

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

February 24, 1997

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VA 96-21-M
Petitioner : A.C. No. 44-00040-05559
v. :
Eastern Ridge Lime Co.
EASTERN RIDGE LIME COMPANY, : L P
L P, :
Respondent :

DECISION

Appearances: Pamela S. Silverman, Esq., Gretchen Lucken, Esq.,
U.S. Department of Labor, Office of the Solicitor,
Arlington, Virginia, for the Petitioner
John F. Cowling, Esq., Armstrong, Teasdale,
Schlafly & Davis, St. Louis, Missouri, for the
Respondent.

Before: Judge Weisberger

I. Statement of the Case

This case is before me based upon a petition for assessment of civil penalty filed by the Secretary of Labor (Petitioner) alleging violations by Eastern Ridge Lime L.P. (Respondent) of 30 C.F.R. ' 57.3360, 30 C.F.R. ' 57.3201, and 30 C.F.R. ' 57.14205. Pursuant to notice, a hearing was held on October 8, 1996 through October 11, 1996, and October 15, 1996 through October 16, 1996, in Salem, Virginia. On December 26, 1996, Petitioner filed a post hearing brief containing a proposed statement of facts, and Respondent filed proposed findings of fact and conclusions of law. On January 13, 1996, Respondent filed a response to Petitioner's proposed findings and conclusions.

II. Findings of Fact

1. The Eastern Ridge mine located in Ripplemead, Virginia is an underground limestone mine owned and operated by Eastern Ridge, and Mississippi Lime Company.

2. Operations of the Eastern Ridge mine are subject to the

Mine Safety and Health Act of 1977, as amended, 30 " U.S.C. 801 et seq.

3. Limestone was extracted from the Eastern Ridge mine using a random room and pillar mining method.

4. On July 25, 1994, a mine supervisor, Barry Snider, was fatally injured, and a driller, Jeffrey Morgan, was seriously injured when a fall occurred in the 204E/11S area of the Eastern Ridge mine.

5. The July 25, 1994, roof fall occurred while Barry Snider, mine supervisor, and Jeffrey Morgan, driller, were attempting to scale loose rock with an Ingersoll-Rand, Model MHJIDV, Single-Boom Jumbo drill. The rock was located in the right rib of the 204E heading near the top.

6. A mud-filled cavity was encountered in the roof of the 204E heading in November or December 1993 during the heading advance.

7. In the Eastern Ridge mine, a cavity is an opening in the stone surface caused by solution activity in the geologic past. A joint widened by solutioning occurs when ground water seeps into the limestone and tends to move through the joints, actually dissolving part of the rock and carrying it off with it. As the process continues over periods of geologic time, the joint can be widened out, and in an extreme case form a cave.

8. A mud seam is an opening or cavity that contains mud.

9. The cavity in the roof of 204E heading started at the face of 204E, and came back about five feet towards the haul road.

10. The cavity in the roof of 204E heading extended most of the way across the face of 204E.

11. The uppermost boundary of the cavity in the roof of the 204E heading extended so far into the roof that it could not be seen from the ground or the roof line with a light.

12. The roof of 204E heading was drummy from the cavity out toward the haul road for a distance of up to sixteen feet, a condition which was reported to mine management.

13. Generally, if drummy top cannot be scaled down it is drilled and shot. This was not done in this case.

14. The roof of 204E was popping and cracking in December 1993, a condition which was reported to mine management. When a mine roof makes popping and cracking noises, it indicates that the top is not sound.

15. On numerous times between November/December 1993 and July 1994, scalers told mine management that it was not safe for anybody to go into the 204E heading, and they condemned this area.

16. Mining advance was stopped in the 204E heading around November or December of 1993 after the mud-filled cavity was encountered in the roof of 204E because the area could not be safely scaled.

17. Mining in 203, the heading adjacent to 204E/11S, was stopped prior to the advance of 204E when a mud seam was encountered in the face area of 203, and mining could not advance any further. The mud seam appeared in 203 as a mud hole in the upper left corner where the face and rib intersected.

18. The 206 heading was advanced after 204E was stopped in December 1993. Bad top was encountered in the 206 heading prior to the July 25, 1994, roof fall in 204E/11S.

19. Scalers attempted to scale the 204E heading in May or June 1994, and observed that the top of the heading was checkered with wide mud seams. Scaling could not be completed due to the unsafe ground conditions, and the area was condemned. Mine management was advised that the top of 204E was ~~A~~all chopped up@ and leaking mud (Tr. 400).

20. In late June or early July 1994, the 11S heading was started to the right off of 204E.

21. The left rib of 11S was situated approximately 10 to 15 feet back toward the haul road from the face of 204E.

22. The left rib of 11S, or the right rib of 204E was on a slick.

23. A slick is generally a smooth surface on stone. A slick indicates some type of discontinuity in the stone, and in some cases, it indicates that there may have been movement in the geologic past, in which another piece of stone rubbed across the plane being observed. When positioned on the rib, a slick provides no support for the top. The smooth plane of the slick can only be observed after the second piece of stone is no longer there.

24. A joint is a fracture or discontinuity in the rock; a separation between two solid portions of the rock. A joint plane

can be oriented to the vertical or at some angle to the vertical. When the discontinuity intersects the surface being looked at, it generally looks like a line.

25. On Thursday, July 21, 1994, Darran Eugene Reed, a scaler/blaster observed two roughly parallel seams or joints that ran approximately 18 to 20 feet apart in the roof of the 11S heading, one on the right side of the heading, one on the left side. In the 11S heading itself, the seams were six to nine inches wide and muddy in color. As the seams traveled through 204E in the direction of the haul road, they Aseized up and were more like white lines@ (Tr. 567).

Robert L. Bradford, the mine Superintendent testified that prior to the development of 11S, the top of 204E to the haul road was real smooth. He indicated that on July 21, 1994, he did not recall any changes in 204E, and did not observe anything of significance.

26. On July 22, 1996, Danny Carter, a salaried supervisor, observed two mud seams in the face of 11S, each an eighth of an inch wide and ten inches apart. He said these seams Athen . . . ran up to the top, then back out towards the haul road@ (Tr. 914).

27. On Sunday, July 24, 1994, a one to two inch mud seam ran from the left side of the cavity in the roof of the 204E straight back toward the haul road then turned right into the 11S heading. According to Tim Belcher, a scaler, the roof of the 11S heading looked like a checkerboard of mud seams, with two or three more seams jutting off the two main seams inside the heading.

28. On Sunday, July 24, 1994, driller Milton Conley observed a one to two inch wide seam encircling the roof of the 204E heading. The seam looked like a one to two inch wide chalk line forming a twenty to thirty foot diameter circle in the entry, as shown in Government Exhibit 19. He opined that there was nothing holding the top up.

Jeffrey Morgan, a driller, testified that on July 24, 1994, there were tight joints across the top of 204, A . . . but it would run into the 11 South area@ (Tr. 962). He indicated that one joint Aprobably@ ran into the left rib of 11 South (Tr. 962).

29. Several miner witnesses testified about the condition of the roof of 204E/11S at various times prior to the accident. Michael Farley, a scaler/blaster, testified that in November or

December 1993, the roof was drummy about two to three feet back from the mud seam in 204E, but that the rest of the roof was Apretty solid@ (Tr. 465).

Darran Reed, a scaler/blaster, stated that six months to a year prior to the accident at issue, the roof of 204E was drummy two to three feet back from the crevice near the face. Reed indicated that he tested the roof in the area of 11S on July 21, 1994, and Ait sounded good.@ Tr. 590.

Walter L. Breeden, a scaler/blaster, stated that the last time 204E was blasted, he sounded the roof with a scaling bar, and it sounded drummy up to ten feet back from the opening of the cavity at the face.

30. On Monday, July 25, 1994, five minutes before the accident occurred, Conley took his light and showed Snider the seam encircling the roof of the 204E heading, explaining to Snider that there was no support for the roof of the heading, and that the whole roof had broken loose.

31. After talking to Conley on Monday, July 25, 1994, Snider instructed Morgan to bring the Jumbo drill to the 204E heading to knock down a loose rock near the roof at the intersection of the right rib of 204E, and the left rib of 11S. After extending the drill boom, the cab of the drill in which Morgan was seated was located approximately 40 feet outby the rock in question. Snider was standing on the ground approximately 15 to 20 feet to the left and in front of the cab of the drill. Morgan then attempted to rattle the rock loose with the Jumbo drill by allowing the drill bit to vibrate, and tap on the surface of the rock. As Morgan was attempting to rattle the rock loose, nearly the entire roof of the 204E/11S heading collapsed killing Snider, and seriously injuring Morgan.

32. No artificial ground support was used in the 204E/11S area of the Eastern Ridge mine prior to the July 25, 1994, roof fall.

33. The natural ground support in place between 204E and 11S prior to the July 25, 1994, roof fall was not sufficient to control the ground.

34. After the accident, miners and MSHA personnel observed two parallel joints, and a third intersecting joint, running from the roof of the haul road into the 204E/11S area.

35. Imposition of the civil penalties will not affect

Respondent's ability to continue in business.

36. Respondent's violation history shows 70 assessed violations in 72 inspection days in the preceding 24 month period, or .97 violations per inspection day. This is a moderate violation history.

37. The violations were abated within the time set for abatement.

38. The Eastern Ridge mine is a moderate sized mine with 192,906 tons mined in 1994. Eastern Ridge is a moderate size operator with 1,939,510 tons mined in 1994.

III. Discussion and further findings

A. Citation No. 4289772

1. Violation of 30 C.F.R. ' 57.3360.

On July 25, 1994, a roof fall occurred in the 204E/11S area of Respondent's Eastern Ridge Lime LP underground mine, fatally injuring a supervisor, Barry Snider and seriously injuring a driller, Jeffrey Morgan. Subsequent to an investigation, the Mine Safety and Health Administration (MSHA) issued a citation pursuant to Section 104(d) of the Act, alleging a violation of 30 C.F.R. ' 57.3360. Section 57.3360, as pertinent, provides as follows: "[g]round support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary." Hence, in order to prevail, Petitioner must establish the existence, prior to the fatal accident, of ground conditions which indicated that ground support was necessary.¹ For the reasons that follow, I find that

¹In the alternative, Petitioner has the burden of establishing that mining experience in similar ground conditions in the mine indicated that ground support is necessary. Since, as will be hereinafter discussed (III(A),(1) infra), the record establishes that the ground conditions did indicate that ground

Petitioner has met this burden.

The record clearly establishes that a mud-filled cavity was encountered in the roof of the 204E heading in November or December 1993, during the heading advance. The witnesses who observed this cavity testified regarding its dimensions. Some witnesses indicated that it commenced in the roof at the face, and extended back in the direction of the haul road for a distance of only three feet, whereas others described this distance as being six feet. The weight of the evidence establishes that the cavity in the roof started at the face and extended outby about five feet. Some witnesses indicated that the cavity extended rib to rib, whereas others indicated that it did not extend that far. The weight of the evidence establishes that the cavity extended most of the way across the face of 204E. The testimony of all witnesses indicated that the crevice extended six feet up into the roof, and was mud filled.

It is not necessary to make a finding regarding the specific dimensions of the cavity, as the record clearly establishes its existence, and that it was considered a hazardous condition. When the mine roof was sounded with a bar, it produced a drummy sound from the cavity out toward the haul road for a distance up to 16 feet. On numerous times between November/December 1993 and July 1994, the scalers who worked in the area told mine management that the 204E heading area was not safe, and the area was condemned. The roof in 204E evidenced popping and cracking noises in December 1993, which indicated that the top was not sound. A mud hole had been observed in the upper left hand corner of the face in the adjacent 203 heading and mining was stopped there. In May 1994, scalers observed that the top of the 204E heading contained mud seams. Although the top sounded good, it was condemned.

Sometime around June or early July 1994, the 11S heading was opened up to the right of the 204E heading. Breeden who drilled the 11S heading, indicated that Snider had placed marks on the right rib of 204E, 40 feet from the face to indicate where drilling should start to open up the 11S heading. However, he

support was necessary, there is no need to decide whether Petitioner met its alternate burden of establishing that mining experience in similar ground conditions indicated that ground support was necessary.

did not testify specifically as to the distance between the outby edge of the cavity at the face of the 204E heading, and the left rib of the 11S heading. Bradford testified that the start of the 11S heading was probably 25 to 30 feet from the hole in the ceiling of 204E. However, Wright who blasted the 11S entry testified that the 11S left rib was approximately 10 to 15 feet from the 204E face. In the same fashion, Darran Reed, a scaler/blaster who worked in the area, indicated that the 11S heading was approximately 10 to 12 feet back from the 204E face.

Significantly, Jeffrey Morgan, who testified on behalf of Respondent, stated that the left rib of 11S A. . . would have been 10, 15 feet, maybe better than that.@ (Tr. 957). Morgan had drilled in the 11S and was found to be a particularly credible witness.

I find that the weight of the evidence establishes that it was more likely than not that the distance from the cavity at the face of the 204E heading to the left rib of the 11S heading was approximately 15 feet.

Joseph Cybulski, Petitioner's roof control expert, proffered his opinion that the ground conditions in the 204E/11S area prior to the fatal accident, indicated that ground support was necessary. In essence, he based his opinion upon the totality of the following conditions in the area at issue: a cavity that extended rib to rib and formed an opening to eight feet from the 204E face, the existence of a drummy roof in 204E, the existence of joints running parallel to the 204E face, the presence of a mud seam in the 203E heading, the existence of joints running parallel to 11S that were tight across 204E and then became wide and mud filled in 11S, and the proximity of the left rib in 11S to the vertical cavity in 204E. The record establishes the existence of most of these conditions, as discussed above. Thus, I find Cybulski's opinion to be well founded.

Bradford, and Respondent's expert, Jack Parker, opined, in essence, that ground support in the area at issue was not necessary. As a basis for his opinion, Parker cited only the fact that the 204E face was Astopped@ when the cavity was reached and that, A . . . except for a strip four-to-ten feet wide beside the cavity the rest of 204E and 11S was good roof@ (Tr. 1227). Parker offered elaborate testimony critical of Cybulski's theory that the roof fall at issue was caused by lack of support for the roof whose main support prior to the accident, consisted of cantilever type support. Parker opined that the cause of the roof fall was the existence of a cavity above the roof in the area in question, and that miners could not have been aware of this condition. However, the issue before me is not the cause of

the accident, but rather whether ground conditions indicated the necessity for ground support. It is significant to note that aside from criticizing the significance of Cybulski's reliance on the existence of parallel joints in the roof, Parker did not explicitly contradict Cybulski's testimony regarding the specific conditions he cited that supported his conclusion that the need for ground support was indicated. It also is significant that miners who regularly worked in the area, expressed concerns of the various conditions encountered. Breeden was concerned about the drummy roof in 204E. Marvin Wright, a scaler/blaster, opined that the pillar between the 204E face and the left rib of 11S was too small to support the top. Belcher expressed concern about the seams in the top of 11S. Reed was concerned about turning the 11S heading to the left due to the presence of mud seams in the left rib of 11S, and the face of 204E.

For all the above reasons, I find that the record establishes that, prior to the fatal accident, ground conditions indicated that ground support was necessary.² There is no evidence that Respondent provided any ground support.³ Accordingly, I find that it has been established that Respondent did violate Section 57.3360, supra.

2. 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 C.F.R. ' 814(d)(1). 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,

²According to Cybulski, ground support in the form of steel sets or cribs would have provided ground support.

³In this connection, I agree with Respondent that the ground support contemplated by Section 57.3360, supra, is artificial and not natural ground support.

National Gypsum Co., 3 FMSHRC 822, 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 United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, 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).

The evidences establishes that Respondent did violate a mandatory standard i.e., Section 57.3360. Also, it is clear that the essence of the violation i.e., failure to provide ground support, contributed to the hazard of a roof fall. Taking into account the combination of ground conditions as discussed above, (III)(A) infra, and considering the fact that a roof fall did occur in the area causing a fatality and seriously injuring another miner, I conclude that the third and fourth elements set forth in Mathies have been established. For these reasons I find that the Petitioner has established that the violation was significant and substantial.

3. Unwarrantable Failure

The totality of ground conditions which indicated a need for

ground support, as discussed above, III(A)(1) infra, were obvious as they had been observed by Respondent's miners. As noted by Respondent, in its Proposed Findings of Fact, its Supervisor, Barry Snider, was aware of all of the concerns the miners had regarding the area at issue prior to July 25, 1994. Indeed the 204E heading had been condemned. However, in spite of this knowledge, Respondent did not provide ground support. Accordingly I find that the level of its negligence was more than ordinary, and constituted aggravated conduct. (See, Emery, Mining Corp., 9 FMSHRC 1997 (December 1987)) I thus find that it has been established that the violation herein was as the result of Respondent's unwarrantable failure.

4. Penalty

I find that the gravity of the violation was of a very high level as the violation contributed to a fatal roof fall. Also, as set forth above, (III)(A)(3) Infra, the level of Respondent's negligence constituted aggravated conduct. Respondent does not argue that any penalty to be imposed should be reduced by virtue of its affect on Respondent's ability to continue in business. Based upon the above, and taking into account the remaining factors set forth in Section 110(i) of the Act, I conclude that a penalty of \$50,000 is appropriate for this violation.

B. Order No. 4289773 (Violation of 30 C.F.R. ' 57.3201

1. Violation of 30 C.F.R. ' 57.3201

On July 25, 1994, Morgan was instructed by Snider to use an Ingersoll-Rand Model MHJ1DV drill to remove a rock from the left rib of 11S. Morgan fully extended the boom of the drill, and remained inside the cab of the drill rig which was about 40 to 45 feet away from the rock. Snider was on the ground, and about 20 to 25 feet in front of, and to the left of Morgan, and 40 to 45 feet from the rock that was to be removed. Morgan hit the rock once with the end of the drill bit and it did not move. Morgan then drew the bit back and moved it over a few inches. Morgan then saw falling rock, and the glass in front of the cab of the drill imploded. Morgan was seriously injured, and Snider was killed.

Subsequent to an investigation, MSHA issued an order alleging a violation of 30 C.F.R. ' 57.3201 which provides as follows: **A**Scaling shall be performed from a location which will not expose persons to injury from falling material, or other protection from falling material shall be provided.®

As set forth above, III(A)(1) infra, the evidence clearly establishes that on July 25, 1994, prior to the accident, the 204E/11S area did not contain any ground support in spite of conditions which had indicated the necessity for such support. Accordingly, even though Morgan was inside a cab about 45 feet away from the rock that he was rattling, he was nonetheless exposed to the hazard of a roof fall as a consequence of working in an area that had inadequate ground support. According to Morgan, his injury was caused by rocks that were rolling towards him, rather than rocks that fell on him from the roof. However, even if Morgan was injured in this fashion, he was nonetheless exposed to the hazard of being hit or injured by rocks falling from the roof. Clearly, the cab provided some measure of protection from falling material, but there is no evidence to predicate a finding that it provided adequate protection from falling material. Also, it appears that, as part of the normal process of using a drill to remove a rock, Snider was present directing the scaling. He was situated unprotected on the ground. Hence, I find that Morgan, and Snider to a greater degree, were exposed to injury from falling material. Since scaling was performed from a location which exposed them to this hazard, I find that it has been established that Respondent did violate Section 57.3201, supra.

2. Significant and Substantial

Considering the fact that there was no support in the area in question where scaling was being performed, and taking into account the existence of a number of ground conditions that indicated the need for ground support (See, III A,(1) infra), I find that the violation was significant and substantial.

3. Unwarrantable Failure

As set forth above, III(A)(3) infra, management was aware that scaling was being performed in an area that did not have any ground support. In addition, Milton Conley showed Snider a circular seam in the ceiling of 11S five minutes before he was killed. For these reasons, I find that the performance of scaling in the area at issue under the conditions set forth above, III (A)(1) infra, constituted aggravated conduct. I thus find that the violation herein was as a result of Respondent's unwarrantable failure.

4. Penalty

Considering the fact that the Respondent's negligence reached the level of aggravated conduct, and the fact that the

violation herein contributed to a fatality, I conclude that the gravity of the violation was relatively high. I find that the penalty sought by Petitioner of \$35,000 is warranted under these circumstances.

B. Order No. 4289774.

After investigation of the fatal accident, MSHA issued an order alleging a violation of 30 C.F.R. ' 57.14205 which provides as follows: **A**Machinery, equipment, and tools shall not be used beyond the design capacity intended by the manufacturer where such use may create a hazard to persons.@

Based upon the clear language of Section 57.14205, supra, it is manifest that in order to establish noncompliance with this section, the Secretary must first prove that the equipment in issue, i.e., the Ingersoll-Rand Model MHJ1DV Single-Boom Jumbo drill was used **A**. . . beyond the design capacity intended by the manufacturer@ (Emphasis added). The evidence is undisputed that immediately prior to the fatal accident Morgan was using the Jumbo drill, as instructed by Snider to rattle a loose rock near the roof at the intersection of the right rib of 204E and the left rib of 11S. He explained that he was using the drill to rattle the rock loose by allowing the drill bit to vibrate and tap on the surface of the rock. Petitioner did not adduce the testimony of any representative of the manufacturer who was competent to testify regarding the use of the drill **A**intended by the manufacturer@. Instead, Petitioner relies upon the hearsay testimony of Inspector Carl Liddeke, regarding a telephone conversation that he had with Carl Nasca whom he contacted at Ingersoll-Rand. According to Liddeke, Nasca **A**. . . was the business unit manager of crawler drills with Ingersoll-Rand@ (Tr. 810). According to Liddeke, Nasca indicated that the drill was not manufactured for other than drilling holes in a rock. No weight was accorded this hearsay testimony. Since the declarant, Nasca, did not testify, there is no evidence in the record regarding his background, and responsibilities at Ingersoll Rand which would make him competent to proffer an opinion as to the use of the drill intended by Ingersoll-Rand. Petitioner also relies on literature sent by Nasca to inspector Dennis Yesko, pursuant to Liddeke's request. The literature entitled **A**DESCRIPTION AND SPECIFICATIONS@ in general lists specifications and features of the drill (Gov't. Exh. 43). The last page of this exhibit, contains a drawing of the drill, and lists 13 features and specifications for the drill's length, width, height, weight operating, chassis, articulations, ground clearance, gradeability, jack/stabilizers, tire size, tramming speed, and face coverage. At the top of the page it states that

the drill, Ais . . . designed to drill horizontal, vertical and angle holes for underground mining production headings. It supports one hydraulic drifter and can drive headings@ (Gov't Exh. 43, pg 16). I find this one sentence inadequate to satisfy the Secretary's burden of establishing that the use of the drill to rattle goes beyond the design capacity of the drill Aintended by the manufacturer@.⁴ For all the above reasons, I conclude that Petitioner has not established that Respondent violated Section 57.14205, supra.

IV. Order

It is ORDERED that Order No. 4289773, and Citation No. 4289772 are affirmed as written, and that Order No. 4289774 shall be dismissed. It is further ORDERED that Respondent shall, within 30 days of this decision, pay a total civil penalty of \$85,000 for the violations found herein.

Avram Weisberger
Administrative Law Judge

Distribution:

Pamela S. Silverman, Esq., Gretchen McMullen, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 516, Arlington, VA 22203 (Certified Mail)

John F. Cowling, Esq., Thomas L. Orris, Esq., Amstrong, Teasdale, Schlafly & Davis, One Metropolitan Square, Suite 2600, St. Louis, MO 63102 (Certified Mail)

/mh

⁴I note that Respondent's Expert, Jack Parker, testified, in essence, that, based on his over 35 years mining experience, he is familiar with the design capacities of the drill. He opined that using it to rattle is not beyond its design capacity.