operating condition in that the extension cord the three prong pump cable was plugged into was an ungrounded extension cord. The pump was not energized and the cable supplying power to it was unplugged about 60 foot [sic] away.

Ex. G-25. Silvers testified that he found it unlikely that someone would be injured by the condition, based on the fact that the pump was unplugged and because Rothermel's surprised reaction convinced him that the condition had existed for only a short time. Tr. 333-34. He assessed the operator's negligence as moderate, he explained, because the pump's naked ground prong should have been obvious when it was connected to the ungrounded extension cord. Tr. 334-35. According to Silvers, Rothermel immediately abated the citation by removing the ungrounded extension cord from the mine. Tr. 337.

Rothermel expressed his opposition to the citation by testifying that the pump was not operating and the extension cord was taken out of service as soon as Silvers identified the problem. Tr. 456-57. I am persuaded by the positions of the cords that the pump was ready and available for use, and that it was ungrounded when energized. Therefore, section 77.502 has been violated, as alleged.

Silvers also issued Citation No. 7008403, alleging a non-significant and substantial violation of section 77.502. The citation describes the violation as follows:

> There was no record of a monthly electrical examination for the month of November or December 2005.

Ex. G-29. Silvers testified that the first entry in the electrical book was January 13, 2005. Tr. 351-52. He explained that surface operations regulated by Part 77 are required to have monthly inspections of their electrical installations and, therefore, he had expected to see entries for every month that the mine had been energized. Tr. 352-54. According to Silvers, Rothermel told him that the mine had been energized sometime in late November, that he was aware of the requirement, but that he had simply forgotten to have a qualified electrician conduct the periodic electrical examinations. Tr. 355. Because this was a "record" citation, Silvers found it unlikely that an injury would result from the violation, and he assessed the operator's negligence as moderate because Rothermel had been in the business for a long time and knew of the requirement. Tr. 356-57. The citation was terminated by the electrical exam recorded on January 13. Tr. 357.

Rothermel essentially stipulated at the hearing that he had committed the violation, but emphasized that he objected to having been cited where the abatement occurred prior to issuance of the citation. Tr. 462. Therefore, section 77.502 was violated, as alleged.

5, 6. Citation Nos. 7008400 and 7008401

Inspector Silvers issued Citation Nos. 7008400 and 7008401, alleging non-significant and substantial violations of section 77.516, after discovering a 3/4 inch and two 2 ½ inch unused knockouts in the bottom of electrical disconnect boxes located on the surface.[5] Tr. 339-40, 344-46. The Condition or Practice section of Citation No. 7008400 describes the violation as follows:

> Two unused openings existed in the top of the energized disconnect box marked Miner Disconnect. The openings were 2 ½ [inches] in diameter. The disconnect was located in the trailer beside the head frame. Reference NEC 370-8.

Ex. G-27. Citation No. 7008401 describes the violation as follows:

> An unused opening existed in the energized visible disconnect box mounted on a pole beside the slope fan. The opening was on the bottom right side. The box is marked 480 vac. Reference NEC 370-8.

Ex. G-26. Section 370-8 of the National Electric Code of 1968, as incorporated by section 77.516, requires that openings in electrical boxes be either used or plugged. Tr. 340-41. Silvers determined that an injury would be unlikely to occur respecting both conditions, because the miner disconnect box with the 2 ½ inch openings at the top was at least 6 ½ feet off the ground, and the 3/4 inch opening in the other box was too small to allow access to the electrical components. Tr. 342, 347. He explained that his assessment of moderate negligence was based on Rothermel's explanation that the violations were inadvertent, but that he should have known about them at some point in time. Tr. 342, 348. Rothermel promptly abated the citations by plugging the unused openings. Tr. 342.

Rothermel testified that he had purchased electric boxes from a coal company that had gone out of business, and had assumed that they had been inspected by MSHA and were up to code. He essentially conceded that he had violated the standard by acknowledging that there was a problem with the boxes that was fixed probably within 15 minutes of Silvers' discovery. Tr. 457-58, 489-90. He also conceded that the boxes may have been installed for one to two months and that, had a qualified electrician conducted a monthly inspection, as required, the

[5] 30 C.F.R. § 77.516 states that "[i]n addition to the requirements of §§ 77.503 and 77.506, all wiring and electrical equipment installed after June 30, 1971, shall meet the requirements of the National Electrical Code in effect at the time of installation."

openings would have been detected. Tr. 490-91. Accordingly, in both instances, I find that section 77.516 was violated, as alleged.

7. Citation No. 3561179

Inspector Mehalchick issued Citation No. 3561179, alleging a non-significant and substantial violation of section 77.1900-1, after discovering that Respondent had not complied with the mine's Shaft and Slope Sinking Plan.[6] Tr. 65. Respondent's Shaft and Slope Sinking Plan was approved by MSHA on July 6, 2005, and required that the entry to the slope have a maximum height and width of eight feet. Tr. 71; ex. G-4. The citation alleges the following:

> The operator shall adopt and comply with the shaft or slope sinking plan for the mine. The operator's plan calls for the slope to be a maximum of eight feet high by eight feet wide. The slope was measured approximately 8'3" high by 13'5" wide at the face. Men are required to work and travel in this area.

Ex. G-3. Mehalchick testified that he found that the violation was unlikely to result in an injury because the roof control utilized in the mine appeared to be adequate. Tr.66. He explained that, subsequently, Respondent was permitted to submit a revision of its Shaft and Slope Sinking Plan, and the citation was terminated by MSHA's approval of the Plan. Tr. 67-68.

Although Rothermel argued that there is no procedure in Part 77 regulations for revision of shaft and slope sinking plans, Respondent's Shaft and Slope Sinking Plan includes a Roof Control Plan that incorporates revision procedures set forth in section 75.113. See Tr. 107-109. Furthermore, as a very experienced mine operator, it is reasonable to hold Rothermel responsible for knowing that he should not have deviated from the mine's approved Plan without first contacting MSHA. He stipulated that the dimensions of the slope at the face were "technically" at variance with the Plan and, therefore, a violation. Tr. 70. Accordingly, I find that section 77.1900-1 was violated, as alleged.

8. Citation No. 3561180

Inspector Mehalchick issued Citation No. 3561180, alleging a non-significant and substantial violation of section 77.1914(a), based upon his observation of a non-permissible pump located at the face.[7] The Condition or Practice is described as follows:

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[6] 30 C.F.R. § 77.1900-1 requires that, "[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."

[7] 30 C.F.R. § 77.1914(a) requires that "[e]lectric equipment employed below the collar of a slope or shaft during excavation shall be permissible and shall be maintained in a permissible condition."

> Electrical equipment employed below the collar of a slope during excavation shall be permissible and maintained in permissible condition. The sump pump at the face of the slope is not a permissible pump. Men are required to work and travel in this area. Ventilation tubing extended to approximately ten feet of the face, providing approx. 15,000 cfm. No methane was detected. The pump was maintained in good condition.

Ex. G-5. Mehalchick testified that the pump was located near the face of the slope, approximately 150-250 feet from the surface. Tr. 75. He explained that the pump was lacking MSHA identification indicating that the pump was permissible. Tr. 79. Mehalchick found that the violation was unlikely to cause an injury, he explained, because although non-permissible, the pump was maintained in good condition, there was adequate ventilation at the face and, during the inspection, no methane was detected. Tr. 77-78. He ascribed moderate negligence to the operator because Rothermel should have known that equipment used at the face must be permissible. Tr. 78.

During cross-examination of Mehalchick, Rothermel acknowledged that the pump was non-permissible. Tr. 109. It is Rothermel's contention that MSHA unfairly "singled him out," by issuing a letter to other underground anthracite coal operators six months after he was cited, granting them a two-week grace period in which to switch from non-permissible to permissible pumps. Tr. 112-13, 119-23. I am persuaded by the Secretary's argument, however, that, at the time Respondent was cited its operations were inspected under Part 77 of the regulations, and that the notice to which Rothermel referred pertained to slope development under other conditions that are regulated by Part 75. Tr. 114-118. In any case, the distinction is not pivotal, because the mere issuance of the letter six months after the citation was issued to Respondent establishes its irrelevance. Accordingly, I find a violation of section 77.1914(a), as alleged.

9. Citation No. 7008404

Inspector Silvers issued Citation No. 7008404, after learning that Rothermel had performed the electrical installations and had overlooked having them examined before energizing the mine. Tr. 359-61. The citation charged a significant and substantial violation of section 77.501.[8] The violation is described as follows:

[8] 30 C.F.R. § 77.501 provides that "[n]o electrical work shall be performed on electric distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by persons who installed them or, if such persons are unavailable, by persons authorized by the operator or his agent.

A non-qualified electrician performed electrical work and the work was not examined and tested by a qualified electrician prior to being placed in service.

Ex. G-30. The citation was terminated by the electrical inspection performed by the qualified electrician five days earlier on January 13. Tr. 368. Silvers explained that Rothermel had been authorized to work on de-energized circuits, but only under the direction of an MSHA qualified electrician, and that he had not been authorized to energize the system until it had been examined and tested by a qualified electrician. Tr. 361-63, 365-66. Therefore, because of the extensive nature of the work and the safety risks associated with low, medium and high voltage electricity, unexamined and untested prior to energization, Silvers found it reasonably likely that a permanently disabling injury could occur, and designated the violation significant and substantial. Tr. 364-65. Silvers also testified that he evaluated the operator's negligence as moderate, because he believed Rothermel's explanation that his failure to have the installations inspected prior to powering the mine had been an oversight. Tr. 368.

MSHA records indicate that Rothermel had been certified as a qualified electrician, for both surface and underground installations, through 1999. Tr. 370-71; ex. G-31. Moreover, Rothermel conceded the violation, but objected to the S&S designation and any likelihood of injury, based on the quality of his work. Tr. 70. Accordingly, I find that a violation of section 77.501 has been established.

I do not find, however, that Rothermel's performance of electrical installations was reasonably likely to result in an injury of a serious nature. Silvers testified that Respondent's unsupervised, then unexamined, work could have reasonably contributed to numerous safety hazards ". . . bad connections, a flash, a burn, a cable that was going through a panel that may have been cut and would possibly ground out, that the arc itself would injure you." Tr. 366. None of these hazardous conditions existed, however. Silvers acknowledged that "[t]he circuits that I saw, the cable runs I saw I thought was very well, very good." Tr. 405. He also testified that the qualified electrician had reported "no deficiencies found" in the January 13 electrical book entry, and that he, himself, had indicated the same in his field notes. Tr. 408. Therefore, I find that the violation was not S&S.

10. <u>Citation No. 7008405</u>

Inspector Silvers issued Citation No. 7008405, after discerning that Respondent's continuous miner had not passed a permissibility inspection prior to being placed into service, alleging a significant and substantial violation of section 77.502-2. It is clear, however, as the Secretary points out, that the evidence conforms to the broader standard, 77.502, which requires that electric equipment be frequently examined, tested, and properly maintained by a qualified person, rather than the narrower substandard, 77.502-2, which requires that those tests be

performed at least monthly.[9] Sec'y Br. at 36-37. Accordingly, this citation will be analyzed under section 77.502. *See Faith Coal Co.,* 19 FMSHRC 1357, 1361-62 (August 1997) (permitting adjudication of issues actually litigated by the parties irrespective of pleading deficiencies).

Citation No. 7008405 describes the violation as follows:

> The monthly electrical examination and tests required under provision 77.502 were not conducted for the month of December 2005.

Ex. G- 32. Silvers testified that Rothermel informed him that the continuous miner had been put in service the last week of December, and that the permissibility inspection had been conducted "at the breaker before it was loaded and moved to the mine site." Tr. 372-73. Silvers explained that permissibility must be established by a qualified electrician at the site where the equipment is to be used. Tr. 373-75, 377. He assessed the violation as reasonably likely to result in a permanently disabling injury and, therefore, significant and substantial, primarily because transporting the machine - -loading and off-loading the machine and cables, bouncing on the highway - - has the potential of damaging its components, including sensitive instruments like the methane monitor, and damage to the cables could result in burn injuries. Tr. 376-79. He explained that, in charging the operator with moderate negligence, he had taken into account that anthracite miners are relatively inexperienced with permissible equipment, and that Rothermel had made some effort to comply with the regulations by having the continuous miner inspected off-site. Tr. 379-81. The citation was terminated by the January 13 electrical inspection and calibration performed by a qualified electrician. Tr. 381.

Rothermel conceded that he had violated the standard, but disagreed with the S&S designation. Tr. 462. Accordingly, I find that the Secretary has established a violation of section 77.502. Without evidence of any damage to the components of the continuous miner, however, I do not find that the violation was reasonably likely to result in an injury of a serious nature. Accordingly, I find that the violation was not S&S.

11. <u>Citation No. 7008253</u>

Inspector Pinchorski issued Citation No. 7008253, alleging a significant and substantial

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[9] 30 C.F.R. § 77.502-2 provides that "[t]he examinations and tests required under the provision of this § 77.502 shall be conducted at least monthly."

30 C.F.R. § 77.502 provides that "[e]lectric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept."

violation of section 77.1605(k), for Respondent's failure to provide adequate berms along elevated roadways.[10] The Condition or Practice is described as follows:

> The elevated roadways located on the mine property were not adequately bermed on the outer bank to prevent accidental overtravel at the following locations: for a distance of approximately 35 feet from the hoist building in a southerly direction along the creek with a drop of approximately 40 feet; to the northeast of the mine hoist building on the main haul road leading to the tipple area, for a distance of approximately 20 feet with a drop off of approximately 15 feet; the main haul road leading to the tipple area where the road crosses over the creek on both sides for a distance of approximately 20 feet with a drop off of approximately 40 feet; in the area of the mine settling pond on [the] south side of the pond for a distance of approximately 40 feet with a 10 foot drop off; and on the elevated road leading past the mine generator building for a distance of approximately 65 feet with a drop off of approximately 65 feet.

Ex. G-12. Pinchorski testified that, in the areas cited, mine personnel and inspectors were present, and that water company personnel drive through. Tr. 176. In his opinion, a truck or car or loader could have a mechanical problem, or a vehicle operator could make a mistake, causing a vehicle to travel over the roadside down to a ditch, creek or pond. Tr. 177. Pinchorski explained that some areas were entirely without berms, while others cited were bermed with "little piles of dirt that were nowhere near mid-axle high." Tr. 229-34. According to Pinchorski, the dirt piles that he observed, no more than 3-4 inches high and a few inches wide, may have been a barrier for a bicycle, but could not have prevented a car from overtravel. Tr. 235-36, 240-41. He determined that the violation was significant and substantial based on the reasonable likelihood that serious injury, i.e., broken bones and head trauma, could result from overtravel, and that the likelihood of occurrence becomes "more likely when the activity becomes more prevalent at the mine." Tr. 176, 178. Pinchorski assessed the operator's negligence as moderate because of Rothermel's years of experience in the mining industry and his familiarity with berm requirements in mine construction. Tr. 179. Pinchorski further testified that Respondent timely abated the citation, except for one cited area. Tr.180-81. Consequently, he issued 104(b) Order No. 7008277, as a result of Respondent's failure to berm the roadway near the generator building, where there is a 65-foot drop down to the lower mine property. Tr. 180-82; ex. G-13, 14. According to Pinchorski, as of the date of the hearing, because that area remained unbermed, the citation had not been completely abated. Tr. 180, 436.

Rothermel testified that the mud berms, initially four feet high, had settled to 1 ½ feet high by two feet wide, with "at least 10 foot of mud between the road and what was left of the berm." Tr. 437-38. According to him, all areas of roadway cited were flat, except the remaining unbermed area, and no vehicles could overtravel because they would get stuck in the mud.

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[10] 30 C.F.R. § 77.1605(k) provides that "[b]erms or guards shall be provided on the outer bank of elevated roadways."

Tr. 436-39, 476. He testified that he bermed the areas within two days of the citation, except that he did not construct berms or guardrails along the roadway elevated 30 feet above the others, because the deep miners never use that segment for fear of rupturing the township waterline that runs under it. Tr. 476-82. He further explained that the roadway continues off mine property for about three miles and extends across a number of other properties. Tr. 478-79.

The Commission has held that "the adequacy of a berm or guard under section 77.1605(k) is to be measured against the standard of whether the berm or guard is one a reasonably prudent person familiar with all the facts, including those peculiar to the mining industry, would have constructed to provide the protection intended by the standard." *U.S. Steel Corp.,* 5 FMSHRC 3, 5 (January 1983). The Commission explained that "[t]he definition of berm in section 77.2(d) makes clear that the standard's protective purpose is the provision of berms and, by implication, guards that are "capable of restraining a vehicle." *Id.* (citing 30 C.F.R. § 77.2(d)).

By his own testimony, Rothermel conceded that the berms were inadequate due to substantial settlement over time and that, at some point, they should have been built up. Tr. 238-40. While he argued that the cited segments are only slightly sloped, he did not discredit Pinchorski's estimation of the drop-off distances to the ditch, pond and creek noted in the citation. Moreover, respecting the elevated segment that has remained unbermed, Respondent does not dispute that it is on deep mine property.

I find that the cited segments of roadway were elevated above dangerous drop-offs, that the existing berms were incapable of restraining vehicles used at the mine, and that the segment near the generator building, bordered by a 65 foot drop-off, was required to be bermed also, especially because it was accessible for travel. Accordingly, I find that section 77.1605(b) was violated, as alleged. Furthermore, because the drop-off distances from the cited areas of roadway ranged from 10 to 65 feet, I find it reasonably likely that serious injuries would occur in the event of a vehicle overtraveling and, therefore, that the violation was S&S.

12. Citation No. 7008254

Inspector Pinchorski issued Citation No. 7008254, alleging a non-significant and substantial violation of section 109(a) of the Mine Act, for Respondent's failure to identify the mine office with a sign.[11] The Condition or Practice is described as follows:

> There was no conspicuous sign at the mine site that designates the location of the mine office.

Ex. G-15; tr. 169. Pinchorski testified that he assessed Respondent's negligence as moderate,

[11] Section 109(a) of the Mine Act states, in part, "[a]t each coal or other mine there shall be maintained an office with a conspicuous sign designating it as the office of such mine. . . ." 30 U.S.C. § 819(a).

based on Rothermel's years of experience in the mining industry and his conclusion that Rothermel knew or should have known of the requirement, based on his ownership of other mines. Tr. 184. He also noted that the citation was timely abated. Tr. 184-85. Rothermel's contention that there is only one building at the mine site, the hoist building, does not exempt Respondent from posting a conspicuous sign, as required by the standard. Tr. 246-48. Pinchorski's testimony that he and Coleman observed that there was no sign on either the hoist building or the mobile home trailer was not rebutted by Rothermel. Tr. 298. Accordingly, I find that section 109(a) of the Act was violated, as alleged.

13. Citation No. 7008255

Inspector Pinchorski, upon inspecting the mobile home trailer on site, issued Citation No. 7008253, alleging a significant and substantial violation of section 77.1104,[12] describing the Condition or Practice as follows:

> Combustible materials were allowed to accumulate where they could create a fire hazard along the south wall of the mobile home trailer used as a change house on mine property. These materials consisted of various types of motor and hydraulic oils to include a container of kerosene and a kerosene torpedo type heater with spillage of kerosene on the (carpet) floor.

Ex. G- 16. According to Pinchorski, Rothermel told him that the trailer was part of the surface strip mine, but Pinchorski inspected it, nonetheless, because it appeared to him to be situated on deep mine property. Tr. 169. Pinchorski observed that the kerosene heater, apparently used for miners changing clothing, was leaking and, contrary to Rothermel's explanation that the moisture was rain from the leaking roof, determined that the carpet was saturated with a combination of strong-smelling kerosene and water. Tr. 169-70, 185. Pinchorski, a volunteer fire chief for 27 years, testified that he designated the violation significant and substantial primarily because of the fire hazard caused by the strong fumes that could easily ignite, for example, if someone entered the trailer with a lit cigarette. Tr. 186. Pinchorski also testified that the heater was off at the time of inspection, but that a miner could have set the trailer on fire by turning it on. Tr. 186-87. In his opinion, serious second and third degree burns could reasonably be expected to result from an ignition, depending upon where a person would be situated. Tr. 187. Pinchorski ascribed moderate negligence to Respondent based on general common sense that kerosene is flammable and should have been removed or diluted. Tr. 188-89. He also testified that Respondent timely abated the citation by cleaning up the spillage. Tr.189.

Rothermel maintained throughout the hearing that two mines occupy the property, and that the sole building on deep mine property is the hoist building. Tr. 440. He explained as follows:

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[12] 30 C.F.R § 77.1104 provides that "[c]ombustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard."

> "There are two mines. There's the surface mine and the deep mine. That's where the problem's arising here. . . . The surface mine overlaps the deep mine. So the deep mine is actually just a postage stamp. The other building that was there [mobile home trailer], if you want to call it a building, was the office for the surface mine. The equipment for the surface mine was parked by that building. You know, there was like a - - someone with mining knowledge would know that a flourescent orange truck 14- foot high, 14-foot wide, 40-foot long does not belong at the deep mine. That was part of the surface mine."

Tr. 440-41; see 250-256. Rothermel also testified credibly that he pointed out to Pinchorski the bulletin board for the surface mine in the trailer. Tr. 258-59, 443-44.

The Secretary bears the burden of establishing that the mobile home trailer was part of the underground mine. Her insistence on placing it on deep mine property is not substantiated by any concrete evidence, but rather Pinchorski's conjecture that "without a map, without an engineer or survey marks or some kind of identification, I have to go with my gut feeling as far as I have to do my job." Tr. 257-58. Additionally, while Rothermel acknowledged that the trailer was formerly used as the underground mine office, that fact alone, without any proffer from the Secretary of the mine boundaries, is insufficient to carry the Secretary's burden of establishing that the mobile home trailer was part of the Brockton Slope mine and properly inspected by Pinchorski. Consequently, I find that the Secretary has failed to prove a violation of section 77. 1104, as alleged, and vacate the citation.

14. <u>Citation No. 7008256</u>

Inspector Pinchorski issued Citation No. 7008256 for stumbling hazards that he observed in the mobile home trailer, alleging a significant and substantial violation of section 77.205(b).[13] The Condition or Practice was described as follows:

> The travelway in the mine mobile home trailer used for a change house facility is not being kept clear of extraneous materials and other stumbling hazards. I observed various 5 gallon cans of motor oils [sic], hose, equipment parts, and personnel [sic] items in the travelway.

Ex. G-17. Pinchorski testified that he designated the violation significant and substantial because, based on the clutter that he observed, and his determination that the area was frequently used for storage and changing clothes, it was reasonably likely that someone could trip and fall into any of the sharp edges and objects in the trailer, and suffer serious injury such as cuts,

[13] 30 C.F.R. § 77.205(b) requires that "[t]ravelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or tripping hazards."

broken bones, and head injuries. Tr. 190-93. In his opinion, the operator was moderately negligent based on Rothermel's experience in the mining industry and common knowledge that travelways should be kept uncluttered and free of tripping hazards. Tr. 193-94.

Rothermel's primary defense was essentially the same as that offered regarding the kerosene spillage in the mobile home trailer- - that the inspector did not observe any deep miners entering the trailer because it was on surface mine property. Tr. 250-260, 446. Based on my finding that the Secretary has failed to prove that the mobile home trailer was situated on deep mine property, I find no violation of section 77.1104.

15. Citation No. 7008257

Inspector Pinchorski issued Citation No. 7008257, based on his observation of a haul truck parked on mine property, alleging a significant and substantial violation of section 77.400(a).[14] The Condition or Practice is described as follows:

> The Caterpillar Model 769B haul truck located on the mine property was not provided with adequate guarding to prevent persons from coming into contact with moving parts in that the engine cooling fan belts and pulleys were exposed.

Ex. G- 18. Pinchorski opined that the truck was probably operated at the surface mine. Tr. 171, 195. According to Pinchorski, however, the truck was parked on underground mine property, plugged into an engine block heater overnight to facilitate an easier start-up in the morning, and it was not tagged out of service, but readily available for use at the deep mine. Tr. 195-96, 300. Pinchorski testified that the violation was significant and substantial based on the fact that the truck's motor oil can be checked with the engine running, so that it is reasonably likely that an operator performing maintenance or a pre-shift examination could come in contact with the exposed pulleys and belts and get caught up in the moving parts. Tr. 196-97. Pinchorski opined that contact with the unguarded moving parts would be reasonably likely to cause serious injuries ranging from severe lacerations to loss of hands or fingers. Tr. 197-98. He assessed the operator's negligence as moderate because Rothermel knew or should have known that exposed belts and pulleys must be guarded and because, as part of its outreach to the mining industry, MSHA places great emphasis on the seriousness of guarding. Tr. 198-99. He also testified that the citation was timely abated. Tr. 199.

Rothermel, again, argued that the truck was not on deep mine property by explaining that "[t]he demarcation between the surface and the underground mine is the road that traveled through the property. Anything to the right of the road belonged to the surface mine. Anything

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[14] 30 C.F.R. § 77.400(a) requires that "[g]ears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

to the left of the road belonged to the deep mine. And it was parked to the right of the road." Tr. 484. While he confirmed that, six months prior to being cited, the truck had been used to haul dirt for the underground mine, he insisted, nevertheless, that it was parked on surface mine property. Tr. 484. Based on my finding that the Secretary has failed to carry her burden of establishing the boundaries of the Brockton Slope mine and, therefore, that the truck was properly inspected as part of that mine, I find that the Secretary has failed to prove a violation of section 77.400(a).

16. Citation No 7008258

Inspector Pinchorski issued Citation No. 700258, for failure to provide a sign warning against smoking and open flame on a diesel fuel storage tank, alleging a non-significant and substantial violation of section 77. 1102.[15] The Condition or Practice is described as follows:

> The diesel fuel tank located in the mine generator building was not provided with signs warning against smoking and open flames that could readily be seen by all persons.

Ex. G- 19. Pinchorski testified that there was a sign on the 500-gallon fuel tank located in the generator building, but that it was not readily apparent upon entering the building, because it was located on the far end of the tank. Tr. 200-01, 264; ex. G-20. He stated that it was necessary to look in the 12-inch space between the fuel tank and the generator in order to see the sign. Tr. 276. The Respondent's level of negligence was moderate, he explained, because "everybody in the mining industry knows that you have to - - gasoline, fuel tanks, and so on - - you are required to label them as far as warning against no smoking or . . . contents flammable, and so on." Tr. 202. He also testified that the citation was timely abated. Tr. 202.

Rothermel testified that the fuel tank was brand new and manufactured with a "no smoking" sign painted on it. Tr. 446-47. He opined that number 2 diesel fuel poses no explosion hazard and that it is impossible to light the vapors with a cigarette. Tr. 447-49. His opinions were unsubstantiated, however, and, in addition to warning against smoking, the standard requires warning against exposure to open flames. Beyond the lack of explosion and ignition argument, Rothermel simply stands on the fact that the manufacturer provided a sign at the end of the fuel tank, even though he did not attempt to argue that it was readily visible. Accordingly, I find that section 77.1102 was violated, as alleged.

17. Citation No 7008259

Inspector Pinchorski issued Citation No. 7008259, alleging a significant and substantial violation of section 77.205(b), for failure to maintain the travelway in the generator building free

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[15] 30 C.F.R. § 1102 requires that "[s]igns warning against smoking and open flames shall be posted so they can readily be seen in areas or places where fire or explosion hazards exist."

of stumbling hazards.[16] The Condition or Practice is described as follows:

> The travelway leading from the entrance of [the] mine generator building past the fuel tank to the front of the generator was not clear of stumbling hazards in that the 8 inch I-beams were positioned on end approximately 2 feet apart from each other for a distance of approximately 8 feet. This is the only entrance to the generator for persons to check and provide maintenance which is performed at least two times per day to start and stop the generator.

Ex. G-21. Pinchorski described the generator building as a series of enclosed I-beam frames with the base rails rising approximately eight inches above the concrete floor, and a fuel tank and generator welded to the I-beams. Tr. 203-05, 277; see 278-89; ex. G-22. He explained that travel from the entrance to the front of the generator required stepping over each I-beam, and that eventually someone was going to fall; were they to fall onto the concrete, or into the generator, fuel tank or I-beams, injuries could occur. Tr. 203-04. He assessed the violation as significant and substantial because the area was traveled daily to check the generator and oil, and to start and stop the generator, and it was reasonably likely that a miner could stumble and fall, sustaining broken bones, a concussion, lacerations, or burns. Tr. 205-06. He ascribed moderate negligence to the operator, based on the owners' extensive mining experience and because they could have done a better job of preventing the condition. Tr. 207. Respondent abated the citation in good faith by installing a flat walking surface of boards over the I-beams. Tr. 207.

Rothermel's argument that miners are accustomed to walking on I-beams may be true, but does not allow for any missteps or moments of inattentiveness that are bound to occur from time to time. See Tr. 280-81, 287-88.

It is evident that the raised I-beams presented a stumbling hazard that could reasonably be expected to result in injuries of a serious nature. Therefore, I find a violation of section 77.205(b), as alleged, and that the violation was S&S.

18. <u>Citation No. 7008260</u>

Inspector Pinchorski issued Citation No. 7008260, alleging a significant and substantial violation of section 77.412(a).[17] The Condition or Practice is described as follows:

> The compressed air receiver tank located adjacent to the mine tipple is not

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[16] 30 C.F.R § 205(b) requires that "[t]ravelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or slipping hazards."

[17] 30 C.F.R. § 77.412(a) requires that "[c]ompressors and compressed-air receivers shall be equipped with automatic pressure-relief valves, pressure gauges, and drain valves."

equipped with an automatic pressure relief valve and a pressure recording gauge.

Ex. G-23. Pinchorski testified that the air compressor was equipped with a pressure-relief valve and gauge, but that the compressed-air receiver tank was not. Tr. 208-09. He explained that the gauge indicates the amount of air pressure in the system, and that the pressure-relief valve is a safety mechanism to prevent an explosion. Tr. 210. In his opinion, the importance of having a gauge and valve on both pieces of equipment is that the mechanisms on the one act as a check against failure of the mechanisms on the other. Tr. 291. The gravity of the violation was assessed as significant and substantial because, according to Pinchorski, without a safety device to check the continuation of air pumped from the compressor, an explosion is reasonably likely to occur. Tr. 209-12. He further testified that "you could have shrapnel like a hand grenade or something. I mean, air lines have busted before, and they'll bust at the weakest point. And if it would happen to burst . . . next to where somebody might be working . . . you could have pieces of aluminum coupling flying." Tr. 211. The Respondent was charged with moderate negligence because, he reasoned, mines that have an air compressor usually have an air receiver tank with a "pop off" valve and gauge either underground or on the surface, and the operator knew or should have known that the safety devices were required. Tr. 213-14. Pinchorski also noted that the citation was timely abated. Tr. 214.

Rothermel testified that the air receiver tank had been installed at the end of the previous day, that the installation was incomplete at the time of inspection, and that the valve and gauge were 30 miles away at the preparation plant. Tr. 452-53. According to him, the compressor started leaking oil into the compressed air line, and the compressor was not run for a week or two thereafter, until the appropriate replacement parts arrived. Tr. 453-54. His own rendition of the facts, then, establishes that the compressor and air receiver tank had been running the prior day until the oil leak occurred, without the proper safety mechanisms on the tank, and the system could have been energized at any time thereafter. Therefore, I find a violation of section 77.412(a) and that there was a reasonable likelihood that, should the safety mechanisms installed on the compressor fail to detect a hazardous concentration of air, an explosion could have occurred that could seriously injure a miner. Accordingly, I find that the violation was S&S.

19. Citation No. 3082100

Inspector Mehalchick issued Citation No. 3092100 during his investigation of the roof and rib fall at the face of the Brockton Slope mine, alleging a non-significant and substantial violation of section 50.10, after concluding that Respondent had failed to report the accident.[18] The Condition or Practice reads as follows:

[18] 30 C.F.R. § 50.10 requires that "[i]f an accident occurs, an operator shall immediately contact the MSHA District Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District Office, it shall immediately contact the MSHA Headquarters Office in Arlington, Virginia by telephone, at (800) 746-1553."

> If an accident occurs, the operator shall immediately contact the MSHA district office having jurisdiction over the mine. If the operator cannot contact the district office, it shall immediately contact the MSHA headquarters office in Arlington, Virginia. An accident occurred at the operation on or about 04/06/06 when an unplanned roof/rib fall occurred in active workings that impaired ventilation and impeded passage. The operator failed to contact MSHA of this event.

Ex- G-8. At the time of the investigation, the operator was required to contact MSHA within 30 minutes of the accident. Tr. 99. Mehalchick estimated the fall to have occurred on or before February 6 at 11:30 a.m., and noted that MHSA was not properly notified until February 7 at 9:30 a.m. when the inspectors were on-site. Tr.86-87; ex. G-6.

Rothermel testified that the roof of the slope "squeezed" over the course of a month, rather than fell, that the miners reported to work on Monday morning, observed the result of the squeeze, and met Tom Garcia when they came up to the surface. Tr. 431-32; see 130-33. Rothermel admits that the accident was never called in to District 1 but, according to him, that should not have been necessary because the inspector was at the mine. Tr. 432. This testimony is wholly unconvincing, because it is rebutted by the credible testimony of Mehalchick that the accident investigation was initiated by information about the fall brought to Garcia's attention the day before. Nevertheless, the standard requires that Respondent timely contact the District Office directly, and it failed to do so on the day of occurrence within the time permitted. Accordingly, I find a violation of section 50.10, as alleged.

Mehalchick did not explain the basis for ascribing high negligence to the operator for failing to timely notify the MSHA District Office. In support of the inspector's assessment, the Secretary notes that Respondent challenged a violation of the same standard five years ago. *See Summit Anthracite, Inc*., 24 FMSHRC 720, 735-36 (ALJ) (finding no violation of section 50.10 where the Secretary failed to prove that Summit had exceeded the time limit required for contacting MSHA). Therefore, it is evident that Respondent knew or should have known of its responsibility in contacting District 1. I do not find any aggravating factors, however, that would elevate the operator's actions beyond ordinary negligence, and conclude that the violation was due to moderate negligence.

IV. Penalty

A. 110(c) Criteria

While the Secretary has proposed a total civil penalty of $1,569.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(j). *See Sellersburg Stone Co.,* 5 FMSHRC 287, 291-92 (March 1993), *aff'd*, 763 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that Summit is a small operator and, as a new mine in

the midst of starting production, its history of assessed violations is minimal. See Pet. for Assessment of Civil Penalty, ex. A (MSHA Form 1000-179). As stipulated by the parties, the total proposed penalty will not affect Respondent's ability to continue in business. Tr. 13, stip. 6. I also find that, with the exception of two citations (7008242 and 7008253), Summit demonstrated good faith in achieving rapid compliance, after notice of the violations.

The remaining criteria involve consideration of the gravity of the violations and Summit's negligence in committing them. These factors have been discussed fully respecting each citation. Therefore, considering my findings as to the six penalty criteria and, considering that Summit has not established any conduct that could be viewed as mitigating factors, the penalties are set forth below.

B. Assessment

1. Citation No. 7008242

The Secretary has established a non-significant and substantial violation of 30 C.F.R. § 50.30(a), that it was due to Summit's moderate negligence, and that Summit failed to timely abate the citation. Applying the civil penalty criteria, I find that a penalty of $109.00, as proposed by the Secretary, is appropriate.

2. Citation No. 7008148

The Secretary has established a violation of 30 C.F.R. § 77.410(a), that it was significant and substantial, due to Summit's moderate negligence, and that the citation was timely abated. Applying the civil penalty criteria, I find that a penalty of $91.00, as proposed by the Secretary, is appropriate. __

3. Citation No. 7008402

The Secretary has established a non-significant and substantial violation of 30 C.F.R. § 77.502, that it was due to Summit's moderate negligence, and that Summit timely abated the citation. Applying the civil penalty criteria, I find that a single penalty assessment of $60.00, as proposed by the Secretary, is appropriate.

4. Citation No. 7008403

The Secretary has established a non-significant and substantial violation of 30 C.F.R. § 77.502, that it was due to Summit's moderate negligence, and that the citation was timely abated. Applying the six civil penalty criteria, I find that a single penalty assessment of $60.00, as proposed by the Secretary, is appropriate.

5, 6. Citation Nos. 7008400 and 7008401

The Secretary has established non-significant and substantial violations of 30 C.F.R. § 77.516, that they were due to Summit's moderate negligence, and that Summit timely abated the citations. Applying the civil penalty criteria, I find that a single penalty assessment of $60.00 for each violation, as proposed by the Secretary, is appropriate.

7. Citation No. 3561179

The Secretary has established a non-significant and substantial violation of 30 C.F.R. § 77.1900-1, that it was due to Summit's moderate negligence, and that Summit timely abated the citation. Applying the civil penalty criteria, I find that a single penalty assessment of $60.00, as proposed by the Secretary, is appropriate.

8. Citation No. 3561180

The Secretary has established a non-significant and substantial violation of 30 C.F.R. § 77.1914(a), that it was due to Summit's moderate negligence, and that Summit timely abated the citation. Applying the civil penalty criteria, I find that a single penalty assessment of $60.00, as proposed by the Secretary, is appropriate.

9. Citation No 7008404

The Secretary has established a non-significant and substantial violation of 30 C.F.R. § 77.501, that it was due to Summit's moderate negligence, and that the citation was timely abated. Applying the civil penalty criteria, I find that a penalty of $60.00 is appropriate.

10. Citation No. 7008405

The Secretary has established a non-significant and substantial violation of 30 C.F.R. § 77.502, that it was due to Summit's moderate negligence, and that the citation was timely abated. Applying the civil penalty criteria, I find that a penalty of $60.00 is appropriate.

11. Citation No. 7008253

The Secretary has established a violation of 30 C.F.R. § 77.1605(k), that it was significant and substantial, due to Summit's moderate negligence, and that Summit timely abated the citation, except for a portion of roadway for which it refuses to construct berms. In fact, as of the date of this proceeding, Summit had refused to correct the condition. I have taken note of Summit's justification for its failure to act and, while the legitimacy of the argument has not been proven by the operator, I find that it is acting on a good faith belief. For that reason, and also because I credit Summit's testimony that the miners do not use the segment of road in question, I decline to raise the penalty and, applying the civil penalty criteria, find that a penalty of $221.00, as proposed by the Secretary, is appropriate.

12. Citation No. 7008254

The Secretary has established a non-significant and substantial violation of 30 U.S.C. § 819(a), that it was due to Summit's moderate negligence, and that Summit timely abated the citation. Applying the civil penalty criteria, I find that a single penalty assessment of $60.00, as proposed by the Secretary, is appropriate.

13. Citation No. 7008255

The Secretary has failed to establish a violation of 30 C.F.R. § 77.1104 and, therefore, the

citation shall be vacated and no penalty shall be assessed.

14. Citation No. 7008256

The Secretary has failed to establish a violation of 30 C.F.R. § 77.205(b) and, therefore, the citation shall be vacated and no penalty shall be assessed.

15. Citation No. 7008257

The Secretary has failed to establish a violation of 30 C.F.R. § 77.400(a) and, therefore, the citation shall be vacated and no penalty shall be assessed.

16. Citation No. 7008258

The Secretary has established a non-significant and substantial violation of 30 C.F.R. § 77.1102, that it was due to Summit's moderate negligence, and that Summit timely abated the citation. Applying the civil penalty criteria, I find that a single penalty assessment of $60.00, as proposed by the Secretary, is appropriate.

17. Citation No. 7008259

The Secretary has established a violation of 30 C.F.R. § 77.205(b), that the violation was significant and substantial, due to Summit's moderate negligence, and that Summit timely abated the citation. Applying the civil penalty criteria, I find that a penalty of $72.00, as proposed by the Secretary, is appropriate.

18. Citation No. 7008260

The Secretary has established a violation of 30 C.F.R. § 77.412(a), that it was significant and substantial, due to Summit's moderate negligence, and that Summit timely abated the citation. Applying the civil penalty criteria, I find that a penalty of $72.00, as proposed by the Secretary, is appropriate.

19. Citation No. 3082100

The Secretary has established a non-significant and substantial violation of 30 C.F.R. § 50.10. Contrary to her charge that the violation was due to high negligence, however, I find that Summit's negligence was no more than moderate. Applying the civil penalty criteria, I find that a single penalty assessment of $60.00, as proposed by the Secretary, is appropriate.

ORDER

Accordingly, it is **ORDERED** that Citation Nos. 7008255, 7008256 and 7008257 are **VACATED**, that the Secretary **MODIFY** Citation Nos. 7008404 and 7008405 to reduce the level of gravity to "non-significant and substantial," and Citation No. 3082100 to reduce the level of negligence to "moderate," that Citation Nos. 7008242, 7008148, 7008402, 7008403, 7008400, 7008401, 3561179, 3561180, 7008253, 7008254, 7008258, 7008259 and 7008260 are **AFFIRMED**, as issued, and that Summit Anthracite, Incorporated, **PAY** a civil penalty of

$1,225.00, within 30 days of this Decision.

Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (Certified Mail)

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