# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
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November 5, 2004

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. SE 2002-111 |
| Petitioner | : | A.C. No. 01-01247-03501 VAD |
| v. | : | |
| | : | Docket No. SE 2003-69 |
| SEDGMAN, | : | A.C. No. 01-01247-03502 VAD |
| Respondent. | : | |
| | : | No. 4 Mine |
| | : | |
| SECRETARY OF LABOR, | : | Docket No. SE 2003-189 |
| MINE SAFETY AND HEALTH | : | A.C. No. 01-01247-06606 A |
| ADMINISTRATION (MSHA), | : | |
| Petitioner | : | No. 4 Mine |
| | : | |
| v. | : | |
| | : | |
| DAVID GILL, employed by Sedgman, | : | |
| Respondent. | : | |

## DECISION

Appearances: Leslie Paul Brody, Esq. Office of the Solicitor, U.S. Department of Labor, Atlanta, GA, for the Secretary;
R. Henry Moore, Esq., Jackson & Kelly, Pittsburgh, PA, for the Respondents.

Before: Judge Weisberger

Statement of the Case

These cases, consolidated for hearing, are before me based on Petitions of Assessment of Civil Penalty ("Petition") filed by the Secretary of Labor, pursuant to Section 104 of the Federal Mine Safety and Health Act of 1977 (the Act), alleging violations by Sedgman of 30 C.F.R. §§77.1710(g) and 77.200. Additionally the Secretary filed a petition seeking the imposition of a civil penalty against Sedgman's on-site representative, David Gill, related to the alleged violation by Sedgman of Section 77.200, supra.

Subsequent to notice, these cases were heard in Birmingham, Alabama, on April 20, 21, and 22, 2004. At the hearing, the parties filed a set of stipulations. On July 23, 2004, Respondents filed a Brief and Proposed Findings of Fact. On July 26, 2004, the Secretary filed a Post Hearing Brief. On August 7, 2004, Respondents filed a Reply Brief and Response to the

Secretary's Proposed Findings of Fact. On August 12, 2004, the Secretary filed a statement indicating that it does not object to Respondents' proposed finding of fact, and that it does not intend to reply to Respondents' Brief. On September 29, 2004, in a conference call with counsel for both parties, the parties were ordered to file a statement setting forth their position regarding the applicability of *Twentymile Coal Co.,* 29 FMSHRC 666 (Aug. 2004). The Secretary's statement was filed on October 12, 2004. On October 18, 2004, Respondents filed their statement.

## I. Introduction and Findings of Fact

These cases involve the No. 4 Preparation Plant, a coal facility owned and operated by Jim Walter Resources (Jim Walter) that processes coal for Jim Walter's No. 4 underground mine. The plant was constructed in the 1970's, and since that time has undergone various upgrades and modifications.

In August of 2001, the plant was undergoing a major modification, and the work was being conducted on a contract basis. Sedgman was hired by Jim Walter to design and construct the modification of the plant ("the project"). Pursuant to the contract between Sedgman and Jim Walter, the latter expected that Sedgman would have existing steel structures demolished in order to erect new ones. It was not within the contract for Sedgman to replace or repair structural steel that was to remain in place but was subsequently identified as deficient as the project proceeded . Sedgman obligated itself to comply with all health and safety laws, and to supervise the project.

Sedgman entered into a contract with Pro Industrial Welding, Inc. ("PIW") which obligated the latter to provide the labor, equipment, services and materials required to perform the construction activities associated with the project.[1] It was PIW's responsibility to determine the exact method of demolition required by the project. Sedgman retained the right to order PIW to comply with any unsafe practices, and at its discretion to terminate the agreement with PIW.

Sedgman employed David Gill as its on-site representative. Gill came to the site during the first week of June 2001, and was Sedgman's sole employee on the site. Prior to that time, PIW had performed work on the project, including demolition of existing structure and removal of equipment.

It was not Gill's responsibility to directly supervise PIW employees. His responsibilities were to ensure that PIW complied with the engineering drawings, and to receive the equipment shipped to the site for the project. On occasion, Gill would correct safety deficiencies he observed, but PIW was responsible for the safety and supervision of its employees. When certain safety issues arose at the site in July 2001, Jim Walter dealt directly with PIW.

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[1]PIW, as a contractor, also had other crews at the plant performing work directly for Jim Walter Resources

If during the project PIW discovered deteriorated steel, it was to repair it under a separate contract with Jim Walter. PIW regularly performed work for Jim Walter at this and other plants in repairing and replacing deteriorated steel.

In August 2001, Keith Crabtree, the President of PIW, was its construction supervisor. He was generally present on the site for some period every day but PIW employed "lead men" to direct the day-to-day construction activities of its 39 employees on site. Treavor William Rhine was PIW's lead man on the site in August 2001, and supervised the PIW employees.

On August 27, 2001, PIW encountered an overhang that consisted of a reinforced concrete slab landing that extended from the fifth to the seventh floor of the existing structure. On this date, Rhine was unaware of the need to demolish this landing.

On August 29, 2001, two PIW employees, Rich Fields and Gary McDonald, were assigned by Rhine to connect a steel skeleton that had been erected from the two and one half "decant" floor, into the existing fifth and sixth floor structure at the west side of the plant.

In order to perform this work, a reinforced concrete slab landing extending out from the fifth floor had to be completely removed in order to make the beam connections to the fifth floor. The landing was surrounded by opaque sheeting or siding, and supported a stairway that provided access between the fifth and sixth floors.

The landing consisted of a steel framework covered by a concrete slab. One 19-foot channel formed the outer (west) edge of the support steel. Four cross channels, one at each end (north and south) and two intermediate channels formed the rest of the supporting steel structure below the landing.

The steel landing structure was supported by support members from above; these were attached to the outside edge of the landing at either end (north and south) and at mid-span of the 19-foot channel that formed the outer edge of the landing.

On August 29, 2001, Rhine conferred with Gill; they discussed the fact that the structural drawings did not reflect the existence of the concrete slab landing on a connection point to the main beam on a column. They went to the site and determined that they would have to remove the concrete slab landing before erecting the new floor. Gill suggested that the landing be separated into pieces, cable slings strung through the pieces, and a mobile crane used to "fly" the pieces out. It was Gill's expectation that all of the concrete would be removed before the steel was cut or removed.

Rhine and Gill looked at the bottom of the landing from the second and fourth floors. The view of the steel structure supporting the landing was blocked by the concrete itself and obscured by the presence of the sheeting around the landing.

The underside of the landing could not be readily observed. Access to a view of the underside of the landing from the fourth floor of the plant was blocked by piping and the lighting was poor. In addition, the crane was not available as a personnel hoist to use a manbasket to view the underside of the platform.

During the discussion with Rhine, Gill noted some corrosion of the steel but believed it was in sufficiently good condition to demolish. It did not concern him "... because the whole walkway had to be removed anyway". (Tr. 534-535)

Fields and McDonald removed a portion of the landing. Working north to south, they used a concrete saw to make two cuts across the width of the landing, isolating two pieces, each approximately five feet long. These pieces were lifted out, as suggested by Gill. He did not observe the landing from the fifth floor after the concrete was removed.

In addition to removing two pieces of the landing, some pieces of steel that supported or formed the landing were removed or cut by Fields and McDonald. They also cut the 19-foot channel as the north end of the landing, eliminating any support for the outer edge of the channel at the north end and the stability that had been imparted by the connection at the end of that channel. In addition, they removed an intermediate channel cross piece that provided stability to the structure, particularly the 19-foot channel supporting the landing. The removal of these supports reduced the load bearing capacity of the 19-foot channel.

Three hangers supported the outside edge of the platform, one on the north end, one on the south end, and one in the middle of the channel formed the outer edge of the platform. The support from the north end hanger was eliminated when the north end of the 19-foot channel was cut. As a result only two hangers, the one at the south and the one in the middle, were left to support the outer edge of the platform. Fields cut the mid-span hanger that supported the outer edge of the platform, which caused the landing to fail. Fields fell to the floor located at level two and half, and suffered a fatal injury.[2]

There is not any evidence that Fields was wearing a safety belt immediately prior to the accident. In the post accident investigation of the site, fall protection devices were not found.

Subsequent to an investigation, MSHA issued Sedgman two citations alleging violations

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[2]Respondents' expert, Fill, explained in credible testimony, as it was not contradicted or impeached, that a chain hoist had been attached to the steel channel on the other edge of the structure that improperly supported the landing and one of the stair treads above it. This arrangement pulled the channel laterally toward the building. In addition, removal of the cross piece and the cutting of the north of the 19-foot channel, lateral forces (i.e., torsion) on the channel that formed the outer edge of the platform and on the south hanger. These forces exceeded the design capabilities of the supports, causing their failure. Fill opined that due to the action of these forces, even if the supports were new, it was likely that the landing would have fallen due to failure of the supports

of 30 C.F.R. §§77.1710(g), and 77.200. MSHA also issued a citation to Gill under Section 105(c) of the Federal Mine Safety and Health Act of 1977 ("The Act") relating to the alleged violation by Sedgman of Section 77.200, supra.

## II. Discussion

### A. Docket No. SE 2003-69 Citation No. 7676881, violation of 30 C.F.R. § 77.200 (Docket No. SE 2003-6a), and Gill's liability under Section 110(c) of the Act (Docket No. SE 2003-189)

Subsequent to the investigation of the August 29 fatal accident, the Secretary issued Citation No. 7676881 to Sedgman. The citation alleges a violation of Section 77.200, supra, as follows: "Steel members and supporting structures beneath and attached to the concrete deck of the 5th floor level were not substantially maintained to prevent collapse of the structure. The steel beams and structure associated with the deck support showed signs of deterioration, corrosion, and fatigue which had seriously reduced their load carrying capacity."

Section 77.200, supra, provides, as pertinent, that all mine structures, or other facilities "... shall be maintained in good repair to prevent accidents and injuries to employees.

In support of its position that Section 77.200 was violated, the Secretary relies on the testimony of Terence Michael Taylor, its expert. On August 30 and September 1, 2001, he examined the structural steel members that had supported the landing at issue. He noted that the cited area contained significant amounts of rust, corrosion, delamination, and deterioration in supporting steel vertical, diagonal, and horizontal members. Photographs taken at the time illustrate his testimony (Exhibits P-5 through P-8, P-13 through P-19, P-21 through P-36).

On the other side, Respondents argue, *inter alia*, that Section 77.200, supra, does not apply to demolition work, and that even if it does so apply there was not any violation. Respondents also argue that even if it is found that Section 77.200, supra, was violated, the Secretary abused its discretion in citing Sedgman. Also, that the Secretary's delay in notifying Respondents of penalty proposals should result in dismissal of these petitions. For the reasons that follow, I find these defenses to be without merit.

#### 1. The applicability of Section 77.200, supra, to structures being demolished.

In essence, Respondents argue that it is not logical to maintain a structure in good repair where, as here, it will no longer be used as it is in the process of being demolished. Respondents further argue that Section 77.200, supra, should not be applied to Sedgman because it was not in any position to maintain the structure in good repair inasmuch as the deteriorating rust conditions had existed for an extensive period of time, and Sedgman only became contractually involved with the cited area for a brief time in August 2001.

I recognize the logic inherent in Sedgman's position. However, in resolving the issue posed regarding the interpretation of the scope of Section 77.200, supra, I look first of all at its plain meaning. *Island Creek Coal Co.*, 20 FMSHRC 14, 18 (Jan. 1998). In this connection, the unambiguous wording of Section 77.200 imposes an unrestricted duty to maintain structures in good repair to prevent accidents and injuries. The regulation does not contain any exception for structures that are being demolished. Thus it would not be proper for me, as an Administrative Law Judge bound to follow the regulations, to carve out an exception where one does not already exist. To do so would usurp the congressionally delegated responsibility of the Secretary of Labor to promulgate appropriate regulations. Further not to apply the requirements of Section 77.200, supra, to the cited area because it was going to be demolished, would violate the purpose of Section 77.200, supra, i.e. to prevent accidents and injuries to employees. In this case, Sedgman's representative on the premises, Gill, and the employees of PIW, with whom Sedgman contracted to perform the demolition work, would be unnecessarily exposed to the hazards of working in and around structures not being maintained pending their actual demolition.

2. The Citation of Sedgman by the Secretary

It is well established by Commission precedent that "in instances of multiple operators," the Secretary has "wide enforcement discretion" and "may, in general, proceed against either an owner/operator, his contractor, or both." *W-P Coal Co.* 16 FMSHRC 1407, 1411 (July 1994). Thus, MSHA may properly hold an operator strictly liable for all violations of the Mine Act that occurred on the mine site "... whether committed by one of its employees or an employee of one of its contractors." *Mingo Logan Coal Co.*, 19 FMSHRC, 246, 249 (Feb. 1997). In *Mingo Logan*, supra, at 249, the Commission quoted its earlier holding in *Bulk Transportation Services, Inc.*" 13 FMSHRC 1354, 1359-60 (Sep. 1991), that ' ... "the Act's schemes of liability [that] provides that an operator, although faultless itself, may be held liable for violative acts of its employees, agents and contractors." '

The Commission's holding in *Mingo Logan*, supra, related to the citing of an operator for a violations committed by its contractor. The Commission in *Mingo Logan*, supra, at 251 rejected the operator's assertion "... that the citation against it fails to promote the safety purposes of the Act." The Commission reasoned that this assertion was inconsistent with the rationale of the Ninth Circuit in *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F 2d. 1116, 1119 (9th Cir. 1981). In this connection, the Commission, *Mingo Logan*, supra, at 251 quoted the following language from *Cyprus*, supra. ' "[i]f the Secretary could not cite the owner, the owner could evade responsibility for safety and health requirements by using independent contractors for most of the work [Id.]" '. Applying this language, the Commission reasoned that holding a production-operator liable for violations of their independent contractors "... provides operators with an incentive to use independent contractors with strong health and safety records." (Id.) I find that the same rationale applies with equal force to the holding of a contractor liable for the violation of its subcontractor as an incentive to use a subcontractor with strong health and safety records.

I take cognizance of Respondents argument that, in essence, the Secretary abused her discretion in citing Sedgman as it did not have control over the conditions of corrosion and deterioration during their development, nor did it know of the existence of these conditions. Also alleged is that Sedgman was not a principle party responsible for the corrosion, and did not contribute to the violative condition.

On the other hand, I note that Sedgman, due to its contract with Jim Walter relating to the demolition project of the cited area, obligated itself to comply with all safety laws and to supervise the project. In this connection it furnished an on-site construction manager, and contracted with PIW for the latter to perform the work at the cited area. As such, Sedgman was clearly aware that as part of the project for which it was responsible to Jim Walter, employees would be working on or in close proximity to the cited area.

Within the context of all the above, I find that the Secretary did not abuse its discretion by citing Sedgman.[3]

3. The Violation of Section 77.200, supra

It is Respondents' position that since demolition of the cited structure was contemplated as part of the project, a reasonably prudent person would interpret the requirements of Section 77.200 in these circumstances as requiring maintenance of the structure in sufficiently good repair to prevent demolition.

Respondents argue that the area in question was in sufficiently good repair to allow demolition. In support of this argument, Respondents cite the testimony of the Secretary's expert, Taylor, that had the support framing not been cut on August 29, it would not have collapsed. In this connection, Sedgman's expert, Fill, described the actions taken by PIW's employees on August 29, which created various forces that caused the supporting members to fail. He opined that accordingly, these members would have failed even if they were in new condition. Thus, it is argued that there was not any violation of Section 77.200, supra.

For the reasons that follow, I find Respondents' interpretation not to be in harmony with the requirements of Section 77.200, supra.

I agree with the holding of former Commission Judge Koutras, that "... in order to establish a violation of Section 77. 200, supra, the disrepair or condition of the cited equipment must present a hazard to miners." *U.S. Steel Mining Co.*, supra, 13 FMSHRC 1465, 1473 (Sept.

[3]In support of its position that it was improperly cited by the Secretary, Sedgman cites *Industrial Company of Wyoming,* 12 FMSHRC 2463, 2478 (Judge Cetti) (Nov. 1990), as holding that Section 77.200, supra, does not apply to buildings under construction. To the extent that this decision, written by a fellow commission judge, is contrary to my decision on the issue presented herein, I choose not to follow it as it is not binding.

1991) aff'd 14 FMSHRC 973 (June 1992)). Subsequently, in *Freeman United Coal Mining Co.* FMSHRC 108 F. 3rd 358 (D.C. Cir. (1997)), the Court of Appeals, in rejecting the operator's claim that Section 77.200, supra, was vague and hence unconstitutional, held that the plain language of Section 77.200, supra, gives fair notice of what it requires. The court, in essence, agreed with the finding of former Commission Judge Koutras, that:

> the plain meaning of the standard's requirement that structures be "maintained" to prevent accidents and injuries is that the structures ... be " '[kept] in a state of repair or efficiency[,]. ...[kept] in good order [,] ... or preserv[ed]' " so that they do not deteriorate to a condition that is hazardous.' J.A. 67 (citing *Webster's Third New International Dictionary*, Unabridged) 1362 (1971); a *Dictionary of Mining, Mineral and Related Terms* 677 (1968); and *Black's Law Dictionary* 859 (ed. 1979)). *Freeman United,* supra, at 362.

Based on *Freeman United*, supra, I find that the plain meaning of Section 77.200 requires the cited structures to have been maintained at a level of repair sufficient to have prevented their condition from deteriorating to the point where they have become hazardous. To find, as argued by Respondents that Section 77.200 is satisfied because the cited structures were maintained sufficiently to allow demolition, would impose a lower duty of maintenance than that required by the plain meaning of Section 77.200, supra. It would allow supporting structures to be in such disrepair as to constitute a hazard, which is clearly precluded by the plain meaning of Section 77.200, supra.

According to Taylor, support for the southwest corner of the landing was provided by a hanger (the intersection of a vertical beam and a horizontal beam). Examination of the horizontal cross section of the hanger indicated it had lost 80% of its thickness due to corrosion. In addition, angles attached to the webbing of various horizontal supporting beams were corroded. A horizontal supporting beam had a notch the size of a half-dollar coin where it connected to another beam. Another area on this beam was torn. The beam itself and bolts on the beam were rusted. Also noted were areas of rust, notches, and delamination on other supporting steel members. In the main, this testimony was not impeached or contradicted.

I find that the record establishes the existence of extensive conditions of rust, deterioration, and corrosion including portions of supporting members that were no longer whole, or whose thickness had been significantly reduced. Based on these findings, I conclude that it was more likely than not that the supporting structures had deteriorated to a condition that was hazardous.

Therefore, based upon all the above, I conclude the Secretary has established by a preponderance of evidence that the cited area was not being maintained in good repair to prevent accidents and injuries to employees. Accordingly, I find that Sedgman did violate Section 77.200, supra.

4. Significant and Substantial

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(l). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the 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 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum* the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In *U. S. Steel Mining Co.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U. S. Steel Mining Co.*, 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 Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

It is clear that the evidence establishes the violation of a mandatory standard and that the violation contributed to the creation of a hazard, i.e., structural failure of the landing at issue. Further, due to the extensive corrosion including holes in supporting members, and significant reduction of their thickness, it was reasonably likely that the hazard of a failure of supporting members would have occurred causing the landing to fall. I note the testimony of Boyle, that was not impeached or contradicted, that the hazard of a collapse of the landing, contributed to the violation herein, would have reasonably likely resulted in serious injuries.

With regard to the third element in *Mathies*, supra, it appears to be the position of Respondents that the landing at issue would not have failed had it not been for the mistakes made

by PIW employees. In this connection Sedgman's expert testified extensively that the failure of the supporting members was caused by lateral forces on these members created by mistakes made by PIW employees. It is argued that, accordingly, the rusted deteriorated condition of the supporting members did not play any part in the landing's failure.

I do not place much weight on this argument. The key issue for resolution is not whether the cited conditions caused the failure that actually occurred, but rather whether these conditions were reasonably likely to have resulted in collapse of the landing. (See, *U.S. Steel*, supra, at 1129). I find, based upon the evidence of extensive rust deterioration, holes in, and significant thinning and delamination of deterioration of supporting members, that the Secretary has established the third criteria of *Mathies,* supra, i.e., that there was a reasonable likelihood that the violative condition would have resulted in failure of support for the landing, an injury producing event. Further, inasmuch as the accident herein, failure of supporting members of the landing, resulted in a fatality, I find that the fourth criteria in *Mathies*, supra, has been met. Based on all the above, I conclude that the cited violation was significant and substantial.

5. Unwarrantable Failure and Gills liability Under Section 110(c) of the Act (Docket No. SE 2003-189)

It is the position of the Secretary that the record establishes that the violation herein was as a result of Sedgman's unwarrantable failure. The Secretary argues that the violative condition was obvious and extensive, referring to the fact that the conditions existed for 25 years. The Secretary also relies on the opinion of its expert, Taylor, who examined all structural members on August 30, that various corrosive and deteriorating conditions would have been observable before the structure collapsed.

The Secretary also alleges that Gill violated Section 110(c) of the Act[4] because he knowingly acted in giving instructions in how to demolish the landing, knowing it was in poor shape, having seen rust and corrosion without first checking the integrity of the structure .

In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, and is characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 189, 193-94 (February 1991). The Commission has also stated that use of a "knew or should have known"

[4]Section 110(c) of the Act imposes liability on an agent of an operator who " ... knowingly authorized, ordered, or carried out" a violation by the operator of a mandatory standard.

test by itself would make unwarrantable failure indistinguishable from ordinary negligence, and accordingly, the Commission rejected such an interpretation. A breach of a duty to know is not necessarily an unwarrantable failure. The thrust of *Emery* was that unwarrantable failure results from aggravated conduct, constituting more than ordinary negligence. *Secretary* v. *VA. Crews Coal Co.*, 15 FMSHRC 2103, 2107 (October 1993).

In support of its position that the violation was as a result of Sedgman's unwarrantable failure, the Secretary refers to the testimony of the inspector in which he indicated, *inter alia*, that he determined Sedgman's negligence was high because Gill had stated to him that he (Gill) had observed some corrosion of the landing from underneath. On the other hand, Gill testified that on August 29, when he was on the 4th floor, there was some obstruction of his vision, the lighting was poor and he saw "some" rusting (Tr. 534). I find this testimony credible based on my observations of his demeanor while testifying, and because some obstructions are depicted in various photographs (Exs. P-17 and P-18).

The weight to be accorded to Taylor's opinion regarding the obviousness of the deteriorating conditions is diluted somewhat by the fact that it was based on an examination of structural items after the landing had already fallen. Prior to this occurrence, the entire area at question had been surrounded by an opaque sheeting that had reduced the lighting. The record does not establish that the sheeting was still in place when Taylor made his observations of the structures that remained in place.

Further, as noted by Respondents, the mid-span hanger, that, according to Taylor had rust on it that was visible, was located under the stairs thus reducing the likelihood that it would have been apparent to someone in the area.

In the two year period prior to August 29, 2001 there were not any violations of Section 77.200, supra, issued to Jim Walter who had control of the structure's supporting members of the entire plant including the area in question. This tends to weaken a finding that the violative conditions were obvious. Further, on August 28, 2001, an MSHA inspector who was on the site to inspect chain hoists used on the stairwell in question, did not make any comments about the condition of the steel on the landing.

Moreover, any failure on Gill's part to take action to assess the integrity of the supporting steel members or to repair them is mitigated by the fact that the conditions had existed for probably more than 20 years on a structure within the control of Jim Walters. In contrast, in examining Gill's relationship to the violative conditions, the record indicates; 1) that he and Sedgman were responsible mainly for adding on to the original structure rather than maintaining it; 2) that he and Sedgman had been involved in the area in question for just a very short period, and; 3)that Sedgman was not obligated to Jim Walters to replace any existing steel found to be in a deteriorated condition.

Within the above context, I find that the weight of the evidence does not establish that the

violation was as a result of Sedgman's aggravated conduct and hence there was not an unwarrantable failure. Further, within the context of this evidence, I find that due to various mitigating factors it has not been established that Gill knowingly authorized, ordered, or carried out the violation of Section 77.200, supra. (See, *Warren Steen Constr., Inc.* and *Steen*, 14 FMSHRC 1125, 1131 (1992). Accordingly, I find that it has not been established that Gill violated Section 110(c) of the Act.

6. Penalty

The gravity of the violation was relatively serious as discussed above. (II(B)(4), *infra*) However, for the reasons set forth above (II(B)(4) *infra*) the level of negligence is less than that originally found by the Secretary as set forth in the narrative findings for a special assessment appended to the petition. Thus, in weighing the various factors set forth in Section 110(I) of the Act, I accord considerable weight to the less than high degree of negligence. Placing considerable weight on this factor and considering the remaining factors in Section 110(I) of the Act, I find that a penalty of $1,000.00 is appropriate for this violation.

It is Sedgman's position that it should not be assessed any penalty and that the petition should be dismissed.[5] It is argued that Section 105(a) of the Act was not complied with by the Secretary inasmuch as Section 105(a), supra, requires that the Secretary shall "within a reasonable time" after the termination of an investigation notify the operator of the proposed civil penalty. Sedgman refers to the following facts that have been stipulated to; 1) on February 4, 2002, Citation No. 7676881 was issued to Sedgman and on the same date issued its accident investigation report; 2) the assessment of penalty for this citation was proposed on December 31, 2002, and; 3) the petition for assessment of civil penalty with respect to this citation was filed on February 27, 2003.

The Secretary argues that the delay in issuing the accident investigation report five months after the accident was reasonable given a multiple operator situation, and the complexity of determining whether Sedgman maintained the structures in good repair. The Secretary has also alleged in the set of stipulations filed that she "would offer evidence" that the reason for the

[5]Initially, Respondents, in their brief, had sought dismissal of the petition for assessment against Gill on the ground that the Secretary reasonably delayed notifying Gill of a civil penalty for almost two years after the accident and 18 months after the citation was issued. In light of the decision dismissing the 110(c) action against Gill consideration of this argument is moot at this point. However, in a footnote to its argument, Respondents assert that although they did not intend to brief a similar argument regarding a delay in the issuance to a penalty to Sedgman such a argument was not waived. In a statement filed subsequently on September 29, 2004, Sedgman stated its position that Citation No. 7676881 issued to it should be dismissed because the civil penalty was unduly delayed. Accordingly, the legal arguments set forth in their brief on this issue relating to the penalty proposed against Gill, were considered in deciding the similar issue raised regarding the penalty assessed against Sedgman.

passage of time between the issuance of Citation No. 7676881 and the issuance of the proposed penalty to Sedgman was "problems with the implementation of a new computer system for assessments".

Essentially the same issue presented herein was considered by the Commission in the recent case of *Twentymile Coal Co.*, 26 FMSHRC 666 (Aug 2004). In *Twentymile*, the Commission, in considering the requirements of Section 105(a), supra, held that "the issue ultimately turns on whether the delay is reasonable under the circumstances in each case". (*Twentymile*, supra, 682)

In *Twentymile*, supra, at 684 the Commission also noted that the Secretary set goals for timely proposing penalty assessments as set forth in its program policy letter (PPL) No. P 99-III-5, at 6 (Aug 16) 1999) which provides that even cases involving "a serious accident, fatality, or other special circumstance should be assessed within 180 days [6 months] of the accident." The Commission further noted that in addition the PPL stated that to meet that goal "the office of assessments should process citations and orders within ... 45 days for accident-related assessments." (Id.)

The Commission, in *Twentymile*, supra, at 682, reviewed *Salt Lake County Road Dept.*, 3 FMSHRC 1714, *Steel Branch Mining*, 18 FMSHRC 6 (Jan 1996), *Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 1982), and *Black Butte Coal Co.*, 25 FMSHRC 457 (Aug 2003). The Commission held that under these cases, in analyzing the Secretary's delay in proposing a penalty either resultant prejudice to the operator, or lack of proof of adequate cause may be a ground for dismissing the penalty petition. (Id.)

In the case at bar the only grounds asserted by the Secretary to establish reasonableness of a delay between the citation and the penalty proposal is the statement in the parties' stipulations that the Secretary "would offer evidence" that the reason for the passage of time between these periods was "... problems with the implementation of a new computer system for assessments." However, the Secretary has failed to establish any of the specifics to support this assertion. Thus, the record is devoid of evidence regarding the nature of the problems of the computer system when these problems were discovered, how long they lasted, and how they specifically caused a delay in the issuance of the proposed penalty to Sedgman. The lack of adequate proof to justify the Secretary's delay distinguishes the case at bar from *Black Butte*, supra, and *Steel Branch*, supra, where the Commission held that reasonableness of delay was established.[6]

In *Twentymile*, supra, the Commission found that the bulk of the delay was due to; 1) unexplained delays in the review and issuance of the accident report and; 2) neglect in moving

[6] In *Black Butte*, supra, the Commission found that a 13 month delay was due in large part to ongoing revisions to an accident report requested by the operator. In *Steel Branch*, supra, the Secretary delayed 11 months but did not offer any reason. However, the Commission took judicial notice of the Secretary's unusually high case load at that time and found justification for the delay.

the report through agency channels. (*Twentymille*, supra at 682) The Commission noted that the 17 month delay therein between the accident date and assessment "greatly exceeded" the Secretary's goal of six months. (*Twentymille*, supra at 684) The Commission found that the Secretary's handling of the penalty assessment and her rationale for the excessive delay was "wholly inadequate." (*Twentymille*, supra at 685) Based on this finding, the Commission held that it was "compelled" to vacate the civil penalty. (Id.)

The case at bar presents similar inadequate rationale for a delay. The 16 month delay herein between the accident on August 29, 2001, and the proposal of the penalty assessment on December 31, 2002, is substantially the same as the 17 month delay presented in *Twentymile*, supra. Also, in the case at bar, the accident report was not completed and issued until five months after the accident, which is comparable to the seven month delay in *Twentymile*, supra.

In *Twentymile*, supra, at 684, the Commission held as follows:

> While we could possibly excuse delay in *either* the preparation of the accident report *or* the processing of the proposed penalty, the cumulative effect of the two significant delays that took place in this case lies beyond the boundaries of what the Commission has previously allowed as reasonable under the circumstances.

In the case at bar the Secretary similarly delayed both the preparation of the accident report, and the processing of the penalty, and the extent of the delays were significant the same as in *Twentymile*, supra. Accordingly, the delays herein appear to fall squarely within the Commission holding that the cumulative effect of these delays "... lies beyond the boundaries of what the Commission has previously allowed in the past." (Id.)

Further, the unexplained delay in *Twentymile*, supra, is similar to the lack of facts in assertions by the Secretary herein to provide a rationale for the delay. Indeed, the Secretary did not adduce any evidence on this issue at the hearing.

I find that there were delays in issuing the accident report and the penalty but no facts adduced regarding a rationale for the delay in issuing the penalty assessment. I conclude, following *Twentymile*, supra, that it was not established by the Secretary that there was adequate cause for the delay. Accordingly, following *Twentymile*, supra, at 685, I am compelled to vacate the civil penalty, but stress that the finding of the violation remains intact.

### C. Citation No. 7669633 (Docket No. SE 2002-111)

#### 1. Violation of 30 C.F.R. §77.1710

Citation No. 7669633 cited Sedgman, as pertinent, as follows "contract employees did

not wear safety belts and lines when there was a danger of fall during demolition and reconstruction work at the JWR plant ... . Prior to the accident, Sedgman, the contractor responsible for directing and monitoring the construction activities, had observed the work area and work activities."

The citation alleges a violation of Section 77.1710, supra, which provides, as pertinent, that "each employee working in ... the surface working areas of an underground coal mine shall be required to wear protective ... devices as indicated below:

* * *

(g) safety belts and line where there is a danger of falling ... ."

On Wednesday August 29, 2001, PIW employees, Ricki Fields and Gary McDonald, were assigned by Rhine, PIW's lead man on the site who supervised their employees at the time, to work on the fifth and sixth floors of the west side of the plant. Their duties included connecting the steel skeleton that had been erected from the two and a half "decant" floor into the existing fifth and sixth floor structure. Their duties involved working on the fifth floor landing, approximately 35 feet above the ground.

James Robert Boyle, Jr., an MSHA ventilation specialist who was on the site on August 30, testified that during the investigation of the August 29 accident, fall protection devices were not found. According to Inspector Church, on August 30, he looked at the 5th floor landing area where a portion had collapsed. He observed that there were not any handrails, safety ropes, guarding, or safety devices installed on its outer edges. This testimony was not impeached or contradicted, and I so find.

Based on the testimony which was not contradicted or impeached I find that Fields, who had fallen from the landing on August 29 had not been wearing a fall protection device. Within the context of the above facts I find that on August 29 a violation of Section 17.10, supra, occurred.

As a defense, Sedgman argues that since Fields was an employee of PIW, Sedgman's subcontractor, it was improper of the Secretary to cite Sedgman for the violation which it did not commit. Further, Sedgman asserts that Fields had not been directly supervised by Sedgman. For the reasons that follow I find Sedgman's argument to be without merit.

As set forth above, the Secretary has the discretion to cite a contractor for violations committed by employees of its subcontractor. (IIA(2)( *infra*)) In evaluating whether the Secretary abused her discretion in citing Sedgman, focus is placed on the scope of Sedgman's supervision and control of its subcontractor's work practices.

Before Gill arrived on the site during the first week of June 2001, PIW, Sedgman's

subcontractor, had been performing work on the site, and supervising its own employees. PIW was responsible for their safety. In July 2001, after Gill arrived on the site, the owner, Jim Walter, dealt directly with PIW when certain safety issues arose On August 29, 2001, Rhine, who was PIW's lead man, directed the day to day construction activities of PIW's employees and supervised them.

On the other hand, pursuant to an agreement dated May, 2001, between Jim Walter and Sedgman, the latter obligated itself to comply with all health and safety laws. Sedgman was further obligated, under the agreement, to furnish labor, supervise the project, and complete it. In carrying out its agreement with Jim Walter, Sedgman employed PIW to provide the labor to perform the construction activities. In the agreement PIW obligated itself to comply with all safety regulations on the job but Sedgman retained the right to order PIW to comply with any unsafe practices and at its discretion, to terminate PIW.

Gill testified that, in his capacity as Sedgman's on-site manager, in the three months he was at the site prior to August 29 "on occasion" he told PIW employees to put on safety belts. Also, two to three times he had told PIW employees to come down from a ladder as they were not working safely, and the employees reluctantly did what he told them. Also, Gill testified that when PIW employees were operating a jackhammer he told them to make sure that they were tied off.

I find that the above factors are sufficient to validate the Secretary's action in citing Sedgman for the violation committed by PIW's employees. I thus find that the Secretary did not abuse its discretion.

2. Significant and Substantial

The record clearly establishes that a violation of a mandatory standard is the lack of safety-belt and line, which contributed to the hazard of falling off a elevated landing. Indeed, the fact that Fields did fall from the landing establishes that the hazard of falling off from the landing was reasonably likely to have occurred. The fall actually resulted in a fatality. I thus find that the evidence establishes that the violation herein was significant and substantial. (See, *Mathies*, supra)

3. Penalty

Based on all the factors set forth in Section 110(I) of the Act, I find that the proposed penalty of $160.00 is appropriate for this violation.

## Order

It is **Ordered** that within 30 days of this Decision Sedgman pay a civil penalty of **$160.00** for the violation of Section 77.1710, supra, as alleged in Citation No. 7669633. It is further

**Ordered** that Citation No. 7676881 be amended to delete the finding of unwarrantable failure. It is further **Ordered** that Docket No. SE 2003-189 be Dismissed.

Avram Weisberger
Administrative Law Judge

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