FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

January 12, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. SE 2004-106
Petitioner	:	A.C. No. 01-02901-17315
	:	
v.	:	Docket No. SE 2004-91
	:	A.C. No. 01-02901-17466 A
DRUMMOND COMPANY, INC., And	:	
MICHAEL EARL, Employed by	:	
DRUMMOND COMPANY, INC.,	:	Shoal Creek Mine
Respondents	:	

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Warren B. Lightfoot, Jr., Esq., and John B. Holmes, III, Esq., Maynard, Cooper & Gale, P.C., Birmingham, Alabama, for Respondents.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Drummond Company, Inc., and Michael Earl, respectively, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege a violation of the Secretary's mandatory health and safety standards and seek penalties of $6,350.00 against Drummond and $475.00 against Earl. A hearing was held in Birmingham, Alabama. For the reasons set forth below, I affirm the citation and assess the penalties proposed.

Background

Drummond is the owner and operator of the Shoal Creek Mine in Jasper, Alabama. The mine is located beneath a river and includes two coal seams. The Mary Helen seam is the top seam and ranges from 18 to 24 inches thick. The Blue Creek seam varies from 42 inches to 11 or 12 feet in thickness. In between the two seams is a layer of rock, called the "middleman," which is 12 to 40 inches thick. Developmental entries are mined by continuous mining machines. Once these have been completed, mining is by longwall miner. Both the two seams and the middleman are mined at the same time, so that the mine height ranges between 8 and 19 feet. Entries are up to 22 feet wide.

The mine floor is not always level, but consists of hills and hollows as it follows the coal seams. Since it is located under a river, the mine is often wet and muddy. Because the mine is so spacious, large equipment, such as Wagner 3.5 ton front-end loaders and Hummers, is used in the mine.

Michael Pruitt, an MSHA coal mine inspector based in Pikeville, Kentucky, was detailed to Alabama for 20 days to assist in inspecting the Shoal Creek Mine during March 2003. He conducted his last day of inspections on March 28, accompanied by Edward Sartain, a Drummond Safety Inspector, and Willie Johnson, a union safety committeeman and miner representative. The three men were riding in a Hummer. After entering the B-10 section roadway, they were at about crosscut 30 when they observed a miner riding in the bucket of a 3.5 ton front-end loader. The bucket was in the front of the loader and the loader was traveling forward down the roadway.

Sartain, who was driving the Hummer, started flashing his lights and shaking his cap light in an attempt to get the attention of the loader operator and the miner in the bucket. Sartain remarked that the miner in the bucket was a foreman who knew better than to ride in the bucket when the loader was traveling in a forward direction, that they had gone over that in training and in safety meetings. Johnson asked if there was something wrong with him, saying he must be crazy riding forward like that. Inspector Pruitt asked Sartain if there was not a safeguard that prohibited riding in the bucket when the loader was going forward and Sartain said that there was.

They followed the loader for at least one and one-half crosscuts, about 225 feet, before the loader stopped in crosscut 36. Inspector Pruitt got out of the Hummer and went to the bucket of the loader. He determined that the person in the bucket was Michael Earl, a Drummond foreman. He asked Earl if he knew it was against the law to ride in the bucket in a forward direction and Earl replied that he did but that he just was not thinking. Earl apologized and said it would not happen again.

As a result of this, Inspector Pruitt issued Citation No. 7395288.[1] The citation alleges a violation of section 75.1403 of the Secretary's regulations and states:

> No one shall ride in the bucket of any equipment traveling in forward motion. The foreman, Mike Earl, was observed riding in the bucket of a Wagner 3 and ½ ton loader. The bucket was wet and muddy with slick conditions. There was no tie off or safety belt to keep the foreman from falling out and being run over. The loader traveled for 1 and ½ crosscuts before Ed Sartain, Safety Inspector, could get them to stop. Foreman Earl engaged in

[1] The citation was originally issued as an order and subsequently modified to a citation. (Govt. Ex. 2 at 3.)

> aggravated conduct constituting more than ordinary negligence. The foreman knew that this is a violation. The foreman stated that he was not thinking. Ed Sartain stated that this is gone over in annual retraining and several times throughout the year in safety meetings. This violation is an unwarrantable failure to comply with a mandatory standard. This safeguard was issued 02-23-98, Citation Number 4473466.

(Govt. Ex. 2.)[2] Section 75.1403 repeats section 314(b) of the Act, 30 U.S.C. § 874(b), and provides that: "Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided."[3]

After the hearing, the Secretary filed a motion to amend the citation to conform to the evidence adduced at hearing by adding the following paragraph:

> A subsequent safeguard, Safeguard Number 7664815, dated February 12, 1999, was issued which allows a person to travel in the bucket of the front end loader when it is traveling in a forward direction but only when positioning to do work and only at a creep speed. When observed, Mr. Earl was being transported and was not positioning to do work, and the front end loader was not traveling at a creep speed.

(Mot. at 1.) The Respondent opposed the motion "to the extent the Secretary seeks to cover up or extinguish the fact that Inspector Pruitt had no knowledge whatsoever of the exception set forth in Safeguard No. 7664815, dated February 12, 1999, at the time he issued the citation in question." (Opp. at 2.) For the following reasons, the motion is granted.

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[2] The citation originally alleged a violation of section 75.1400, 30 C.F.R. § 75.1400, but was amended later the day it was issued to section 75.1403. Punctuation and grammatical changes have been made in the body of the citation.

[3] The procedures by which an authorized representative of the Secretary may issue a citation pursuant to section 75.1403 are described in 30 C.F.R. § 75.1403-1(b):

> The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

The Commission has long looked to Rule 15 of the Federal Rules of Civil Procedures in resolving issues relating to the amendment of citations. *See, e.g., Wyoming Fuel Co.*, 14 FMSHRC 1282, 1289-90 (Aug. 1992); *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990); *Magma Copper Co.*, 8 FMSHRC 656, 659 n.6 (May 1986). It has noted that: "The weight of authority under Rule 15(a) is that amendments are to be liberally granted unless the moving party has acted in bad faith, has acted for the purpose of delay, or where trial of the issue will be unduly delayed." *Wyoming Fuel*, 14 FMSHRC at 1290 (citations omitted).

Stating that Rule 15(b) "provides for conformance of pleadings to the evidence adduced at trial, and permits the adjudication of issues actually litigated by the parties irrespective of pleading deficiencies," the Commission amended a citation after the judge had vacated it and remanded the case to the judge to consider the amended citation. *Faith Coal Co.*, 19 FMSHRC 1357, 1362 (Aug. 1997). In this case, all of the evidence adduced at trial went to whether or not Drummond's actions met the exception in Safeguard No. 7664815. There is no evidence that the Secretary acted in bad faith and, of course, there was no delay in the hearing. Accordingly, the motion is **GRANTED** and the citation is amended by adding the proposed second paragraph to the citation.

Findings of Fact and Conclusions of Law

Drummond argues that Earl did not violate the language or the intent of the safeguard. Its position is that: "The intent of the safeguard was to prohibit personnel from being transported throughout the mine at a fast or unsafe rate of speed to prohibit someone from being bounced out and injured, but allow personnel to do necessary work out of the bucket." (Resp. Br. at 13.) Therefore, they argue that although Earl traveled at least 225 feet without performing any work, it was permissible because he intended to work from the bucket when he arrived at the area were water line tubing was to be taken down. Not only is this not a correct interpretation of the safeguard, but the evidence indicates that the requirements of the safeguard, even as interpreted by Drummond, were not being followed.

Meaning of the safeguard.

Safeguard No. 4473466 was the first safeguard issued at Shoal Creek which regulated riding in the bucket of a front-end loader. It was issued on February 23, 1998, because: "An employee was observed riding in the bucket of a Wagner 3.5 loader while being trammed in forward motion in the outby area of South 11 section. There is the danger of a person falling out of the bucket and being run over or the equipment running into something and injuring the rider." (Govt. Ex. 5.) The safeguard went on to state that: "This safeguard is issued to require that no one is to be allowed to ride in the bucket of any equipment traveling in forward motion." (*Id.*)

A second safeguard, No. 4477394, was issued by Inspector William E. Herren on October 7, 1998. It noted that: "An employee was riding on crib block material on the fork lift of a 3.5 diesel front end loader being pushed toward the face in the "C" longwall working section.

Controls were not secured or blocked to prevent accidental activation resulting in injuries to personnel riding the machine." (Govt. Ex. 6.) Consequently, it stated: "Notice to Provide Safeguard: Personnel shall not be allowed to ride mobile diesel forklift equipment."[4] (*Id.*) Inspector Herren was not aware of Safeguard No. 4473466 when he issued this safeguard.

After issuing the safeguard, Inspector Herren began discussions with other MSHA inspectors and supervisors, as well as Drummond management personnel and union members, to determine how front-end loaders were being used in the mine and to justify the safeguard. On October 15, 1998, Herren sent a memorandum to the District Manager that detailed his findings. Among other findings, he noted that:

> 5. The 3.5 Wagner diesel front end loader with interchangeable attachments was used as a utility vehicle.
>
> 6. Frequently, the machine was used to set cribs in the longwall working sections, retrieve high voltage power cables and install or remove water lines.
>
> 7. During the above described work, persons may be lifted or ride the bucket or fork lift of the machinery.
>
> 8. Throughout the mine persons perform work from the bucket or on an unsecured platform of the fork of the front end loaders.
>
> 9. On advancing working sections, ventilation tubing, brattice cloth, water lines, communication wires and cables are installed, removed and maintained by persons frequently working from the fork or bucket of the 3.5 diesel front end loaders.
>
> 10. Management stated that persons had been prohibited from riding the front of the machines, except when hanging ventilation curtain and tubing inby the last open crosscut. Personnel could ride and work from the front of the machine traveling forward in a creep or very slow speed toward the face.
>
> * * *
>
> 15. The mine floor was uneven as the coal seam was frequently undulating and pitching throughout the mine with wet, slick floor and accumulations of water in most areas.

[4] Forklift attachments and buckets are interchangeable on the 3.5 front-end loader used by Drummond. (Tr. 164-65.)

(Govt. Ex. 11.) He went on to recommend:

> I believe that the following points should be addressed in a Notice to Provide Safeguards to assure a safer work place for personnel at the mine:
>
> 1. When necessary to ride front end loaders to perform work from a raised position, the machine shall be operated at a creep or very slow speed in the reverse direction, except from the last open crosscut to the face or dead-end place when hanging ventilation devices, installing roof or rib control support or other necessary work.
>
> 2. The lift or tilt controls shall be locked or secured to prevent accidental or inadvertent movement when persons are being transported or lifted.
>
> 3. Persons shall not be allowed to ride front end loaders with fork lift attachments unless the above conditions have been met, and stable work platforms have been provided and secured to the machine.

(*Id.*)

This memorandum lead to further discussions among MSHA personnel concerning the proposed safeguard. A new safeguard, No. 7664815, was finally issued on February 12, 1999, and presented to Drummond by Inspector Herren. It required:

> Notice to Provide Safeguards:
>
> 1. Underground personnel shall not be transported in or on a fork lift platform/bucket unless precautions are taken to assure the safety of persons being transported.
>
> [A] The machine shall be operated with the fork lift/bucket in the rear position according to the direction of travel, except for positioning at a creep speed.
>
> [B] A locking device [stiff link or other accepted device] shall be used to preclude the possibility of accidental activation of the hydraulic control levers which control the fork lift attachment-platform/bucket.

> [C] Platforms or work decks supported by the fork lift attachment shall be secured to the machine to prevent accidental detachment and kept low to the floor as practical when persons are being transported.

(Govt. Ex. 7.)

Inspector Herren, who retired from MSHA at the end of 2001, testified that he met with Joe R. Estep, the mine's Safety Director, among others, on February 12, 1999, when he gave the company the safeguard. (Tr. 186-87.) He testified that: "[A]s I indicated here [in his notes, Govt. Ex. 10 at 2] and the best of my memory, there was no controversy whatsoever concerning the safeguard . . . ." (Tr. 188-89.) He related that he discussed the meaning of the exception and testified that:

> I will call your attention to page 2 of Exhibit 10, the notes on the right. I said, "Discussed in detail persons could hang vent tubing in the last open crosscut working from the machine. However, must be under controlled conditions to protect persons being transported. In no way does the safeguard allow a person to ride from the last open crosscut to the face being pushed forward. Must walk to the face, mount the machine, and only ride while performing necessary work of hanging tubing." That was just one of the examples that we discussed at the time that the safeguard was issued. So that is pretty specific to me. That is pretty specific as to what positioning and what we allowed as far as performing work on the machine.

(Tr. 200-01.) This is consistent with his previous finding, set out in the October 15 memorandum, *supra*, that the company only permitted its employees to ride in front of the loader inby the last open crosscut and his recommendation that the bucket had to be in the rear of the loader except inby the last open crosscut.

Herren testified that his recommended language limiting working from the bucket at the front of the loader to inby the last open crosscut was not included in the safeguard to allow miners to work from the bucket at the front of the loader when performing such activities as hanging tubing and pipe throughout the mine. (Tr. 180-81.) He explained that this was not an exception to the procedure for working from the bucket in front of the loader. (Tr. 190-91.) He stated that:

> [I]n the case of hanging vent tubing we wanted to allow them to work at one point and creep up at a slow speed, a slow controlled speed to either hang or extend whatever they had to do; or if it were working on pipe, work on one end of the pipe and creep up to

> the other end moving in a forward direction and do whatever work there. If they had to move 50 feet or 100 feet, dismount and walk to the next work position and pick up there.

(Tr. 191.) When asked whether the facts of this case came within the exception to the safeguard, Herren replied: "There was no intention to allow personnel to be transported just for transportation purposes. [O]nly to perform the work and to travel 200 feet without performing any work was never intended as part of that safeguard." (Tr. 192.)

Contrary to Herren's explanation, Estep, testified that he interpreted the language "except for positioning at a creep speed" to mean "[p]ositioning to me would be what you would be allowed to do by riding in a bucket to perform work." (Tr. 226.) He went on to say: "You could use it as a transportation vehicle if you were utilizing it to position yourself to perform work. You can call it transportation or riding the bucket. As long as you are utilizing it to perform work if you are moving in a forward direction." (Tr. 227.) In other words, as long as one were planning to perform work, as opposed to be transported from one place to another, the exception to having the bucket in the rear of the loader would apply.

With regard to the facts in this case, Estep testified that, after receiving the citation, he conducted his own investigation of the incident. He said that he questioned Ed Sartain and the following colloquy took place: "And I said, 'Was they performing work?' And Mr. Sartain said, 'Mike had the pipe wrenches in his hands and they were going to take down an inch-and-a-half water line during the shift.' I said, 'Long as he was preparing to do work, I don't have a problem with that.'" (Tr. 232-33.)

Not only does this interpretation expand the exception beyond its intent, as explained by Herren, both to the company at the time the safeguard was issued and during his testimony at the hearing, but such an interpretation makes the safeguard unenforceable. Clearly, the exception does not permit someone to ride all over the mine in a bucket in the front of a loader as long as they intend to do some work out of the bucket eventually. Nor should the inspector have to attempt to determine the intent of the miner riding in the bucket when deciding whether or not the safeguard has been violated. The exception was intended to permit riding in the bucket when positioning it within a few feet of the work to be done, or to travel the five or ten feet between hangers when taking down tubing. Herren explained to the company that no one could ride in the bucket in front from the last open crosscut to the face. That is a much shorter distance than the 225 feet that Earl rode in the bucket.

Safeguard violated under the company's interpretation.

Furthermore, even if Drummond's interpretation of the exception put forward at the hearing were correct, the miners involved did not comply with the requirement that the positioning be done at *creep speed*. Driving at creep speed means driving the loader in low, or first, gear. (Tr. 133, 300.) Inspector Pruitt testified that the loader was traveling "faster than a

good fast walk." (Tr. 48.) Johnson testified that: "It was not in creep speed. It was probably in the next gear." (Tr. 132.) Eddy Keeton, the loader operator, testified that he "could have been in second gear" and he "might have been going a little faster than I should have been" which was faster than a man can walk. (Tr. 357-58.) Thus, I conclude that the loader was being operated at greater than creep speed with Earl in the bucket in front of it.

Drummond witnesses not credible

In addition, it is appears that the Respondent did not arrive at its "theory" of what the exception to the safeguard permits until sometime after the citation was issued. The reactions of of the company's employees at the time of the incident makes it evident that they believed that a violation had been committed. When talking with the inspector and each other after they were stopped, none of them claimed that they were operating within the "exception." Further, there is no evidence that the Respondent requested a conference on this citation or otherwise presented MSHA with its defense until sometime after the matter was contested and placed on the hearing track.

When Inspector Pruitt, Sartain and Johnson first observed the man in the bucket, Sartain started trying to flag the loader down and said that the guy in the bucket is a foreman and that the foreman "knows better" than to be riding in a bucket in a forward direction. (Tr. 44, 260.) Sartain also confirmed to Pruitt that there was a safeguard prohibiting such conduct. (Tr. 45.) Sartain further stated that they had gone over that in safety meetings, that it was a big discussion at the mine not to be riding in a forward direction. (Tr. 46, 261.) In addition, Sartain told Pruitt that they discussed not riding in the bucket when going forward three to four times a year, that they had just gone over not riding in a bucket a few weeks earlier and he also brought to the inspector's attention that there had been a fatality at another mine for "this same type condition." (Tr. 47.) At the same time, Johnson said: "What's wrong with him? He must be crazy getting in that riding forward like that." (Tr. 128.) Plainly, both Sartain and Johnson thought that Earl was violating the safeguard.

After the loader was stopped, the inspector went to talk to Earl. He asked Earl "if he knew that it was against the law to ride in a forward direction." (Tr. 53.) He said that Earl replied: "Yes, but I just wasn't thinking." (Tr. 53-54.) Earl told the inspector that he would try to make sure it did not happen again. (Tr. 58, 318.) Earl then went back to the Hummer to talk to Sartain. Sartain told him that he knew better than to ride in the bucket and Earl agreed that he did know better. (Tr. 263, 317.) Again, this is a clear indication that Sartain and Earl thought that the safeguard had been violated.

Moreover, none of the parties at the stop claimed that no violation had occurred because work was being performed. Earl did not explain to Pruitt that he was performing work as permitted by the safeguard. Nor did Earl tell Sartain that he was taking down water line or offer any other defense for his actions when Sartain chastised him. (Tr. 293, 343.) This is certainly

not the reaction one would expect from people who believed that they were not doing anything wrong.

Finally, the testimony of Estep, Earl, Sartain and Keeton was evasive and self-serving. For instance, on cross-examination Estep was asked several times if, under the safeguard, the only exception to going with the bucket in the rear is positioning at creep speed. (Tr. 238-40.) The question clearly called for a "yes" or "no" answer. Yet Estep gave the following responses: (1) "The safeguard is basically talking about when you're traveling with a bucket in the rear and then with the bucket while you are traveling in a forward direction." (Tr. 238.) (2) "When your intentions are to perform work and not to utilize it as a transportation vehicle. The intent of both safeguards that led up to this final safeguard was to prohibit people from riding in a bucket or on the forks of a 3.5 at a high rate of speed. That was the intentions of all the safeguards was to prohibit people from riding it in a high rate of speed and unsafe." (Tr. 239.) (3) "To perform work. It says underground –." (Tr. 239.) (4) "If you are in a bucket of a 3.5 or if you are on the forks of a 3.5." (Tr. 240.)

The following dialogue took place between Earl and the judge:

> Q. Mr. Earl, the first person you talked to after you got stopped was Mr. Sartain?
>
> A. No. I met Mr. Pruitt and Mr. Johnson coming out of the bucket. One of them – I don't know whether it was Mr. Pruitt or Mr. Johnson. One of them asked me or told me you know better than to get in that bucket. And I said yes, I do. Or to ride in it. I didn't think I was riding.
>
> Q. Why did you say yes, I do, if you didn't think you were doing anything wrong?
>
> A. Because it pertains to riding in it. I didn't think I was riding in it. I was getting ready to work out of it.
>
> Q. Well, if somebody tells you you know better than to do something, aren't they telling you you did something wrong?
>
> A. I didn't look at it like that, no.
>
> Q. You didn't?
>
> A. I was just answering his question.
>
> Q. Why did you tell Mr. Pruitt you would never do it again?

A. I said that when he was walking back to the man trip. I was trying to make conversation with him.

Q. Why did you tell him you would never do something again if you hadn't done anything wrong?

A. Just something that come out at that time.

(Tr. 342-44.)

On the other hand, Inspector Pruitt's testimony was very credible. It was corroborated in many respects by the admissions of Johnson, Sartain, Earl, and Keeton. It was also consistent with his notes which he made contemporaneously with the occurring events. (Govt. Ex. 3 at 2-3, Tr. 48)

Company's other arguments not persuasive.

The Respondent has also alleged that Inspector Pruitt did not "issue the citation in accordance with mandatory standards" because he relied on the first safeguard rather than the third one, that he did not inform Drummond of the violation in a timely fashion, that he did not tell Earl to stop what he was doing, that he did not "red tag" the loader and that he did not instruct the other miners not to ride in the bucket. (Resp. Br. at 12-13.) For these reasons, the company apparently believes that the citation should be vacated.

These arguments are without merit. In the first place, Drummond has not cited any mandatory standard governing the issuance of citations with which it believes the inspector did not comply. In the second place, while the inspector admitted that he had relied on Safeguard No. 4473466 in issuing the citation, the citation has been amended to cite the correct safeguard and the inspector testified that he believed that the company violated that safeguard as well. (Tr. 62-66.) In the third place, the inspector furnished the citation to the company when he completed his inspection. Finally, there was no reason to tell Earl explicitly what he had told him implicitly, or to red tag the loader or to tell the other men not to ride in the bucket, and, even if there were, it would not affect the issuance of the citation.

Conclusion

In conclusion, I find that the company's self-serving interpretation of the safeguard was incorrect, but that even if it were correct, the safeguard was violated because the loader was being operated at faster than creep speed. Furthermore, Drummond's witnesses were not credible on this issue, while the inspector was. Accordingly, I conclude that the Respondent violated the safeguard as alleged.

Significant and Substantial

The inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission enumerated four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) a violation of a safety standard; (2) a distinct safety hazard 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 will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

Inspector Pruitt testified that he considered the violation to be S&S because the bucket was slippery with mud and water in it, Earl was not tied-off while riding in the bucket, the mine had dips and hills throughout, the bucket was elevated and Earl could have been thrown out of the bucket and run over. (Tr. 71-75.) Keeton, the loader operator, confirmed that the bucket was wet, muddy and slippery. (Tr. 405.) Robert Jones, who was driving a man trip that followed the loader and Hummer down the entry, testified that they went down a hill before the loader was stopped. (Tr. 439-40.) In addition, the loader was being operated at greater than creep speed.

Applying the *Mathies* criteria to the facts in this case, I make the following findings: (1) the Respondent violated Safeguard No. 7664815; (2) the violation of this safeguard contributed to a distinct safety hazard, that of falling in the bucket or falling out of the bucket and being run over; (3) there was a reasonable likelihood that falling in or out of the bucket would result in an injury; and (4) there was a reasonable likelihood that serious injuries such as broken bones or death would result. Accordingly, I conclude that the violation was "significant and substantial."

Unwarrantable Failure

This violation was also charged as resulting from the "unwarrantable failure" of the company to comply with the regulation.[5] The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987); *Youghiogheny*, 9 FMSHRC at 2010. "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (Aug. 1994); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Inspector Pruitt testified that he found this violation to be an unwarrantable failure because a foreman had committed the violation. (Tr. 70.) In addition, the evidence is uncontroverted that when Earl got in the bucket of the loader, the loader operator started to turn around so the bucket would be in the rear and Earl signaled him to go forward with the bucket in the front. (Tr. 127, 135-36, 366, Govt. Ex. 13 at 2.) Plainly, Earl made a conscious decision to violate the safeguard.

The Commission has stated that foremen are held to a heightened standard of care regarding safety matters. *S & H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995); *Youghiogheny*, 9 FMSHRC at 2011. In this case, not only was Earl present when the violation occurred, he was the one who committed it. Furthermore, it is apparent from his actions in telling the operator to go forward, that Earl intentionally violated the safeguard. Accordingly, I find that the violation was an unwarrantable failure to comply with the safeguard.

Earl's 110(c) Liability

The Secretary seeks to hold Earl personally liable for this violation. Section 110(c) of the Act, 30 U.S.C. § 820(c), provides that: "Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties . . . that may be imposed upon a person under subsections (a) and (d)."

The Commission set out the test for determining whether a corporate agent has acted "knowingly" in *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd*, 689 F.2d 623 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983), when it stated: "If a person in a position to protect safety and health fails to act on the basis of information that gives him knowledge or reason to

[5] The term "unwarrantable failure" is taken from section 104(d)(1) of the Act, which assigns more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." *See also Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 363-64 (D.C. Cir. 1997) (approving Commission's definition of "knowingly"). The commission has further held that to violate section 110(c), the corporate agent's conduct must be "aggravated," *i.e.* it must involve more than ordinary negligence. *Wyoming Fuel*, 16 FMSHRC at 1630; *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992); *Emery*, 9 FMSHRC at 2003-04.

I have already found that Earl intentionally violated the safeguard. Clearly, this intentional conduct comes within the meaning of "knowingly" and involves more than ordinary negligence. Consequently, I conclude that Earl in liable for the violation under section 110(c).

Civil Penalty Assessments

The Secretary has proposed penalties of $6,350.00 against the operator and $475.00 against Earl for this violation. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(I) of the Act, 30 U.S.C. § 820(I). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (Apr. 1996).

The Company's Penalty

In connection with the penalty criteria, the parties have stipulated with regard to Drummond that it is a large company, that it demonstrated good faith in attempting to achieve rapid compliance after notification of the violation and that the penalty will not affect its ability to continue in business. (Tr. 15-19.) Accordingly, I so find. I further find, from its Assessment History and the allied documents in the file, that the company has a average history of previous violations. (Govt. Ex. 1.) Finally, I find that the gravity of this violation was serious and that, commensurate with my conclusions that the company unwarrantably failed to comply with the safeguard and that Earl intentionally violated it, the level of negligence involved in the violation was "high."

Accordingly, taking into consideration all of these factors, I find the penalty of $6,350.00 proposed by the Secretary to be appropriate for this violation.

Earl's Penalty

With regard to the application of the penalty criteria in 110(c) cases, the Commission has stated that:

> Commission judges must make findings of each of the criteria as they apply to *individuals*. . . . In making such findings, judges should thus consider such facts as an individual's income and

> family support obligations, the appropriateness of a penalty in light of the individual's job responsibilities, and an individual's ability to pay. Similarly, judges should make findings on an individual's history of violations and negligence, based on evidence in the record on these criteria. Findings on the gravity of a violation and whether it was abated in good faith can be made on the same record evidence that is used in assessing the operator's penalty for the violation of the underlying section 110(c) liability.

Sunny Ridge Mining Co., Inc., 19 FMSHRC 254, 272 (Feb. 1997).

Applying these criteria, I make the following findings. Since there is no evidence that Earl has a history of any previous violations, I find that he has a good history of previous violations. For the same reasons that I found that the operator's negligence was "high," I find that Earl's negligence was "high." Similarly, I find that the gravity of the violation was serious and that it was abated in good faith. I further find that the proposed penalty is appropriate in view of Earl's responsibilities as a section foreman.

Finally, there is no evidence concerning Earl's income and family support obligations or his ability to pay the proposed penalty. However, the Commission has held with respect to operators that "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, *it is presumed that no such adverse [e]ffect would occur*." *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983) (emphasis added), *aff'd* 763 F.2d 1147 (7th Cir. 1984); *accord Broken Hill Mining Co.*, 19 FMSHRC 673, 677 (Apr. 1997); *Spurlock Mining Co.*, 16 FMSHRC 697, 700 (Apr. 1994). There does not appear to be any reason that the same presumption should not apply in 110(c) cases. Consequently, there being no evidence to the contrary, I find that Earl's income and family support obligations will not be adversely affected by the penalty and that he has the ability to pay it.

Taking all of these factors into consideration, I find that the $475.00 proposed by the Secretary is appropriate for this violation.

Order

In view of the above, Citation No. 7395288 in Docket No. SE 2004-106 and the civil penalty petition in Docket No. SE 2004-91 alleging that Michael Earl knowingly carried out the violation in the citation are **AFFIRMED**. Drummond Company, Inc., is **ORDERED TO PAY** a civil penalty of **$6,350.00** and Michael Earl is **ORDERED TO PAY** a civil penalty of **$475.00** within 30 days of the date of this order.

T. Todd Hodgdon
Administrative Law Judge

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