FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

March 22 , 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2005-236-M
Petitioner	:	A. C. No. 01-00011-55330
v.	:	
	:	
IMERYS PIGMENTS, LLC,	:	Sylacauga Operation
Respondent	:	

DECISION

Appearances: Dane L. Steffenson, Esq., Office of the Solicitor, U.S. Dept. of Labor, Atlanta, Georgia, 30303, for the Petitioner;
Craig Stickley, Sylacauga, Alabama, 35150, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C § 801 *et. seq.*, the "Act", charging Imerys Pigments, LLC (Imerys) with violations of mandatory standards and proposing civil penalties for those violations. The general issue before me is whether Imerys violated the cited standards as alleged and, if so, what is the appropriate civil penalty to be assessed in accordance with Section 110 (i) of the Act. Additional specific issues are addressed as noted.

Citation No. 6095190

Citation No. 6095190 alleges two "significant and substantial" violations of the standard at 30 C.F.R. § 56.20003 (b) and charges as follows:

> The 1st level floor of the Ultra Fine Blending Building has water being drained from lines in several different locations which do not discharge directly into a drainage ditch. The water is 1/8 inch deep and in places deeper and practically covering the entire ground level floor. Also hoses and other debri [sic] have accumulated in and near work areas and travel ways. Also on the upper levels old crates, valves, hoses and used parts are lying in work areas and travel ways. The condition is stated not be a norm for this location, and workers state they and their supervisor just now returned from holiday vacation and this is not a normal condition. People were traveling over and through the travel ways today.

The cited standard, 30 C.F.R § 56.20003 (b), provides in relevant part as follows:

> The floor of every workplace shall be maintained in a clean and, so far as possible, dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places shall be provided where practicable....

Inspector Billy Randolph of the Department of Labor's Mine Safety and Health Administration (MSHA) commenced his inspection of Imerys' Sylacauga mine on January 3, 2005. At the Ultra Fine Blending Building, a multi level complex with a concrete ground level floor and elevated metal walkways, Randolph found water 1/8 inch to two inches deep on the ground level floor. The stairways and walkways were also wet. Randolph testified that he found in one area what he believed was oil mixed with the water making that area particularly slippery (See Exhibit G-3, pp. 1-3). These photographic exhibits corroborate Randolph's testimony in significant respects. In particular, they show an area where a container or bin was located from which Randolph determined that there was leakage of a substance mixing with the water and making the floor slick (Exhibit G-3, p. 1). Randolph also identified in this photograph footprints on the floor in the liquid. Other photographs show a liquid, which Randolph described as water running across the floor and, in particular, water pouring out of a drain onto the building floor (Exhibit G-4, pp. 2-3).

I find Randolph's testimony, corroborated by the photographic evidence, to be credible and sufficient to establish the first violation alleged in the citation. In this regard, I also observe Respondent's own photographic evidence showing a hose from which a liquid is pouring onto the building floor (Exhibit R-1) and note that the cited standard requires that "the floor of every workplace shall be maintained in a clean and, so far as possible, dry condition." Clearly the drain shown in Exhibit 3, page 3 and the hose shown in Exhibit R-1 could have been extended to the drainage ditches to remediate the wet conditions. Indeed, Plant Supervisor Michael Dewberry acknowledged at hearing that the hose seen in Exhibit R-1 could have been extended to the drainage ditch.

In reaching my findings, herein, I have not disregarded Respondent's claim that the cited plant had been operating for an "extended period", had been inspected by MSHA twice annually and had never been cited for the conditions now at issue. Respondent thus claims that it had not been given fair notice of MSHA's interpretation of the regulation in that MSHA had not been consistent in its enforcement, citing the case of *Alan Lee Good dba Good Construction*, 23 FMSHRC 995 (September 2001).

In order to prevail in this argument Respondent has the burden of proving that the cited condition had previously been inspected by MSHA and had not been cited or otherwise identified as violative. There is, however, no evidence in this record that an MSHA inspector had ever previously conducted an inspection at a time when similar conditions existed. Respondent's claims in this regard are based solely on speculation. Under the circumstances, Respondent has failed to prove that it lacked notice based on inconsistent enforcement. Clearly, a reasonably prudent person

familiar with the mining industry and the protective purposes of the standard would not have allowed the amount of water observed herein to pour across a work area as found herein. See *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990); *BHP Minerals Int'l Inc*., 18 FMSHRC 1342, 1345 (August 1996).

I also agree with the inspectors' assessment that the violation was "significant and substantial" and of high gravity. A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonably likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory standard is significant and substantial under *National Gypsum* the Secretary 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 injury in question will be of a reasonably serious nature.
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> See also *Austin Power Co. v. Secretary,* 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

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), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.,* 6 FMSHRC 1573, 1574 (July 1984); See also *Halfway, Inc.,* 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

In this regard Inspector Randolph testified in the following colloquy at hearing:

> Q. [By Mr. Steffenson] Let's start with the water. Did you consider the water on the first floor to be an S&S violation.
> A. Yes, I did. I mentioned that to Charles when we came through the door.
> Q. Who is Charles?
> A. Charles Sanders, the safety director. He was the company representative representing Imerys on the inspection. And Charles, if I remember right, had a camera with him that night.
>
> ADMIN. JUDGE MELICK: Well, the question was why did you label that significant and substantial?
>
> THE WITNESS: Because I could see that people had traveled in it. I turned to the miner's rep and Charles both and asked them had they ever had an accident out there from people sliding in this water. I think Charles said that he couldn't remember, but the miner's rep said, Yes, I have slipped in it and fell myself.

ADMIN. JUDGE MELICK: That's your testimony on S&S?
BY MR. STEFFENSON:

Q. Do you know the water on the floor, did that make the floor more slippery than otherwise?
A. Yes, it did. And then you had to step up on metal stairs, leaving that floor going up to the other levels. Water and the metal is very slippery to your feet.
Q. And what type of injury did you envision might occur?
A. Lost work days and restricted duty at the least.
Q. From what type of injury or accident?
A. From sliding down, broken arm, twisted knees, ligament damage to your knees, lacerations, bruising.

(Tr. 36-37)

While this testimony is not, in itself, very elucidating, reasonable inferences may also be made from the record to establish that reasonably serious injuries could likely result from the cited conditions and that the violation was of high gravity.

I also find that the violation was a result of significant negligence. It may reasonably be inferred that the slippery conditions were obvious and that Respondent could easily have remedied the conditions by extending a hose to the drainage ditches.

The second violation charged in the citation at bar relates to debris found on the upper level of the facility. In relevant part, the cited standard provides that "the floor of every work place shall be maintained in a clean... condition." While acknowledging the existence of the trash and debris as cited, the Respondent maintains that the debris (trash) was only recently placed where it was found and that the area was not a "workplace" as required by the standard at bar. However, since the trash was admittedly placed for temporary storage, I find that the cited area was, indeed, a "workplace". In this regard Plant Operator Robert McDaniel acknowledged that the trash was intentionally placed where it was found.

I also find that the violation was "significant and substantial" and of high gravity. In this regard Randolph credibly testified in the following colloquy at hearing:

Q. [BY MR. STEFFENSON] Let's go to the second floor material and you considered the debris and material laying on the walkway to result in an S&S violation:
A. Yes, I did.
Q. Why?
A. If you trip and fell, you're falling into other machinery, electrical boxes, all kind of machinery along those floors. You're falling on other debris, they had wooden crates that you could trip and fall into. These would cause lacerations and bruising enough to cause lost work days or restricted duty.
Q. And did you believe that an accident of that nature was reasonably likely?

A. Yes, I did, due to the fact of the number of people that's traveling it and the frequency they were traveling it, and when I interviewed them and asked them how often, that's how I determined it.

(Tr. 37-38)

Respondent also acknowledged that two miners were working when the citation was issued. While exposure to the hazards to two miners is significant, consideration must be given to the exposure to miners during continued operations.

Inspector Randolph found the operator chargeable with "moderate" negligence. According to Randolph the cited material had "a lot of dust on it" thereby suggesting that it had existed "a pretty good while". In addition, it is undisputed that there were no records at the mine to verify that the required workplace examinations had been conducted in the cited area. I find Randolph's testimony to be credible in this regard and conclude that the Secretary's negligence findings are proven.

Citation No. 6095193

Citation 6095193 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.11012 and charges as follows:

> Two openings from which a person or material could fall were found on the tops of the Blending tanks in the Ultra fines building. The openings were not marked or barricaded or covered or provided with railings. The plant operators state they have been collecting samples from these 2 and ½ feet in diameter (approximate) openings and leaning into openings to get samples and not wearing fall protection. Also a hazard to any clean up or maintenance person of falling into the openings are [sic] possible since the openings were in walkways. Lids were readily available to cover the openings but were not in use. The two plant operators state that they have been on vacation during past several days and that they normally cover the holes, but they think people filling in during their absence have left the lids off. Termination was agreed that railings will be installed to also provide protection while persons are getting samples of material from the holes. This is the third time in two years this standard has been cited at this mine site.
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> The cited standard provides as follows:
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> Openings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.

It is undisputed that the cited openings existed as charged and that they were not marked with warning signals, barricaded or covered (See Exhibits G-4, pp 1-4). I accept the testimony of supervisor Michael Dewberry that the openings were 28 to 30 inches and 22 to 24 inches in diameter respectively. Plant Operator Robert McDaniel also acknowledged at hearings that persons could fall

through these openings. Accordingly, they were purportedly directed to wear fall protection when working around the openings. Clearly, however, the violation is proven as charged.

I also find that the violation was "significant and substantial" and of high gravity. As noted by Inspector Randolph, if the tank into which one would fall was empty, the drop off would be sufficient to cause fatal injuries. He testified that on the other hand, if the tank had liquid within, there was the risk of drowning. Although he incorrectly determined the depth of the drop-off, I find Randolph's testimony, adjusted to reflect the lesser distance of a fall, to be sufficient to support findings of a reasonable likelihood of serious injuries.

I also find that the Secretary has established that the violation was the result of high negligence. Inspector Randolph credibly testified in this regard, that the required workplace examinations had not been recorded and that there were other uncovered holes at the plant. I note that Plant Operator McDaniel testified that he had removed the cited covers earlier on the shift. Respondent notes that the covers had therefore been removed for no more than two hours and 55 minutes thereby suggesting lower gravity and negligence. I find, however, that leaving such conditions for that period of time rather amplifies the gravity and negligence. Respondent also suggests that no one would have been exposed to the open holes. He fails, however, to consider that the inspection party itself was exposed to the hazard.

In reaching my conclusions herein, I have not disregarded the evidence that Plant Operator McDaniel claimed that he had removed the covers earlier the same day they were cited. However, because they were left uncovered for at least two hours and 55 minutes and because of the number of other uncovered holes found at the plant, I find the operator chargeable with at least moderate negligence.

Citation No. 6095226

Citation No. 6095226, as amended, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.15005 and charges as follows:

> The contract miner, laying out the drill pattern had stepped off the drill pattern within 4 feet of the highwall face. He had traveled parallel to the drop off for approximately 35 feet. A fall of 25 feet to a water pond below which is stated to be 10 feet deep was likely. Tracks were measured and were 4 feet from the edge. Loose rocks were on the highwall edge increasing a chance of falling. The employee states he was told to stay 6 feet back from the edge and wear fall protection if needed. He also was told to mark off drill pattern which is closer than 6 feet to the edge. He had a safety harness in his truck and a 6 foot lanyard. A longer lanyard would be needed and a system to anchor to also is needed if, to work this close to a fall hazard. This company has been cited before within the past year for this same standard.

The cited standard provides in relevant part, that "[s]afety belts and lines shall be worn when persons work where there is danger of falling".

The credible and essentially undisputed evidence shows that an employee of a contractor engaged by Respondent was laying out a drill pattern above the highwall as close as four feet from the highwall face. The drop off from the top of the highwall was about 25 feet to a pond which was about 10 feet deep. The contractor's employee was not then wearing his six-foot safety harness nor any other safety belt or line. The ground where he was working was also rocky and unstable. I find that this evidence supports a violation of the cited standard.

Respondent maintains however, that even assuming, *arguendo*, that there was a violation since the cited miner was employed by an independent contractor it was not responsible for the violation.[1] The Commission in *Twenty mile Coal Co.*, 27 FMSHRC 260 (March 2005) *(appeal docketed No. 05-1124 D.C. Cir., argued February 14, 2006)*, set forth four factors to consider in determining whether a mine operator should be held liable for a violation committed by its contractor i.e. (1) which entity was in the best position to prevent the violation; (2) the extent of the operator's involvement in relevant activities; (3) whether the operator contributed to the violations; and (4) whether any criteria in the Secretary's enforcement guidelines were satisfied. The Secretary's guidelines include (a) whether the operator contributed to the violation or its continued existence; (b) whether the operator's employees were threatened by the violation; and (c) whether the operator had significant control over the condition requiring abatement.

In the instant case, I find that the Respondent was in the best position to have prevented the violation. The contractor's employee was admittedly working at the mine without the presence of direct supervision by his employer. The Respondent, on the other hand, had both hourly and supervisory personnel at the mine site in the general vicinity of the highwall. At the same time, however, it was the contractor's responsibility to properly train, supervise and discipline its employee - - matters relevant to the prevention of a violation.

I also find that Respondent was involved in initially establishing the drill pattern to be followed by the contractor's employee. The evidence shows that Respondent's personnel marked the back line to initially locate where drill holes should be placed. It is apparent however, that once the back line was established, Respondent's employees left the area and the contractor's employee was then left alone to actually mark the drill holes. At that point, the Respondent was no longer directly involved in the activities of the contractor's employee.

I find, however, that the Respondent did not significantly contribute to the violation. Indeed,

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[1] While not essential to proving the violation, the allegation in the second to last sentence of this citation is in fact disputed and the credible evidence indeed shows that a six foot lanyard would be adequate to provide fall protection. The credible evidence also shows that a person could stand in a safe area (acknowledged to be at least six feet from the edge of the highwall), and drop or toss a colored rock to mark drill holes closer than six feet to the edge of the highwall.

I find that it did not contribute at all. The driller cited herein was a trusted and experienced professional who performed his tasks without supervision. He was trained by both his employer and the Respondent in the need to wear fall protection when working closer than six feet to the edge of the highwall. The credible evidence also shows that the use of such fall protection was feasible and

that alternative safe methods of marking drill holes located within six feet of the edge of the highwall were both feasible and common practice in the industry.

Finally, the Secretary acknowledges that the cited contractor's employee did not place any of the Respondent's personnel in danger. Following the Commission's criteria and on balance then, I do not find that Imerys should be held responsible for the violation at bar.[2] Imerys was not appropriately charged for its contractor's violation and the citation must accordingly be vacated.

Citation No. 6095227

Citation No. 6095227, as amended, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.14107(a) and charges as follows:

> The Caterpillar D-10 dozer had 4 V belts and sheaves not guard [sic] against contact. There are four belts on the fan water pump drive and one on the alternator, and one air conditioner drive belt. The operator of the dozer states he enters the cab in the mornings with the engine running and the belts turning, he also exits the cab with the cab running, taking breaks occasionally. A hazard of the operator slipping on the metal stairs is likely and contacting the v belts through the approximate 2 and ½ foot high and 4 ½ foot opening is possible. Injuries would likely result in serious cuts to the hands.

The cited standard provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

Respondent again appears to claim lack of fair notice regarding application of this standard to the facts herein. It again appears to rely upon a claim of inconsistent enforcement practices by MSHA (i.e. that MSHA had previously inspected and approved of the dozer operating without a guard) but argues only on the basis of speculation, unreliable hearsay and off-the-record "evidence".

This less than credible argument is countered by the first-hand observations of Chief Union Shop Steward Larry Smith. Smith credibly testified that during an MSHA inspection two or three years before the instant citation was issued, MSHA required that this operator install guarding over the same area now cited (Tr. 198-201). I find Smith's testimony credible and therefore conclude that the Respondent had actual notice of the requirements of the cited standard. I also note that the

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[2] It is noted that the contractor for whom the cited employee was employed was separately cited and assessed a penalty on these facts for the same violation.

Respondent was provided interpretive notice through a picture in the guarding guidebook showing, according to the undisputed testimony of Inspector Randolph, that "that type of component has to be guarded" (Tr. 115). Under the circumstances, I find Respondent's claimed lack of fair notice to be without credible support.

There is clearly a dispute regarding the level of guarding provided in the cited area. According to Inspector Randolph the cited V-belt and sheaves were unguarded to such an extent that they presented a hazard of burnt fingers and amputation of fingers. In particular, he noted that the bulldozer operators would relieve themselves while standing on the track adjacent to the alleged unguarded V-belts and sheaves thereby placing them within close proximity of the moving belts. On the other hand, according to Mine Manager David Jarvis, the cited belts and sheaves were protected from exposure by their location some two feet inside the engine compartment and by a water pipe (See Exhibits G-5 and R-6). In addition, the direction of rotation of the cited sheave (See Exhibits G-5 and R-6) would preclude the existence of a pinch point at the location where the belts rounded the sheave.[3]

I find that this dispute can be resolved by reference to the photographs in evidence (See Exhibits G-5 and R-4, 5 and 6). These photographs show that the cited belts were indeed not guarded as required by the cited standard. However, because of the partial protection afforded by the noted water pipe and the fact that the alleged pinch points were remotely located, I do not find that reasonably serious injuries were likely to result from the cited condition. I therefore find that the violation was neither "significant or substantial" nor of high gravity. However, because I find that Respondent was previously required by MSHA to have guarded the area cited herein, it thereby had clear notice of the requirement of the standard and is therefore chargeable with significant negligence.

Civil Penalties

In assessing a civil penalty under Section 110 (i) of the Act, the Commission and its judges must consider the operator's history of previous violations, the appropriateness of such penalties to the size of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve compliance after notification of the violation. According to the documents attached to the pleadings, Imerys does not have a serious history of violations and is a medium size business. There is no dispute that it achieved appropriate compliance after notification of the violations herein. Gravity and negligence have been previously discussed. There is no evidence that the penalties herein would effect the operators ability to continue in business. I have considered the above statutory factors and conclude that the civil penalties assessed herein are appropriate.

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[3] Inspector Randolph could not recall which direction the sheave rotated but claimed there would, in any event, be a pinch point below the area depicted in the photographs. I find that such area to be so remote as to indeed be protected by its location.

ORDER

Citation No. 6093470 was vacated by the Secretary prior to hearings. Citation No. 6095226 is hereby vacated. Citations No. 6095190, 6095193, and 6095227 are hereby affirmed and Imerys Pigments LLC is directed to pay civil penalties of $500.00, $1,200.00 and $800.00, respectively for the violations charged therein within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge
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